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Thou Shalt Not Sue the Church: Denying Court Access to Ministerial Employees

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INTRODUCTION

The government's interest in ending discrimination is one "of the highest order."¹ In an effort to end discrimination in the workplace, Congress passed Title VII, making it unlawful for an employer to discriminate on the basis of an employee's "race, color, religion, sex, or national origin"² and other laws prohibiting discrimination based on age³ and disability.⁴ Such laws give an employee who has been discriminated against in the workplace access to the judicial system in order to remedy the situation.

A ministerial employee who experiences discrimination, however, does not have a right to a judicial remedy. While Congress did not intend to insulate religious organizations,⁵ courts have consistently held that the application of anti-discrimination laws to religious organizations and their ministerial employees would prove a violation of the First Amendment.⁶ This exception, commonly referred to as the "ministerial exception," applies even when a religious organization claims no religious justifications for its alleged discriminatory actions. Courts have held that applying anti-discrimination laws in such cases would interfere with religious organizations' autonomy in deciding their own internal affairs in violation of the First Amendment's Free Exercise Clause and would result in excessive entanglement in violation of the First Amendment's Establishment Clause.⁷

This Note will attempt to show that the Constitution may not necessitate an exception to Title VII and other anti-discrimination laws in cases in which the religious organization offers no religious justification for discriminatory

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This Note is dedicated to the memory of my grandparents, Leroy and June Bruns.

1. *Roberts v. United States Jaycees*, 468 U.S. 609, 623-24 (1984).

2. 42 U.S.C. § 2000e-2(a) (1994).

3. *See Age Discrimination in Employment Act (ADEA)*, 29 U.S.C. S. § 623 (Law. Co-op. 1990 & Supp. 1998).

4. *See Americans with Disabilities Act (ADA)*, 42 U.S.C. § 12112 (1994).

5. This Note interchanges the use of the terms "religious organization" and "church" throughout. Both terms are used generically to include any religious organization or denomination unless otherwise specifically noted.

6. *See, e.g., Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184, 187-88 (7th Cir. 1994); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167-72 (4th Cir. 1985); *McClure v. Salvation Army*, 460 F.2d 553, 558-61 (5th Cir. 1972).

7. *See discussion infra* Part I.B.

employment action.⁸ Part I briefly looks at the discrimination that exists in religious organizations and then discusses the court-made ministerial exception to anti-discrimination statutes and the limitations placed on this exception. Part II examines relevant Supreme Court decisions and argues that these decisions leave ample room for allowing courts to hear ministers' claims of discrimination. In addition, Part II also criticizes the lower courts' response to these Supreme Court decisions in ministerial discrimination cases. Part III examines court decisions in other kinds of cases involving ministers and churches and compares them to ministerial discrimination cases.

I. A BRIEF OVERVIEW OF ANTI-DISCRIMINATION LAWS AND RELIGIOUS ORGANIZATIONS

Anti-discrimination laws have proven an important tool in helping to eradicate discrimination in the workplace. This Part will briefly examine the importance of anti-discrimination statutes and give an overview of courts' reasoning in deciding that ministerial employees should not be afforded the protections of such statutes.

A. Anti-Discrimination Legislation—Its Importance, Applications, and Legislative Exemptions

The Supreme Court has stated that the government has a compelling interest in eradicating discrimination and its effects.⁹ In enacting Title VII of the Civil Rights Act of 1964, Congress decreed that the policy of outlawing discrimination in the workplace should be one of "highest priority."¹⁰ Congress intended to prohibit any form of discrimination in the workplace that would create inequality in employment opportunity.¹¹ Discrimination in the employment setting had become a serious problem, with approximately fifty percent of those seeking jobs

8. This Note will not attempt to argue that churches with bona fide discriminatory beliefs should be subject to anti-discrimination statutes. A religious organization that discriminates with no religious justification allows that organization to "secretly" engage in discriminatory conduct while claiming to have non-discriminatory practices and beliefs. Thus, members of the congregation and clergy tend to believe that their church does not discriminate, and can do nothing to change discriminatory actions that they do not know about. On the other hand, members of churches that openly discriminate, such as the Catholic Church's refusal to ordain women, have chosen to be a part of such a church with full knowledge of its beliefs and practices. Thus forcing such religious organizations to comply with anti-discrimination statutes may truly interfere with not only the churches' free exercise rights under the First Amendment, but also with the rights of individual members who have chosen to be a part of the organization and adhere to its beliefs and practices. In addition, because members of such religious organizations have full knowledge of the church's practices, they can work to change them if they choose to do so.

9. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 656 (1993); *United States v. Paradise*, 480 U.S. 149, 167 (1987); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280-81 (1986) (Powell, J., plurality opinion).

10. *Franks v. Bowman Trans. Co.*, 424 U.S. 747, 763 (1976) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)).

11. *See id.*

suffering from some sort of discrimination.¹² Unequal employment opportunities had resulted in increased welfare assistance costs and higher dropout rates among disillusioned high school students.¹³ Thus, discriminatory actions in the employment setting harmed both individuals and society in general. Title VII and later anti-discrimination statutes were passed not only to help individuals harmed by discriminatory action, but to improve society in general.

Discrimination in the workplace does not lose its sting simply because the employee being discriminated against is a ministerial employee in a religious organization. In fact, such discrimination may be even more harmful to the individual than discrimination in the secular world. As one scholar has pointed out, religion provides spirituality and can be an important source of identity.¹⁴ By allowing religious organizations to discriminate on the basis of sex, race, age, disability, etc., clergy who have been discriminated against come to view religion as both spiritual and oppressive.¹⁵ In addition, religion plays an important role in shaping political views.¹⁶ By excluding individuals from religious leadership, religious organizations exclude them from an important avenue of political access.¹⁷ The fact that approximately 12.3% of clergy members are female, while 11.2% are black demonstrates the fact that few women and minorities have the opportunity to influence politics through the pulpit.¹⁸

Discriminatory practices exist in religious organizations today. Some, like the Catholic Church's refusal to ordain female priests, are based on the Church's religious beliefs and doctrine.¹⁹ Discriminatory practices exist, however, even in religious organizations that have no religious justification for their actions. For example, women clergy in The Christian Church (Disciples of Christ) with five to nineteen years of experience earn approximately \$5000 less than male clergy with similar experience.²⁰ Another example is found in the United Methodist

12. See H.R. REP. NO. 87-1370, pt. 2, at 1 (1962).

13. See *id.* at 2.

14. See Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1091 (1996).

15. See *id.* at 1092.

16. See *id.* at 1092-94. Rutherford writes:

Religious groups often become directly or indirectly involved in the moral issues that dominate public debate. Religions are key political players. They have long been influential on the most important political concerns from abolition, to desegregation, to abortion. Religious organizations not only take stands on important issues, they also often become involved in politics directly. Clergy members have run for and held political office, and conservative Christian groups have taken control of several state Republican Party organizations. Consequently, religious groups are sources of political power and influence.

Id. at 1092-93 (citations omitted).

17. See *id.* at 1094.

18. See U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 410 (1997).

19. See Elisabeth S. Wendorff, *Employment Discrimination and Clergywomen: Where the Law Has Feared to Tread*, 3 S. CAL. REV. L. & WOMEN'S STUD. 135, 139 (1993).

20. See *id.* at 145 (citing *Where We Stand: Women in Ministry Research Project*, Survey Summary (1992)).

Church, where "clergywomen report salary disparities, glass ceilings, and discrimination in the hiring process."²¹

Claims brought by clergy members also illustrate the prejudices that can exist in religious institutions. For example, in *Young v. Northern Illinois Conference of United Methodist Church*,²² Young, a female African-American, had allegedly received excellent references and ratings during her four years as a probationary minister for the United Methodist Church in Chicago.²³ Despite excellent reviews, the church denied her a promotion to become an "Elder," and dismissed her as a minister in the church.²⁴ The church's review panel criticized Young's preaching skills without, according to Young's complaint, ever hearing her preach.²⁵ Thus, despite a seemingly excellent record as a minister, the church denied Young a position as an Elder and fired her for no apparent reason. The possibility that such a denial was due to either racial or sexual discrimination, or both, seems very probable.

Congress did not exempt religious organizations from liability for such apparent discriminatory actions, but it did create two specific exemptions for religious organizations. The religious corporation exemption, section 702 of Title VII, exempts a religious organization from an employee's claim of discrimination based on religion.²⁶ This exemption applies to employees whose duties are secular, as well as employees who have duties connected to the religious mission of the organization.²⁷ Similarly, the religious school exemption²⁸ allows educational institutions that are substantially owned, controlled, or supported by a religious organization to "hire and employ" persons of a particular religion.²⁹ While allowing religious employers to discriminate based on religion, Congress refused to extend such an exemption to discrimination based on sex, race, color, or national origin.³⁰ The courts, however, overruled Congress's intent by establishing the "ministerial exception."

21. *Id.* at 146.

22. 818 F. Supp. 1206 (N.D. Ill. 1993), *aff'd*, 21 F.3d 184 (7th Cir. 1994).

23. *See id.* at 1207.

24. *See id.*

25. *See id.*

26. *See* 42 U.S.C. § 2000e-2(e) (1994).

27. *See id.* § 2000e-1. The Supreme Court upheld the constitutionality of this exemption in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

28. *See* 42 U.S.C. § 2000e-2(e)(2).

29. *Id.*

30. *See McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972) (noting that while Title VII specifically exempted religious institutions from liability based on religious discrimination, Congress specifically declined to expand this exemption to discrimination based on race, color, sex, or national origin).

B. The "Ministerial Exception" and the Courts' Refusal to Protect Clergy From Discrimination

Despite Congress's intent, courts have consistently held that the First Amendment bars civil courts from resolving discrimination suits brought by clergy members.³¹ Courts have based their creation of this "ministerial exception" on both the Free Exercise and Establishment Clauses of the First Amendment.

1. The Free Exercise Clause

The Free Exercise Clause³² prevents the government from placing an impermissible burden on religious beliefs. The government can burden religion in two ways: (1) by interfering with an individual's religiously motivated conduct or practice,³³ or (2) by interfering with the internal affairs of a church.³⁴ The right of churches to be free from governmental interference in their internal affairs is commonly referred to as the "church autonomy" doctrine. The central theme in the church autonomy doctrine is that "churches have a constitutionally protected interest in managing their own institutions free of government interference."³⁵

The Supreme Court, however, has differentiated between beliefs and actions, noting that the freedom to believe is "absolute," but the freedom to act "remains subject to regulation."³⁶ The kind of governmental interest needed to burden religious activities has been the subject of much controversy. Before 1990, the general consensus was that even for a neutral regulation, one not meant to burden religion but having an incidental, burdensome effect nonetheless, the government must demonstrate a compelling interest that would justify the burden placed on free exercise rights.³⁷

In *McClure v. Salvation Army*, the first case to establish the ministerial exception, the Fifth Circuit used the compelling interest test to determine if a Title VII action brought by a ministerial employee was constitutionally permissible.³⁸ In *McClure*, the plaintiff, an ordained minister of The Salvation Army, brought an action against The Salvation Army, a religious organization,

31. *See id.* at 558-61; *see also* *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1356-58 (D.C. Cir. 1990); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167-71 (4th Cir. 1985).

32. U.S. CONST. amend. I.

33. *See* *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 460 (D.C. Cir. 1996) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-33 (1993)).

34. *See id.* (citing *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 116 (1952)).

35. 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).

36. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940); *see also* *Rutherford*, *supra* note 14, at 1118 ("[T]he Court never has held that religious liberties are unlimited.").

37. *See McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972).

38. *Id.* at 558-59.

alleging that she had received a lower salary and fewer benefits than her male counterparts and that she had been released from her employment after she complained to her superiors and the EEOC.³⁹ While recognizing that Congress did not intend to exclude religious employers from liability for sexual discrimination,⁴⁰ the court, nevertheless, concluded that holding a religious organization liable for discrimination in this case would violate the Free Exercise Clause of the First Amendment.⁴¹ The court noted that “[t]he relationship between an organized church and its ministers is its lifeblood,”⁴² and that resolving such a discrimination case would necessarily force the court to intrude upon the internal matters of the church.⁴³ In reaching its conclusion, the Fifth Circuit failed to even consider the state’s interests in ending discrimination, concentrating almost exclusively on the apparent burden to religion.

The *McClure* court’s “ministerial exception” to Title VII has since been followed by nearly every court that has faced the same issue. Unlike the *McClure* court, some of these courts have taken into account the balancing test usually employed in free exercise analysis,⁴⁴ and have considered the government’s competing interest in ending discrimination.⁴⁵ Such courts, however, have decided that churches’ rights to autonomy in their dealings with their ministers outweigh the right of a minister to be free from discrimination.⁴⁶

39. *Id.* at 555.

40. *See id.* at 558.

41. *See id.* at 560.

42. *Id.* at 558.

43. *See id.* at 560 (Applying Title VII to the employment relationship between a minister and its employer “would involve an investigation and review of these practices and decisions and would, as a result, cause the State to intrude upon matters of church administration and government.”).

44. *See, e.g., Van Osdol v. Vogt*, 908 P.2d 1122, 1127 (Colo. 1996).

45. Note that such a balancing test may no longer be necessary after *Employment Division, Department of Human Resources v. Smith*, in which the Court held that a neutral law with an incidental effect on religion is constitutional so long as the law does not have a religious purpose. 494 U.S. 872, 878-82 (1990). However, courts’ continuous refusal to apply *Smith* to claims of employment discrimination suggest that they are still balancing interests by using the compelling interests test. *See discussion infra* Part II.A.

46. *See Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184, 185 (7th Cir. 1994) (“[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.”) (quoting *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)); *see also Van Osdol*, 908 P.2d at 1127 (“Where the clergy member alleges a violation of civil law by the church in the appointment process, courts have repeatedly found that the church’s interest in free exercise outweighs the government’s interest in enforcing the particular statute.”).

2. Establishment Clause

Courts have also used the Establishment Clause⁴⁷ to justify the ministerial exception to Title VII and other anti-discrimination laws.⁴⁸ The Establishment Clause addresses the necessity of neutrality in the relationship between government and state.⁴⁹ In *Lemon v. Kurtzman*,⁵⁰ the Supreme Court created a three-part test to determine if a statute violates the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"⁵¹

Despite the growing debate about whether the *Lemon* test is still the proper test in the Establishment Clause analysis,⁵² lower courts have continued to use it in evaluating ministers' claims of discrimination. While Title VII and other anti-discrimination statutes clearly pass the first two prongs of the *Lemon* test, courts have consistently held that resolving discrimination suits by clergy members would excessively entangle the government in religious affairs.⁵³ The excessive entanglement question involves considerations such as "the character and purpose of the institution involved, the nature of the regulation's intrusion into religious administration, and the resulting relationship between the government and the religious authority."⁵⁴ Even when a church does not claim a religious justification for an employment decision, courts have found that it would be impossible to evaluate claims of discrimination without drawing the court into matters of church doctrine, faith, and governance.⁵⁵

The difficulty in resolving ministerial discrimination cases without becoming excessively entangled seems to be the result of the importance courts have placed on allowing churches to make their own decisions regarding who is qualified to be a minister. The D.C. Circuit has noted that the "determination of 'whose voice speaks for the church' is *per se* a religious matter. We cannot imagine an area of

47. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

48. It should be noted that the Establishment Clause and the Free Exercise Clause sometimes involve very similar analysis because some courts fail to distinguish the two clauses, while others attempt to distinguish them by using the term "burden" for Free Exercise Clause analysis and "entanglement" for Establishment Clause analysis, although there is no distinguishable difference between the two terms. See Laycock, *supra* note 35, at 1378-79; see also discussion *infra* Part II.B.1.

49. See, e.g., Whitney Ellenby, *Divinity vs. Discrimination: Curtailing the Divine Reach of Church Authority*, 26 GOLDEN GATE U. L. REV. 369, 389 (1996).

50. 403 U.S. 602 (1971).

51. *Id.* at 612-13 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)).

52. See *infra* note 118 (discussing the status of the *Lemon* test).

53. See, e.g., *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 465-66 (D.C. Cir. 1996); *Powell v. Stafford*, 859 F. Supp. 1343, 1348-49 (D. Colo. 1994).

54. *Van Osdol v. Vogt*, 908 P.2d 1122, 1132 (Colo. 1996) (citing *Lemon*, 403 U.S. at 614-15).

55. See *Himaka v. Buddhist Churches of Am.*, 917 F. Supp. 698, 709 (N.D. Cal. 1995); see also *Catholic Univ. of Am.*, 83 F.3d at 466.

inquiry less suited to a temporal court"⁵⁶ The courts' refusal to make any sort of inquiry gives churches free reign in their decisionmaking regarding ministerial employees.⁵⁷

C. Limits of the Ministerial Exception

While allowing religious organizations to discriminate against clergy members at will, courts have limited the ministerial exception, applying the exception to only ministerial employees and refusing to extend it to nonministerial employees. For example, in *DeMarco v. Holy Cross High School*,⁵⁸ the Second Circuit held that adjudicating a lay teacher's claim of age discrimination against a parochial school would not excessively entangle the court in religious matters and therefore would not violate the First Amendment. The court noted that the inquiry required in such a case would be limited, and that even if the school offered a religious justification for its decision, challenging the justification as a pretext for an impermissible reason would not involve the court in evaluating the truthfulness of a religious doctrine.⁵⁹ Other courts have come to similar conclusions regarding nonministerial employees.⁶⁰

Because courts have refused to expand the ministerial exception to nonministerial employees of religious organizations, the difficulty in some cases has been in deciding whether a particular employee fits into the ministerial or nonministerial category.⁶¹ While a minister of a church clearly falls into the ministerial category, a church administrator or other employees with some secular

56. *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1356-57 (D.C. Cir. 1990) (citation omitted) (emphasis in original) (quoting *Minker v. Baltimore Annual Conference of United Methodist Church*, 699 F. Supp. 954, 955 (D.D.C. 1988)).

57. See, e.g., *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994) ("In other words, religious bodies may make apparently arbitrary decisions affecting the employment status of their clergy members and be free from civil review having done so.").

58. 4 F.3d 166 (2d Cir. 1993).

59. See *id.* at 171.

60. See, e.g., *EEOC v. Pacific Press Publ'g Ass'n*, 676 F.2d 1272, 1278 (9th Cir. 1982) (finding that a female editorial secretary at a church-affiliated publishing house was not in a position similar to that of a minister); *Welter v. Seton Hall Univ.*, 608 A.2d 206 (N.J. 1992). In *Welter*, the University had justified its decision to terminate four nuns' teaching contracts on an order of the Roman Catholic Church, and was thus, motivated by religious concerns. Finding that the nuns' duties were not of an "extra religious . . . status," the court held that the University should be held to the same standards as any other employer and could be found liable under Title VII (the nuns taught computer science). *Id.* at 215.

61. See *Ellenby*, *supra* note 49, at 372.

The courts' position with respect to non-ministerial functions, however, remains unclear. . . . In the absence of any meaningful guidelines from the Supreme Court, lower courts, which must determine the religious nature of an employee's position, must rely upon standards set by previous courts grappling with this issue. This method of resolving discrimination disputes has led courts to reach different conclusions on ostensibly similar facts.

and some religious duties present a more difficult question.⁶² Courts faced with the question of whether an employee is a ministerial employee have generally looked at such factors as whether the employee has been ordained by the church, acts as an intermediary between the church and the congregation, performs functions of the sacrament, or serves as a church governor.⁶³ In those cases where the court has determined that the employee served mostly secular duties, claims of discrimination have been allowed to go forward.⁶⁴ Even when religious organizations give religious reasons for their actions, courts have held that in the case of a secular employee, the First Amendment does not preclude an inquiry into whether the religious reason given was simply a pretext for unlawful discrimination against the employee.⁶⁵

II. IS THE MINISTERIAL EXCEPTION CONSTITUTIONALLY MANDATED? HINTS FROM THE SUPREME COURT

The Supreme Court has not yet addressed the judicially created ministerial exception. The Court, however, has dealt with other types of Free Exercise and Establishment Clause cases, and the language in these cases suggests that the First Amendment may not mandate the ministerial exception. This Part will look at some of these Supreme Court cases and examine the holdings and language that may allow civil courts to hear discrimination suits brought by clergy members without violating the First Amendment.

62. *See e.g.*, *Weissman v. Congregation Shaare Emeth*, 839 F. Supp. 680, 681-82 (E.D. Mo. 1993) (stating that the administrator of a Jewish Temple is a ministerial employee because of his religious duties).

63. *See, e.g.*, *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283-84 (5th Cir. 1981); *EEOC v. Mississippi College*, 626 F.2d 477, 485-86 (5th Cir. 1980).

64. *See, e.g.*, *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993); *Shirkey v. Eastwind Community Dev. Corp.*, 941 F. Supp. 567 (D. Md. 1996) (holding that the job of community developer was not a ministerial position, even though the United Methodist Church had developed and approved the project). Oddly, while courts have held that a judicial determination of whether non-religious reasons for employment action in regards to clergy would involve impermissible entanglement, determining whether someone is a ministerial or nonministerial employee has not been viewed as impermissible entanglement. *See id.* at 577-78. *But see* *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 343-44 (Brennan, J., concurring) ("What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. . . . A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity.")

65. *See, e.g.*, *DeMarco*, 4 F.3d at 171 ("[I]n those cases where a defendant proffers a religious purpose for its allegedly discriminatory employment action, a plaintiff will usually be able to challenge as pretextual the employer's justification without calling into question the value or truthfulness of religious doctrine."); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 809 (N.D. Cal. 1992) (holding that a parochial school's religious reasons for firing an unmarried pregnant librarian did not protect it from discrimination liability because if the plaintiff was fired solely because of her pregnant condition, and not because she had committed adultery, this would be discriminatory because only women can be fired for being pregnant).

A. Smith, *Free Exercise, and Lower Courts' Reactions*

Seemingly, the Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*⁶⁶ should have an effect on how the ministerial exception is viewed under the Free Exercise Clause. In *Smith*, members of the Native American Church used the drug peyote for sacramental purposes and challenged the Oregon law prohibiting the use of peyote. The Supreme Court held that prohibiting the use of the drug peyote did not violate the Free Exercise Clause even though the plaintiffs used the drug for sacramental, religious purposes. In its decision, the Court noted that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"⁶⁷ Thus, as clarified later, if a law has an incidental effect on religious practices, but is a neutral law of general applicability, the state does not need to demonstrate a compelling governmental interest.⁶⁸ *Smith*, therefore, did away with the previous balancing test. The ruling seemingly made any neutral law valid, no matter what the effect on religion, so long as the law is not cloaked in neutral terms only to cover up an intent to specifically target a certain religion's practices.⁶⁹

The *Smith* decision has been widely criticized.⁷⁰ Justice O'Connor's opinion, concurring in the judgment only, criticized the majority's opinion for rejecting clear precedent and leaving minority religions with little protection.⁷¹ Congress responded to the *Smith* decision by enacting the Religious Freedom and Restoration Act ("RFRA").⁷² RFRA reinstated the compelling governmental interest test which the court had overturned in *Smith*, stating that the government was prohibited from burdening the exercise of religion, even if a law is neutral and of general applicability, unless it can be demonstrated that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest."⁷³

66. 494 U.S. 872 (1990).

67. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1981)) (parentheticals in original).

68. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1992) (citing *Smith*, 494 U.S. at 878-82).

69. *See id.* at 534. In *Lukumi*, the city of Hialeah had passed an ordinance prohibiting animal sacrifice. The ordinance, however, excluded almost all killing of animals except for those done for religious reasons. *Id.* at 536. The Court found that because the ordinance's purpose was to target a specific religion, it was not neutral and must therefore, pass the strict scrutiny test—it must "advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Id.* at 546 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1977) (quoting in turn *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972))). The Court found that the ordinance in question failed to pass this test. *See id.*

70. *See, e.g., James D. Gordon III, Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1.

71. *See Smith*, 494 U.S. at 892-903 (O'Connor, J., concurring in the judgment only) (arguing that the statute would have been upheld under the compelling interest test).

72. 42 U.S.C. § 2000bb-2000bb4 (1994).

73. *Id.* § 2000bb-1(b).

The Supreme Court, however, has recently held RFRA unconstitutional,⁷⁴ and in the process, reiterated its holding in *Smith*.⁷⁵ RFRA, however, may still apply to Title VII and other federal anti-discrimination laws.⁷⁶ The Court in *Boerne* held only that RFRA is unconstitutional as it applies to *state* laws.⁷⁷ The Court did not rule on the constitutionality of RFRA as it applies to *federal* laws. Thus, some lower courts have held that RFRA still applies to federal laws;⁷⁸ therefore, a neutral federal law may still have to pass the compelling interest test. Many discrimination cases, however, are brought under both federal *and* state law,⁷⁹ as many states have enacted their own anti-discrimination statutes.⁸⁰ Thus, even if *Smith* does not apply to federal laws because of RFRA, courts must still address it when confronted with state law claims. How courts have dealt with *Smith* when dealing with federal anti-discrimination laws, therefore, may still have significance.

1. Lower Courts' Response to *Smith*

Despite *Smith's* holding that a neutral law incidentally affecting religion need not be accompanied by a compelling governmental interest, lower courts have still used the Free Exercise Clause to deny clergy members access to the courts. Some of these courts have reached their decision by ignoring *Smith* or by relying on RFRA.⁸¹ Still others have held that the reasoning in *Smith* does not apply to Title VII and other anti-discrimination statutes and, therefore, such statutes must

74. See *City of Boerne v. P.F. Flores*, 117 S. Ct. 2157 (1997). The *Boerne* case concentrated on the powers of Congress and noted that RFRA was meant to alter the meaning of the Free Exercise Clause rather than enforce the Clause, *id.* at 2164, and therefore, Congress had exceeded its powers, *see id.* at 2171-72.

75. See *id.* at 2160-61, 2172 (explaining the *Smith* decision and declaring that "it is this Court's precedent, not RFRA, which must control").

76. See, e.g., *Christians v. Crystal Evangelical Free Church*, 141 F.3d 854 (8th Cir. 1998); *Gunning v. Runyon*, 3 F. Supp. 2d 1423 (S.D. Fla. 1998).

77. *Boerne*, 117 S. Ct. at 2170-72.

78. See *Crystal Evangelical*, 141 F.3d at 859; *Gunning*, 3 F. Supp. 2d at 1432-33.

79. See, e.g., *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1355 (D.C. Cir. 1990) (asserting claims under both the ADEA and the Maryland age discrimination statute); *Black v. Snyder*, 471 N.W.2d 715, 718 (Minn. Ct. App. 1991) (asserting a claim under the Minnesota Human Rights Act).

80. See, e.g., IND. CODE § 22-9-1 (1998) (Civil Rights Law); *id.* § 22-9-2 (Age Discrimination Law); *id.* § 22-9-5 (prohibiting discrimination based on disability); MINN. STAT. § 363 (Supp. 1998) (Minn. Human Rights Act).

81. See, e.g., *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991). The court simply stated that the Free Exercise Clause "prohibits the courts from deciding cases such as this one," *id.* at 363 (discrimination suit brought by minister), and that "[p]ersonnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts," *id.* (emphasis in original). See also *Powell v. Stafford*, 859 F. Supp. 1343, 1347 (D. Colo. 1994) (using the congressionally restored compelling interest standard in holding that governmental interest in ending age discrimination is not sufficiently compelling "in light of the fundamental right of a church to determine who may be trusted with the spiritual function of teaching its ecclesiastical doctrine under the free exercise clause").

still pass the compelling interest test.⁸² Such lower court decisions severely limit the *Smith* decision and give protection to churches which go beyond what the First Amendment requires.

a. Narrowing *Smith's* Holding—It Applies
Only to Individuals, Not to Churches

One of the leading cases to confront the apparent confrontation between *Smith* and the ministerial exception is *EEOC v. Catholic University of America*.⁸³ In *Catholic University*, Sister McDonough had been employed at the University as a professor in the Canon Law Department. She applied for tenure but the reviewing committee for such decisions rejected her application, citing such reasons as “marginal performance in teaching and scholarly publications.”⁸⁴ Sister McDonough, however, felt that these reasons were pretextual and that the University had engaged in sex discrimination.⁸⁵ Sister McDonough argued that even if she did qualify for the ministerial exception, the *Smith* case now required that such an exception be eliminated.⁸⁶ The court rejected this argument and attempted to distinguish the case from *Smith*. First, the court said, the “burden on free exercise that is addressed by the ministerial exception is of a fundamentally different character from that at issue in *Smith*.”⁸⁷ According to the court, the ministerial exception was meant to protect the church, not individuals,⁸⁸ thus implying that *Smith* did not apply because it dealt only with neutral laws and freedom of *individuals*. In addition, according to the court, the dangers involved in letting an individual ignore a neutral law for religious reasons, which the Supreme Court warned of in *Smith*, were not involved in the ministerial exception.⁸⁹ The *Catholic University* majority also noted that previous cases using the ministerial exception have not necessarily depended on the compelling interest test, but have relied on the fundamental right of churches that has been recognized by the Supreme Court “to decide for themselves, free from state

82. See *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996).

83. 83 F.3d 455.

84. *Id.* at 459.

85. See *id.* The D.C. Circuit noted that the ministerial exception was not limited to only members of the clergy, but also applied “to lay employees of religious institutions whose ‘primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.’” *Id.* at 461 (quoting *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)).

86. See *id.* at 462.

87. *Id.*

88. See *id.*

89. See *id.*

Protecting the authority of a church to select its own ministers free of government interference does not empower a member of that church, by virtue of his beliefs to become a law unto himself. Nor does the exception require judges to determine the centrality of religious beliefs before applying a compelling interest test in the free exercise field.

Id. (internal citations and quotations omitted).

interference, matters of church government as well as those of faith and doctrine.”⁹⁰

Such a reading by the D.C. Circuit Court in *Catholic University* significantly restricts the *Smith* holding and does not address the fact that some of the dangers warned of in *Smith* may also be present in cases involving anti-discrimination statutes and churches. For example, instead of allowing an individual to “become law unto himself,”⁹¹ the ministerial exception allows a *church* to become a law unto itself. What is unlawful for a secular employer, discrimination, is overlooked when the employer is a religious organization and the employee is a clergy member. Courts allow churches immunity from liability for discrimination even when the church states no religious reason for its actions. Thus, in allowing a church to escape scrutiny for possible discriminatory actions, courts give religious organizations free reign to discriminate for any reason. The ministerial exception does what the Supreme Court warned of in *Smith*—it opens

the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, . . . to health and safety regulations such as manslaughter and child neglect laws, compulsory vaccination laws, . . . and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and *laws providing for equality of opportunity for the races*.⁹²

b. Other Supreme Court Decisions Relied Upon by Lower Courts to Uphold the Ministerial Exception

The court in *Catholic University*, as well as most other courts who have addressed free exercise and discrimination, have relied on Supreme Court cases which give churches the right to decide internal matters without governmental interference. In the process, they have ignored and/or distinguished *Smith*.⁹³ The cases that these courts rely on, however, address different types of circumstances, and clergy discrimination cases are seemingly distinguishable.

First of all, the Supreme Court cases relied upon by lower courts did not involve generally applicable neutral statutes.⁹⁴ For example, in *Kedroff*, the case relied on by the court in *Catholic University*, the Supreme Court addressed the

90. *Id.* (quoting *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)).

91. *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 885 (1990).

92. *Id.* at 888-89 (citations omitted) (emphasis added).

93. *See, e.g., Catholic Univ.*, 83 F.3d at 462 (citing *Kedroff*, 344 U.S. at 116); *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184, 186-88 (7th Cir. 1994) (citing *Serbian Eastern Orthodox Diocese for the United States & Can. v. Milivojevich*, 426 U.S. 696 (1976)); *Jocz v. Labor & Indus. Review Comm'n*, 538 N.W.2d 588, 597 (Wis. Ct. App. 1995) (citing *Milivojevich*, 426 U.S. at 713, and *Kedroff*, 344 U.S. at 116).

94. The court in *Catholic University* acknowledged this fact, but briefly did away with this difference by stating “we cannot believe that the Supreme Court in *Smith* intended to qualify this century-old affirmation of a church’s sovereignty over its own affairs.” *Catholic Univ.*, 83 F.3d at 463.

constitutionality of a New York law which "had the *purpose* and *effect* of transferring the administrative control of the Russian Orthodox churches."⁹⁵ The case involved a dispute about the right to use and occupy church property in New York City.⁹⁶ The appellee relied on the New York statute, but the Supreme Court held that the statute violated the First Amendment: "Legislation that regulates church administration, the operation of the churches, the appointment of clergy, by requiring conformity to church statutes . . . prohibits the free exercise of religion."⁹⁷

The legislation that the Court referred to, however, was clearly a non-neutral law. While *Catholic University* and other cases may rely on such a case to stand for the proposition that churches have an unqualified right to have control over who their clergy members are, the two situations involve differences that these courts fail to sufficiently address, particularly in light of the *Smith* decision. While the statute in *Kedroff* had the specific purpose of deciding who controlled a particular church, anti-discrimination laws clearly have no similar religious purpose.

Some courts have relied on *Serbian Eastern Orthodox Diocese for the United States & Canada v. Milivojevich*⁹⁸ to uphold the ministerial exception. While this case may be a closer match to clergy discrimination cases, it still has significant differences that make it distinguishable.

The *Milivojevich* case involved a complicated fact pattern, in which the Serbian Eastern Orthodox Church had a dispute over the control, property, and assets of the American-Canadian Diocese.⁹⁹ A suit was brought to determine if certain proceedings of the Mother Church were consistent with the internal regulations of the Church. The Supreme Court, however, held that resolving such an internal dispute would violate the First Amendment.¹⁰⁰ According to the Court, the Constitution mandated that "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law."¹⁰¹

The Seventh Circuit relied on this type of language to dismiss a discrimination suit brought by Young,¹⁰² the African-American woman who was denied a promotion and fired, despite excellent reviews.¹⁰³ According to the court in *Young*, "*Milivojevich*, read in its entirety, holds that civil court review of ecclesiastical decisions of church tribunals, particularly those pertaining to the

95. *Kedroff*, 344 U.S. at 94 (both emphasis added).

96. *See id.* at 94-95.

97. *Id.* at 107.

98. 426 U.S. 696 (1976).

99. *Id.* at 698-99.

100. *See id.* at 708-09.

101. *Id.* at 713.

102. *See Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184, 186-87 (7th Cir. 1994).

103. *See supra* text accompanying notes 22-25.

hiring or firing of clergy, are in themselves an 'extensive inquiry' into religious law and practice, and hence forbidden by the First Amendment."¹⁰⁴

This reading of *Milivojevich*, however, seems to expand the Supreme Court decision well beyond what it was originally intended to mean. Resolving the dispute in *Milivojevich* would have required the court to "probe deeply enough into the allocation of power within a [hierarchical] church so as to decide . . . religious law."¹⁰⁵ *Milivojevich* was clearly an extensive inquiry into the internal decisions that would decide the very future of the church. Such an inquiry is very different from the sort of inquiry needed to resolve a discrimination suit. In addition, it should be noted that *Milivojevich* was decided well before *Smith's* holding that a general law of neutral applicability does not violate the Free Exercise Clause.¹⁰⁶

B. Establishment Clause

The Establishment Clause presents a more challenging problem for clergy members wishing to bring discrimination suits. While the initial case which created the ministerial exception relied on the Free Exercise Clause,¹⁰⁷ many other courts have used both religious clauses,¹⁰⁸ while others have based the ministerial exception on the Establishment Clause alone.¹⁰⁹ The excessive entanglement prong of the three-part *Lemon* test is a very difficult obstacle in overcoming an Establishment Clause defense to clergy discrimination cases.¹¹⁰ Excessive entanglement analysis, however, may no longer be a proper test; and even if the excessive entanglement test is used, as courts continue to insist on using it, resolving claims of clergy discrimination does not necessarily violate such a test.

1. The Purpose of the Establishment Clause Compared to Excessive Entanglement in Clergy Discrimination Cases

As the plain language of the First Amendment suggests, the Establishment Clause was meant to prevent the government from establishing a religion, which would seem to mean that the government cannot "help or aid religion."¹¹¹ The Supreme Court has stated that the Establishment Clause prohibits "sponsorship, financial support, and active involvement of the sovereign in religious

104. *Young*, 21 F.3d at 187 (quoting *Milivojevich*, 426 U.S. at 709) (emphasis omitted).

105. *Milivojevich*, 426 U.S. at 708-09 (quoting *Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring) (omission and alteration in original)).

106. See *supra* text accompanying notes 66-69.

107. See *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972).

108. See, e.g., *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991); *Powell v. Stafford*, 859 F. Supp. 1343 (D. Colo. 1994).

109. See, e.g., *Himaka v. Buddhist Churches of Am.*, 917 F. Supp. 698 (N.D. Cal. 1995).

110. See, e.g., *Wendorff*, *supra* note 19, at 155 ("The third prong of inquiry, excessive entanglement with religion, is also likely to prove an insurmountable obstacle in applying Title VII to any religious employers of clergywomen.")

111. Rodney J. Blackman, *Showing the Fly the Way Out of the Fly-Bottle: Making Sense of the First Amendment Religion Clauses*, 42 U. KAN. L. REV. 285, 300 (1994).

activity.”¹¹² As noted by Douglas Laycock, nothing in the history or language of the Establishment Clause suggests that it is a “general ban on inhibiting religion.”¹¹³ The Free Exercise Clause was originally intended to prevent undue burden on religion, while the Establishment Clause was supposed to prevent government from establishing religion through financial aid or other support. According to Laycock, if the Establishment Clause is read as prohibiting the government from inhibiting religion, the two religion clauses become indistinguishable.¹¹⁴

The lower courts, however, have blindly applied the *Lemon* test, concentrating exclusively on the third prong, excessive entanglement, without considering the fact that an exemption may have the purpose of advancing religion.¹¹⁵ By holding that adjudicating ministerial discrimination cases would result in excessive entanglement with religion, courts seem concerned only with how discrimination statutes inhibit religion, but ignore the fact that giving religious organizations an exception to the statute may help or aid religion. As noted by one scholar, however, “it is oxymoronic to claim that a regulation restricting religion simultaneously establishes religion.”¹¹⁶ Yet, by justifying their decisions in clergy discrimination cases by using the Establishment Clause, this is exactly what courts are claiming.

In fact, if one were to use the seemingly clear and literal meaning of the Establishment Clause, that it prohibits government from promoting religion, the ministerial exception, instead of being necessary under the First Amendment, would actually seem to violate the First Amendment. After all, by allowing religious organizations immunity from discrimination suits brought by their clergy, courts give them an advantage that no secular employer enjoys. In addition, as one commentator has argued, it is more likely that an exemption for religious organizations in discrimination cases violates the Establishment Clause and fails the *Lemon* test: “An exemption created expressly for religious organizations clearly does not have a secular purpose. Similarly, it creates religious effects by promoting discriminatory religious beliefs Finally, it may entangle the government in religion if the state decides whether an employee is engaged in religious activities.”¹¹⁷ Thus, the plain meaning of the Establishment

112. *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

113. Laycock, *supra* note 35, at 1382.

114. *See id.* at 1378-79.

[C]ourts and commentators have drawn distinctions [between free exercise and establishment] without a difference, elaborately discussing whether religion was burdened by the state under the free exercise clause, and then whether it was entangled with the state under the establishment clause, with no identifiable difference between “burden” and “entanglement.”

The two clauses can be run together this way only at the risk of distorting their meaning.

Id. (citation omitted).

115. *See, e.g.,* *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 361-63 (8th Cir. 1991).

116. Joanne C. Brant, “*Our Shield Belongs to the Lord*”: *Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275, 298 (1994).

117. Rutherford, *supra* note 14, at 1110.

Clause and the effect that the ministerial exception has in promoting religion, seem to suggest that the Establishment Clause does not mandate the ministerial exception, and in fact, it may even prohibit it.

2. Resolving Clergy Discrimination May Not Even Be Excessive Entanglement

Even if the Establishment Clause applies to statutes that somehow inhibit religion, a discrimination suit may still be able to overcome the excessive entanglement prong,¹¹⁸ despite the lower courts' consistent refusal to see otherwise.

The Supreme Court has authorized a "neutral principles of law" approach in order to resolve internal church disputes.¹¹⁹ The main case using this neutral approach, *Jones v. Wolf*, involved a property dispute among factions of a Presbyterian congregation in Macon, Georgia. The majority of the church had decided to withdraw from its affiliation with the Presbyterian Council of the United States,¹²⁰ creating a dispute about which faction had a right to control the church property.¹²¹ The Supreme Court held that a civil court could resolve the dispute without violating the First Amendment by applying the neutral principles of property law.¹²² This could be done even if it involved an examination of church documents, so long as the civil court takes "special care to scrutinize the document in purely secular terms."¹²³

Lower courts have rejected the neutral principles of law approach in clergy discrimination cases, even in cases where the religious organization has offered no religious justification for its actions. For example, in *Minker v. Baltimore Annual Conference of United Methodist Church*,¹²⁴ Minker, a Methodist minister, alleged that the church had refused to appoint him to a congregation which could

118. It should be noted that although it has not been specifically overruled, the Supreme Court and critics alike have criticized the *Lemon* test. See, e.g., Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795 (1993). In approaching Establishment Clause issues in many of its recent cases, the Supreme Court has not used the *Lemon* test, but rather has examined whether the government acted in a religiously neutral manner. For example, in holding that the University of Virginia could not withhold student fees from student religious groups, and that prohibiting the University from withholding these funds did not violate the Establishment Clause, the Court stated that "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995). Other anti-discrimination statutes would seem to pass such a test, since they are clearly neutral, and their primary purpose is neither to promote or inhibit religion. However, in *Agostini v. Felton*, 117 S. Ct. 1997 (1997), the Court used both the neutrality test and the *Lemon* test, thus, as one publication has stated, "add[ing] another layer of confusion to its Establishment Clause jurisprudence," *The Supreme Court, 1996 Term—Leading Cases*, 111 HARV. L. REV. 197, 279 (1997).

119. *Jones v. Wolf*, 443 U.S. 595, 604 (1979).

120. See *id.* at 597-98.

121. See *id.* at 602.

122. See *id.* at 602-06.

123. *Id.* at 604.

124. 894 F.2d 1354 (D.C. Cir. 1990).

have paid him at a higher level of income solely on the basis of his age.¹²⁵ Minker argued that the church's Book of Discipline, which stated that appointments would be made without regard to race, ethnic origin, sex, color, or age, had created a contract which could be enforced in a secular court.¹²⁶ The court found it seemingly impossible to interpret the Book of Discipline's simple nondiscrimination passage without becoming involved in internal religious matters.

In determining whether the Church has discriminated on the basis of age, a court would be required to consider the religious purpose of the anti-discrimination provision and to define its limits for the Church. The scope of the Church's purported duty to not discriminate in its ministerial appointments will inevitably require interpretations of provisions in the Discipline that are highly subjective, spiritual, and ecclesiastical in nature.¹²⁷

The court went on to explain that resolving the age discrimination case would necessarily involve the court in evaluating a minister's qualifications, which is an ecclesiastical matter beyond the court's jurisdiction.¹²⁸

It may be true that resolving discrimination suits could involve an evaluation of ministerial qualifications, which could even be considered entanglement of some sort. However, "[n]ot all entanglements, of course, have the effect of advancing or inhibiting religion. . . . Entanglement must be 'excessive' before it runs afoul of the Establishment Clause."¹²⁹ Hearing the limited number of clergy discrimination cases should not be considered excessive. In addition, many kinds of discrimination cases may be capable of being resolved without becoming excessively entangled in church doctrine, yet most courts refuse to even consider the possibility. For example, in *McClure*, the plaintiff claimed that she was paid less than her male counterparts.¹³⁰ Such a claim can certainly be objectively evaluated without becoming excessively involved in church doctrine by simply evaluating the duties and wages of the church's employees. Also, in *Young*, the plaintiff had received excellent reviews, yet the church suddenly decided that she was not qualified to be a minister.¹³¹ A court could have objectively looked at Young's reviews that had been done by the church, and compared them with the church's claims that Young was not qualified. Doing this would not have involved

125. *See id.* at 1355. Included in Minker's complaint was an allegation that the bishop who was responsible for pastoral appointments had said that the plaintiff "should not expect a new better level appointment and that Methodist pastors in their fifties cannot expect growth opportunities in new appointments." *Id.*

126. *See id.* at 1358.

127. *Id.* at 1359.

128. *See id.* at 1359. Similarly, in *Catholic University*, the D.C. Circuit asserted that to evaluate Sister McDonough's qualifications as a Canon Law professor would involve assessing her scholarly works which would necessitate judging whether her conclusions were in agreement with Church teachings. *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 466 (D.C. Cir. 1996).

129. *Agostini v. Felton*, 117 S. Ct. 1997, 2015 (1997).

130. *McClure v. Salvation Army*, 460 F.2d 553, 555 (5th Cir. 1972).

131. *Young v. Northern Ill. Conference of United Methodist Church*, 818 F. Supp. 1206, 1207 (N.D. Ill. 1993), *aff'd*, 21 F.3d 184 (7th Cir. 1994).

the court in deciding whether a minister is qualified because it would be objectively relying upon the church's own judgments.

By refusing to even consider the possibility of resolving clergy discrimination cases, courts have ignored the strong public interest in resolving discrimination disputes. Society has a strong interest in eradicating all discrimination:

[I]nterests being protected and enforced in civil rights actions are not only the interests of the parties; substantial public and third-party interests are present as well [T]he public interest tends to be much smaller in the typical dispute involving church members' competing claims to church property or church office, in which there is little external concern other than that the dispute be settled peacefully.¹³²

Courts, however, have simply dismissed the public interest in ending discrimination despite the fact that the neutral principles of law may be a legitimate alternative in some cases.

III. LOWER COURTS' WILLINGNESS TO RESOLVE OTHER TYPES OF CASES INVOLVING CHURCH CLERGY—IS IT LEADING TO THE DEMISE OF THE MINISTERIAL EXCEPTION?

Despite the lower courts' continuous refusal to hear ministerial discrimination cases, many have been willing to hear other sorts of cases involving ministers, discipline, qualifications, and other internal matters. The language in these cases and some courts' willingness to allow investigation into some internal matters suggests that it is possible that such cases may lead to a greater willingness to hear discrimination cases involving ministerial employees. This Part will look at such cases and compare their reasoning to the issue of ministerial discrimination.

A. Ministers and Contractual Disputes

Some courts have declined to dismiss an action brought by a clergy member for breach of contract. For example, in *Minker*, the court held that a contractual relationship between a minister and the church could be enforced in a secular court.¹³³ Allegedly, the superintendent in charge of appointments had orally promised Minker a better ministerial appointment as soon as possible, but this never happened.¹³⁴ The court held that such a contract could be enforced,¹³⁵ but cautioned that a court assessing Minker's claim must not inquire into any reasons given by the church regarding Minker's qualification for pastorship that would create an excessive entanglement.¹³⁶ The court noted, however, that it was

132. Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 408-09 (1987).

133. *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360 (D.C. Cir. 1990).

134. *See id.* at 1355.

135. *Id.* at 1359 (“[C]hurches . . . ‘may be held liable upon their valid contracts.’”) (quoting *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985)).

136. *See id.* at 1360.

possible for Minker to show that an inquiry into his contract claims without "impermissible avenues of discovery or remedies" was feasible.¹³⁷

While the court's holding in *Minker* is a narrow one, it does leave an open door for at least some sort of protection for ministerial employees. While it may be easy for a religious organization to claim some sort of religious reason for dismissing a minister by questioning his or her qualifications, thus possibly still foreclosing a remedy even under contract theory, the *Minker* case at least recognizes that a claim by a ministerial employee can possibly be resolved without excessive entanglement in religion.¹³⁸ In addition, ministers may be able to protect themselves from future discriminatory actions by insisting on some sort of employment contract.

B. Cases Involving Allegations of Sexual Abuse

An increasing number of suits have been brought by congregation members against churches for their roles in negligently failing to take action to prevent sexual abuse by clergy members. Lower courts are split on the issue of whether or not the First Amendment divests secular courts of jurisdiction over such cases.¹³⁹ While this Note makes no particular judgment about which circuit courts have decided the issue correctly, it does appear that those courts which do allow such claims to proceed are moving a step closer to allowing clergy members'

137. *Id.* The court also noted that "while the first amendment forecloses any inquiry into the Church's assessment of Minker's suitability for a pastorate, even for the purpose of showing it to be pretextual, it does not prevent the district court from determining whether the contract alleged by Minker in fact exists." *Id.* at 1360-61.

138. *Accord* *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."); David J. Overstreet, Note, *Does the Bible Preempt Contract Law?: A Critical Examination of Judicial Reluctance to Adjudicate a Cleric's Breach of Employment Contract Claim Against a Religious Organization*, 81 MINN. L. REV. 263, *passim* (1996) (arguing that clergy's contract claims should be allowed to be adjudicated in some cases). *But see* *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940, 942 (6th Cir. 1992) (affirming the dismissal of the minister's breach of contract claim).

139. *Compare* *Schmidt v. Bishop*, 779 F. Supp. 321, 332 (S.D.N.Y. 1991) (holding that the First Amendment barred the court from adjudicating claims of negligent hiring/supervision because it would require the court to make "sensitive judgments" about supervision of clergy in light of religious beliefs), *and* *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 790 (Wis. 1995) (holding that the negligent hiring claim was barred by the First Amendment because judgments about the qualifications of a priest would require an interpretation of church doctrine and practices), *with* *Smith v. O'Connell*, 986 F. Supp. 73, 81 (D.R.I. 1997) (holding that where liability is predicated upon an alleged failure to take appropriate action to prevent sexual assault by clergy, the First Amendment does not divest the court of jurisdiction), *and* *Moses v. Diocese of Col.*, 863 P.2d 310, 320 (Colo. 1993) (stating that neutral principles of law could be applied in resolving a suit for negligent hiring/supervision and breach of fiduciary duty).

discrimination suits.¹⁴⁰ While ministerial discrimination cases and cases involving clergy members and sexual abuse may seem very different, they both involve a similar analysis of Free Exercise and Establishment issues and similar inquiries into matters involving clergy members.

1. Free Exercise Issues in Sexual Abuse Cases Compared

Plaintiffs alleging that religious organizations are liable for sexual assault by their clergy members have had to overcome Free Exercise arguments in order to proceed with their claims. The courts that have allowed such claims to go forward have held that neutral tort law can be used without violating the Free Exercise Clause and that the *Smith* case requires that churches not be immune from neutral laws of general applicability.¹⁴¹ Such a holding contradicts language in ministerial discrimination cases which state that the *Smith* case applies only to individuals.

In *O'Connell*, the defendant Roman Catholic Church attempted to argue that the conduct required by tort law conflicted with church doctrine.¹⁴² Canon law, the church argued, placed limits on the church's authority to discipline priests,¹⁴³ and the Catholic belief in redemption and forgiveness prohibited "church officials from summarily taking action to punish priests who sexually abuse children."¹⁴⁴ Thus, according to the Catholic Church, forcing the church to conform to the standards of tort law would require them to deviate from church doctrine and would violate the Free Exercise Clause.¹⁴⁵ The district court, however, rejected this argument stating that there was nothing to indicate that tort law and the principles of the Church were incompatible.¹⁴⁶

In the alternative, the court noted that even if the principles of tort law and the principles of the Catholic Church are incompatible, the law in *Smith* was applicable.¹⁴⁷ Thus, despite the church's argument that forcing them to comply with tort principles would contradict its religious principles, the court stated that this did not give the Church the right to engage in conduct prohibited by neutral tort law.¹⁴⁸

140. This Part will only be comparing ministerial discrimination cases with those cases that have held that secular courts can hear claims involving churches' liability for sexual assaults by clergy members without violating the First Amendment.

141. *See, e.g., Smith v. O'Connell*, 986 F. Supp. 73, 79 (D.R.I. 1997) (citing Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 895 (1990)).

142. *Id.* at 75.

143. *See id.* at 77-78.

144. *Id.* at 78.

145. *See id.* at 78-79.

146. *See id.* at 79 ("Briefly stated, there is no indication that, by taking the kind of preventative action required by tort law, the hierarchy defendants would have violated any 'doctrine, practice or law' of the Roman Catholic Church.").

147. *See id.*

148. *See id.* The court also noted that "[i]ndeed, permitting some individuals to engage in conduct proscribed by neutral laws that must be observed by everyone else simply because that conduct emanates from a religious belief might be viewed as the kind of official recognition of a religion that is prohibited by the establishment clause." *Id.* at 80.

Such a holding may be significant to clergy discrimination cases. Many clergy discrimination cases have upheld the ministerial exception based on the apparent "fundamental right of churches" to decide matters of internal church government, faith, and doctrine.¹⁴⁹ A decision like *O'Connell*, however, indicates that a neutral law of general application can be applied to a church even if it somehow interferes with the church's right to decide internal matters, such as how to discipline a priest accused of sexual abuse. Surely, deciding whether to fire, relocate, counsel, or take some other action in regards to a clergy member accused of such acts is an internal matter involving the church and its clergy. Requiring a church to conform to anti-discrimination laws may be no more an interference in the internal matters of a church than requiring that actions taken by religious organizations conform to neutral tort law in sexual abuse situations.

2. Establishment Clause

Like the Establishment Clause analysis in clergy discrimination cases,¹⁵⁰ analysis under the Establishment Clause in cases involving sexual assault by a clergy member also takes a closer look at the question of state interference in internal matters.¹⁵¹ Courts that allow such cases to proceed have held that neutral principles of law can be applied that do not require interpretation of church doctrine.¹⁵² For example, in *Jones v. Trane*, an action for negligent hiring/supervision, plaintiff alleged that church officials knew or should have known that a priest was likely to commit sexual abuse but appointed him to a position which gave him the opportunity to commit such acts.¹⁵³ The court held that the action was not barred by the First Amendment because it is "conduct, and not creed, that underlies plaintiffs' actions."¹⁵⁴ Thus, inquiry into whether the internal, disciplinary actions taken by the church were appropriate was not considered excessive entanglement.

Similarly, in clergy discrimination cases, it is also "conduct and not creed" that is at the heart of plaintiffs' actions. In most cases, the religious organization does not put forth a religious justification for its actions. Rather, a church can use a generic reason, such as questioning the minister's qualifications, and still be immune from civil liability. While questions about a clergy member's qualifications may involve some religious inquiry, it is the same sort of inquiry about qualifications that must also be made in cases involving clergy misconduct, yet this type of inquiry is allowed. While the two cases are clearly not identical, the apparent ban on allowing civil courts to review internal church matters does not always divest courts from jurisdiction in matters involving clergy sexual

149. *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996).

150. *See supra* text accompanying notes 47-57.

151. *See, e.g., O'Connell*, 986 F. Supp. at 73.

152. *See, e.g., Moses v. Diocese of Colo.*, 863 P.2d 310, 321 (Colo. 1993) ("[B]ecause the facts of this case do not require interpreting or weighing church doctrine and neutral principles of law can be applied, the First Amendment is not a defense.").

153. 591 N.Y.S.2d 927, 928 (Sup. Ct. 1992).

154. *Id.* at 931.

misconduct; therefore, such a ban is not absolute and may lead to a greater willingness to hear clergy discrimination cases.

C. Sexual Harassment by Clergy Members

A cross between discrimination cases and those involving sexual assault by clergy members are cases in which a clergy member alleges sexual harassment by another clergy member. Despite the possible close similarity between such cases and discrimination cases, at least one court has refused to allow the church to escape liability under the First Amendment.

In *Black v. Snyder*, Black, an associate pastor of an Evangelical Lutheran Church, filed numerous complaints against the church, including sexual harassment, retaliation, and wrongful termination.¹⁵⁵ Black alleged that she had informed church officials that she was being sexually harassed by her supervising pastor, but that after an investigation, nothing was done to stop the alleged harassment. In addition, she also claimed that after filing a complaint with the Minnesota Department of Human Rights, she was discharged in retaliation for her actions.¹⁵⁶ While noting that the Free Exercise Clause did not prohibit the court from hearing Black's claims,¹⁵⁷ the court held that the Establishment Clause did divest the court of jurisdiction over Black's breach of contract and retaliation claims, noting that such claims were "fundamentally connected to issues of church doctrine and governance and would require court review of the church's motives for discharging Black."¹⁵⁸ The Establishment Clause did not, however, prevent the court from hearing Black's charge of sexual harassment.¹⁵⁹ The court noted that excessive entanglement is a "question of degree," and the degree of intrusion necessary in resolving Black's sexual harassment claims presented "no greater conflict with the church's disciplinary authority than that presented in cases enforcing child abuse laws."¹⁶⁰

Thus, even though an investigation into claims that a church failed to take action for sexual harassment would surely require the court to at least inquire about whether or not a church's actions regarding an internal dispute within the church were appropriate, the court held that such an inquiry would not violate the First Amendment. While the court refused to hear Black's other discrimination

155. 471 N.W.2d 715, 717 (Minn. Ct. App. 1991).

156. *See id.* at 718.

157. *See id.* at 719. This court is one of the few which has recognized that *Smith* is actually applicable in a suit brought by a clergy member, and that a church is not immune from a neutral law of general application: "Black's claims are not based on laws that expressly mandate or prohibit religious conduct or beliefs, or involve additional constitutional rights. . . . Consistent with *Smith*, proceeding on these claims does not violate the church's free exercise rights." *Id.*; *see also supra* text accompanying notes 66-92 (discussing the impact of *Smith*).

158. *Black*, 471 N.W.2d at 720.

159. *See id.* at 720-21.

160. *Id.* at 721.

claims, the possible adjudication of the sexual harassment claim may be one step closer to allowing discrimination claims to be heard.¹⁶¹

CONCLUSION

Discrimination is a serious violation of one's right to equal treatment. Discrimination in the workplace can have serious effects on both the individual discriminated against, and society in general; thus we have devised laws to give employees remedies for discrimination in the workplace. Clergy members, however, do not enjoy such protections. Churches cloak themselves in the First Amendment, leaving their employees susceptible to the arbitrary and discriminatory actions of their employers. What gives churches a right to discriminate without fear of liability is a question that does not have a clear answer. Some courts have relied on the Free Exercise Clause, some on the Establishment Clause, while other courts have relied on both clauses of the First Amendment. The judicially created ministerial exception, however, may be unnecessary because the First Amendment does not dictate that someone be denied such protections simply because he or she is a ministerial employee. Lower courts should consider the language of both Supreme Court holdings and of the First Amendment more closely and entertain the possibility that despite the general tendency to think otherwise, there may be a way to allow clergy members to have their day in court.

161. Important in the court's conclusion was the fact that Black's remedy for her sexual harassment claim was nonintrusive, in that she sought only monetary damages and not reinstatement. *See id.* Thus, the church's right to choose its own pastor would remain intact. It remains to be seen whether courts would be more willing to hear a discrimination claim which similarly only seeks monetary damages.