Richard W. Garnett*: Thank you. It is a treat to be here with you and with my friend and colleague Professor Lash. It is also a bit bittersweet, because I wanted very much to lure Professor Lash to Notre Dame and he chose you instead. Congratulations.

I want to say at the outset of my remarks that anything Professor Lash says that is contrary to what I'm about to say is what you should believe.

Most of you don't remember—I am embarrassed that I do—the 1988 presidential election. One day, way back then, then-Vice President George H.W. Bush was out on the stump, recalling his experience as a young fighter pilot when he was shot down over the South Pacific in World War II. This is what he said (and, even if you don't remember the election, you might have heard Saturday Night Live's Dana Carvey imitating the former President's voice): "Was I scared, floating in a little yellow raft, off the coast of an enemy-held island, setting the world record for paddling? Of course I was. What sustains you in times like that? Well, you go back to fundamental values. I thought about Mother and Dad and the strength I get from them. I thought about God and faith . . . and the separation of church and state."

Now, I hope this train of thought strikes us as a bit absurd. At the same time, it's understandable and perhaps even entirely American that "God" and "faith" couldn't be invoked by the would-be President as fundamental values without the awkward addition of "and the separation of church and state." It says a lot, better or worse, about how we Americans think about the content and the implications of what President Clinton once called our "first freedom," that is, the freedom of religion.

As I'm sure all of you know, an earlier president, Thomas Jefferson, in a campaign letter to the Danbury Baptists, once professed his "sovereign reverence" for what he saw as the decision of the American people to constitutionalize church-state separation. In doing this, he supplied what was going to become for many people the authoritative interpretation of the First Amendment. Professor Dreisbach has noted that "no metaphor in American letters has had a greater influence on law and policy than Thomas Jefferson's 'wall separation' between church and state." We're familiar with these words, but that doesn't mean we agree about their meaning.

Notwithstanding Jefferson's reverence for the concept of church-state separation, and notwithstanding the comfort that it supplied to our paddling 41st President, the idea remains contestable and controversial. What does it really mean to say that "church" and "state" are "separate"? In what sense does the Constitution require that separation?

You might recall a more recent election in Delaware, when a candidate for the Senate caused a little bit of eye rolling and chuckling when she suggested that the First Amendment doesn't say anything about church-state separation. As it turns out, her critics were a bit too quick to pounce because, in fact, the First Amendment doesn't say anything about church-state separation. Yet it is the case that church-state separation as an idea, as an institutional arrangement, if it's properly understood, is a crucial dimension of the religious freedom that our Constitution does and should protect.

It was a mistake, therefore, for Representative Katherine Harris of Florida to say, a few years ago, that church-state separation is a "lie" that is told to keep religious believers out of politics and public life. John Courtney Murray, the American Jesuit and theorist of religious freedom, put it better when he said that church-state separation, properly understood, is not an anti-religious principle but rather a "policy to implement the principle of religious freedom."

True, the idea has been incorporated into our constitutional law in controversial ways. It has often been applied in mistaken ways. But there is a core to the idea that is important, and I think if we can scrape off the error that has built up on it, we can see that there is something there that we do want to embrace, not because we are hostile to religion, but because we understand that it is a dimension of real religious freedom.

The specific topic that Professor Lash and I are going to talk about is the question of whether, when, and why religious institutions should be able to discriminate and, more particularly, to discriminate in ways that would be unlawful for Wal-Mart, 7-Eleven, or General Electric. The Supreme Court, much to the delight of law geeks like me, has agreed to review a case called *Hosanna Tabor Evangelical Lutheran Church & School v. EEOC*. Full disclosure: I am doing an *amicus* brief in this case. I'm not neutral. I'm on one side, and you'll be able to figure out what side that is.

This case is an employment discrimination case of a kind that might seem utterly garden-variety to you, and yet it raises what I think are some of the most important questions of religious freedom and church-state relations that the Court has considered in decades. I want to tell you a little bit about the case and the doctrine it involves, and then suggest why I think this doctrine—the so-called "ministerial exception"—is important to church-state separation, correctly understood, and to the First Amendment, correctly understood.

A couple years ago, *The New York Times* was doing a series called "In God's Name," and the point of the series was to "examine how American religious organizations benefit from an increasingly accommodating government." The articles were interesting and informative, but their suggestion was that religious institutions were unfairly benefitting from a range of special deals, tax breaks, and exemptions. The concern was raised by the writer that "the wall between church and state is being replaced by a platform that raises religious organizations to a higher legal plane than their secular counterparts."

One of the installments in the series was called "Where Faith Abides, Employees Have Few Rights," and the point of this piece was to examine what the editors called the "most disturbing instance of favoritism for religion," namely, that

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employment discrimination by churches and religious entities is not only common but is also being protected by courts. In other words, the *Times* complained, courts are creating a "right to bias." This "right to bias," the ministerial exception, was, according to the writer, "a subsidy to religion that undermines core political values of equality and nondiscrimination."

The case that the Supreme Court has taken up is precisely what the *New York Times* was complaining about. Cheryl Perich was a teacher at a pervasively-religious Lutheran school. Actually, she wasn't just a teacher, she was a commissioned lay minister. She taught "secular subjects" but also led the kids in prayer regularly and taught religion classes. She was hired by the congregation. Eventually, she was fired.

The underlying facts are complicated, and I think it is fair to say that reasonable people can and do disagree about whether or not she was treated as well as she should have been. In any event, the district court said that it couldn't hear the case. It dismissed, invoking this ministerial exception, a rule that provides that religious institutions, in the context of a particular kind of relationship, should not be supervised or second-guessed by courts in the context of employment discrimination cases. I'm going to tell you a little bit more about that doctrine and where it comes from. The first thing to note is that it is different from another religion-related exception which some of you, if you've studied employment law, probably already know about.

Title VII prohibits employment discrimination on the basis of race and sex and religion and other categories, but it exempts religious institutions in this way: Religious institutions are allowed to take religion into account when they're hiring and firing. The ministerial exception is different. The Title VII exemption that religious schools get to discriminate is limited to religion-based decisions. The ministerial exception is both broader and narrower than the Title VII rule. The ministerial exception says that, with respect to certain kinds of positions, ministerial positions, religious institutions are in effect allowed to discriminate on the basis of other grounds as well, grounds that otherwise would be prohibited—race, sex, disability, age, and so on.

This ministerial exception has been developed by courts over the course of about thirty years, although there does not seem to be a consistent theory about the constitutional basis for it. Is it grounded in the Establishment Clause? The Free Exercise Clause? In the relevant statutes themselves? I am going to cheat, and skip over these questions. Where we are today is that every circuit in the country has recognized that there is a ministerial exception, and that one of the things it means is that employment-related lawsuits that might otherwise go forward if they were being brought against Wal-Mart should be dismissed if they are brought against churches. You might think, as the *New York Times* writers did, that this is kind of strange, or even worse. After all, why would we give some institutions a right to do something that we've decided institutions ought not to do, namely, discriminate in employment?

In 1972, in a case called *McClure*, one of the courts of appeals said, "The relationship between an organized church and its ministers is its lifeblood. Just as the initial function of selecting a minister is a matter of church administration and governance, so are the functions that accompany such a selection." "There is," the court continued, "a spirit of freedom for religious organizations and independence from secular control or manipulation that the Constitution protects."

One of the themes that sounds in all of the ministerial exception cases, and which I suspect the lawyers will be arguing about in the *Hosanna-Tabor* case, is that the right to religious freedom and to religious exercise belongs not just to individuals in their personal confrontations with government, but institutions and communities as well. So a religious community, institution, association, school, church, or congregation has the right, just as you and I have the right, to religious liberty. And one of the things that religious liberty includes for a church, religious community, or association is the right to decide questions like, "Who is going to speak for us?" and "To whom are we going to entrust the formation of our members, the propagation of our teachings, and the development of our doctrines?"

There are a number of strands in the Supreme Court's religious freedom and church-state law that feed into this ministerial exception, and one of the things I hope the Supreme Court will do is sort them out a little bit. For example, there are cases that stand for the proposition that churches enjoy something like "autonomy" in terms of their internal governance. Remember, the classic church-state problem is the king wanting to pick the bishops, and this is the kind of thing that the First Amendment does not permit.

There is also a strand of case law with which you are probably familiar involving the so-called *Lemon* test, which says, among other things, that we are wary of government actions that "entangle political and religious authorities." Certainly, one concern we might have about employment lawsuits involving ministerial positions is that they are likely to entangle political authority (that is, the courts) and religious authorities (the employer). How is a court to decide whether or not a religious authority is telling the truth when it says, "We fired our minister because he is a heretic"? We don't have heresy trials in our secular courts—at least, we don't admit that we have them—but we permit religious institutions to take doctrinal purity into account if they want to.

Finally, there are cases that have to do with things like church property disputes, and that teach that courts cannot make decisions about religious questions or doctrines. That is, it can't be the province of a secular court to decide what a church's doctrine really is, or really should be.

Putting all these ideas together, the courts have concluded that that there has to be something like the ministerial exception that prevents courts from adjudicating some employment law cases that they otherwise would hear.

What's the controversy, then? Why is this case before the Supreme Court if every circuit in the country agrees that the doctrine exists? Well, every circuit in the country agrees that the doctrine exists, but they do not agree about why it exists and they do not agree entirely about what the doctrine's content and contours are. You can probably spot for yourselves what some of the questions might be: It's one thing to say that religious institutions are protected by a ministerial exception. Well, what counts as a religious institution? What if a mega-church owns

a Starbucks? Are baristas covered by a ministerial exception? That seems like a relatively easy case. On the other end of the spectrum, there are also easy cases: Could, for example, the government really tell an Orthodox Jewish congregation that it had to, say, select a woman to be its Rabbi? Somewhere in between are the tricky cases. In these cases, courts have to wrestle with the questions "what kinds of institutions are covered?" and "what kinds of positions are covered?"

In the *Hosanna-Tabor* case, my sense is that everybody agrees that the institution, a religious school, is covered. This is a school that advertises to the world that it aims to provide a "Christ-centered environment" for educating children. It's a pervasively religious school. It is, like so many parochial schools, a thorough-goingly religious mission that nonetheless provides a quality secular education. What about the position? Again, you can imagine a spectrum. The person who is the religious education director of a school is almost certainly going to be covered in any circuit. But what about the person whose job it is to drive the school bus? Maybe we think that this person shouldn't be covered by the ministerial exception. How do we decide?

In *Hosanna-Tabor,* what the Sixth Circuit did is compare the amount of time the teacher spent doing things that the court thought were secular to the time spent on tasks that the court thought were religious. It tallied up the hours and decided that more minutes were spent doing secular things and therefore concluded that the ministerial exception did not apply.

The *amicus* brief that I'm going to be working on is going to say that this "count up the minutes" approach is not good enough and that instead we need to step back a bit and recognize that somebody can be a math teacher who spends ninety-nine percent of his or her time teaching math to kids in a school like this one and yet, from the perspective of the school, still be involved in the religious formation of the students. We should want the ministerial exception to cover someone like that.

But, of course, the challenge is to anticipate what the Court's hard questions are going to be, and we know what one of them is going to be. One of the Court's hard questions for the lawyers is going to be, "Where is the line? Where is the limit? Are you saying that every single employee is covered by the ministerial exception, and therefore no employee of a religious institution can ever bring a job discrimination case?" The lawyers for the school are probably not going to want to say that. On the other hand, the hard question for the other side is going to be, "Are you saying that if a church has a pastor who happens to be spending fifty-one percent of his time on a capital campaign, that pastor is no longer covered by the ministerial exception?"

I don't teach employment law. I'm not an expert in the area. Why am I so interested in this case? It seems to me, circling back to the former President Bush, that if the separation of church and state means anything, it is not that the Constitution requires a so-called naked public square. It is not that it is unconstitutional for President Obama to say "God bless America." It is not that there is a constitutional problem with a town called Sacramento. It is not that courts should measure the distance between a publicly displayed crèche and the accompanying reindeer.

What church-state separation is really about, it seems to me, is the crucial distinction between political authority and religious authority, a distinction that does not reflect fear or hostility with respect to religion but rather, I think, respect. This distinction does not, of course, preclude cooperation. My hope, then, is that when the Court is working through this technical question of employment law, it will at the same time take the opportunity in its role as teacher—the Supreme Court is often a teacher; it helps to form our constitutional values—to help reclaim this idea of church-state separation.

In so many of our political debates now, there's one side that wants to say that the separation of church and state is a myth, that it's anti-religious; that it unfairly requires believers to hide their lights under bushels or to hold their tongue in public debates. Again, church-state separation does not have to mean these things. What it can and should involve is an institutional arrangement that keeps the authority of the state from trying to answer religious questions and to direct the internal operations of religious communities. Such an arrangement is going to be good for religious freedom because it allows religious communities, the communities that are in charge of forming those of us who are religious believers, to operate and develop on their own.

Does this mean religious communities are above the law? Of course not. At least, it shouldn't mean that. It might well mean, though, that there are some questions about what happens in a religious community—like how to interpret a passage of Scripture or what should be the standards for administering the sacrament—that secular courts just don't answer, not because the questions are unimportant—they're very important—but because of a genuine respect for the limits of the competence of secular government.

This way of thinking about church-state separation is not new. It is ancient. From St. Augustine, to Roger Williams, and forward, this institutional and jurisdictional approach to separation has been at work. Accordingly, our Constitution does separate church and state not to confine religious belief, not to silence religious expression, but to curb the ambitions and reach of governments. In our laws, as Pope Benedict put it not long ago, "Caesar recognizes that he is only Caesar and forswears any attempt to demand what is God's."

Now, I'll let Professor Lash correct my errors.

Kurt T. Lash*: It is an absolute pleasure to be here and to talk and comment on the theory of church-state separation with my good friend, Rick Garnett.

Had I gone to Notre Dame, the person who brought me there would have been Rick Garnett. He does extraordinary work on constitutional theory and theory of religious freedom as well, and he's far too modest. He is the expert on the theory of religious freedom and religious freedom in American constitutional jurisprudence here, and it's an honor to be here simply to give my thoughts and my comments on his analysis.

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What I'd like to do is just spend a little bit of time backing up and talking about theories of religious freedom and some questions that I think are raised by this particular case and also by the principle of church-state separation of the kind Professor Garnett was talking about. I think it's wonderful the way he began by talking about the foundational principle of the separation of church and state and how it is so broadly accepted as being a fundamental constitutional principle of freedom under the First Amendment. It's quite true that it's not in the Constitution. You have, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

There's no separation of church and state, but that's how those words have quite often been interpreted, at least for the last 150 years or so. So much so that maybe if I were in a raft somewhere in the Pacific Ocean and was thinking about things that were important to me and God and family and then maybe even the society in which I have staked my life and my family's life and the freedom represented here in this country, I don't know if I would actually articulate separation of church and state. But the idea that I've been blessed by freedom, I think, might occur to me as something that would sustain me in difficult times and one of those theories that's quite common for people to think about. What is our freedom? Well, separation of church and state.

As Professor Garnett has spoken, he is quite right. In this very precise doctrinal issue as to whether or not a religious institution should have autonomy from antidiscrimination laws, that doctrinal question is undecided. It's been addressed by different courts. It hasn't been addressed in a specific way by the Supreme Court, so it is in play. And in determining the scope of autonomy that religious institutions ought to have, the Court will back up and think about first principles, and they are almost certainly going to back up and think about the principle of separation of church and state because it informs so much of our jurisprudence.

But what I just briefly would like to address is, where does that principle come from and how ought it to be defined? Here, I'd like to break the analysis into three separate parts. You can think of separation of church and state in terms of pure theory, perhaps a theory of Justice. You can think of it as a principle that informs the text of the Constitution; the proper interpretation of the First Amendment would be separation of church and state. Or you can think of it in terms of precedent. Whatever we think of theory, whatever we think of text, the Court has adopted that principle, and it plays out in a particular way in jurisprudence.

Now, as far as theory is concerned, I think one of the first questions we have to think about is, where does the theory of separation of church and state come from? Is this a religious principle? Is this a principle which maximizes the people's ability to thrive in their relationship with a deity? In other words, is it foundationally something that you would accept only if you have religious beliefs? And if that's the case, if this is a theory of religious freedom which is based upon your belief in a deity or your belief in certain religious principles, why should it be approached in a supportive manner by those who do not have religious beliefs? This is a question of how we come together as a polity and what will our foundational principles be, and why should a secularist adopt a theory of separation which maximizes a theory or belief that they do not share? So, is that what's driving this? Is this a religious principle? If so, then we have some problems as to why it should be developed by courts that are not based upon any particular religious theory.

Perhaps our recourse then is to text. We've had a society that has embraced certain religious-based doctrines and certain ideas of freedom, which include religious freedom, and some of those ideas have been enshrined in the text of the Constitution. This issue has been decided. We do believe in religious freedom. What makes us think that separation of church and state is part of the text of the Constitution? That is a difficult issue, and people have come to different conclusions about it. The text itself speaks of free exercise of religion. It speaks of non-establishment. But it doesn't necessarily spin out to separation of church and state, and it certainly doesn't necessarily spin out into exemptions of religious institutions from general anti-discrimination laws.

So we would have to know a little bit more. How do we interpret this text? Where do we go for tools for interpreting the text? Well, perhaps recourse would be to theories of popular sovereignty. If the people have the right to enshrine the text, then they should have the right to tell us what that text is supposed to mean. That might lead to principles of original understanding or originalism. And the courts generally do make that move in their jurisprudence. They talk about what was the original understanding of the text. But at the time of the Founding, there would appear to be a number of different ideas of religious freedom, and not all of them embraced what we would understand as separation of church and state.

You could follow the views of people like President George Washington, who very much believed that government should be involved in the support and the promotion and the pruning of religious exercise in order to protect the proper flourishing of democratic society. So neither he nor those who followed his particular model were separationists. And there are many states that had religious establishments where the government was involved. Massachusetts, for some time, at the time of the Founding and for years afterwards, believed in government involvement, not government separation.

There were separationists, of course, such as Thomas Jefferson. He wasn't involved in the drafting of the Bill of Rights, but his theory of the separation of church and state, that individual freedom best flourished if you separated government power and religious doctrine, did inform a number of members at the time of the Founding. This theory would spin out in particular ways that would lead to a hands-off approach from the government in its interference with religious institutions. But Jefferson's views were just a minority. There was also a third view, a view under which there wasn't any particular position that ought to be enshrined in the Federal Constitution. They wanted to leave the matter to individual debate in the states—leave Massachusetts free to establish if Massachusetts wanted to; leave Virginia free to disestablish if Virginia wanted to.

So I think there's a good argument that all of these views were in play at the time of the Founding: separationism, pro-government support, and federalist—federalist, meaning just

leave it to the states. Which is the one that we should adopt, and why? There are major implications depending upon which ones we adopt. If we adopt Washington's view, then government should be allowed a great deal of control over the operation of religious institutions in order to make sure that proper religious freedom develops. That certainly would not be a separationist view.

If we adopt Jefferson's approach, it would be fairly hostile to the concerns of religion. His separation of church and state was based on the idea that religion actually distorts the proper functioning of the democratic process. And so, presumably, Jefferson would be in favor of any kind of law that controlled those crazy, zealous religious institutions and would minimize their impact on people's lives—and hopefully would lead everyone to become a Unitarian someday. So that wouldn't necessarily get you to any strong religious freedom-maximizing principle.

And federalism doesn't lead you to any kind of maximizing principle. Some scholars have said that there was no religious freedom principle at all at the time of the Founding. They simply shunted it off to local officials and tried to keep the federal government out of the subject. If that is the principle that you approach, then, as long as anti-discrimination laws don't address the subject of religion or don't particularly target religion, then maybe even the federalist view is satisfied by allowing anti-discrimination principles to affect the operation of religious institutions, as long as they don't target particular religious beliefs.

You can come up with a Madisonian argument. I think Madison was very much in favor of religious freedom, and I would agree with those scholars. Professor Garnett has talked about this in his writings. I think there are ways that you can identify founders who wanted to maximize religious autonomy. But the point is that the text isn't self-defining, and the history is very difficult. There were a variety of views in play at the time of the Founding. So maybe we can't go to theory. Maybe we can't go to the historical understanding.

Perhaps our recourse in the end is to precedent. History is not clear. We can argue about whether or not the Court has properly engaged itself in these issues, but let's consider how the Supreme Court has approached this issue and see if precedent, at the very least, can help us resolve this particular question.

Precedent is difficult as well. When it comes to the free exercise of religion, the Court has taken the position that as long as the government doesn't discriminate against religion, it can regulate religion up the wazoo, or whatever the particular phrase might be.

There is no general remedy from generally-applicable laws under the Free Exercise Clause in cases like *Employment Division v. Smith*. As long as you don't discriminate, as long as your regulations affect everybody equally, then it can affect Starbucks or it can affect the Catholic Church or it can affect the Starbucks in the Catholic Church. As long as it's all equal, then it's fine.

In *Smith*, you can find some preservation of precedent that maybe leaves room for church autonomy, and I think it does leave room for church autonomy. But the thrust of *Smith* is equal treatment. So if that's the thrust, if that's the direction in which the Court is going, then it doesn't look good for the church. It looks more like the Court is heading toward equal treatment to be some of the Free Exercise Clause. What about the Establishment Clause? It's the same thing. Recent jurisprudential developments regarding the Establishment Clause by the Supreme Court head toward equal treatment.

For example, regarding government funding of religious institutions, it used to be separation of church, and no government could end up in the hands of religious institutions. The Court has changed that. Now it adopts a position that says, as long as the funding is equal, as long it's structured so that it ends up in both secular educational institutions and religious educational institutions, there's no skewing in favor of religion or against religion; there's equal treatment, then by and large it's perfectly proper for there to be equal treatment.

That doesn't perfectly resolve what the Court is going to do when it comes to the ministerial exception. But if that is the thrust of the direction of the Court's current jurisprudence, then it doesn't look good for the church. The Court's jurisprudence under both the Free Exercise and the Establishment Clauses seems to be heading in the direction of equal treatment, and no particular favored treatment or disfavored treatment of religion. So, if that's the thrust, then it seems to me that the autonomy case for the church in this case is fairly difficult. It's in danger.

One final thought: Maybe we should be thinking about this as a freedom of association case. There's an area of jurisprudence that might work in the favor of the church in this instance. In cases like *Dale*, the Boy Scout case, and in cases like *Hurley*, the parade case, the Court indicates that associations and expressive associations should be able to control their own membership and, in particular, ought to be able to control those people who have potentially influential roles—leadership roles, teaching roles, things along those lines—and that they should be associations immune from anti-discrimination laws. So, if anywhere, I think jurisprudence that's developing and that could be in favor of the church is under the Freedom of Association Clause and not under the provisions that are supposed to be protecting religious liberty.

I would like to close with this: How can it be that, under the American Constitution, if we're dealing with the thrust of precedent, if religious freedom is to be pursued, it can't be pursued under the Religion Clauses. The Constitution no longer provides any special protection for religion. You would have to find it someplace else. That, I think, is an indictment of the Court's jurisprudence all by itself, and I'd simply like to leave that provocative statement as my close.

Thank you for coming and thank you for being here with us today.

Professor Garnett Response: As I would have predicted, all of what Professor Lash says is correct. It is true that, with respect to exemptions, the *Smith* case says that the task of dealing with the incidental burdens on religious exercise that are caused by generally applicable laws is for the political process, and not for unelected federal judges. And in the context of the Establishment Clause, we've also moved to an equal-treatment approach. Where, then, can we find the grounding for this ministerial exception? As you heard, one possibility might be

this Boy Scout case and freedom of association. I share Professor Lash's surprise at the idea that the only way to protect religious freedom is to avoid the two clauses that actually speak about religion and go to a third one.

But here's another possibility, and it's one that I hope I remembered to mention when I was talking before. Notwithstanding the equal treatment thrust in both *Smith* and in the funding cases, it's still the law that secular courts are not supposed to make religious decisions, or decisions about doctrine. It seems likely that the grounding for the ministerial exception is going to be on this rule.