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David J. Overstreet

Note

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For more than a decade, the Synod of Lakes and Prairies of the Presbyterian Church employed Reverend Robert Jeambey in the non-ministerial position of Executive Director for Communications and Stewardship.[1] The long-term employment relationship abruptly ended, however, when the Synod forced Jeambey to resign amid allegations of sexual misconduct.[2] When Jeambey attempted to bring a breach of employment contract claim against the Synod, the court ruled that the Establishment Clause of the First Amendment barred secular adjudication of the employment contract claim.[3]

Employment-based lawsuits against religious organizations[4] have become more common over the last three decades.[5]

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1. Jeambey v. Synod of Lakes & Prairies, No. CX-95-902, 1995 WL 619814, at *1 (Minn. Ct. App. Oct. 24, 1995).

2. *Id.*

3. *Id.* at *2. Rejecting Jeambey's claim that the court could secularly analyze the procedures outlined in the employee handbook, the court believed that any such inquiry would excessively entangle the state in religious doctrine. *Id.*

4. The term "religious organization" as used in this Note refers to both a place of worship, such as a church, synagogue, or mosque, and an institution that is owned and operated by a religious collective, such as a parochial school, seminary, religiously affiliated university, nonprofit or profit corporation, shelter, agency, or mission society. *See* Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 585 (1995) (providing the definition of "religious organization" used in this Note).

5. Most published opinions involving employment claims against relig-

To shield themselves from the potential liability these lawsuits pose, religious organizations have sought protection in the First Amendment.[6] Courts have largely embraced the view that the First Amendment prohibits judicial intrusion into the employment matters of a religious organization, especially when the employee is a member of the clergy. Consequently, courts have routinely dismissed employment actions filed by clergy members, leaving them with severely limited employment rights.[7]

Traditionally wary of resolving disputes arising within religious organizations,[8] courts became even more reluctant to entertain cleric employment lawsuits after the federal courts

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ious organizations have arisen since the 1970s. This relatively recent phenomenon corresponds with the beginning of the erosion of the at-will employment doctrine. *See* J. Michael Fitzgerald & Lynne M. L. Fitzgerald, *Mediation: A Systemic Alternative to Litigation for Resolution of Church Employment Disputes*, 5 ST. THOMAS L. REV. 507, 510-11 (1993) (discussing the creation of exceptions to the at-will doctrine and the rise of employment litigation to argue for the use of mediation in church employment disputes).

Moreover, the increase in employment litigation involving religious organizations also should be attributed to the increased presence of such organizations in the national economy. In 1992, religious organizations employed over 1.15 million individuals. JAMES C. FRANKLIN, U.S. DEP'T OF LABOR, THE AMERICAN WORK FORCE: 1992-2005, at 54 (1994). For a relative perspective, the U.S. Postal Service employed about .66 million individuals in 1992. *Id.*

As religious organizations continue to expand into commercial and nonprofit businesses, the number of individuals affected by religious employment and personnel policies increase. Joanne C. Brant, *"Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275, 277 (1994). At the same time, so does an organization's "risk of entanglement in civil litigation" over employment disputes. Patrick Garry, *Churches and the Courts: The First Amendment Protection from Clergy Lawsuits*, 9 J. L. & RELIGION 179, 179 (1991).

6. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. From this language springs the Constitution's two safeguards for religious liberty: the Establishment Clause and the Free Exercise Clause.

7. *See* Garry, *supra* note 5, at 187 (observing that courts have continually refused to adjudicate employment-related lawsuits between religious organizations and clergy); *see also infra* Part I.C (describing how the majority of courts have dismissed both discrimination and contract claims brought by clergy). One court described the lack of clergy employment rights in noting:

> [S]ecular courts will not attempt to right wrongs related to the hiring, firing, discipline or administration of clergy. Implicit in this statement of the rule is the acknowledgment that such wrongs may exist, that they may be severe, and that the administration of the church itself may be inadequate to provide a remedy.

Higgins v. Maher, 210 Cal. App. 3d 1168, 1175 (Cal. Ct. App. 1989).

8. *See infra* notes 46-48 and accompanying text (describing the Supreme Court's deferential stance toward intrachurch disputes).

exempted clergy from the protections of federal anti-discrimination laws on the ground that the First Amendment accords religious organizations autonomy in core ecclesiastical matters.[9] Over the last few decades, courts have extended this autonomy rationale to non-clergy employees whom the courts consider central to the spiritual mission of religious organizations.[10] These employees include a parochial school teacher,[11] a seminary professor,[12] and even a church organist.[13] More recently, courts have relied on the autonomy rationale to justify nonadjudication of another type of employment-based claim, breach of employment contract.[14] Yet such reliance is highly questionable given that contract formation is purely voluntary, undermining the assertion by religious organizations that they are constitutionally privileged to be free from coercive governmental regulation.[15]

This Note explores the constitutional limitations on secu-

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9. *See infra* notes 77-81 and accompanying text (detailing the influential federal circuit discrimination cases).

10. A significant, doctrinal by-product of the discrimination cases is the ministerial/nonministerial test devised by the federal courts. The test is used to determine whether a non-clergy employee should nonetheless be considered clergy and whether the autonomy rationale should extend to that employee. "As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.'" Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979)); *cf.* David L. Gregory, *Government Regulation of Religion Through Labor and Employment Discrimination Laws*, 22 STETSON L. REV. 27, 30 (1992) ("Only those employees of religious institutional employers who perform wholly secular functions and become irrevocably and systematically marginalized at the very bottom of workplace hierarchies have any realistic hope of receiving some passing judicial interest.").

11. *See, e.g.*, Gabriel v. Immanuel Evangelical Lutheran Church, Inc., 640 N.E.2d 681, 683 (Ill. App. Ct. 1994) (concluding that a parochial school teacher should be considered clergy).

12. *See, e.g.*, EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 283 (5th Cir. 1981) (concluding that members of a seminary faculty should be considered clergy).

13. *See, e.g.*, Assemany v. Archdiocese of Detroit, 434 N.W.2d 233, 238 (Mich. Ct. App. 1988) (concluding that a church organist should be considered clergy).

14. *See infra* note 92 and accompanying text (listing cases that have dismissed a cleric's breach of employment contract claim against a religious organization).

15. *See infra* Part II.B (arguing the voluntary nature of contract undercuts a religious organization's claim to institutional autonomy).

lar adjudication of breach of employment contract claims that clergy bring against their religious employers. Part I surveys applicable constitutional jurisprudence and reviews both employment discrimination and contract principles. Part I also describes current judicial approaches to employment cases involving religious employers. Part II questions the doctrinal support for the proposition that a clergy member's employment contract claim, like a discrimination action, must be dismissed under the First Amendment solely because the plaintiff is a cleric. Part III advocates that courts in breach of contract cases should focus less on the work the plaintiff performs for the religious organization and more on the gravamen of the contract claim. Specifically, Part III analyzes within a constitutional framework the two most common circumstances that arise in the adjudication of an employment contract claim against a religious organization: when the employee attempts to imply a contract from promises contained in a religious document and when the employer proffers a religious-based just cause reason for the dismissal. Finally, this Note concludes that while many contract claims are nonjudicable under the First Amendment, courts that summarily dismiss all contract claims solely because of a plaintiff's job status place unjust limitations on the disposition of contract disputes.

I. THE LEGAL PARAMETERS OF CIVIL ADJUDICATION OF RELIGIOUS EMPLOYMENT ACTIONS

A. EXPLORING THE CONSTITUTIONAL DIMENSION

The Supreme Court has declared that the First Amendment accords religious organizations the right to regulate internal matters of ecclesiastical significance free from outside governmental interference.[16] The Court, however, has been vague about which religion clause, the Free Exercise Clause or the Establishment Clause, serves as the source of this religious freedom.[17] Without clear precedent,[18] lower courts have em-

16. *See, e.g.*, Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952) (recognizing "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"); *see also* Garry, *supra* note 5, at 180 ("The great weight of judicial authority, dating back more than one hundred years, has maintained the freedom of religious organizations to govern themselves and to resolve church disputes according to their own church laws and rules.").

17. *See* Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution*

ployed various combinations of the Free Exercise Clause's compelling interest test, the Establishment Clause's *Lemon* test, and a body of Supreme Court precedent concerning intrachurch disputes.[19] Each constitutional doctrine has its own analytical framework, and all three are currently in a state of flux.[20]

1. The Free Exercise Clause and the Compelling State Interest Test

The Supreme Court has interpreted the Free Exercise Clause to guarantee individuals the unequivocal right to hold religious beliefs of whatever nature they choose.[21] At the same time, however, the Court has declared that the right to act in accordance with those beliefs is less than absolute.[22] Since 1963, the Court has employed a balancing test to decide the constitutionality of any state action that burdens an individual's religious practice.[23] Under this balancing test, the Court

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of Internal Church Disputes, 69 CAL. L. REV. 1380, 1381 (1981) (observing that the Supreme Court has been obscure about which religion clause governs the constitutionality of secular adjudication of intrachurch disputes).

18. *See* 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, 1373 (1981) (arguing that most of the judicial uncertainty surrounding employment and labor litigation involving churches derives from the Supreme Court's failure to develop a "coherent general theory of the religion clauses").

19. *See* Part I.C (discussing the various doctrinal approaches courts have employed to analyze the constitutionality of secular adjudication of employment disputes involving religious organizations).

20. *See* Laycock, *supra* note 18, at 1395 ("The doctrinal details of [a religious organization's] right to autonomy are in flux and not entirely clear.").

21. *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 877 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."); Sherbert v. Verner, 374 U.S. 398, 402 (1963) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such.").

22. *See* Bowen v. Roy, 476 U.S. 693, 699 (1986) ("Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute."); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) ("[T]he [First] Amendment embraces two concepts, —freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.").

23. The Court first articulated the test in *Sherbert*, 374 U.S. at 404-07. The Court applies the test when a governmental regulation is specifically targeted to prohibit a religious practice. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993) (applying the compelling interest test to a state statute passed to suppress a religion's ritual sacrifice of animals). Additionally, the Court applies the test when an individual seeks an exemption from a facially neutral law because of the burden on the

first examines whether the individual's conduct is motivated by a sincerely held religious belief.[24] Once that threshold inquiry is met, the Court weighs the magnitude of the burden on the religious-based conduct[25] against the government's interest in imposing the burden.[26]

Notwithstanding the Court's occasional use of language implying that only a compelling governmental interest will override an individual's religious liberty,[27] the majority of the Court's decisions have denied an individual's religious-based exemption from a facially neutral law.[28] The Court's general

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person's religious practice. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (applying the compelling interest test to a request by the Amish to be exempt from a state compulsory education law that significantly interfered with Amish religious beliefs).

24. *See* Thomas v. Review Bd., 450 U.S. 707, 713 (1981) ("Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion."); *see also* Esbeck, *supra* note 4, at 598 ("Government cannot place an individual in the position of having to prove the truth of his or her religious beliefs, but sincerity is required when invoking [free exercise of religion] protection.").

25. *See* Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) (finding the initial step in Free Exercise Clause analysis is to determine whether the government action places a substantial burden on a religious belief or practice); Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 303 (1985) (explaining that the Free Exercise Clause does not exempt a religious entity from governmental legislation unless the legislation actually burdens the entity's free exercise rights).

26. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 603 (1983) (noting that the Supreme Court has sometimes found "certain governmental interests so compelling as to allow even regulations prohibiting religiously-based conduct"); *Thomas*, 450 U.S. at 718 ("The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.").

27. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("[N]o showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'") (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

28. Only five Supreme Court decisions have upheld a claimant's request for a free exercise exemption from a facially neutral law: the *Yoder* case, in which the Court exempted Amish parents from complying with a state law requiring children under the age of sixteen to attend school, and four cases in which the Court exempted a claimant from an unemployment compensation requirement. David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241, 248 (1995). The Court more often has denied an individual's free exercise exemption claim. *Id.* at 248-49. Not surprisingly then, the Supreme Court almost always finds that the government satisfies its burden to demonstrate the existence of a compelling governmental interest. *See* Shea Sisk Wellford, *Tort Actions Against Churches—What Protections Does the First Amendment Provide?*, 25 U. MEM.

uneasiness with religious-based exemptions from facially neutral laws came to a head in 1990, when it ruled in *Employment Division, Department of Human Resources v. Smith*,[29] that the First Amendment does not release an individual from complying with an otherwise valid, religiously neutral law of general applicability.[30] In a response to the *Smith* decision,[31] Congress enacted the Religious Freedom Restoration Act (RFRA)[32] three years later "to restore the compelling interest test" and "to guarantee its application in all cases where free exercise of religion is substantially burdened."[33]

2. The Establishment Clause and the *Lemon* Test

The Supreme Court has interpreted the constitutional proscription on state establishment of religion to prohibit the government from supporting religion, endorsing all religion or preferring one religion over another, instituting a state religion, or

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L. REV. 193, 203 (1994) (observing that in the majority of cases the Supreme Court found the proffered governmental interest sufficiently compelling to deny the religious-based exemption).

29. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 872 (1990).

30. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 255 n.3, 263 (1982) (Stevens, J., concurring in judgment)).

31. *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(a) (1994).

32. *Id.* §§ 2000bb to 2000bb-4.

33. *Id.* § 2000bb(b). RFRA mandates that the government may not "substantially burden a person's exercise of religion" unless it "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering" that interest. *Id.* § 2000bb-1.

The exact impact of RFRA on free exercise analysis is uncertain. A number of scholars question the constitutionality of RFRA. *See, e.g.*, Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 213 (1995) (raising constitutional questions about Congress's power to force state governments to comply with RFRA).

Moreover, scholars have posited that RFRA is open to several different statutory constructions, arguably allowing courts to apply the compelling interest test in either a stringent or a lax manner. *See id.* at 193-98 (discussing the various interpretations of RFRA and their effects on a free exercise challenge to an application of a governmental regulation). RFRA expressly states that the purpose of the Act is to reinstate the "compelling interest test *as set forth* in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b)(1) (emphasis added). At the same time, however, Congress notes in its findings that "the compelling interest test *as set forth* in prior federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* § 2000bb(a)(5) (emphasis added). The ambiguity lies in the fact that while "*Sherbert* and *Yoder* were stringent in their application of the compelling interest test, . . . later cases found the test easily met." *Wellford*, *supra* note 28, at 210.

actively participating in the affairs of religious organizations.[34] Since the early 1970s, the Court has employed a three-part test devised in *Lemon v. Kurtzman*[35] to determine whether a governmental action resulting in substantial contact between religion and government violates the Establishment Clause.[36] The *Lemon* test requires that a valid regulation affecting religion has a secular purpose,[37] its primary effect neither advance nor inhibit religion,[38] and that it not foster excessive government entanglement with religion.[39] The entanglement prong is ultimately concerned with the degree of contact between the state and religion as a consequence of the state action.[40]

Commentators and judges speculate that the Supreme Court has abandoned the *Lemon* test *sub silentio*[41] after em-

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34. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) ("[T]he three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'") (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

35. *Id.*

36. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1162 n.1 (4th ed. 1991) (noting that the Supreme Court has used the three-part *Lemon* test "in most of the majority opinions of the Supreme Court that examined establishment clause issues" since the test's introduction).

37. *Lemon*, 403 U.S. at 612.

38. *Id.*

39. *Id.* at 613. The entanglement prong includes an analysis of the character and purpose of the institution benefited, the nature of the governmental aid, and the resulting relationship between the government and the religious authority. *Id.* at 615.

40. While the entanglement prong is perhaps the most critical element of the *Lemon* test, scholars have criticized it as lacking concreteness. *See, e.g.*, Laycock, *supra* note 18, at 1392 ("'Entanglement' is such a 'blurred, indistinct, and variable' term that it is useless as an analytical tool. Sometimes it seems to mean contact, or the opposite of separation; it has also been used interchangeably with 'involvement' and 'relationship.' Sometimes it seems to mean anything that might violate the religion clauses.") (citations omitted).

41. *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2500 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("As the Court's opinion today shows, the slide away from *Lemon's* unitary approach is well under way. A return to *Lemon*, even if possible, would likely be futile, regardless of where one stands on the substantive Establishment Clause questions."); Esbeck, *supra* note 4, at 583 ("The Supreme Court continues distancing itself from Establishment Clause doctrine first stated in *Lemon v. Kurtzman*, by not referring to—or noting only in passing—the three-part test."); Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 256-76 (1993) (arguing that the latest Supreme Court Establishment Clause cases indicate a shift away from *Lemon*).

Commentators identify two possible doctrinal replacements for the *Lemon* test that appear in Supreme Court decisions but have yet to be embraced by a majority of the Justices: the endorsement test and the coercion

ploying the test for nearly twenty years. Rather than applying the *Lemon* test, the Court has recently approached Establishment Clause cases by examining whether the government exercised its authority in a religiously neutral manner.[42] The neutrality principle ultimately ensures that government does not favor one religion over another or all religions over non-religion.[43] Thus, the Court requires that government employ "neutral criteria and evenhanded policies" as to an individual or group's religious beliefs when imposing benefits or burdens.[44]

3. Judicial Deference to Intrachurch Disputes and the Neutral Principles of Law Exception

The Supreme Court applies the "deference rule" whenever a case requires a civil court to assume jurisdiction over a dispute arising within a religious organization.[45] The rule forbids

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test. *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 115, 147-65 (Geoffrey R. Stone et al. eds., 1992) (discussing the doctrinal tenets of both the endorsement and coercion tests); Kristin M. Engstrom, Comment, *Establishment Clause Jurisprudence: The Souring of Lemon and the Search for a New Test*, 27 PAC. L.J. 121, 135-40 (1996) (providing an overview of the endorsement and coercion tests).

The endorsement test embodies the neutrality principle by forbidding government from favoring religion over non-religion, or one religion over another. Engstrom, *supra,* at 135. The central criterion of the test is whether the governmental action sends the message to observers that the government "endorses" a particular religion or religion in general. *Id.* at 136-37; McConnell, *supra,* at 147-48. The coercion test forbids governmental action that has the effect of placing pressure on individuals to support or participate in religion or its exercise. Engstrom, *supra,* at 140.

As this Note goes to publication, the Justices are still grappling with Establishment Clause cases and searching for an analytical framework to replace *Lemon*.

42. *See, e.g.*, Rosenberger v. Rectors and Visitors of Univ. of Va., 115 S. Ct. 2510, 2521 (1995) (stating that a "significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion"); *Grumet*, 114 S. Ct. at 2494 (ruling that a state statute creating a special school district for a village comprised solely of a religious enclave violates the Establishment Clause test of neutrality).

43. *Grumet*, 114 S. Ct. at 2491 (observing that "a principle at the heart of the Establishment Clause" is that "government should not prefer one religion to another, or religion to irreligion").

44. *Rosenberger*, 115 S. Ct. at 2521.

45. The Supreme Court announced the rule in *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), its first case addressing the power of secular courts to resolve a religious institution's internal disputes that affected civil interests. *Id.* at 727. Because *Watson* arose before the Court applied the religion clauses to the states, the Court decided the case following federal common law. *See* Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 n.5 (1976) (noting that the *Watson* Court based its decision on general federal

civil courts from resolving ecclesiastical disputes over discipline, faith, church governance, or doctrine.[46] Furthermore, the rule prohibits courts from adjudicating civil claims that would require extensive inquiries into, or turn upon core ecclesiastical subjects.[47] When such litigation comes before a

law). In dicta, subsequent Courts have accorded the deference rule constitutional status. *See, e.g.*, Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 446 (1969) (characterizing *Watson* as having "a clear constitutional ring").

Despite such occasional dicta, however, the Supreme Court has failed to integrate the deference rule with other religion clause analyses. *See Grumet*, 114 S. Ct. at 2500 (O'Connor, J., concurring) (characterizing Supreme Court deference rule precedent as a distinct category of religion clause analysis). As a result, many doctrinal questions in this area are without a definite answer. For example, the Court has yet to decide whether a civil court can set aside judicial deference towards a religious organization if a compelling governmental purpose exists. Additionally, the viability of the deference rule with the current Supreme Court is uncertain. Chief Justice Rehnquist has maintained that the rule as announced and applied in *Watson v. Jones* has "no constitutional dimension." *Serbian Orthodox Diocese*, 426 U.S. at 728 (Rehnquist, J., dissenting).

46. *Watson*, 80 U.S. (13 Wall.) at 727. Specifically, the *Watson* Court identified as outside the purview of secular courts those matters which concern "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Id.* at 733. The Court has hinted that the selection and assignment of clergy also should be considered a "purely ecclesiastical" matter. *See* Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16-19 (1929) (refusing jurisdiction over a beneficiary's claim to certain income under a will where the claim turned on whether the beneficiary would be appointed to a chaplaincy). Interestingly, few courts dismissing employment claims of clergy refer to the *Gonzalez* decision, despite its strong support for the proposition that secular courts cannot disturb the employment decisions of a religious organization regarding its clergy.

In a later decision, however, the Court indicated that the Free Exercise Clause protects the freedom to select clergy. *See* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952). The *Kedroff* Court most likely was integrating the *Watson* and *Gonzalez* decisions with religion clause jurisprudence after the clauses were held applicable to the states. Yet, placing the right to select clergy under the Free Exercise Clause raises the question of whether the deference rule or the compelling interest test should be used to decide whether adjudicating the claim of a clergy member against a religious organization violates the First Amendment. The distinction is significant because while the deference rule absolutely prohibits judicial intervention, the Free Exercise Clause allows limited governmental intrusion where a compelling state interest exists.

The Court has limited the viability of *Gonzalez* by characterizing the fraud, collusion, and arbitrariness exceptions to the rule as dicta. *See Serbian Orthodox Diocese*, 426 U.S. at 712. The *Serbian* Court expressly rejected the arbitrariness exception, *id.* at 713, but left open the question of whether there can be " 'marginal civil court review' under the narrow rubrics of 'fraud' or 'collusion' when church tribunals act in bad faith for secular purposes." *Id.*

47. *See* Jones v. Wolf, 443 U.S. 595, 602 (1979) (stating that the First Amendment bars secular courts from resolving civil disputes on the basis of

civil court, the deference rule requires the court to abide by the final decision of the highest religious authority on such matters, regardless of whether the court believes the religious organization's decision is "arbitrary."[48]

The Supreme Court has justified the deference rule in part on the principle that religious organizations maintain both the right to create tribunals to decide religious controversies and the right to govern their members.[49] Adopting a contractual rationale, the Court has stated that individuals who join religious organizations implicitly consent to be bound by the decisions of such tribunals.[50] The Court also believes civil courts, unlike ecclesiastical authorities, do not possess the necessary competence or expertise to decide religious controversies or interpret canonical doctrine.[51]

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religious doctrine and practice); *Serbian Orthodox Diocese*, 426 U.S. at 709 (stating that the First Amendment precludes judicial resolution of civil disputes that require extensive inquiry into religious law and polity); *Hull Memorial Presbyterian Church*, 393 U.S. at 449 (recognizing that civil litigation violates the First Amendment when it turns on courts deciding controversies over religious doctrine).

48. *Serbian Orthodox Diocese*, 426 U.S. at 713. In other words, a civil court cannot review a religious tribunal's decision for compliance with the church's own ecclesiastical constitutions, laws, and regulations, but must instead accept that tribunal's decision as binding on religious matters. The *Serbian* Court reasoned that such an inquiry would require a civil court impermissibly to scrutinize church law and doctrine. *Id.* The Court rejected any review of ecclesiastical action relying on "rational" or "objective criteria" because such decisions are "reached and are to be accepted as matters of faith." *Id.* at 714 (footnote omitted).

49. *See Watson*, 80 U.S. (13 Wall.) at 728-29. The *Watson* Court acknowledged that the religious freedom of individuals to

> organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general associations, is unquestioned.

Id.

50. *Id.* at 729. The Court also expressed concern that submitting those decisions to secular court review would render the implied consent meaningless, undermining the authority and autonomy of religious entities to govern themselves. *Id.*

51. *Id.* The Court contended that most religious organizations have "a body of constitutional and ecclesiastical law of [their] own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith," making ecclesiastical courts the most learned tribunals for settling such disputes. *Id.* The Court was concerned that the interpretation of religious doctrine by civil courts would lead to the persecution of certain religious minorities or to the establishment of a particular religion. *Id.* at 727-28, 733-34.

In its last decision involving the deference rule, the Court created the neutral principles of law exception.[52] Under this exception, civil courts have the authority to resolve disputes that involve matters typically secular in nature and in which the state has an "obvious and legitimate interest," such as property rights.[53] The Court maintained that courts do not violate the First Amendment by adjudicating intrachurch property disputes according to objective, well-established neutral principles of law, thereby avoiding any consideration of ecclesiastical doctrine in judicial resolution.[54] In addition, the Court suggested that the judiciary could even examine church documents to resolve disputes as long as the court did so in purely secular terms.[55]

B. FEDERAL ANTI-DISCRIMINATION LAWS AND COMMON LAW EMPLOYMENT CONTRACTS: TWO EXCEPTIONS TO THE AT-WILL EMPLOYMENT RULE

The foundation of American employment law is the at-will employment rule, which provides that either the employer or employee may terminate the employment relationship for any cause or for no cause at all, absent an express agreement to the contrary.[56] Most jurisdictions presume that an employment

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52. Jones v. Wolf, 443 U.S. at 602, 604.

53. *Id.* at 604. The *Jones* Court acknowledged that controversies would require deference where church documents incorporated ecclesiastical concepts or where adjudication would require doctrinal inquiries. The Court, however, expressly rejected the contention that the First Amendment required "compulsory deference to religious authority" in internal disputes "even where no issue of doctrinal controversy [was] involved." *Id.* at 604-05.

54. *Id.* at 602-03. The Court argued that one advantage of the neutral principles approach is that "it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity." *Id.* at 603. Originated to resolve property disputes, the "method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges," thereby promising "to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Id.* The Court also lauded the flexibility of the neutral principles method "in ordering private rights and obligations to reflect the intentions of the parties." *Id.*

55. *Id. Jones* arguably conflicts with *Serbian Orthodox Diocese*, which forbids courts from engaging in a "detailed review" of church canon or "delv[ing] into . . . various church constitutional provisions" to resolve disputes. Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 718-21 (1976).

56. *See* Payne v. Western & Atl. R.R., 81 Tenn. 507, 518-20 (1884) (producing the classic definition of the at-will rule that "all may dismiss their employees at-will, be they many or few, for good cause, for no cause or even for cause morally wrong, without thereby being guilty of legal wrong"), *rev'd on other grounds*, Hutton v. Watters, 179 S.W. 134, 138 (Tenn. 1915).

relationship is at-will but allow an employee to rebut that presumption by demonstrating that the claim falls within one of the recognized exceptions to the rule.[57] Two of the most common exceptions are discrimination claims and claims alleging the existence of an employment contract restricting the employer's right to discharge.[58]

1. Fundamentals of Federal Anti-Discrimination Laws in an Employment Context

Arguably, the most far-reaching and important restriction on an employer's ability to discharge an employee is the body of federal law prohibiting discrimination on the basis of race,[59] national origin,[60] sex,[61] religion,[62] age[63] and disability.[64] These

57. The common law presumption is that an employment relationship is at-will. *See* HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 1.1, at 3-4 (3rd ed. 1992). The plaintiff bears the burden of rebutting this presumption by proving that the dismissal either violates a common law doctrine or contravenes a state law. *Id.*

58. For a compete synopsis of the exceptions to the at-will doctrine, see LEX K. LARSON & PHILLIP BOROWSKY, 1 & 2 UNJUST DISMISSAL §§ 3, 4, 6, 8, 10 (1996).

59. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994) (declaring it unlawful for an employer to not hire, to discharge, or to otherwise discriminate against a current or prospective employee with respect to compensation, terms, conditions, or privileges of employment, on the basis of race).

60. *Id.*

61. *Id.*

62. *Id.* Title VII contains three exemptions for religious employers: the religious corporation exemption, the religious schools exemption, and the "bona fide occupational qualification" provision, all of which overlap to a degree and which religious employers use as defenses against religious discrimination claims. *Id.*

The religious corporation exemption excuses religious corporations, associations, educational institutions, and societies from complying with Title VII " 'with respect to the employment of individuals of a particular religion to perform work connected with' the organization's activities." *Id.* (quoting 42 U.S.C. § 2000e-1). While this exemption originally only applied to employees whose jobs were connected with an employer's "religious activities," Congress in 1972 deleted the term "religious." *Id.* The 1972 amendment broadened the scope of the exemption to include employees who performed purely secular duties for the religious employer. *Id.* Above all, it is important to note that the exemption only extends to discrimination on the basis of the employee's religion, and not to sex, race, color, or national origin discrimination. Brant, *supra* note 5, at 284.

The second exemption permits religious schools, colleges, universities, and other educational institutions owned, aided, or operated by a religious organization to "hire and employ" individuals of a particular religion. *Id.* at 285 (quoting 42 U.S.C. § 2000e-2(e)(2)).

Finally, Title VII allows all employers, secular or religious, to "hire and

federal anti-discrimination laws prohibit an employer from intentionally discriminating against individuals who belong to certain protected classes.[65] In cases in which direct evidence of intentional discrimination does not exist, a plaintiff must present circumstantial evidence of disparate treatment.[66] In these cases, the plaintiff bears the ultimate burden of persuading the factfinder that any nondiscriminatory reason proffered by the employer for the adverse employment action is merely pretext.[67] If the factfinder concludes that a discriminatory animus

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employ" individuals based on their sex, race, color, national origin, or religion if the employer can demonstrate that the characteristic is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." *Id.* (quoting 42 U.S.C. § 2000e-2(e)(1)). Although the defense is popular in employment discrimination cases, courts construe it narrowly. *Id.* at 286.

63. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994) (declaring it unlawful for an employer to not hire, to discharge, or to otherwise discriminate against a current or prospective employee with respect to compensation, terms, conditions, or privileges of employment, on the basis of age).

64. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797(b) (1994) (declaring it unlawful for an employer who receives federal funds to discriminate against a current or prospective employee solely because the employee is handicapped); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994) (declaring it unlawful for an employer to discriminate against a qualified individual with a disability in regard to job application procedures, hiring, advancement, discharge, compensation, job training, or other terms, conditions, and privileges of employment).

65. The Supreme Court recognizes two types of employment discrimination. One type is disparate treatment, which occurs when an employer intentionally discriminates. *See* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 3.6, at 96-98 (1994). The other type is disparate impact, occurring when the employer adopts an employment policy or criterion that disproportionately affects members of a protected class even though a discriminatory animus did not motivate the action. *See id.* § 3.18, at 128-32.

66. Because direct evidence of intentional discrimination rarely exists, the Supreme Court, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), ruled that plaintiffs could establish a prima facie claim of employment discrimination with circumstantial evidence. *McDonnell Douglas*, 411 U.S. at 802; *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("[T]he entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by."). *See generally*, ROTHSTEIN ET AL., *supra* note 65, §§ 3.7 & 3.8, at 98-103 (detailing methods by which a plaintiff can prove intentional employment discrimination with direct and circumstantial evidence).

67. Under *McDonnell Douglas*, a plaintiff first must establish a prima facie case of employment discrimination. *McDonnell Douglas*, 411 U.S. at 802. If the plaintiff is successful, the burden shifts to the employer to articulate a non-discriminatory reason for the alleged discrimination. *Id.* Because the burden of persuasion remains with the plaintiff at all times, the employer need not persuade the court that its articulated reason actually motivated the

motivated the employer's adverse action, the court may award a variety of remedies, including back pay, reinstatement, reasonable attorney's fees and costs, and punitive damages.[68]

2. Overview of Express and Implied Employment Contract Claims

Common law traditionally provided that an employer could dismiss an employee before the expiration of a definite term contract only for cause.[69] Moreover, courts enforced express agreements providing protection against at-will discharge as long as independent consideration existed.[70] More recently, courts have expanded the common law protection for employees by recognizing an implied contract exception to the at-will rule.[71] Under this approach, courts imply a contract from an employer's promise of job security unilaterally communicated to the employee through an informal source, such as

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adverse employment action, but must only produce admissible evidence sufficient to justify judgment in its favor. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-55 (1981). If the employer proffers a legitimate reason, the burden shifts back to the plaintiff to show that the employer's reason is a pretext for discrimination *Id.* at 255-56.

68. *See* PAUL N. COX, 2 EMPLOYMENT DISCRIMINATION § 23, ¶¶ 23.02-.06 (2d ed. 1992) (detailing the remedies for Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, the Rehabilitation Act, and the Americans with Disabilities Act).

69. *See* LARSON & BOROWSKY, *supra* note 58, § 3.01, at 3-1 to 3-2 (observing that, historically, the employment at-will rule never applied to express contracts for a fixed term of employment); ROTHSTEIN ET AL., *supra* note 65, § 9.2, at 524-25 (noting that an individual employed under a definite term contract may not be fired except for cause).

70. Courts historically refused to enforce an employer's express promise of job security unless the employee had provided consideration beyond continued service. LARSON & BOROWSKY, *supra* note 58, § 3.03, at 3-11. The rationale is that an employee's promise to provide continual service in return for job security lacks consideration because the employee already is obligated to render that service for a paycheck. Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326, 336 (1991-1992). While most jurisdictions still adhere to this traditional view, a growing number of courts have liberalized the consideration requirement. These courts employ two theories: unilateral contract and promissory estoppel. *See* PERRITT, *supra* note 57, § 4.5, at 268-69 (stating that courts currently recognizing wrongful termination claims allow the consideration requirement to be met by a promissory estoppel theory); Befort, *supra*, at 340-45 (stating that courts use unilateral contract and promissory estoppel theories as alternatives to the consideration requirement).

71. *See* 9A INDIVIDUAL EMPLOYEE RIGHTS MAN., BNA 505: 51-52 (1996) (noting that 34 states recognize an implied contract exception); PERRITT, *supra* note 57, § 4.9, at 276-78 (describing how courts have fashioned common law implied contract exceptions to the at-will rule).

an employee handbook.[72]

Where an employer discharges an employee in contravention of an express or implied contract, the court must determine whether the employer's action constitutes a breach.[73] At times this simply requires the factfinder to determine whether the employer satisfied the contractual obligation, such as when an employer promises to adhere to a progressive discipline policy.[74] Not infrequently, however, as in the case of just cause provisions, the factfinder must also consider the policy ramifications of declaring the employer's actions a breach.[75] If the factfinder ultimately concludes improper dismissal occurred, the employee is entitled to traditional contract damages measured by the employee's financial loss caused by the breach, less any costs avoided by not having to work.[76]

C. JUDICIAL APPROACHES TO EMPLOYMENT LITIGATION INVOLVING RELIGIOUS ORGANIZATIONS

Beginning in 1972, the federal appellate courts decided a series of cases in which they exempted the employment relationship between clergy and religious organizations from federal anti-discrimination laws.[77] Although the courts varied

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72. *See* Befort, *supra* note 70, at 333 (stating that courts have implied a contractual obligation from a variety of informal sources, including oral representations, pre-employment letters, employee handbooks, and a combination of circumstances, including past company policy and the employee's length of service).

73. *See* PERRITT, *supra* note 57, § 4.46, at 369-70 (describing what constitutes a breach of an express or implied employment contract).

74. For example, if the contract obliges the employer to follow discipline or discharge procedures, the factfinder only has to decide whether the employer followed the procedures. PERRITT, *supra* note 57, § 4.46, at 370. In this situation, it is irrelevant whether just cause for the dismissal existed. *Id.*

75. When a breach of contract claim arises out of a just cause provision in either an expressed or implied employment contract, two separate issues exist: whether the employee engaged in the alleged conduct, and whether such conduct constitutes just cause for discharge. *Id.* § 4.49, at 375. Perritt suggests that while the "first question is a straightforward fact dispute," the "second question requires employer interests to be balanced against employee interests, with appropriate consideration of the public interest on both sides." *Id.*

76. *Id.* § 4.62, at 408-09; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981) (stating that contract damages are ordinarily based on the injured party's expectation interest and are intended to put him in as good a position as he would have been in had the contract been performed). Ordinarily, reinstatement is not an appropriate remedy. PERRITT, *supra* note 57, § 4.63, at 418 (citing RESTATEMENT (SECOND) OF CONTRACTS § 367 cmt. b (1979)).

77. *See, e.g.*, Young v. Northern Ill. Conference of United Methodist

slightly in their reasoning, they ruled without exception that adjudication of cleric discrimination claims would violate one or both of the religion clauses. Some of the courts applied the Free Exercise Clause's compelling interest test and concluded that the state's interest in eliminating discrimination in the workplace did not outweigh a religious organization's need for the unfettered right to choose its spiritual leaders.[78] Other courts concluded that applying anti-discrimination law to employment decisions concerning clergy would offend the Establishment Clause, under the *Lemon* test, by causing an intolerable level of entanglement between the religious organization and the state.[79] Finally, most of the courts incorporated the deference rule into their analyses by characterizing clergy

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Church, 21 F.3d 184, 188 (7th Cir.) (affirming the dismissal of a sex and race discrimination suit by a minister against a church), *cert. denied*, 115 S. Ct. 320 (1994); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 363 (8th Cir. 1991) (upholding the dismissal of an age and sex discrimination action by a priest against a church-affiliated hospital); Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1358 (D.C. Cir. 1990) (affirming the dismissal of a minister's age discrimination suit against his church); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171-72 (4th Cir. 1985) (upholding the dismissal of a sex and race discrimination suit by a pastor against a church), *cert. denied*, 478 U.S. 1020 (1986); McClure v. Salvation Army, 460 F.2d 553, 560-61 (5th Cir.) (affirming dismissal of a sex discrimination suit by a minister against a religious organization), *cert. denied*, 409 U.S. 896 (1972).

78. *See, e.g.*, *Young*, 21 F.3d at 185 ("[I]n a direct clash of 'highest order' interests, the interest in protecting the free exercise of religion embodied in the First Amendment to the Constitution prevails over the interest in ending discrimination embodied in Title VII."); *Rayburn*, 772 F.2d at 1168-69 (holding that the free exercise of religion outweighs the governmental interest in eradicating employment discrimination where finding discrimination would introduce government standards to the selection of spiritual leaders).

79. *See, e.g.*, *Scharon*, 929 F.2d at 362-63 (holding that the application of Title VII and the ADEA to the employment relationship between a religious institution and a cleric would result in excessive governmental entanglement with religion); *Rayburn*, 772 F.2d at 1169-71 (concluding that subjecting church employment decisions to scrutiny under anti-discrimination law would produce excessive governmental entanglement with religion).

The *Rayburn* court contended that applying both Title VII and the ADEA to the employment relationship between a church and a cleric would cause substantive and procedural entanglement. *Rayburn*, 772 F.2d at 1170-71. The court believed that state entanglement with religion was a risk because of the importance of spirituality in the selection process of clergy. *Id.* The court also contended that a religious organization's goals in the selection of its clergy may differ from the neutral statutory mandates of anti-discrimination laws. *Id.* This is clear when doctrine directly clashes with secular prohibitions, as is the case of Seventh-Day Adventists whose doctrine precludes the ordination of women. *Id.* at 1171 n.9. Using language more typical of Free Exercise Clause analysis, the *Rayburn* court posited that religious organizations should be free to pursue their own goals and views free from governmental entanglement. *Id.* at 1171.

employment disputes as fundamentally ecclesiastical in nature, and therefore outside the realm of secular authority.[80]

Although some courts have demonstrated a willingness to adjudicate the discrimination claims of non-clergy plaintiffs,[81] other courts are wary of adjudicating such lawsuits when a religious organization proffers a religious reason for its employment decision.[82] While some courts have dismissed the plaintiff's case under those circumstances, both the Second and Third Circuits recently ruled that secular courts may inquire into whether the religious belief is sincerely held or is mere pretext masking a non-religious reason for the discharge.[83]

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80. *See, e.g.*, *Scharon*, 929 F.2d at 363 ("Personnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts."); *McClure*, 460 F.2d at 559-60 (holding that the deference rule prohibits judicial review of a religious organization's employment decisions and clergy practices because such matters are of "singular ecclesiastical concern").

81. *See, e.g.*, Weissman v. Congregation Shaare Emeth, 38 F.3d 1038, 1045 (8th Cir. 1994) (holding secular adjudication of a temple administrator's age discrimination claim did not violate First Amendment); Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324, 331-32 (3rd Cir. 1993) (ruling application of age anti-discrimination law to lay teachers at church-operated school did not violate the First Amendment); DeMarco v. Holy Cross High Sch., 4 F.3d 166, 171-72 (2nd Cir. 1993) (holding application of age anti-discrimination law to lay teacher who performed limited religious duties at parochial school posed no First Amendment risks).

82. *See, e.g.*, Geraci v. Eckankar, 526 N.W.2d 391, 401 (Minn. Ct. App.) (affirming dismissal of non-clergy employee's claims because the religious organization provided a religious-based reason for discharge), *cert. denied*, 116 S. Ct. 75 (1995)). Because religion clause jurisprudence prohibits secular courts from deciding the veracity of religious belief, such courts perceive an organization's religious-based decision as a constitutional barrier to secular adjudication. *See id.* ("The parties were unable and we cannot devise a way to determine if [the religious organization's] reason for termination was a pretext for discrimination without questioning the reasons for the excommunication and the veracity of those reasons.").

83. *See Geary*, 7 F.3d at 330 ("A conclusion that the religious reason did not in fact motivate dismissal would not implicate entanglement since that conclusion implies nothing about the validity of the religious doctrine or practice and, further, implies very little even about the good faith with which the doctrine was advanced to explain the dismissal."); *DeMarco*, 4 F.3d at 170-71 (ruling a factfinder may make a pretext inquiry into a religious reason for a challenged employment action without offending the First Amendment).

The *DeMarco* court believed courts can avoid First Amendment pitfalls by focusing "upon factual questions such as whether the asserted reason for the challenged action comports with the defendant's policies and rules, whether the rule applied to the plaintiff has been applied uniformly, and whether the putative non-discriminatory purpose was stated only after the allegation of discrimination." *DeMarco*, 4 F.3d at 171. The court concluded that "in those cases where a defendant proffers a religious purpose for its allegedly discriminatory employment action, a plaintiff will usually be able to challenge as

In 1990, the Court of Appeals for the District of Columbia circuit broke with the tradition of nonadjudication in *Minker v. Baltimore Annual Conference of United Methodist Church*.[84] In *Minker*, a minister sued his church for age discrimination and breach of written and oral contract.[85] While the court affirmed the dismissal of the age discrimination claim and the written contract claim,[86] it remanded the minister's breach of oral con-

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pretextual the employer's justification without calling into question the value or truthfulness of religious doctrine." *Id.* As the *Geary* court explained later:

> The secular tribunal merely asks whether a sincerely held religious belief actually motivated the institution's actions. The institution, at most, is called upon to explain the application of its own doctrines. Such an explanation is no more onerous than is the initial burden of any institution in any First Amendment litigation to advance and explain a sincerely held religious belief as the basis of a defense or claim.

Geary, 7 F.3d at 330.

84. Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990).

85. Minker based his federal and state age discrimination claims on the allegations that he had been denied a promotion solely on the basis of his age and that younger individuals were offered new appointments when he was passed up. *Id.* Minker's complaint also alleged that the Annual Conference breached two contracts they had with him. *Id.* Minker based his breach of contract claim on the promise by the United Methodist Church "to provide [him] with a congregation more suited to his training and skills in exchange for his continued work at the Mount Ranier Church." *Id.* at 1359. Minker also argued that section 529.1 of the Book of Discipline, "the book of law of the United Methodist Church," which declares that "appointments are to be made without regard to race, ethnic origin, sex, color, or age, except for the provisions of mandatory retirement," created a contract not to discriminate against him on account of his age, independent of his age discrimination claims. *Id.* at 1355-56. Minker appealed after the lower court dismissed both of his claims. *Id.* at 1356. He argued the First Amendment did not bar his statutory claims because "the Church has no religious policy permitting age discrimination, and no religious belief can be implicated by the fact alleged." *Id.* He also contended that a breach of employment contract claim "does not implicate first amendment principles." *Id.*

86. The *Minker* court affirmed the lower court's dismissal of the age discrimination claim on the ground that the Free Exercise Clause prohibits governmental interference with the appointment of clergy because it is a purely religious matter. *Id.* at 1356-57. The court noted that both the First Circuit in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), and the Fourth Circuit in *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), reached the same conclusion. *Minker*, 894 F.2d. at 1356-57.

Minker also affirmed the dismissal of the written contract claim because it required the court to interpret provisions in a religious document that were "highly subjective, spiritual, and ecclesiastical in nature." *Id.* at 1359. The court acknowledged that the Supreme Court in *Jones v. Wolf* stated that courts could interpret religious documents "as long as the analysis can be done in purely secular terms." *Id.* at 1358. The *Minker* court added, however, that the *Jones* Court "cautioned that not all provisions [of a religious docu-

tract claim.[87] Acknowledging that employment claims involving a minister and a church "touch the core of the rights protected by the free exercise clause,"[88] the court nonetheless maintained that the First Amendment does not preclude all employment contract claims made against a religious organization.[89] The court held that secular adjudication is permissible if the plaintiff can prove an employment contract claim without engaging in an inquiry into church doctrine or church motives behind the employment decision, and can demonstrate that a non-intrusive remedy exists.[90]

The *Minker* court's holding that some employment contract

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ment] are susceptible to neutral interpretation" because the document may "'incorporate[] religious concepts . . . [which] would require the civil courts to resolve a religious controversy.'" *Id.* at 1359 (quoting Jones v. Wolf, 443 U.S. 595, 604 (1976). The *Minker* court concluded that interpretation of the anti-discrimination passages of the Book of Discipline was not possible because it required the court "to consider the religious purpose of the anti-discrimination provision and to define its limits for the church." *Id.*

87. *Id.* at 1361.

88. *Id.* at 1360.

89. *Id.* The *Minker* court reasoned that "[a] church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court." *Id.* (citing Watson v. Jones, 80 U.S. (13 Wall.) 679, 714 (1871)). It further stated that "courts may always resolve contracts governing 'the manner in which churches own property, hire employees, or purchase goods.'" *Id.* (quoting Jones v. Wolf, 443 U.S. at 606). The court concluded:

> A church, like any other employer, is bound to perform its promissory obligations in accord with contract law. Pastor Minker is entitled to rely upon his employer's representations and to enforce them in a secular court. It is possible that the first amendment's prohibition against proceedings that would create excessive entanglements with religious beliefs will make appellant's task more difficult. But these difficulties do not eliminate [Minker's] right to enforce his employment contract.

Id. at 1361.

90. *Id.* at 1360. The *Minker* court suggests both a possible, neutral method of inquiry for proving the breach of contract claim and a permissible remedy:

> As a theoretical matter, the issue of breach of contract can be adduced by a fairly direct inquiry into whether [Minker's] superintendent promised him a more suitable congregation, whether [Minker] gave consideration in exchange for that promise, and whether such congregations became available but were not offered to Pastor Minker. Similarly, Minker's injury can be remedied without court oversight. Money damages alone would suffice since Minker already has a new pastorship. Maintaining a suit, by itself, will not necessarily create an excessive entanglement. Furthermore, as the remedy would be limited to the award of money damages, we see no potential for distortion of church appointment decisions from requiring that the Church not make empty, misleading promises to its clergy.

Id. at 1360-61.

claims are potentially judicable represented a departure from the general judicial trend dismissing employment claims brought by clergy against their religious employers. Few courts have followed the trail of the *Minker* court. Instead, most have dismissed a cleric's breach of employment contract claim against a religious organization simply because the employee is a cleric.[91] These courts believe employment decisions regarding clergy are of prime ecclesiastical significance, rising to the same level as decisions regarding doctrine; therefore, any grievance arising from those decisions should be left to the religious organization to resolve.[92]

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91. *See, e.g.*, Lewis v. Seventh-Day Adventists Lake Region Conference, 978 F.2d 940, 942-43 (6th Cir. 1992) (affirming dismissal of minister's breach of contract and promissory estoppel claim against religious organization); Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1578 (1st Cir. 1989) (affirming dismissal of cleric's wrongful termination claim against non-profit religious corporation); Hutchison v. Thomas, 789 F.2d 392, 396 (6th Cir. 1986) (affirming dismissal of minister's breach of employment contract claim against church); Sanders v. Casa View Baptist Church, 898 F. Supp. 1169, 1182 (N.D. Tex. 1995) (affirming church's motion for summary judgment against minister's breach of contract claim); Knuth v. Lutheran Church Mo. Synod, 643 F. Supp. 444, 449 (D. Kan. 1986) (mem.) (dismissing minister's employment contract claims against church and church officials); Gabriel v. Immanuel Evangelical Lutheran Church, Inc., 640 N.E.2d 681, 684 (Ill. App. Ct. 1994) (affirming dismissal of teacher's breach of contract claim against parochial school on grounds teacher is equivalent to cleric); Marshall v. Munro, 845 P.2d 424, 429 (Alaska 1993) (affirming dismissal of minister's breach of employment contract claim against a Presbyterian Church executive officer); Black v. Snyder, 471 N.W.2d 715, 720-21 (Minn. Ct. App. 1991) (affirming dismissal of associate pastor's breach of contract claim against supervising pastor and church); Higgins v. Maher, 210 Cal. App. 3d 1168, 1176 (Cal. Ct. App. 1989) (affirming dismissal of priest's wrongful termination and breach of implied covenant claims against bishop and church); United Methodist Church, Baltimore Annual Conference v. White, 571 A.2d 790, 796-97 (D.C. 1990) (dismissing minister's breach of contract claim against church).

92. *See, e.g.*, *Lewis*, 978 F.2d at 942 (concluding First Amendment prohibits civil courts from reviewing claims related to the employment of clergy); *Natal*, 878 F.2d at 1578 (holding that inquiry into whether church discharged pastor according to internal governance procedures would violate the Free Exercise Clause); *Hutchison*, 789 F.2d at 396 (affirming dismissal of a Methodist minister's challenge to forced enforcement because the claim "concerns internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom and law"); *Sanders*, 898 F. Supp. at 1182 (concluding First Amendment principles require dismissal of minister's breach of contract claim because the claim relates to his employment as a minister); *Knuth*, 643 F. Supp. at 449 (characterizing employment-based claims between clergy and the church as "surrounded by an imposing and, in most cases, insurmountable barrier" to civil adjudication); *Black*, 471 N.W.2d at 720 (holding that associate pastor's discharge-related claims are "fundamentally connected to issues of church doctrine and governance" which are beyond judicial review); *Higgins*, 210 Cal. App. 3d at 1174-75 (maintaining that First Amendment principles preclude secular courts from "righting the

II. THE FIRST AMENDMENT DOES NOT COMPEL DISMISSAL OF A CLERIC'S EMPLOYMENT CONTRACT CLAIM SOLELY BECAUSE THE PLAINTIFF IS A CLERIC

A religious organization's ability to choose clergy freely is paramount to its autonomy.[93] Courts are therefore arguably justified in their reluctance to impose governmental regulations, such as anti-discrimination legislation, that restrict a religious organization's ability to choose who preaches from its pulpit.[94] Judicial refusal to adjudicate an employment contract simply because the plaintiff is a cleric, however, has less merit.[95] Unlike anti-discrimination legislation, which imposes society's moral and political values upon a religious organization,[96] judicial enforcement of contracts results from a voluntary decision by the organization to burden itself through contract.

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wrongs related to the hiring, firing, discipline or administration of clergy"); *White*, 571 A.2d at 794 ("Any attempt by the civil courts to limit the church's choice of its religious representatives would constitute an impermissible burden on the church's First Amendment rights.").

93. *See* Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1167-68 (4th Cir. 1985) ("The right to choose ministers without government restriction underlies the well-being of religious community, for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrine both to its own membership and to the world at large.") (citation omitted); McClure v. Salvation Army, 460 F.2d 553, 558-59 (5th Cir. 1972) ("The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose.").

94. This Note passes no judgment on whether the circuit court discrimination cases were correctly or incorrectly decided, but only seeks to distinguish contract claims from discrimination claims. For a criticism of the circuit court decisions, see Elizabeth S. Wendorff, *Employment Discrimination and Clergywomen: Where the Law Has Feared to Tread*, 3 S. CAL. REV. L. & WOMEN'S STUD. 135, 152-56 (1993).

95. Even the circuit courts that have dismissed clerics' discrimination claims recognize the difference between discrimination and employment contract claims. *See, e.g.*, Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1361 (D.C. Cir. 1990) ("A church, like any other employer, is bound to perform its promissory obligations in accord with contract law. [A plaintiff] is entitled to rely upon his employer's representations and to enforce them in a secular court."); *Rayburn*, 772 F.2d at 1171 ("Of course churches are not—and should not be—above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts.").

96. *See* Brant, *supra* note 5, at 277 ("Employment discrimination laws reflect society's understanding of legitimate and illegitimate bases of power and status in the workplace.").

A. THE DEFERENCE RULE DOES NOT COMPEL DISMISSAL

The strongest barrier to adjudication of a cleric's contract claim is the deference rule.[97] The rule's purpose is to ensure that a secular court does not decide a question that is purely ecclesiastical in character.[98] Unfortunately, the Supreme Court has not clearly defined what matters are "purely ecclesiastical." Although the Court has designated doctrine, church government, faith, and religious law as core ecclesiastical matters,[99] it has failed to elaborate on why these subjects, and not other spheres of religious activity, deserve deferential treatment. Furthermore, the Court has been unclear as to whether judicial deference extends to a religious organization's assessment of a potential cleric's qualifications.[100]

Even assuming that a deference rule protects a religious organization's personnel decisions regarding clergy, secular adjudication of contract cases does not violate the rule. First, unlike anti-discrimination legislation that limits the factors a religious organization may consider in deciding whether to hire an individual as a cleric,[101] contract law generally applies only after a religious organization hires an individual and then proceeds voluntarily to enter into a contract.[102] Consequently, adjudication of breach of contract claims does not substantially abridge a religious organization's freedom to select clergy. This is also true for a religious organization's ability to discharge or replace a cleric, because reinstatement is not ordinarily a remedy when the employer has breached the employment contract.[103]

More importantly, the rationale behind the deference rule does not apply to a cleric's contract dispute. The underlying

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97. *See* Wellford, *supra* note 28, at 196 ("Ecclesiastical abstention is the strongest protection afforded to churches under the First Amendment.").

98. *See supra*, note 45 (discussing the deference rule).

99. *See supra* note 46 and accompanying text (describing those matters the Supreme Court has identified as "purely ecclesiastical" under the deference rule).

100. *See supra* note 46 (discussing the Supreme Court's ambiguity regarding whether employment matters concerning clergy should be protected under the deference rule).

101. *See supra* notes 59-64 and accompanying text (discussing the limitations that federal anti-discrimination legislation impose on employers).

102. *See* Gabriel v. Immanuel Evangelical Lutheran Church, Inc., 640 N.E.2d 681, 684 (Ill. App. Ct. 1994) ("Enforcing vested secular, contractual rights is clearly different from reviewing the subjective, ecclesiastical, personnel-appointment process of the church.").

103. *See supra* note 76 and accompanying text (detailing the remedies available for a breach of contract claim).

justification for the rule is that individuals who voluntarily join religious organizations give their implied consent to be bound by the decisions of that organization.[104] When a religious organization and a cleric enter into a civil contract, both parties should implicitly understand that secular laws protect those contractual rights.[105] Thus, the notion of implied consent does not apply where the parties implicitly or explicitly agree that a particular matter will be governed by civil authorities and secular law.[106] The more secular the contract, the greater the understanding of both parties that secular laws protect the agreement.[107] In contrast, implied consent to secular enforce-

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104. *See supra* notes 49-51 and accompanying text (describing the *Watson* Court's rationale for the deference rule).

105. The act of entering a civil contract should be viewed as a "non-ecclesiastical activity." As one commentator notes, "The rule has long existed that religious organizations, like everyone else, can be sued if they participate in secular or 'non-ecclesiastical' activities." Garry, *supra* note 5, at 179. For instance, "if religious organizations enter into a contract to purchase land, they are as liable on that contract as any other individual or organization in society." *Id.* The Supreme Court said as much in *Watson v. Jones*, explaining that "[r]eligious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their *rights of property*, or *of contract*, are equally *under the protection of the law, and the actions of their members subject to its restraints.*" Watson v. Jones, 80 U.S. (13 Wall.) 679, 714 (1871) (emphasis added).

106. *See* Arlin M. Adams & William R. Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1331 (1980) ("And whether a particular question is a matter of internal church affairs, which may not be intruded upon by a civil court, depends entirely on whether the parties consented, either expressly or by implication, to have the issue resolved within the structure of church government.").

107. To illustrate this principle, Laycock points out that a merchant who sells goods to churches does not implicitly consent to having any dispute arising from the sale adjudicated by church courts or without due process protections. Laycock, *supra* note 18, at 1406. While Laycock generally favors granting religious organizations deference and autonomy in their employment practices, he nevertheless acknowledges that a religious organization and its employees are free to bargain to have their agreements enforced in secular court. *Id.*

Where the religious employer and employee agree to an express employment contract, there should be little question that both parties expect that agreement to be enforced in a secular court. More questionable is the situation in which an alleged contract is implied from an employee handbook, given the possibility that many religious organizations are unsophisticated in employment matters and may not realize that promises contained in their employee handbooks can give rise to enforceable contracts. *See supra* notes 71-72 and accompanying text (describing the judicial trend of enforcing promises in employment manuals as implied contracts). There are two compelling arguments, however, for enforcing implied contracts based on employee handbooks. Principally, religious organizations are becoming more sophisticated in

ment is not present where the document giving rise to an alleged contract is purely ecclesiastical in nature.[108] Hence, courts need to weigh the religious and secular character of the contract to determine the parties' implied intent as to which authority, civil or ecclesiastical, governs its enforcement.[109]

Finally, because of the harshness of the deference rule, courts should limit its application to only those ecclesiastical matters clearly identified by the Supreme Court. Unlike the compelling interest test,[110] the deference rule does not involve a balancing of the state's interests against those of the religious organization. Instead, the rule absolutely bars secular court intervention, regardless of whether the state or the plaintiff has an overriding interest in secular adjudication of the employment dispute. Because of the potential for abuse by religious organizations who may use the rule to shield themselves from civil liability, courts should not extend the deference rule to other areas without a clear directive from the Supreme Court. [111]

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employment law. *See, e.g.,* Philip J. Murren, *Employment Issues*, 34 CATH. LAW. 331, 340-41 (1991) (discussing judicial enforcement of contracts based on oral or written promises, in a Note originally delivered at a meeting of the Diocesan Attorneys Association). Additionally, many secular employers remain in the dark about legal developments that impact their personnel practices, raising the question of why religious employers should be treated differently and whether such disparate treatment implicates the Establishment Clause's prohibition on governmental favoritism towards religion.

Of course, if religious organizations do not want to incur contractual obligations, they can simply decline to enter into employment contracts with their clergy. If the religious organization does choose to agree to an express contract or promise job security in an employee handbook, the religious organization is still free to place a waiver in the document that provides that the employee's only recourse for breach is ecclesiastical court. This is consistent with *Jones v. Wolf*, in which the Supreme Court noted that the neutral principles doctrine still allows religious organizations to achieve their wishes regarding property distribution prior to disputes by modifying deeds, corporate charters, or religious constitutions. Jones v. Wolf, 443 U.S. 595, 606 (1979).

108. *See* Laycock, *supra* note 18, at 1405 (arguing that secular courts should not turn "plainly ecclesiastical sources and documents" into contracts because such documents have "no clear indicia of a desire for secular adjudication"); *see also* Ellman, *supra* note 17, at 1419 (observing that few church documents are "drafted with an eye towards creation of an easily enforceable contract.").

109. *See infra* Part III.A (arguing that implied employment contracts based on religious documents are not enforceable because religious organizations are not consenting to secular adjudication of the promises contained in the documents).

110. *See supra* notes 25-26 and accompanying text (noting that the compelling interest test balances an individual's free exercise of religion against the state's interest).

111. *See* Ira C. Lupu, *Free Exercise Exemption and Religious Institutions:*

While the deference rule does not bar a contract claim simply because the plaintiff is a cleric, the rule does preclude those claims that require courts to decide questions of doctrine, church policy, faith, or discipline.[112] This construction of the deference rule is consistent with the neutral principles of law exception approved by the Supreme Court.[113] In fact, a number of courts have employed the neutral methods of proof approach to adjudicate clerics' contract claims, implicitly concluding that the deference rule does not necessarily bar a contract claim merely because the plaintiff is a cleric.[114]

B. ENFORCING EMPLOYMENT CONTRACTS IMPOSES A NEGLIGIBLE BURDEN ON FREE EXERCISE RIGHTS OF RELIGIOUS ORGANIZATIONS

Although courts faced with clergy contract claims often refer to the Free Exercise Clause, not one has applied the compelling interest test in either its pre-*Smith* or RFRA form.[115] Perhaps these courts believe that, since previous courts have already concluded that eliminating employment discrimination is not a compelling enough reason to override the religious organization's interest in selecting and dismissing clergy, the state's colorable interest in enforcing contracts is hardly wor-

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The Case of Employment Discrimination, 67 B.U. L. REV. 391, 401 (1987) ("[A]utonomy theories tend to shield undesirable behavior without producing any guarantee of a commensurate return of constitutional value.").

112. *See supra* note 46 and accompanying text (summarizing the types of claims that the deference rule excludes from judicial review).

113. *See supra* notes 52-55 and accompanying text (describing the neutral methods of proof doctrine).

114. *See, e.g.*, Elmora Hebrew Ctr., Inc., v. Fishman, 593 A.2d 725, 729-31 (N.J. 1991) (applying neutral principles of law doctrine to adjudicate employment contract dispute between rabbi and synagogue); Reardon v. Lemoyne, 454 A.2d 428, 432-33 (N.H. 1982) (concluding that the trial court should have adjudicated a contract dispute between nun-teachers and bishop superintendent of parochial school according to neutral principles doctrine).

115. *See supra* notes 23-28 and accompanying text (describing the compelling interest test). If RFRA is found unconstitutional, then secular adjudication of a cleric's contract claim clearly is permissible according to the free exercise analysis articulated in *Smith*. *See supra* note 33 (discussing speculation by scholars that RFRA is unconstitutional); *supra* note 30 and accompanying text (describing the *Smith* Court's interpretation of the Free Exercise Clause). Contract law is facially neutral. Therefore, under *Smith*, religious organizations would not be entitled to a religious-based exemption from judicial enforcement of a cleric's employment contract. *See* Black v. Snyder, 471 N.W.2d 715, 719 (Minn. Ct. App. 1991) (ruling under a *Smith* analysis that adjudicating a minister's breach of contract claim did not violate the church's free exercise rights because contract law is generally applicable and facially neutral).

thy of analysis.[116] Yet, before courts even address whether a compelling governmental interest exists, they must first determine whether the burden on the religious entity's free exercise rights is substantial.[117] Thus, courts need to address the magnitude of the burden that secular adjudication of a cleric's employment contract imposes on a religious organization's free exercise rights.

The voluntary nature of contracts significantly attenuates any perceived burden imposed by secular enforcement. Unlike federal anti-discrimination legislation that requires mandatory compliance from employers,[118] religious organizations are under no obligation to enter into employment contracts with clergy.[119] It is highly improbable that those religious organi-

116. It is noteworthy that as late as 1979, after deciding both *Sherbert* and *Yoder*, the Supreme Court ruled in *Jones* that "[t]he State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively." Jones v. Wolf, 443 U.S. 595, 602 (1979) (citing Presbyterian Church v. Hull Church, 393 U.S. 440, 445 (1969)). Interestingly, the *Jones* Court never addressed whether judicial resolution of property rights was a compelling governmental interest. Judicial enforcement of contract rights is arguably just as important. *See Elmora Hebrew Ctr., Inc.*, 593 A.2d at 729 ("[C]ourts have a power, and perhaps a duty as well, to enforce secular contract rights, despite the fact that the contracting parties may base their rights on religious affiliations.").

117. *See supra* note 25 and accompanying text (discussing the role of burden in free exercise analysis). For a description of RFRA's codification of the "substantial burden" requirement and its impact on free exercise analysis, see Lupu, *supra* note 33, at 188-90. In summarizing the post-RFRA case law on substantial burden, Lupu identifies three circumstances in which a burden may be found: "a direct legal prohibition against conduct religiously required, direct legal compulsion of conduct religiously forbidden, or the conditioning of an important benefit upon infidelity to religious commitment." *Id.* at 202. While federal and state anti-discrimination legislation may arguably impose a burden under the second circumstance, secular adjudication of employment contracts does not fit any of the three criteria.

118. Because federal anti-discrimination legislation requires mandatory compliance from employers, those laws significantly burden a religious organization's ability to select clergy without interference. This is particularly evident when the prohibitions of the anti-discrimination laws directly conflict with religious belief. For example, those religious organizations that do not allow women to serve as clerics would face the dilemma of violating either the anti-discrimination legislation or their own religious tenets. *See* Wendorff, *supra* note 94, at 138 (noting that the Roman Catholic Church, the Mormon faith, and Orthodox branches of Judaism still exclude women from ordination).

119. An obvious exception is when employees form a union and force an employer to enter into collective bargaining negotiations under the guidelines of the National Labor Relations Act. Significantly, the Supreme Court exempted teachers in church-owned schools from the jurisdiction of the Act in *NLRB v. Catholic Bishop*, 440 U.S. 490, 504-07 (1979).

zations that choose to contract with their clergy do so because of a doctrinal tenet or religious conviction. Instead, religious organizations, like any other entity, enter contractual agreements to obtain some benefit, such as to "lock up" the services of an employee.[120] To excuse a religious organization from complying with a commitment into which it has voluntarily entered is unjust and illogical.[121]

The different burdens that employment contracts and governmental workplace regulations impose are particularly evident when viewed in the context of the at-will employment doctrine.[122] The belief that religious organizations should have the unfettered right to hire and fire clerics underlies the institutional autonomy argument in favor of granting religious organizations exemptions from compliance with governmental regulations.[123] In other words, courts maintain an unassailable at-will relationship between clergy and their religious employers. Yet, the employment at-will rule never traditionally applied when the parties agreed to an employment contract.[124] In fact, freedom of contract served as a primary philosophical and legal justification for the at-will rule.[125] When a religious organization voluntarily enters into an employment contract with a cleric, the organization exercises its freedom to contract away an at-will relationship. This voluntary waiver is fundamentally different than the governmental imposition of exter-

120. *See* Befort, *supra* note 70, at 337-38 (describing how employers benefit from promises contained in general statements of personnel policy).

121. *See* Reardon v. Lemoyne, 454 A.2d 428, 432 (N.H. 1982) ("[I]t would be unfair and illogical to deny access to the civil courts in non-doctrinal matters to parties who have voluntarily entered into civil contracts.") (citing Ellman, *supra* note 17, at 1402-03); *see also* Adams & Hanlon, *supra* note 106, at 1330 ("Indeed, refusal to adjudicate a dispute over . . . contractual obligations simply because the litigants are religious [entities] 'smacks of a denial of equal protection as well as a violation of first amendment rights.'" (quoting Robert C. Casad, *The Establishment Clause and the Ecumenical Movement*, 62 MICH. L. REV. 419, 432 (1964)).

122. *See supra* notes 59-63 (noting protections extended by Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967).

123. *See* Esbeck, *supra* note 4, at 600 n.72 (defining a religious organization's "institutional autonomy" to include the organization's right to freely hire and fire clergy).

124. *See supra* note 70 and accompanying text (explaining that the at-will employment rule has never been applied to an employment relationship governed by an express employment contract for a fixed term).

125. *See* Caroline R. Fredrickson, *Freedom of Contract and the Remedy of Forced Hiring: A Comparative Assessment of German and American Anti-Discrimination Law*, 4 J.L. & POL'Y 1, 5-12 (1995) (providing an overview of the notion of freedom of contract in American law).

nal limits on the religious organization's employment relationship with its clerics.[126]

C. ADJUDICATION DOES NOT VIOLATE THE ANTI-ENTANGLEMENT PRINCIPLE OF THE ESTABLISHMENT CLAUSE

Courts that invoke the *Lemon* Establishment Clause test to dismiss clergy employment claims believe adjudication would result in excessive entanglement between government and religion.[127] They reason that the relationship between clergy and religious organizations is so highly ecclesiastical that any governmental intrusion would result in an intolerable level of contact between church and state. The Supreme Court, however, has required a "permanent and pervasive" contact between religious organizations and the government in order to find entanglement.[128] By its nature, secular adjudication of a civil claim produces only a limited and singular contact, thereby avoiding excessive entanglement.[129] To conclude otherwise would effectively insulate religious organizations from any civil claim brought by members of clergy. Nevertheless, courts have been reluctant to adopt such a far-reaching view of the First Amendment's protections.[130]

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126. *See* Laycock, *supra* note 18, at 1403 (arguing state enforcement of a voluntary agreement is different from coercive state regulation imposed upon a religious organization).

127. *See supra* note 79 and accompanying text (discussing the entanglement concerns expressed by courts that dismiss cleric employment suits against religious organizations).

128. *See* Aguilar v. Felton, 473 U.S. 402, 413 (1985) (finding entanglement where federal funds were used to pay the salaries of public school teachers working in parochial schools).

129. *See* Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324, 328 (3rd Cir. 1993) (distinguishing between a single instance of judicial intrusion into a religious organization's autonomy, such as adjudication of an age discrimination suit, and a continuing and pervasive governmental intrusion such as allowing the NLRB to certify teachers at a Roman Catholic high school); DeMarco v. Holy Cross High Sch., 4 F.3d 166, 169-70 (2nd Cir. 1993) (distinguishing between "ongoing supervision of all aspects of employment" and a "limited inquiry" produced by a civil employment suit).

130. *See, e.g.*, Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1360 (D.C. Cir. 1990) ("[T]he first amendment does not immunize the church from all temporal claims made against it."); Reardon v. Lemoyne, 454 A.2d 428, 431 (N.H. 1982) ("Religious entities . . . are not totally immune from responsibility under the civil law. In religious controversies involving property or contractual rights outside the doctrinal realm, a court may accept jurisdiction and render a decision without violating the first amendment."); Bodewes v. Zuroweste, 303 N.E.2d 509, 511 (Ill. Ct. App. 1973) ("It was not the intent of [the First] [A]mendment, and it has been so held in

Further, the real entanglement risk lies where secular adjudication of a contract claim requires a judicial inquiry into core ecclesiastical matters. By adopting a neutral principles approach, courts can resolve the secular questions a contract claim raises and still avoid any religious controversies over "questions of religious doctrine, polity, and practice."[131] As long as adjudication of the contract claim does not require the court to decide such questions, no risk of excessive entanglement with religion exists.[132]

If commentators are correct in asserting that the Supreme Court has replaced the *Lemon* test with a neutrality-based analysis,[133] secular courts undoubtedly can adjudicate contract claims. As long as courts enforce employment contracts against both religious and non-religious employers, the state would be exercising its authority in a religiously neutral manner. Moreover, a court would violate the neutrality test if it did exempt religious organizations from compliance with their employment contracts unless the Free Exercise Clause compelled such an exemption.

III. PROPER CONSTITUTIONAL ANALYSIS SHOULD FOCUS ON THE NATURE OF THE EMPLOYMENT CONTRACT INSTEAD OF THE PLAINTIFF'S JOB IN THE RELIGIOUS ORGANIZATION

Courts should not dismiss a cleric's employment contract claim solely because of the job the plaintiff performs for the re-

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many cases, that civil and property rights should be unenforceable in the civil court simply because the parties involved might be the church and members, officers, or the ministry of the church.").

131. Jones v. Wolf, 443 U.S. 595, 603 (1979); *see also* Geraci v. Eckankar, 526 N.W.2d 391, 396 (Minn. Ct. App.) (maintaining that the religion clauses do not prevent judicial review of an employee's workplace claims against a religious organization if the claims can be resolved through neutral methods of proof), *cert. denied*, 116 S. Ct. 75 (1995); Schoenhals v. Mains, 504 N.W.2d 233, 235 (Minn. Ct. App. 1993) ("[W]hen a claim may be resolved by 'neutral methods of proof' unrelated to issues of church doctrine or governance, then the First Amendment will not prohibit judicial review.").

132. *See* Hernandez v. Commissioner, 490 U.S. 680, 696-97 (1989) ("[R]outine regulatory interaction which *involves no inquiries into religious doctrine*, no delegation of state power to a religious body, and no 'detailed monitoring and close administrative contact' between secular and religious bodies, *does not of itself violate the nonentanglement command.*") (citations omitted) (emphasis added); *see also supra* note 54 and accompanying text (discussing how the neutral principles approach avoids entanglement).

133. *See supra* notes 40-41 and accompanying text (discussing the Supreme Court's apparent abandonment of the *Lemon* test in favor of a neutrality-based approach).

ligious organization. This tenet does not mean, however, that courts must adjudicate all contract claims brought by clerics. Instead, courts should examine the contract claim and any defenses the religious organization offers to determine whether any constitutional barriers exist. Specifically, courts should dismiss contract claims based on promises contained in religious documents or claims that require a court to determine the truth of an employer's religious reason for its adverse employment decision. In this regard, a cleric's employment contract claim is no different from that of any other employee who works for a religious organization.

A. SECULAR COURTS CANNOT IMPLY CONTRACTUAL OBLIGATIONS FROM RELIGIOUS DOCUMENTS

Clerics who seek judicial enforcement of religious organizations' employment promises and practices generally claim the existence of an implied employment contract. They, like most American workers, do not have an express contract with their employers.[134] Typically, the cleric asks the court to imply a contractual obligation from promises contained in a religious document or canonical text.[135] These promises usually include procedural requirements governing the hiring, appointment, discipline, and discharge of clerics. The cleric claims that the employer breaches the alleged implied contract when it fails to follow its own procedures.[136]

Courts must dismiss these implied contract claims for a variety of reasons. First, the deference rule prohibits courts

134. *See* Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 850 (noting that experts estimate that of the approximately 90 million persons employed by the private sector in nonagricultural jobs, approximately 60 million are at-will employees).

135. *See, e.g.*, *Minker*, 894 F.2d at 1358-59 (analyzing implied contract claim based on promises made by church in religious text); United Methodist Church, Baltimore Annual Conference v. White, 571 A.2d at 790, 791 (D.C. 1990) (arising from minister's breach of implied contract claim based on promise made by religious organization in religious text).

136. *See, e.g.*, Drevlow v. Lutheran Church, Mo. Synod, 991 F.2d 468, 471 (8th Cir. 1993) (affirming dismissal of minister's claim that the religious organization violated its own bylaws because such claims are not judicable by secular courts); Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1576 (1st Cir. 1989) (arising from cleric's contract claim that church failed to follow its own employment procedures contained in religious constitution and ecclesiastical canon); Music v. United Methodist Church, 864 S.W.2d 286, 287 (Ky. 1993) (arising from minister's employment contract claim that church failed to follow procedures set forth in religious document).

from forcing a religious organization to follow its own ecclesiastical laws and procedures, regardless of how arbitrary or egregious an organization's behavior appears.[137] The Supreme Court has declared the notions of due process and fundamental fairness embodied in secular law inapplicable to the question of whether religious organizations observe their own tenets and canons.[138] Second, for virtually all such promises, the relevant provisions in the document incorporate subjective and religious concepts in their promissory language.[139] Under all religion clause theories, courts must leave the interpretation of doctrinal matters and the right to construe religious canon to ecclesiastical tribunals and religious bodies.[140] Finally, the implied consent principle underlying the deference rule bars secular adjudication of contract claims based on religious documents. Implicit in the promises made by religious organizations in ecclesiastical documents is the understanding that any dispute arising from such promises will be resolved within the religious body.[141] A cleric is justified in relying on such promises only to the extent that a remedy is available from the religious organization itself.[142]

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137. *See supra* note 48 and accompanying text (describing *Serbian Orthodox Diocese* as establishing the constitutional principle that civil courts may not overturn a religious organization's arbitrary decision on an ecclesiastical matter).

138. Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 715 (1976) ("Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.").

139. *See supra* note 86 and accompanying text (noting that the *Minker* court dismissed a minister's implied contract claim because it required judicial interpretation of subjective and ecclesiastical provisions in a religious document); Williams v. Palmer, 532 N.E.2d 1061, 1065 (Ill. App. Ct. 1988) ("Whether or not the Conference followed required procedure in appointing plaintiff is not for a civil court to consider, because it would entail scrutinizing the appointment decision-making process and reviewing the subjective criteria used by the church organization in reaching its decision.").

140. *See* Adams & Hanlon, *supra* note 106, at 1328 ("Although civil courts have an expertise in the tasks of interpreting documents and discovering the intentions of parties to contracts, that expertise presumably does not extend to ecclesiastical matters."); *see also White*, 571 A.2d at 794 (arguing secular courts cannot interpret religious documents without usurping the right of religious organizations to construe their own ecclesiastical texts).

141. *See supra* note 50 and accompanying text (describing the *Watson* Court's reasoning that individuals who join religious organizations give their implied consent to be bound by ecclesiastical rules).

142. *See* Simpson v. Wells Lamont Corp., 494 F.2d 490, 494 (5th Cir. 1974) (stating that the only remedy available to a pastor claiming congregation's employment actions are arbitrary is an internal grievance process).

While religious documents as a rule do not give rise to an employment contract cognizable in a civil court, an instrument secular in nature, such as an employee handbook, generally should be enforceable under an implied contract theory.[143] Obviously, some secular documents will contain religious concepts, rendering them unenforceable. Yet, a court should not allow the mere existence of a doctrinal seal on a contract or document to deter it from enforcing an otherwise valid contractual obligation. Total judicial abstention would transform secular courts "into handmaidens of arbitrary lawlessness."[144] Hence, where the secular text can be subjected to an objective, neutral reading, the court simply must "evaluate the pertinent contractual provisions and extrinsic evidence in cases of ambiguity, to determine whether any violations of the contract have occurred, and to order appropriate remedies, if necessary."[145]

B. SECULAR COURTS MAY ADJUDICATE JUST CAUSE PROVISIONS WHILE DEFERRING RELIGIOUSLY-BASED FACTFINDING TO APPROPRIATE TRIBUNALS

For both definite term employment contracts and some implied contracts providing job security, an employer can raise the defense that no breach occurred because a just cause for the discharge existed.[146] If the religious organization provides a non-religious explanation for its actions, then the contract claim is completely judicable.[147] Because the employer is a re-

143. *See* Hemphill v. Zion Hope Primitive Baptist Church, Inc., 447 So. 2d 976, 977 (Fla. Dist. Ct. App. 1984) (holding wrongful termination claim based on discharge procedures contained in corporate charter does not touch ecclesiastical matters); Reardon v. Lemoyne, 454 A.2d 428, 432-33 (N.H. 1982) (concluding that secular courts may enforce the terms of a nondoctrinal employer handbook against a religious employer).

144. Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 727 (1976) (Rehnquist, J., dissenting).

145. Reardon, 454 A.2d at 432; *see also* Avitzur v. Avitzur, 446 N.E.2d 136, 139 (Ct. App. N.Y.) (stating that courts can enforce secular provisions in documents that contain provisions which are not judicially recognizable), *cert. denied*, 464 U.S. 817 (1983).

146. *See supra* note 75 and accompanying text (discussing the role of just cause in contract disputes).

147. *See, e.g.*, Drevlow v. Lutheran Church, Mo. Synod, 991 F.2d 468, 471-72 (8th Cir. 1993) ("The First Amendment does not shield employment decisions made by religious organizations from civil court review . . . where the employment decisions do not implicate religious beliefs, procedures, or law."); Geraci v. Eckankar, 526 N.W.2d 391, 397 (Minn. Ct. App.) (ruling an employee's employment claims based on pay disparity were judicable because the religious organization did not allege religious reasons for the disparity), *cert. denied*, 116 S. Ct. 75 (1995).

ligious organization, however, there is a strong likelihood that the organization will proffer a religious reason for its adverse employment decision.[148] Such a circumstance presents a potential constitutional barrier to further adjudication of the contract claim because traditional Free Exercise Clause analysis forbids courts from deciding the veracity of religious belief and doctrine.[149]

One possible solution is for courts to follow recent federal caselaw ruling that the judiciary can inquire into whether an organization's proffered religious-based motivation for an adverse employment action is mere pretext.[150] Under this approach, courts decide whether the organization's proffered just cause served as the actual motivation behind a cleric's discharge.[151] While courts may determine whether the proffered religious-based justification is pretext, they are prohibited from determining the veracity of the religious justification.[152] Moreover, the First Amendment bars courts from making judgments about whether the alleged religious reason for dismissal rises to a level significant enough to merit a just cause for the breach, because such a determination would displace the organization's constitutional right to define its own religion and interpret its doctrine and canon.

A second possibility exists when the religious organization has established its own tribunal to decide disputes of ecclesiastical character. If both parties consent, the court can refer to the ecclesiastical tribunal the question of whether the organization's religious-based reason for discharging the cleric constitutes just cause.[153] While submitting religious disputes to an

148. *See* Treaver Hodson, Comment, *The Religious Employer Exemption Under Title VII: Should a Church Define Its Own Activities?*, 1994 BYU L. REV. 571, 586 (1994) (observing that the "employment practices of religious employers are often religiously based").

149. *See supra* note 24 (stating that free exercise jurisprudence prohibits the state from questioning the truthfulness of a religious belief).

150. *See supra* note 83 and accompanying text (describing courts that have allowed a limited pretextual inquiry).

151. *See supra* note 67 and accompanying text (summarizing the pretextual approach in intentional employment discrimination cases).

152. *See* DeMarco v. Holy Cross High Sch., 4 F.3d 166, 170 (2nd Cir. 1993) ("Supreme Court precedents preclude the government from serving as the arbiter of the truthfulness or validity of religious beliefs.").

153. *See, e.g.*, Elmora Hebrew Ctr., Inc. v. Fishman, 593 A.2d 725, 729-32 (N.J. 1991) (refusing to overturn trial court's decision to submit the religious issues of a synagogue's contract claim against a rabbi to a rabbinical tribunal, based on finding that synagogue consented to the tribunal's jurisdiction and decision).

ecclesiastical tribunal for resolution, the court reserves for civil adjudication any contract issues remaining after the tribunal's determination.[154] This approach guarantees judicial deference to the religious organization on underlying ecclesiastical issues, while allowing a court to decide the civil aspects of the cleric's contract claim.

CONCLUSION

Clergy perform vital and highly spiritual functions for their religious employers. Consequently, courts should act cautiously when resolving employment disputes involving a clergy member and a religious organization to prevent unnecessary intrusion into the right of a religious organization to set its own ecclesiastical course. Religious organizations, however, are not above secular law and should be held accountable for the contracts they voluntarily enter. Hence, courts face the difficult challenge of deciding at what point a cleric's secular right to enforce a valid employment contract must yield to an organization's constitutionally protected right to religious autonomy in ecclesiastical matters.

Unfortunately, courts generally abstain from engaging in that delicate balancing act and, instead, have deferred blindly to religious organizations' employment practices regarding clergy. Because religion clause jurisprudence does not support judicial deference when religious organizations voluntarily enter into secular contracts, some courts wrongly dismiss clerics' contract claims. As courts continue to expand the class of individuals filling cleric-like positions in religious organizations, more individuals are being unjustly deprived of their contractual rights. Courts must begin to examine the nature of the alleged contract and the constitutional issues stemming from the contract itself. The shift in focus from the plaintiff's job status to the gravamen of the claim will enable courts to protect both a religious organization's right to autonomy in core ecclesiastical matters as well as a cleric's reliance on promises made by the religious organization in secular contracts.

154. The New Jersey Supreme Court expressly noted that the First Amendment forbids secular courts from referring civil issues to a religious tribunal. *Id.* at 732. To avoid impermissible entanglement of civil and religious issues and to preserve a record for the parties and a reviewing court, the court emphasized the important responsibility of civil courts to identify precisely and carefully which issues are civil and which issues should be referred to religious authority.