Two Visions, Two Results: Making Sense of the Disagreement over the Application of the Ministerial Exception to Teachers in Parochial Schools

*By G. David Mathues**

Most religious believers, whatever their age, see their minister once or twice a week for one or two hours a time. By contrast, children who attend a religiously-affiliated school spend six or seven hours a day with their teachers. Parents of these children, who often select the school for religions reasons, whose children spend far more time at school than at church, might be surprised to learn that while the First Amendment protects the church's ability to hire and fire a minister, courts cannot agree as to whether it also protects the religious school's ability to hire or fire a teacher. In legalspeak, the courts disagree over the scope of the ministerial exception. This article addresses this persistent and important dispute.

I. Summary and History of the Ministerial Exception

The ministerial exception gives religious institutions broad freedom in selecting their leaders. Technically speaking, there are two ministerial exceptions: one is statutory, and one is constitutional. The *statutory* ministerial exception appears in Title VII and allows religious institutions to hire and fire all of their employees based on an employee's religion without fear of a lawsuit.[1] Thus, while the manager of a McDonalds cannot hire only Catholics, a Catholic school may. The *constitutional* ministerial exception derives from the First Amendment, and bars suits against religious institutions based on any of Title VII's provisions and on certain other employment laws.[2] Thus, while the manager of the McDonalds cannot hire only males as cooks, a synagogue may hire only males as rabbis. But while the constitutional exception is broader than the statutory exception in that it bars a larger class of employment suits, the constitutional exception is narrower in that it applies to a smaller class of employees.[3] The constitutional exception applies only to employees of a religious institution who perform a "ministerial" or "spiritual" function. The constitutional exception is also more complicated, more frequently litigated, is the focus of this article. Cases, including cases involving teachers at parochial schools, usually turn on the definition of "spiritual function."

The Fifth Circuit first articulated the constitutional ministerial exception in the 1972 case of *McClure v. Salvation Army*.[4] The plaintiff, an ordained minister in the Salvation Army, sued her employer under Title VII for sex discrimination. The court recognized that "[t]he minister is the chief instrument by which the church seeks to fulfill its purpose,"[5] and applied the Supreme Court's church government cases, which held that churches should be free from state interference in matters of church government as well as church doctrine.[6] Because allowing a minister to sue the church over an employment dispute would permit the State to "intrude upon matters of church administration" and make the State the final arbiter between the church and its employees,[7] the court held that the Free Exercise Clause barred McClure's suit. Since *McClure*, eight other circuits have considered the ministerial exception. All have agreed that the constitutional exception exists,[8] but they do not agree which constitutional provision creates the exception.[9]

The ministerial exception continues to provoke debate in both the courts and the academy.[10] This clash should not be surprising, because the ministerial exception lies at a crossroads between two foundational American values: equality and religious freedom.[11] Supporters see the exception as critical to religious freedom and a reminder of the limits on state power; foes see the exception as an anachronistic license to engage in noxious discrimination. Going forward, this disagreement is most likely to focus on the definition of "minister," because while the ministerial exception's existence appears settled, its scope is not.[12] The courts define "ministers" as those who exercise a "spiritual function" or "carry [a religion's] spiritual message."[13] An employee performs a spiritual function if the employee's "primary duties" consist of matters like "teaching, spreading the faith, church governance, supervision of a religious order, or supervision of participation in religious ritual and worship."[14] But while courts generally agree on the test, they disagree strongly on how to apply the test.

II. The Ministerial Exception and Teachers in Religious Schools

There are two reasons for examining the clash over the definition of "minister" in the context of teachers at religious schools. First, whether a teacher fulfills a "spiritual function" is an intriguing question. On the one hand, even opponents of the ministerial exception must admit that a clergy member performs a spiritual function. On the other, many supporters of the ministerial exception would agree that a part-time church groundskeeper does not perform a spiritual function.[15] But teachers perform duties that appear both spiritual and secular. Teachers may lead the class in prayers, teach theology, and serve as a role model. But a teacher also may explain multiplication tables, grade English papers, and drive for a field trip. Given this split in a teacher's responsibilities, it should not be surprising that "there are courts on both sides"[16] of this oft-litigated issue.

Second, and more importantly, how we see the relationship between the ministerial exception and teachers in religious schools reveals our views on two deeper issues: the source of the ministerial exception, and the nature of religion itself. Of course, a full discussion of these issues lies well beyond the scope of this article, but we should recognize our underlying assumptions, because these assumptions will shape our views on other questions of religious freedom. The following four cases, two on each side, illustrate both the different views on whether a teacher fulfills a "spiritual function" and the premises underlying those views.[17]

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A. Decisions Not Applying Ministerial Exception to Teachers

In *Guinan v. Roman Catholic Archdiocese of Indianapolis*, plaintiff Ruth Anne Guinan taught fifth grade at a parochial school for eleven years.[18] She was 52 years old when her contract was not renewed, and she sued for age discrimination. The school invoked the ministerial exception, arguing that Guinan was serving in a spiritual role as a teacher in the parochial school. The court acknowledged that Guinan always taught at least one class in religion, organized Mass once a month, and that one of her "principle duties [was] to be an 'example of Christianity'" to her students.[19] Nevertheless, it ruled that because she taught "mostly secular" subjects and because the school did not require that all teachers be Catholic, she was not a minister and that therefore the ministerial exception did not apply.

In repeating that Guinan's teaching duties were "secular," the court discounted the importance of responsibilities as a worship leader and accepted without analysis the idea that "spiritual" duties could be separated from "secular" duties. The most remarkable example of this rigid mode of thought came when the court noted that Guinan taught a class called "Images of God," which was "basically a sex-education program for human growth and development,"[20] but insisted that there was nothing "religiously oriented" about the program. How a program entitled "Images of *God*" could be secular, especially when the belief that mankind was made in the image of God has played such an influential role in the Catholic Church's teaching on sexual matters,[21] the court left unexplained.[22]

In another case, Jewel Redhead taught fifth grade at a school run by the Seventh-Day Adventist Church for several years without incident. But when she became pregnant outside of marriage and refused to marry the child's father, the school fired her for "immoral conduct," contrary to Adventist teachings.[23] When she sued for pregnancy discrimination, the school argued that Redhead was a minister because she led worship, acted as a role model, and most importantly because parents sent their children to the Seventh-Day Adventist school so that children would obtain an education that "complies with the teachings of the church."[24]

The federal district court rejected these arguments, characterizing Redhead as a "lay employee," because she taught only one hour of Bible every day and "spent the remainder of her time teaching secular subjects." The court admitted that the school could fire teachers for conduct it saw as a "grievous sin," but refused to dismiss the case because it saw a question of fact as to whether the school enforced its policy unevenly.[25] In the court's view, because questions of pretext could be answered without delving into church doctrine, the ministerial exception did not apply.[26] After the Second Circuit vacated and remanded the case,[27] the district court adhered to its original decision, relying even more heavily on its initial claim that the ministerial exception should not apply because judging the issue of pretext did not require investigating church doctrine. As the court put it, while some church employment disputes risk unconstitutional "entanglement" in doctrinal disputes, "employment disputes that a court can decide without having to question the validity or plausibility of a religious belief, or having to favor a certain interpretation of religious doctrine, do not post a similar risk" and therefore do not call for the ministerial exception.[28]

B. Decisions Applying the Ministerial Exception to Teachers

In *Clapper v. Chesapeake Conference of Seventh-Day Adventists*, the Fourth Circuit confronted a case that strongly resembled *Redhead*.[29] As in *Redhead*, the defendant school argued that the teacher carried out a spiritual function because he led the students in worship and prayer, acted as a role model, was required to be a member of the church, and instructed the students from a religious perspective.[30] Like Jewel Redhead, plaintiff Clapper countered that his overall duties were secular. Indeed, *Redhead* looks like a better case for applying the ministerial exception. Redhead was fired for conduct that clearly violated the Adventist schools' moral code, but in *Clapper*, the school argued that it declined to renew Clapper's contract because of declining enrollment and Clapper's negative teaching reviews.[31] Yet *Clapper*, not *Redhead*, applied the ministerial exception to the teacher.

Clapper noted that teachers at the defendant school led the classes in worship and prayer, but the court recognized that the teachers' role as spiritual leaders ran deeper.[32] It focused on the constant, daily interaction between the teachers and students, the teachers' status as a role model, and the teachers' responsibility to "incorporate the teachings of the Seventh-Day Adventist Church whenever possible."[33] *Clapper* even quoted from, and relied on, the Adventists' Education Code, which stated that the church's school "influences [children] more continuously than any other agency of the church."[34] For these reasons, the court held that "enforcement of Clapper's action would substantially infringe upon the Chesapeake Conference's right to choose its own spiritual leaders."[35]

Just as *Clapper* contrasts with *Redhead*, *Staley v. Indian Community School of Milwaukee, Inc.*,[36] contrasts with *Guinan*. The Indian Community School was a private elementary and middle school that sought to "offer students an education based on traditional Indian spiritual practices and cultural principles."[37] While the school taught the same subjects as any other primary school, it also "expose[d] students to as much Indian culture and spiritual belief in the classroom as possible."[38] Marny Staley taught at this school for several months until she was fired. The school said it fired her because she failed to respect the Indian religious tradition of the school; she claimed that she was a victim of racial and religious discrimination.[39] When she sued, the school invoked the ministerial exception.

Staley recognized that Native American culture and religion are inseparable, and that the line between the "sacred and the profane does not exist in Native American cultures."[40] Given this connection between culture and religion, and the school's mission to expose students to Native American culture and religion, the court reasoned that a teacher was the means by which the school's message was transmitted to the students. Therefore, the court found that the teacher fulfilled a "spiritual function," applied the ministerial exception, and dismissed the case.[41]

III. Evaluating the Ministerial Exception With Respect to Teachers

The question now becomes whether *Guinan* and *Redhead*, or *Staley* and *Clapper*, applied the ministerial exception correctly. Remember that under the prevailing "primary duties" test, "if 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," the employee performs a "spiritual function" and is therefore a minister and covered by the ministerial exception.[42] A straightforward reading of this language seems to favor applying the exception to teachers. The test speaks of "teaching," and of "spreading the faith," and teachers in religious schools do both and see both as important to their mission. Furthermore, courts, including the Supreme Court, have made equally clear that the ministerial exception protects a church's right to decide matters of governance and organization.[43] When the church operates the school, it follows that selecting teachers is a matter of organizing one arm of the church.[44] Given these arguments, the question becomes why courts continue to disagree on applying the exception to teachers.

The answer is that in applying the primary duties test to teachers, the courts rely on their assumptions on two deeper issues. The first is the constitutional source of the ministerial exception. One view on this issue, expounded most recently by Judge Posner, roots the ministerial exception in an Establishment Clause judgment that courts should not "interfere in the internal management of churches as they sometimes do in the management of prisons or school systems."[45] Posner argues that because the state is not competent to adjudicate disputes over "liturgies," "schisms," and other matters of religious doctrine, and because such disputes are often resolved by selecting a minister, courts should not judge employment disputes between churches and ministers.[46] The D.C. Circuit demonstrated Posner's reasoning when it applied the exception to a suit between a Methodist minister and his superiors.[47] The minister claimed that he was denied a promotion because of his age; the bishops countered that they followed their Book of Church Discipline and based their judgment on the "gifts and graces" of the minister.[48] The court dismissed the case, explaining that it could not imagine "an area of inquiry less suited to a temporal court for decision [than] evaluation of the 'gifts and graces' of a minister."[49] Posner, and the D.C. Circuit's position, is partially justified, because Establishment Clause principles do support the ministerial exception.[50]

If the Establishment Clause offers the *only* support for the ministerial exception, the case for applying the exception to teachers looks weak.[51] This follows from the fact that most employment lawsuits revolve around two questions: what are the qualifications for the job, and was the plaintiff fired for poor performance, or some other reason? With clergy members, the courts admit that they cannot decide what qualifies someone for a clergy position or what constitutes good job performance by a clergy member without violating the Establishment Clause. Thus, they apply the ministerial exception to bar cases brought by members of the clergy. By contrast, courts often believe that they can judge whether a teacher was qualified or whether a teacher should have been terminated, and therefore refuse to apply the ministerial exception to teachers in parochial schools. *Redhead* took this exact path, ruling that the case did not involve a dispute over religious doctrine, that the court was capable of determining why the plaintiff was fired, and that the ministerial exception did not apply.[52]

But the Establishment Clause is not the only constitutional source for the ministerial exception. As other courts and commentators have recognized, the Free Exercise Clause requires a robust ministerial exception and supports applying that exception to teachers in religious schools.[53] Justice Brennan's prescient analysis lays the groundwork for why the exception should cover teachers:

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself.[54]

Brennan went on to explain that "[w]hile a church may regard the conduct of certain functions as integral to its mission, a court may disagree.... As a result, the community's process of self-definition would be shaped in part by the prospects of litigation."[55]

A church's ability to define itself and its message turns on the church's ability to determine who will carry that message. As the Third Circuit explained, because a religious community must be free to communicate its religious message, and because a minister is the "embodiment" and "voice" of that message, "any restriction on the church's right to choose who will carry its message necessarily infringes upon its free exercise right to profess its beliefs."[56] And when a church operates a school, selection of teachers is just as important as selection of ministers, because the teacher plays such a pivotal role in communicating the church's worldview to the students. A religious school does not exist merely to teach the "Three R's," but to communicate a religious community's meaning to the children. Many parents who choose a religious education for their children do so precisely because they understand this truth. So did *Clapper*, which saw the "primary purpose" of the Adventist school as theological, not pedagogical, and therefore applied the ministerial exception when *Redhead* did not, even on less favorable facts.[57]

Justice Brennan's warning about allowing a church's identity to be shaped by the prospects of litigation applies to schools. If a school determined that a teacher failed to sufficiently "incorporate the teachings" of Seventh-Day Adventism, or any other faith, into her classroom, how is a court any more fit to judge this determination than to judge whether someone has the "gifts and graces" of a minister?[58] The obvious answer is that a court cannot make such a judgment, and a court that understands the Free Exercise mandate of the ministerial exception will not make such a judgment.

The second philosophical question concerns the nature of religion itself. Is religion merely a private matter, that can be quarantined off into theology classes and worship services, or

is it something that by its nature permeates every aspect of the believer's life? Our current, post-Enlightenment culture often assumes that religion is just a matter of private belief, but few devout believers take so crabbed a view of their faith. As Douglas Laycock points out, "most serious believers believe that the religious aspects of their lives cannot be segregated or isolated from the other aspects of their lives" and "reject the model of religion as something private, reserved for Sunday morning or Friday night, and irrelevant to the rest of the week."[59]

Here, *Staley* looks in the right direction but fails to look far enough: there is no line between the sacred and the profane in Native American religions, but in many other religions that same line is permeable or non-existent.[60] Once again, many parents who send their children to religious schools understand this truth. They do not send their children to religious schools merely to take a theology class, but to participate in "an ongoing tradition of shared beliefs,"[61] and to learn how "their religious commitments are relevant to their other roles" in society.[62]

Turning back to *Staley* and *Guinan*, we see the consequences of these two views of religion. While *Guinan* saw "religion" as something limited to theology classes, *Staley* saw it as something that permeated the entire educational process. Thus, *Staley* found that the teacher performed a spiritual function and applied the ministerial exception, but *Guinan* viewed the teacher as a secular employee and did not. If *Staley* had followed the same approach as *Guinan*, the Indian Community School would have been forced to defend its decision to fire Staley for being "insensitive" to Native American religions in front of a court that rejected the schools' concept of religion. Suffice it to say that such a scenario would not favor the school. Adopting *Guinan*'s limited view of "religion" would leave little room for religious communities to transmit their identity through schools, force religious schools to made decisions about their mission in the shadow of litigation, and even undermine religious liberty in other areas. [63]

Eventually, the Supreme Court will resolve the split over whether teachers in religious schools are covered by the ministerial exception. When it does, it will have to choose between two sets of assumptions in interpreting the "primary duties" test. One set views the ministerial exception as a creature solely of the Establishment Clause and views religion as a private matter than can (and perhaps should) be quarantined off from the rest of life; the other views the exception as critical to the Free Exercise Clause and religion as something that can permeate every aspect of a believer's life. The choice ought to be easy.

Endnotes

1 42 U.S.C. § 2000e-1(a) (2000).

2 Hollins v. Methodist HealthCare, Inc., 474 F.3d 223, 225 (6th Cir. 2007).

3 Joshua D. Dunlap, Note, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 Notre Dame L. Rev. 2005, 2009 (2007).

4 460 F.2d 553 (5th Cir. 1972).

5 *McClure*, 460 F.2d at 558–59.

6 *McClure*, 460 F.2d at 560.

7 *McClure*, 460 F.2d at 560.

8 *See* Rweyemamu v. Cote, 520 F.3d 198, 207 (2d Cir. 2008); Petruska v. Gannon Univ., 462 F.3d 294, 305 (3d Cir. 2006); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1303–04 (11th Cir. 2000); Bollard v. California Province of the Society of Jesus, 196 F.3d 940, 945 (9th Cir. 1999); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463 (D.C. Cir. 1996); Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184, 185 (7th Cir. 1994); Scharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F.2d 360, 362 (8th Cir. 1991); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1170 (4th Cir. 1985).

9 *Rweyemamu* listed the Free Exercise Clause, the Establishment Clause, and a version of the Expressive Association doctrine as possible sources. *Rweyemamu*, 520 F.3d at 205.

10 For recent activity in the courts, see Schleicher v. Salvation Army, 518 F.3d 472, 474 (7th Cir. 2008) (Posner, J.) and *Petruska*, 462 F.3d at 294 (panel initially rejected ministerial exception, but on rehearing accepted it). For recent scholarship, compare Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject Matter Jurisdiction, and the Freedom of the Church*, 17 Wm. & Mary Bill Rts. J., (forthcoming 2008) (arguing in favor of the ministerial exception) and Dunlap, *supra* Note 3, (same), with Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 Fordham L. Rev. 1965, 2004 (2007) (arguing against the exception) and Sara Fulton, Note, Petruska v. Gannon University: *Cracks in the Stained Glass Ceiling*, 14 Wm. & Mary J. Women & L. 197 (2007) (same). For a recent discussion within *Engage*, see Thomas C. Berg, *Ministers, Minimum Wages, and Church Autonomy*, Engage: J. Federalist Soc'y Prac. Groups, June 2008, at 135.

11 *EEOC*, 83 F.3d at 460 ("This case presents a collision between two interests of the highest order: the Government's interest in eradicating discrimination in employment and the constitutional right of a church to manage its own affairs free of government interference."); Oliver S. Thomas, *The Application of Anti-Discrimination Laws to Religious Institutions: The Irresistible Force Meets the Immoveable Object*, 12 J. Nat'l Ass'n Admin. L. Judges 83, 83 (1992).

12 Of course, the Supreme Court might grant certiorari and reject the ministerial exception. Nevertheless, given the unanimity of the courts of appeal, the prolonged silence from the Supreme Court even after *Employment Division v. Smith*, 494 U.S. 872 (1990), and the consequences of a contrary ruling (is the Supreme Court really going to order the Catholic Church to ordain female priests?), I think that scenario is unlikely.

13 *Petruska* , 462 F.3d at 306.

14 *Petruska*, 462 F.3d at 307.

15 Although a reasonable argument exists that the ministerial exception should cover all church employment decisions, *see* Dunlap, *supra* note 3, at 2008, no court has not accepted this argument. *But see* Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 798 (9th Cir. 2004) (Kleinfeld, J., dissenting from denial of rehearing en banc) (arguing that ministerial exception should shield almost all church employment decisions).

16 EEOC v. Hosanna-Tabor Evangelical Lutheran Church and Sch., 582 F.Supp.2d 881, 888 (E.D. Mich. Oct. 23, 2008).

17 All four cases are federal cases, but state courts have also split on this question. *Compare, e.g.*, Weishuhn v. Catholic Diocese of Lansing, 756 N.W.2d 483 (Mich. App. Ct. 2008) (exception applies to elementary school teacher) *with* Coulee Catholic Schs. v. Labor and Indus. Review Com'n, Dept. of Workforce Dev., 752 N.W.2d 341, 344 (Wis. App. 2008) (exception does not apply to elementary school teacher).

18 42 F. Supp.2d 849, 805 (S.D. Ind. 1998).

19 *Guinan*, 42 F. Supp.2d at 850–51.

20 *Guinan*, 42 F. Supp.2d at 851.

21 *See, e.g.*, John Paul II, The Theology of the Body (1997).

22 The court's statement may have been due to poor fact development, because the district court noted that Guinan's description of the class was the only description in the record. *Guinan*, 42 F. Supp.2d at 851.

23 *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp.2d 211, 215–16 (E.D.N.Y. 2006).

24 *Redhead*, 440 F. Supp.2d at 214.

25 *Redhead*, 440 F. Supp.2d at 223 ("Thus, while a religious school employer may validly seek to impose moral doctrine upon its teaching staff, punishment singularly directed at the Hester Prynnes, without regard to the Arthur Dimmesdales, is not permissible.").

26 *Redhead*, 440 F. Supp.2d at 222.

27 The remand was for reconsideration in light of *Rweyemamu*. *Redhead v. Conference of Seventh-Day Adventists,* 566 F. Supp.2d 125, 128 (E.D.N.Y. 2008).

28 *Redhead*, 566 F. Supp.2d at 133.

29 16 F.3d 1208, 1998 WL 904528 (4th Cir. Dec. 29, 1998).

30 *Clapper*, 1998 WL 904528 at *2–3.

31 *Clapper*, 1998 WL 904528, at *4.

32 *Clapper*, 1998 WL 904528, at *7.

33 *Clapper*, 1998 WL 904528, at *7.

34 *Clapper*, 1998 WL904528, at *2.

35 *Clapper*, 1998 WL 904528, at *6.

36 351 F. Supp.2d 858 (E.D. Wis. 2004).

37 *Staley*, 351 F. Supp.2d at 862.

38 *Staley*, 351 F. Supp.2d at 863. For example, the school held pipe ceremonies, a sweat lodge, and traditional prayer ceremonies around a "spirit pole." *Id.*

39 *Staley*, 351 F. Supp.2d at 864.

40 *Staley*, 351 F. Supp.2d at 867.

41 *Staley*, 351 F. Supp.2d at 869.

42 *Petruska*, 462 F.3d at 304 n.6 (quoting *Rayburn*, 772 F.2d at 1168).

43 *Petruska*, 462 F.3d at 306 (citing *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)).

44 Of course, not all religious schools are directly operated by a church. The closer the relationship between a religious school, and a specific church denomination or congregation, the stronger the case for applying the ministerial exception to that school's employment decisions.

45 *Schleicher*, 518 F.3d at 475. For other supporters of Posner's view, see e.g., *Gellington*, 203 F.3d 1299 at 1304; Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L. Rev. 347, 410 (1984).

46 *Schleicher*, 518 F.3d 472 at 475.

47 Minker v. Baltimore Annual Conference of the United Methodist Church, 894 F.2d 1354, 1355 (D.C. Cir. 1990).

48 *Minker*, 894 F.2d at 1356.

49 *Minker*, 894 F.2d at 1357.

50 *Berg*, *supra* note 12, at 136.

51 Some commentators have suggested that the current "primary duties" test itself raises serious Establishment Clause issues, because the prevailing definition of "spiritual function" reflects a "familiar, but by no means universal, view of ministers as employees with leadership or worship roles, or direct responsibilities for the spread of the church's message." Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 B.Y.U. L. Rev. 1633, 1693–94 (2004); *see also* Stephen L. Carter, The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion 142–43 (1994). From this viewpoint, because this test favors a particular type of church, it threatens to "establish" that church through government support. The logical consequence of this viewpoint is that courts should be very deferential towards a church's claim that an activity is "spiritual," and if accepted, this viewpoint would strengthen the case that the ministerial exception should apply to employment suits brought by teachers at religions schools.

52 *Redhead*, 566 F. Supp.2d at 133.

53 *Hollins*, 474 F.3d at 225; *Petruska*, 462 F.3d at 306–07; Brady, *supra* note 50, at 1698.

54 *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring).

55 *Amos*, 483 U.S. 327 at 343–44 (Brennan, J., concurring).

56 *Petruska*, 462 F.3d at 306–07.

57 *Clapper*, 1998 WL 904528, at *7.

58 *Cf. Minker*, 894 F.3d at 1357.

59 Douglas Laycock, *The Rights of Religious Academic Communities*, 20 J.C. & U.L. 15, 16 (1993).

60 *See, e.g.,* Brady, *supra* note 47, at 1697 (stating that "where Catholic organizations are involved, such a division between secular and religious activities is not possible" because "[f]or Catholic Church, social services activities are no more secular than worship and preaching."). Many Protestants agree that the divide between the secular and the scared does not exist. Abraham Kuyper, a turn-of-the-century Dutch Calvinist pastor who later served as Prime Minister of the Netherlands and helped found the Free University of Amsterdam wrote that "no single piece of our mental world is to be hermetically sealed off from the rest, and there is not a square inch in the whole domain of our human existence over which Christ, who is Sovereign over all, does not cry: 'Mine!'" *Sphere Sovereignty*, in Abraham Kuyper: A Centennial Reader 488 (James D. Bratt ed., 1998). However, Kuyper's statement should not be taken as a call for theocracy, and readers familiar with Kuyper will not make that mistake. For a short discussion of Kuyper's thought and influence, see David A. Skeel, Jr., *The Unbearable Lightness of Christian Scholarship*, 57 Emory L.J. 1471, 1507–09 (2008).

61 *Amos*, 483 U.S. 327 at 343–44 (Brennan, J., concurring).

62 Laycock, *supra* note 54, at 16. Indeed, in other arenas, the courts have recognized the religious character of religious schools. Intellectual consistency suggests that they should do the same here. *See, e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) ("In short, parochial schools involve substantial religious activity and purpose.").

63 For example, in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), over whether a university could fund student publications by all student groups except religious groups. If one thinks that religious commitments cannot be isolated from other aspects of a believer's life, it follows that the university's suppression was unconstitutional viewpoint discrimination because it limited speech on any issue that came from a religious viewpoint. *See Rosenberger*, 515 U.S. at 831–32 (majority op.). By contrast, if one sees religious beliefs as private matters unrelated to other areas of life, the university's suppression looks like permissible content discrimination, because the university identified one particular topic (religion) that can be separated from all other topics and denied funding. *See id.*at 898–99, (Souter, J., dissenting).