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I. INTRODUCTION

In *Vigars v. Valley Christian Center*,[1] a librarian was presumably terminated by a parochial school for the sin of being pregnant out of wedlock. The district court precluded summary judgment until it determined whether the librarian was terminated because she was pregnant or because she had an adulterous relationship. If she was terminated for adultery, then her religious employer was exempt under Title VII's provisions. However, if she was terminated for being pregnant, then the religious employer was liable under Title VII.

The district court was interpreting the religious employer exemption: "This subchapter [Equal Employment Opportunities] shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[2] The court was concerned with whether under the exemption a religious employer could discriminate on a nonreligious basis such as gender. Religious employers are exempt from Title VII's prohibition of employment discrimination[3] in some circumstances. Courts have established that

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1. 805 F. Supp. 802 (N.D. Cal. 1992).

2. 42 U.S.C. § 2000e-1(a) (West Supp. 1994). Throughout this Comment these religious corporations, associations, educational institutions, and societies will be referred to collectively as religious employers.

3. 42 U.S.C. § 2000e-2(a) (West Supp. 1994). The statute states:

> It shall be an unlawful employment practice for an employer:
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race,

this religious employer exemption does not permit religious employers to discriminate on the basis of race, gender, or national origin.[4] However, a problem arises when determining whether this exemption allows religious employers to adopt employment practices rooted in sincere religious belief and doctrine that have a disparate impact on or that facially discriminate against individuals because of their race, sex, or national origin.

The federal circuit courts are split on the extent of protection that religious employers receive under the exemption. The Ninth and Fourth Circuits have read the exemption narrowly, deciding that employment practices that violate Title VII on a nonreligious basis are prohibited regardless of whether they are religiously based or not.[5] Conversely, the Third and Fifth Circuits give the exemption a broader reading, holding that religious based employment practices should be given some deference, even when they violate Title VII on a nonreligious basis.[6]

This Comment charts the history of the religious employer exemption, the differing interpretations in the circuit

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color, religion, sex, or national origin.

4. Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985) ("While the language of [the exemption] makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin."), *cert. denied*, 478 U.S. 1020 (1986); McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir.) ("Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex, or national origin."), *cert. denied*, 409 U.S. 896 (1972).

5. For the Fourth Circuit position, consider Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985) ("The language and the legislative history of Title VII both indicate that the statute exempts religious institutions only to a narrow extent."), *cert. denied*, 478 U.S. 1020 (1986). For the Ninth Circuit position, consider EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272, 1277 (9th Cir. 1982) (finding that the argument for broadly exempting religious employers is not supported by legislative history).

6. For the Third Circuit position, consider Little v. Wuerl, 929 F.2d 944, 951 (3rd Cir. 1991) ("With sensitivity to the constitutional concerns that would be raised by a contrary interpretation, we read the exemption broadly."). For the Fifth Circuit position, consider McClure v. Salvation Army, 460 F.2d 553, 560-61 (5th Cir.) ("Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister."), *cert. denied*, 409 U.S. 896 (1972). The Fifth Circuit has more recently narrowed its view of the religious employer exemption. *See* cases cited *infra* note 58.

courts, and proposes a solution relying on a recent Supreme Court decision,[7] the First Amendment religion clauses, and the language of the exemption. This Comment addresses the extent to which a religious employer has the right to determine its own doctrine, goals, and method of pursuing those goals. Specifically, this Comment addresses the obligations of a religious employer under Title VII and whether the courts should obligate religious employers to change their religiously based employment practices to appease the dictates of Title VII. This Comment concludes that the obligations of a religious employer under Title VII should be based on whether the employment practice is religiously based rather than on whether the employment practice discriminates on a nonreligious basis or whether the activities of the employee in question are central to the religion's mission.

II. THE RELIGIOUS EMPLOYER EXEMPTION UNDER THE CIVIL RIGHTS ACT OF 1964 AS AMENDED IN 1972

A. The Exemption Protects Religious Employers From the Full Effect of Title VII

As originally enacted, the religious employer exemption under Title VII was fairly narrow. It covered "a religious corporation, association, or society with respect to employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association or society of its *religious* activities."[8] However, in 1972, the exemption was broadened to exempt religious employers from Title VII in all of their activities, not just their religious activities.[9] It is this 1972 broadening amendment which is viewed differently among the circuit courts.

The Ninth Circuit has viewed the 1972 amendment as only a slight broadening of the exemption, holding that it did not "broadly exempt[] religious organizations from charges of discrimination based on nonreligious grounds."[10] That

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7. Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

8. 42 U.S.C. § 2000e-1(a) (1970) (emphasis added).

9. 42 U.S.C. § 2000e-1(a) (Supp. IV 1992) ("This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of *its activities*.") (emphasis added).

10. EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272, 1277 (9th Cir.

court explained, "Congress [has] consistently rejected proposals to allow religious employers to discriminate on grounds other than religion."[11] Alternatively, the Third Circuit has read the exemption broadly, being "persuaded that Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'"[12]

B. The Debates Over the Religious Employer Exemption Are at Best Inconclusive as to Whether the Exemption Should Be Read Broadly or Narrowly

Although the conflicting circuits cite the legislative debates of the 1964 legislation and the 1972 amendment in support of their differing views,[13] the debates are at best inconclusive. The 1964 Civil Rights Act, which originally passed the House, contained a broad exemption entirely excluding religious employers from the Act.[14] The Senate wrote a substitute bill which contained a more limited exemption allowing a religious organization to employ individuals of a particular religion only if they performed work connected with the organization's religious activities. After debate in the Senate this substitute bill was passed in both the Senate and the House.[15]

With respect to the 1972 amendment, some senators proposed that religious employers be completely removed from the jurisdiction of the Equal Employment Opportunity Commission,[16] but these proposals were rejected.[17] The subsequent Senate proposals only broadened the scope of the exemption to cover employees who performed nonreligious activities. This broadened exemption was proposed in an effort to allow religious organizations to create communities faithful to their religious principles.[18] These proposals were

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1982).

11. *Id.*
12. Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991).
13. *See Pacific Press*, 676 F.2d at 1276-77; *Little*, 929 F.2d at 949-51.
14. H.R. 914, 88th Cong., 1st Sess. § 703 (1963).
15. 110 CONG. REC. 12,812 (1964); *see* 42 U.S.C. § 2000e-1(a) (1970).
16. 118 CONG. REC. 1982 (1972).
17. *Id.* at 1995.
18. *See id.* at 1994 (discussing the rights of parochial schools to hire only

enacted into law and remain with the current statute.[19] A section by section analysis of the statute concluded that religious employers remain "subject to the provisions of Title VII with regard to race, color, sex, or national origin."[20]

C. The Clause "Of a Particular Religion" Allows Religious Employers to Create Communities Consistent with Their Religious Beliefs

The language "of a particular religion" is found in both the original and the amended versions of the exemption.[21] The Third Circuit found this language determinative and searched for a definition.[22] It looked to the definition of "religion" found in the Act.[23] The definition of "religion" under Title VII requires an employer to "reasonably accommodate" an employee's religious practices unless it would cause "undue hardship" on the employer.[24] The court determined that this definition of "religion" should be read broadly, but did not find any indication in the legislative history that Congress considered the effects of this definition on the scope of the religious employer exemption.[25] However, the Third Circuit concluded, "The permission to employ only persons 'of a particular religion' includes permission to employ persons whose beliefs and conduct are consistent with the employer's religious precepts."[26]

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members of their faith as teachers).

19. *Id.* at 7170; *see* 42 U.S.C. § 2000e-1(a) (West Supp. 1994).

20. *Id.* at 7167.

21. *Compare* 42 U.S.C. § 2000e-1(a) (1970) *with* 42 U.S.C. § 2000e-1(a) (West Supp. 1994) ("particular religions" is in both versions of the act).

22. Little v. Wuerl, 929 F.2d 944, 950 (3rd Cir. 1991).

23. 42 U.S.C. § 2000e(j) (1988) (The statute states: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.").

24. *Id.*

25. *Little*, 929 F.2d at 950.

26. *Id.* at 951.

D. The Religious Employer Exemption Under Title VII Should Be Interpreted to Allow Religious Employers to Create Communities Consistent with Their Religious Beliefs

1. The issues raised by the circuit courts overlook the more fundamental issue of religious autonomy

When interpreting the religious employer exemption, the circuit courts have emphasized different aspects of the legislative history to give credibility to their respective interpretations. They seem to be grappling with the issue of whether or not a religious employer in its employment practices can discriminate on a nonreligious basis.[27] However, under the plain language of the exemption a religious employer may not discriminate on a nonreligious basis. An employer is only exempt from Title VII "with respect to the employment of individuals *of a particular religion*."[28] Under the plain language of the statute religious employers are only exempt from Title VII when making employment decisions that are religiously based. Religious employers are still liable under Title VII if their employment practice is based on a prohibited classification such as race, gender, or national origin.

The circuit courts overlook the more fundamental question of whether religions have the right to pursue their own goals through their employment practices. More specifically, under Title VII, the question is whether religious employers are restricted by Title VII when their religiously based employment practices, which presumably aid in the pursuit of religious goals, disparately impact on nonreligious protected groups. The circuit courts' discussions of whether the exemption allows religious employers to discriminate on a nonreligious basis overlook the more fundamental issue of religious autonomy and the right of religious employers to define themselves through employment practices in ways consistent with their doctrines, even when those doctrines have a disparate impact on race, gender, or national origin.

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27. *See infra* part III.
28. 42 U.S.C. § 2000e-1(a) (West Supp. 1994) (emphasis added).

2. Religious employers should be given autonomy to pursue their religious goals through their employment practices

Without the religious employer exemption, a religious congregation would violate Title VII when it preferred a minister of its own faith, over one of another faith, purely on the basis of religion. The exemption at the very least seems aimed at allowing a religious employer to prefer one ministerial candidate over another, purely on the basis of religion.[29] However, the application of the exemption is less clear when it is claimed by a religious employer hiring a janitor or librarian who the courts view to be less central to the religion's mission. The application of the exemption is even further clouded when it is claimed for an employment practice that has a disparate impact on race, gender, or national origin.

Although circuit courts apply the religious employer exemption differently in the above three situations, under the current exemption all three should be analyzed similarly. The religious employer exemption should be read to illustrate the principle of religious autonomy. The Supreme Court has articulated the principle that religions must be allowed to define their own doctrines, goals, and method of pursuing those goals in its church property decisions.[30] This principle rests on the religion clauses of the First

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29. *See supra* note 18 and accompanying text.

30. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 602 (1979) (courts can settle church property disputes as long as there is "no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith"); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724 (1976) ("[T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government."); Maryland & Va. Eldership of the Churches of God v. Church of God, 396 U.S. 367, 368 (1970) (per curiam) (holding that because the state court's "resolution of the dispute involved no inquiry into religious doctrine," there was no violation of the First Amendment); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969) ("First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice."); Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church, 363 U.S. 190, 190 (1960) (per curiam) (holding that the use and occupancy of a cathedral were "strictly a matter of ecclesiastical government' and as such could not constitutionally be impaired by a state statute"); Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 107-08 (1952) ("Legislation that regulates church administration, the operation of the churches, the appointment of clergy, by requiring conformity to church statutes . . . prohibits the free exercise of religion.").

Amendment[31] supported by recent federal statutory law.[32] Under the Free Exercise Clause, religions are autonomous because a government regulation may not burden the free exercise of religion unless the government has a compelling interest in the subject of the regulation.[33] Likewise, under the Establishment Clause, religions are autonomous because (1) a statute must have a secular purpose, (2) the primary effect of the statute must neither advance nor inhibit religion, and (3) the statute must not foster excessive entanglement between government and religion.[34]

With these First Amendment principles and religious autonomy in mind, the application of the religious employer exemption is clearer. A religious employer must be allowed to determine who it will employ as a means of fulfilling its mission. So long as a religion's employment practices are an effort to fulfill its mission, it must be given the autonomy afforded by the First Amendment regardless of the activities performed by its employee or the disparate impact the practices have on nonreligious protected groups.

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31. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

32. 42 U.S.C. § 2000bb (West Supp. 1994).

33. The test used to determine whether or not a statute violates the Free Exercise Clause was articulated in Sherbert v. Verner, 374 U.S. 398, 403 (1963) (noting that courts cannot uphold state action that imposes even an "incidental burden" on the free exercise of religion unless there exists a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate") (citations omitted); *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (First and Fourteenth Amendments prevent the state from compelling Amish parents to cause their children who have graduated from the eighth grade to attend formal high school.).

The constitutional analysis of the First Amendment is in transition. Employment Division v. Smith, 494 U.S. 872 (1990), has changed the analysis of the Free Exercise Clause. In that case the Court stated "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (citations omitted). The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (West Supp. 1994), is the congressional attempt to return to the *Sherbert v. Verner* and *Wisconsin v. Yoder* analysis, requiring the compelling state interest test to be applied when the government burdens a religion. Although it is questionable whether Congress can dictate constitutional analysis, the Religious Freedom Restoration Act codifies the compelling state interest test. Regardless of the constitutional analysis, the Free Exercise Clause continues to stand for the proposition that a religion should be allowed to dictate its own doctrine and practices without the burden of governmental interference. Notwithstanding *Employment Division v. Smith*, this general proposition remains constant.

34. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

III. THE ANALYSIS OF THE FEDERAL CIRCUIT COURTS IN APPLYING THE RELIGIOUS EMPLOYER EXEMPTION

The following cases illustrate the differing approaches of the circuit courts to the religious employer exemption. The cases are presented in chronological order by circuit to chart the development of the case law as well as the exemption. The facts in each case are significant because the activities held by the employees within the religious organization determine the outcome in the cases.

A. The Fifth Circuit Distinguishes Between Employee Activities Within Religious Organizations to Alleviate First Amendment Violations Under Title VII

McClure v. Salvation Army[35] establishes an exception for ministers under Title VII which other circuit courts discuss in subsequent cases. This case was decided before the 1972 amendment to the religious employer exemption, so the court had to decide whether the employment activities involved were religious. McClure, a female minister, brought suit against the Salvation Army alleging discrimination on the basis of sex. Specifically, she received lower wages than similarly situated males.[36] The court held that application of Title VII in this case would violate the First Amendment.

According to the court,[37] the religious employer exemption was "intended to allow a religious organization to employ persons of a particular faith to perform work connected with the carrying on of their religious activities without otherwise violating the provisions of Title VII."[38] However, the court concluded that religions may not discriminate "on the basis of race, color, sex, and national origin."[39]

Using the "compelling state interest" test,[40] the court decided that application of Title VII in this case would violate the First Amendment. It found that "[t]he relationship between an organized church and its minsters is its

35. 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).

36. *Id.* at 555.

37. Note that this case was decided before the 1972 amendment broadened the exemption to cover all activities of religious employers, rather than strictly religious activities. *See* 42 U.S.C. § 2000e-1(a) (1970).

38. *McClure*, 460 F.2d at 558.

39. *Id.*

40. *See supra* note 33.

lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."[41] The court found that a minister's salary, assignments, and duties are "matters of church administration and government and thus, purely of ecclesiastical cognizance" and that a review of these practices and decisions would "cause the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of singular ecclesiastical concern."[42] The court concluded that Congress did not intend to "regulate the employment relationship between church and minister."[43]

While interpreting the religious employer exemption before the 1972 amendment, which broadened the exemption to cover all of a religious employer's activities rather than just its religious activities,[44] the Fifth Circuit saw the need to create an exception for ministers. This exception is a manifestation of the right of religions to be autonomous. The court found that religions have a First Amendment right to determine the qualifications and compensation for their ministers without governmental regulation. To hold otherwise would infringe on religious autonomy and require religions to change employment practices, conceivably based on religious doctrine, thereby infringing on the First Amendment religion clauses. The 1972 amendment to the religious employer exemption seems to remove the need for the ministerial exception because it protects all activities of religious employers, not just the religious activities. Nevertheless, the ministerial exception continues beyond the 1972 amendment.

41. *McClure*, 460 F.2d at 558-59.
42. *Id.* at 560.
43. *Id.* at 560-61.
44. *See* 42 U.S.C. § 2000e-1(a) (1970).

B. If a Religious Employer's Employment Practice Infringes on a Nonreligious Classification, the Ninth Circuit Only Allows a Religious Employer To Violate Title VII when the Employee's Activities Are Ministerial

1. EEOC v. Pacific Press Publishing Association

The Ninth Circuit refuses to interpret the 1972 amendment as removing the need for a ministerial exception by reading the religious employer exemption narrowly when it impacts nonreligious protected groups. *EEOC v. Pacific Press Publishing Ass'n*[45] illustrates the problems created when courts disallow religions the autonomy they are entitled to under the First Amendment religion clauses. Pacific Press, a nonprofit religious publishing house, required all of its employees to be members of the Seventh-Day Adventists Church in good standing.[46] Lorna Tobler, a female editorial secretary, had worked for the publishing company for fifteen years.[47] Pacific Press paid its employees according to a written wage scale which provided married males a higher rental allowance than single males who received a higher allowance than females whether married or unmarried. Tobler brought an action against Pacific Press for the disparate wage scale.

After Pacific Press discovered that Tobler had initiated charges with the Equal Employment Opportunity Commission, her discretionary work load was shifted to other employees, presumably in retaliation for her complaints. Tobler then filed retaliation charges against the publishing company as well.[48] The General Conference of Seventh-Day Adventists, the governing body of the church, formed a committee that recommended that Tobler and another female employee who was pursuing charges against it be terminated from Pacific Press. In accordance with internal procedures, this committee found that both employees had failed to meet the high standards of biblical teachings and church authority because they had filed suit against the church, were at variance with the church, and were unresponsive to

45. 676 F.2d 1272 (9th Cir. 1982).
46. *Id.* at 1274.
47. *Id.* at 1275.
48. *Id.*

counseling.[49] Both of these actions by Pacific Press were violations of Title VII, so the Equal Employment Opportunity Commission brought suit. The district court found the disparate wage scale and the retaliation to be violations of Title VII.[50]

The court addressed two issues in this case:

> First, whether Title VII of the Civil Rights Act of 1964 prohibits a religious publishing house from (a) discriminating in wages because of sex, and (b) retaliating against and ultimately discharging an employee because of her participation in Title VII proceedings. Second, whether application of Title VII in the context of this case infringes the Free Exercise and Establishment clauses [sic] of the First Amendment.[51]

Pacific Press argued that it was exempt as a religious employer from the provisions of Title VII and, alternatively, that application of Title VII in this case violated the First Amendment religion clauses.[52]

For its analysis of whether Title VII prohibits the publishing company's actions, the court looked to *NLRB v. Catholic Bishop of Chicago*.[53] That Supreme Court decision mandated that a court first determine whether the proposed application of Title VII "would give rise to serious constitutional questions."[54] If the proposed application of Title VII did give rise to serious constitutional questions, then the court could only apply the statute in the proposed way if there was an "affirmative intention of Congress clearly expressed" to do so.[55]

The court concluded that Pacific Press was not expressly or implicitly exempt from the provisions of Title VII in this case. The court read the exemption narrowly, allowing reli-

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49. *Id.*
50. *Id.* at 1274.
51. *Id.* at 1275.
52. *Id.* at 1276.
53. 440 U.S. 490 (1979). In *Catholic Bishop*, the Court held that a religiously associated school was not within the jurisdiction of the National Labor Relations Board (NLRB) and that there would be a significant risk of infringement on the religion clauses of the First Amendment if jurisdiction were found. In light of such a risk, there must be clear congressional intent of NLRB jurisdiction to find such jurisdiction. *Id.*
54. *Id.* at 501.
55. *Id.*

gious employers to discriminate on the basis of religious faith, but holding that such employers are "not immune from liability for discrimination based on race, sex, national origin, or for retaliatory actions against employees who exercise their rights under the statute."[56] The court cited congressional debate on the exemption and its broadening amendment[57] and Fifth Circuit case law to support its determination that Congress "intended to prohibit religious organizations from discriminating among their employees on the basis of race, sex or national origin."[58]

Pacific Press argued that Tobler was outside the reach of Title VII since her job involved religious activities including "discretionary and administrative responsibilities."[59] Under *McClure v. Salvation Army*[60] and *NLRB v. Catholic Bishop of Chicago*, Pacific Press alternatively argued that application of Title VII violated the First Amendment.[61] The court rejected the Pacific Press argument that the religious employer exemption "applies to all actions taken by an employer with respect to an employee whose work is connected with the organizations 'religious activities.'"[62] The court found that "Tobler was not a minister, nor an author of religious texts. Moreover, Press has not shown that her duties go to the heart of the church's function in the manner of a minister or a seminary teacher."[63] The court concluded that Congress clearly intended Title VII to apply to Pacific Press when it discriminated against Tobler.

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56. *Pacific Press*, 676 F.2d at 1276.

57. *Id.* at 1276-77.

58. *Id.* at 1277 (citing EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981) (holding that Title VII did not apply to the employment relationship between the seminary and its faculty, but that applying Title VII's reporting requirements to the seminary's nonministerial employees did not violate the religion clauses of the First Amendment), *cert. denied*, 456 U.S. 905 (1982); and EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980) (holding that when a religious institution presents clear and convincing evidence that an employment practice results "from discrimination on the basis of religion," then the EEOC has no "jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination"; only the relationship between minister and the church is exempt from Title VII; imposing Title VII requirements on a religious institution does not violate the religion clauses of the First Amendment), *cert. denied*, 453 U.S. 912 (1981)).

59. *Pacific Press*, 676 F.2d at 1277.

60. *See supra* part III.A.

61. *Pacific Press*, 676 F.2d at 1277.

62. *Id.*

63. *Id.* at 1278.

In using the "compelling state interest" test,[64] the court decided that the enforcement of equal pay provisions on Pacific Press did not conflict with its religious beliefs because the church "proclaims that it does not believe in discriminating against women or minority groups, and that its policy is to pay wages without discrimination on the basis of race, religion, sex, age, or national origin."[65] The court found that the state interest in this case was high and the impact on religious belief was minimal and so concluded that the Free Exercise Clause was not violated with respect to the equal pay provisions of Title VII.[66]

The court had more difficulty determining whether application of the retaliatory provisions of Title VII[67] violated the Free Exercise Clause. The court found that there was a substantial impact on the religious beliefs of the Adventists Church when the Equal Employment Opportunity Commission prosecuted Pacific Press for taking retaliatory action based on religious doctrine.[68] The court concluded, however, that the compelling state interest found in Title VII justified this substantial impact on religious belief and that the Free Exercise Clause was not violated by applying Title VII to the retaliatory actions of Pacific Press.[69]

The court also found that application of Title VII in this case did not violate the Establishment Clause by using the test articulated in *Lemon v. Kurtzman*.[70] That Supreme Court decision provides a three-step analysis to determine whether a statute complies with the Establishment Clause:

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64. *See supra* note 33.
65. *Pacific Press*, 676 F.2d at 1279.
66. *Id.*
67. 42 U.S.C. § 2000e-3(a) (1981). The statute states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

68. 676 F.2d at 1279.
69. *Id.* at 1279-80.
70. 403 U.S. 602 (1971).

(1) the statute must have a secular purpose, (2) the primary effect of the statute must neither advance nor inhibit religion, and (3) the statute must not foster excessive government entanglement with religion.[71] The court focused on whether application of Title VII in this case fostered excessive government entanglement with religion.

Pacific Press argued that application of Title VII in this case would excessively entangle the Equal Employment Opportunity Commission with religion. To determine this question the court looked at "the character and purpose of the institution involved, the nature of the regulation's intrusion into church affairs, and the resulting relationship between the government and the religious authority."[72] Pacific Press supported their argument by citing *NLRB v. Catholic Bishop of Chicago*,[73] in which the Supreme Court found a serious risk of excessive entanglement between the National Labor Relations Board and religion by enforcing mandatory collective bargaining provisions at a religious school.[74] The court distinguished *Catholic Bishop* from the present case finding that the Equal Employment Opportunity Commission had less authority to continuously supervise than the National Labor Relations Board did.[75] The court found that the Equal Employment Opportunity Commission could not initiate suits to enforce its statutory provisions or issue coercive orders like the National Labor Relations Board.[76] Therefore, the court found no excessive entanglement between the Equal Employment Opportunity Commission and the Adventists Church by applying Title VII to Pacific Press with regard to the equal pay or retaliatory provisions.[77]

2. The Ninth Circuit risked influencing religious doctrine contrary to the First Amendment religion clauses

The Ninth Circuit in *Pacific Press* infringed upon religion to a greater degree than they seem to have understood. The court found that the First Amendment religion clauses

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71. *Id.* at 612-13.

72. *Pacific Press*, 676 F.2d at 1282 (citing Lemon v. Kurtzman, 403 U.S. 602, 614-15 (1971)).

73. 440 U.S. 490 (1979).

74. *Catholic Bishop of Chicago*, 440 U.S. at 502-03.

75. *Pacific Press*, 676 F.2d at 1282.

76. *Id.*

77. *Id.*

were not infringed when a religious employer was forced to alter its employment practices that were arguably religiously based. By forcing a religious employer to alter its employment practices, the court was tampering with the doctrines and practices of the religion itself. As Professor Douglas Laycock has stated, "When the state interferes with the autonomy of a church, and particularly when it interferes with the allocation of authority and influence within a church it interferes with the very process of forming the religion as it will exist in the future."[78]

This case substantially limits the autonomy of religion. By scrutinizing and essentially overturning a religious employer's decisions, the court is limiting the religion's ability to fulfill its religious mission through its employment practices, simply because the practices do not meet the court's definition of religious activity. Under this analysis, courts infringe on the right to freely exercise religion and possibly entangle themselves in determining religious doctrine.

The Ninth Circuit seemed to neglect the fact that the employment practices of religious employers are often religiously based and so are a form of religious practice. The court seemed willing to permit the Title VII violation if Tobler had been a minister, but since she was only an editorial secretary the court was not willing to do so. By determining which positions were ministerial and central to the religion, the court was dictating how the religion would define itself and who it would employ to fulfill its mission.

Likewise, the court ignored the plain language of the statute, which makes no distinction based on the activities performed by the employee. In this manner the court risked becoming the interpreter of religious practice and a filter through which employment-related religious practices must pass. Under such a system, if the practice does not meet the political touchstone, then the court condemns the practice, thereby influencing the doctrine and forcing religions to redetermine their missions. This sort of corruption of religious practice and doctrine is contrary to the express intent of the First Amendment religion clauses.

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78. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1391 (1981).

Employment practices that are religiously based are an exercise of religion, regardless of the employee's activities within the religious community. Even an editorial secretary, like Lorna Tobler, reflects the religious community when she works for a church-affiliated publishing company. It does not make a difference whether she edits religious or secular text, she is still a member of the religious community. As such she may confront sensitive church issues or deal in matters that only the faithful would respect. Under religious autonomy the religion alone should decide which employees and which activities necessitate close religious affiliation.

As Professor Stephen L. Carter has stated, "religions, to be truly free, must be able to engage in practices that the larger society condemns. The state has a perfect right to send a message that it is wrong to discriminate . . . but government must not be allowed to conscript private organizations, least of all religions, to assist."[79] Continuing, he stated that religious autonomy and independence are what "the First Amendment traditions contemplate and democracy desperately needs."[80] He defined religious autonomy as meaning that religions "should not be beholden to the secular world, that they should exist neither by the forbearance of, nor to do the bidding of, the society outside of themselves. It means, moreover that they should be unfettered in preaching resistance to (or support of or indifference toward) the existing order."[81]

Religious autonomy permits religions to define themselves as they see fit, which is essential to their right to freely exercise their religion. When the courts influence religious practice and doctrine by invalidating religiously based employment practices, they run the risk of making religion meaningless and turning the state's political policies into a state religion by defining each religion within the state's political agenda.

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79. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 34 (1993). On the issue of employment discrimination by religious employers Professor Carter advocates focusing on whether employee activities are "central acts of faith of a religious community." *Id.* at 143. However, his arguments supporting religious autonomy reach the opposite conclusion; and, his analysis based on employee activities is inconsistent with the plain language of the religious employer exemption. *See* 42 U.S.C. § 2000e-1(a) (West Supp. 1994).

80. CARTER, *supra* note 78, at 34.

81. *Id.* at 34-35.

3. Religious employers may have valid reasons for observing employment practices that are contrary to their official doctrine

The Ninth Circuit argued that there was no Free Exercise violation against the Adventists Church, because their own doctrine was contrary to their employment practice.[82] However, the free exercise of religion and the right of religious autonomy are founded on the principle of fluidity of religious doctrine. Religious employers may have religiously based reasons for observing an employment practice that is contrary to the official pronounced doctrine. Official pronouncement of doctrine may not be "a reliable indication of what the faithful believe. At best the officially promulgated doctrine of large denominations represents the dominant or most commonly held view; it cannot safely be imputed to every believer or every affiliated congregation."[83]

Likewise, many religions profess to be governed by divine revelation, which may change with different situations. Inherent in the right to freely exercise religion is the right to freely change beliefs. Organizations that profess to be governed by a higher law must be afforded the latitude to change their official pronouncements as they see fit. The right to freely exercise religion must include the right to act contrary to official pronouncements when moved upon by God to do so. Although it would be more difficult for a religious employer to show that its employment practice, which is contrary to the official doctrines of the religion, is religiously based, the religion should be given the opportunity to do so.

Moreover, as Professor Laycock has argued, religious organizations may have constitutionally legitimate reasons for resisting regulations that comply with their official doctrines. First, they may simply be "hypocritically seeking to exempt themselves from a moral duty they preach to others."[84] Although not admirable, this position is still constitutionally permissible because the "free exercise protection is not limited to churches the government admires."[85] Second, religions may be resisting regulations on principle—"to

82. *See Pacific Press*, 676 F.2d at 1279.
83. Laycock, *supra* note 77.
84. *Id.* at 1399.
85. *Id.*

avoid creating an adverse precedent that might support some more objectionable regulation in the future."[86] Third, "[e]ven if government policy and church doctrine endorse the same broad goal, the church has a legitimate claim to autonomy in the elaboration and pursuit of that goal."[87] Under this autonomy right, deference must be given to religiously based employment practices, even when those practices seem inconsistent with the religion's official pronouncements.

4. Vigars v. Valley Christian Center

The Northern District Court of California in *Vigars v. Valley Christian Center*[88] followed *EEOC v. Pacific Press Publishing Ass'n*. In that case Vigars, a librarian, was allegedly fired from a parochial school for being pregnant out of wedlock. When the school moved for summary judgment on the Title VII action, it alleged that the termination was not for the sin of pregnancy out of wedlock, but for the sin of adultery.[89] The court decided that if Vigars was terminated for being pregnant out of wedlock then Title VII applied, but if the termination was for adultery, then Title VII did not apply. The court stated, "[I]t is clear that Title VII *generally* applies when a woman has been terminated for pregnancy, regardless of the *reason* put forth by the employer as to why that pregnancy justifies termination."[90]

The district court found that under *Pacific Press* "church organizations have been held liable under Title VII for benefit and employment decisions which they contended were based upon religious grounds but which also discriminated against women based on sex."[91] However, the district court's finding is contrary to the Ninth Circuit's finding in *Pacific Press* that the Adventists Church did not have a religiously held belief of discrimination against women.[92] Finally, the court decided that Title VII did not violate the First Amendment. It decided that summary judgement must

86. *Id.*
87. *Id.*
88. 805 F. Supp. 802 (N.D. Cal. 1992).
89. *Id.* at 804-5.
90. *Id.* at 806.
91. *Id.* at 807.
92. *Pacific Press*, 676 F.2d at 1279. *See supra* text accompanying note 65.

be denied because there is a legitimate issue of material fact as to whether the school terminated Vigars for being pregnant or for committing adultery.[93]

The Northern District of California found that a religious employer could not put forth a reason sufficient to terminate an employee for pregnancy, but that termination for adultery was acceptable. This is the sort of arbitrary distinction that courts make when permitted to scrutinize the employment practices of religious employers. With this decision the court is preferring one employment practice over another. Although generally such preference is proper, when a religious employer is involved the court risks preferring one doctrine over another as they are manifest in employment practices.

Employment practices are central to the fulfillment of religious missions for two reasons. First, they may be expressions of religious belief and as such are part of the exercise of religion. Second, they create communities that are working to fulfill religious missions. When courts exercise power over the employment practices of a religious employer, they risk changing the expression of religious belief and the creation of communities to fulfill religious missions. Although the district court may need to determine whether Vigars was terminated for being pregnant out of wedlock or committing adultery, the case should not turn on this issue. Rather, it should turn on whether the employment practice is religiously based (regardless of whether it condemns pregnancy out of wedlock or adultery).

Under the plain language of the religious employer exemption and its legislative history, religious employers may not discriminate on a nonreligious basis. The ministerial exception of *McClure v. Salvation Army* and the First Amendment religion clauses prohibit the application of Title VII to positions that are central to a religion's mission. The plain language of the exemption also protects religious employers regardless of whether the activities involved are secular or religious. Therefore, since the analysis cannot focus on the activities involved, it must focus on the em-

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93. *Vigars*, 805 F. Supp. at 810. The district court also considered Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991) and Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987), but found both inapplicable in the current case. *See infra* parts III.D., IV.A.

ployment practice itself. The court's focus should be on whether an employment practice is part of a religion's exercise of religion. If it is, then it should be given deference. If the employment practice is not religiously based, then no deference should be given to the employment practice and it should be treated the same as any other employment practice of any other employer.

C. The Fourth Circuit Perpetuates the Focus on the Employee Activities Rather than on the Basis of the Employment Practice

The Fourth Circuit in *Rayburn v. General Conference of Seventh-Day Adventists*[94] interpreted the religious employer exemption based on the activities of the employee, rather than on the religious basis for the employment practice. Rayburn, a female pastor who was denied a position, brought an action charging sexual and racial discrimination.[95] In applying the *NLRB v. Catholic Bishop of Chicago* standard,[96] the court determined that "the language and the legislative history of Title VII both indicate that the statute exempts religious institutions only to a narrow extent."[97]

Citing *EEOC v. Mississippi College*,[98] from the Fifth Circuit, the court stated that when a religious institution presents clear and convincing evidence that an employment practice favors one religion over another, then the religious exemption of Title VII deprives the EEOC from further investigation to determine whether the religious discrimination is a "pretext for some other form of discrimination."[99]

The court continued that it was clear from the exemption that religious employers can discriminate on the basis of religion, but that "Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin."[100] The court viewed this case as discrimination on the basis of race and gender

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94. 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).
95. *Id.* at 1165.
96. *See supra* text of note 53.
97. *Rayburn*, 772 F.2d at 1166.
98. 626 F.2d 477 (5th Cir. 1980).
99. *Rayburn*, 772 F.2d at 1166.
100. *Id.*

among applicants of the same religion, so, by the clear intent of Congress, Title VII applied to this case.[101]

Using the "compelling state interest" test,[102] the court found that applying Title VII in this case would violate the Free Exercise Clause. It reasoned, "The role of an associate in pastoral care is so significant in the expression and realization of Seventh-day Adventist beliefs that state intervention in the appointment process would excessively inhibit religious liberty."[103] However, the court found that "Title VII is an interest of the highest order" and therefore some occasions arise when "the state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."[104]

The court also found that application of Title VII in this case would violate the Establishment Clause. It stated that "the application of Title VII to employment decisions of this nature would result in an intolerably close relationship between church and state."[105] However, the court noted, "churches are not—and should not be—above the law. . . . Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions."[106] The court decided that Title VII was not applicable to the employment practices of religions concerning their pastors even when the practices discriminated on the basis of nonreligious criteria.[107]

In this case, the Fourth Circuit did not apply Title VII to the religious employer discriminating on a nonreligious basis only because the employee's activities were closely tied to the religion's mission. The court relied on the First Amendment religion clauses, misinterpreting the religious employer exemption. Even though this analysis resulted favorably for the religious employer in this case, it distinguished the protection that religious employers received on the basis of the activities performed by the employee. This implies that employees whose activities the court views as

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101. *Id.* at 1166-67 & n.2.

102. *See supra* note 33.

103. *Rayburn*, 772 F.2d at 1168.

104. *Id.* at 1169 (citing Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981)).

105. *Id.* at 1170.

106. *Id.* at 1171.

107. *Id.* at 1172.

further removed from the religion's mission would not receive protection under the religious employer exemption. However, the plain language of the exemption protects both the secular and the religious activities of religious employees, regardless of their centrality to the religion's mission. Instead of focusing on centrality, the court should focus on whether the employment practice is religiously based, completely distancing itself from the centrality of the employee's activities.

D. The Third Circuit Focuses on Whether the Employment Practice is Religiously Based Rather than on Whether the Employee's Activities Are Central to a Religion's Mission

The Third Circuit in *Little v. Wuerl*[108] focused on the basis for the employment decision, rather than on the activities of the employee, when applying the religious employer exemption. In this case Susan Long Little was a Protestant teacher at a Catholic school.[109] She brought suit under Title VII when the school failed to renew her contract.[110] The St. Mary Magdalene Parish, the operator of the school, hired Little with full awareness that she was Protestant.[111] Little did not teach religion, but attended and participated in ceremonies and programs that were intended to strengthen the Catholic values of the students.[112] She was a tenured teacher and assumed that her contract would be renewed unless there was just cause for her termination.[113] There is no dispute that Little performed well in her teaching capacity.[114] The annual contracts contained a clause that gave the school the right to dismiss a teacher for "serious public immorality, public scandal, or public rejection of the official teachings, doctrine or laws of the Roman Catholic Church."[115]

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108. 929 F.2d 944 (3d Cir. 1991).
109. *Id.* at 945.
110. *Id.* at 946.
111. *Id.* at 945.
112. *Id.*
113. *Id.* at 945-46.
114. *Id.* at 945.
115. *Id.*

Little was married when hired.[116] Later, she was divorced and during a leave of absence was remarried by a justice of the peace to a second husband who was a baptized, but nonpracticing, member of the Catholic Church.[117] When Little tried to renew her contract with the school, she was told that she would not be rehired because she had not pursued "the 'proper canonical process available from the Roman Catholic Church to obtain validation of her second marriage.'"[118] Little filed suit. The district court granted the school's summary judgment motion, finding that the religious employer exemption exempted the school from liability under Title VII.[119]

The court used the *Catholic Bishop*[120] standard to determine the applicability of Title VII to this case. The court first decided whether the Free Exercise Clause was violated. Relying on several cases analyzed above,[121] the court recognized the ministerial exception found in the circuit court decisions. It stated, "Title VII does not apply to the relationships between ministers and the religious organizations that employ them, even where discrimination is alleged on the basis of race or sex."[122] The court broadened the impact of this ministerial exception, stating, "Title VII has been interpreted to bar race and sex discrimination by religious organizations towards their nonminister employees. But attempting to forbid religious discrimination against nonminister employees where the position involved has *any religious significance* is uniformly recognized as constitutionally suspect, if not forbidden."[123]

The court also recognized the test found in *Mississippi College*: when a religious organization "presents convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion," then the religious exemption "deprives the Equal Employment Opportuni-

116. *Id.* at 946.
117. *Id.*
118. *Id.*
119. *Id.*
120. 440 U.S. 490 (1979). *See supra* note 53.
121. The court relied on Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); and McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972). *See supra* parts III.A-C.
122. *Little*, 929 F.2d at 947.
123. *Id.* at 947-48 (emphasis added).

ty Commission of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination."[124] The court determined that there is grave danger in a court determining who fits into certain religious categories, and that this determination is better left to the discretion of religious authorities and governments.[125] It determined that to apply Title VII in this case, it would have to examine the official teachings and doctrines of the Catholic Church, which raises serious constitutional questions.[126]

The court found that applying Title VII to the school's decisions would "create excessive government entanglement with religion" violating the *Lemon* test.[127] As support for this argument the court turned again to *Catholic Bishop*, in which the Supreme Court decided that the National Labor Relations Board is presumed to have no jurisdiction over parochial school employees. The court found that the "very process of inquiry leading to findings and conclusions" brings excessive entanglement.[128] The court quoted from Professor Douglas Laycock[129] that "churches have a constitutionally protected interest in managing their own institutions free of government interference."[130] Thus, the court concluded that interpreting Title VII to apply to the school's decision may only be done when Congress has shown clear intent to do so.

In looking at the legislative history of Title VII, the court determined that it "suggest[ed] that the sponsors of the broadened exception were solicitous of religious organizations' desire to create communities faithful to their religious principles."[131] The court continued, "[W]e are also persuaded that Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful

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124. EEOC v. Mississippi College, 626 F.2d 477, 485 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981), *quoted in* Little v. Wuerl, 929 F.2d 944, 948 (3d Cir. 1991).

125. *Little*, 929 F.2d at 948.

126. *Id.*

127. *Id.*

128. *Id.* at 949.

129. Laycock, *supra* note 77, at 1373.

130. *Little*, 929 F.2d at 949.

131. *Id.* at 950.

to doctrinal practices."[132] The court concluded that "it does not violate Title VII's prohibition of religious discrimination for a parochial school to discharge a Catholic or a non-Catholic teacher who has publicly engaged in conduct regarded by the school as inconsistent with its religious principles."[133]

The Third Circuit made the correct inquiries and respected the autonomy of religions to fulfill their mission. The court stated that governmental infringement on an activity with "any religious significance" is "constitutionally suspect" and probably "forbidden."[134] Courts should not attempt to determine the religious significance of an employment activity to a religion. By validating certain employment practices when the employee's activities are sufficiently religious, courts interfere with the religion's practice and creation of communities to fulfill its mission. The inquiry of the court should be whether a certain employment practice is religiously based, not whether the employee's activities are religiously significant.

IV. RESOLUTION OF WHETHER A RELIGIOUS EMPLOYER SHOULD BE GIVEN AUTONOMY TO PRACTICE ITS RELIGION THROUGH ITS EMPLOYMENT PRACTICES THAT VIOLATE TITLE VII ON NONRELIGIOUS GROUNDS

A. Whether the Employee's Activities Are Religious Should Not Be Determinative

The above-cited circuit courts all acknowledge the ministerial exception to Title VII, found in *McClure v. Salvation Army*,[135] which allows religious employers to violate Title VII on grounds other than religion when the employee's activities are ministerial.[136] However, the circuit courts do not agree on whether the 1972 amendment to the religious employer exemption provides this same protection for religious employers when the employee's activities are not ministerial. The 1972 amendment makes no distinction between

132. *Id.* at 951.
133. *Id.*
134. Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991).
135. *See supra* part III.A.
136. Little v. Wuerl, 929 F.2d 944, 947-48 (3d Cir. 1991); EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272, 1278 (9th Cir. 1982). *See supra* part III.

religious and nonreligious activities, suggesting that the activities performed by an employee should not be determinative of the breadth of the exemption.

The Supreme Court addressed the issue of whether the religious employer exemption distinguishes between religious and nonreligious activities in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.[137] In that case, the Court held that the religious employer exemption applied to employees performing nonreligious as well as religious activities. A janitor of a church-sponsored gymnasium was discharged after not qualifying for a temple recommend.[138] The Court decided that the church had the right to discriminate on the basis of religion even if the employee was not performing religious activities. While applying the first prong of the *Lemon* test the Court stated:

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.[139]

In analyzing the second prong of the *Lemon* test, the Court stated, "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence."[140] This gives great deference to Congress to create exemptions for religions from statutes that violate the First Amendment religion clauses. The Court further stated, "[T]here is ample room for accommodation of religion under the Establishment Clause. Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities."[141]

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137. 483 U.S. 327 (1987).

138. *Id.* at 330. A temple recommend is "a certificate that [a person] is a member of the Church and eligible to attend its temples." *Id.*

139. *Id.* at 336.

140. *Id.* at 337.

141. *Id.* at 338 (citations omitted).

The Supreme Court did not strictly scrutinize the religious employer exemption but rather applied a rational relationship test. The Court stated:

> [W]here a statute is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion, we see no justification for applying strict scrutiny to a statute that passes the *Lemon* test. The proper inquiry is whether Congress has chosen a rational classification to further a legitimate end.[142]

The Court is again deferring to Congress to create exemptions for religions in an effort to accommodate religious free exercise. The Court seems to be acknowledging the right of religious autonomy over the pursuit of its goals and mission through employment practices. On the facts of this case, the Supreme Court is protecting the religion's right to evince its religious beliefs through its employment practices regardless of the nature of the activities involved.

In *Amos*, the Supreme Court found that there is no distinction within the religious employer exemption between religious and nonreligious activities. Courts should not get involved in characterizing whether an activity is central to an organization's religious mission. So long as the employment practice is religiously based, and not a facade to some other interest, it should be given the benefit of the exemption, regardless of whether the court objectively values the practice or not. This holds true even when the religiously based employment practice violates Title VII on nonreligious grounds. Under this decision the ministerial exception becomes unnecessary, since there is no longer a distinction within the exemption between ministerial and nonministerial positions, or religious and nonreligious activities.

B. When Religious Employers Are Able to Prove by Clear and Convincing Evidence that Their Employment Practice Is Religiously Based, the Court Should Grant the Employer the Benefit of the Exemption

In *Little v. Wuerl*, the court amplified a test articulated in *Rayburn v. General Conference of Seventh-Day Adventists*[143] and *EEOC v. Mississippi College*.[144] It stat-

142. *Id.* at 339.
143. 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

ed that a religious employer is exempt from Title VII if it can show by clear and convincing evidence that its employment practice is religiously based. This test seems to meet the needs of the two conflicting interests. A religion should not be able to violate Title VII except for religious purposes. This limitation is stated specifically in the religious exemption itself.[145] However, if a religious employer by its religiously based employment practices violates Title VII on grounds other than religion, then that employer must show by clear and convincing evidence that its employment practices are religiously based. By so doing the employer falls under the exemption and the court's scrutiny of the employment practice ends.

V. CONCLUSION

The circuit courts are split in determining whether the religious employer exemption under Title VII applies to employment practices which violate Title VII on a nonreligious ground. Courts should not try to determine whether an employee's activities are central to the religion's mission. Rather, the courts should focus on whether the employment practice is religiously based. If so, the exemption applies. If the employment practice is not religiously based, then the religious employer is subject to the dictates of Title VII just as any other employer.

To fall under the religious employer exemption, an employer would have to show by clear and convincing evidence that its employment practice is religiously based. This showing values the state's interest in eliminating employment discrimination, while keeping the courts from influencing the religion's autonomy to practice its religion as it sees fit and pursuing its goals through its employment practices.

Treaver Hodson

144. 626 F.2d 453 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).
145. *See* 42 U.S.C. § 2000e-1(a) (West Supp. 1994).