Hosanna Tabor Ruling a Win for Religious Freedom
Richard W. Garnett
USA Today
Jan 11, 2012

At a time when the elected branches of government seem divided and dysfunctional, and when candidates in primary elections struggle to magnify every disagreement, it was nice of the Supreme Court, led by Chief Justice John Roberts, to remind us today that clear, efficient, consensus, and correct decisions about things that really matter are still possible.

The justices came together in a closely watched religious-freedom case called Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC to affirm, unanimously, a foundational principle: In a constitutional democracy like ours, secular governments lack the power to resolve religious disputes, to answer religious questions, or to select religious ministers.

The facts of the case were described in USA TODAY last spring: A former teacher at a church-run Lutheran grade school sued the church for disability-based discrimination after the church rescinded her "call" as a "commissioned minister" and fired her as a third- and fourth-grade teacher. Although the federal trial court dismissed the case, the Court of Appeals for the Sixth Circuit decided that, notwithstanding her "call," the teacher's "primary duties" were secular, rather than religious, and that the case could go forward.

Writing for a unanimous court, Chief Justice Roberts insisted, clearly and directly, that the "authority to select and control who will minister to the faithful is the church's alone." If an antidiscrimination lawsuit attempts to interfere with such matters, the First Amendment does not permit it to proceed.

Lawyers for the federal government sided with the teacher, and advanced the bizarre position — one that no courts and very few scholars or experts endorse — that, notwithstanding the First Amendment's protections for religious freedom, secular courts should be able to second-guess most decisions made by religious communities and institutions about their ministers, and to treat them as garden variety employment-discrimination cases. This view was characterized by the chief justice as "remarkable," "extreme," and "untenable," and it received no support, from any of the justices.

As the chief justice observed, taking readers back to 1215 and Magna Carta, "controversy between church and state over religious offices is hardly new." Indeed, it is not, and the court's decision serves as a reminder that the values and principles at stake in such controversies are as important today as they ever were. Our Constitution protects religious freedom by distinguishing between — that is, by separating — religious and political offices and authorities. This is the point, the justices told us, of the Free Exercise and Establishment Clauses. These provisions reflect the idea, which is as powerful today as it was in centuries past, that the power of secular
governments is, and should be, limited, and that religious freedom includes the freedom of religious communities and institutions to decide religious questions for themselves. "The church," the chief justice observed, "must be free to choose those who will guide it on its way."

To be sure, the court's decision does not answer every question that might arise in a discrimination lawsuit against a religious institution, and it doesn't provide a mechanical rule for distinguishing "ministerial" employees from others. It was enough, for purposes of this case, for the chief justice to note that the teacher's "job duties reflected a role in conveying the Church's message and carrying out is mission." That she also performed "secular" duties does not change this fact.

Still, at a time when we have become accustomed to fractured, sprawling, and unstable rulings, and to decisions that divide the justices on ideological lines, it is striking that the court in this case spoke so plainly, and correctly identified and affirmed the bedrock underneath the dispute's particular facts: If "the separation of church and state" means anything, they told us, it means that the government may not "(interfere) with the decision of a religious group to fire one of its ministers."

What's more, the religious freedom protected by the First Amendment is enjoyed not only by individuals, on their own, but also by religious communities, institutions, and schools, which have the task of forming believers in the faith and passing it on to future generations. To require a church to accept an unwanted minister, the chief justice correctly emphasized, "(deprives) the church of control over the selection of those who will personify its beliefs."

Some will complain that the court's ruling and the ministerial exception somehow put religious institutions "above the law" or rest on the mistaken assumption that churches always act as they should. They do not. As we are all too aware, religious institutions and leaders sometimes behave very badly. And, when they violate applicable criminal and civil laws, they may and should be held accountable. However, the Hosanna-Tabor case does not put churches "above" the law, it simply reminds us that the law's reach is limited, that there are some matters and relationships to which it does not apply, that there are, in a free society, some things that are not Caesar's.

Richard Garnett is a professor of law and associate dean at the University of Notre Dame and a senior fellow at the Center for the Study of Law & Religion at Emory University.