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## REVISITING *HOSANNA-TABOR* v. *EEOC*: THE ROAD NOT TAKEN

Ioanna Tourkochoriti \*

*The article approaches critically the balancing between freedom of religion and the enforcement of disability anti-discrimination law followed by the Supreme Court in Hosanna-Tabor v. EEOC. Enforcing disability anti-discrimination law is a compelling interest, as it finds a very strong philosophical justification, making thus the result of the case contrary to the philosophical conception of a well-ordered society. Doing away with the social construct of disability is a compelling interest as it is a universalisable interest, an interest upon which there can be an overlapping consensus independently of a person's comprehensive, religious or not, vision of the good. Reference to the ministerial exception to justify exempting employers from the disability antiretaliation laws is of doubtful compatibility with Emp't Div., Dep't. of Human Resources of Or. v. Smith.<sup>1</sup> Courts can distinguish between a doctrinal and a nondoctrinal issue and abstain from controlling the first while controlling the legality of nondoctrinal issues. If the case of a qualified minister is at stake, whose substantive qualifications the courts cannot control under the First Amendment, then disability anti-discrimination law should be enforced, as it is neutral law of general applicability.*

### INTRODUCTION

Should religious ministers who develop an ailment at a moment subsequent to their appointment by a religious institution and become thus disabled, be protected by disability anti-discrimination law? The U.S. Supreme Court recently decided negatively in the famous case *Hosanna-Tabor v. EEOC*.<sup>2</sup> Balancing between the competing rights of freedom of religion protected by the First Amendment to the Constitution of the United States and the rights of the disabled to equal treatment, the Supreme Court gave the advantage to freedom of religion. The case raises concerns of justice, as well as of fit with legal precedents. This article attempts to suggest a different perspective, stressing the importance of disability anti-discrimination law and proposing an interpretation of the

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1. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

2. See *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694 (2012).

ministerial exception that would be in harmony with anti-discrimination law. If no doctrinal issue is at stake, the Americans with Disabilities Act (“ADA”) must be enforced to protect ministers from accidents or illnesses that appear at some point in their lives.

Lutheran elementary school teacher Cheryl Perich developed narcolepsy and began the 2004-2005 year on disability leave.<sup>3</sup> In January 2005, she notified the school principal that she would be able to report to work in February.<sup>4</sup> The principal responded that the school had already contracted with a lay teacher to fill Perich’s position for the remainder of the school year, and the congregation offered to pay a portion of Perich’s health insurance premiums in exchange for her resignation as a called teacher.<sup>5</sup> Perich refused, presenting a note from her doctor stating that she would be able to return to work on February 22.<sup>6</sup> In February, she presented herself at the school reporting to work, and when the principal told her that she would likely be fired, she responded that she intended to assert her legal rights under anti-discrimination law.<sup>7</sup> She was thus terminated for “insubordination and disruptive behavior,” as well as for damaging her “working relationship” with the school by “threatening to take legal action.”<sup>8</sup> Perich filed a charge with the Equal Employment Opportunity Commission (“EEOC”), which brought suit against Hosanna-Tabor, alleging that Perich had been fired in retaliation for threatening to file an ADA lawsuit.<sup>9</sup> As the Court noted, “[t]he ADA prohibits an employer from discriminating against a qualified individual on the basis of disability.”<sup>10</sup> It also prohibits employers from retaliating against employees who assert their legal rights.<sup>11</sup> Perich sought “reinstatement to her former position (or frontpay in lieu thereof), along with backpay, compensatory and punitive damages, attorney’s fees and other injunctive relief.”<sup>12</sup> Hosanna-Tabor argued that the suit was barred by the First Amendment, invoking also what is known as the “ministerial exception.”<sup>13</sup> The district court granted summary judgment in Hosanna-Tabor’s favor, dismissing Perich’s claim based on a lack of subject matter jurisdiction not reaching the merits of the claim.<sup>14</sup> The Sixth Circuit vacated and remanded.<sup>15</sup> The court concluded that Perich did not qualify as a “minister” under the exception, because her duties as a called teacher were identical to her duties as a lay teacher.<sup>16</sup> The Supreme Court reversed.<sup>17</sup>

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3. *Id.* at 699-700.

4. *Id.* at 700.

5. *Id.*

6. *Id.*

7. *Hosanna-Tabor*, 132 S. Ct. at 700.

8. *Id.*

9. Americans with Disabilities Act [hereinafter ADA], 42 U.S.C. § 12101 (1990); *Hosanna-Tabor*, 132 S. Ct. at 701.

10. 42 U.S.C. § 12112(a) (1990); *Hosanna-Tabor*, 132 S. Ct. at 701.

11. 42 U.S.C. § 12203(a) (1990); *Hosanna-Tabor*, 132 S. Ct. at 701.

12. *Hosanna Tabor*, 132 S. Ct. at 701.

13. *Id.*

14. *Id.*

15. *Id.*

16. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and Sch.*, 597 F.3d 769, 778-81 (6th Cir. 2010) *rev’d*, 132 S. Ct. 694 (U.S. 2012).

17. *Hosanna-Tabor*, 132 S. Ct. at 710.

The case appeared as a retaliation lawsuit. Late in the litigation, the church defended its position as a religious decision.<sup>18</sup> Although the Lutheran Church expressed its commitment to the anti-discrimination laws in the school's employment manual,<sup>19</sup> it argued that Perich was terminated because of her threat to exercise the rights recognized to her by the ADA; that is, to file a lawsuit against the church in a civil court, "contravened the Lutheran doctrine that disputes among Christians should be resolved internally without resort to the civil court system and all the legal wrangling it entails."<sup>20</sup> The question thus emerges whether religious dogma can be invoked to negate the exercise of a legally recognized right, a right recognized in order to protect exactly from the arbitrariness of an employer regardless of whether that employer is a religious institution. Is the termination of a wholly qualified minister, according to the uncontrollable religious requirements of the church, lawful when she asserts the exercise of her ADA rights?

A number of commentators of the case focused on the priority of freedom of religion in the American constitutional scheme.<sup>21</sup> References to the history of religious freedom in the United States serve to underline the need to protect this liberty to the detriment of disability rights. This article argues that this reference to the history of freedom of religion is misplaced and irrelevant to the crucial questions raised by *Hosanna-Tabor*. The historical arguments are based on a selective decontextualized reference to the philosophy of the founding era, which is not plausible for disability anti-discrimination law. The fear of eighteenth century state intervention to the self-government of the churches cannot be paralleled and compared to the state enforcement of disability anti-discrimination laws of the twenty-first century.

This article makes two arguments. Firstly, the thesis of this article is that reference to the ministerial exception to justify exempting employers from the antiretaliation laws is contrary to the idea of the rule of law.<sup>22</sup> The first part of the article shows that the case is not compatible with *Smith*.<sup>23</sup> Secondly, the result of *Hosanna-Tabor* is contrary to the philosophical conception of a well-ordered society. Given that disability is a social construct, as part two of the article shows, doing away with it is a compelling interest. This

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18. Leslie Griffin, *Religious Freedom Defeats Secular Law*, THE IMMANENT FRAME (Jan. 19, 2012, 3:06 PM), <http://blogs.ssrc.org/tif/2012/01/19/religious-freedom-defeats-secular-law/> [hereinafter Griffin, *Religious Freedom*].

19. *Hosanna-Tabor*, 597 F.3d at 782.

20. *Hosanna-Tabor*, 132 S. Ct. at 715 (Alito and Kagan, JJ., concurring).

21. Thomas C. Berg, et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175 (2011); Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 973 (2012); Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 848-50 (2012); Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL'Y 821, 827-30 (2012); see generally Brian M. Murray, *The Elephant in Hosanna-Tabor*, 10 GEO. J.L. & PUB. POL'Y 493 (2012) (focusing on the need to define properly the religious institutions which should be allowed to refer to the ministerial exemption in order to escape the application of anti-discrimination laws); and Howard M. Wasserman, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. 289 (2012).

22. Cf. Leslie Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. (forthcoming 2013) [hereinafter Griffin, *Sins of Hosanna-Tabor*]. In the same spirit, see Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine and the Public Good*, 2004 B.Y.U. L. REV. 1099 (2004); and MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005).

23. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

is all the more the case in *Hosanna-Tabor*, where it is possible and easy to distinguish between a doctrinal matter, which is uncontrollable by the courts, and the enforcement of disability anti-discrimination laws.

As argued below, doing away with the social construct of disability is a compelling interest as it is a universalisable interest.<sup>24</sup> This is the case because it is an interest upon which there can be an overlapping consensus independently of a person's comprehensive, religious or not, vision of the good. As this article asserts, for philosophical reasons grounded within liberalism, enforcing disability anti-discrimination law is a universal compelling interest, which means that the autonomy of the religious institutions ends where ADA rights begin. Similarly, access to courts in order to have a person's legally protected rights enforced is a right protected by the U.S. Constitution.<sup>25</sup> It must also be recognized for all employees independently of the quality of their employer. Accepting that the freedom of religious institutions outweighs the right to access the courts means permitting religions to overstep the boundaries that allow peaceful coexistence in the public sphere.<sup>26</sup> As discussed below, access to courts is a right, which reasonable comprehensive doctrines can agree to protect, as it pertains to the fundamental elements of political and social cooperation.<sup>27</sup>

This article proposes a broad definition of the ministerial exception concerning the employees to whom it applies by allowing the churches to define, according to their own criteria, who qualifies as a minister. At the same time, the article proposes a narrow definition of the ministerial exception concerning the cases upon which it applies. The exception must apply only to the substantive qualifications of religious ministers, which the courts are not competent to decide. When a case of discrimination emerges against a minister, which is not justified in reference to a religious doctrine, then anti-discrimination law must be enforced. The Sixth Circuit Court of Appeals<sup>28</sup> and some commentators<sup>29</sup> have tried to defend the application of disability anti-discrimination law in *Hosanna-Tabor* by defining narrowly the ministerial exception in reference to the duties of the church employee. They have thus attempted to exclude Perich from the category of religious minister.<sup>30</sup> This article adopts the position that religious institutions should be allowed to define for themselves who qualifies as a minister, as the *Hosanna-Tabor* Court ruled. Since the choice of the ministers is an element at the core of the Free Exercise Clause,<sup>31</sup> churches should be allowed to determine who among their employees has duties inside their organization which concern the transmission of their religious

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24. See *infra* Part II.B.

25. See *infra* notes 131-46 and accompanying text.

26. See *infra* notes 147-51 and accompanying text.

27. See *infra* notes 151-57 and accompanying text.

28. EEOC v. Hosanna-Tabor Evangelical Lutheran Church and Sch., 597 F.3d 769 (6th Cir. 2010) *rev'd*, 132 S. Ct. 694 (U.S. 2012).

29. See generally Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 106 Nw. U. L. REV. 96 (2011) [hereinafter Corbin, *Irony of Hosanna-Tabor*].

30. See *id.* at 102.

31. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

messages, free from the judgment of the secular courts. However, disability anti-discrimination law should also apply to ministers if they substantively qualify as such. The *Hosanna-Tabor* decision as it stands leads to the result that a religious minister who, for example, develops an inability to move due to an accident or illness, can be terminated by his church without enjoying the protection of disability anti-discrimination law.

This article asserts that this is a result which is against the law, as well as the conception of a liberal, well-ordered society. In order to accord proper consideration to religious freedom, the article distinguishes discrimination on the grounds of disability, as compared with discrimination on other grounds, such as gender. It is highly unlikely that the discrimination on the grounds of disability will ever appear as supported by the internal dogma of a religious institution.<sup>32</sup> This is all the more obvious in cases of termination of a substantively qualified minister like Perich. The church of Hosanna-Tabor had accepted the application of anti-discrimination law in regulating its relations with its employees, as is obvious from the personnel manual of the church.<sup>33</sup> This article contributes to the existing literature in favor of a narrow ministerial exception,<sup>34</sup> proposing a nuanced way of defining its scope. It also provides a strong legal and philosophical justification in favor of this narrow conception, which does not exist in previous analyses of the topic. For reasons grounded within liberalism, it is possible to reconcile the autonomy of the churches with the need to promote anti-discrimination goals (especially concerning disability) on the basis of a sophisticated interpretation of the ministerial exception. This article also offers a comparative perspective on how the exception is understood in France.

Accommodating between freedom of religion and the need to enforce anti-discrimination law is a genuine dilemma. It is a hard case that implies the choice between two normative claims equally important in a well-ordered democratic society that respects human dignity. A conflict of two civil rights is at stake, each one having its own distinctive history and importance for the American constitutional scheme.<sup>35</sup> Freedom of religion is a constitutional value, which *prima facie* is as important as the social and political integration of the disabled. Inevitably, the use of state constraint is implied in both cases: if the state respects freedom of religion, it enforces discriminatory attitudes; if it

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32. Cf. Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 31-32 (2011).

33. *Hosanna-Tabor*, 597 F.3d at 782. (“[The] LCMS personnel manual, which includes EEOC policy, and the Governing Manual for Lutheran Schools clearly contemplate that teachers are protected by employment discrimination and contract laws.”).

34. Laura L. Coon, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481 (2001); Sarah Fulton, *Petruska v. Gannon University: A Crack in the Stained Glass Ceiling*, 14 WM & MARY J. WOMEN & L. 197 (2007); Lauren P. Heller, *Modifying the Ministerial Exception: Providing Ministers with a Remedy for Employment Discrimination under Title VII while Maintaining First Amendment Protections of Religious Freedom*, 81 ST. JOHN'S L. REV. 663 (2007); Benton C. Martin, Note, *Protecting Preachers from Prejudice: Methods for Improving Analysis of the Ministerial Exception to Title VII*, 59 EMORY L.J. 1297 (2010); Elizabeth R. Pozolo, Note, *One Step Forward, One Step Back: Why the Third Circuit Got It Right the First Time in Petruska v. Gannon University*, 57 DEPAUL L. REV. 1093, 1097 (2008); Jessica R. Vartanian, Note, *Confessions of the Church: Discriminatory Practices by Religious Employers and Justifications for a More Narrow Ministerial Exception*, 40 U. TOL. L. REV. 1049 (2009).

35. Martha Minow, *Should Religious Groups Be Exempt From Civil Rights Laws?*, 48 B.C. L. REV. 781, 786 (2007).

enforces anti-discrimination law, it violates freedom of religion. In this case, however, the power dynamics favors the churches, and state intervention is required to protect the employee as the weaker party. Although religious institutions are entitled to practice their religion against the power of the state, they are themselves exercising power upon their employees. This intervention should be very careful and artfully circumscribed in order not to violate freedom of religion more than is necessary in order to promote anti-discrimination goals. An accommodation of the two competing principles is possible.<sup>36</sup> There are legal instruments which can assure that the right not to be discriminated against can be protected in a form that minimizes the impact upon freedom of religion protected by the Establishment Clause. This can be achieved by tracing properly the line between what is a doctrinal question, not controllable by courts, and what is a non-doctrinal question, which is controllable. It can also be achieved by granting compensation, and not imposing reinstatement of the person discriminated against on unlawful grounds. The Court could have awarded frontpay to Perich without imposing her reinstatement.

The first part of this article proposes ways of tracing properly the distinction between doctrinal and non-doctrinal matters in order to limit the scope of the ministerial exception as it is currently being understood and applied by courts. It aims also at pointing out inconsistencies with Supreme Court precedents. It contains a criticism of *Hosanna-Tabor* in light of *Smith*.<sup>37</sup> Freedom of expressive association of the church when the church is concerned as an employer is not at stake when a doctrinal issue is not under consideration. The second part of this article analyzes the purpose and the philosophical justification of the ADA to stress that the integration of the “disabled” is a compelling interest. This article argues that defending the social integration of the “disabled” means protecting a minority social group from the power of the majority, a concern which is omnipresent in the American constitutional scheme ever since the foundation of the American republic.

### I. THE MINISTERIAL EXCEPTION

The result reached by the Court in *Hosanna-Tabor* is in tension with *Smith*.<sup>38</sup> The solution to the problem at stake in *Hosanna-Tabor* is far from being obvious given that the “ministerial exception” as it has been elaborated by courts is an important consequence of freedom of religion assuring the effectiveness of its protection. The crucial question is how the scope of the exception should be interpreted. The exception must cover only issues of substantive doctrinal qualifications of the minister. The enforcement of disability anti-discrimination law can be done in a way that does not violate freedom of religion, as courts can distinguish between a doctrinal substantive question, which is uncontrollable on the basis of the First Amendment, and a nontheological issue pertaining to the enforcement of disability civil rights. Perich’s substantive competence to serve

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36. Cf. Nancy L. Rosenblum, *Amos: Religious Autonomy and the Moral Uses of Pluralism, in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES* 165 (Nancy L. Rosenblum ed., 2000).

37. *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

38. *Id.*

as a minister was not at stake. Even if Perich's claim is important and must be protected, there are legal tools which can assure a harmonious exercise between her right to have the ADA enforced, and the right of the church to not have an unwanted minister. Ordering damages instead of restitution is a way of recognizing the important value of the two competing claims. Given that disability is a social construct,<sup>39</sup> doing away with this social construct is a compelling universalizable interest.<sup>40</sup> When it is possible and easy to distinguish between a doctrinal matter, which is uncontrollable by the courts, and the enforcement of disability anti-discrimination law, as in *Hosanna-Tabor*, then it does not make sense to talk about the ministerial exception at all.

A. *Problems of scope*

*Hosanna-Tabor* raises important issues concerning freedom of religion and the autonomy of religious institutions in the appointment of their ministers. In some cases, it is possible for courts to distinguish between a religious doctrinal issue which is beyond the control of the courts, and a nonreligious one in the appointment of their ministers. When this is possible, the ADA must be enforced for ministers as well, in order to protect them from discrimination on the grounds of disability.

Title VII of the Civil Rights Act of 1964 allows for an exception to the general principle against discrimination for religious employers.<sup>41</sup> Employers are allowed to use religion, sex, or national origin as a bona fide occupational qualification ("BFOQ") whenever "reasonably necessary to the normal operation of that particular business or enterprise."<sup>42</sup> The ADA also recognizes a defense for religious institutions for discriminating in the appointment of individuals of a particular religion to perform work con-

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39. See *infra* part II.A.

40. See *infra* part II.B.

41. 42 U.S.C. § 2000e 1(a):

Inapplicability of subchapter to certain aliens and employees of religious entities. This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42. 42 U.S.C. § 2000e-2(e):

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.



nected with the carrying on of their activities.<sup>43</sup>

In parallel, courts have elaborated an exception to anti-discrimination laws for religious organizations according to which they may be exempted from the application of anti-discrimination laws in the choice of their clergy and similar religious leaders.<sup>44</sup> The Civil Rights Act exceptions are narrower and concern only religious discrimination for any employee of a religious organization or school, compared to this second ministerial exception which applies to any kind of discrimination with narrow application—only the clergy.<sup>45</sup> Courts extended the exemption to employees whose duties contributed in important ways to the spiritual mission of the church, despite lacking formal ordination, applying the primary duties test, on the basis of which “the employee’s primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.”<sup>46</sup> This test raises the concern that it is not for the secular judges to decide what qualifies as a religious activity. A church could “understandably be concerned that a judge would not understand its religious tenets and sense of mission.”<sup>47</sup> The *Hosanna-Tabor* Court repeats the same legitimate concern refusing to engage in a substantive duties test, deferring to the judgment of the church about who constitutes a “lay” or a “called” teacher.<sup>48</sup>

This second exception is a limitation on the scope of application of Title VII, and was carved by the courts “in order to reconcile the statute with the Constitution.”<sup>49</sup> The application of Title VII to ministers would be seen, thus, as violating two constitutional limitations on Congress: the Establishment Clause and the Free Exercise Clause. The former prevents the government from according preferential treatment for a specific religious community, and the latter consecrates the right to practice religion. According to another opinion, “the ministers’ exception is a rule of interpretation, not a constitutional rule; and though it is derived from policies that animate the First Amendment, the relevant policies come from the establishment clause rather than from the free-exercise

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43. 42 U.S.C. § 12113(a), (d):

(a) In general - It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter. [...] (d) Religious entities (1) In general - This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

44. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (dismissing appellant’s Title VII suit alleging sex discrimination in salary and benefits while appointed by the Salvation Army as one of its ordained ministers).

45. Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1182 (2007).

46. *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985).

47. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987).

48. See *infra* notes 67-71 and accompanying text.

49. *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 945, 947 (9th Cir. 1999); see also *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 800 (9th Cir. 2005) (dissent by Judge Kleinfeld, with whom O’Scannlain, Callahan, and Bea, Circuit Judges, join); Wasserman, *supra* note 21.

clause.”<sup>50</sup> This latter exception created by court interpretation was criticized as contrary to the language of the statute, which prohibits *expressis verbis* discrimination on the basis of a number of grounds.<sup>51</sup> According to these criticisms, the exception amounts to “state action,” allowing violation of the “constitutional rights of those excluded.”<sup>52</sup>

The ministerial exception is a rule justified under the First Amendment, and the separation of church and state protecting the autonomy of the churches from state intervention, a claim at the core of religious freedom.<sup>53</sup> Courts and scholars invoke as their foundation the Free Exercise Clause as well as the Establishment Clause either interchangeably or in combination.<sup>54</sup> The judgment of whether a person is actually a minister or not belongs to the religious organizations themselves, and the courts cannot substitute their secular judgment without a serious threat to free exercise rights.<sup>55</sup> The ministerial exception is also justified as a hybrid right, which combines the protection of multiple clauses of the Bill of Rights. *Prima facie* a part of freedom of religion, freedom of association increases the weight of the protection, which must be accorded to the churches in the choice of their employees.<sup>56</sup> The Supreme Court in the past has deferred to the judgment of the party concerned in expressive association cases.<sup>57</sup> The exception is justified

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50. Schleicher v. Salvation Army, 518 F.3d 472, 475 (7th Cir. 2008).

51. Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 396 (1987); Jane Rutherford, *Equality as the Primary Constitutional Value: the Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1079 (1996); see also Dolter v. Wahlert High Sch., 483 F. Supp. 266, 269 (N.D. Iowa 1980) (“There is no indication in the legislative history that when Congress enacted the 1972 amendment it also intended to exempt sectarian schools from liability for sex discrimination.”).

52. Rutherford, *supra* note 51, at 1079.

53. 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, 1394 (1981) (expressing a rigid defense of the right to church autonomy while accepting that the general right is not absolute. Laycock makes a claim that “the state has no legitimate interest sufficient to warrant protection of church members from their church with respect to discrimination, economic exploitation, or a wide range of other evils that the state tries to prevent in the secular economy” unless there is explicit agreement which is made enforceable in a secular court.) *Id.* at 1403. Most churches would thus choose internal dispute resolution, as suing the church or a fellow member is inconsistent with the norms of most religions. One can respond however that when churches behave as employers, given the considerable power that they exercise (see *infra* Part I.C.), especially in the case of disability when this power is in reality the power of a majority which “incapacitates” a minority (see *infra* Part II.A.), then there is a compelling interest in enforcing disability anti-discrimination laws, or at least recognizing frontpay in case reinstatement seems impossible (see *infra* Part I.C.). Inconsistency with internal norms of religions for suing a church must be appreciated in a well-ordered society only in cases where no such compelling interest is at stake as the social integration of the “disabled.” Otherwise, the very concept of the rule of law is in danger (see *infra* Part I.B.).

54. McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972); Douglas Laycock, *supra* note 53, at 1373; Lupu, *supra* note 51, at 422; Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption From Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1982 (2007) [hereinafter Corbin, *Above the Law*]; Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71 (2001).

55. See Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1776-77 (2008); Joshua D. Dunlap, Note, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 NOTRE DAME L. REV. 2005, 2011-12, 2032-34 (2007); Lund, *supra* note 32, at 69-71.

56. See Mark Tushnet, *supra* note 54, at 91 for a discussion of hybrid rights.

57. Boy Scouts of Am. v. Dale, 530 U.S. 640, 648, 653 (2000) (citing N.Y. State Club Ass’n, Inc. v. City of New York, 487 U.S. 1, 13 (1988), “[t]he forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”).

[I]ntroduction of government standards to the selection of spiritual leaders would signif-

in order to avoid a clash of values between churches and government policies or “a differing emphasis among priorities or as to means in an employment decision of a theological nature.”<sup>58</sup> “[B]oth religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.”<sup>59</sup> More than other associations, ministers as “embodiments of [the] message” of the churches serve as their “voice to the faithful,” making their selection “per se a religious exercise.”<sup>60</sup>

The crucial question thus becomes how to define the scope of the exception in a systematic interpretation of the relevant clause in reference to the net of disability regulations in a way as to be in conformity with the rule of law and the idea of living in a well-ordered society. This exception must be interpreted as concerning the evaluation of the substantive qualifications of the applicant as to whether she is the appropriate person to teach the religious dogma of the religious institution employing her. If part of the mission of a religious school is to inculcate the religious doctrine and the normative system that accompanies its system of beliefs, then it is appropriate to distinguish among candidates on the basis of who is the most appropriate person to inculcate these beliefs. A decision of appointing a minister on the basis of substantive competence cannot be evaluated by the courts, even if the institution discriminates on the basis of the above mentioned criteria, as this is the core of the freedom protected by the Free Exercise and the Establishment Clauses. Anything that pertains to this decision is, by definition, beyond the admissibility and the possibility of the courts to examine, as it would constitute an impermissible intrusion into matters of faith and doctrine. Perich was a substantively qualified minister and thus, the Lutheran Church’s ability to advocate its viewpoints was not at stake in *Hosanna-Tabor*.

As the *Hosanna-Tabor* Court notes, the exception must concern questions of eligibility on the basis of the substance of the religious doctrine taught by the religious school, such as the evaluation of the degree of religious training and the process of commissioning<sup>61</sup>—the evaluation of the teacher’s academic transcripts, letters of recommendation, personal statement and written answers to various ministry-related questions; and oral examination by a faculty committee at a Lutheran college—requirements that took Perich six years to fulfill.<sup>62</sup> As Justices Alito and Kagan noted in their concurring opinion, if religious communities are autonomous under the First Amendment, this means that their authorities “must be free to determine who is qualified to serve in position of substantial religious importance,” like those “who serve in positions of leader-

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icantly, and perniciously, rearrange the relationship between church and state. While an unfettered church choice may create minimal infidelity to the objectives of Title VII, it provides maximum protection of the First Amendment right to the free exercise of religious beliefs.

Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, at 1169 (4th Cir. 1985).

58. *Rayburn*, 772 F.2d at 1171.

59. *Ill. ex rel. McCollum v. Bd. of Ed. of Sch. Dist. No. 71*, 333 U.S. 203, 212 (1948).

60. *Petruska v. Gannon Univ.*, 462 F.3d 294, 306, 307 (3d Cir. 2006) (“The ministerial exception, as we conceive of it, operates to bar any claim, the resolution of which would limit a religious institution’s right to select who will perform particular spiritual functions.”).

61. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012).

62. *Id.*

ship, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation.”<sup>63</sup> Thus, the ministerial exception must concern “the freedom of religious groups to engage in 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” and thus, the freedom of the same groups “to choose the personnel who are essential to the performance of these functions.”<sup>64</sup>

Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection . . . these include the determination of a minister’s salary, her place of assignment, and the duty she is to perform in the furtherance of the religious mission of the church.<sup>65</sup>

Courts of appeals have been interpreting this ministerial exception very broadly as precluding application of legislation concerning the employment relationship between a religious institution and its ministers.<sup>66</sup> The *Hosanna-Tabor* Court interprets the exception very widely, referring to the need to abstain from interfering with the “internal governance of the church” which would deprive “the church of control over the selection of

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63. *Id.* at 712.

64. *Id.* at 711-12.

65. *McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972).

66. *See Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008) (plaintiff alleging race discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C.S. §§ 2000e to 2000e-17 in denial of promotion and termination); *Schleicher v. Salvation Army*, 518 F.3d 472 (7th Cir. 2008) (plaintiffs expelled from the Salvation Army for filing lawsuit charging violation of the minimum-wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007) (plaintiff claiming that termination violated the ADA, 42 U.S.C. § 12101); *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (plaintiff alleging sex discrimination for being constructively discharged in a restructuring); *Werft v. Desert SW Annual Conference of United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004) (plaintiff seeking damages for employment discrimination based on failure of church to accommodate his disabilities); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. 2002) (plaintiff minister terminated for having civil commitment ceremony with her same sex partner); *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795 (4th Cir. 2000) (plaintiff alleging sex discrimination in reassignment of her duties as teacher of music and director of the church choir); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000) (appellant’s lawsuit alleging violation of Title VII for being reassigned for helping a co-worker with a sexual harassment complaint dismissed); *Combs v. Cent. Tex. Annual Conference of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999) (appeal of dismissal of Title VII sex and pregnancy discrimination suit dismissed); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 460-63 (D.C. Cir. 1996); *Scharon v. St. Luke’s Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991) (plaintiff alleging age discrimination in termination violating Age Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C. § 630 (1988), and Title VII, 42 U.S.C. § 2000e (1988)); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1359 (D.C. Cir. 1990) (First Amendment trumps age anti-discrimination provisions as “in determining whether the Church has discriminated on the basis of age a court would be required to consider the religious purpose of the antidiscrimination provision and to define its limits for the Church”); *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989) (discharged plaintiff alleged violation of due process rights); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1165 (4th Cir. 1985) (lawsuit by woman denied pastoral position in Church charging it with sexual and racial discrimination under Title VII barred by the religion clauses of the First Amendment).

those who will personify its beliefs,” “imposing an unwanted minister.”<sup>67</sup> For the Supreme Court “[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.”<sup>68</sup> The Court further refers to precedents where it refused in the past to intervene in matters of church government, and faith and doctrine.<sup>69</sup> For the Court “[t]he purpose of the exception is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason;”<sup>70</sup> it is instead to ensure “that the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical,’ [ . . . ] —is the church’s alone.”<sup>71</sup> The justification imposed by the First Amendment without consideration of the details of the specific case raises concerns, since what is at stake is not the substantive qualifications of Perich to be a minister. How far then can the exception to anti-discrimination law go? Is this broad interpretation justified? Exceptions to the principle against discrimination must be interpreted narrowly.<sup>72</sup> An exemption concerning ministers should concern matters of faith, and not the employment status of the ministers. Otherwise, the existence of labor law or anti-discrimination law does not make sense, as argued below.<sup>73</sup> In the past, the Supreme Court has held that the BFOQ requirement exception imposed by Title VII must be interpreted very narrowly.<sup>74</sup>

The Hosanna Tabor Evangelical Lutheran Church classifies its schoolteachers into two categories: “called” and “lay.”<sup>75</sup> The first are regarded as having been called to their vocation by God and are required to complete some academic requirements, including a course of theological study.<sup>76</sup> The latter are not required to be trained by the Synod or to

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67. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

68. *Id.* at 703.

69. *Serbian E. Orthodox Diocese for U. S. and Canada v. Miliwojevich*, 426 U. S. 696, 720 (1976) (civil action by bishop for being removed from office for defiance of the church hierarchy concerns “quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals.”); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (noting that the *Watson* opinion “radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”); *Watson v. Jones*, 80 U.S. 679, 727 (1871) (holding that “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them.”).

70. *Hosanna-Tabor*, 132 S. Ct. at 709.

71. *Id.* (citing *Kedroff*, 344 U. S. 94 at 119).

72. *Cf. Laura S. Underkuffler, Odious Discrimination and the Religious Exemption Question*, 32 *CARDOZO L. REV.* 2069, 2076 (2011).

73. *See infra* Part I.B.

74. *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

We are persuaded—by the restrictive language of § 703 (e), the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission—that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.

*Id.* at 334. The EEOC issued guidelines on sex discrimination in 1965 reflecting its position that “the bona fide occupational qualification as to sex should be interpreted narrowly.” 29 CFR § 1604.2(a).

75. *Hosanna-Tabor*, 132 S. Ct. at 699.

76. *Id.* at 699.

be Lutheran, and are hired when called teachers are unavailable.<sup>77</sup> Cheryl Perich became a called teacher and in addition to teaching secular subjects, taught a religion class, led her students in daily prayer and devotional exercises, and took her students to a weekly school-wide chapel service. She also led the service about twice a year.<sup>78</sup> Contrary to the Court of Appeals' holding,<sup>79</sup> who qualifies as a minister is a judgment that must be left to the autonomy of the churches. In this specific case, "Perich's job duties reflected a role in conveying the Church's message and carrying out its mission,"<sup>80</sup> since "significant religious training and a recognized religious mission underlie the description of . . . [her] position."<sup>81</sup> The question thus emerges whether persons who do qualify as ministers according to the criteria of the church are exempt from the protection of the ADA for a disability that they develop at a time posterior to their appointment. Allowing the churches to define on the basis of their own uncontrollable criteria the substantive qualifications of the legal category "minister" does not mean that this category should be exempt from the protection of the ADA.

According to the concurring opinion of Justices Alito and Kagan concerning ministers, "[i]f a religious group believes that the ability of such an employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group's right to remove the employee from his or her position."<sup>82</sup> The proper balance between freedom of religion and anti-discrimination law imposes a consideration of the reasons of the termination. If the church puts forward inability to fulfill the duties on the basis of a doctrinal disagreement or question, which is beyond the ability of the courts to control on the basis of the First Amendment, then the church has the right to terminate the employment. If, however, termination is due to a disability which emerged after the appointment of the minister, and which does not relate to the substantive ability of the minister to accomplish her teaching duties as defined by the church, then the clauses of anti-discrimination law should apply, protecting all ministers from the danger of losing their work on the basis of an accident that might occur, at some point in their life, leaving them disabled while they are appropriately accomplishing their duties to their employer. This is a claim upon which there can be an overlapping consensus independent from a person's religious or more generally comprehensive views.<sup>83</sup>

By focusing on the autonomy of the churches in view of ruling inapplicable an entire category of law, that is anti-discrimination law, the Court undermines the very concept of the rule of law and the idea of living in a well-ordered society.<sup>84</sup> Enforcing the respect of disability anti-discrimination law does not mean imposing an unwanted minister. The courts do not interfere in a religious debate proposing a specific interpretation, which would impose a minister that the church does not accept, violating the First

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77. *Id.* at 699-700.

78. *Id.* at 700.

79. *EEOC v. Hosanna-Tabor*, 597 F.3d 769, 780-81 (2010).

80. *Hosanna-Tabor*, 132 S. Ct. at 708.

81. *Id.*

82. *Id.* at 712. (Alito and Kagan, JJ., concurring).

83. *See infra* part II.B.

84. *See infra* part I.B.

Amendment rights of the specific church. *Hosanna-Tabor* concerns a minister that already satisfied these internal uncontrollable criteria of religious doctrine, a person already appointed as a “called” teacher who invoked the exercise of a right that does not pertain to the religious doctrine at all. By enforcing anti-discrimination law, courts are enforcing a law of general applicability aimed at protecting the disabled, which is totally irrelevant to the internal doctrinal point of view of the specific church-employer. It is hard to see how *Hosanna-Tabor* “concerns government interference with an internal church decision that affects the faith and mission of the church itself,”<sup>85</sup> since there is no doctrinal matter at stake. The church did not put forward a doctrinal reason against maintaining disabled employees. The ministerial exemptions should concern matters of religious doctrine, and courts are able to make a distinction between what pertains to religious doctrine and what does not in this case. Disability discrimination in particular is a kind of discrimination which can be easily distinguished from other criteria that pertain to the doctrine of a religious community. It is highly unlikely that the discrimination on the grounds of disability will ever appear as supported by the internal dogma of a religious institution.<sup>86</sup> This is all the more obvious in cases of termination of a substantively qualified minister like Perich. The church of Hosanna-Tabor had accepted the application of anti-discrimination law in regulating its relations with its employees as is obvious from the school handbook.<sup>87</sup> The case, as it stands, allows for the possibility of terminating a minister who following, for example, a car accident is obliged to use a wheelchair in order to move. This result is what anti-discrimination legislation aims to prevent.

Justice Thomas in his concurring opinion expressed the idea that the extensive interpretation of the ministerial exception is imposed by the concern that since there is disagreement on who qualifies as a minister, judicial attempts to define this issue risk “disadvantaging those religious groups whose beliefs, practices, and membership are outside of the ‘mainstream’ or unpalatable to some.”<sup>88</sup> “[T]he question whether an employee is a minister is itself religious in nature, and the answer will vary widely.”<sup>89</sup> Courts, however, can easily distinguish once the churches are allowed to define who qualifies as a “minister” whether a dispute involves a matter of internal religious doctrine beyond their control on the basis of the First Amendment, and whether it involves a matter of disability anti-discrimination law. The distinction between what is an issue internal to religious doctrine and what is a violation of disability laws is easy to make. Legislative history indicates that Congress intended the ADA to broadly protect employees from the arbitrariness of religious employers from retaliation on the grounds of exercising their rights providing the following example:

[A]ssume that a Mormon organization wishes to hire only Mormons to perform certain jobs. If a person with a disability applies for the job,

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

86. *Cf. Lund*, *supra* note 32, at 32.

87. *EEOC v. Hosanna-Tabor*, 597 F.3d 769, 782 (2010).

88. *Hosanna-Tabor*, 132 S. Ct. at 711 (Thomas, J., concurring).

89. *Id.* at 710.

but is not a Mormon, the organization can refuse to hire him or her. However, if two Mormons apply for a job, one with a disability and one without a disability, the organization cannot discriminate against the applicant with the disability because of that person's disability.<sup>90</sup>

Thus, the philosophy crystallized in the law is that a religious organization may not discriminate between individuals who equally satisfy the permitted religious criteria on the basis of disability. Cases where the disability prevents the minister from exercising her expected duties should also be considered in reference to the evaluation of the ability to do the job, and the possibility of the religious institution to offer a "reasonable accommodation" without undue hardship.<sup>91</sup> This is an aspect of the employment relation, which can be evaluated without reference to the religious dogma of the institution and the substantive capacity of the minister.<sup>92</sup>

The criteria of appointing a person as a minister pertain to religious doctrine in reference to the ministerial exception. If a religious institution asserts that gender discrimination is imposed on the basis of its religious doctrine, then it should be accepted.<sup>93</sup> It is very unlikely that such a justification will emerge for disability. However, once a person is appointed according to religious criteria, she must enjoy the protection of labor and anti-discrimination laws. Cases of discharging are thus less threatening to religion, since the religious institution has already "determined that the individuals initially met their religious qualifications."<sup>94</sup> The requirement of protecting freedom of religion is met in these cases. Examination of whether the discharge is due to illegal discrimination is easier and the state can legitimately serve the interest in preventing discrimination with a minimal impact on religious beliefs. Courts will not be asked to decide who qualifies according to the doctrinal criteria. They will just need to determine whether there is a non-discriminatory reason for the termination, and whether this reason is a pretext or not. When the religious institution does not assert that the alleged discrimination is actually dictated by the religious dogma, as in gender discrimination,<sup>95</sup> courts exercise a review

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90. Hosanna-Tabor, 597 F.3d at 777 (citing H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess. 76-77 (1990)).

91. See *infra* notes 258-68 and accompanying text.

92. *Contra* Leavy v. Congregation Beth Shalom, 490 F. Supp. 2d 1011, 1021 (N.D. Iowa 2007) (declining to inquire whether plaintiff was using reasonable accommodation provided by religious institutions as "the analysis quickly implicates whether the performance she was providing could meet her religious obligations."). The court refused to examine whether plaintiff was actually using reasonable accommodation offered by her employer, a question of fact, which does not imply evaluation of religious doctrine.

93. Cf. Griffin, *Sins of Hosanna-Tabor*, *supra* note 22, at 44-48.

94. Rutherford, *supra* note 51, at 1107.

95. In *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), the court found that gender discrimination was imposed by theological reasons. In "quintessentially religious" matters, *Milivojevich*, 426 U.S. at 720. "[T]he free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content." *Id.* at 1169. "But courts must distinguish incidental burdens on free exercise in the service of a compelling state interest from burdens where the 'inroad on religious liberty' is too substantial to be permissible." *Id.*

Of course, churches are not—and should not be—above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts. Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions.



“much less threatening to the Religion Clauses of the First Amendment than the pervasive reach of the [ ] NLRB which concerned the Supreme Court in [*NLRB v.*] *Catholic Bishop [of Chicago]*.”<sup>96</sup> When no religious reason exists, the state interest to oppose discrimination should outweigh the vague reference to religious freedom. This means that a woman already appointed as a minister can raise a claim of discrimination in her pay since her ability to be appointed as a minister is not at stake.<sup>97</sup> It is a resolved issue. If churches, though, accept women as ministers, then salary inequality between men and women for providing the same kind of services cannot be justified. However, cases where pastors are terminated for behavior which indicates departure from church doctrine imply evaluation of qualifications and standard of performance within the role of being a minister, which does not belong to the state’s adjudicative competence.<sup>98</sup>

Once a minister thus selected and fulfilling all the substantive criteria that the church imposes and which are uncontrollable by the courts on the basis of religious freedom develops a disability, should she be deprived from the protection of disability anti-discrimination law? This is the point where the autonomy of the church stops and the application of anti-discrimination law begins. This is the reason of existence of disability anti-discrimination law—protecting individuals from the arbitrary policies of their employers when they are based on their disability. Many of these cases do not involve any entanglement at all, as it is possible to distinguish between a doctrinal matter covered by freedom of religion and a nondoctrinal matter which is not.<sup>99</sup> Courts can and must decide on a case-by-case basis whether there is unlawful discrimination or whether the First Amendment bars a similar claim.<sup>100</sup>

Courts make such distinctions between expert knowledge, which they cannot evaluate, and facts that they can evaluate very frequently. In the United States in the academic context, courts have shown that they can distinguish between substantive issues pertaining to the qualifications of an employee, which are thus uncontrollable as the courts lack the necessary knowledge to evaluate them, and legal issues, which can be controlled. As a matter of substance, academic institutions, just like religious ones, are the most appropriate on the basis of their First Amendment freedoms to decide who will

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*Id.* at 1171.

96. *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038, 1043 (8th Cir. 1994), *abrogated by* *Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011) (concerning an administrative employee of a Jewish Temple and referring to *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979)).

97. *See infra* Part I.C.

98. *Singleton v. Christ the Servant Evangelical Lutheran Church*, 541 N.W.2d 606, 611, 612 (Minn. Ct. App. 1996) (concerning theological conflicts between the pastor and the church and its members); *Music v. United Methodist Church*, 864 S.W.2d 286, 287, 290 (Ky. 1993) (concerning internal church discipline, faith, and organization, governed by ecclesiastical rule, custom, and law).

99. *Cf. Hankins v. Lyght*, 441 F.3d 96, 116 (2d Cir. 2006) (Sotomayor, J., dissenting).

[T]he ADEA, unlike the NRLA, does not pose the risk of “extensive or continuous administrative or judicial intrusion into the functions of religious institutions.” [citation omitted] Instead, the ADEA involves “routine regulatory interaction” and requires “no inquiries into religious doctrine, no delegation of state power to a religious body, and no detailed monitoring [or] close administrative contact between secular and religious bodies.”

*Id.* (citing *Hernandez v. Comm’r*, 490 U.S. 680, 696-97 (1989)).

100. *Cf. Weissman*, 38 F.3d at 1044.

serve as their employees. Although courts abstain from evaluating the substantive qualifications of a candidate deferring to the employer's scientific judgment, they can evaluate whether a selection policy shows intentional bias or "no rational basis,"<sup>101</sup> or "if the criteria used and the procedures followed were reasonable and rationally related to the decision reached."<sup>102</sup> Courts are thus in position to distinguish between a substantive qualification, academic or religious-doctrinal, which is uncontrollable and rightly so, and a legal claim violating anti-discrimination requirements.

This doctrine of judicial appreciation of the extreme limits of the discretion recognized to competent bodies for expert judgments on religious, scientific, and other bases, which are beyond the competence of the civil courts, especially when civil rights are at stake and not an uncontrollable expert judgment, is common in European courts. French courts in public law litigations abstain from evaluating the discretionary power of the administration to evaluate the substantive qualifications of a candidate for a position, limiting their control to what constitutes "an obvious mistake of appreciation."<sup>103</sup> The French labor code prohibits terminations discriminating on the basis of disability,<sup>104</sup> and besides civil sanctions, employers incur criminal sanctions in cases of illegal discrimination.<sup>105</sup> Religious institutions are not exempt from labor regulations,<sup>106</sup> although they are recognized as *entreprises de tendance*, enterprises with a special purpose.<sup>107</sup> Once hiring has taken place on the basis of substantive religious uncontrollable criteria, this does not mean that the institution is allowed to discriminate towards its employees.<sup>108</sup> Employers are not allowed to terminate employees in a discriminatory way, and an employee in a private educational institution can sue for discrimination in the development of her career even if a religious institution is the employer.<sup>109</sup> The firing of a homosexual sacristan from a catholic parish was considered by the French Court of Cassation (supreme jurisdiction of the judiciary branch) as violating labor laws.<sup>110</sup> The court noted that the court of appeals which upheld the firing had violated labor laws since the firing concerned the "mores" of the employee, whereas his actions had not caused any problem within the association ("trouble caractérisé").

In a recent decision of the European Court of Human Rights, issued after *Hosanna-Tabor*, the court referred to the "autonomy of religious communities" concerning "their own opinion on any collective activities of their members that might undermine

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101. EEOC v. Tufts Inst. of Learning, 421 F. Supp. 152, 158 (D. Mass. 1975). See generally Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 961 (1982).

102. Johnson v. Univ. of Pittsburgh, 435 F. Supp. 1328, 1357 (W.D. Pa. 1977).

103. This is the doctrine of the "L'erreur manifeste d'appréciation." See 1 ANDRE DE LAUBADERE, JEAN-CLAUDE VENEZIA & YVES GAUDEMET, *TRAITE DE DROIT ADMINISTRATIF* 590-91 (1999).

104. Code du Travail Article L. 1132-1; see generally JEAN PELISSIER, GILLES AUZERO & EMMANUEL DOCKES, *DROIT DU TRAVAIL*, 549-53 (2011).

105. Code Pénal, art. 225-1.

106. Cour de Cass. Crim. Jan 14. 2003 Application No. 01-87300.

107. See generally François Gaudu, *Labor Law and Religion*, 30 COMP. LABOR LAW & POL'Y J. 507, 515 (2009).

108. *Id.* at 515.

109. Deliberations of HALDE No. 2007-170 (July 2, 2007).

110. Cour de Cass. Soc. Apr. 17, 1991, Application No. 90-42636.

their autonomy.”<sup>111</sup> The court deferred to the “margin of appreciation” of the state to decide “whether or not to recognise trade unions that operate within religious communities and pursue aims that might hinder the exercise of such communities’ autonomy,” given that there is a “lack of a European consensus on this matter.”<sup>112</sup> As the dissenting judges noted, however, the measure was not proportionate or necessary for “preserving the autonomy of the Romanian Orthodox Church.”<sup>113</sup> Both the dissenting judges and the majority mention that the European States do not exclude members of the clergy from the right to form trade unions and in some countries “they are even expressly afforded that right.”<sup>114</sup> Similarly, the case does not exclude that ministers have a right to access courts, which will decide as a last resort what rights they have against their employer, the religious institution.

*B. Is the Ministerial Exception compatible with Smith?*

The refusal to enforce Perich’s rights protected by the ADA raises concerns of compatibility with *Smith*.<sup>115</sup> In *Smith*, the respondent was asking for a religious exemption from a law criminalizing consumption of peyote.<sup>116</sup> Smith was fired from his job with a private drug rehabilitation organization for ingesting peyote for sacramental purposes at a ceremony of the Native American Church, and was denied unemployment compensation as he was determined to be ineligible for benefits for having been discharged for work-related “misconduct.”<sup>117</sup> The Supreme Court held that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”<sup>118</sup> The Court cited a number of precedents where it reached the same ruling:

“Laws,” we said, “are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may

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111. *Sindicatul “Pastorul Cel Bun” v. Romania*, July 9, 2013, Application no. 2330/09, § 159.

112. *Id.* at § 171.

113. *Id.* at § 5 (Joint partly dissenting opinion of Judges Spielmann, Villiger, Lopez Guerra, Bianku, Mose and Jäderblom).

114. *Id.* at § 61 (majority opinion). “In Austria, Bulgaria, Finland, Turkey, France, the United Kingdom, Ireland and the Netherlands there are trade unions for ministers of religion, or associations that defend interests closely resembling those defended by workers’ trade unions.” *Id.*

115. *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). *Cf.* Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 379-81 (1999); Joanne C. Brant, “Our Shield Belongs to the Lord”: *Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L. Q. 275 (1994); Caroline Mala Corbin, *Above the Law*, *supra* note 54, at 1983; Griffin, *Sins of Hosanna-Tabor*, *supra* note 22; 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, 130-31 (2009); Tushnet, *supra* note 54, at 84; Martin, *supra* note 34, at 1301; Peter Danchin, *Hosanna-Tabor in the religious freedom Panopticon*, THE IMMANENT FRAME (Mar. 6, 2012, 1:49 PM), <http://blogs.ssrc.org/tif/2012/03/06/hosanna-tabor-in-the-religious-freedom-panopticon/>.

116. *Smith*, 494 U.S. 872 at 878-79.

117. *Id.* at 874.

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

with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”<sup>119</sup>

A “private right to ignore generally applicable laws” is for the Court “a constitutional anomaly.”<sup>120</sup> *Smith* was thus denied unemployment benefits. The Court held that “[g]enerally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest.”<sup>121</sup>

The *Hosanna-Tabor* Court dismissed the application of *Smith*, which would preclude recognition of a ministerial exception, holding that it “involved government regulation of only outward physical acts,” whereas “[t]he present case . . . concerns government interference with an internal church decision that affects the faith and mission of the church itself.”<sup>122</sup> A counterargument to this point would be that disability anti-discrimination law does not concern in any case the “faith” or the “mission” of the church itself. It is in reality an aspect totally external to its internal dogma.<sup>123</sup> The justification offered for Perich’s dismissal does not concern her inability to fulfill the religious aspect of her duties, nor her fitness for offering the religious instruction she had been offering to the school five years before her disability appeared. What is at stake is whether a totally fit and appropriate religious instructor has the benefits of disability anti-

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119. *Id.* at 879 (citing *Reynolds v. United States*, 98 U.S. 145, 166-67 (1879)) (rejecting the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice); *see also id.* (citing *United States v. Lee*, 455 U.S. 252, 258-61 (1982)) (holding that an Amish employer cannot be exempted from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs); *Gillette v. United States*, 401 U.S. 437, 461 (1971) (sustaining the military Selective Service System against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion) (upholding Sunday closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding); *Minersville Sch. Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594-95 (1940).

Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.

*Id.* (footnote omitted). *But see Smith*, 494 U.S. at 880, citing *Hernandez v. Comm’r*, 490 U.S. 680 (1989) (rejecting free exercise challenge to payment of income taxes alleged to make religious activities more difficult).

120. *Smith*, 494 U.S. at 886.

121. *Id.*

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

123. Ian Bartrum argues that the constitutional values of representation and identity suggest that decisions that threaten the basic equality and inclusiveness central to U.S. polity must be treated as “outward” actions that fall within the state’s supervisory jurisdiction. The author accepts a principle of toleration of church governance decisions made on the basis of gender, sexual orientation and disability excluding race, as racial equality occupies a special place in U.S. constitutional hierarchy. *See* Ian C. Bartrum, *The Ministerial Exception and the Limits of Religious Sovereignty*, WHERE LAW AND RELIGION MEET - THE ONLINE JOURNAL OF THE EMORY CENTER FOR THE STUDY OF LAW AND RELIGION (July 19, 2012), available at SSRN: <http://ssrn.com/abstract=2117335>. This approach does not consider *Smith*, which has constitutionalized the requirement of compliance with a neutral law of general applicability, like the ADA.

discrimination law for an impediment, which emerged at a moment posterior to the substantive judgment of whether she qualified as a minister. When the substantive competence of the religious minister is not at stake, enforcing anti-discrimination law is a universal and thus compelling interest, as the analysis of Part II of this article shows.<sup>124</sup> *Smith* has constitutionalized the requirement of a generally applicable neutral law in view of limiting religious freedom, even in the absence of a compelling governmental interest. In Perich's case, her rights are not only consecrated by a neutral law of general applicability, the ADA, meeting thus the constitutional requirement imposed by *Smith*, but the law actually serves a compelling interest as well, making the need of enforcing it all the more imperative.

Late in the *Hosanna-Tabor* litigation, the Lutheran Church attempted to present the totally legitimate question of exercising a legally protected right, suing in order to have one's rights enforced, as a doctrinal matter, as an act, which contravenes the Lutheran dogma.<sup>125</sup> According to Justice Alito's and Justice Kagan's concurring opinion, Perich was discharged because she threatened to file suit against the church in a civil court, a threat which "contravened the Lutheran doctrine that disputes among Christians should be resolved internally without resort to the civil court system."<sup>126</sup> According to the two Justices, for civil courts to prove the real reason for respondent's firing they "would be required to make a judgment about church doctrine."<sup>127</sup> This is indeed a delicate issue at the margins between the rule of law and the autonomy of the religious institution. However, in these cases of limits between religious doctrine and anti-discrimination law, it is anti-discrimination law that must be enforced in order to protect against the arbitrariness of the employer who discriminates on the grounds of disability. Perich was discharged because she informed her employer that she would sue the church, making use of a right imputed to her by disability anti-discrimination laws. When such a right exists, the courts should enforce it. The fact-finding process does not need to go so deeply into evaluating the importance of alternative dispute resolution for the specific dogma of a religious community as the two concurring Justices asserted.<sup>128</sup> If a religious doctrine of a church prevents one of its employees from exercising a right recognized by the law, it is the law that must be enforced.<sup>129</sup> In order to establish a case under the ADA, a plaintiff must prove that she is a qualified individual able to perform the essential functions of the job as they are defined by the religious incontrollable criteria that the church imposes exer-

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124. See *infra* Part II.B.

125. Griffin, *Sins of Hosanna-Tabor*, *supra* note 22.

126. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 715 (2012) (Alito and Kagan, JJ., concurring).

127. *Id.*

128. *Id.*

129. As the Court of Appeals for the Sixth Circuit held in the same case, contrary to *Hosanna-Tabor's* assertions, Perich's claim would not require the court to analyze any church doctrine; rather, a trial would focus on issues such as whether Perich was disabled within the meaning of the ADA, whether Perich opposed a practice that was unlawful under the ADA, and whether *Hosanna-Tabor* violated the ADA in its treatment of Perich. *EEOC v. Hosanna-Tabor*, 597 F.3d 769, 781-82 (6th Cir. 2010) *rev'd*, 132 S. Ct. 694 (U.S. 2012). A causal link between the activity protected by the ADA and the adverse action of the church must be proved as well; see Corbin, *Irony of Hosanna-Tabor*, *supra* note 29, at 102.

cising its First Amendment rights.<sup>130</sup> The ADA thus applies once the solid doctrinal decision has been made.

Rules must be based on a public justification and “[t]hey must be treated as entrenched with respect to their own generating justifications. . . [as well as] with respect to other rules.”<sup>131</sup> Freedom of religion should be interpreted in harmony with a neutral law of general applicability protecting against discrimination on the grounds of disability. Having access to civil courts in order to have these rights enforced, when a religious institution negates them, is an essential aspect of the protection of these rights. If a religious doctrine negates this possibility, then the freedom of religion of this institution should cede before the requirements of protecting others’ rights. This is constitutive of a well-ordered and cooperative society.<sup>132</sup> Freedom of religion should not serve as a defense in order for churches to negate the legally recognized rights of their employees on the basis of disability anti-discrimination law.

The solution imposed by a systematic interpretation of all of the clauses of the Bill of Rights, which treats the Constitution as expressing a consistent whole of values, is that the First Amendment must be interpreted in harmony with the Fourteenth Amendment’s<sup>133</sup> ideas of equality.<sup>134</sup> Following the reconstruction,<sup>135</sup> the Fourteenth Amendment inserted on the level of the Constitution the “equal protection of the laws.” The right not to be discriminated against on the grounds of disability and the right to have access to the courts in order to have the first right enforced are such rights which realize the constitutional requirement of assuring “equal protection of the laws” to everyone. The Fifteenth Amendment,<sup>136</sup> granting voting rights to African-Americans, and the Nineteenth Amendment,<sup>137</sup> granting the same rights to women consolidated this vision. The principle of freedom of religion has an equal constitutional value with the principle of equal liberty and free development for all, and it must be interpreted as having such an

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130. 42 U.S.C. § 12112 (2009). “No covered entity shall discriminate against a *qualified* individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” (emphasis added).

131. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 190-91 (Tony Honore and Joseph Raz eds., 1991).

132. See *infra* notes 140-54 and accompanying text.

133. U.S. CONST. amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

134. Rutherford, *supra* note 51, at 1067.

135. BRUCE ACKERMAN, *WE THE PEOPLE, VOL. II: TRANSFORMATIONS* 110-11 (1998). AKHILL R. AMAR, *THE BILL OF RIGHTS, CREATION, RECONSTRUCTION* (1998). Bruce Ackerman parallels the shift in constitutional values to a constitutional revolution.

136. U.S. CONST. amend. XV, § 1-2. “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.” *Id.* at § 1; “The Congress shall have power to enforce this article by appropriate legislation.” *Id.* at § 2.

137. U.S. CONST. amend. XIX, § 1-2. “The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.” *Id.* at § 1; “Congress shall have power to enforce this article by appropriate legislation.” *Id.* at § 2.

equal value. In cases of conflict between the two rights, courts should be committed to finding a solution, which assures the proper harmonization for the exercise of both rights to the extent that it is possible; and in this case it is.<sup>138</sup> Accepting a solution, which allows discrimination on behalf of religious institutions on the basis of disability is of doubtful compatibility with existing constitutional law. It also neglects the compelling interests that the ADA serves, reinforcing the denial of political access to an entire category of citizens who are different and whose differences are being misunderstood and misinterpreted as impossibilities.<sup>139</sup>

Access to courts is, according to the Supreme Court, a “fundamental constitutional right,”<sup>140</sup> an essential aspect of due process protected by the Fifth Amendment of the Constitution.<sup>141</sup> If settling disputes against the state justifies having access to courts, excluding the same right for disputes among private persons in labor proceedings, especially when a legally protected right is at stake, at least a very strong justification is needed. Perich was exercising a right recognized by a law of general applicability, the ADA, which on the basis of *Smith* can suffice as a constitutional requirement in order to limit another constitutionally protected liberty, like freedom of religion.<sup>142</sup> In addition, the same right is a constitutionally protected right as a direct realization of the Fourteenth Amendment’s requirement of assuring to everyone the “equal protection of the laws.” The Supreme Court has recognized the importance of access to courts in civil proceedings concerning divorce, holding that filing fees are equivalent “absent a countervailing state interest of overriding significance” to a “denial of due process.”<sup>143</sup> The Court held that “with the ability to seek regularized resolution of conflicts, individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society.”<sup>144</sup>

Depriving an employee of the possibility of exercising her legal rights, in this case the right not to be discriminated on the basis of disability and the right to have access to courts in order to have the first right enforced, in reference to a religious dogma is an

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138. See *infra* Part I.C.

139. See *infra* Part II.A.

140. *Bounds v. Smith*, 430 U.S. 817, 828 (1977). For an analysis, see ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 1133-51 (2009).

141. U.S. CONST. amend V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

142. See *Emp’t Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990).

143. *Boddie v. Connecticut*, 401 U.S. 371, 377-81 (1971).

144. *Id.* at 374.

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitely settle their differences in an orderly, predictable manner . . . Without such a “legal system,” social organization and cohesion are virtually impossible . . . it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the “state of nature.”

overreaching of the religious dogma to an area that is regulated by state law. The autonomy of the churches ends where the ADA rights begin. The need to protect a person's legally recognized rights, is a rule on which there can be an overlapping consensus on the philosophical level.<sup>145</sup> A justification of a rule like this one that permeates the system of the law,<sup>146</sup> points towards an interpretation of existing legal rules that allow for a practical harmonization of the protection of the rights of all parties involved in the case.<sup>147</sup>

Enforcing disability anti-discrimination law is also a right with a very strong philosophical justification in reference to the idea of a well-ordered liberal political society: it is a universalizable claim upon which there can be an overlapping consensus independently from the religious views that a person holds.<sup>148</sup> A person should not lose her job for exercising a legally recognized right; otherwise the existence of a legal system itself does not make sense. The exercise of a person's legally protected rights should not be prevented in reference to a contrary religious dogma. The religious dogma must cede before the application of the law; in this case, as it exceeds the limits recognized to it by the legal system since the opposite would be contrary to the idea of living in a well-ordered society. Otherwise, religion would be overstepping the boundaries, which allow peaceful coexistence inside a well-regulated society. People should be able to affirm their comprehensive doctrines such as religious doctrines while at the same time keeping them separate from the public political sphere. As Rawls notes,<sup>149</sup> there has to be and there is a common ground, which reasonable comprehensive doctrines can agree to protect, even if these doctrines are in conflict, that specify the fundamental terms of political and social cooperation; otherwise social coexistence would be impossible.<sup>150</sup> The legally recognized rights not to be discriminated against on the basis of disability are rights of this kind. On the basis of a Rawlsian reasoning, the test in each case should be whether there can be an overlapping consensus that certain legal rights should be enforced.<sup>151</sup> In Kantian terms, these are rights, which are universalizable, or in Habermasian terms, rights, which all persons concerned would accept in an ideal speech situation where only the force of the best argument is accepted, that they must be enforced.<sup>152</sup>

All citizens, employees of religious institutions included, should have the rights recognized by disability anti-discrimination law enforced independently from their membership to a specific religious community. Accepting the jurisdiction of the civil courts in view of enforcing these legally protected rights is a right that can also assemble an overlapping consensus marking the boundaries of what is acceptable or not in a well-ordered society that respects all its citizens and is committed to providing them equal opportunities. Just like the religious institutions can sue the state if it is overstepping its

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145. *See infra* Part II.B.

146. *See* SCHAUER, *supra* note 131, at 190.

147. *Cf.* Minow, *supra* note 35, at 847.

148. *See infra* Part I.B and II.B.

149. *See infra* notes 310-23 and accompanying text.

150. *See* Bartrum, *supra* note 123. Bartrum makes an argument very close to this one referring to Locke's conception of cohesion in a political community in JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT*, chs. 8-10 (1690).

151. *See infra* Part II.B.

152. *Id.*



boundaries violating their religious freedom on the basis of the First Amendment, the employees of a religious institution should be able to sue the institution if it is overstepping its boundaries refusing to comply with disability anti-discrimination law. As Habermas notes,<sup>153</sup> the state should be able to constrain actors of civil society if they violate others' legally protected rights to liberty and free development. The civil jurisdiction of the courts is the medium, which will assure recognition that those who were excluded by the violence of words of a powerful majority and relegated to the category of "disabled," will be able to live a meaningful life, as argued below.<sup>154</sup> The law has a profoundly liberating potential for the weakest participants in social interaction, as it can recognize and enforce rights, which otherwise would not be protected due to the power inequalities that inevitably exist in the dynamics of every society. Access to courts, in order to have these rights enforced, is an indispensable element of their recognition and is also consecrated by laws that are neutral and of general applicability.

This interpretation fits well with numerous past Supreme Court cases. The *Smith* Court did not accept the use of peyote, although the ritual of the dogma of the specific religious community imposed it, and the *Reynolds v. United States* Court did not accept the right to polygamy, although the concerned religious community presented a First Amendment claim.<sup>155</sup> Courts always appreciate the limits of one freedom to the detriment of another striking a balance, and in *Hosanna-Tabor* they have erred on the side of freedom of religion. Anti-discrimination law is not a facially neutral law targeting a specific religion either, which would be unconstitutional under *Church of the Lukumi Babalu Aye v. City of Hialeah*.<sup>156</sup> It is not a neutral law of general applicability enacted with the aim to prohibit a specific religious practice. It was enacted in order to protect the rights of the weaker part—the disabled against the abuses of their employers. Allowing religious exemptions from compliance with a law of general applicability, in this case, means disadvantaging those who do not subscribe to these beliefs, as well as discriminating between secular and non-secular beliefs<sup>157</sup> of employers and employees raising concerns of compatibility with the Establishment Clause.<sup>158</sup> Wide judicial deference to religious institutions for the enforcement of disability anti-discrimination law should not be accepted.

### *C. A different treatment for religious institutions compared to individuals?*

A number of court cases have attempted to distinguish between the free exercise

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153. See *infra* notes 332-33 and accompanying text.

154. See *infra* Part II.A.

155. *Reynolds v. United States*, 98 U.S. 145, 166-67 (1879).

156. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524 (1993) (invalidating a law *prima facie* of general applicability, enacted however in order to limit the sacrificial practices of a specific religion).

157. Cf. PHILIP B. KURLAND, *RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT* 22 (1961).

158. See *infra* Part I.C.

rights of individuals from those of the churches in the application of *Smith*.<sup>159</sup> Their key argument consists in putting forward that “the burden on free exercise that is addressed by the ministerial exception is of a fundamentally different character from that at issue in *Smith*,” which is “designed to protect the freedom of the church to select those who will carry out its religious mission.”<sup>160</sup> The distinction is not very persuasive, unless a doctrinal issue is at stake. It holds concerning the refusal to tenure a minister in reference to her academic and doctrinal credentials,<sup>161</sup> which is beyond the competence of the courts to evaluate. In this case, civil judges cannot substitute their judgment to the expert judgment of the academic committee of a religious university assessing the scholarship of a faculty member in view of granting her tenure. However, it cannot justify the termination of a minister entitled to maternity leave, whose childbirth caused complications extending her inability to provide her services to the church and who raised an issue of gender discrimination in her pay,<sup>162</sup> in the absence of any other substantive reason pertaining to her competence to be a minister. If women are accepted as substantively qualified ministers, then discrimination in their pay compared to male ministers does not make sense. In cases where another right seems to be at stake, granted by a law of general applicability, a civil right whose courts can assess the violation on the basis of criteria irrelevant to the religious doctrine, then a more detailed examination has to take place in view of assuring that the right is protected. In this case concerning the female minister, the court held that “in investigating employment discrimination claims by ministers against their church, secular authorities would necessarily intrude into church governance in a manner that would be *inherently* coercive, even if the alleged discrimination were purely non-doctrinal.”<sup>163</sup> However, it is to be noted that in a well-ordered society the doctrinal autonomy of the churches does not mean license to harm others’ legally protected rights. Coercing the churches so that they do not violate others’ rights is the kind of legal coercion widely accepted in a liberal society: the very purpose of a legal system is to assure an equilibrated exercise of the rights of all social members to the extent that this is possible and just. By accepting the criterion of the doctrinal or non-doctrinal issue at stake, the autonomy of the churches to manage their own affairs is protected while acts harmful to others are limited. While judicial deference is imposed by the need to protect the autonomy of the religious institutions, courts possess the necessary expertise in “evaluating circumstantial evidence to ferret out discrimination.”<sup>164</sup> If circumstantial evidence is missing, courts can always defer to the evaluation of the religious institutions.<sup>165</sup>

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159. See, e.g., *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461 (1996); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 348 (1999).

160. *Catholic Univ.*, 83 F.3d at 462.

161. As in the case of *Catholic Univ.*, where plaintiff “would be a member of an ecclesiastical faculty whose stated mission is to ‘foster and teach sacred doctrine and the disciplines related to it.’” *Canonical Statutes of the Ecclesiastical Faculties of the Catholic University of America* (“Canonical Statutes”), Part I, Sec. 2. *Id.* at 463-64.

162. See *Combs*, 173 F.3d at 343.

163. *Id.* at 350 (citing *Simpson v. Wells Lamont Corp.*, 494 F.2d 490 (5th Cir. 1974)) (emphasis added). The later case, though, concerned a minister whose sermons were substantively displeasing to certain members of the congregation and thus in substance uncontrollable by courts; *Simpson*, 494 F.2d at 492.

164. See also *Corbin*, *Above the Law*, *supra* note 54.

165. *Id.*

Is the ministerial exception a “hybrid” situation necessitating increased protection as it combines free exercise claims with Establishment Clause and expressive association safeguards?<sup>166</sup> *Smith* eliminated strict scrutiny in cases involving the application of neutral generally applicable laws, maintaining it however, in cases combining free exercise claims with other constitutional protections.<sup>167</sup> However, freedom of association for religious institutions must be evaluated in this context in reference to the fact that they are operating as employers and must thus respect labor laws. Courts have accepted in the past that “the First Amendment does not exempt religious institutions from all statutes that regulate employment . . . [f]or example . . . from laws that regulate the minimum wage or the use of child labor even though both involve employment relationships.”<sup>168</sup> Similarly, courts have been willing to enforce Title VII in harassment cases concerning ministers.<sup>169</sup> If “sexual harassment is not protected by the First Amendment,”<sup>170</sup> disability discrimination should not be protected either. The protection of the ADA is a form of labor law, which should have been applied in this case as well. Even *Boy Scouts of Am. v. Dale* recognized that freedom of association is not absolute and can be limited by a law furthering a compelling state interest.<sup>171</sup> *Dale*, which held that promoting anti-discrimination on the basis of sexual preferences is not a compelling interest, concerned a volunteer and not an employee.<sup>172</sup> When religious institutions operate as employers, the interest to promote anti-discrimination in the labor market becomes all the more compelling.<sup>173</sup> Anti-discrimination law is such a law furthering the compelling interest of eliminating discrimination for the disabled.<sup>174</sup>

In a number of cases, courts held that freedom of association does not trump employment opportunities. In *Tony & Susan Alamo Found. v. Sec’y of Labor*, the Court held that the minimum wage, overtime, and record-keeping provisions of the Fair Labor Standards Act applied to workers engaged in the commercial activities of nonprofit reli-

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166. See *supra* notes 53-56 and accompanying text.

167. Emp’t Div., Dep’t of Human Res. of Or. v. *Smith*, 494 U.S. 872, 881 (1990).

168. *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 792 (9th Cir. 2004) (citing *Emp’t Div.*, 494 U.S. 872, at 888; *Tony and Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 291 (1985) (minimum wage); *Prince v. Massachusetts*, 321 U.S. 158, 159 (1944) (child labor)).

169. *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 944 (9th Cir. 1999); *Elvig*, 397 F.3d at 791; *Black v. Snyder*, 471 N.W.2d 715, 721 (Minn. Ct. App. 1991) (“The establishment clause is not an automatic barrier to governmental regulation.”). See *Alamo Found.*, 471 U.S. at 291 (1985) (applying FLSA to a religious foundation); *Salvation Army v. N.J. Dep’t of Cmty. Affairs*, 919 F.2d 183 (3d Cir. 1990) (applying state building regulations to religious organization). Excessive entanglement is, ultimately, a question of degree. See *Walz v. Tax Comm’n of the City of N.Y.*, 397 U.S. 664, 674 (1970). Permitting *Black’s* claim to go forward presents no greater conflict with the church’s disciplinary authority than that presented in cases enforcing child abuse laws. See, e.g., *State v. Motherwell*, 114 Wash. 2d 353 (1990) (conviction of religious counselors for failure to comply with child abuse reporting statute did not violate Establishment Clause). “We hold, therefore, that the first amendment does not bar *Black* from litigating her sexual harassment claim.” *Black*, 471 N.W.2d at 721; see also *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996, 1009 (D. Kan. 2004) (“To the extent plaintiff can demonstrate that defendant engaged in retaliatory harassment that did not involve an employment decision relating to its choice of a minister, and so long as defendant does not assert a religious justification for the alleged harassment the First Amendment does not preclude her claims.”).

170. *Elvig*, 397 F.3d, at 795.

171. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

172. *Id.* at 640.

173. Cf. *Corbin*, *Above the Law*, *supra* note 54, at 2035.

174. See *infra* Part II.

gious organizations.<sup>175</sup> Application of the Act to the Foundation did not infringe on rights protected by the religion clauses of the First Amendment.<sup>176</sup> Expressive association defenses have been rejected by the Supreme Court in the past for sex discrimination in membership in private associations,<sup>177</sup> holding that anti-discrimination laws “plainly serv[e] compelling state interests of the highest order”<sup>178</sup> for assuring access to quasi-commercial conduct involving “goods, privileges and advantages,”<sup>179</sup> as well as concerning partnership in law firm.<sup>180</sup> The protection of freedom of religion as an expressive association claim makes sense in reference to the vertical relation concerning the rights of a religious association against the power of the state, but not in the context where the government intervenes in civil society in order to protect the weaker part among two private actors, in the horizontal relation between the employee of the religious institution against the aggregate of power of the religious institution.<sup>181</sup> Thus in *NLRB v. Catholic Bishop of Chicago*,<sup>182</sup> the Court held that the National Labor Relations Act (“NLRA”) should be construed so as not to grant the NLRB jurisdiction over labor relations between parochial schools and their teachers on the basis of the First Amendment, but must also be interpreted as covering all the uncontrollable elements of substantive judgment of the institutions concerned. The Supreme Court has noted that “even religious schools cannot claim to be wholly free from some state regulation.”<sup>183</sup> Thus, the Ohio Civil

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175. *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 291 (1985).

176. According to the court, there is “no ‘significant risk’ of an infringement on First Amendment rights.” *Id.* at 298. Although the religious institution argued that the businesses functioned as “churches in disguise” and “vehicles for preaching and teaching the gospel to the public,” the lower courts found that:

[T]he Foundation’s businesses serve the general public in competition with ordinary commercial enterprises and the payment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of “unfair method of competition” that the Act was intended to prevent. *See* 29 U.S.C. § 202(a)(3) and the admixture of religious motivations does not alter a business’ effect on commerce.

*Id.* at 298-99.

177. *See Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987) (application of sex anti-discrimination law in membership in private association does not violate the First Amendment rights of the association). “In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship.” *Id.* at 546 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (holding that the Minnesota Human Rights Act prohibiting discrimination in membership limits freedom of expressive association)).

178. *Roberts*, 468 U.S. at 624.

179. *Id.* at 626. Thus, in explaining its conclusion that the Jaycees local chapters are “[places] of public accommodations” within the meaning of the Act, the Minnesota court noted the various commercial programs and benefits offered to members, and stated that “leadership skills are ‘goods,’ [and] business contacts and employment promotions are ‘privileges’ and ‘advantages’ . . . .” *U.S. Jaycees v. McClure*, 305 N.W. 2d 764, at 772 (1981). Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests. *Roberts*, 468 U.S. at 626.

180. *Cf. Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). The Supreme Court has also rejected associational challenges in the context of public funding to private education. *See Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (denying tax exemption to nonprofit private school that prescribed and enforced racially discriminatory admissions standards on the basis of religious doctrine); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (anti-discrimination law does not violate constitutionally protected rights of free association of private, commercially-operated, non-sectarian schools).

181. *Rutherford*, *supra* note 51, at 1089.

182. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1978).

183. *Ohio Civil Rights Comm’n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 628 (1986).

Rights Commission violated “no constitutional rights by merely investigating the circumstances of [the teacher’s] discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge.”<sup>184</sup>

As Caroline Mala Corbin notes, there is a disconnect in trying to propose a greater protection of institutions compared to individuals, since institutions are composed by individuals in the first place, which makes their rights derivative from the primary rights recognized to individuals.<sup>185</sup> If the association argument is pushed to its limits, it means accepting that *Smith* limits the freedom of individuals to use forbidden substances in sacramental ceremonies, whereas it allows churches as associations to offer the forbidden substances to their parishioners, and which clearly is outside the wording as well as the spirit of *Smith*.<sup>186</sup> The Supreme Court’s attempt in *Hosanna-Tabor* to distinguish between “internal” and “external”<sup>187</sup> aspects of religious behavior is not very persuasive either. The case did not concern the internal doctrinal questions of the church, but the enforcement of the ADA for a qualified minister.<sup>188</sup> This can be considered as an “external” issue, since as developed earlier, the enforcement of disability anti-discrimination law, in the absence of a doctrinal question, is a necessary condition which assures peaceful coexistence in a well-regulated society among different social groups, religious or otherwise. The enforcement of disability anti-discrimination law belongs to the political sphere, and is a rule upon which there can be an overlapping consensus even among religious doctrines which are in conflict.<sup>189</sup>

In this case a balancing which would attribute equal weight to the two competing concerns offering a medium of practical harmonization in the exercise of the two rights is possible. In *Lemon v. Kurtzman*,<sup>190</sup> the Court decided whether a statute violated the Establishment Clause on the basis of a three-part test: the statute must have a secular legislative purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster an excessive government entanglement with religion.<sup>191</sup> Anti-discrimination laws do not fail to meet the requirements of this test. Perich did not seek reinstatement, but instead damages and in particular, “frontpay, backpay, compensatory and punitive damages, and attorney’s fees.”<sup>192</sup> Reinstatement, imposing the appointment of ministers by the state might echo government intervention in defining who speaks for the church and co-defines its doctrine. However, reinstatement is left to the discretion of the courts and it is not ordered if another employee is in place or if there is a history of deterioration of relations between the parties, as in *Hosanna-Tabor*.<sup>193</sup>

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184. *Id.*

185. Corbin, *Above the Law*, *supra* note 54, at 1988-89.

186. *Id.* at 1989.

187. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012).

188. *Id.* at 710.

189. *See infra* Part II.B.

190. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

191. *Id.*

192. *Hosanna-Tabor*, 132 S. Ct. at 698.

193. 42 U.S.C. § 2000-e-5(g)(1), 12117(a); *see* Leslie C. Griffin, *Ordained Discrimination: The Cases against the Ministerial Exception*, UNIV. OF HOUSTON L. CTR., No. 2011-A-9, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1936073](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1936073) [hereinafter Griffin, *Ordained Discrimination*].

Courts are more likely to order damages, as this is the least intrusive measure to church autonomy.<sup>194</sup> The Court should have awarded backpay and frontpay as well as compensatory damages.<sup>195</sup> A reasonable accommodation between two rights in conflict, church autonomy versus disability rights, means compensation for the inability of exercising one of the two. If the restitution is not possible in order to protect a core of church autonomy, the diminution of the protection of the right not to be discriminated against in reference the rights of others does not mean the vanishing of this right. Other duties and obligations can emerge like the one of compensation.<sup>196</sup> This is a possible “accommodation of the clashing principles,” imposed by “flexibility, respect and humility.”<sup>197</sup>

Both the expressive association claim concerning an employer as well as the establishment claim do not outweigh in this case the social interest of reintegration of the disabled; the social sensibility towards those who have been disadvantaged in their life due to an accident or illness—a situation that can emerge in anyone’s life.<sup>198</sup> The interest in enforcing disability anti-discrimination laws lies in protecting everyone in case of an accident. It is an interest in the heart of a well-ordered and just society whose rules pass the universalizability test.<sup>199</sup> Just like the interest of the state to protect employees against sexual harassment is a matter of the “highest priority,”<sup>200</sup> as courts have recognized in the past, raising no First Amendment concerns, enforcement of disability anti-discrimination laws is an interest equally important in a “civilized society.”<sup>201</sup> In a series

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“Reinstatement may not be appropriate . . . when the employer has exhibited such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible.” *EEOC v. Prudential Fed. Sav. & Loan Assoc.*, 763 F.2d 1166, 1172-73; *see, e.g.*, *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 281 (8th Cir. 1983); *Cancellier v. Federated Dep’t Stores*, 672 F.2d 1312, 1319-20; *Whittlesey v. Union Carbide Corp.*, 567 F. Supp. 1320, 1330 (S.D.N.Y. 1983); *Hoffman v. Nissan Motor Corp.*, 511 F. Supp. 352, 355 (D.N.H. 1981).

194. *See* *Bollard v. Cali. Province of the Soc’y of Jesus*, 196 F.3d 940, 950 (9th Cir. 1999); *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 792 (9th Cir. 2004); *Smith v. O’Connell*, 986 F. Supp. 73, 79 (1997); *see also* *Rutherford*, *supra* note 51, at 1126.

195. The Court could award backpay from the day that Perich was in position to provide services; *see* PETER BLANCK, ET AL., *DISABILITY CIVIL RIGHTS LAW AND POLICY* 316 (2009). Frontpay could cover a period taking into consideration “the availability of employment opportunities, the period within which one by reasonable efforts may be re-employed, the employees work and life expectancy, the discount tables to determine the present value of future damages and other factors that are pertinent on prospective damages awards.” *Prudential Fed. Sav. & Loan Assoc.*, 763 F.2d at 1173 (citing *Koyen v. Consol. Edison Co.*, 560 F. Supp. 1161, 1167 n.33 (S.D.N.Y. 1983)). Frontpay covers the period until which plaintiff finds a “comparable” job: “[A] position constitutes comparable employment if it would afford the plaintiff virtually identical promotional opportunities, compensation, job responsibilities, working conditions and status as the position from which she was discharged.” *Hutchison v. Amateur Elec. Supply*, 42 F.3d 1037, 1044 (7th Cir. 1994).

196. Monetary relief in lieu of reinstatement has been criticized as violating the freedom of religion of the churches. *See* *Lund*, *supra* note 32, at 40. This argument makes sense only if one accepts that distinction between an issue pertaining to religious doctrine and one not pertaining is not possible. If, as proved earlier, this distinction is possible, the impact upon freedom of religion is nonexistent. Giving frontpay merely compensates for an illegal discrimination, which should not have taken place, while preserving church autonomy in its aspect of respecting its wish not to have reinstated a person with whom relations have been deteriorated.

197. *Minow*, *supra* note 35, at 847.

198. *Cf. Battaglia*, *supra* note 115. “[A]n expressive association interest can be overcome by a compelling governmental interest in the enforcement of the anti-discrimination policy.” *Id.* at 395.

199. *See infra*, Part II.B.

200. *EEOC v. Pac. Press Pub. Ass’n*, 676 F.2d 1272, 1280 (9th Cir. 1982).

201. As the Ninth Circuit has held:

By practicing religion within our society, churches and their members necessarily undertake some of the burdens along with the benefits of civilized life. This will inevitably dis-

of sexual harassment cases, courts have shown that they are in position to distinguish between substantive concerns in the selection and promotion of ministers protected by the First Amendment and the legitimate interest of the state in protecting ministers against sexual harassment.<sup>202</sup> Courts have established the distinction between “procedural entanglement” and “substantive entanglement.” When the latter is absent, “procedural entanglement considerations are reduced to the constitutional propriety of subjecting a church to the expense and indignity of the civil legal process.”<sup>203</sup> This is an example of an entanglement “not sufficiently significant to violate the Establishment Clause.”<sup>204</sup> In other words, the increased protection accorded to religious associations on the basis of the First Amendment does not mean license to violate the legally protected rights of others if a doctrinal issue is not at stake.

Instead of violating the First Amendment the argument can be and has been made that recognizing a preferential status for religions to discriminate violates the Establishment Clause of the First Amendment to the extent that it means granting preferential treatment by the government to a specific religion.<sup>205</sup> As P. Kurland has written, “the freedom and separation clauses should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden.”<sup>206</sup> In this case, instead of imposing a burden, the government is granting a benefit concerning the exemption from the application of its neutral laws of general applicability.<sup>207</sup> This benefit can have as disparate impact discriminatory treatment of different religious communities by the state, which is also contrary to the wording and the spirit of the Establishment Clause. According wide exemptions in the application of neutral laws of

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tort hiring and firing incentives to some degree, but it is both misguided and futile to seek to avoid all such effects [...] The *Bollard-Elvig* rule, which leaves the decision whether to hire or fire clergy with the religious institution, but subjects other decisions that may have a collateral effect on employment to the authority of the civil courts, strikes me as entirely workable.

*Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 798 (9th Cir. 2004). Similarly,

while we recognize that applying any laws to religious institutions necessarily interferes with the unfettered autonomy churches would otherwise enjoy, this sort of generalized and diffuse concern for church autonomy, without more, does not exempt them from the operation of secular laws. Otherwise, churches would be free from all of the secular legal obligations that currently and routinely apply to them. [...] At the same time, the strength of the government’s interest, expressed in the text of Title VII, in protecting employees against sexual harassment is difficult to overstate.

*Bollard v. Cali. Province of the Soc’y of Jesus*, 196 F.3d 940, 948 (9th Cir. 1999).

202. See *supra* note 169 and accompanying text.

203. *Bollard*, 196 F.3d at 949.

204. *Id.*

205. Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979); KURLAND, *supra* note 157, at 22.

206. KURLAND, *supra* note 157, at 18.

207. See *Tex. Monthly, Inc., v. Bullock*, 489 U.S. 1 (1989) (exemption from a state’s sales tax for the sale of periodicals that are published or distributed by a religious faith consisting wholly of writings promulgating the teaching of the faith violates the Establishment Clause of the Constitution’s First Amendment where the state denies a like exemption for other publications); see also *Estate of Thornton v. Caldor Inc.*, 472 U.S. 703 (1985) (a Connecticut statute, “which provides Sabbath observers with an absolute and unqualified right not to work on their Sabbath, violates the establishment clause” of the First Amendment).

general applicability on the basis of a freedom of association autonomy right leads to discrimination between religious communities, “which by historical development or modern design, are structured in ways that facilitated exemption claims” possessing “a central authority or system of religious law maintained by an educated elite” compared to religious communities, which do not possess “institutions of law-declaring authority.”<sup>208</sup>

According to one interpretation, *Smith* did not aim at affecting the churches’ autonomy over their own affairs.<sup>209</sup> It is a matter of interpretation where the churches’ affairs end and where other compelling social interests begin. The liberal tradition has been struggling to find the proper balance between protecting the defensive purposes of intermediate institutions such as churches, and the fact that they are powerful institutions “mobiliz[ing] the deepest passions of believers in the course of creating institutions that stand between the individuals and the state,”<sup>210</sup> having thus the potential to undermine the rule of law. In this case, where the autonomy of the churches is not affected, since their doctrinal uncontrollable criteria have applied in the substantive qualification of Perich as a minister, the interest to protect her as a “disabled” person emerges. This interest must be recognized as an interest-limit to the arbitrariness of the church, which instead of protecting the “disabled” person, shields itself behind the idea of autonomy developed for other purposes; this allowed the church to escape the arbitrariness of the state mingling in its internal affairs in the eighteenth and nineteenth centuries,<sup>211</sup> in order not to meet its legal duties towards its employee. The reference to past state arbitrariness, in order to negate the application of disability law, is misplaced, decontextualized and aims at concealing the true crucial questions at stake.<sup>212</sup> In this case, the Church expresses the majoritarian deformed opinion that Perich’s illness makes her a person unable to operate as a cooperative member of society.<sup>213</sup> State intervention is legitimized in order to protect the minority status of Perich from the majoritarian social power that the religious institution expresses relegating her to the status of the “disabled,” who is unable to work and thus to contribute to society.

The religious reason put forward by the church in order to justify Perich’s termination in reference to her unsuitability to be a minister, was that it was against the Lutheran faith to be resolving disputes before civil courts, which seems to be pretextual in this case.<sup>214</sup> In similar cases, courts should be able to distinguish whether the employer’s stated nondiscriminatory ground for the action “is the true ground of the employer’s action rather than being a pretext for a decision based on some other undisclosed ground. . .

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208. Lupu, *supra* note 51, at 423.

209. Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. L. 25, 36 (2000); *See Ministerial Exception*, *supra* note 55, at 1783; *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (1996) (“[W]e cannot believe that the Supreme Court in *Smith* intended to qualify this century-old affirmation of a church’s sovereignty over its own affairs.”).

210. MARK TUSHNET, *RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 248 (1988).

211. *See infra* Part I.D.

212. *Id.*

213. *See infra* Part II.A.

214. Griffin, *Ordained Discrimination*, *supra* note 193.



If it is the true ground and not a pretext, the case is over.”<sup>215</sup> Courts generally consider that the investigation of whether the stated reason is mere pretext for a person’s termination “is not very threatening to the Religion Clauses of the First Amendment.”<sup>216</sup> The religious context does not convert the retaliation question into a religious one; on the contrary the pretext even worsens Hosanna-Tabor’s position from the point of view of the ADA, since its claim that Perich was spiritually unfit because she threatened legal action is an admission of retaliation, which makes it liable under the law.<sup>217</sup> In the past, courts did not accept the same argument of referring to violation of church doctrines, which prohibit lawsuits by members against the church in order not to evaluate the retaliatory action of religious institutions against employees, stressing the “compelling interest” of the government in assuring equal employment opportunities as “the protection of employees who participate in EEOC proceedings from retaliatory job actions is essential to accomplish the purpose of Title VII.”<sup>218</sup>

The further consequences of the case allowing for discrimination in a number of ways are not to be neglected either. The refusal of the state to enforce anti-discrimination law for religious employees as it does for non-religious ones leads to a discriminatory result between these two categories of employees.<sup>219</sup> At the same time, it leads to a discriminatory result for employers as it provides religious employers with more latitude and bargaining power than their secular competitors.<sup>220</sup> Religious institutions are powerful social actors affecting consciences and thus perpetuating understandings about legitimacy in the exercise of social power inside civil society.<sup>221</sup> Michel Foucault has made us conscious of the fact that power is omnipresent in society—we are permeated by it, and it emanates from multiple sources.<sup>222</sup> Religious institutions are among the sources of this power because religious affiliations are among the strongest in a person’s life. Religion fills a very important role, providing meaning and purpose.<sup>223</sup> A license to discriminate accorded to religious institutions can have detrimental effects perpetuating social

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215. Forrester v. Rauland-Borg Corp., 453 F.3d 416, 417 (7th Cir. 2006).

216. Weissman v. Congregation Shaare Emeth, 38 F.3d 1038, 1043, 1044 (8th Cir. 1994) (“Under the ADEA, the factfinder does not ask if the employer’s stated reasons are fair or reasonable, but asks if they are the actual reasons.”); see also Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324, 330 (3d Cir. 1993) (In a case concerning a lay employee, the court noted “[a] conclusion that the religious reason did not in fact motivate dismissal would not implicate entanglement since that conclusion implies nothing about the validity of the religious doctrine or practice.”).

217. See Corbin, *Irony of Hosanna-Tabor*, *supra* note 29, at 104.

218. EEOC v. Pac. Press Pub. Ass’n, 676 F.2d 1272, 1281 (9th Cir. 1982) (for a non-ministerial employee of a non-profit religious publishing house, finding violation of Title VII for denying to a female employee monetary allowances paid to similarly situated male employees, and for terminating her employment in retaliation of her filing charges and participating in proceedings under the Act).

219. Rutherford, *supra* note 51, at 1083.

220. Cf. Brant, *supra* note 115, at 277.

221. *Id.* Danchin, *supra* note 115; Lupu, *supra* note 51, at 408-09; Ira Lupu, *Risky Business*, 101 HARV. L. REV. 1303, 1318 (1988); Shawna Meyer Eikenberry, *Thou Shalt Not Sue the Church: Denying Court Access to Ministerial Employees*, 74 IND. L.J. 284 (1999).

222. See, MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 193 (Alan Sheridan trans., 2d ed., 1977) [hereinafter FOUCAULT, *Discipline & Punish*].

223. FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY (by Maudemarie Clark and Alan J. Swensen trans., 1998) (analyzing that morality is also the result of power and religious institutions as the most powerful agents towards its formation providing meaning for human existence).

stereotypes against which anti-discrimination laws are fighting. Religion might be overstepping its boundaries when religious institutions operate as employers in affecting people's perceptions. State power should be legitimized in order to minimize the power of these institutions upon weaker social actors, their employees. The very purpose of anti-discrimination law is to transform citizens' consciousness, which to some extent can be done through the use of coercion,<sup>224</sup> and which is legitimized in this case, since the protection of the rights of others are at stake. This is exactly the purpose and the role of the state: arbitrating among differences in civil society protecting those, usually the weakest social agents, whose rights have been violated from the power of the stronger social agents assuring the conditions for a harmonious coexistence for everyone.

The implications of the ruling are uncertain, and thus concerning. As Winnifred Sullivan notes, with the decision defending church autonomy, *Hosanna-Tabor* allows for a priority of the rights of some Christians—the church officials—and a denial of rights to other Christians, such as Perich; and this disregards the freedom from hierarchical church discipline arguably accorded to American Christians by the religion clauses.<sup>225</sup> A broad interpretation of the ministerial exception, such as the one in *Hosanna-Tabor*, merely reflects a model of “ceding sovereignty within certain areas, allowing them to act as small state-like institutions, enforcing their own laws.”<sup>226</sup> It also echoes a model of state-supported churches with their own jurisdictional domains—the common model in Europe, from which Americans have been trying to distance themselves.<sup>227</sup> The result in *Hosanna-Tabor* means that the state instead of enforcing its own law, enforces the rules of the church on the specific labor relation which it has decided to regulate independently of the quality of the employer by enacting the ADA. The result of *Hosanna-Tabor* also allows religious employers to terminate their ministers for non-religious reasons.<sup>228</sup> *Hosanna-Tabor* results in a rule of the stronger to the detriment of the weaker, a situation where might makes right, contrary to the universalizability rule and any conception of justice whatsoever.<sup>229</sup> Accepting an exemption to the application of the antiretaliation clauses of the ADA potentially opens Pandora's Box, allowing religious organizations to escape the application of the law.<sup>230</sup>

#### D. An argument from history?

The Court, in order to defend the ministerial exception, referred to the importance throughout the history of the United States of the protection of freedom of religion. However, this interpretation is modeled to fit the general argument the Court makes, and

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224. ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 4 (1996).

225. Winnifred Fallers Sullivan, *The Church*, *THE IMMANENT FRAME* (Jan. 31, 2012), <http://blogs.ssrc.org/tif/2012/01/31/the-church/>.

226. Winnifred Fallers Sullivan, *Rethinking Secularism: Going to Law*, *THE IMMANENT FRAME* (Oct. 13, 2011), <http://blogs.ssrc.org/tif/2011/10/13/going-to-law/>.

227. *Id.*

228. Griffin, *Religious Freedom*, *supra* note 18.

229. *See infra* Part II.B.

230. *Cf.* Corbin, *Irony of Hosanna-Tabor*, *supra* note 29, at 105.

it is of dubious consistency with the issues at stake in defending freedom of religion during the founding era. The key motivation behind protecting freedom of religion during that era was protecting minorities from the oppression of majorities.<sup>231</sup> This majority oppression of religious minorities was dominant in Europe and led to the flow of emigration to America.<sup>232</sup> Both the Establishment Clause and the Free Exercise Clause were conceived in order to protect the freedom of religion of minority religious communities from interventions by majoritarian political decision-making.<sup>233</sup> The Free Exercise Clause, which was meant to protect the weaker from the stronger, namely religious minorities from the protection of majorities, is now being used to protect the stronger to the detriment of the weaker; that is religious institutions and their right to discriminate.<sup>234</sup> It is an irony of history to use the dominant philosophy underlying the Constitution and the First Amendment, the need to protect minorities by the power of majorities, in order to refuse protecting another minority today, the minority of those labeled as “disabled” from the power of the majority who has labeled them as such.<sup>235</sup> Anti-discrimination law shows the tension between protecting a minority’s rights against the power of a majority, a concern that permeates U.S. law ever since the foundation of the American republic. James Madison’s idea of checks and balances, which is defining of the American constitutional order, was conceived on the basis of a similar concern for protecting minorities from the power of political majorities.<sup>236</sup>

The *Hosanna-Tabor* Court cites Thomas Curry’s book, *The First Freedoms*:

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231. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985); MORTON WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION* (1978); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969); MICHAEL P. ZUCKERT, *THE NATURAL RIGHTS REPUBLIC: STUDIES IN THE FOUNDATION OF THE AMERICAN POLITICAL TRADITION* (1996).

232. SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY 19-66* (1902); see also MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY* (2008).

233. Madison was initially against a Bill of Rights altogether, asserting that a “multiplicity of sects... is the best and only security for religious liberty in any society. For where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest.” JAMES H. HUTSON, *CHURCH AND STATE IN AMERICA: THE FIRST TWO CENTURIES* 149 (2008). When the Bill of Rights was eventually enacted as a concession of the Federalists to the Antifederalists, it was meant “to satisfy the Antifederalists, by explicitly stripping the national government of intrusive power in religious matters, and the Federalists, especially those in New England, by maintaining considerable state autonomy in religion.” *Id.* at 155. The second great awakening of religion between 1800 and 1830 was spurred by “the egalitarianism and jealousy fostered by revolutionary ideals which convinced the average citizen that his opinion on religious matters was as valid as those of the ‘experts.’” *Id.* at 166. The Bill of Rights was developed by Madison as containing the common denominator of liberties protected already at the state level; see Donald S. Lutz, *The States and the U.S. Bill of Rights*, 16 S. ILL. U. L.J., 251, 261 (1992). The very idea of a Bill of Rights, just as the content of the Federal Bill of Rights, was developed first at the state level. For a presentation of the debates in the assemblies of the states, see JOHN PHILIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* (1986); and John P. Kaminski, *Liberty versus Authority: The Eternal Conflict in Government*, 16 S. ILL. U. L.J., 213, 222 (1992).

234. Cf. Rutherford, *supra* note 51, at 1083.

235. See *infra* Part II.A.

236. See THE FEDERALIST NO. 10 (James Madison); *Letter of June 8, 1789: Amendments to the Constitution*, in THE PAPERS OF JAMES MADISON (Robert A. Rutland et al., eds., 1978). For an analysis, see HENRY STEELE COMMAGER, *THE EMPIRE OF REASON: HOW EUROPE IMAGINED AND AMERICA REALIZED THE ENLIGHTENMENT* 234-35 (1977).

*Church and State in America to the Passage of the First Amendment*,<sup>237</sup> to make the argument that escaping from the control of the national church and exercising the right of the churches to select their own ministers against the oppression of the state was the reason why many Puritans fled to New England.<sup>238</sup> The book cited in the case discusses the omnipresent concern during the founding era for protecting minority religions: the multitude of different religious communities in colonial America led to a situation of tolerating dissenters “as a matter of principle.”<sup>239</sup> Unlike England, which excluded dissenters from political rights and public life, in America they “were eligible to hold office” and overall “fared much better than their counterparts in England.”<sup>240</sup> The Establishment Clause was intended to limit the federal government, allowing the existing arrangements of religious communities on the level of the states. However, the Founders had a different understanding of the term establishment compared to the one dominant today:<sup>241</sup> the long debates during 1784, taking place at the level of states like Virginia, show that any advantage towards a specific religion was seen as an “Establishment.”<sup>242</sup> Thomas Curry notes that of the eleven states that ratified the First Amendment, “nine . . . adhered to the viewpoint that . . . government[al] financial assistance to religion constituted an establishment of religion. . . .”<sup>243</sup> During the founding era when Americans were condemning the idea of establishment, “they had in their minds an image of tyranny, not a definition of a system.”<sup>244</sup> Thus, by the time of the revolution, all the colonies “were substantially ready for the adoption of measures, which should make the severance of Church from State complete:” those including according liberty to dissenting persuasions.<sup>245</sup> Thomas Jefferson’s resolution of 1776 to strip the civil power of authority in matters of religion, was aimed at “taking away all privileges and preeminence of one religion over another.”<sup>246</sup> The minority-majority dynamic is at the heart of all of these concerns in the founding era.

The concern for protecting those who are different and whom the majority cannot understand has been omnipresent throughout the history of the protection of freedom in America and in particular religious freedom. That concern in our era means protecting different minorities, such as the “disabled,” from the majoritarian power of religious in-

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237. THOMAS CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 5 (1986).

238. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702 (2012).

239. CURRY, *supra* note 237, at 78.

240. *Id.* at 79-80.

241. Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 407 (2002); LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 92 (2001). Establishments were not understood based on European experience. An establishment meant “government aid and sponsorship of religion,” which was accorded to various churches simultaneously. *Id.* at 101.

242. CURRY, *supra* note 237, at 147. The opponents of a tax for religion in Maryland and the people of Delaware and New Jersey held similar views. *Id.* at 160.

243. *Id.* at 220.

244. *Id.* at 211.

245. COBB, *supra* note 232, at 482.

246. CURRY, *supra* note 237, at 212. The author cites a series of similar conceptions in Virginia, South Carolina, Maryland, Massachusetts, and Rhode Island.

stitutions among others potentially threatening them.<sup>247</sup> In *Hosanna-Tabor*, it was the churches that were expressing majoritarian power in relegating to the category of the “disabled” a number of citizens, on the basis of misunderstanding their abilities.<sup>248</sup> If the churches were the weak actor that needed protection from the state in the founding era, today it is the “disabled” who need protection. The churches are the ones who express the oppression of the majority towards the minority of those called “disabled.” A consistent application of the concern of protecting minorities from powerful majorities, omnipresent throughout American constitutional history, means limiting the power of the churches by enforcing disability anti-discrimination law.

## II. DISABILITY ANTI-DISCRIMINATION LAW AND ITS PHILOSOPHICAL JUSTIFICATION

Disability is a social construct, the result of the exercise of the power of discourse of a majority upon a minority. If it is the case, given a dialectic relation that exists between the “is” and the “ought,” then an important obligation emerges to do away with the social construct assuring the social integration of the persons called “disabled.” The ADA has a very strong philosophical justification. Enforcing it is a compelling state interest, as the rights that it recognizes to the disabled are universalisable claims; claims that can concentrate an overlapping consensus independently from a person’s comprehensive, metaphysical, religious, or other vision of the good.

### A. Title VII, the ADA and the social construction of disability

The current disability civil rights paradigm started influencing U.S. government policies in the 1970s, modeling the cause of the disabled in the line of the civil rights cause won by the struggles of other disadvantaged social groups.<sup>249</sup> Title VII extended the constitutional prohibition of discrimination to private employers, going beyond the “state action” doctrine which limits the scope of the Fifth and Fourteenth Amendments to actions by government on the basis of the Commerce Clause.<sup>250</sup> The Act involved “massive governmental intrusion into private economic choices.”<sup>251</sup> Title VII actions may be brought in state or federal courts and the Act has served as a model for most state laws prohibiting employment discrimination.<sup>252</sup> The ADA extended the same prohibitions to cases of discrimination on the grounds of disability.<sup>253</sup> It applies to qualified individuals able to perform the essential functions of the job as defined by the employer—and if this employer happens to be a religious institution, by the uncontrollable religious criteria on

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247. See *infra* Part II.A.

248. *Id.*

249. Basically, African-Americans and women. See BLANCK, *supra* note 195, at 6.

250. GEORGE A. RUTHERGLEN & JOHN J. DONOHUE III, EMPLOYMENT DISCRIMINATION LAW AND THEORY 2 (3rd ed. 2012); see also Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 439 (1991).

251. KOPPELMAN, *supra* note 224, at 2.

252. Brant, *supra* note 115, at 283.

253. 42 U.S.C. §12112(a) (1990).

the basis of exercising its First Amendment rights.<sup>254</sup> The ADA's goals are assuring "equality of opportunity, full participation, independent living, and economic self-sufficiency."<sup>255</sup>

The ADA incorporates the substantive jurisprudence developed under the previous Rehabilitation Act of 1973,<sup>256</sup> as well as the proof standards developed under Title VII, and applies those rules to the broad class of individuals, employers, and unions covered by Title VII.<sup>257</sup> The definition of what counts as "disability" is defined in the broadest possible terms so that those protected by the statute represent an extremely heterogeneous group. The ADA requires employers not to take "adverse action" and obliges them to make reasonable accommodations for qualified employees, unless the accommodation imposes undue burden upon their business.<sup>258</sup> Failure to make a reasonable accommodation constitutes discrimination: prevention and affirmative action are required at the same time.<sup>259</sup> Unless employers can satisfy any of the statutory exemptions, they must "reasonably accommodate" their employees' special needs.<sup>260</sup> The ADA prohibits an em-

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254. *Id.* Congress found that:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

See also DIANNE AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 803 (8th ed. 2010).

255. 42 U.S.C. § 12101(a)(8). The National Council on the Handicapped (later named the National Council on Disability) released its report, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities—With Legislative Recommendations: A Report to the President and to the Congress of the United States*, ISBN-0-936825-00-6 (Feb. 1, 1986), according to which:

The present and future costs of disability to the Nation are directly related to the degree of success we attain in reducing existing barriers, both structural and attitudinal, and in providing appropriate services to individuals with disabilities so that they may reach their full potential and become more independent and self-sufficient.

*Id.* at 2; see also BLANCK, *supra* note 195, at 44.

256. Rehabilitation Act of 1973, 29 U.S.C. § 701 (1973).

257. JOEL WM. FRIEDMAN, THE LAW OF EMPLOYMENT DISCRIMINATION 891-92 (7th ed. 2009). The Rehabilitation Act aimed to promote and expand "employment opportunities in the public and private sectors for [individuals with disabilities] and place such individuals in employment." H.R. 8070, 93d Cong. § 2(8) (1973).

258. 42 U.S.C. § 12112:

(b) Construction

As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes

(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

259. RUTHERGLEN & DONOHUE, *supra* note 250, at 779; see also Pamela S. Karlan & George Rutherford, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1 (1996); Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 877 (2008) ("[T]he ADA defines discrimination in terms of accommodation.").

260. 42 U.S.C. § 12111(9).

ployer from retaliating “against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA].”<sup>261</sup>

The ADA was enacted in order to protect “qualified individuals” from employment discrimination; that is, those

[W]ho, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.<sup>262</sup>

The concept of “reasonable accommodation” affects both the determination of discrimination and the determination of qualifications.<sup>263</sup> Perich did fulfill all the substantive criteria to qualify as a “called teacher,” according to the requirements of the Lutheran Church.<sup>264</sup> The philosophy inspiring the concept of reasonable accommodation is promoting “equal employment opportunity,”<sup>265</sup> reflecting the social model of disability anti-discrimination law. It does not “require employers to grant people with disabilities special treatment” as “employers are free to give the same type of accommodation to nondisabled workers;” the employer must in any case determine after “examination of both” the job requirements and the abilities of the person if an “aspect of the job could reasonably be rearranged to permit” the person “to perform” the essential functions of the job, provided that she is indeed the most qualified person to do the job.<sup>266</sup> Disability leave, such as the one that Perich used, is a kind of reasonable accommodation destined to facilitate reintegration of the disabled into the labor market.<sup>267</sup> As her doctor confirmed, following the leave and “with the assistance of medication,” she would be “fully functional” to fulfill her teaching responsibilities.<sup>268</sup>

The legislation expresses two basic values dominant in post-World War II American liberalism; the inherent dignity of the individual and the need for a rational and efficient economy. “Antidiscrimination law seeks to neutralize widespread forms of prejudice that pervasively disadvantage persons based on inaccurate judgments about their

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261. 42 U.S.C. § 12203(a).

262. 42 U.S.C. § 12111(8).

263. AVERY, *supra* note 254, at 804.

264. *See infra* Part II.A.

265. *United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities* (1983), in MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 677 (6th ed. 2003).

266. 42 U.S.C. § 12111(8) (1994); see Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 459 (2000) [hereinafter Bagenstos, *Subordination*].

267. BLANCK, *supra* note 195, at 223.

268. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and Sch.*, 597 F.3d 769, 773 (6th Cir. 2010) *rev’d*, 132 S. Ct. 694 (U.S. 2012).

worth or capacities.”<sup>269</sup> In the case of disability, anti-discrimination law aims to assure the social integration of the “disabled,” a goal all the more imperative if we consider that every person runs the danger of becoming disabled due to accident or illness that can occur at some point in her life. Like all anti-discrimination law, the ADA aims at “removing misleading signals from the employers’ information mix”<sup>270</sup> when they are considering potential candidates for a job. The ADA expresses a compelling interest—the need to protect a category of stigmatized citizens from “systematic disadvantage” and discrimination.<sup>271</sup>

The purpose of anti-discrimination law is to transform cultural attitudes<sup>272</sup> and “existing social arrangements.”<sup>273</sup> This is a very important exercise of state coercion in forming consciousness, preferences, and behavior necessitating a strong justification. Anti-discrimination law is trying to do away with all the social constructs, whether they operate on the symbolic or the institutional level, that perpetuate stigmatization, disadvantage and the general mistreatment of a certain group of citizens on the basis of a characteristic seen as negative. In order to attack prejudice<sup>274</sup> against the “disabled,” a “structural” and multilevel approach is necessary to “reorganize[] workplace structures to minimize the risk that biases will limit opportunities. . . .”<sup>275</sup> In the case of the disabled, it is these social arrangements and constructs that prevent them from being productive and cooperative members of society.

In opposition to the “medical” model of disability, which used to be the dominant paradigm to discuss disability and which focused on the elements of the person, seeing some of her characteristics as “inherent [. . .] that should ideally be fixed,”<sup>276</sup> the “social” model of disability focuses on the social circumstances which render a person “disabled.”<sup>277</sup> Inspired by this philosophy, this latter model of approaching disability concludes that some people are disabled because social arrangements make them seem so.<sup>278</sup> In different social circumstances they could be perfectly cooperative and productive so-

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269. ROBERT POST ET AL., PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 10 (2001).

270. BLANCK, *supra* note 195, at 64.

271. Bagenstos, *Subordination*, *supra* note 266, at 458.

272. KOPPELMAN, *supra* note 224, at 4.

273. POST, *supra* note 269, at 20; MARTHA MINOW, MAKING ALL THE DIFFERENCE; INCLUSION, EXCLUSION, AND AMERICAN LAW 110-14 (1990); Len Barton, *Sociology, Disability Studies and Education: Some Observations*, in *THE DISABILITY READER* 62 (Tom Shakespeare ed., 1998).

274. See PIERRE-ANDRE TAGUIEFF, THE FORCE OF PREJUDICE: ON RACISM AND ITS DOUBLES (Hassan Melehy trans., 2001); FACE AU RACISME: LES MOYENS D’AGIR TOME 1 (Pierre André Taguieff ed., 1991).

275. Samuel Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 15 (2006) (Bagenstos also expresses doubts as to the possibility that courts would police the structures employers adopt to promote workplace equality).

276. See Bagenstos, *Subordination*, *supra* note 266, at 427. The medical model “locates the ‘problem’ of disability within the individual and secondly it sees the causes of this problem as stemming from the functional limitations or psychological losses which are assumed to arise from disability.” MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 32 (1996).

277. *Id.* at 19-42; Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 12 (2004); Adam M. Samaha, *What Good is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1255-56 (2007).

278. Michael Ashley Stein, *Disability Human Rights*, 95 CALIF. L. REV. 75, 85-87 (2007). Samuel Bagenstos talks about “a socially assigned group status that tends to result in systematic disadvantage and deprivation of opportunity.” Bagenstos, *Subordination*, *supra* note 266, at 401.



cial members. The existing social arrangements are made to reflect the needs of the majority of the population, making those who, on the basis of some difference, have different needs unable to operate and to contribute to others.

Difference is reinterpreted as disability and stigmatized by the power of the words of the stronger to the detriment of the weaker.<sup>279</sup> Speaking and categorizing means exercising power, especially in a specific context of enunciation where the majority imposes ways of thinking upon minorities. A difference is worded into a disadvantage on the basis of the power of a majority, which does things with its words.<sup>280</sup> The very definition of a human attribute as an “impairment” making a person “unable” to operate in a specific social setting is a function of social power. The exercise of the same social power leads to the formation of criteria of esthetics, taste, and stigmatization of physical features seen as “abnormal.”<sup>281</sup> The majority reinterprets the differences of a minority as “disabilities” and forms a world where these differences prevent those having them from being creative and cooperative. The problem of disability is profoundly a tension between the rights of a minority and political and social majorities, a concern towards which the U.S. legal order has been very sensitive throughout American constitutional history.<sup>282</sup>

Michel Foucault has written extensively on the elaboration of the concept of “normalization.”<sup>283</sup> The concept has two meanings: a normative one, describing what should be an *ought*; and a descriptive one, describing an *is*.<sup>284</sup> Given the dialectic that exists between the *is* and the *ought*, the *is*, imposed by a powerful majority, produces normativity and creates opinions and consciousnesses according to its precepts. What counts as “normal” descriptively produces the normative conception of “normality” as well. A series of social needs, economic and systemic, have been producing the normativity of the “normal” qualifying as normatively “abnormal,” a series of deviating attitudes imposing homogeneity and the “shading of individual differences.”<sup>285</sup> The disabled constitute this

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279. MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* (1970); *see also* MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (A.M. Sheridan Smith transl., 1972) (Foucault discusses how name-giving is actually an exercise of power. Scientific discourse imposes order upon “nature” by naming things).

280. This idea is due to a combination of J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962), and PIERRE BOURDIEU, *CE QUE PARLER VEUT DIRE: L’ECONOMIE DES ECHANGES LINGUISTIQUES* (1982). Austin focuses on the performativity of language in specific social contexts. Words have a locutory meaning; the meaning that they have in a dictionary, and an illocutory meaning, that is, they produce results in specific contexts of communication. Bourdieu stresses the idea that the stronger a person is, the more things she can do with her words on the basis of this performative aspect of speech. In a context of communication defined by the social power of the majority, its use of words such as “disability” and “impairment” actually create in the world of the contents of thought, the existence of these qualities; subordinating and disadvantaging an entire class of people, as Justice Ginsburg notes in her concurring opinion in *Sutton v. United Air Lines*, 527 U.S. 471, 494-95 (1999). Rae Langton makes a similar argument about women and pornography in *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFFAIRS 293 (1993).

281. MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004); PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* (Richard Nice trans., 1985); Cass R. Sunstein, *Why Markets Don’t Stop Discrimination*, 8 SOC. PHIL. & POL. 22, 31-34 (1991).

282. *See supra* Part I.D.

283. FOUCAULT, *Discipline & Punish*, *supra* note 222, at 183; *ABNORMAL: LECTURES AT THE COLLEGE DE FRANCE 1974-1975* (Valerio Marchetti and Antonella Salomoni eds., Graham Burchell trans., 2003). For a discussion in the same spirit, see Bagenstos, *Subordination*, *supra* note 266, at 441-45.

284. FOUCAULT, *Discipline & Punish*, *supra* note 222, at 213.

285. *Id.* at 184.

category of citizens that have been oppressed due to the inability of the majority to understand them, seeing their difference existing at the level of the “is” as an unwanted difference on the level of the “ought.”

The will to subordinate also goes together with the will to discriminate;<sup>286</sup> the majority affirms its narcissism and its superiority, as well as its fear towards those who are different, by subordinating them. Sartre’s<sup>287</sup> and Beauvoir’s<sup>288</sup> existentialism has appropriated the Hegelian idea<sup>289</sup> of the struggle of recognition and of the battle between different consciousnesses and subjectivities in trying to make sense of their lives and define themselves. Every existent needs to be recognized by another existent as such: the self needs to pose an Other and define herself in reference to that Other. Beauvoir has developed very eloquently how men have relegated women to the category of the inferior while keeping them at the level of the existent—not annihilating them to the point of entirely turning them into objects. This is because it is the recognition of a human being that is always indispensable to an existent in order to affirm himself.

The subjugation of the disabled has some similar elements, although it is difficult to hold them accountable for complicity as Beauvoir does with women for their subordination. For the disabled, the fear and the impossibility to understand the difference led to their subordination and the perpetuation of stigmatization. This happens in a way that does not objectify them entirely but allows them to be existents in order to provide recognition to the “normal,” those that need it the most.

Hegel’s insight is that in the struggle for recognition, a dialectical inversion takes place at some point:<sup>290</sup> if we all need someone else’s recognition and if the strong majority needs to oppress a minority in order to affirm itself as superior, then in the end it turns out to be the case that it is the majority that is enslaved in its narcissism permanently seeking glorification of its “normalness” by those who are different. It is those who subordinate that are weaker in reality than the subordinated, because the first ones are dependent on the admiration of those who are weaker, whereas the excluded and “abnormal” have nothing to lose.

If the construction of disability is based on the underestimation of the potential of those seen as “disabled,”<sup>291</sup> then it is the context that needs to be properly adjusted in order to offer them the possibility to create, realize themselves, and contribute in return to society. State coercion is thus needed to provide these social arrangements that will allow the “disabled” to show their abilities and thus gain respect and admiration for how they can contribute to society just like every “non-disabled” person. Andrew Koppelman presents three reasons for defending the anti-discrimination project; government impartiality, recognition of the individual value of every human being, and doing away with material disadvantages that some citizens suffer by the perpetuation of the social con-

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286. Cf. Bagenstos, *Subordination*, *supra* note 266, at 418.

287. See, e.g., JEAN PAUL SARTRE, *L’ETRE ET LE NEANT* (1943).

288. See, e.g., SIMONE DE BEAUVOIR, *THE SECOND SEX* (Constance Borde and Sheila Malovany Chevallier trans., 2010).

289. See, e.g., G.W.F. HEGEL, *PHENOMENOLOGY OF SPIRIT* §187 (A.V. Miller trans., 1977).

290. *Id.* at §193-96.

291. MINOW, *supra* note 273, at 321.

structs that form prejudice against them.<sup>292</sup> At the same time it, aims at promoting the self-fulfillment of an important category of citizens, indispensable to the promotion of democracy and social peace.<sup>293</sup>

The Supreme Court has proved in the past that it is very sensitive to similar considerations in a series of cases. In *School Board of Nassau County, Florida et al. v. Arline*, the Court referred to the motivation of the ADA as being to dissipate “society’s accumulated myths and fears about disability,”<sup>294</sup> as well as “archaic attitudes and laws.”<sup>295</sup> In *Olmstead v. L.C.*, the Court showed an intense concern in favor of the social integration of persons with mental “disabilities” against the perpetuation of “unwarranted assumptions that [these] persons [...] are incapable or unworthy of participating in community life.”<sup>296</sup> In *Alexander v. Choate*, the Court made a detailed presentation of the motivation of the ADA, especially the fact that the handicapped person had been living “shunted aside, hidden and ignored,”<sup>297</sup> a fact that can no longer be tolerated.<sup>298</sup> The ADA aims to attack the social constructs to which the Court refers in these cases. In *Hossanna-Tabor*, the rhetoric of the Supreme Court concerning the need to enforce the disability anti-discrimination law became too mild, neglecting how compelling an interest this is, although it was possible to find a solution which would promote Perich’s reintegration in the job market, which would respect the core of the freedom of religion and the autonomy of the Lutheran Church at the same time.<sup>299</sup> Granting frontpay would have served both these purposes very well.

### B. The philosophical foundations of disability anti-discrimination law

Enforcing disability anti-discrimination law is as compelling an interest as it is universal. This can be proved through deontological moral reasoning or a consequentialist moral reasoning. Promoting the social integration of the “disabled” is something good in itself, *a priori*, while benefiting everyone, based upon its consequences. Finding inspi-

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292. KOPPELMAN, *supra* note 224, at 9.

293. Bagenstos, *Subordination*, *supra* note 266, at 454.

294. *School Bd. of Nassau Cnty. Fla. v. Arline*, 480 U.S. 273, 284 (1987).

295. *Id.* at 279 (citation omitted).

296. *Olmstead v. Zimring*, 527 U.S. 581, 600-01 (1999). For the Court “confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.” See Brief for American Psychiatric Association et al. as Amici Curiae at 20-22, *Olmstead v. Zimring*, 527 U.S. 581 (1999) (No. 98-536), 1999 WL 134004. Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy, given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice. *Id.* at 6-7, 17.

297. *Alexander v. Choate*, 469 U.S. 287, 296 (1985) (citing 117 Cong. Rec. 45974 (1971)).

298. *Id.* at 296 (citing Sen. Humphrey’s statement in 118 Cong. Rec. 525-26 (1974)). “And Senator Cranston, the Acting Chairman of the Subcommittee that drafted § 504, described the Act as a response to ‘previous societal neglect.’” *Id.* (citing 119 Cong. Rec. 5880, 5883 (1973)). See also 118 Cong. Rec. 526 (1972) (statement of cosponsor Sen. Percy, describing the legislation leading to the 1973 Act as a national commitment to eliminate the “glaring neglect” of the handicapped).

299. See *supra* part I.C.

ration from the Hegelian perspective,<sup>300</sup> we can note that there is a dialectic relation between the *is* and the *ought*.<sup>301</sup> This means that if the very conception of “disability” is socially constructed, then a responsibility emerges to do away with the construction allowing everyone to live fully flourishing lives. Once we realize that it is social power that has imposed the social structures qualifying a category of individuals as “disabled” to the extent that they cannot fit in the structures designed to reflect the standards of the majority, a moral responsibility emerges for us to take measures doing away with the structures that perpetuate the situation of force and injustice.

The justification of anti-discrimination law lies thus in the idea already enunciated by Aristotle according to which we must treat equal cases equally and unequal cases unequally.<sup>302</sup> By extension, this means treating similar cases similarly and dissimilar cases dissimilarly. Justice is a question of right balance and proportion in distributing goods and possibilities,<sup>303</sup> as well as proper treatment of each specific case. From this conception derives the idea that if the right proportion is not met then a responsibility emerges for society to meet the right proportion.<sup>304</sup> This is a principle of justice which is so fundamental that it applies to any conception of the state, independently of whether we accept Aristotle’s vision of the state or not.<sup>305</sup> It is a principle consequent with contemporary constitutional liberalism, which does not consider the state as having a wide moralizing role assuring how its citizens can live a moral life.<sup>306</sup> Even if the state does not have a wide moralizing role, its very purpose of existence is to mediate between disagreements and to validate distributions of goods and possibilities settling conflicts.<sup>307</sup> Thus, the state should be legitimized to do away with this discourse which, exercising violence, relegates a number of citizens to the category of “disabled” purely on the basis of their differences, depriving them of the possibility to develop themselves in their own way.

Especially in cases of disability, special protection is justified as anyone runs the risk to become disabled due to an accident at some point in her life. The need to invent a mechanism of coming up with impartial principles, or in other words, principles of justice that respect particularities while being just for everyone, is a recurrent concern throughout a number of deontological theories. The universalizability test for Kant, the idea of an overlapping consensus for Rawls, and the ideal speech situation for Habermas, are examples of such mechanisms. For Kant, the legal rules which regulate our external freedom, that is our freedom in social interaction, must meet the test of universalizabil-

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300. G.W.F. HEGEL, *THE PHILOSOPHY OF HISTORY* (J. Sibree trans., 1991).

301. *Contra Samaha, supra* note 277, at 1257-58 (distinguishing between the social origins of disability and the normative conception of the need to change the circumstances that create the “disabled”).

302. *THE COMPLETE WORKS OF ARISTOTLE, Nicomachean Ethics* 1785 (Jonathan Barnes ed., 1984).

303. *Id.* at 1785.

304. *Id.* at 1786.

305. *See* *THE COMPLETE WORKS OF ARISTOTLE, Politics* 1987 (Jonathan Barnes ed. 1984).

306. *See, e.g.*, RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996); RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985).

307. The protection of negative liberties and settling disputes is essentially the role that Locke foresees for the state; *see, e.g.*, JOHN LOCKE, *POLITICAL WRITINGS, Second Treatise on Government: An Essay Concerning the True Original, Extent, and End of Civil Government* 324-27 (David Wootton ed., 2003).

ity, which means that they must apply to everyone universally.<sup>308</sup> The principle of universalizability has its foundation in the idea that we must always treat each person as an end and never simply as a means.<sup>309</sup>

Rawls discusses the idea of a well-ordered society as a society whose citizens all accept the same principles of justice, whose political and social institutions satisfy these principles, and whose citizens comply with these institutions considering them as just.<sup>310</sup> For Rawls, these principles are political principles, not metaphysical—that is, they are principles that can be agreed upon independently from the comprehensive religious philosophical and moral conceptions of each person. A society based on fair cooperation is thus based on the idea that there are some terms that each participant may reasonably accept in a reciprocal way with everybody else and which serve everybody's good.<sup>311</sup> In attempting to define the fair terms of social cooperation, acceptable by free and equal citizens in circumstances excluding coercion, force, deception and fraud. Rawls uses the thought experiment of the “veil of ignorance”<sup>312</sup>—that is of an abstraction of the contingencies of each person in the social world.<sup>313</sup> The social members under the veil of ignorance have, however, a rational capacity—that is they can have a conception first of their own good, and second reasonable capacity, that is they can have a capacity for a sense of justice which means accept the validity of rules that regulate interaction. Although Rawls has been criticized for eliminating the elements constitutive of the identity of a person which allow her to reason in the first place;<sup>314</sup> the purpose of his theory is to propose principles of fairness articulating a conception of the Kantian idea of universalizability that makes sense for us today. Under a veil of ignorance everyone would accept the enforcement of disability anti-discrimination law. If we did not know the circumstances that define our existence, and “disability” is one such circumstance, then we would certainly accept the difference principle that is a society that is organized in a way that meets the needs of all participants. In the case of disability, the veil of ignorance is already there—the average reasonable and rational person indeed does not know whether she will become “disabled” one day. Disability can be the result of an accident that can happen any moment in a person's life. The members of any religious institution and the believers of any religious faith would agree to the enforcement of disability anti-discrimination law concerning even the ministers of the church whose members they are, as they cannot know whether one day they will become “disabled”.

Rawls rearticulates the liberal principle of legitimacy associating the exercise of political power in accordance

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308. IMMANUEL KANT, METAPHYSIQUE DES MOEURS, PREMIERE PARTIE, DOCTRINE DU DROIT 105 (Alexis Philonenko ed., 1993); *Perpetual Peace: A Philosophical Sketch*, in KANT'S POLITICAL WRITINGS 122 (Hans Reiss ed., 1970).

309. IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 36 (James W. Ellington trans., 1993).

310. JOHN RAWLS, POLITICAL LIBERALISM 35 (1993) [hereinafter RAWLS, *Political Liberalism*].

311. *Id.* at 16.

312. JOHN RAWLS, A THEORY OF JUSTICE 136-42 (1971) [hereinafter RAWLS, *Theory of Justice*].

313. RAWLS, *Political Liberalism*, *supra* note 310, at 16.

314. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

[W]ith a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason [. . .] Only a political conception of justice that all citizens might be reasonably expected to endorse can serve as a basis of public reason and justification.<sup>315</sup>

Rawls continues with the idea that questions about constitutional essentials and matters of public justice are to be settled by appeal to political values alone, with respect to which the political values have weight to override all other values that may come in conflict with them.<sup>316</sup> Some of the ideas that people would agree upon in the original position are ideas that can concentrate an overlapping consensus even in our contemporary pluralistic societies. People can affirm their comprehensive doctrine, such as a religious doctrine, and yet keep it separate from the political realm. The political values cannot be overridden as they govern “the basic framework of social life” which constitutes “the very groundwork of our existence,” and “specify the fundamental terms of political and social cooperation.”<sup>317</sup> Among these values are “equal political and civil liberty; fair equality of opportunity; the values of economic reciprocity; the social bases of mutual respect between citizens.”<sup>318</sup> Thus, the most “reasonable political conception of justice for a democratic regime will be liberal, protecting the rights of the citizens as assigning them a special priority and including measures to ensure that all citizens have sufficient material means to make effective use of those basic rights.”<sup>319</sup> About these values, there can be an overlapping consensus among reasonable comprehensive doctrines, even if these doctrines are in conflict. Or better, they can win the support of every citizen addressing their reason, even if they adhere to conflicting comprehensive doctrines.<sup>320</sup> Agreement is possible in circumstances of reasonable pluralism. Provided that all citizens are willing to use their public reason, they will agree on the fundamental role of some political values expressing the terms of fair social cooperation consistent with mutual respect of free and equal citizens. As Rawls notes, “any realistic idea of a well-ordered society may seem to imply that some such compromise is involved.”<sup>321</sup>

To extend Rawls’ thought further, it seems that there can be an overlapping consensus in favor of enforcing disability anti-discrimination law, coming from different religious or more generally comprehensive views. An overlapping consensus can also be

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315. RAWLS, *Theory of Justice*, *supra* note 312, at 137.

316. *Id.* at 137-38.

317. *Id.* at 139.

318. *Id.*

319. *Id.* at 156-57.

320. For Rawls, it is possible for liberal principles of justice to cohere loosely with comprehensive views since most people’s religious, philosophical, and moral doctrines are not seen by them as fully general and comprehensive. Very often, their conception of justice is inspired by their comprehensive doctrines; when it is not the case then they are willing to appreciate the good of their comprehensive doctrines modified and adjusted by the acceptance of some basic principles of justice. RAWLS, *Theory of Justice*, *supra*, note 312, at 160. Some people are more willing to do this than the other way around.

321. *Id.* at 169.

achieved around the idea that there must be some limits to the reach of religion upon the political sphere as far as employment relations and labor law are concerned. What is more, although Rawls puts aside temporarily and permanently “disabled” people as well as people with mental disorders,<sup>322</sup> his theory can be read to include them as well.<sup>323</sup> This conclusion is strengthened all the more if one realizes that everyone might become physically or mentally “disabled” someday due to an accident or illness. Every member of every religious institution would agree upon the need to enforce disability anti-discrimination law, given the uncertainty of human life itself. Even the rational and reasonable agents of Rawls’s construction might become disabled someday, which means that a well-ordered society that respects the liberty and the dignity of all its citizens is one that foresees integrating them once something happens in their life that alters them so profoundly as to deviate from the majority’s behavioral standards. Independently from the religious, moral, and other comprehensive theory a person might be inspired by, there would be an overlapping consensus that reintegration of those who are or become different at some point in their lives, assuring their possibility to become cooperative members of society, is indeed a compelling interest even when religious ministers are concerned. Enforcing disability anti-discrimination law is a compelling interest upon which there can be overlapping consensus independently from one’s religious views even when religious ministers are concerned.

Habermas’ theory focuses on the fact that in everyday life human beings engage in communicative practices aiming at coordinating their action, forming networks of interaction through processes of reaching understanding.<sup>324</sup> Anyone who engages in argument presupposes two things: first, a real communication community whose member he has become through a process of socialization and; and second, an ideal communication community that would be, in principle, capable of adequately understanding the meaning of his arguments and judging their truth in a definitive manner.<sup>325</sup> These presuppositions, which are counterfactual, open up a perspective which allows possibilities that go beyond local practices of justification and transcends the provinciality of contexts. Therefore, they can do justice to context transcending validity claims.<sup>326</sup> This allows Habermas to come up with a methodological fiction—a thought experiment of an ideal communication community—which presents itself as a model of pure communicative sociation. The only available mechanism of self-organization is the instrument of discursive opinion. The community is supposed to be able to settle all conflicts without violence and only with the force of the best argument.<sup>327</sup>

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322. *Id.* at 20.

323. The veil of ignorance cannot include those who are right now mentally handicapped. However, there are “disabled” who can develop the two capacities, the reasonable and the rational.

324. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 18 (William Rehg trans., 1996).

325. *Id.* at 322.

326. *Id.* at 323.

327. This conception does not detach discursive processes of reaching understanding from their situation in specific cultural and social contexts, the lifeworld. Although these contexts condition the actors’ latitude for action and interpretation, the actors are not unilaterally defined by the lifeworld, rather, they act back on it. The lifeworld itself is fluid and self-reproducing through communicative action, just as our laws are produced and

The idealizations of pure communication provide a suitable foil for bringing out the functionally necessary resources for communications in general. The ideal model abstracts from the unequal distribution of attention, competences, and knowledge within a public. It is also blind to dogma, egocentrism, weakness of will, irrationality, and self-deception on the part of the participants.<sup>328</sup> Habermas acknowledges the systemic constraints and accidental inequalities in the distribution of individual abilities. However, he conceives this model as merely a methodological fiction aimed at displaying the unavoidable inertial features of societal complexity. By its very nature, positive law serves to reduce social complexity. Through idealizations, legal rules can compensate for the limited coordinating power of moral norms. The basic rights and principles of government by law can be understood as steps towards reducing the unavoidable complexity evident in the necessary deviations from the model of pure communication. In opposition to the Marxist view of the law as the result of class power,<sup>329</sup> and to the Weberian pessimism concerning the power of the self-referential bureaucratic systems to create legality without legitimacy,<sup>330</sup> for Habermas, the law in a contemporary representative democracy also has a liberating function. There is a direct communication between the political public sphere and civil society in view of amending and reamending our legal institutions. The law is, for Habermas, fluid and defined in the numerous spheres of our communicative action, which are overlapping. Every day we participate in numerous public forums exchanging ideas and these ideas inevitably affect social evolution, our conception of justice, and finally, our legal rules. The constitutional state has a “dynamic character;” it is an unfinished project whose purpose is to realize the system of rights anew in changing circumstances.<sup>331</sup>

On the basis of a Habermasian ideal speech situation where only the force of the best argument applies, disability anti-discrimination law would be seen as an indispensable medium in view of promoting integration of those who are different.<sup>332</sup> At the same time, the law is indeed a medium that assures recognition and a voice to those who are excluded by the violence of words and have been relegated to the category of the “disabled.” For Habermas, the law is at the same time the product of power while having a liberating potential allowing, through the proper legal rules, everyone’s development and neutralizing the power and inequalities at play inside civil society. In other words, the state, through the law, can constrain actors inside civil society if by using their institutional economic and other kind of power they violate others rights to liberty and free development. If one considers that it is power that has led to the social arrangements that make someone appear as “disabled,” then the costs for reasonable accommodations ap-

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reproduced following deliberation in the public sphere.

328. *Id.* at 325.

329. *See, e.g.*, Karl Marx, *The German Ideology*, in THE MARX-ENGELS READER 187 (Robert C. Tucker ed., 2d ed. 1972).

330. Max Weber, *Bureaucracy*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 220 (H.H. Gerth and C. Wright Mills eds., 1946).

331. HABERMAS, *supra* note 324, at 383.

332. Concerning who can participate in the discussions the same idea applies as for Rawls, see RAWLS, *Political Liberalism*, *supra* note 310.



pear as an element of corrective justice,<sup>333</sup> a measure due to those excluded from the job market on the basis of force and majority preferences. There is a strong principle of justice in favor of reasonable accommodations. On the basis of all these mechanisms of universalizability of the legal rules that regulate our interaction as social beings, the recognition of the rights of a minority—in this case the disabled—against the power of the majority, in this case, the “normal” and non-disabled, would be justified. Independently from one’s religion or faith, there can be agreement on the basis of an ideal speech situation for enforcing anti-discrimination law even when religious ministers are concerned.

Admittedly, Rawls’s theory, just like Kant’s and Habermas’, is not exempt of critiques which stress among others the role of the irrational in humans. Human beings do not always have the ability to filter through their reason all their prejudice and think in terms of impartiality.<sup>334</sup> Unconsciously, or consciously, a reasonable consensus might not be possible. Other critiques have stressed the importance of community and belonging towards the very possibility of humans to think rationally.<sup>335</sup> Social class also affects how we think and interact with others. A foucauldian critique would stress the omnipresence of power, which makes the very possibility of a free equal and rational being almost impossible.<sup>336</sup> The theory’s powerful optimism, though, is very strong, and despite the difficulties of its implementation, it does not lose its appeal as an ideal. As Kant has famously noted, the fact that a theory might seem at times impracticable does not mean that it does not have a value as an ideal.<sup>337</sup>

Even on the basis of a consequentialist-utilitarian moral reasoning, the need to integrate the “disabled” can be justified. This model evaluates the moral quality of an action on the basis of its positive consequences,<sup>338</sup> the beneficial consequences for everyone of allowing the “disabled” to become cooperative members. Studies have stressed the economic efficiency of giving opportunities to “disabled” workers.<sup>339</sup> They very of-

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333. For an analysis of the obligation to integrate the disabled as an element of corrective justice, see Samaha, *supra* note 277.

334. See, e.g., HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Wiensheimer & Donald G. Marshall trans., 2d ed. 2004) (analyzing the role of conscious and unconscious prejudice in any effort to understand the world).

335. Amy Gutmann, *Communitarian Critics of Liberalism*, 14 *PHIL & PUB. AFFAIRS* 308, 313-14 (1987).

336. See, e.g., 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION TO SEXUALITY* 94 (Robert Hurley trans., 1990).

337. See KANT, *supra* note 308, at 63.

338. *CONSEQUENTIALISM AND ITS CRITICS* (Samuel Scheffler ed., 1988); DAVID WIGGINS, *ETHICS: TWELVE LECTURES ON THE PHILOSOPHY OF MORALITY* 207 (2006).

339. According to the findings of a 2007 cost-benefit study:

- [E]mployees with disabilities have much to contribute to the labor force:
  - Participants with disabilities from the retail and hospitality sectors stayed on the job longer than participants without disabilities.
  - Across all sectors, participants with disabilities had fewer scheduled absences than those without disabilities.
  - Retail participants with disabilities had fewer days of unscheduled absences than those without disabilities.
  - Regardless of sector, participants with and without disabilities had nearly identical job performance ratings.
  - Across all sectors, the difference in amount of supervision required ratings were rela-

ten show “higher productivity, greater dedication, and better identification of qualified candidates for promotion.”<sup>340</sup> Employment decreases the need for government spending to support these individuals, and increases their tax revenues, avoiding spreading the cost for their subsistence among the public.<sup>341</sup> Their productive power outweighs the *prima facie* cost of the reasonable accommodations required by the ADA.<sup>342</sup> Third parties also benefit from reasonable accommodations changing attitudes towards disability itself.<sup>343</sup> Integration of the “disabled” in the labor market is indispensable in order to brake the vicious cycle of resignation and “the lack of motivation to invest in their human capital,”<sup>344</sup> which reinforces stigma and marginalization.<sup>345</sup> The enforcement of disability anti-discrimination law benefits everyone from the productive use of the talents of this important category of citizens; employers can obtain a wider labor force among which they will be able to make better choices.<sup>346</sup> Steven Hawking, one of the greatest physicists of all time needs technical assistance in order to move, and Beethoven, one of the greatest composers in history, was deaf. Self-sufficiency leads to the possibility of responsible exercise of citizenship.<sup>347</sup> According to the “radical social model,” excluding the “disabled” from the job market disables everyone as it perpetuates a deformed way of experiencing reality.<sup>348</sup>

Work is a fundamental medium of self-fulfillment and social integration. It has a profoundly liberating potential for providing meaning in a person’s life. Marx and Hegel noted how important labor and creation is for humans. Humans work in order to satisfy their needs of survival, but also their spiritual needs of contributing to others and finding accomplishment through their creations.<sup>349</sup> Satisfying one’s needs conditions the mutual

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tively minor among participants with and without disabilities.

· The number of worker’s compensation claims of retail participants with and without disabilities were equivalent.

DePaul Univ. & Ill. Dep’t of Com. & Econ. Opportunity, *Exploring the Bottom Line: A Study on the Costs and Benefits of Workers with Disabilities* (2007).

340. Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 105 (2003) (citations omitted).

341. During congressional hearings for the ADA, Rep. Miller noted:

[We] must bear the economic costs to our society when the disabled are prevented from fully participating in education, jobs and community life. If the disabled are locked out of jobs, then society must bear the cost of maintaining these individuals and their families – families that otherwise would be self supporting and paying taxes.

BLANCK, *supra* note 195, at 60 (citing 136 Cong. Rec. H2447-448, daily ed., May 17, 1990; Stein, *supra* note 340, at 106 (citations omitted)).

342. See BLANCK, *supra* note 195, at 66 (analyzing a series of evaluation of costs, profits and the improvement of corporate culture and attitudes which may motivate using accommodations).

343. Emens, *supra* note 259, at 910-11.

344. Bagenstos, *Subordination*, *supra* note 266, at 464.

345. See also Karlan & Rutherglen, *supra* note 259, at 22-24 (noting that the ADA caused employers to adopt practices that efficiency should have caused them to adopt earlier).

346. Stein, *supra* note 340, at 106-07 (containing a wonderful critique of objections to disability anti-discrimination law in reference to the neoclassical economic model).

347. *Id.* at 106.

348. Emens, *supra* note 259, at 889.

349. G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 229 (Allen W. Wood ed., H. B. Nisbet trans., 1991); Karl Marx, *The Economic and Philosophic Manuscripts of 1848*, in THE MARX-ENGELS READER 67-105 (Robert C. Tucker ed., 1972).

relations between individuals, leading them to mutual recognition by making them realize that their individual needs are in reality social needs,<sup>350</sup> which can be fulfilled through dependence and reciprocity.<sup>351</sup> For Hegel, human freedom lies in the realization that by a dialectical movement, when a person satisfies her own needs, she realizes that she also produces and contributes to the enjoyment of others.<sup>352</sup> The realization that human beings are participants in civil society, satisfying their needs and those of others, is constitutive of a person's self-determination; through the mediation of the satisfaction of one's needs with the universal social needs and through the realization of social duties, people find "recognition in their own eyes and in the eyes of others."<sup>353</sup> Marx also stressed the point that the way people relate to one another is defined by the way they obtain their means of subsistence.<sup>354</sup> Thus, denying a person the opportunity to contribute as a social member in the labor force means depriving her the possibility to discover and realize herself by contributing to others. It also deprives her of the possibility to develop and experience self-respect as a cooperative and contributing member of the same society.<sup>355</sup>

Anti-discrimination law embodies a constitutional value of equal protection explicit in the Fourteenth Amendment and implicit in the Fifth Amendment. Understood in this way, measures promoting anti-discrimination as giving a positive advantage should be submitted by the Supreme Court to heightened scrutiny, as all cases of discrimination of minorities.<sup>356</sup> However, the need to reorient and reconstruct the social surroundings which produce the deformed category of understanding called "disability" can be articulated as a liberty right. The existing social context prevents those seen as "disabled" from the possibility to live a meaningful life. Thus it deprives them the possibility and the liberty to live their life in their own terms, and therefore, it is a core of negative freedom that is being violated by social circumstances. Kenji Yoshino recently enunciated the idea that among equal protection claims, those that can be phrased as liberty claims are worthy of protection.<sup>357</sup> Liberty claims are more persuasive, whereas equal protection claims "tend to stress distinctions, even as they ask [. . .] to overcome those distinctions," committing a performative contradiction.<sup>358</sup> The liberty claims do not essentialize identities, emphasizing instead what all citizens have in common.<sup>359</sup> The fact that the state, by claiming to promote equality in order to protect liberty, is actually enforcing equality by merely limiting liberty, makes traditional equality claims not as persuasive because they are seen as implying limitation of liberty. According to this way of thinking, gay marriage, for example, should be defended not in terms of equality but in terms of liberty; its

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350. HEGEL, *supra* note 349, at 229.

351. *Id.* at 233.

352. *Id.*

353. *Id.* at 238.

354. Marx, *supra* note 349, at 147-200.

355. RAWLS, *Theory of Justice*, *supra* note 312, at 318.

356. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

357. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 794 (2011).

358. *Id.*

359. *Id.* at 796.

non-recognition violates the rights of homosexuals to happiness and to give sense and meaning to their lives. The cause of the disabled can also be phrased as a liberty argument, not only as an equality argument; the need to protect the rights of the disabled to live a meaningful life is a liberty right. It means allowing the minority of citizens labeled “disabled” to give meaning in their lives through their work and their feeling that they participate as cooperative members in a society that collectively satisfies its needs. The very characterization of “disabled” is imposed by a majority upon a minority because of the fear and the impossibility to understand their differences. The concern to protect minorities from powerful majorities has been central throughout U.S. constitutional history. It is the need to protect a person from the negative consequences of an accident that might happen in her life leaving her disabled. The social model encourages social integration, cooperation, and reinsertion of the disabled into the workforce, making them feel worthy and participative members of society, increasing their self-respect, instead of making them feel as beneficiaries of the charity of others. Disability leave is a medium that facilitates the social integration of the disabled. The importance of enforcing disability anti-discrimination law lies in the idea that everyone runs the risk of becoming disabled following an accident. A well-ordered society accepts as a principle of justice the idea of making up for those who have been disadvantaged due to accident or illness. Thus, Perich had in *Hosanna-Tabor*, a very strong legal and philosophical claim whose protection could take place in a way that would have a small impact upon the autonomy of the church as no doctrinal issue was at stake. Interpreting the ministerial exception as covering only matters of religious doctrine that the courts are unable to control is possible and appropriate.

#### CONCLUSION

Perich was exercising a legally protected right. At the same time, this right had a very strong philosophical justification on the basis of a deontological reasoning as well as on the basis of a consequentialist reasoning. Integration of the “disabled” is a compelling interest, which creates no “balkanization” fears.<sup>360</sup> In a series of affirmative action cases, Justices have been expressing fears that giving preferential treatment to a specific social group might be threatening to social cohesion by perpetuating categorization of citizens and creating feelings of injustice to those belonging to social categories not being advantaged.<sup>361</sup> The delicate questions that courts in the U.S. have confronted were doing justice to historically disadvantaged minorities, while at the same time choosing the mediums that promote social cohesion and do not reproduce prejudice. This is not a justifiable fear for the case of the disabled, as everyone has to benefit from their integration in the labor market. Perich also had a very strong legal claim since the ADA is a neutral law of general applicability, which should have been enforced in *Hosanna-Tabor* on the basis of *Smith*. Under *Hosanna-Tabor*, a priest, already appointed according to the

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360. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011).

361. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989); *Shaw v. Reno*, 509 U.S. 630 (1993).

uncontrollable substantive criteria as a qualified minister, who due to an accident remains disabled physically and needs to use a wheelchair, can be terminated by his church at will, without enjoying the protection of disability anti-discrimination law. This result strikes as profoundly unjust, being contrary to the requirement of universalizability, which must characterize the rules of any well-ordered society.

The widespread religiosity in the U.S. and the distrust towards state power<sup>362</sup> create a presumption in favor of protecting religious freedom, even when no serious threats to it are at stake. Tocqueville had noted that religion in America furnishes the moral bond necessary to substitute for the loosening of the political bond.<sup>363</sup> Normative pluralism,<sup>364</sup> which should be acceptable as the need to reconcile conflicting moral obligations coming from the quality of being a citizen and a member of a religious community, should also be limited when religious imperatives are in such open conflict with specific principles of justice, such as the universalizability rule and the rule of not harming others. A religious community, which is supposed to express the quintessence of values of justice, should have been itself more sensitive to accommodating the “disability” needs of one of its pastors. The Lutheran Church failed to respect humanity in the face of one of its members. The Kantian universalizability rule rearticulated by Rawls in the idea of the consensus of the reasonable and rational persons under the veil of ignorance, and the idea or the overlapping consensus within our existing political societies is a new enunciation of a basic principle of justice, existing in all normative and other systems of morals throughout history—the long Judeo-Christian cultural history, as much as the Greek and Roman.<sup>365</sup> It is a principle upon which there is an overlapping consensus and a principle that is by definition the reason of existence of every legal system. We have always known that the liberty of a person stops where the liberty of another person begins, and that we must treat every person always as an end and never as a means;<sup>366</sup> otherwise social coexistence would be impossible. In the principle of universalizability, philosophers from Kant to Rawls and Habermas are merely restating a principle of justice, which is dictated by common sense to every socialized human being. At the same time, it is a legal principle, which exists in all legal cultures and all the more in the U.S. legal culture.<sup>367</sup> The state is thus legitimized to take measures towards its implementation when the principle is violated by an actor of civil society which harms another one, even when the principle is forgotten by a religious group whose it should be the quintessence.

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362. See Ioanna Tourkochoriti, *The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the U.S.A.*, 20 WM. & MARY BILL RTS. J. 791 (2012) (offering a detailed analysis of religiosity in the U.S. and what it means for the protection of freedom of religion in the U.S. compared to France).

363. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 273-74 (J.P. Meyer and Max Lerner eds., George Lawrence trans., 1966).

364. Angela C. Carmella, *Exemptions and the Establishment Clause*, 32 CARDOZO L. REV. 1731, 1742 (2011).

365. Paul Ricoeur, *Le Cercle de la Demonstration*, in *INDIVIDU ET JUSTICE SOCIALE* 142-43 (Catherine Audard et al., eds., 1988); Cf. Jürgen Habermas, *Religion in the Public Sphere*, in *THE IDEA OF THE PUBLIC SPHERE: A READER* 304-05 (Jostein Gripsrud et al., eds., 2010).

366. Ricoeur, *supra* note 365, at 143.

367. Hamilton, *supra* note 22, at 1116.