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Recommended Citation

Andrew Donovan, *Freedom of Breach: The Ministerial Exception Applied to Contract Claims*, 63 DePaul L. Rev. 1063 (2014)
Available at: <https://via.library.depaul.edu/law-review/vol63/iss4/6>

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FREEDOM OF BREACH: THE MINISTERIAL EXCEPTION APPLIED TO CONTRACT CLAIMS

INTRODUCTION

Imagine a recent college graduate seeking a full-time position as a schoolteacher who has a choice between two positions. The first is a sixth grade teaching position at a charter school and the second is a sixth grade teacher position at a Lutheran school. There are advantages and disadvantages to each. The charter school pays a little more, yet she likes the fact that the Lutheran school has offered her an employment contract that guarantees her a two-year term. Wary of rumors that the charter school has low retention rates for new teachers, she thinks she should choose job security over higher pay. Additionally, she is Lutheran and likes the idea that she can teach students both secular and religious topics at that school. Therefore, after stressful deliberation, she chooses to accept the offer from the Lutheran school.

The board of directors at the Lutheran church affiliated with the school sends her an employment contract that stipulates two years of employment in exchange for a \$34,000 salary and various benefits. She carefully reads through the contract and notices a termination clause. It allows the church to terminate her employment before the two-year period ends if the church finds just cause to do so. The clause is vague, and does not specify exactly what “just cause” may be. It does, however, indicate that conducting herself in a manner grossly inconsistent with the values of the church may qualify as cause for termination. The nondescript language does not bother her to a great extent, however, because she has no intention of conducting herself in such a way. As a religious person, she does not plan on violating the teachings of her faith and she knows she would never do anything to jeopardize her employment or tarnish her professional reputation. Thus, she signs the contract and begins teaching.

Although the job starts out well, about four months into her tenure the teacher’s relationship with the principal becomes strained. The principal is a micromanager who picks on her seemingly for no good reason. One day, she overhears the principal speaking to a member of the staff about how a family friend is seeking a teaching position at a religious school. The principal says that it is unfortunate that there

are no openings at the school because his friend would be a great asset to the school.

Two weeks later, the new teacher is terminated by the board of directors, notwithstanding the overwhelming support she has received from the students in her class, their parents, and other veteran teachers at the school. She is stunned, considering her employment contract was supposed to secure her employment at the school for two years. When she brings up the contract at her termination meeting, a member of the board informs her that her firing is legal under the termination clause. Unsure of how she could have possibly violated the clause, she denies that her behavior has given the church good cause for termination and demands an explanation. The board member tells her that the totality of her conduct regarding her working relationship with the principal is inconsistent with the values of the Lutheran faith.

It is the middle of the school year and no schools are hiring, including the charter school she turned down. Feeling devastated and betrayed, she decides she has no choice but to consult an attorney. An employment attorney agrees to take her case, but quickly confirms the church's claim that courts cannot adjudicate this type of conflict. Because courts cannot consider religious questions, such as whether the teacher violated the beliefs of the Lutheran church pursuant to the termination clause, there is no remedy for the teacher in the legal system. Additionally, a former co-worker at the school with whom she stayed in contact informs her who has taken her place: the principal's family friend whom she overheard him discussing. She relays this information to her attorney, excited that she has proof that the school illegally breached the contract in favor of another teacher.

Surprisingly, under the Supreme Court's interpretation of the First Amendment, the schoolteacher still will not be able to bring her claim, despite the new evidence showing that her firing was pretextual. In 2012 the Supreme Court validated the "ministerial exception," a well-established rule used by courts for decades.¹ In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Supreme Court held that the ministerial exception prevents civil courts from interfering with a religious institution's decision to hire or fire a "minister" in

1. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012); see also 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, 124 (2009) (noting that the doctrine originated in 1972). Though the ministerial exception had been recognized by lower courts for decades, see, e.g., *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *Hosanna-Tabor* marked the first acknowledgment of the exception by the U.S. Supreme Court. *Hosanna-Tabor*, 132 S. Ct. at 706.

the context of antidiscrimination laws.² Doing so would violate both Religion Clauses in the First Amendment.³ Accordingly, religious institutions increasingly assert the ministerial exception as a defense in litigation.⁴

This Comment focuses on what the Supreme Court did not decide in *Hosanna-Tabor*: the appropriate application of the ministerial exception to breach of employment contract lawsuits.⁵ Far less has been written about the application of the ministerial exception to breach of contract cases than its application to discrimination cases. The Court in *Hosanna-Tabor* explicitly stated that its ruling applied to claims under antidiscrimination statutes, and not to breach of contract claims.⁶

Part II of this Comment discusses basic religion clause jurisprudence and “church autonomy” cases, up to and including *Hosanna-Tabor*, and also touches on employment law relationships.⁷ Part III identifies and compares two approaches used by lower courts in applying the ministerial exception.⁸ The first, the “wait-and-see” approach, is more plaintiff-friendly and allows employees of religious institutions to bring claims without entangling the courts in religious

2. *See id.*

3. *Id.* The First Amendment states that “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.” U.S. CONST. amend. I.

4. *See* Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 983 (2013) (describing the ministerial exception as “a rule that always grants victory to the employer”).

5. It should be noted that there are many other unanswered ministerial exception questions after the *Hosanna-Tabor* decision. Other unanswered questions include the following: what exactly are the parameters for classifying an employee as “ministerial”; what characteristics does an institution need to have in order to qualify as “religious” and therefore be covered under the ministerial exception; and how does the ministerial exception apply to other types of claims, including tort, whistleblower, and retaliation? *See generally, e.g.*, Summer E. Allen, Comment, *Defining the Lifeblood: The Search for a Sensible Ministerial Exception Test*, 40 PEPP. L. REV. 645 (2013); Zoë Robinson, *What is a “Religious Institution”?*, 55 B.C. L. REV. 181 (2014); Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 CARDOZO L. REV. 225 (2007). For the most part, these other unanswered questions are beyond the scope of this Comment, which is limited to breach of contract claims with few other uncontested issues.

6. *Hosanna-Tabor*, 132 S. Ct. at 710 (“The case before us is an *employment discrimination* suit brought on behalf of a minister, challenging her church’s decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.” (emphasis added)).

7. *See infra* notes 15–84 and accompanying text.

8. *See infra* notes 85–130 and accompanying text.

questions.⁹ Alternatively, the “presumptive entanglement” approach presumes that virtually any employee asserting a breach of contract claim against her religiously affiliated employer will ultimately entangle the court with religion.¹⁰ Accordingly, the presumptive entanglement approach requires that claims be dismissed on First Amendment grounds. This Comment argues that the presumptive entanglement approach gives the ministerial exception an unnecessarily broad scope and advocates for the wait-and-see approach because employment contracts are distinguishable from at-will employment.¹¹ Part III also analyzes these alternate approaches in light of fundamental principles of contract law, including consideration, unequal bargaining power, and good faith and fair dealing.¹² Additionally public policy weighs against an absolutist approach to these cases.

Part IV discusses the impact and importance of how the ministerial exception doctrine unfolds in the contract context.¹³ Particularly, the approach ultimately chosen by courts in breach of contract claims could give employers guidance as to how other types of employment claims will be treated in the religious context. Finally, Part IV discusses the impact that increased autonomy and power for religious institutions will have on their employees.¹⁴

II. BACKGROUND OF THE DOCTRINE AND CONTEXT

A. *The Religion Clauses Generally*

The Free Exercise Clause prevents the government from burdening an individual or group’s religious liberty.¹⁵ The Free Exercise Clause doctrine underwent major changes in the Supreme Court case of *Employment Division v. Smith*, which remains one of the leading Free Exercise cases.¹⁶ In *Smith*, the issue was whether Oregon could deny unemployment benefits to two Native Americans who were fired for using peyote at a religious ceremony.¹⁷ The Supreme Court ultimately held that Oregon’s prohibition of peyote use and consequential denial of unemployment benefits to citizens terminated for peyote use was constitutional.¹⁸ Justice Scalia, writing for the Court, relied

9. See *infra* notes 85–112 and accompanying text.

10. See *infra* notes 113–130 and accompanying text.

11. See *infra* notes 131–213 and accompanying text.

12. See *infra* notes 162–190 and accompanying text.

13. See *infra* notes 191–213 and accompanying text.

14. See *infra* notes 210–213 and accompanying text.

15. Robinson, *supra* note 5, at 201–02.

16. *Employment Div. v. Smith*, 494 U.S. 872 (1990); see also Griffin, *supra* note 4, at 992.

17. *Smith*, 494 U.S. at 874.

18. *Id.* at 890.

on the notion that the prohibition against drug use was a “neutral, generally applicable law,” and therefore not a violation of the Free Exercise Clause.¹⁹

The Establishment Clause prohibits the government from making law “respecting an establishment of religion,” or favoring a religious group over another, or benefitting one religion.²⁰ The Supreme Court has used numerous tests to analyze Establishment Clause cases over the years.²¹ For instance, the test set forth by the Court in *Lemon v. Kurtzman* establishes a three-prong inquiry: (1) Does the law have a secular purpose?; (2) Does the law have the primary or principal effect of advancing religion?; and (3) Does the law excessively entangle the government with religion?²² At least one First Amendment scholar has posited that the “core principle” of the Establishment Clause is neutrality.²³ Another has noted “the Court has begun to increasingly shift its focus to an emphasis on neutrality.”²⁴

B. Pre-Hosanna-Tabor Supreme Court Church-State Jurisprudence: Property Disputes and Bishop Removal

The following cases illustrate the Supreme Court’s hesitation in interfering with the autonomy of religious institutions during litigation. First, in *Watson v. Jones*, the Court heard a case involving an intra-church property dispute between two factions of the Walnut Street Presbyterian Church.²⁵ The *Watson* decision marked one of the first cases in which the Supreme Court dealt with the extent to which courts may involve themselves in disputes over the ownership of church property.²⁶ The lower courts focused on deciding which faction had the authority to control the property.²⁷ However, the Supreme Court chose to answer a different question: whether or not it

19. *Id.* at 880 (citing *United States v. Lee*, 455 U.S. 252, 258–61 (1982)).

20. U.S. CONST. amend. I; see also Robinson, *supra* note 5, at 203.

21. Richard Albert, *The Separation of Higher Powers*, 65 SMU L. REV. 3, 6 (2012) (discussing the Court’s varying applications of “a number of constitutional tests to demarcate the boundary separating God from man,” including “the neutrality principle, the *Lemon* test, the endorsement test, and the coercion test”).

22. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); see also Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1192 (2009).

23. Albert, *supra* note 21, at 25–27.

24. Mark W. Cordes, *The First Amendment and Religion After Hosanna-Tabor*, 41 HASTINGS CONST. L.Q. 299, 299 (2014).

25. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 681 (1871).

26. Daniel J. Marciniak, Comment, *Separation of Church and Estate: On Excluding Parish Assets from the Bankruptcy Estate of a Diocese Organized as a Corporation Sole*, 55 CATH. U. L. REV. 583, 607 (2006).

27. See *Watson*, 80 U.S. (13 Wall.) at 681–82.

should be deciding the dispute at all.²⁸ In a 7–2 decision, the Court held,

whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest . . . church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.²⁹

According to the Court, this concept distinguished the American system of government from the English system,³⁰ and granting such un-touchable authority to churches was one of the essential rights that came with forming a religious union.³¹ The Court also stated that, when it comes to religious questions, unlike purely legal questions, ecclesiastical courts are the best judges because leaders of churches are far more versed in faith and doctrine than any civil judge.³² Therefore, the Presbyterian tribunal's decision was final, and the American courts could not provide a remedy.³³

Eighty years later, the Supreme Court revisited this issue in *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*.³⁴ *Kedroff* involved an intra-church feud between two factions of the Russian Orthodox Church—one American and one Russian—regarding control over the church property.³⁵ Central to that dispute was the determination of which faction's archbishop would lead the church. To help resolve the disputes, the New York legislature passed a statute giving authority to the American faction.³⁶ The dispute subsequently made its way to the Supreme Court, and the

28. *Id.* at 713–14.

29. *Id.* at 727.

30. *Id.* (“We concede at the outset that the doctrine of the English courts is otherwise.”).

31. *Id.* at 729 (“It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance . . .”).

32. Specifically, the Court opined that

[t]he decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offence against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals.

Id. at 732 (quoting *German Reformed Church v. Seibert*, 3 Pa. 282, 291 (1846) (internal quotation marks omitted)).

33. See *Watson*, 80 U.S. (13 Wall.) at 732.

34. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).

35. *Id.* at 95–96.

36. *Id.* at 95.

Court used the case as an opportunity to reaffirm and extend the principles it created in *Watson*.³⁷

The Court recognized that in order to resolve the property dispute it would have to intervene in the church's selection of the archbishop.³⁸ In an opinion written by Justice Reed, the Court ruled that neither the New York legislature nor the civil courts could decide that issue.³⁹ The Court relied on the Free Exercise Clause, applied through the Fourteenth Amendment, to find the statute favoring the American faction unconstitutional.⁴⁰ Once again, although on different grounds, the Supreme Court held that American civil courts could not overturn the decisions of ecclesiastical tribunals.⁴¹ *Kedroff* extended this idea to reach a church's right to choose its own clergy.⁴²

Twenty years later the Supreme Court addressed religion again, this time in the employment context. The third case, and the one which leads into *Hosanna-Tabor*, took an approach which more closely resembled an employment lawsuit. In *Serbian Eastern Orthodox Diocese for the United States of America & Canada v. Milivojevic*, a bishop of a Serbian Orthodox Church had been suspended and removed from his position by the Holy Assembly of Bishops and the Holy Synod of the Church.⁴³ He filed suit, alleging that the Holy Assembly of Bishops and Holy Synod had not followed the church's internal regulations when they removed him.⁴⁴ The Illinois Supreme Court agreed and ruled that his removal was invalid.⁴⁵

37. *See id.* at 110.

38. *Id.* at 96–97 (“Determination of the right to use and occupy Saint Nicholas depends upon whether the appointment of Benjamin by the Patriarch or the election of the Archbishop for North America by the convention of the American churches validly selects the ruling hierarch for the American Churches.”).

39. *Id.* at 119–21.

40. *Kedroff*, 344 U.S. at 107. The Fourteenth Amendment states,

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.

U.S. CONST. amend. XIV, § 1. In a concurring opinion, Justice Frankfurter wrote, “These considerations undermine the validity of the New York legislation in that it enters the domain of religious control barred to the States by the Fourteenth Amendment.” *Kedroff*, 344 U.S. at 126 (Frankfurter, J., concurring).

41. *See Kedroff*, 344 U.S. at 120–21.

42. Mark P. Strasser, *A Constitutional Balancing in Need of Adjustment: On Defamation, Breaches of Confidentiality, and the Church*, 12 FIRST AMENDMENT L. REV. 325, 334 (2013).

43. *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevic*, 426 U.S. 696, 697–98 (1976). A synod is an “ecclesiastical council lawfully assembled to determine church matters.” BLACK’S LAW DICTIONARY 1588 (9th ed. 2009).

44. *See id.* at 698.

45. *Id.*; *see also* *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevic*, 328 N.E.2d 268 (Ill. 1975).

The U.S. Supreme Court held that the state court had impermissibly involved itself in a case which required “the interpretation of ambiguous religious law and usage.”⁴⁶ By attempting to discern whether the Holy Assembly of Bishops had abided by its regulations, the Illinois Supreme Court had overstepped its bounds.⁴⁷ Interestingly, the Court explicitly dismissed the relevance of rationality, measurable objective criteria, and “fundamental fairness” to matters of religious disputes.⁴⁸ The Court once again concluded, this time in an employment context, that ecclesiastical tribunals could not be trumped by civil courts.⁴⁹ These three cases represent the doctrine of “the deference rule.”⁵⁰ In addition to holding that the courts must avoid cases muddled with religion, the rule also stands for the point that courts must accept decisions of religious authorities even if those decisions are arbitrary.⁵¹

C. Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC

In 2012, the Supreme Court was finally ready to recognize the ministerial exception in the landmark case, *Hosanna-Tabor*. Hosanna-Tabor was a church that also operated a Lutheran school for children in kindergarten through eighth grade.⁵² The respondent, Cheryl Perich, had taught fourth grade for five years at the school.⁵³ Perich taught both secular and religious classes⁵⁴ and led student prayers and devotional exercises on a daily basis.⁵⁵ In addition to attending the

46. *Milivojevic*, 426 U.S. at 708–09 (quoting *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring)).

47. *See id.* at 712–13.

48. *Id.* at 714–15.

49. *Id.* at 724–25.

50. David J. Overstreet, Note, *Does the Bible Preempt Contract Law? A Critical Examination of Judicial Reluctance to Adjudicate a Cleric's Breach of Employment Contract Claim Against a Religious Organization*, 81 MINN. L. REV. 263, 271–73 (1996).

51. *Id.* (citing *Milivojevic*, 426 U.S. at 713).

52. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 699 (2012).

53. *Id.* at 700. The Equal Employment Opportunity Commission (EEOC) also sued on her behalf. *Id.* at 701. The EEOC

is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

Overview, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc> (last visited June 19, 2014).

54. *See Hosanna-Tabor*, 132 S. Ct. at 700.

55. *Id.*

school's chapel service every week, she conducted the service twice a year.⁵⁶

In 2004, Perich was diagnosed with narcolepsy and took disability leave at the beginning of the school year.⁵⁷ In January 2005, after she told the principal that she would soon be fit to return, the principal informed her that her teaching position had been filled through the end of the school year.⁵⁸ Perich nevertheless reported for work on the first day she was cleared by her doctor to return.⁵⁹ When the principal turned her away, Perich refused to leave.⁶⁰ Over the phone that afternoon, Perich was informed by the principal that she would probably be fired for her actions that day.⁶¹ After Perich threatened to sue, she received a letter that Hosanna-Tabor had terminated her for refusing to leave the school and then “threatening to take legal action.”⁶²

Perich filed a claim against the church under two provisions of the Americans with Disabilities Act (ADA). She alleged that the church discriminated against her because of her disability and that the church had retaliated against her for threatening to assert her ADA rights.⁶³ At summary judgment, Hosanna-Tabor argued that Perich's claims were barred by the ministerial exception because she was a ministerial employee that was fired for a religious reason—threatening to sue was a violation of the Synod's “belief that Christians should resolve their disputes internally.”⁶⁴ The district court agreed and granted Hosanna-Tabor's motion for summary judgment on ministerial exception grounds.⁶⁵ On appeal, the Sixth Circuit vacated the district court's decision and remanded the case.⁶⁶ The court acknowledged the ministerial exception but held it was inapplicable to Perich because her job involved more secular duties than religious duties; thus, she was not a minister.⁶⁷ The Supreme Court granted certiorari and the case was argued in October of 2011.⁶⁸

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

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

61. *Id.*

62. *Id.*

63. *See id.* at 701; *cf.* 42 U.S.C. §§ 12112(a), 12203(a) (2006).

64. *Hosanna-Tabor*, 132 S. Ct. at 701; *see also* EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 582 F. Supp. 2d 881, 886–87 (E.D. Mich. 2008).

65. *Hosanna-Tabor*, 582 F. Supp. 2d at 892.

66. EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769 (6th Cir. 2010)

67. *Id.* at 780–81.

68. *Hosanna-Tabor*, 132 S. Ct. 694.

The Supreme Court began its analysis by reviewing the history of the separation of church and state, covering everything from the Magna Carta and the American colonies to *Watson*, *Kedroff*, and *Milivojevich*.⁶⁹ The Court acknowledged that, although “the Courts of Appeals have uniformly recognized the existence of a ‘ministerial exception[]’ grounded in the First Amendment,” the Supreme Court had not.⁷⁰ In a unanimous opinion, the Court finally recognized the legitimacy of the ministerial exception:

We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.⁷¹

After confirming what lower courts had recognized for years,—the validity of the ministerial exception—the Supreme Court then considered whether it applied to Perich’s situation.⁷² The Court held that it did; Perich had a considerable amount of religious training, claimed certain ministerial tax allowances, and led her students in worship.⁷³ Despite all of her secular duties, there was enough of a ministerial element to her job to afford her a ministerial label for the sake of the exception.⁷⁴ The Court also declared that any analysis of whether *Hosanna-Tabor*’s religious reason for termination was pretextual “miss[ed] the point of the ministerial exception.”⁷⁵ According to Chief Justice Roberts, the ministerial exception did not apply exclusively to a church’s decision to terminate an employee for a religious reason.⁷⁶ Rather, it applied to all hiring and firing decisions of ministers for any reason.⁷⁷

69. *Id.* at 702–05.

70. *Id.* at 705.

71. *Id.* at 706.

72. *Id.* at 707. See generally Robinson, *supra* note 5 (exploring the question of which intuitions the ministerial exception encompasses).

73. *Id.* at 707–08 (majority opinion).

74. See *Hosanna-Tabor*, 132 S. Ct. at 708.

75. *Id.* at 709.

76. *Id.*

77. *Id.*

The most significant part of the Court's holding, for the purposes of this Comment, came in the penultimate paragraph of the opinion. While addressing the scope of the ruling the Court stated that its decision applied to the facts before it: an employee challenging her termination for an *employment discrimination* suit.⁷⁸ The Justices “express[ed] no view on whether the [ministerial] exception bars other types of suits, including actions by employees alleging breach of contract . . . by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.”⁷⁹ Therefore, while the Court's decision finally recognized the existence of the exception, it left open questions of application. There are significant distinctions between employment claims based on antidiscrimination statutes and claims based on common law breach of contract, which suggests they might interact differently with the ministerial exception.

D. Overview of At-Will Employment, Employment Contracts, and Cause for Termination

Before analyzing how the ministerial exception and *Hosanna-Tabor* might be applied to breach of contract claims, it is helpful to give a brief overview of employment contract claims and how they differ from ordinary discrimination claims. Under the common law, the relationship between employees and employers—absent a formal contract agreement—is referred to as “at-will employment.”⁸⁰ Under the at-will employment rule, both the employer and employee are free to end the employment relationship for any reason, or for no reason at all.⁸¹ This freedom of termination is not absolute; for instance, federal and state legislatures may enact laws forbidding termination based on discriminatory motives, most notably Title VII of the Civil Rights Act of 1964.⁸² Strictly at-will employment relationships are beyond the scope of this Comment because they do not involve a binding employment contract.

Alternatively, employees and employers may alter their at-will relationship by entering into an employment contract. By entering into a fixed-term contract, employers and employees are abandoning the freedom provided by an at-will relationship and binding themselves

78. *Id.* at 710.

79. *Id.*

80. See Steven S. Gensler, Note, *Wrongful Discharge for In-House Attorneys? Holding the Line Against Lawyers' Self-Interest*, 1992 U. ILL. L. REV. 515, 518–19.

81. *Id.* at 518.

82. See *id.* at 519.

together for a period of time.⁸³ Terminating the employee early is generally considered a breach of contract, though exceptions may apply when the parties mutually agree to early termination or when the employer terminates the employee for “good cause” or “just cause.”⁸⁴

Thus, the employer and employee can alter the default at-will employment relationship by entering into an employment contract, giving rise to a new cause of action for the employee should she be terminated: breach of contract. Against that backdrop, courts face the question of how to adjudicate those claims when the employer invokes the ministerial exception.

E. Applications of the Ministerial Exception

The lack of a clear mandate from the Supreme Court, both before and after *Hosanna-Tabor*, has left lower courts with discretion to apply the ministerial exception to breach of contract claims. In applying the ministerial exception, courts appear to employ one of two methods: the “wait-and-see” approach or the “presumptive entanglement” approach.

1. Wait-and-See Approach

Some lower courts have been willing to remand certain breach of contract claims when it appears that the ministerial exception was applied prematurely.⁸⁵ In *Minker v. Baltimore Annual Conference of United Methodist Church*, the D.C. Circuit Court of Appeals applied a seemingly liberal approach to the breach of religious employment contract dilemma.⁸⁶ In *Minker*, a minister sued his employer, a church, for age discrimination and breach of contract.⁸⁷ The case revolved around a district superintendent’s promise that the minister

83. See David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security*, 146 U. PA. L. REV. 975, 988 (1998).

84. See Overstreet, *supra* note 50, at 278 & n.75.

85. See, e.g., *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990); *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 (3rd Cir. 2006); *Second Episcopal Dist. African Methodist Episcopal Church v. Prioleau*, 49 A.3d 812 (D.C. 2012) (holding that the ministerial exception did not bar a reverend from bringing her breach of contract claim because the record suggested the court will not be entangled in church doctrine); *Pardue v. Ctr. City Consortium Schs., Inc.*, Civil Action No. 02-5459, 2003 D.C. Super. LEXIS 30 (D.C. Super. Ct. July 29, 2003) (denying employer’s motion for summary judgment on breach of contract claim); *Kirby v. Lexington Theological Seminary*, No. 2012-SC-000519-DG, 2014 Ky. LEXIS 161, at *3 (Ky. April 17, 2014) (holding that the ministerial exception did not bar plaintiff’s breach of contract claim because of the employer’s “willing participation”); *McKelvey v. Pierce*, 800 A.2d 840 (N.J. 2002) (holding that former seminarian may be able to bring his breach of implied contract claim without running afoul of the ministerial exception).

86. *Minker*, 894 F.2d 1354.

87. *Id.* at 1355.

“would be moved to a congregation more suited to his training and skills, and more appropriate in level of income, at the earliest appropriate time.”⁸⁸ Four years passed and the church did not grant the minister his transfer.⁸⁹ Interestingly, “[t]he contract claim was based both on the district superintendent’s oral promises to find him a more suitable congregation, and on passages from the Book of Discipline—‘the book of law of the United Methodist Church’—concerning the assignment of pastorships.”⁹⁰

The district court dismissed the minister’s case for failure to state a claim.⁹¹ On appeal, the minister set forth two alternate arguments regarding his contract claim.⁹² First, he contended “that the [F]irst [A]mendment cannot bar enforcement of his private employment contract because the issue of breach does not implicate [F]irst [A]mendment principles.”⁹³ His alternate argument was that regardless of whether the facts would implicate religion, the lower court prematurely dismissed his claim because it did not afford him “an opportunity to show that his contract claim [did] not create an excessive entanglement with church religious policy.”⁹⁴

Beginning with the claim arising out of the Book of Discipline, the D.C. Circuit Court of Appeals held that it “could not interpret or enforce such a provision without running afoul of the [F]irst [A]mendment.”⁹⁵ Accordingly, the court affirmed the lower court’s dismissal of that aspect of the contract claim.⁹⁶ The court, however, took a much closer look at the minister’s oral contract claim.⁹⁷

First, the court held that the district superintendent’s promise to transfer the minister to a more suitable congregation did in fact create a contractual relationship.⁹⁸ It then held, citing *Watson v. Jones*, “[a] church is always free to burden its activities *voluntarily* through contracts, and such contracts are fully enforceable in civil court.”⁹⁹ After

88. *Id.* (internal quotation marks omitted).

89. *Id.*

90. *Id.*

91. *Id.* at 1356.

92. *Minker*, 894 F.2d at 1356. The minister also appealed the dismissal of his age discrimination claim. The appellate court found that the claim was rightfully dismissed on free exercise grounds. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1358. The court went further to “hold that the interpretation of the appointment and antidiscrimination provisions of the Book of Discipline is inherently an ecclesiastical matter; it follows that this court lacks jurisdiction to hear *Minker*’s contract claim.” *Id.* at 1359.

96. *See id.* at 1359.

97. *Minker*, 894 F.2d at 1359.

98. *Id.*

99. *Id.* (emphasis added) (citing *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 714 (1871)).

acknowledging the Church's contention that permitting courts to hear religious contract claims could infringe on the Free Exercise Clause, the court stated, "[n]evertheless, the [F]irst [A]mendment does not immunize the church from all temporal claims made against it."¹⁰⁰ Accordingly, the court ruled that the minister should be afforded an opportunity "to demonstrate that he can prove his case without resorting to impermissible avenues of discovery or remedies."¹⁰¹

The court stated that theoretically, the breach of contract claim required merely a determination of whether the church promised the minister a transfer to a more suitable congregation, whether there was consideration for that promise, and whether the church failed to offer the transfer.¹⁰² Furthermore, because the minister had already been replaced, the minister's remedy would be money damages, which mitigated the risks to church autonomy and would merely force a church to uphold a voluntary promise.¹⁰³

The *Minker* decision, however, does not help the ministerial plaintiff as much as it may appear. The court noted that on remand, church-state entanglement issues could once again foreclose the minister's claim.¹⁰⁴ Instead, the court's decision might have been a swipe at the premature nature of the lower court's dismissal, and not at the dismissal itself.¹⁰⁵

This wait-and-see method was adopted by the Third Circuit as well. In *Petruska v. Gannon University*, the Third Circuit heard a former chaplain's appeal of the dismissal of a host of claims, including breach of contract.¹⁰⁶ The Third Circuit affirmed the lower court's dismissal for all claims except for breach of contract.¹⁰⁷ With regards to the

100. *Id.* at 1360.

101. *Id.*

102. *Id.*

103. *See Minker*, 894 F.2d at 1360 ("Similarly, Minker's injury can be remedied without court oversight. Money damages alone would suffice since Minker already has a new pastorate. Maintaining a suit, by itself, will not necessarily create an excessive entanglement. Furthermore, as the remedy would be limited to the award of money damages, we see no potential for distortion of church appointment decisions from requiring that the Church not make empty, misleading promises to its clergy.").

104. *See id.*

105. *See id.* at 1360-61 ("Thus, while the [F]irst [A]mendment forecloses any inquiry into the Church's assessment of Minker's suitability for a pastorate, even for the purpose of showing it to be pretextual, it does not prevent the district court from determining whether the contract alleged by Minker in fact exists."). Unfortunately, it appears that the minister in *Minker* decided not to pursue further litigation against the church, as no case on remand appears in the record.

106. *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 (3rd Cir. 2006). The claims included gender discrimination, retaliation, civil conspiracy, negligent retention and supervision, fraudulent misrepresentation, and breach of contract. *Id.* at 301-02.

107. *Id.* at 312.

contract claim, the court began its analysis by recognizing the “entirely voluntary” nature of the church’s contractual obligations.¹⁰⁸ Accordingly, the contract claim passed the Free Exercise Clause test and the court then analyzed the claim under the scope of the Establishment Clause.¹⁰⁹ The court held that, “at the outset,” the claim did not necessarily entangle the court in religion.¹¹⁰ Citing *Minker*, the Third Circuit remanded the contract claim and held that it was too soon to dismiss on ministerial exception grounds.¹¹¹ However, the court did hint that the claim might not survive the second look by the lower court, stating, “If Gannon’s response to Petruska’s allegations raise[s] issues which would result in excessive entanglement, the claims may be dismissed on that basis on summary judgment.”¹¹²

Minker and *Petruska* illustrate that some courts are patient when it comes to dismissing breach of contract claims brought by ministerial employees. These courts recognize that it is plausible for a ministerial employee to bring a breach of contract claim without necessarily entangling the court in religious questions, while also expressing caution that discovery may invoke such impermissible questions. Both courts recognize that the voluntary nature of employment contracts warrants a closer look than traditional discrimination claims.

2. Presumptive Entanglement

A stricter approach, referred to in this Comment as “presumptive entanglement,” is best illustrated by *DeBruin v. St. Patrick Congregation*.¹¹³ In that case, the Supreme Court of Wisconsin affirmed the dismissal of a breach of contract claim brought by the director of faith formation at a Catholic church.¹¹⁴

108. *Id.* at 310 (“On its face, application of state contract law does not involve government-imposed limits on Gannon’s right to select its ministers: Unlike the duties under Title VII and state tort law, contractual obligations are entirely voluntary.”).

109. *Id.* at 310–11.

110. *Id.* at 311.

111. *Petruska*, 462 F.3d at 312.

112. *Id.*

113. *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878 (Wis. 2012). For more instances of courts taking the presumptive entanglement approach, see, for example, *Washington v. African Methodist Episcopal Church, Inc.*, No. 11-CV-6087-CJS, 2011 U.S. Dist. LEXIS 108117 (W.D.N.Y. September 16, 2011) (dismissing breach of contract claim under the ministerial exception); *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192 (Conn. 2011) (dismissing breach of implied contract and promissory estoppel claims); *Ballaban v. Bloomington Jewish Cmty., Inc.*, 982 N.E.2d 329, 332 (Ind. Ct. App. 2013) (noting that “Indiana courts have applied the ministerial exception broadly to dismiss breach of contract claims against religious institutions”); *Prince of Peace Lutheran Church v. Linklater*, 28 A.3d 1171 (Md. 2012) (dismissing breach of contract and breach of implied contract claims).

114. *DeBruin*, 816 N.W.2d at 882–83 (plurality opinion).

The director, DeBruin, had a seemingly typical employment contract with her employer.¹¹⁵ The contract described her duties, salary, benefits, and length of employment.¹¹⁶ More importantly, the contract contained a termination clause in which the parish promised not to discharge the employee “without good and sufficient cause.”¹¹⁷ It further promised that the parish would be required to give the employee notice if it was dissatisfied with her work.¹¹⁸ Four months into her one-year contract term, the employee was terminated by the church.¹¹⁹

Once terminated, the employee brought a lawsuit alleging breach of employment contract.¹²⁰ Arguing that the church terminated her without “good and sufficient cause” pursuant to the contract, she sought the remainder of her salary due as damages.¹²¹ However, the church interestingly did not even attempt to assert that it had “good and sufficient cause” for the termination.¹²² Instead, the church immediately moved to dismiss based on the ministerial exception.¹²³ The church argued that, because the employee’s position was ministerial, and because it was a religious institution, any “court review of St. Patrick’s reason for terminating DeBruin would constitute impermissible interference with St. Patrick’s religious mission” in violation of the Wisconsin Constitution.¹²⁴

115. *See id.* at 883.

116. *Id.* The contract also described “the facilities to which DeBruin would have access as Director of Faith Formation, and the procedures for employee evaluation and annual contract renewal.” *Id.*

117. *Id.*

118. *Id.* at 883. The clause, in its entirety, stated:

The PARISH agrees that the DIRECTOR OF FAITH FORMATION shall not be discharged during the term of this contract, without good and sufficient cause, which shall be determined by the PARISH. The PARISH agrees that the Pastor of the PARISH will be responsible for giving the employee notice of any dissatisfaction with service or conduct. Dismissal may be immediate or within a time frame determined by the PARISH.

Id.

119. *DeBruin*, 816 N.W.2d at 883 (plurality opinion). The contract was entered into on July 1, 2009 and the termination took place on October 5, 2009. *Id.*

120. The employee also brought a promissory estoppel claim on the same grounds. *Id.*

121. *Id.*

122. *Id.*

123. *See id.*

124. *Id.* at 883–84. The Wisconsin Constitution reads in relevant part,

The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall

The employee countered by arguing that the ministerial exception applies to antidiscrimination claims but not contract claims, because breach of contract cases are governed by neutral principles of law.¹²⁵ She “claimed that applying such neutral principles of law would not constitute impermissible government action because the court could examine [her] complaint and determine the truth or falsity of her allegations without interfering with the religious institution’s mission.”¹²⁶

Citing *Hosanna-Tabor*, *Milivojevich*, and *Kedroff*, the Wisconsin Supreme Court held that the ministerial exception protected St. Patrick’s from liability.¹²⁷ The ministerial exception gave the church “the absolute right to terminate DeBruin for any reason, or for no reason,” ignoring both the fixed-term contract and the termination clause.¹²⁸ The court rejected the wait-and-see approach taken by the Third Circuit in *Petruska*, instead holding that “any inquiry into the validity of a religious institution’s reasons for the firing of a ministerial employee will involve consideration of ecclesiastical decision-making.”¹²⁹ The court then held that there was no distinction between causes of action based on contract theory versus statutory theory, holding that ruling on either would violate the Free Exercise Clause.¹³⁰

III. ANALYSIS

A. *Evaluating the Methods*

A key distinction between these two approaches is the way in which they apply the ministerial exception to breach of contract claims, *relative to antidiscrimination claims*. The wait-and-see approach distinguishes these types of claims; the presumptive entanglement approach treats them the same. This Comment argues that the wait-and-see approach is fairer to the plaintiff and more reflective of the limited holding in *Hosanna-Tabor*.

The first clue that the wait-and-see approach is correct comes from the *Hosanna-Tabor* decision itself.¹³¹ The Court explicitly drew a line

any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

WISC. CONST. art. 1, § 18.

125. *DeBruin*, 816 N.W.2d at 884 (plurality opinion).

126. *Id.*

127. *Id.* at 885–86.

128. *Id.* at 888.

129. *Id.* at 889.

130. *Id.*

131. Ironically, the two cases in this Comment illustrating the view recognizing *Hosanna-Tabor*’s contract-discrimination distinction occurred years before the *Hosanna-Tabor* decision. *See generally* *Petruska v. Gannon Univ.*, 462 F.3d 294 (3rd Cir. 2006); *Minker v. Balt. Annual Con-*

and said that the case before it addressed only discrimination suits, and the Court did not express any view on breach of contract actions.¹³² Drawing this line was significant because the opinion drew very few others.¹³³ It offered no explicit parameters about which classes of employees may be considered “ministerial” under the exception, and it did not make an effort to decide what kinds of entities may be considered protected “religious institutions.” Because the Supreme Court made a distinction between discrimination claims and breach of contract claims, the wait-and-see approach taken in *Petruska* and *Minker* better reflects the Court’s limited holding in *Hosanna-Tabor*.

The Supreme Court may have refused to include breach of contract claims within the scope of its holding because of the *voluntary* element of contract cases.¹³⁴ In other words, churches, like nonreligious institutions, are not required to offer their ministerial employees contracts; they choose to do so.¹³⁵ They are free to maintain at-will relationships with all of their employees, and most do.¹³⁶ Alternatively, antidiscrimination statutes apply to all employees regardless of whether they are at-will or contract employees.¹³⁷

According to the *Minker* court, “A church is always free to burden its activities *voluntarily through contracts*, and such contracts are *fully enforceable* in civil court.”¹³⁸ The court continued, “courts may always resolve contracts governing ‘the manner in which churches own property, hire employees, or purchase goods.’”¹³⁹ Accordingly, the *Minker* court stated that these religious employers “may be held liable upon their valid contracts.”¹⁴⁰

Distinguishing between voluntary contracts and default at-will employees for purposes of the ministerial exception does not undermine

ference of. *United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990). The case illustrating the opposite view occurred months after *Hosanna-Tabor* was decided. See *DeBruin*, 816 N.W.2d 878.

132. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012).

133. See Strasser, *supra* note 42 at 336 (noting the “Court addressed a very narrow issue”).

134. See generally *Minker*, 894 F.2d at 1359 (noting that “[a] church is always free to burden its activities voluntarily through contracts”).

135. Overstreet, *supra* note 50 at 284.

136. See *id.*; see also Kathleen C. McGowan, Note, *Unequal Opportunity in At-Will Employment: The Search for a Remedy*, 72 ST. JOHN’S L. REV. 141, 142 (1998) (explaining that “most employees are at-will”).

137. Overstreet, *supra* note 50, at 289–90.

138. *Minker*, 894 F.2d at 1359 (emphasis added).

139. *Id.* (quoting *Jones v. Wolf*, 443 U.S. 595, 606 (1979)).

140. *Id.* (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th. Cir. 1985)).

the purpose of the exception.¹⁴¹ In *Hosanna-Tabor*, the Court stated that the purpose of the exception is to safeguard a church's "authority to select and control" its ministerial employees.¹⁴² By applying the ministerial exception to at-will relationships, churches are only subject to an action if they act affirmatively to alter the employment relationship through a contract.¹⁴³ In other words, a church that is forced to abide by an employment contract has voluntarily put itself in that position.¹⁴⁴

Another voluntary step that the church must take to subject itself to liability is to make the contract a fixed-term of employment by including an end date or including a set amount of time.¹⁴⁵ Most courts presume an at-will relationship when a contract does not show intent to establish a fixed term.¹⁴⁶ Even further, it is the church's decision to include an early termination clause such as the one seen in *DeBruin*, which stated "The PARISH agrees that the DIRECTOR OF FAITH FORMATION shall not be discharged during the term of this contract, without good and sufficient cause."¹⁴⁷ It is hard to blame an employee for interpreting this clause to mean that their employment is secure as long as no "good and sufficient cause" occurs. Additionally, the next clause in *DeBruin* suggests that "good and sufficient cause" will be a function of the employee's conduct by stating that the Church agrees to provide notice to the employee if there are problems with her service or conduct.¹⁴⁸

In many employment relationships, the employer drafts the contract and the employee accepts its terms or declines the offer; little negotiation occurs.¹⁴⁹ It follows that an employer, religious or otherwise, re-

141. See Overstreet, *supra* note 50, at 285.

142. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709 (2012).

143. Lupu & Tuttle, *supra* note 1, at 145 (citing *Tomie v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1041-42 (7th Cir. 2006)) (noting that churches can use contracts to waive their autonomy).

144. Overstreet, *supra* note 50, at 289-90.

145. See *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 281 (Iowa 1995) (holding that the at-will employment doctrine is a "gap-filler," presumed when a contract does not explicitly set out a duration).

146. J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 839 (noting that "courts in virtually every American jurisdiction continue to presume than an indefinite term employment contract is terminable at will by either party").

147. *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 883 (Wis. 2012) (plurality opinion).

148. See *id.*

149. See Allison E. McClure, Comment, *The Professional Presumption: Do Professional Employees Really Have Equal Bargaining Power When They Enter Into Employment-Related Adhesion Contracts?*, 74 U. CIN. L. REV. 1497, 1506-07 (2006).

tains substantial autonomy in deciding to offer an employment contract and what terms to include.¹⁵⁰ In this way, some employment contracts may be akin to a contract of adhesion.¹⁵¹ These notions of autonomy and volition underscore the idea that the ministerial exception should treat contract claims and statutory claims differently.

1. *What Happens on Remand?*

The wait-and-see method used by both the D.C. Circuit Court of Appeals and the Third Circuit Court of Appeals involves a cautionary approach to remanding claims. After holding that the ministerial exception had been exercised prematurely, both courts gave hints that the exception could be applied eventually. The Third Circuit stated in *Petruska* that if on remand, the employer “raise[d] issues which would result in excessive entanglement, the claims may be dismissed on that basis on summary judgment.”¹⁵² The court did, however, add that hearing the contract claim did not appear to turn on a religious question, “at least not at the outset.”¹⁵³

The D.C. Circuit Court of Appeals in *Minker* offered a stronger disclaimer.¹⁵⁴ While remanding the case, it “acknowledge[d] that the contract alleged by Minker threatens to touch the core of the rights protected by the [F]ree [E]xercise [C]lause.”¹⁵⁵ The court also stated that it “agree[d] that any inquiry into the Church’s reasons for” not transferring the pastor to a more suitable parish pursuant to the contract “would constitute an excessive entanglement in its affairs.”¹⁵⁶ These restrictive disclaimers seem to contradict the optimism reflected later in the opinion; the court goes on to suggest that if the employee “can prove his case without resorting to impermissible avenues of dis-

150. *Id.* (“[T]he employer generally controls the terms of the contract, whether any negotiations occur, and whether the employee is ultimately hired.”).

151. *See id.* at 1507 (“[M]any courts have held that non-professional employees have unequal bargaining power when they enter into employment-related contracts.”).

152. *Petruska v. Gannon Univ.*, 462 F.3d 294, 312 (3rd Cir. 2006).

153. *Id.* On remand in 2008, a district court dismissed *Petruska*’s discrimination claims after she attempted to replead them as Title IX claims instead of Title VII claims. Her breach of contract and fraudulent misrepresentation claims were not dismissed. *Petruska v. Gannon Univ.*, Civil Action No. 1:04-cv-80, 2008 U.S. Dist. LEXIS 54884 (W.D. Penn. Mar. 31, 2008); *see also* Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*, 10 FIRST AMENDMENT L. REV. 233, 281 n.297 (2012).

154. Jeffrey Hunter Moon, *Protection Against the Discovery or Disclosure of Church Documents and Records*, 39 CATH. LAW. 27, 31 (1999) (noting that “[t]he court was very explicit in [*Minker*]: it limited the appropriate boundaries of litigation to only those areas legitimate for court inquiry and resolution, and then clearly limited permissible discovery to those areas.”).

155. *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360 (1990).

156. *Id.*

covery or remedies,” his claim would survive.¹⁵⁷ It also added that, theoretically, the breach of contract issue can be reviewed permissibly “by a fairly direct inquiry into whether [the employee’s] superintendent promised him a more suitable congregation, whether [the employee] gave consideration in exchange for that promise, and whether such congregations became available but were not offered to [the employee].”¹⁵⁸

These disclaimers suggest, somewhat contradictorily, that inquiring into why the church refused the transfer would be a violation of the Establishment Clause, yet also state that there might be a permissible way for the employee to make his case without entangling the court in religion.¹⁵⁹ The *Minker* court does not explain how to determine a breach of a church-employment contract while respecting a church’s autonomy.¹⁶⁰ Some experts, however, posit that the parties would need to stipulate to certain religious questions during discovery in order for the case to proceed.¹⁶¹

B. Can These Two Methods Be Reconciled with Fundamental Principles of Contract Law?

“A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”¹⁶² This *Restatement* definition of a contract begs the question, if courts cannot review whether or not a promise was kept—in *DeBruin* one year of employment,¹⁶³ in *Minker* a transfer,¹⁶⁴ and in *Petruska* employment¹⁶⁵—in order to provide a remedy, are these “contracts” even contracts? The way the courts have handled these claims contradicts fundamental principles of contract law and public policy.¹⁶⁶

157. *See id.*

158. *Id.*

159. *See id.*

160. *See id.*

161. Lupu & Tuttle, *supra* note 1, at 146.

162. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

163. *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 883 (Wis. 2012) (plurality opinion).

164. *Minker*, 894 F.2d at 1355.

165. *Petruska v. Gannon Univ.*, 462 F.3d 294, 300 (3d Cir. 2006).

166. *See* Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in Hosanna-Tabor*, 64 MERCER L. REV. 405, 426 (2013) (noting that the *Hosanna-Tabor* Court appeared to ignore ordinary principles of contract law).

1. *Consideration*

A fundamental requirement in contract formation is consideration; each party must promise to perform for the other party.¹⁶⁷ In the case of a fixed-term employment contract, consideration may be an employee's guarantee of a source of income for a defined period of time.¹⁶⁸ Alternatively, the employee may promise the employer that she will perform her job satisfactorily for the time set out in the contract.¹⁶⁹ This may also mean that she gives up any potential opportunities for a better paying or more enjoyable job during that time period.

This Comment's introductory hypothetical scenario illustrates this doctrine. The imaginary schoolteacher had a choice between two jobs. She could have chosen to accept the higher paying position at the charter school, but consciously decided that the promise of stable employment offered by the religious school made that position more valuable. Because she had bargained for the promise of stability, she agreed to accept a lesser salary.

The problem when applying the doctrine of consideration to the ministerial exception is that the church does not give complete consideration to the employee. A church is able to pay less money to an employee based on a promise that the employee can rely on the church.¹⁷⁰ This is especially unfair in a case in which, but for the perceived stable employment, the employee would not have accepted the lesser salary.¹⁷¹ This notion of inequity leads into two other fundamentals of contract law: uneven bargaining power and the implied doctrine of good faith and fair dealing.

2. *Bargaining Power and Good Faith*

A potential problem of applying the presumptive entanglement approach to all breach of contract claims is that there is a potential for abuse of the doctrine by religious institutions. First, consider the relative bargaining power of the two parties, the church (employer) and the employee. As this Comment has discussed, the church most likely retains the power to (1) use an employment contract and (2) draft its

167. See RESTATEMENT (SECOND) OF CONTRACTS § 71.

168. See Millon, *supra* note 83, at 988 (describing how an employee may bargain for a defined term contract). In *DeBruin*, it was one year of employment. *DeBruin*, 816 N.W.2d at 883 (plurality opinion).

169. Overstreet, *supra* note 50, at 290 (noting that churches may enter into contracts in order to "lock up" an employee's services).

170. See Millon, *supra* note 83, at 978 (noting that workers may bargain for job security); see also *id.* at 988 ("Presumably [a] worker would pay for job security by accepting a lower wage.").

171. See *id.* at 978, 987-88.

contents. This, however, is only one indication that the church has far more bargaining power over the employee.¹⁷² The sophistication and resources available to the two parties also diminishes any equality of bargaining power.¹⁷³ If a religious institution is aware of the ministerial exception when offering an employment contract, it would know that, under a presumptive entanglement approach, it will likely never have to explain its reasoning to the courts.

One striking piece of *DeBruin* is that the church created a termination clause agreeing not to terminate the employee without “good and sufficient cause.”¹⁷⁴ It also agreed to give notice to the employee if it became dissatisfied with her performance.¹⁷⁵ However, when the employee brought suit alleging that the contract had been breached, the church did not even attempt to honor the terms it drafted.¹⁷⁶ Instead, the church plainly asserted that the courts had no right to enforce the contract.¹⁷⁷

This is a curious response to a lawsuit regarding a contract that the church itself had created. Surely, one can imagine neutral and non-religious reasons for having “good and sufficient cause” to terminate an employee before the end date of a fixed-term contract. Defenses asserting that the employee did not meet the employer’s objective goals or expectations, was generally incompetent, was excessively late or absent, improperly used church resources, refused to perform employment duties, and the like could all present the possibility that a civil court could review the claim without entangling itself in religion. This begs an important question: did the church in *DeBruin* know that the contract was unenforceable when it created it? And furthermore, if the church was aware that the contract could not be litigated in court, why did it create the contract at all? When the employee read and signed the contract, she likely believed that it was enforceable.¹⁷⁸ Many employees would presume that being hired depends on their

172. Of course, this advantage is not inherent to religious employers; it applies to secular employment relationships as well.

173. See McClure, *supra* note 149, at 1516 (noting that the employee entering the employment contract may have “never encountered this type of contract before, and therefore, [may] not have any actual knowledge of the types of provisions it contains”).

174. *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 883 (Wis. 2012) (plurality opinion).

175. *Id.*

176. *See id.*

177. *See id.* This defense was based on both state and federal constitutions. *Id.*

178. *But see* Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 Nw. U. L. REV. (forthcoming 2014) (manuscript at 37–39). Professor Lund makes a compelling argument that, in many breach of contract claims, the parties may understand the “promise” of employment to be unenforceable in court.

signing of the contract. Nothing suggests to them that the contract is unenforceable. Even in a case like *Hosanna-Tabor*, where the contract came in the form of a verbal promise, there may still be detrimental reliance on the part of the employee.¹⁷⁹

The opportunity for abuse of the doctrine arises when a legally sophisticated religious institution creates an employment contract setting out a fixed term, while at the same time knowing that it does not have to fulfill its promise to employ the individual for the entire term. This abuse of bargaining power becomes bad faith if a church uses the illusion of an enforceable contract in order to convince the employee to accept lesser compensation in situations where, but for the promise of security, the employee would not have accepted the offer.¹⁸⁰

Universal notions of fairness and fundamental principles of contract law are both offended when an employer “gets” something—whether it is the benefit of an employee who believes she is “locked in” to her position and thus, will not “jilt” the employer for a better opportunity during the term, or the ability to pay less salary or benefits to the employee—but does not “give up” anything in return.¹⁸¹ The employer has been enriched by these benefits without being forced to hold up its end of the bargain.¹⁸² When the ministerial exception applies with equal force to a contract claim and a statutory claim, a church will *always* be free to use the exception as an “escape hatch” when it no longer wants to honor an employment contract.¹⁸³

C. *The Wait-and-See Approach Is the Lesser of Two Evils*

Of the two approaches to breach of contract claims, the approach that allows a plaintiff to at least try to establish his breach of contract claim is more consistent with the purpose of the ministerial exception. When courts automatically treat a religious employment contract as unenforceable through presumptive entanglement, they encourage religious institutions to deceptively present illusory promises in the form of what appears to be a contract.¹⁸⁴ This goes beyond the scope of the

179. See Gedicks, *supra* note 166, at 426 (noting that Perich appeared to rely to her detriment on the Hosanna-Tabor’s promise that she could return to her job).

180. See Millon, *supra* note 83, at 987–88 (noting that if an employee is worried about losing her job, she may bargain for job security by accepting a lower payment).

181. See Overstreet, *supra* note 50, at 290 (“To excuse a religious institution from complying with a commitment into which it has voluntarily entered is unjust and illogical.”).

182. *Id.*

183. Cf. Andrew Koppelman, “Freedom of the Church” and the Authority of the State, 21 J. CONTEMP. LEGAL ISSUES 145, 148 (2013) (noting that the “power that *Hosanna-Tabor* gives to churches is sobering”).

184. For an illustration of illusory promises, see RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. e (1981).

ministerial exception—to protect a church’s decision to choose who represents the faith¹⁸⁵—and instead gives a church free reign to swindle an unsuspecting employee into accepting less compensation under the illusion of job security. The wait-and-see approach still allows religious institutions to select who represents the faith; yet it also forces them to perform their contractual obligations.

By unequivocally refusing to hear a breach of contract case and inquire into why a church made a decision not to honor a contract, a “presumptive entanglement” approach potentially dismisses claims that have nothing to do with religion. For example, consider a person hired by a religious institution to raise funds. Assume his employment contract gives him one year of employment and states that, as long as he meets monthly fundraising goals, his contract will not be terminated prior to the end date. If the fundraising is accounted for objectively in the institution’s books, a civil court can simply look to whether or not the employee met the goals and determine if the employer had a right to terminate him based on the goal provision of the contract.

Under the wait-and-see approach, a court would allow the employee to argue that he had a valid contract, that he met the consideration requirement, and that the employer terminated him despite his meeting objective criteria set out by the employer in the contract.¹⁸⁶ Alternatively, under presumptive entanglement, the employee would not even be afforded the opportunity to state a nonreligious case because the court would assume that religious questions would enter the fray. The ministerial exception would preclude liability for the church.

One may also see that the presumptive entanglement approach goes too far by considering the consequences if that same employee’s contract tied his meeting or not meeting fundraising goals to commission bonuses instead of guaranteed employment. For instance, if the contract stated that the employee would receive a small bonus every time he met a monthly fundraising goal, and he met the goal but was denied payment, would the presumptive entanglement method cause a court to refuse to hear his claim for wages due? After all, a church,

185. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 697 (2012) (“By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments.”).

186. See Gedicks, *supra* note 166, at 426 (explaining that applying ordinary principles of contract law to a terminated ministerial employee could possibly resolve the case without violating the First Amendment: “The detrimental-reliance inquiry is simple and secular: Did Hosanna-Tabor promise Perich her job back after she recovered? Did she rely to her detriment on that promise? The answer to both questions seems to be, ‘yes’” (footnote omitted)).

like the one in *DeBruin*, could simply argue that any inquiry into why the church chose to not make the payment is inquiring into an ecclesiastical zone forbidden by the ministerial exception.¹⁸⁷ Alternatively, the wait-and-see method would allow a plaintiff to make her case that she is owed money as long as she can do so without forcing the court to consider matters of religious doctrine.¹⁸⁸

Because a church is free to maintain at-will employees, it cannot be said that its autonomy to hire and fire ministerial employees is violated if a court uses a wait-and-see approach.¹⁸⁹ Having an employee sign a document that has a start date and end date gives that employee an understandable impression that a bilateral promise has been made, and it is reasonable for that employee to rely on that promise.¹⁹⁰ Accordingly, courts can sensibly apply the ministerial exception differently between contract claims and discrimination claims.

IV. IMPACT

A. *Extension to Other Employment Claims*

Statutory employment discrimination claims are the only type of claim that the Supreme Court has held is categorically subject to the ministerial exception.¹⁹¹ As lower courts apply the Supreme Court's holding in *Hosanna-Tabor* to future religious employment decisions, more questions about the ministerial exception's applicability to other types of employment claims will be answered. The future application of *Hosanna-Tabor* to breach of contract claims will signal how other types of employment claims, such as retaliation, whistleblower, or tort, will be treated in the context of religious institutions.

Retaliation and whistleblower claims present an interesting challenge to the broader view of the ministerial exception. Legal protection for employees from retaliation following "whistleblowing," or

187. See *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 889 (Wis. 2012) (plurality opinion) ("[A]ny inquiry into the validity of a religious institution's reasons for the firing of a ministerial employee will involve consideration of ecclesiastical decision-making.").

188. See *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360 (D.C. Cir. 1990) (holding that the employee "should be allowed to demonstrate that he can prove his case without resorting to impermissible avenues of discovery or remedies"); see also *Griffin*, *supra* note 4, at 1011–12 (noting that the harm to religious institutions is arguably less severe when the plaintiff seeks only money damages as opposed to reinstatement).

189. See *McGowan*, *supra* note 136, at 142 (explaining that "most employees are at-will").

190. See *Gedicks*, *supra* note 166, at 426 (noting that Perich appeared to rely to her detriment on the church's promise that she could return to her job upon her recovery).

191. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012) ("The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit.").

“unpopular disclosure of employer corruption,” began increasing in the early 1970s.¹⁹² The public policy behind whistleblower protections may relate to many areas, including public health, privacy, and corporate reporting practices.¹⁹³ The rationale for legal protection from retaliation for employees stems from the idea that “[w]ithout employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public would remain unaware of large-scale and potentially dangerous abuses.”¹⁹⁴ Additionally, whistleblower protection laws provide a deterrent effect to potential wrongdoers.¹⁹⁵

Whistleblower claims are similar to employment discrimination claims in that they are rooted in statute.¹⁹⁶ These statutes may be federal or state-enacted.¹⁹⁷ Every state provides employees some form of whistleblower protection, yet “[t]he major areas of difference include the class of protected employees, the appropriate recipient of the employee’s report, the nature of the employer activity that the employee reports, whether the employee’s report must be accurate, and the available remedies.”¹⁹⁸

A determination that presumptive entanglement applies to breach of contract claims would strengthen the viability of the ministerial exception against whistleblowers that have been retaliated against.¹⁹⁹ The worst-case scenario might involve an employee of a religious institution being retaliated against for reporting sexual abuse within the institution, and then having no recourse against the employer.²⁰⁰ The problem of sexual abuse in religious institutions is not limited to the Catholic Church.²⁰¹

192. See Lois A. Lofgren, Comment, *Whistleblower Protection: Should Legislatures and the Courts Provide a Shelter to Public and Private Sector Employees Who Disclose the Wrongdoing of Employers?*, 38 S.D. L. REV. 316, 318 (1993).

193. Gerard Sinzdak, Comment, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CALIF. L. REV. 1633, 1635 (2008).

194. *Id.* (alteration in original) (quoting *Dolan v. Cont’l Airlines*, 563 N.W.2d 23, 26 (Mich. 1997)).

195. *Id.* at 1635–36.

196. See *id.* at 1638.

197. *Id.*

198. *Id.* at 1641–42 (footnotes omitted).

199. See, e.g., Hamilton, *supra* note 5, at 230–31 (explaining how the ministerial exception shields clergy in employment disputes in the childhood abuse context).

200. This scenario is not merely hypothetical. See Griffin, *supra* note 4, at 1013–16 (detailing numerous examples of employees being terminated for reporting illegal conduct and not having recourse against the employer).

201. Hamilton, *supra* note 5, at 225 (noting that the problem of childhood sexual abuse in religious institutions is nondenominational); see also Emily C. Short, Comment, *Torts: Praying for the Parish or Preying on the Parish? Clergy Sexual Misconduct and the Tort of Clergy Malpractice*, 57 OKLA. L. REV. 183, 184–85 (2004). Studies suggest substantial abuse occurs within

The Catholic Church's position is that courts should not be involved in dealing with cases of abuse by clergy.²⁰² Instead, it believes those incidents are better handled independently through mediation.²⁰³ This idea stems from both the principle of church-state separation and the Church's belief in conciliation and forgiveness.²⁰⁴

Arguably, the Catholic Church's stance against litigation over abuse is analogous to the evangelical Lutheran rule against lawsuits among members.²⁰⁵ Accordingly, if a ministerial employee had knowledge of abuse occurring between a priest and a child parishioner, and reported the abuse, the institution could terminate the employee and cite the ministerial exception as an affirmative defense. After all, the ministerial exception protects a church's decision to fire an employee, the employee acted in a way that arguably contradicts the beliefs of the church, and under a presumptive entanglement approach, the court is in no position to analyze whether or not the church's reasoning was pretextual.²⁰⁶

The impact of such a precedent, effectively holding that whistleblower protection laws insulate an employee from only non-religious employer retaliation, would be against public policy.²⁰⁷ If employees are not willing to risk the adverse consequences (retaliation) that may follow disclosure of abuse, then abusers will not be exposed.²⁰⁸ Additionally, if abusers know that the whistleblower protections do not apply to religious institutions, then they will no longer provide a deterrent effect.²⁰⁹

the Church of England, the Southern Baptist Church, the Presbyterian Church U.S.A., the United Methodist Church, and among other evangelical ministers, as well as among Buddhist teachers and American rabbis. *Id.* at 184–86. Unfortunately, victims in approximately 90% of childhood sexual abuse cases will never report the abuse to the proper authorities. Hamilton, *supra* note 5, at 227.

202. See Michelle Rosenblatt, Article, *Hidden in the Shadows: The Perilous Use of ADR by the Catholic Church*, 5 PEPP. DISP. RESOL. L.J. 115, 127 (2005) (stating that “[b]ecause of the constitutional concerns regarding the separation of church and state, the Church has taken the position that the most appropriate way to deal with cases of clergy abuse is through independent Church mediation”).

203. *Id.*

204. See *id.*

205. Hosanna-Tabor asserted that Perich's “threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally.” Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 701 (2012).

206. See DeBruin v. St. Patrick Congregation, 816 N.W.2d 878, 889 (Wis. 2012) (plurality opinion) (“[A]ny inquiry into the validity of a religious institution's reasons for the firing of a ministerial employee will involve consideration of ecclesiastical decision-making.”).

207. See Griffin, *supra* note 4, at 1013–14.

208. *Id.* at 1013–15 (collecting cases).

209. See Gerard Sindzack, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CALIF. L. REV. 1633, 1635–36 (2008) (noting

The general impact on employees of religious institutions is also noteworthy. The mean hourly wage of employees of religious institutions is only about \$18 per hour.²¹⁰ Furthermore, this figure is skewed upwards by wealthy outlier positions, such as chief executives, financial managers, attorneys, and other upper management positions.²¹¹ The median hourly wage for religious employees, only \$14.69, reflects the true financial position of these employees.²¹² In the context of whistleblowers, it is likely that employees will be risk-averse in determining whether to disclose the conduct of their employers.²¹³ More power for religious institutions in the employer–employee relationship means less bargaining power for employees of those institutions. These employees may ultimately end up having to settle for less employment rights than those who work for nonreligious institutions.

V. CONCLUSION

Although *Hosanna-Tabor* did not determine whether the ministerial exception applies to breach of contract cases, it is significant for being the first Supreme Court case to acknowledge the validity of the exception.²¹⁴ Now that it is confirmed that a plaintiff's discrimination case against her religious employer will cede to the exception, the lower courts must determine whether breach of contract cases should be treated the same way. Thus far, courts have not been able to agree on whether it should find presumptive entanglement of religion or wait and see if the plaintiff can establish a claim apart from religion.²¹⁵

Because the Supreme Court explicitly held that its holding in *Hosanna-Tabor* did not apply to breach of contract cases,²¹⁶ courts that apply the presumptive entanglement approach mistakenly assume that the ministerial exception has a broad scope. Breach of employment

the necessity of adequately protecting whistleblowers because, “despite . . . their important role as legal monitors, whistleblowers are frequently the victims of retaliation”).

210. NAICS 813100 *Religious Organizations, Religious Organizations – May 2012 National Industry-Specific Occupational Employment and Wage Estimates*, U.S. BUREAU OF LAB. STAT., http://www.bls.gov/oes/current/naics4_813100.htm (last updated Apr. 1, 2014).

211. *See id.* (noting that financial managers, human resources managers, executives, and legal employees in religious institutions average over \$90,000 salaries).

212. *See id.*

213. *See Griffin, supra* note 4, at 1013–15 (listing instances where reporting misconduct led to the termination of the employee without legal recourse).

214. Chopko & Parker, *supra* note 153, at 235.

215. *Compare, e.g., Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990), and *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 (3rd Cir. 2006), with, e.g., *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878 (Wis. 2012), and *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192 (Conn. 2011).

216. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012).

contract claims should be treated differently than employment discrimination claims because of the voluntary nature of employment contracts. Churches and other religious institutions voluntarily alter the at-will employment relationship by forming a legal contract and, accordingly, should be held to their contractual obligations. Additionally, when religious employers allow employees to essentially bargain against themselves through an employment contract that is ultimately unenforceable, that shows bad faith on the part of the institution. Although the ministerial exception serves a very important purpose in protecting the autonomy of religious institutions, the application of the doctrine should uphold its purpose rooted in the First Amendment, and not give a religious institution any additional power at the expense of employees.

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