



Written by [Bruce Walker](#) on October 6, 2011

High Court Hears Fired Lutheran Teacher's Church-State Case

What does “separation of church and state” really mean? Many point out that the phrase is not found anywhere in the Constitution. Rather, it was mentioned by Thomas Jefferson, after the Constitution and the Bill of Rights were adopted. Others note that at the time the Constitution was adopted, about half the states had established state churches and that, although these states on their own ultimately disestablished these churches (ended official state religion), the federal government and federal courts were not involved in this process at all.



The 14th Amendment, not the 1st Amendment, is technically at issue when anyone raises the issue of separating state government operations from religion. Based upon the “Incorporation” principle, after the Civil War and the Reconstruction era, the Supreme Court gradually found various parts of the Bill of Rights to then apply to state governments because the “due process of law” section of the 14th Amendment was deemed to also implicitly include the federal Bill of Rights.

Each state had already incorporated into its own constitution a bill of rights, and often these state constitutional rights were more robust than were the federal Bill of Rights. But providing a federal right under the 14th Amendment allowed federal judges to do what they had almost never done before: intrude into the operation of fundamental rights at the state level.

According to ABC News, now the Supreme Court is hearing a case “testing when people who work for religious organizations can sue for job discrimination.” The federal judges are asked to determine whether private religious denominations have to comply with certain federal civil rights standards.

The Hosanna-Tabor Evangelical Lutheran Church and School of Redford, Michigan (pictured above) has been sued by a former teacher, Cheryl Perich, who alleges that she was fired in violation of the federal Americans with Disabilities Act. In 2004 Perich was not able to return to work at the school because of the sleep disorder narcolepsy, and she was terminated as a teacher.

She complained to the Equal Employment Opportunity Commission, which filed suit for violation of the Americans with Disabilities Act. The federal district court judge dismissed the case, saying that the act’s “ministerial exception,” which prevents government from interfering with church affairs, applied. The 6th Circuit Court of Appeals, however, reinstated the lawsuit, finding that Perich’s primary duty was as a teacher of non-religious subjects.

Now the Supreme Court will hear the case, and already there is a sharp division among the justices. Justice Ruth Bader Ginsburg, for example, has said that Perich ought to be held to the same standards as an ordinary employee, which would mean that she did not fall under the church business exception. Douglas Laycock, counsel for the church, argued that because Perich was also a lay minister, her jobs overlapped. “If you teach the doctrines of the faith, you are a minister,” Laycock said.



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Justice Samuel Alito has cautioned that if federal courts get into the business of determining what is “church business” and what is not, or who is a “minister” and who is not, then the federal government will end up deciding who is an official minister of a church and who is not. “You cannot get away from evaluating religious issues,” Alito warned.

The State of Michigan, through Attorney General Bill Schuette, has filed a brief on behalf of the church as a friend of the court. The Attorneys General of seven other states — Alabama, Florida, Indiana, Louisiana, North Dakota, Oklahoma, and Texas — have joined in that brief. These Attorneys General point out in their brief that once the religious aspect of employment becomes subject to government interpretation, there would be no clear way to draw a line of demarcation.

A reflection on the duties of priests, ministers, and rabbis shows just how easily these lines could be blurred. Each of these three types of clergymen, in the normal course of his work, may give counseling to those facing drug or other addiction problems. Likewise, many churches insist that engaged couples participate in a course of counseling by the clergyman before they are married. Hospital visits are pastoral work, but may also lead into a number of different areas of life in which the clergyman may be giving information, advice, or help.

Outside of the United States, but potentially still subject to its laws, would be the work of many thousands of missionaries whose principal activity is to teach as did Ms. Perich, or provide dental care, help prepare clean water supplies, or perform surgery on adoptable children with curable deformities. Is this religious work? The missionaries are doing their work for the love of God. When Christ enjoins people to seek out the lonely, the hungry, and the afflicted, is that a social welfare message or a holy directive?

Critics note that once federal judges begin to decide these sorts of things, it is hard to see where such creeping judicial power would end.



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