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### October 9, 2011: Why Does There Need to be a Ministerial Exception?

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Title: Why Does There Need to be a Ministerial Exception?

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10/9/2011—For years, the lower courts have applied the so-called ministerial exception to allow churches and other religious groups to avoid application of some anti-discrimination laws. So, for example, a sex discrimination challenge by a woman who wanted to become a Catholic Priest would fail. The courts have done this, however, in direct contradiction to a 1990 case, *Employment Division v. Smith*, in which the Supreme Court, in an opinion by Justice Scalia, of all people, held that generally applicable laws can never violate the Free Exercise Clause. The relationship between the ministerial exception and *Smith* has never been clear. So, it was mildly amusing to note Justice Scalia's surprise at oral argument last week when the United States urged the Court to jettison the notion of a ministerial exception altogether and go to a balancing test instead, in *Hosanna-Tabor v. EEOC*, in which a woman charged that she was wrongfully dismissed from a teaching position at a Lutheran school. I believe that the teacher claimed she was dismissed because of a disability and the school claimed it was because she did not accept church teaching. Although denying that there was any discrimination, the church claims that anti-discrimination laws should not apply in this situation. The odd thing about all this is the question of just where the ministerial exception comes from. The obvious answer is the Free Exercise Clause of the First Amendment, although Patrick Garry, the author of *Wrestling With God*, might say that it comes from the Establishment Clause (he argues that free exercise protects individual liberty, establishment protects institutional autonomy). But *Smith* says that the Free Exercise Clause has no application since anti-discrimination laws are generally applicable. It is time for the Court to get out of the common law constitutionalism it is doing here and get back to the text, which is a strange thing to have to say to Justice Scalia. Time to overrule *Smith* and get the Free Exercise Clause back into the Constitution.