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Title: The New Foundations of the Ministerial Exception

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1/12/2012—There was something odd about the wonderful panel at the AALS Convention that debated the ministerial exception that the Supreme Court has now unanimously upheld. Two of the panelists arguing in favor of the exception, Chris Lund and Douglas Laycock, would not be considered pro-religion in the conventional sense—both believe for example that the Pledge of Allegiance is in principle unconstitutional. Their support of the ministerial exception could not really be based on history or the need for an unfettered religious presence in society. So, upon what was their support ultimately based—what underlying worldview was being urged? (It also struck me as odd that two supporters of employee rights would want to see the ministerial exception overturned, since the predictable consequence would have been to ultimately weaken employments rights for everyone, much as Justice Harlan once pointed out that applying the jury trial right to the States just meant the right no longer required a jury of twelve). Although only mentioned once on the panel, I think the worldview at stake was the “two realms” understanding—that the State and the Church operate in separate domains. But there are problems with this view. First, we as a society do not really believe it. The King’s criminal law now reaches into the churches, fortunately, and a capitalist society will always ensure that ministers’ contracts are honored by churches, in court if necessary (as the majority opinion in *Hosanna-Tabor* predictably reserved). But neither do religious believers accept the two realms. For separate realms can also mean marginalization of religion into a private realm. The next time believers want a national motto with the word God in it, the objection will be raised that State and Church are indeed separate, as the ministerial exception seems to imply. The basis of the ministerial exception has to be something quite different—that it is precisely because churches do not operate in a separate realm that the ministerial exception stands for a limit on the omnipotence of the State in any of its activities (and this has been a defense of the symbolism of one Nation under God as well). Of course if this is the case, then in principle the ministerial exception could be available to groups that are not now considered religious and it suggests that *Smith* was wrongly decided since the Free Exercise Clause also stands for the proposition that the government is not omnipotent even in its legitimate activities. *Smith*’s justification is that, as a practical matter, judges do not know how to harmonize robust religious liberty with the legitimate needs of government.