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Cover Page Footnote

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ARTICLES

ABOVE THE LAW? THE CONSTITUTIONALITY OF THE MINISTERIAL EXEMPTION FROM ANTIDISCRIMINATION LAW

*Caroline Mala Corbin**

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* Associate in Law, Columbia Law School. B.A., Harvard University; J.D., Columbia Law School. I am grateful to Michael Dorf, Elizabeth Emens, and Kent Greenawalt for their extensive and insightful comments. I also thank the members of the Columbia Associates Workshop, particularly Hoi Kong and Olati Johnson. Finally, a special thank you to Michael Cheah for his first-rate editing.

This Article critiques the constitutional underpinnings of the "ministerial exemption," which grants religious organizations immunity from discrimination suits brought by "ministerial" employees. These employees, who range from parochial schoolteachers to church music directors, cannot assert Title VII race or sex discrimination claims against their religious employers—regardless of whether or not religious belief motivated the discrimination. Lower courts and commentators assert that the right of church autonomy created by the religion clauses requires this result, but the Supreme Court has never blessed (nor rejected) it. This Article argues there is no place for the ministerial exemption under the Supreme Court's current religion clause jurisprudence. The free exercise clause neither guarantees religious organizations autonomy in their internal affairs nor

shields them from neutral laws of general applicability like Title VII. And while the establishment clause forbids courts from resolving theological or spiritual disputes, this Article rejects the unexplored assumption that adjudicating a Title VII suit requires courts to evaluate a plaintiff's spiritual qualifications. The Article also briefly explores freedom of expressive association as an alternative justification for the ministerial exemption and concludes that, to the extent it applies at all, it only protects those employers whose religious doctrine requires discrimination.

INTRODUCTION

Consider two sisters. Both want to pursue professional careers where they can do good. One decides to become a public interest attorney, while the other feels called to serve as a minister. Each is an academic superstar and graduates at the top of her respective class.

The attorney is rejected from her town's most prestigious public interest law firm because the senior partner does not believe that advocacy is an appropriate field for women. She settles for a job at a public interest firm that purports to be an equal opportunity employer. To her dismay, she soon hits a glass ceiling.[1] Despite her impressive evaluations, all the best cases and mentoring seem to go to her male colleagues.[2] After she complains to her superiors about the discriminatory treatment, she is fired.

Her devout sister encounters similar obstacles. After graduation, her church clarifies its doctrine and declares that ordination is reserved for men only.[3] In order to fulfill her dream of becoming a minister, she reluctantly switches to a church that believes men and women may equally serve God as leaders. Much to her dismay, she encounters a stained glass ceiling.[4] While men who went to school with her win positions at large churches, she

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1. Women comprise 17.3% of partners at major law firms and 25% of full professors at ABA-approved law schools. Press Release, Nat'l Ass'n for Legal Career Prof'ls, Women and Attorneys of Color Continue to Make Small Gains at Large Law Firms (Nov. 17, 2005), *available at* http://www.nalp.org/press/details.php?id=57; Ass'n of Am. Law Sch., Statistical Report of Law School Faculty #6 (2004-05).

2. *See generally* Deborah L. Rhode, *Gender and the Profession: The No-Problem Problem*, 30 Hofstra L. Rev. 1001 (2002) (detailing obstacles for women in the law).

3. Religions that do not permit women to serve as clergy include Roman Catholicism, Eastern Orthodoxy, Southern Baptist Convention, Church of the Latter Day Saints, and Orthodox Judaism. *See, e.g.*, Alan Cooperman, *Conservative Rabbis Allow Ordained Gays, Same-Sex Unions*, Wash. Post, Dec. 7, 2006, at A17 (reporting that Orthodox Jews do not ordain women); Ontario Consultants on Religious Tolerance, Women as Clergy: When Some Faith Groups Started to Ordain Women, and When Two Denominations Stopped, http://www.religioustolerance.org/femclrg13.htm (last visited Feb. 7, 2007) (listing Roman Catholicism, Eastern Orthodoxy, and the Church of the Latter Day Saints as being among those denominations that do not ordain women, and Southern Baptist as having stopped ordaining women).

4. *See* Neela Banerjee, *Clergywomen Find Hard Path to Bigger Pulpit*, N.Y. Times, Aug. 26, 2006, at A1. *See generally* Elisabeth S. Wendorff, *Employment Discrimination and Clergywomen: Where the Law Has Feared to Tread*, 3 S. Cal. Rev. L. & Women's Stud. 135, 141 (1993) (describing how "[c]lergywomen's experience of employment discrimination parallels that of women who enter any traditionally male field").

is repeatedly passed over—even though she earned better evaluations. After she complains to her superiors about the discrepancy, she is fired.

What legal recourse do the sisters have? The sister who chose a secular path can sue under Title VII of the Civil Rights Act of 1964,[5] which prohibits employment discrimination based on an employee's race[6] or sex. Not so for the sister who followed her religious calling. What is illegal and unthinkable for secular employers is entirely permissible for religious ones. Under a judicially created doctrine called the "ministerial exemption," religious organizations are immune from race or sex discrimination suits brought by "ministerial" employees.[7] Thus, religious organizations can, and regularly do, deny women the influential position of minister, priest, rabbi, and imam on the grounds that religious doctrine requires such discrimination. Religious organizations whose beliefs do not require discrimination or even forbid it can also assert the ministerial exemption.[8] In sum, when it comes to the church-minister relationship, religious organizations are effectively above the law.

The ministerial exemption is a creation of the lower courts and has never been blessed (or rejected) by the Supreme Court.[9] Nevertheless, it has endured for over three decades and continues to serve as the basis for rejecting a host of discrimination-related claims brought by ministerial employees.[10] The exemption raises a number of important constitutional questions.[11] How do lower courts and commentators justify this judicially created exemption from antidiscrimination law? Does the Constitution really require abandonment of Title VII's equal opportunity goals when the employer is a religious organization? And why are religious organizations whose beliefs do not require discrimination allowed to benefit from the protection of the ministerial exemption?

The need to challenge the constitutional underpinnings of the ministerial exemption is more important than ever due to the increasing role of religious entities in distributing social services. To a degree unheard of thirty years ago, religious organizations today provide services to the public including education, health care, job training, and prison and drug

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5. *See infra* notes 32-35 and accompanying text.

6. Title VII actually forbids discrimination based on race, color, or national origin, but I will use race as shorthand. *See* 42 U.S.C. § 2000e-2(a) (2000).

7. The ministerial exemption does not cover religious discrimination because § 702 of Title VII itself permits religious organizations to discriminate against employees on the basis of religion. *See* 42 U.S.C. § 2000e-1(a). The ministerial exemption is also sometimes referred to as the ministerial exception.

8. *See generally infra* Part I.A.

9. *See infra* Part I.A.

10. *See infra* Part I.A.

11. Courts obviously cannot legislate; they can, however, create exceptions to legislation if the Constitution so requires. *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 540 (2001) (finding that an exception to state and federal wiretapping laws was necessary to protect First Amendment rights under the facts alleged).

rehabilitation.[12] This expanded role, spurred by the current Administration's Faith-Based Initiatives[13] and changes in religion clause jurisprudence,[14] multiplies the number of positions that are potentially subject to the ministerial exemption.

Much of the scholarly and political debate arising from these developments has focused on the right of religious organizations to discriminate based on religion. Less attention has been directed toward the right of religious entities to discriminate based on race and sex—the focus of this Article.[15]

Most lower courts and commentators assume that the First Amendment's free exercise clause, the First Amendment's establishment clause, or a combination of the two, justifies the ministerial exemption.[16] Arguably, the religion clauses might have justified the ministerial exemption when it was first enshrined. This Article examines whether its endurance can be justified in light of the Supreme Court's current First Amendment jurisprudence, which now emphasizes more equal treatment between religious and secular entities.[17]

Before the Supreme Court's 1990 decision in *Employment Division v. Smith*,[18] for example, the free exercise clause required strict scrutiny of laws that substantially burdened religious practices[19]—and exemptions

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12. By "religious organization," I mean a church or faith-based organization that has kept its religious character, as opposed to organizations such as Catholic Charities, Lutheran Social Services, and Jewish Family Services, which have roots in organized religion but are essentially secular in nature.

13. Within days of taking office, President George W. Bush issued an executive order creating the White House Office of Faith-Based and Community Initiatives to increase participation of faith-based organizations in all federal social services programs. *See, e.g.*, Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 29, 2001). Under this Initiative, faith-based organizations may receive federal money without having to sacrifice their religious character. *See generally* Exec. Order No. 13,279, 67 Fed. Reg. 77141 (Dec. 12, 2002).

14. *See infra* Part II.C.

15. While the arguments in this Article apply to both race and sex discrimination, I will focus principally on sex discrimination because it is both the harder and more common case.

16. *See infra* Part I.B.1-2.

17. *See infra* Part II.C. In other words, my goal is not to critique Supreme Court decisions, despite my disagreement with many of them, but to ascertain the legitimacy of the ministerial exemption within the Court's existing jurisprudence.

18. 494 U.S. 872 (1990).

19. Specifically, such a law violated the free exercise clause unless it was narrowly tailored to serve a compelling state interest. *See infra* note 70. Therefore, if Title VII imposed a substantial burden on the religious practice of selecting ministers, Title VII would violate the free exercise clause unless ending discrimination was a compelling state interest. *Cf. infra* note 70. Before *Smith*, commentators suggested that antidiscrimination might not be a sufficiently compelling interest to justify intrusion into church affairs. *See, e.g.*, Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination By Religious Organizations*, 79 Colum. L. Rev. 1514, 1539 (1979) (arguing that "[o]nly the most compelling government interest [like] the need to assure the physical well-being of church members or . . . security of the community, might justify" interference with the church-clergy relationship); 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, 1403 (1981) [hereinafter Laycock, *Church Autonomy*] ("The state has

from laws that failed strict scrutiny. In *Smith*, however, the Court declared that neutral laws of general applicability may substantially burden religious practices.[20] In other words, exemptions from laws like Title VII are no longer constitutionally mandated. Yet, commentators and lower courts alike insist that *Smith* did not eliminate or even diminish the ministerial exemption.[21]

This Article rebuts claims that the free exercise clause justification survives *Smith*. In addition, for the first time in the literature, it systematically analyzes and refutes the faulty assumptions underlying the establishment clause justification. Finally, the Article casts a skeptical eye on an alternate basis for the exemption—the First Amendment freedom of expressive association. Disagreeing with the lower courts and most commentators, the Article concludes that the Supreme Court's current view of the religion clauses does not mandate the ministerial exemption and that the right of expressive association offers only limited, if any, support.

Part I of this Article first examines the genesis, scope, and continuing vitality of the ministerial exemption. It then presents the standard justifications for the exemption. The ministerial exemption survives *Smith* primarily because lower courts claim there is a distinct constitutional right of church autonomy in internal ecclesiastical affairs.[22] Often citing pre-*Smith* commentary by Douglas Laycock and Bruce Bagni,[23] these courts ground church autonomy in the free exercise clause either alone or in combination with the establishment clause.[24] For doctrinal support, they cite a line of cases resolving church property disputes where the Supreme Court deferred to church hierarchy. Indeed, some commentators argue that *Smith* reaffirmed the church autonomy principle established by the church property cases.[25] Other commentators recast church autonomy, and the ministerial exemption that flows from it, as grounded in the establishment clause.[26] A few turn to the freedom of association[27] or some combination

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no legitimate interest sufficient to warrant protection of church members from their church with respect to discrimination, economic exploitation, or a wide range of other evils that the state tries to prevent in the secular economy.").

20. *See infra* notes 100-103 and accompanying text.

21. *See, e.g.*, *infra* notes 25-29 and accompanying text.

22. *See infra* note 106 and accompanying text.

23. *See* Bagni, *supra* note 19; Laycock, *Church Autonomy*, *supra* note 19.

24. *See infra* Part I.B.

25. *See, e.g.*, Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. Rev. 1633, 1636, 1672 [hereinafter Brady, *Surprising Lessons*] (asserting that *Smith* supports a broad right of autonomy that extends to all aspects of church affairs); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 4, 19-20 (2000) (stating that *Smith* reaffirmed a church's autonomy regarding its internal governance).

26. *See* Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. Cin. L. Rev. 151, 210-11, 218-19 (2003); Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385 [hereinafter Esbeck, *Dissent and Disestablishment*] (arguing that the ministerial exemption springs more from government's lack of power to regulate religious entities in areas within their exclusive province than from the need to protect free exercise

of the above.[28] Almost all support the ministerial exemption to some degree.[29]

This Article rejects the notion that church autonomy is a distinct constitutional right. To the extent any right to church autonomy exists, it does not exceed the rights that flow directly from various First Amendment clauses including (1) the free exercise clause, (2) the establishment clause, and (3) freedom of expressive association guaranteed by the free speech clause.

Part II explains why the free exercise clause cannot ground the ministerial exemption. *Smith* eviscerated the notion that the free exercise clause mandates exemptions from neutral laws of general applicability.[30] Proponents of the ministerial exemption have nonetheless distinguished *Smith* on the ground that it concerned only religious *individuals'* free exercise rights and left unchanged the free exercise autonomy right of religious *organizations*. I offer three responses to this claim. First, the pre-*Smith* Supreme Court cases that are often cited as supporting a right of church autonomy actually support a more limited right derived from the establishment clause. Second, the claim that *Smith* altered religious individuals' free exercise rights, but left intact religious institutions' free

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rights); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1 (1998) [hereinafter Esbeck, *Structural Restraint*] (stating that the establishment clause offers considerable autonomy to religion and religious organizations); Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. Rev. 1789, 1815 [hereinafter Lupu & Tuttle, *Sexual Misconduct*] (asserting that the ministerial exemption is not about rights but about jurisdictional limits on a state's role imposed by the establishment clause).

27. *See* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245, 1275-77, 1311-14 (1994) (arguing that the ministerial exemption is protected as a right of intimate association); Laura B. Mutterperl, *Employment at (God's) Will: The Constitutionality of Anti-discrimination Exemptions in Charitable Choice Legislation*, 37 Harv. C.R.-C.L. L. Rev. 389, 391-92 (2002) (claiming that the freedom of association protects religious organizations who must discriminate to define their identity); Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 Loy. U. Chi. L.J. 71, 72 (2001) (stating that the right of expressive association provides a constitutional basis for exempting religious organizations from antidiscrimination law).

28. *See* Frederick Mark Gedicks, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States*, 19 Emory Int'l L. Rev. 1187, 1273-74 (2005) (arguing that church autonomy is limited to associational rights and lack of jurisdiction over theological questions).

29. Exceptions include Joanne C. Brant, *"Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate*, 21 Hastings Const. L.Q. 275, 311-13 (1994) (arguing that there is no free exercise right to the ministerial exemption); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 Cornell L. Rev. 1049 (1996) (asserting that equality should trump religious liberty); Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women's Equality*, 10 Wm. & Mary J. Women & L. 459, 472 (2004) (same); and, at one time, Ira C. Lupu; *see* Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. Rev. 391, 431-32, 439 (1987) [hereinafter Lupu, *Employment Discrimination*].

30. *See infra* notes 100-103 and accompanying text.

exercise rights, is untenable. Third, and perhaps most importantly, the assumptions underlying the ministerial exemption no longer hold true. The exemption was born at the height of separationism, a theory that treated religion as distinct and mandated a wall separating church and state. In the past twenty years, prevailing First Amendment doctrine has instead emphasized equality between religion and its secular counterparts. Religion is no longer considered as privileged as it once was, and free exercise jurisprudence no longer presumes that religious commitments are more important than all but the most compelling state interests. While the free exercise clause still protects religion from intentional discrimination, this constitutional distinctiveness does not require immunity from Title VII. The lower courts that cling to the ministerial exemption fail to grasp these changes.

Part III explains why the establishment clause does not justify the ministerial exemption. Commentators who concede that *Smith* ended religious exemptions for both religious organizations and individuals under the free exercise clause nonetheless insist that the ministerial exemption is necessary under the establishment clause, which denies the state jurisdiction over doctrinal and theological disputes. They assume that adjudicating Title VII claims would inevitably require the courts to evaluate a minister's spiritual fitness—a theological question beyond the secular court's competence. Yet, no one has examined Title VII lawsuits to determine if this is likely to occur in all Title VII suits, let alone in most or any such suit. I start by dismissing "procedural entanglement"—excessive entanglement between church and state due to monitoring and related administrative issues—as a vestige of the separationism era. I next demonstrate that the fear that applying Title VII to religious institutions would lead to "substantive entanglement" with religious doctrine is unfounded. I conclude by arguing that the courts' application of the ministerial exemption raises substantive entanglement concerns that are equally, if not more, problematic than those raised by a full-blown Title VII lawsuit.

Acknowledging the diminished force of the First Amendment religion clauses, some commentators suggest that the First Amendment right of expressive association saves the ministerial exemption. I briefly discuss this alternate justification in Part IV. While the Supreme Court's decision in *Boy Scouts of America v. Dale*[31] presents a potentially viable justification for religious entities whose religious doctrine *requires* discrimination with respect to ministerial positions, it does not help those entities without such a policy. Thus, to the extent that freedom of association provides a constitutional basis for the ministerial exemption, it would be a much more limited exemption than the one currently applied.

31. 530 U.S. 640 (2000).

I. THE MINISTERIAL EXEMPTION

A. *The Scope of the Ministerial Exemption*

Title VII of the Civil Rights Act of 1964 forbids employment discrimination on the basis of race, color, religion, sex, or national origin.[32] All public or private sector employers with more than fifteen employees, including religious institutions, must comply with Title VII.[33] Congress provided religious organizations with a narrow exemption: They may discriminate on the basis of religion in employment decisions.[34] Congress did not, however, exempt religious institutions from Title VII's prohibitions against discrimination on the basis of race, color, national origin, or sex.[35]

Title VII had been in effect less than a decade when the Fifth Circuit held, in *McClure v. Salvation Army*, that a female minister could not bring a Title VII sex discrimination claim against her church.[36] Billie M. McClure, an ordained minister in the Salvation Army, complained that her church paid her less and gave her fewer benefits than similarly situated male ministers.[37] McClure also alleged that the Salvation Army fired her in retaliation for her complaints to her superiors and to the Equal Employment Opportunity Commission about the pay and benefit disparity.[38] The Salvation Army did not deny these allegations or claim that the alleged

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32. 42 U.S.C. § 2000e-2(a) (2000). The Pregnancy Discrimination Act of 1978 defines sex discrimination to include discrimination based on pregnancy. 42 U.S.C. § 2000e(k).

33. *See* 42 U.S.C. § 2000e(b).

34. 42 U.S.C. § 2000e-1(a). The statutory religious exemption originally covered only religious positions. In 1972, Congress expanded the exemption to cover all positions, religious and secular. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103 (codified at 42 U.S.C. § 2000e-1(a)). The Supreme Court upheld the expansion against an establishment clause challenge in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). Two other exemptions apply to religious organizations. First, religious educational institutions that are substantially owned, supported, or controlled by religious organizations may "hire and employ" individuals of a particular religion. 42 U.S.C. § 2000e-2(e)(2). Second,

> it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of that particular business or enterprise.

42 U.S.C. § 2000e-2(e)(1). The BFOQ is very limited; it applies only to hiring, never to race, and is interpreted very narrowly to ensure the exception does not swallow Title VII's protections. *See, e.g.*, 29 C.F.R. § 1604.2(a) (1972) (stating that the BFOQ as applied to sex should be interpreted narrowly). No court has yet ruled on whether being male is a BFOQ for Catholic priesthood or other religious positions closed to women because of religious doctrine.

35. Congress considered and rejected a blanket prohibition. *See* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166-67 (4th Cir. 1985); McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972) (suggesting that both the language and legislative history compel this conclusion).

36. *McClure*, 460 F.2d at 553.

37. *Id.* at 555.

38. *Id.*

discriminatory treatment was religiously mandated. Instead, it argued that subjecting a church to Title VII would violate the religion clauses of the First Amendment.[39] The Fifth Circuit agreed, thereby creating the ministerial exemption.[40]

The Fifth Circuit's First Amendment analysis rested on principles of church autonomy. Under the court's reading of Supreme Court precedent, the religion clauses guarantee churches such as the Salvation Army the autonomy and "power to decide for themselves . . . matters of church government as well as those of faith and doctrine."[41] A central facet of church government is the selection and oversight of clergy: "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. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."[42] Title VII intrudes upon this constitutionally protected relationship. Thus, its application to the Salvation Army would violate the First Amendment.[43]

Subsequent lower courts have invariably upheld the ministerial exemption based upon this reasoning.[44] These cases assert two points. First, churches have autonomy over church-minister relations.[45] Because the selection of spiritual leaders is a crucial internal decision for a church, it

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39. *Id.* at 556.

40. *Id.* at 553, 560.

41. *Id.* at 560 (internal quotation marks omitted).

42. *Id.* at 558-59; *see also* Petruska v. Gannon Univ., 462 F.3d 294, 306 (3d Cir. 2006) ("A minister serves as the church's public representative, its ambassador, and its voice to the faithful.").

43. *McClure*, 460 F.2d at 560 (stating that the application of Title VII to the church-minister relationship "would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment").

44. Ultimately, the Fifth Circuit rejected Billie B. McClure's lawsuit on the narrower (and more questionable) ground that Congress "did not intend, through the nonspecific wording of the applicable provisions" for Title VII to apply to the church-clergy employment relationship. *Id.* Subsequent courts rely directly on the First Amendment. *See supra* Part I.B.

45. The few courts to even acknowledge that free exercise rights may be overridden by a compelling state interest have summarily rejected antidiscrimination as sufficiently important. *See, e.g.*, Young v. N. 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."); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (stating that the "balance of values" weighs against the plaintiff); *see also* Werft v. Desert Sw. Annual Conference of the United Methodist Church, 377 F.3d 1099, 1102 (9th Cir. 2004); Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354, 1357 (D.C. Cir. 1990); Simpson v. Wells Lamont Corp., 494 F.2d 490, 493 (5th Cir. 1974). The sole exception has been for cases brought under the Equal Pay Act, where the courts have held that the intrusion on free exercise was minimal. *See* EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986); EEOC v. Tree of Life Christian Sch., 751 F. Supp. 700 (S.D. Ohio 1990).

is therefore a "constitutional imperative"[46] protected by church autonomy. "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."[47]

Second, this autonomy, insofar as it concerns the employment of ministers, is absolute. Religious institutions are not only free to select whomever they wish, but they need not justify their employment decisions. "[I]t would offend the Free Exercise Clause simply to require the church to articulate a religious justification for its personnel decisions."[48] Because "the Free Exercise Clause 'protects the act of decision rather than a motivation behind it,'"[49] "it is the decision itself which is exempt—the courts may not even look into the reasoning."[50] In short, the ministerial exemption "precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision."[51]

This autonomy covers all aspects of the ministerial employment relationship, not just hiring and firing. Just as the initial selection of a minister is a matter of church administration and government, "so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church."[52]

Application of the ministerial exemption is not limited to Title VII claims. It has been successfully asserted as a full defense to a range of antidiscrimination and employee protection laws, including the Age Discrimination in Employment Act,[53] the Americans with Disabilities

46. Pardue v. Ctr. City Consortium Sch. of the Archdiocese of Wash., 875 A.2d 669, 673 (D.C. 2005).

47. *Id.* at 673 (quoting *Rayburn*, 772 F.2d at 1167-68); *see also* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 946 (9th Cir. 1999) ("A church's selection of its own clergy is . . . [a] core matter of ecclesiastical self-governance with which the state may not constitutionally interfere. A church must retain unfettered freedom in its choice of ministers . . . .").

48. *Bollard*, 196 F.3d at 946; *see also Werft*, 377 F.3d at 1103 ("If [the plaintiff is] allowed to proceed, the Church would necessarily be required to provide a religious justification for its [employment action] and this is an area into which the First Amendment forbids us to tread.").

49. EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 801 (4th Cir. 2000) (quoting *Rayburn*, 772 F.2d at 1169).

50. *Werft*, 377 F.3d at 1103.

51. Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 703 (7th Cir. 2003) (quoting *Roman Catholic Diocese of Raleigh*, 213 F.3d at 802).

52. McClure v. Salvation Army, 460 F.2d 553, 559 (5th Cir. 1972).

53. *See* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir. 2006); Clapper v. Chesapeake Conference of Seventh Day Adventists, No. 97-2648, 1998 WL 904528 (4th Cir. Dec. 29, 1998); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360 (8th Cir. 1991); Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990); Sanchez v. Catholic Foreign Soc'y of Am., 82 F. Supp. 2d 1338 (M.D. Fla. 1999); Powell v. Stafford, 859 F. Supp. 1343 (D. Colo. 1994).

Act,[54] the Family and Medical Leave Act,[55] Section 1981,[56] the Fair Labor Standards Act,[57] and a host of state antidiscrimination and human rights statutes.[58]

Furthermore, the ministerial exemption leaves more than ordained clergy without a remedy. Rather than accepting the church's own definition of the term "minister," the lower courts broadly define "ministerial employee" as any employee 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."[59] As one appeals court acknowledged, this approach "necessarily requires the court to determine whether a position is important to the spiritual and pastoral mission of the church."[60] Under this test, the following people have been categorized as ministers:

- Press secretary for the Catholic Church;[61]
- Principal of a Catholic elementary school;[62]
- Director of music and part-time music teacher for a Catholic Church, even though being Catholic was not a job requirement;[63]
- Choir director for a Methodist Church;[64]
- Kosher supervisor of a Jewish nursing home;[65] and

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54. Hollins v. Methodist Healthcare, No. 05-6301, 2007 WL 63714 (6th Cir. Jan. 10, 2007); Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999); Rosati v. Toledo, Ohio Catholic Diocese, 233 F. Supp. 2d 917 (N.D. Ohio 2002).

55. Fassl v. Our Lady of Perpetual Help Roman Catholic Church, No. Civ. A. 05-CV-0404, 2005 WL 2455253 (E.D. Pa. Oct. 5, 2005).

56. Bogan v. Miss. Conference of the United Methodist Church, 433 F. Supp. 2d 762 (S.D. Miss. 2006).

57. Shaliehsabou v. Hebrew Home of Greater Wash., 363 F.3d 299 (4th Cir. 2004).

58. *See, e.g.*, Stately v. Indian Cmty. Sch. of Milwaukee, 351 F. Supp. 2d 858 (E.D. Wis. 2004); Schmoll v. Chapman Univ., 83 Cal. Rptr. 2d 426 (Ct. App. 1999); Malichi v. Archdiocese of Miami, No. 1D05-5108, 2006 WL 3207982 (Fla. Dist. Ct. App. Nov. 8, 2006); Pardue v. Ctr. City Consortium of the Archdiocese of Wash., 875 A.2d 669 (D.C. 2005).

59. Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (internal quotation marks omitted).

60. *Id.*

61. Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 704 (7th Cir. 2003) (discrimination based on national origin and sex).

62. *Pardue*, 875 A.2d at 670 (discrimination based on race).

63. EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 803 (4th Cir. 2000) (discrimination based on sex and retaliation); *see also* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1037, 1042 (7th Cir. 2006) (addressing an Age Discrimination in Employment Act (ADEA) claim of music director and organist).

64. Starkman v. Evans, 198 F.3d 173, 174 (5th Cir. 1999) (discrimination based on disability); Miller v. Bay View United Methodist Church, 141 F. Supp. 2d 1174, 1175 (E.D. Wis. 2001) (discrimination based on race).

65. Shaliehsabou v. Hebrew Home of Greater Wash., 363 F.3d 299, 301 (4th Cir. 2004) (discussing a Fair Labor Standards Act claim for unpaid overtime).

- Chaplain of a church-affiliated hospital.[66]

Because "ministerial employee" has been so broadly defined, the ministerial exemption extends well beyond houses of worship and has been applied to organizations such as religious schools, universities, hospitals, and retirement homes.[67]

A handful of lower courts have permitted sexual harassment claims by clergy notwithstanding the ministerial exemption.[68] To date, this remains the only exception to the broad sweep of the ministerial exemption.[69]

B. *First Amendment Justifications for the Ministerial Exemption*

Supporters of the ministerial exemption do not always identify a specific clause of the First Amendment as supporting the ministerial exemption. Instead, they argue that there is a constitutional right to church autonomy, viz., the right of religious institutions to control their internal affairs, particularly church-minister relations, without interference from the state. Different First Amendment clauses, including the free exercise, establishment, and free speech clauses, might provide support. Each is discussed below.

1. The Free Exercise Clause

When the ministerial exemption was first articulated, the free exercise clause prohibited any substantial burden on religious practices, subject to a strict scrutiny standard of justification.[70] Antidiscrimination law obviously burdens religions whose doctrine requires race or sex discrimination. For example, Title VII would declare illegal the Catholic Church's practice of limiting the priesthood to men. Assuming this burden is substantial, and the

66. Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 361 (8th Cir. 1991) (discrimination based on sex and age).

67. *See, e.g.*, Hollins v. Methodist Healthcare, Inc., No. 05-6301, 2007 WL 63714 (6th Cir. Nov. 30, 2006) (hospital); Petruska v. Gannon Univ., 462 F.3d 294, 299 (3d Cir. 2006) (university); *Shaliehsabou*, 363 F.3d at 301 (retirement home); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 457 (D.C. Cir. 1996) (university); *Scharon*, 929 F.2d at 361 (hospital); Stately v. Indian Cmty. Sch. of Milwaukee, 351 F. Supp. 2d 858, 862 (E.D. Wis. 2004) (school); Curay-Cramer v. Ursuline Acad., 344 F. Supp. 2d 923, 925 (D. Del. 2004) (school); Powell v. Stafford, 859 F. Supp. 1343, 1345 (D. Colo. 1994) (school); Sabatino v. Saint Aloysius Parish, 672 A.2d 217, 218 (N.J. Super. Ct. App. Div. 1996) (school).

68. *See* Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999); Dolquist v. Heartland Presbytery, 342 F. Supp. 2d 996 (D. Kan. 2004); Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church, 63 F. Supp. 2d 694 (E.D.N.C. 1999); Malicki v. Doe, 814 So.2d 347 (Fla. 2002); Black v. Snyder, 471 N.W.2d 715 (Minn. Ct. App. 1991); McKelvey v. Pierce, 800 A.2d 840 (N.J. 2002).

69. *See* Janet S. Belcove-Shalin, *Ministerial Exception and Title VII Claims: Case Law Grid Analysis*, 2 Nev. L.J. 86, 123-25 (2002).

70. More specifically, the government had to establish the existence of a compelling state interest and the absence of a less restrictive means of achieving that interest. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); Sherbert v. Verner, 374 U.S. 398, 403 (1963).

state interest in eliminating discrimination is not narrowly tailored and compelling enough to justify this burden, it follows that Title VII violates the free exercise clause.

This argument is not, however, the primary free exercise argument espoused in favor of the ministerial exemption. Instead, courts applying the exemption have relied upon the so-called "church autonomy" right.[71] Strictly speaking, the right of church autonomy, if it exists, does not derive exclusively from the free exercise clause, but from the establishment clause too and, perhaps, even the right to expressive association. Nevertheless, courts have often framed the church autonomy right as a free exercise right.[72]

As conceived, the church autonomy doctrine declares that the state lacks jurisdiction over a range of internal church matters.[73] Douglas Laycock—whose influential article[74] has been cited in several cases upholding the ministerial exemption both before and after *Smith*[75]—asserts that church autonomy is strongest with respect to internal affairs[76] but extends to all aspects of church operations. Bruce Bagni, also regularly cited,[77] contends that the strength of church autonomy is inversely proportional to the extent that the activity at issue is secular. Church autonomy is therefore greatest at a church's spiritual "epicenter," which encompasses worship, membership policies, and the relationship between the church and its clergy.[78] While lower courts and commentators disagree about the exact contours of church autonomy, all agree that it includes autonomy from the state in church-

71. *See, e.g.*, *infra* notes 73-79 and accompanying text.

72. *See, e.g.*, Petruska v. Gannon Univ., 462 F.3d 294, 306 (3d Cir. 2006); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1302-04 (11th Cir. 2000); Starkman v. Evans, 198 F.3d 173, 175 (5th Cir. 1999); Combs v. Central Tex. Annual Conference of United Methodist Church, 173 F.3d 343, 348 (5th Cir. 1999); Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184, 185-86 (7th Cir. 1994); Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354, 1356 (D.C. Cir. 1990).

73. When lower courts have declined to hear Title VII suits against religious organizations, they have usually held that they lack jurisdiction over the matter. *See, e.g.*, Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 700 (7th Cir. 2003); EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 804 (4th Cir. 2000); *Minker*, 894 F.2d at 1356.

74. Laycock, *Church Autonomy*, *supra* note 19.

75. *See, e.g.*, Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 655 (10th Cir. 2002); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463 (D.C. Cir. 1996); Little v. Wuerl, 929 F.2d 944, 949 (3d Cir. 1991); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1167 n.3 (4th Cir. 1985); Callahan v. First Congregational Church of Haverhill, 808 N.E.2d 301, 306 n.8 (Mass. 2004); Williams v. Episcopal Diocese of Mass., 766 N.E.2d 820, 825 n.3 (Mass. 2002); Alicea v. New Brunswick Theological Seminary, 608 A.2d 218, 222-23 (N.J. 1992).

76. *See* Laycock, *Church Autonomy*, *supra* note 19, at 1403. Internal affairs include the relationships between the organization and all persons who have voluntarily joined it. *Id.*

77. *See, e.g.*, Shaliehsabou v. Hebrew Home of Greater Wash., 363 F.3d 299, 306 (4th Cir. 2004); *Catholic Univ.*, 83 F.3d at 463; *Rayburn*, 772 F.2d at 1169; EEOC v. Roman Catholic Diocese of Raleigh, 48 F. Supp. 2d 505, 511 (E.D.N.C. 1999); Jocz v. Labor and Indus. Review Comm'n, 538 N.W.2d 588, 593 (Wis. Ct. App. 1995).

78. Bagni, *supra* note 19, at 1521, 1539.

clergy relations and precludes application of Title VII regardless of whether church doctrine is actually inconsistent with Title VII. It is sufficient that Title VII intrudes upon the sphere of church-ministerial relations. As doctrinal support, church autonomy proponents invariably rely on a long line of Supreme Court cases in which the Court deferred to church hierarchy in order to resolve disputes pertaining to internal church affairs.[79]

When framed as a free exercise right, the right of church autonomy essentially ratchets up protection for at least one subset of religious practices: clergy employment decisions. According to proponents, the free exercise clause does not just protect these practices from substantial burdens, it shields them from all state interference.

2. The Establishment Clause

Courts and commentators also cite excessive "entanglement," which is forbidden by the establishment clause, as another basis for the ministerial exemption. The very inquiry into whether illegitimate discrimination informed an employment decision is "entanglement" rife with risks to religion. For those who view the establishment clause as a structural restraint on the power of the state, "entanglement" represents the state intruding into areas beyond its constitutional power and competence.[80] Though "entanglement" is a vague term, it can be divided into procedural entanglement and substantive entanglement.[81] Both arguably arise when a civil court adjudicates a ministerial employee's Title VII claim against a religious employer.

A ban on procedural entanglement derives from the view that any extensive or prolonged state interaction with a religious entity is itself constitutionally problematic. For example, the Supreme Court rejected the National Labor Review Board's exercise of jurisdiction over lay teachers in parochial schools in part because it would entail pervasive monitoring and

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79. *See, e.g.*, *Bryce*, 289 F.3d at 655; EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 800 (4th Cir. 2000); McClure v. Salvation Army, 460 F.2d 553, 559-60 (5th Cir. 1972). The main Supreme Court cases cited are *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (deferring to church hierarchy regarding the defrocking of a bishop); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church of North America*, 344 U.S. 94, 116 (1952) (stating that churches must be free "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929) (deferring to church hierarchy regarding the appointment of a chaplain); and *Watson v. Jones*, 80 U.S. 679 (1871) (holding that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law" has been decided by the highest church authority, secular courts must not intervene but must accept the highest church authority's decision as final and binding).

80. *See supra* note 19.

81. *See, e.g.*, Petruska v. Gannon Univ., 462 F.3d 294, 311 (3d Cir. 2006) ("Entanglement may be substantive . . . or procedural."); *see also* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 956 (9th Cir. 2004); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948 (9th Cir. 1999).

extensive administrative cooperation between the Board and schools.[82] Procedural entanglement might even arise from a civil lawsuit because of the "protracted legal process pitting church and state as adversaries."[83]

In contrast, the ban on substantive entanglement seeks to prohibit the state from inculcating, endorsing, or dictating religious doctrine. "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[84] In particular, the establishment clause forbids the state from resolving doctrinal disputes or endorsing one religious vision over another.[85]

In theory, resolution of Title VII claims risks exactly this entanglement with doctrine because these claims require the factfinder to determine whether the religious employer's stated reason for its employment decision about a ministerial employee was pretextual or not. This, some proponents claim, may well result in courts passing judgment on the ministerial employee's qualifications, and second-guessing the religious employer's judgment as to whether she sufficiently embodies the church and its teachings, in violation of the establishment clause.[86] As one court put it, "It is axiomatic that the guidance of the state cannot substitute for that of the Holy Spirit and that a courtroom is not the place to review a church's determination of 'God's appointed.'"[87]

The court risks further entanglement if it orders the religious employer to reinstate or promote a successful Title VII claimant. Because ministerial employees help shape and develop doctrine, it is argued that granting courts the power to decide who is chosen for such positions indirectly affects the development of substantive doctrine. In addition, even the most well-meaning courts are susceptible to error because they lack the competence to properly evaluate the "gifts and graces" of a minister.[88]

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82. NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 502-04 (1979).

83. Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985).

84. Watson v. Jones, 80 U.S. 679, 728 (1871).

85. *See infra* Part III.

86. Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1304 (11th Cir. 2000) ("A church's view on whether an individual is suited for a particular clergy position cannot be replaced by the courts' without entangling the government 'in questions of religious doctrine, polity, and practice.'" (quoting Jones v. Wolf, 443 U.S. 555, 603 (1979))); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 (8th Cir. 1991) ("Personnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts, for to review such decisions would require the courts to determine the meaning of religious doctrine and canonical law . . . ."); *Rayburn*, 772 F.2d at 1171 ("Bureaucratic suggestion in employment decisions of a pastoral character, in contravention of a church's own perception of its needs and purposes, would constitute unprecedented entanglement with religious authority . . . .").

87. *Rayburn*, 772 F.2d at 1170.

88. EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463 (D.C. Cir. 1996) (internal quotation marks omitted).

3. Freedom of Expressive Association

A number of lower courts have suggested that the state should not interfere with ministerial decisions because the minister represents and speaks for the church.

> 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 doctrines both to its own membership and to the world at large.[89]

While lower courts have linked the church's right to select its own leaders to church autonomy under the religion clauses, the value at stake—control over the church's message—is a free speech value protected by the freedom of expressive association. Consequently, some commentators have suggested that church autonomy in ministerial employment decisions can be justified as a First Amendment expressive association right.[90]

Freedom of expressive association protects expression, popular or unpopular, from suppression.[91] Suppression may result if the state meddles with the internal structure of an association, such as by foisting an unwanted member upon the association.[92] If allowed, this type of intrusion would let "the majority . . . impose[] its views on groups that would rather express other, perhaps unpopular, ideas."[93] So, while homophobia may be unpopular, the Supreme Court held that the Boy Scouts may reject a gay man as a Scout leader because his presence would significantly affect the group's ability to advocate its antihomosexual views.[94] Just as it would stifle the Boy Scouts' expression of its opposition to homosexuality to force it to accept gay leaders, it would, for example, stifle the Southern Baptist Convention's expression of its view on the proper place of men and women to force it to ordain women ministers.

Part IV addresses this expressive association justification, suggesting that the issue is not quite this simple, while Part III examines the establishment clause justification. The next section, Part II, critiques the free exercise justification.

II. CRITIQUE OF THE FREE EXERCISE CLAUSE JUSTIFICATION

In analyzing the justifications that have been offered in support of church autonomy and the ministerial exemption, I start with the traditional free

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89. *Rayburn*, 772 F.2d at 1167-68 (citations omitted). Other courts have adopted this language. *See* Bryce v. Episcopal Church in the Diocese of Colo., 121 F. Supp. 2d 1327, 1341 (D. Colo. 2000) (citing *Rayburn* for this proposition); Lewis v. Lake Region Conference of Seventh Day Adventists, 779 F. Supp. 72, 76 (E.D. Mich. 1991) (same).

90. *See supra* note 27.

91. Roberts v. United States Jaycees, 468 U.S. 609 (1984).

92. Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).

93. *Id.* at 647-48.

94. *See id.* at 650-51.

exercise justification, not only because it is the easiest to dismiss, but because a discussion of its weaknesses is necessary to understand the continued viability of the broader church autonomy concept. As explained above, the free exercise clause was traditionally understood to bar substantial burdens on religious practices unless a compelling government interest prevailed.[95]

The first significant limitation of this understanding is that it does not shield religious organizations whose tenets are consistent with antidiscrimination law. If an organization's religious doctrine embraces racial or sexual equality, a Title VII lawsuit would not invalidate any religious practice, but would merely declare illegal an act that does not comport with church doctrine. Thus, it would not aid the vast majority of church-defendants in Title VII cases that, like the Salvation Army in *McClure*,[96] do not require discrimination as part of their religion.

More importantly, the validity of any free exercise justification is now suspect in light of the Supreme Court's 1990 decision in *Employment Division, Department of Human Resources v. Smith*.[97] Prior to *Smith*, religious individuals and organizations could be excused from complying with a burdensome neutral law.[98] *Smith*, however, ended free exercise clause protection of religious practices against neutral statutes of general applicability.[99]

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95. *See supra* note 70 and accompanying text.

96. 460 F.2d 553 (5th Cir. 1972); *see supra* notes 36-43 and accompanying text.

97. 494 U.S. 872 (1990); *see* Brant, *supra* note 29, at 302.

98. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (exempting the Amish from mandatory school attendance laws under the free exercise clause); Sherbert v. Verner, 374 U.S. 398 (1963) (exempting Saturday Sabbatarian from an unemployment benefit regulation requiring willingness to work on Saturday under the free exercise clause).

99. *Smith* contemplates two cases where the compelling interest test would still apply to a neutral law of general applicability: (1) in hybrid rights cases, which implicate the "Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press"; and (2) in cases in which the law allows "individualized governmental assessment." 494 U.S. at 881-82, 884. The latter does not apply here and the former has been widely criticized as unworkable and created merely to account for prior precedent. In describing hybrid rights as "ultimately untenable," Justice David Souter explained,

> If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith* . . . . But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in the judgment); *see also* Brant, *supra* note 29, at 282 (hybrid rights are "jurisprudentially unsound" and "unworkable"); Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 Sup. Ct. Rev. 323, 335 (arguing that "[m]ost scholars assume this language was a make-weight to 'explain' *Yoder* that lacks enduring significance"); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1121 (1990) [hereinafter

In *Smith*, two men were fired from their positions at a drug rehabilitation center because they ingested peyote for sacramental purposes at their Native American church.[100] Because the men were fired for work-related misconduct, the state refused to provide unemployment benefits.[101] Under the existing free exercise jurisprudence, they had a strong argument that the denial of benefits was unconstitutional because (1) the law substantially burdened the exercise of their religious practices, and (2) the state had no compelling interest in forbidding the sacramental use of peyote. But rather than reach the compelling interest test, the Court jettisoned it, holding that the free exercise clause did not exempt religiously motivated conduct from neutral laws of general applicability.[102] As the Court explained, "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[103]

Under *Smith*, then, the free exercise clause should not shield religious practices from Title VII.[104] Title VII is a neutral law of general applicability: It neither expressly nor surreptitiously aims to promote or restrict religious belief, and it applies to all employers.[105] Therefore, just as Smith could not invoke the free exercise clause to violate the drug laws, even if his ingestion of peyote is religiously mandated, religious institutions cannot invoke the free exercise clause to violate antidiscrimination law, even if race or sex discrimination is religiously mandated.

Nevertheless, after *Smith*, lower courts have refused to abrogate the ministerial exemption.[106] Instead, they have dismissed *Smith* as inapposite by claiming that the free exercise clause offers two types of protection, and *Smith* eliminated only the first: "The *Smith* decision focused on the first type of government infringement on the right of free exercise of religion—infringement on an individual's ability to observe the practices of his or her religion. The second type of government infringement—interference with a

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McConnell, Smith *Decision*] (stating that the hybrid rights exception was "created for the sole purpose of distinguishing [*Yoder*]").

100. *Smith*, 494 U.S. at 874.

101. *Id.*

102. *Id.* at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

103. *Id.* (quoting Justice Frankfurter in *Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594-95 (1940)).

104. *Smith*'s elimination of the compelling interest test, *see supra* note 102 and accompanying text, was informed by establishment concerns. These concerns, which are discussed in Part III, are more difficult to rebut than the free exercise issues that *Smith* essentially eviscerated.

105. *See supra* notes 32-35 and accompanying text.

106. *See, e.g.*, Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 656-57 (10th Cir. 2002); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1302-04 (11th Cir. 2000); Combs v. Central Tex. Annual Conference of United Methodist Church, 173 F.3d 343, 348-50 (5th Cir. 1999); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 461-63 (D.C. Cir. 1996).

church's ability to select and manage its own clergy—was not at issue in *Smith*."[107] As one court explained, "The Supreme Court's decision in *Employment Division v. Smith* does not undermine the principles of the church autonomy doctrine. . . . [U]nlike *Smith*, the ministerial exception addresses the rights of the church, not the rights of individuals."[108] According to these courts, *Smith* limited free exercise protection of religious individuals, but left intact the free exercise autonomy of religious institutions. If that is true, the free exercise right of autonomy for religious institutions is broader than the free exercise protection for individuals. As conceived, it guarantees religious organizations autonomy from any state interference in internal affairs, and should, it is claimed, shield religious institutions from Title VII lawsuits whether or not antidiscrimination law clashes with their tenets.[109]

Lower courts also defend the continued vitality of the ministerial exemption on the ground that there is "a long line of Supreme Court cases affirming the church autonomy doctrine . . . [, and their] rationale extends beyond the specific ministerial exception."[110] The most commonly cited cases include *Watson v. Jones*;[111] *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*,[112] *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[113] *Gonzalez v. Roman Catholic Archbishop of Manila*,[114] and *Serbian Eastern Orthodox Diocese v. Milivojevich*.[115] All but one involve church property disputes.[116] Some commentators, including Michael McConnell and Kathleen Brady, maintain that *Smith* affirmed church autonomy by citing with approval the church property cases.[117] Other pre-*Smith* proponents of church autonomy, such as Douglas Laycock, argue that *Smith* simply does not apply to church-minister disputes.[118]

Arguments used to distinguish *Smith* and thereby maintain the ministerial exemption suffer from several weaknesses. First, as a doctrinal matter, the church property cases do not necessarily support a broad right of autonomy from all state interference in internal affairs. Second, church autonomy as a *free exercise* right depends on an unconvincing distinction between the free exercise of religion by individuals and by institutions. Third, the continued

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107. *Gellington*, 203 F.3d at 1303-04.
108. *Bryce*, 289 F.3d at 656-57.
109. *See supra* notes 50-69 and accompanying text.
110. *Byrce*, 289 F.3d at 656-57.
111. 80 U.S. (13 Wall.) 679 (1871).
112. 344 U.S. 94 (1952).
113. 393 U.S. 440 (1969).
114. 280 U.S. 1 (1929).
115. 426 U.S. 696 (1976).
116. *See infra* Part II.A.
117. *See supra* note 25; *see also* Berg, *supra* note 26, at 218-19 (noting that even after *Smith*, "the Constitution still guarantees some special freedoms for religious institutions . . . including the right to hire and fire clergy and the broader right of church autonomy").
118. *See* Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 Cath. Lawyer 25, 36 (2000).

recognition of a broad right to church autonomy does not comport with the changed view of religion in the new First Amendment paradigm that *Smith* embodies.

A. *The Church Property Cases*

The church property cases do not stand for the proposition that a religious institution may ignore or violate a neutral law under the aegis of the free exercise clause. Despite occasional language that suggests a broad autonomy,[119] the actual holdings stand for a much more limited proposition, namely, that the state should not decide doctrinal disputes.[120] Furthermore, the Supreme Court's most recent church property case undermines support for a broad right of autonomy.[121]

To start, none of these cases involved an attempt by the state to enforce a neutral law of general applicability against a religious institution.[122] Instead, they involved rival church factions laying claim to church property after a split within the church, be it a local church splitting into two[123] or a local church or diocese breaking away from its general church.[124] These internal feuds pitted sect against sect—not church against state.

The Supreme Court decided these cases by deferring to the highest church authority. In *Watson v. Jones*,[125] the Supreme Court rejected the English rule of awarding the property to the faction deemed by the court to hold the "true standard of faith," and instead held that it would defer to the highest church authority's decision on this religious question.[126] Similarly,

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119. *See supra* note 79 and accompanying text.

120. *See generally* Brant, *supra* note 29, at 293-95 (discussing Jones v. Wolf, 443 U.S. 595 (1979)); Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. Rev. 1099, 1112-14; Lupu, *Employment Discrimination*, *supra* note 29, at 407 (also discussing *Jones*).

121. *See infra* notes 137-142 and accompanying text.

122. Shawna Meyer Eikenberry, Note, *Thou Shalt Not Sue the Church: Denying Court Access to Ministerial Employees*, 74 Ind. L.J. 269, 281 (1998) ("First of all, the Supreme Court cases relied upon by lower courts did not involve generally applicable neutral statutes.").

123. In *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 717 (1871), the local Presbyterian congregation split into two after the General Assembly, the ruling Presbyterian body, took an antislavery position.

124. After the Russian Revolution, the Russian Orthodox Church in North America declared its autonomy from the Russian Orthodox Church headed by the Patriarch of Moscow. Both factions laid claim to New York City's St. Nicholas Cathedral in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church of North America*, 344 U.S. 94 (1952). In *Serbian E. Orthodox Diocese v. Milivojevich*, the Serbian Eastern Orthodox Diocese for the United States and Canada of the Serbian Orthodox Church tussled with the Mother Church, at one point declaring its independence from the Mother Church. 426 U.S. 696, 700-02 (1976). Finally, the property dispute in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, arose after "two local churches withdrew from a hierarchical general church organization." 393 U.S. 440, 441 (1969).

125. 80 U.S. (13 Wall.) 679. *Watson* was decided before the Supreme Court applied the First Amendment to the states, and therefore did not depend upon the free exercise clause. Nonetheless, free exercise values permeate the decision.

126. *Id.* at 727.

in *Kedroff*, the Supreme Court rejected the New York legislature's finding that one faction would better carry out the church's mission and opted for deference to the highest church body.[127] In *Serbian Eastern Orthodox Diocese v. Milivojevich*,[128] the Supreme Court preferred deference to the highest church authority over scrutiny that would ultimately deprive the church of the right to construe its own church laws.[129] Finally, in *Presbyterian Church*, which involved local churches breaking away from the general church, the Supreme Court invalidated a Georgia law that required courts to resolve this type of dispute by deciding whether the general church had departed from the tenets of faith and practice it held at the time the local churches first affiliated with it.[130] Notably, the Supreme Court did not actually defer to church hierarchy.[131] The sole case not involving church property, *Gonzalez v. Roman Catholic Archbishop of Manila*,[132] did not implicate the First Amendment and does not support a right of church autonomy.[133]

In deferring to the highest church authority, the Supreme Court did recognize a degree of church autonomy. But this autonomy does not translate into a free exercise right of complete autonomy over internal church affairs.[134] Animating the court's recognition of church autonomy was not a free exercise concern for trampling on religious practices but an establishment concern about the state entangling itself in theological disputes. Specifically, the Court wanted to avoid resolving these disputes.[135] Therefore, it adopted the default rule of deferring to the highest

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127. 344 U.S. at 106 n.10, 107-09, 117-18.

128. 426 U.S. at 713-14.

129. *Id.*

130. Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969).

131. *Id.*

132. 280 U.S. 1 (1929).

133. In *Gonzalez*, a testatrix bequeathed property to the Roman Catholic Archbishop of Manila. *Id.* at 12. Her will required that the gift be used to support a chaplain and that the chaplain be a relative of the testatrix. *Id.* The Archbishop refused to appoint the plaintiff, a relative of the testatrix, because the plaintiff failed to meet chaplaincy qualifications established after the bequest. *Id.* The plaintiff argued that he ought to be appointed based upon the qualifications existing at the time of the bequest. *Id.* at 14-15. The Court ruled in favor of the Archbishop, holding that the testator could not have intended that a perpetual chaplaincy founded in 1820 should be forever administered according to the canons of the church that happened to be in force as of that date. *Id.* at 17. In deciding the merits of the dispute, the Court rejected the Archbishop's claim that any controversy regarding the appointment of the chaplain was a spiritual matter beyond the jurisdiction of the secular courts. *Id.* at 15-16. Because the decision turned on interpreting the testator's intent, it does not support a right of church autonomy.

134. *See* Laycock, *Church Autonomy*, *supra* note 19, at 1394, 1397 ("[T]he Court has recognized a right to church autonomy in a series of cases involving disputes over control of church property . . . ."); *id.* at 1398 ("This right of autonomy logically extends to all aspects of church operations. Church labor relations rather plainly fall within the right of church autonomy. Deciding who will conduct the work of the church and how that work will be conducted is an essential part of the exercise of religion.").

135. Lupu, *Employment Discrimination*, *supra* note 29, at 407.

authority as a means of deciding a dispute between religious entities without having to determine which faction in a schism represented the "true" church.[136] Thus, the church property cases stand only for the limited proposition that courts may defer to church authority in order to avoid determining matters of religious doctrine.

Even if these earlier cases had pointed to broad church autonomy, *Jones v. Wolf*,[137] the Supreme Court's most recent church property case, reversed direction.[138] In *Jones*, the Court held that while courts *may* defer to church authority to resolve disputes between factions, they are not *required* to do so.[139] The *Jones* Court held that deference to church authority is but one method of resolving a church dispute without deciding questions of doctrine. As an alternative, the court could apply neutral principles of law, provided that it "involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith."[140] In other words, to resolve a dispute between warring factions, the courts may examine church documents through the lens of the common law as long as they avoid doctrinal controversies.[141] By eliminating deference to church authority as the exclusive means of resolving a dispute between religious entities, *Jones* seriously undercuts any argument that these cases guarantee a broad right of church autonomy.[142]

B. *Religious Institutions Versus Religious Individuals*

Besides its shaky doctrinal foundation, the survival of the church autonomy doctrine post-*Smith* leads to an inherently contradictory position: The free exercise clause offers no protection from neutral laws of general applicability for individual religious practices,[143] but protects absolutely institutional religious practices.[144] Religious organizations arguably foster religion both by facilitating individual religious practice and by creating a

136. At least this is the rule applied to churches belonging to hierarchal church organizations as opposed to congregational churches. All of the church autonomy cases have involved the former.

137. 443 U.S. 595 (1979).

138. Lupu, *Employment Discrimination*, *supra* note 29, at 406.

139. *Jones*, 443 U.S. at 605 ("We cannot agree, however, that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved.").

140. *Id.* at 602 (quoting Md. & Va. Churches v. Sharpsburg Church, 396 U.S. 367, 368 (1970) (Brennan, J., concurring)).

141. *Id.* at 602-03.

142. Lupu, *Employment Discrimination*, *supra* note 29, at 407 ("The Court made clear that the constitutional evil to be avoided in all cases is judicial resolution of questions of religious doctrine and practice and that, in making efforts to so avoid, states may choose between deference and 'neutral principles' as methodological approaches.").

143. This assumes the law was in fact neutral, and not merely facially neutral but actually targeting religion. *See* Church of the Lukumi Babulu Aye v. City of Hialeah, 508 U.S. 520, 521 (1993).

144. In *City of Seattle v. First Covenant Church*, 499 U.S. 901 (1991), the Supreme Court certainly suggested that *Smith* applies to religious organizations in vacating a free exercise judgment in favor of a church and remanding the case for reconsideration in light of *Smith*.

diversity of religious groups.[145] While the latter may lead to some heightened protection under the *free speech* clause, supporters fail to articulate a principled reason to grant greater protection to religious entities than to religious individuals under the *free exercise* clause.

The strongest argument for the individual-versus-institution dichotomy is that religious organizations serve another purpose besides enabling the free exercise of their individual members. Specifically, protecting religious organizations ensures a diversity of religious beliefs, which, in turn, is essential to the health of a democratic society.[146] Democratic values may be advanced in a variety of ways. For example, some maintain that a diversity of religious groups best fosters civic virtue. Others suggest that it guards against religious tyranny or serves as a buffer against state power.[147] Of course, similar claims have been advanced about secular voluntary associations, which are protected by the free speech right of expressive association. As James Madison wrote, "Security for civil rights must be the same as that for religious rights; it consists in the one case in a multiplicity of interests and in the other in a multiplicity of sects."[148] Consequently, distinctive treatment of religious entities stemming from their role in maintaining diversity or a democratic society is, in essence, an associational right. As expressive associations, religious organizations ought to have some autonomy in selecting people who will represent them to the outside world and convey their messages—in other words, they ought to have some autonomy in selecting their ministerial employees. Nonetheless, as discussed more fully in Part IV, this associational right does not translate into church autonomy or absolute immunity from antidiscrimination law.

Otherwise, the constitutional significance of religious organizations depends upon what they can do for individuals.[149] After all, individual believers often "exercise their religion through religious organizations."[150] Allowing institutions but not individuals to violate the law in the name of religious belief amounts to privileging the derivative right over the primary

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145. The aims of free speech have been similarly described as allowing individual self-expression and creating a diversity or marketplace of ideas.

146. *See, e.g.*, Brady, *Surprising Lessons*, *supra* note 25, at 1703 (stating that full freedom of belief, even unpopular and unorthodox belief, is essential to the health of a democratic society).

147. *See, e.g.*, Kathleen A. Brady, *Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom From and Freedom For*, 49 Vill. L. Rev. 77, 154-56 (2004).

148. Bagni, *supra* note 19, at 1540 (citing The Federalist No. 51, at 358 (James Madison) (B. Wright ed. 1961)).

149. *See* Lupu, *Employment Discrimination*, *supra* note 29, at 424 ("[O]rganization[s] might . . . be viewed as exercising the aggregate rights of its [members], or as exercising a derivative right to make choices that will enhance the free exercise rights of its members."); *see also* Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) (stating that "[s]olicitude for a church's ability to [further its religious mission] reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well").

150. Laycock, *Church Autonomy*, *supra* note 19, at 1389.

one.[151] The disconnect is apparent when the harm of state intrusion is considered: Individuals may feel indignity or shame when prevented from fulfilling religious obligations; institutions cannot.[152] The rationale for greater protection for institutions is especially strained when applied to religious entities that espouse no beliefs requiring discriminatory treatment of their ministerial employees, as it results in religious entities being allowed to violate the law even when religious belief plays no role, while the actual religious practices of individuals are unprotected.

The only reason the differential treatment is not completely unworkable is that church autonomy is limited to matters of internal church affairs, including the church-clergy relationship, which has no individual religious practice analog. Were church autonomy not so limited, individual Native Americans would have no constitutional right to ingest peyote during sacramental ceremonies,[153] but Native American churches would have the constitutional right to offer peyote to their parishioners during sacramental ceremonies.

To justify the distinction between religious persons and religious organizations on free exercise grounds, some courts and commentators claim that the consequences of heightened free exercise protection differs for individuals and institutions. In particular, they point to the *Smith* Court's concerns that construing the free exercise clause to contemplate[154] an exemption whenever a law conflicted with someone's religious practices would result in chaos because it would "make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself."[155] Yet, if the problem is the potential for lawlessness, maintaining the church autonomy doctrine—and by extension, the ministerial exemption—does not avoid this problem. As with individual exemptions, allowing a religious institution complete freedom in its internal affairs permits it to become a law unto itself.[156] And instead of the slight disruption of exempting a single person from Social Security taxes,[157] it means allowing an entire institution to withhold contributions for all its employees.

In sum, any principled differential treatment between institutions and individuals stems from the free speech right of expressive association, not free exercise.

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151. To draw an analogy, this would be akin to arguing that a newspaper had a freedom of press protection against a particular search and seizure but not an individual reporter.

152. Lupu, *Employment Discrimination*, *supra* note 29, at 422-23.

153. *See supra* notes 100-102 and accompanying text.

154. Pre-*Smith*, exemptions were not automatic as no exemption was necessary for a neutral law narrowly tailored to advance a compelling state interest. *See supra* notes 21, 70 and accompanying text.

155. *See, e.g.*, Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990) (internal quotation marks omitted).

156. Eikenberry, *supra* note 122, at 281.

157. *Cf.* United States v. Lee, 455 U.S. 252 (1982) (denying a religion exemption from social security taxes).

C. *The Change in Paradigm*

Lower courts that cling to the ministerial exemption miss entirely the fundamental shift in religion clause jurisprudence that has occurred over the past twenty years. The ministerial exemption was created at the height of separationism,[158] the overriding mandate of which was to "prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other."[159] But the Supreme Court has since shifted from a view that the religion clauses require treating religion as separate, autonomous, and distinct towards a view that favors more equal treatment between religion and its secular counterparts.[160] The shift is by no means complete, but separationism's time has passed. *Smith* merely represents a continuation in the shift towards neutrality in the free exercise context.[161] Thus, distinguishing *Smith* on the narrow ground that it applies to religious individuals but not religious institutions ignores the broader trend that the case embodies.

1. Separationism

The theory of separationism insists on a "wall of separation between church and state."[162] The separation is necessary because religion is thought to be constitutionally special in at least three interrelated ways. First, religion is uniquely privileged in that individuals' deep religious commitments are of a different character—and are more important—than other deep commitments that individuals might have. Consequently, the state should value religious freedom over all but the most compelling interests.[163] Second, the state lacks all competence to deal with the uniqueness of religion and religious doctrine. As described by Ira C. Lupu and Robert Tuttle, "The core of the Separationists' message is a claim of institutional differentiation. Secular matters belong to civil authorities and sacred matters belong to religious authorities."[164] Third, a more negative view of religion's distinctiveness posits that religion's interaction with the state poses special problems to both church and state. Church and state must remain separate in order to "protect[] the 'garden of the church' from the encroaching 'wilderness of the world' and insulate[] the political

158. Tellingly, the discussion in *McClure* opens with the observation that "[t]he Supreme Court has many times recognized that the First Amendment has built a 'wall of separation' between church and State." 460 F.2d 553, 558 (1972).

159. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

160. *See supra* Part II.C.2.

161. *See supra* notes 97-103 and accompanying text.

162. Letter from Thomas Jefferson to Danbury Baptist Ass'n (Jan. 1, 1802), *in* Michael W. McConnell et al., Religion and the Constitution 54-55 (2002).

163. *See* Eisgruber & Sager, *supra* note 27, at 1255, 1263 (describing premises of Douglas Laycock and Michael McConnell).

164. Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 Vill. L. Rev. 37, 53 (2002) [hereinafter Lupu & Tuttle, *Distinctive Place*] (discussing the basis of separationists); *see also id.* at 59 ("[I]t is simply beyond the competence of the state to decide for a faith group what its sacred teachings requires.").

process from the jealousy and divisiveness caused by religious strife."[165] For all these reasons, religion needs to be separate and autonomous from the state.

a. *Free Exercise Clause*

Each of three forms of distinctiveness informs separation-era case law. The first form supports pre-*Smith* case law involving conflicts between religious practices and neutral laws of general applicability. Examples include decisions finding that the free exercise clause barred the state from denying unemployment benefits to individuals whose religious beliefs prevented compliance with the benefit program's requirements,[166] as well as decisions exempting Amish children from mandatory school attendance laws on free exercise grounds.[167]

b. *Establishment Clause*

The second form of distinctiveness drives the courts' desire to refrain from resolving doctrinal disputes affecting the division of church property. The third form played a role in the separationism-era view that, under the establishment clause, the state could not provide benefits to religious organizations that it provides to nonreligious organizations. For example, in several instances, courts held that the state could not financially support religious institutions like parochial schools.[168] In sum, while distinctiveness supports the granting of certain privileges to religion that

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165. Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 Harv. L. Rev. 1468, 1469 (1984).

166. Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987) (holding that the denial of unemployment benefits to a religious convert who resigned rather than work on her Sabbath violated the free exercise clause); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981) (holding that the denial of unemployment benefits to an applicant whose religion forbade him to fabricate weapons violated free exercise); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that the denial of unemployment benefits to an applicant who refused to accept work on her Sabbath violated the free exercise clause).

167. Wisconsin v. Yoder, 406 U.S. 205 (1972) (exempting the Amish from compulsory school-attendance law because it interfered with their ability to practice their religion).

168. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985) (holding that the state cannot finance remedial instruction by public school teachers to disadvantaged children in parochial schools); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) (holding that the state cannot finance instruction to religious school students at public expense in classrooms leased from religious schools); Wolman v. Walter, 433 U.S. 229 (1977) (holding that the state cannot finance funds for equipment and field trip transportation for religious school students); Meek v. Pittenger, 421 U.S. 349 (1975) (holding that the state cannot finance auxiliary services (such as counseling and testing) or loan instruction materials (excluding textbooks) to religious schools); Comm. for Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (holding that the state cannot finance maintenance and repair grants to religious schools and tuition reimbursement or tax relief to parents of children in religious schools).

secular counterparts do not enjoy, it also prevents the state from conferring certain benefits to religion that secular counterparts do enjoy.

2. The Shift Towards Neutrality[169]

Over the past twenty years, the wall of separation has steadily crumbled. Rather than treat religion as distinct, the Supreme Court has increasingly treated religious and secular organizations as equals. Many commentators have described the change as a shift from separationism towards "neutrality."[170] Of course, the shift is not, and cannot be, complete: The religion clauses guarantee some distinctive treatment. Nonetheless, religion has lost much of its special and privileged character.[171]

a. *Establishment Clause*

The shift in paradigm has been pronounced in the establishment clause jurisprudence. Subject to certain exceptions, the establishment clause no longer prohibits government from granting religion the same benefits as it does non-religion.[172] Instead, it is constitutionally sufficient that government does not single religion out for special favors. Thus, if the government creates a public forum for speech in public plazas,[173] universities,[174] or schools,[175] religious organizations may have equal access

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169. When I refer to "neutrality," or a "neutrality paradigm," I refer to the practice of treating religious and secular organizations alike.

170. *See, e.g.*, Lupu & Tuttle, *Sexual Misconduct*, *supra* note 26, at 1802 ("By the turn of the millennium, several of the building blocks in the edifice of Separationism had crumbled, and a competing paradigm of Neutrality or evenhandedness between religion and secularity had taken center stage."). Others prefer the term "equality." *See, e.g.*, William P. Marshall, *What Is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 Ind. L.J. 193 (2000).

171. One reason for the shift may be the recognition that the growth of today's huge welfare and regulatory state made separationism—never really a workable paradigm—more impracticable than ever. For example, churches can never really be autonomous from the state because they inevitably benefit from state-funded programs. There are simply too many state benefits—ranging from roads and highways to police and fire departments—that are too entrenched in everyday life for religious organizations to cut themselves off and be truly financially independent. Others suggest that anti-Catholic sentiment motivated the push for separation of church and state, and that these views have thankfully faded. For instance, the Supreme Court noted,

> [H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Opposition to aid to 'sectarian' schools acquired prominence in the 1870's . . . at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'. . .
>
> . . . This doctrine, born of bigotry, should be buried now.

Mitchell v. Helms, 530 U.S. 793, 828-29 (2000).

172. *See generally supra* Part I.B.2.

173. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (finding that a private party was entitled to erect a Christian cross on the grounds of the state capitol, which were designated public fora).

174. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (holding that a printing reimbursement for student groups must be made available to a Christian student

to it.[176] Similarly, the establishment clause no longer bars state subsidies to religious organizations. Consequently, the state may award social services grants to religious organizations as it does to other organizations.[177] Moreover, in a complete turnaround from the separationism era, government may now aid religious private schools in almost the same way it aids nonreligious private schools.[178] This reversal culminated in *Zelman v. Simmons-Harris*,[179] where the Supreme Court approved a school voucher program even though nearly all of the government funds went to parochial schools.[180]

The Supreme Court has not, however, embraced complete neutrality and abandoned the notion that religion is unique.[181] Under a true neutrality paradigm, the government would be able to inculcate, endorse, and fund religion to the same degree as anything else. Despite the government's freedom to, for the most part, say what it pleases, it may not endorse religion. The establishment clause still bars the state from furthering religion by displaying religious icons[182] or sponsoring prayer in school.[183] And while the state can directly fund secular enterprises, it cannot under the establishment clause directly fund certain religious enterprises like religious

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newspaper); Widmar v. Vincent, 454 U.S. 263 (1981) (holding that university facilities must be made available to a student religious group).

175. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (holding that school facilities must be made available after school hours for a Christian children's club); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (holding that school facilities must be made available to a church to screen a religiously oriented film series on family values and childrearing).

176. In fact, the free speech clause requires it; to do otherwise would be to discriminate against religious points of view. *See supra* notes 173-175 and accompanying text.

177. In *Bowen v. Kendrick*, 487 U.S. 589, 593 (1988), the Supreme Court held that the Adolescent Family Life Act, which authorized grants to religious organizations and required potential grantees to describe how they will involve religious organizations, did not violate the establishment clause. While government money cannot be used for religious indoctrination, Lupu and Tuttle describe *Bowen* as "signal[ing] a change in the legal landscape." Lupu & Tuttle, *Distinctive Place*, *supra* note 164, at 45.

178. Mitchell v. Helms, 530 U.S. 793 (2000) (overruling Meek v. Pittenger, 421 U.S. 349 (1975) and Wolman v. Walter, 433 U.S. 229 (1977)) (holding that the state may lend educational materials and equipment to parochial schools); *see also* Agostini v. Felton, 521 U.S. 203 (1997) (overruling Aguilar v. Felton, 473 U.S. 402 (1985) and Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985)) (holding that the state may fund remedial education provided by public school teachers at parochial schools).

179. 536 U.S. 639 (2002).

180. *Id.* at 653.

181. *See, e.g.*, Lupu & Tuttle, *Sexual Misconduct*, *supra* note 26, at 1803 ("This movement towards Neutrality, though sweeping, has remained incomplete.").

182. McCreary County v. ACLU, 544 U.S. 844 (2005) (holding that the Ten Commandments displayed in the county courthouse violated the establishment clause); County of Allegheny v. ACLU, 492 U.S. 573 (1989) (holding that a crèche inside the county courthouse violated the establishment clause).

183. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding that student-led invocations at school football games violated the establishment clause); Lee v. Weisman, 505 U.S. 577 (1992) (holding that nonsectarian prayer at school graduation violated the establishment clause).

worship, indoctrination, or proselytization.[184] Religion also remains special in that courts may not resolve doctrinal disputes—this lesson from the church property cases still holds true.[185] The courts of today are no better equipped to decide matters of church dogma than the courts of yesteryear.

b. *Free Exercise Clause*

The paradigm shift has also significantly altered the scope of the free exercise clause. Previously, religion and religious organizations were separate from the state in the sense that the former were not always required to comply with the latter's rules. This privileged position was ensured by the free exercise compelling interest test, in which any significant burden on religious practice was subject to strict scrutiny.[186] No such test applied to secular practices.

In the shift towards neutrality, religion has lost this privileged position. Even before *Smith* abolished the compelling interest test, the Supreme Court was moving in this direction. In decisions leading up to *Smith*, the Court became less inclined to grant religious exemptions from neutral laws of general applicability. Instead, it regularly concluded that the state interest was compelling enough to override the free exercise clause.[187] As Christopher L. Eisgruber and Lawrence G. Sager observed, free exercise scrutiny was "strict in theory but feeble in fact."[188] For example, at the height of separationism, the Court found it unconstitutional to deny state benefits to an applicant whose religious beliefs precluded compliance with program requirements.[189] In contrast, shortly before *Smith*, the Supreme Court held that because the government interest in avoiding welfare fraud was sufficiently compelling, religious individuals seeking food stamp and welfare benefits must follow state regulations, even where they clashed with religious beliefs.[190] In *Smith*, rather than running through this perfunctory exercise again, the Supreme Court simply eliminated the compelling interest test.[191]

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184. Voucher programs are not considered direct funding. *See generally Zelman*, 536 U.S. 639.

185. *See supra* Part II.A.

186. Ira C. Lupu and Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DePaul L. Rev. 1, 31 (2005) [hereinafter Lupu & Tuttle, *Faith-Based Initiative*].

187. As Lupu points out, it is a myth that free exercise principles were vibrant and strong prior to being gutted in 1990 in *Smith*. *See* Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 Cardozo L. Rev. 565, 568-69 (1999).

188. Eisgruber & Sager, *supra* note 27, at 1247; *see also* Ira C. Lupu, *The Trouble With Accommodation*, 60 Geo. Wash. L. Rev. 743, 756 (1992) (describing the free exercise compelling interest test as "strict in theory, but ever-so-gentle in fact").

189. Sherbert v. Verner, 374 U.S. 398 (1963).

190. Bowen v. Roy, 476 U.S. 693 (1986) (finding that a statutory requirement that a state agency use a social security number in administering AFDC and food stamp programs does not violate the free exercise clause, notwithstanding the belief that use of the number would impair a child's spirit).

191. *See supra* note 102 and accompanying text. Even during the separationism era, the Supreme Court revealed uneasiness in privileging deep religious commitments over deep

Now, rather than shielding religious people and religious organizations from generally applicable requirements, the free exercise clause protects religion from being singled out for disfavor.[192] This protection from discrimination still marks religion as distinctive, since protection from being targeted is not universally available.[193] But instead of privileging religion with immunity from neutral laws, the free exercise clause only protects religion from discriminatory ones.

Of course, the free exercise clause always protected religion from discrimination. As the Supreme Court noted, "it was 'the historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.'"[194] That principle is best exemplified in modern times by the Supreme Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[195] where the Court struck down ordinances targeting ritual animal sacrifice, a principal form of devotion in the Santeria religion.[196] The City of Hialeah's intent to single out this religion was evident from the history, language, and wildly underinclusive nature of the ordinances that had as their ostensible purpose the prevention of animal cruelty and the safeguarding of public health.[197] Under one ordinance, for example, few, if any, killings of animals were

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nonreligious ones when confronted with the stark example presented in *Welsh v. United States*, 398 U.S. 333, 336 (1970). *See, e.g.*, Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DePaul L. Rev. 1197, 1227 (2005); Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 Geo. Wash. L. Rev. 925, 927 (2000) [hereinafter Gedicks, *Defensible Free Exercise*]. Congress had exempted from conscription people who for religious reasons conscientiously objected to war in any form. Elliott Welsh held deep conscientious scruples against war, but denied that his views were religious. *Welsh*, 398 U.S. at 341. Nonetheless, in a rather strained interpretation, the Supreme Court held that Welsh was covered by the exemption. *Id.* at 342-44. The concurrence is quite candid (and the dissent quite insistent) that the majority's statutory interpretation was highly suspect. *Id.* at 344-67 (Harlan, J., concurring); *id.* at 367-74 (White, J., dissenting). By exempting Welsh, the Supreme Court tacitly recognized that deeply felt nonreligious opposition to war merited the same respect as a deeply felt religious opposition. *See id.* at 341-42.

192. *See generally* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

193. Religious individuals and institutions can be treated distinctly in two ways: (1) They can be exempted from generally applicable laws that others must obey, and (2) they can be protected from being discriminated against. Whether the latter should be considered a form of "privileging" religion is an open question. In a way it is, because secular counterparts are not protected from discrimination. But in a way it is not, because it simply ensures that religion is not treated worse than its secular counterpart. In any event, the shift in paradigm has ended the first but not the second.

194. *Hialeah*, 508 U.S. at 532 (quoting Bowen v. Roy, 476 U.S. 693 (1986)).

195. 508 U.S. 520.

196. *Id.* at 542.

197. *Id.* at 536, 540-43 (stating that, though the ordinances were facially neutral, their targeting of Santeria was clear given that they (1) were passed in an emergency session held soon after the plaintiff church announced its plans to establish a Santeria house of worship; (2) used the words 'sacrifice' and 'ritual'; and (3) were wildly underinclusive to their stated goals).

prohibited other than Santeria animal sacrifices.[198] Under a true neutrality paradigm, bans on animal cruelty motivated by religious discrimination would be treated no differently than bans motivated by a secular reason: They would be subject to rational review.[199] Instead, the Supreme Court applied a more searching scrutiny in *Hialeah*.[200] This extra protection demonstrates that religion has not completely lost its status as special.

c. *Reaction to the Paradigm Shift*[201]

Even though religion remains special, this shift towards neutrality has not been universally popular. Separationists who believe any government aid directed towards religion amounts to endorsement lament the relaxation of establishment clause strictures.[202] Others resist the downgrading of religion's status, maintaining that the free exercise clause provides more than just protection against discrimination. Religious commitments, they insist, are more important than all other deep commitments, and therefore demand additional protection from state interference.[203]

Apart from the challenge of reconciling this view of religion with current Supreme Court jurisprudence emphasizing equality between religion and non-religion (including *Smith*), those who insist that the free exercise clause protects against more than discrimination must explain why.[204] The text of the clause—"Congress shall make no law . . . prohibiting the free exercise [of religion]"[205]—is ambiguous enough to support either interpretation.[206]

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198. *Id.* at 536-37.

199. Social and economic laws are generally subject only to a rational basis level of scrutiny. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483 (1955).

200. *See Hialeah*, 508 U.S. at 534 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." (internal quotation marks omitted)).

201. This section digresses from the Article's focus on the constitutionality of the ministerial exemption within the Supreme Court's current jurisprudence. However, *Smith* was so widely reviled I thought that this additional discussion would not be amiss.

202. Justice John Paul Stevens, for example, describes the voucher program approved in *Zelman* as "authoriz[ing] the use of public funds to pay for the indoctrination of thousands of grammar school children in particular religious faiths." Zelman v. Simmons-Harris, 536 U.S. 639, 684 (2002) (Stevens, J., dissenting); *see also id.* at 686 ("Whenever we remove a brick from the wall that was designed to separate religion and government, we . . . weaken the foundation of our democracy.").

203. *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 16 (arguing that "religion is in some way a special human activity, requiring special rules applicable only to it"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 151 (1992) ("Why accommodate religion unless religion is special and important?").

204. *See, e.g.*, Lupu & Tuttle, *Sexual Misconduct*, *supra* note 26, at 1806 ("Religion may indeed be distinctive . . . though we believe that the burden of persuasion should always be placed on the proponent of distinctive treatment.").

205. U.S. Const. amend. I.

The original understanding of the clause, assuming it matters, is hotly contested.[207] Furthermore, as several commentators have observed, other justifications for privileging religion are no longer persuasive.[208] "In a modern, pluralistic world in which religion is but one type of ideology among many, there can be no categorical claim that religion holds a special place . . . ."[209] Religion is constituent of identity, but so are other deep commitments.[210] Thus, the psychic consequences for not heeding religious commitments compared to other deep commitments do not necessarily cut more deeply.[211] Additionally, as discussed in Part II.B, while religious groups further the First Amendment goals of fostering diversity and buffeting democracy, so do nonreligious ones.[212]

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206. *See, e.g.*, Eisgruber & Sager, *supra* note 27, at 1270 ("The text of the Constitution is seldom if ever dispositive of interesting constitutional questions. Neither is the history."). For example, the Supreme Court has interpreted the exact same ambiguous language of the equal protection clause to yield more protection for race than for sex. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 567-68 (1996) (Scalia, J., dissenting) (describing the different standards under the equal protection clause for race and sex, with statutes that discriminate based on race analyzed under strict scrutiny and statutes that discriminate based on sex analyzed under intermediate scrutiny).

207. *Compare, e.g.*, Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992), *with* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

208. *See* Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. Ark. Little Rock L. Rev. 555 (1998) [hereinafter Gedicks, *Unfirm Foundation*]; William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308 (1991) [hereinafter Marshall, *In Defense of* Smith]; Marshall, *supra* note 170.

209. William P. Marshall, *Separation, Neutrality, and Clergy Liability for Sexual Misconduct*, 2004 BYU L. Rev. 1921, 1935; *see also* Eisgruber & Sager, *supra* note 27, at 1263 ("[R]eligious conscience is just one of many very strong motivations in human life, and there is no particular reason to suppose that it is likely to matter more in the run of religious lives generally than will other very powerful forces in the lives of both the nonreligious and the religious."); Gedicks, *Defensible Free Exercise*, *supra* note 191, at 927 ("In this cultural environment, it is difficult to justify giving religious practices special constitutional protection that is not afforded to secular activities that appear to be just as morally serious and socially valuable as religion.").

210. Marshall, *In Defense of* Smith, *supra* note 208, at 320-21 ("[R]eligious belief cannot be qualitatively distinguished from other belief systems in a way that justifies special constitutional consideration. For example, bonds of ethnicity, interpersonal relationships, and social and political relationships as well as religion may be, and are, integral to an individual's self-identity.").

211. *See, e.g.*, Eisgruber & Sager, *supra* note 27, at 1262; *see also* Gedicks, *Unfirm Foundation*, *supra* note 208, at 556 (asking whether a Sabbath observer's refusal to work on Saturday should be privileged over the agnostic noncustodial parent who can only see his children on Saturday); Marshall, *In Defense of* Smith, *supra* note 208, at 321 ("The violation of deeply held moral or political principles may cause as much psychic harm to the believer as would a violation of a religious tenet.").

212. Marshall, *In Defense of* Smith, *supra* note 208, at 321.

3. The Effect of the Paradigm Shift on the Ministerial Exemption

As we have seen, notwithstanding the shift towards neutrality, religion is still viewed as sufficiently special under the religion clauses to (1) warrant protection from state discrimination,[213] and (2) warrant protection from state intrusion in doctrinal disputes.[214] Thus, if the ministerial exemption is required under the religion clauses, it must be within either of these two rubrics. As I have mentioned, the concern about state intrusion in doctrinal affairs is better viewed as a substantive entanglement issue, which is discussed in Part III below.[215] The discussion in this section will address whether the free exercise clause's protection against religious discrimination necessitates the ministerial exemption.

a. *Discrimination Under the Free Exercise Clause*

Whether protection against discrimination supports the ministerial exemption depends upon what kind of discrimination the free exercise clause prohibits. At a minimum, the state cannot intentionally curtail religious practices as in *Hialeah*.[216] If the privilege against discrimination is no broader than this, the ministerial exemption cannot be upheld on this basis; unlike the ordinances in *Hialeah*, Title VII was not passed with the intention of curtailing a religious practice.[217] If, on the other hand, religious discrimination under free exercise is more broadly defined, it could conceivably justify the ministerial exemption. For example, if free exercise prohibited disparate impact, perhaps Title VII could be viewed as discriminating against certain religions, such as ones that do not permit women to be ordained as clergy.

The question, then, is whether the free exercise clause's bar against discrimination is limited to intentional discrimination in the same way that the equal protection bar against discrimination is limited to intentional discrimination.[218] Endless commentary has been written about the shortcomings of this approach under the equal protection clause.[219] It is

213. *See infra* Part II.C.2.b.

214. *See infra* Part II.C.2.a.

215. *See infra* Part III.B.

216. *See supra* note 197 and accompanying text.

217. In addition, Title VII does not provide for "individualized governmental assessment[s]," which would render a law not neutral and generally applicable under *Smith*. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 884 (1990). Nor does Title VII include general secular exemptions, which some have argued necessitates religious exemptions. *See, e.g.*, Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999) (finding that the free exercise clause requires religious exemption from grooming requirements because the policy allowed an exemption for medical reason).

218. *See generally* Pers. Adm'r v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976).

219. *See, e.g.*, Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 Mich. L. Rev. 953 (1993); Charles R.

well deserved, as such a narrow view of discrimination fails to capture unconscious stereotyping or simple indifference to the disparate impact a law may have. This myopic approach to discrimination arguably has the same adverse effects on minority religions as it does on minority people.

The drug law in *Smith* illustrates this point.[220] The legislators did not pass the drug law in order to burden Native American religious practices, so there was no proof of intentional discrimination. Instead, the legislators simply did not care enough to think through and prevent the law's consequences for minority religious practices in the way they probably would have for mainstream religions. (For example, when Prohibition was enacted, Congress specifically exempted the sacramental use of wine.)[221] In other words, the legislators were indifferent to the effect the law had on Native American religions.

Indeed, a central criticism leveled at the Supreme Court for abandoning the compelling interest test is the potentially negative impact on minority religions.[222] It is not difficult to see why. Before *Smith*, any substantial burden on a religious practice, whether intentional or not, and whether affecting a majority or minority religion, had to pass the free exercise compelling interest test.[223] Now, only discrimination against religion (however discrimination is defined) warrants such scrutiny. Mainstream religions are not as vulnerable as minority ones because they are less likely to be targeted and more likely to have their needs taken into consideration by legislators.[224] The *Smith* majority recognized the risk to minority religions created by entrusting their protection to the legislative process,[225] but only the dissent believed the Constitution required more.[226]

But as a doctrinal matter, nothing in *Smith* or *Hialeah* lends support to a broad view of discrimination under the free exercise clause. To the contrary, the Supreme Court appeared to limit free exercise violations to intentional discrimination. In *Hialeah*, the Court used the word "targeting"

Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987).

220. *See supra* notes 100-102 and accompanying text.

221. *See* Volstead Act, ch. 95, § 3, 41 Stat. 305, 308-09 (1919) (exempting sacramental wine from prohibition), *repealed by* U.S. Const. amend. XXI (1933).

222. *See* Kent Greenawalt, *Religion and the Rehnquist Court*, 99 Nw. U. L. Rev. 145, 155 (2004) ("The rule of *Smith* risks legislative indifference to the plight of unfamiliar minority religions."); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. Rev. 221, 230 (explaining that the Religious Freedom Restoration Act (RFRA) was needed because *Smith* left minority religions vulnerable); McConnell, *Smith Decision*, *supra* note 99, at 1132 ("Prior to *Smith*, the Free Exercise Clause . . . allow[ed] the courts . . . to extend to minority religions the same degree of solicitude that more mainstream religions are able to attain through the political process. The Free Exercise Clause, prior to *Smith*, was an equalizer."); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. Chi. L. Rev. 195, 216 (1992) (arguing that the main flaw of *Smith* was "entrench[ing] patterns of de facto discrimination against minority religions").

223. *See supra* note 98 and accompanying text.

224. *See* Marshall, *In Defense of* Smith, *supra* note 208, at 318.

225. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990).

226. *Id.* at 919-21 (Blackmun, J., dissenting).

at least half a dozen times and repeatedly emphasized that the ordinances intentionally sought to "suppress the conduct because of its religious motivation."[227] The Court rejected a disparate impact approach in stating, "[t]o be sure, adverse impact will not always lead to a finding of impermissible targeting."[228] Instead, the Court analogized discrimination under free exercise to discrimination under equal protection,[229] and emphasized that "the ordinances were enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice."[230] Furthermore, a broader view of discrimination under the free exercise clause would arguably vitiate *Smith*. Not only would most burdens on religion become subject to strict scrutiny, but religion would also return to a privileged position in the constitutional order, since religion would be protected from every type of discrimination, but race and sex would not.

Although the jettisoning of the compelling interest test eliminated the best defense against state interference, the situation is not necessarily dire for minority religions. First, free exercise still protects minority religions, like all religions, from intentional discrimination.[231] Second, the establishment clause prohibits favoring a majority religion over a minority one.[232] Third, legislators have proven quite sympathetic and responsive to disparate impact on minority religions. As Marci A. Hamilton observes, "[I]t is a fact that minority religions have done quite well in obtaining exemptions in the legislature."[233] After *Smith*, Congress passed the Religious Freedom Restoration Act and enacted an exemption for the religious use of peyote.[234] Thus, the willingness of legislatures to protect

227. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993).

228. *Id.* at 535.

229. *See id.* at 540 ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. . . . [N]eutrality in its application requires an equal protection mode of analysis." (internal quotation marks and citations omitted)).

230. *Id.* at 540. Only a plurality endorsed this particular section. There would have been a majority opinion had Justice Antonin Scalia (or Chief Justice William Rehnquist, who joined Justice Scalia) not taken issue with the plurality's focus on the subjective motivations of the lawmakers rather than the object of the laws. But Justice Scalia did not quarrel with the plurality's equal protection analogy in his concurrence. *Id.* at 558 (Scalia, J., concurring).

231. *See supra* Part II.C.2.b.

232. *See supra* Part II.C.2.a.

233. Hamilton, *supra* note 120, at 1212; *see also* Eisgruber & Sager, *supra* note 27, at 1304 (stating that "the political branches have protected religious liberty more vigorously than has the [Supreme] Court"); Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. Colo. L. Rev. 1021, 1023 (2005) (citing an empirical study that reveals that minority religions do not fare worse in federal courts in the modern era).

234. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb-2000bb-4 (2000)); American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (codified at 42 U.S.C. §§ 1996-1996a (2000)) (protecting religious ceremonial use of peyote by Native Americans).

religious minorities may be greater than the *Smith* dissent thought.[235] This may be particularly true after *Smith*, since the legislature can no longer assume courts will create exemptions.[236] Fourth, as William P. Marshall has noted, an exemption regime does not cure the vulnerability of religious minorities.[237] In applying the compelling interest test, courts must determine the sincerity and centrality of religious beliefs, and a court is more likely to find against a claimant when the religious practice is unfamiliar or bizarre. "To put it in concrete terms, Mrs. Sherbert's claim that she is forbidden to work on Saturdays is likely to be accepted as legitimate; Mr. Hodges's claim that he must dress like a chicken when going to court is not."[238] In any case, concern for minority religions plays little role with the ministerial exemption, since the vast majority of defendants who assert it as a defense are mainstream Christian denominations.[239] In sum, the free exercise clause requires no exemption from Title VII, a neutral law of general applicability passed with no religious animus.

b. *Resistance to Losing the Free Exercise Justification for the Ministerial Exemption*

Arguing that the state may ban a religious practice often meets with great resistance. Those who maintain religion is still privileged, not surprisingly, deplore infringement on religious practices. Even those who urge a more equal approach to religion and non-religion still seem uncomfortable with curtailing the ministerial exemption.[240] Marci A. Hamilton, who so

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235. While the Constitution may not *require* the ministerial exemption, it may still *permit* the legislative equivalent. Some might argue that the RFRA, which legislatively reinstated the compelling interest test, 42 U.S.C. §§ 2000bb-1(a), (b), codifies the ministerial exemption. *See* Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006) (holding that the RFRA is available as a defense to an ADEA claim). Not everyone agrees. *See id.* at 114 (Sotomayor, J., dissenting) (arguing that RFRA does not apply to suits between private parties). Furthermore, because Title VII must substantially burden a religious practice to qualify for an exemption, RFRA's scope would probably be no greater than that provided by freedom of expressive associations. *See infra* Part IV.

236. David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. Rev. 241, 274 (1995) ("Proscribing court-mandated exemptions should make elected officials more sensitive to statutory exemption claims, because legislators cannot assume that courts will relieve conflicts between religious tenets and secular laws.").

237. Marshall, *In Defense of* Smith, *supra* note 208, at 310-11.

238. *Id.* at 311.

239. For example, my survey of the cases reveals that of those asserting the ministerial exemption as a defense to a federal discrimination claim, roughly half were Catholic institutions and a third were Baptist, Methodist, Episcopalian, or Presbyterian.

240. Interestingly, each argument employs a tactic feminists have criticized as perpetuating gender inequity. Hamilton recreates the argument that women freely choose their own subordinate positions—an argument regularly invoked to explain inequality in the workplace—when she argues that women who choose to work for religious organizations waive their civil rights. *See* Hamilton, *supra* note 120, at 1196, 1189. Eisgruber and Sager invoke protection for behavior by characterizing it as private, a move feminists have long

forcefully argues that religious entities should not be above the law and that there can be no constitutional right to harm others in the name of religion, nonetheless claims the ministerial exemption is justified because "objections to the harm were waived by the adult's decision to accept employment with a religious employer."[241] Of course, this kind of reasoning would nullify all employment protections for everyone, from minimum wage to safety requirements, and was soundly rejected with the overruling of *Lochner v. New York*.[242] Eisgruber and Sager, who persuasively explain why religious commitments should not be privileged above other deep commitments, nonetheless conclude that religious organizations should be allowed to discriminate on the basis of race and sex because choosing a spiritual counselor is as private a choice as choosing your spouse, lawyer, or psychiatrist.[243] While the choice of one's lawyer, psychiatrist, and minister may well be a private decision, no one suggests suspending Title VII for entities that employ lawyers or psychiatrists.[244] Part of this resistance may be a sense that more than just the free exercise right to a discriminatory religious practice is implicated and that application of Title VII is unconstitutional on other grounds. The next two sections address entanglement and associational concerns.

I suspect, however, that establishment and free speech concerns cannot fully account for all the resistance. Part of it may be traced to fears about one particular religious practice, namely that lifting the ministerial exemption would force the Catholic Church, Southern Baptist Convention, and other denominations to cease excluding women from ordination. This great resistance is somewhat curious given that even before *Smith*, the Court had made it clear that a practice is not immune from regulation or prohibition merely because it is a religious practice. Thus, the state could conscript a conscientious objector whose religious beliefs forbade participation in that particular war.[245] The state could forbid an Orthodox Jewish military enlistee from wearing his religiously mandated yarmulke.[246] The state could criminalize polygamy, a religious necessity for Mormons at one time.[247] In the employment context, the state could force a religious employer to violate its beliefs and pay minimum wage[248] or force an Amish employer to violate his beliefs and pay social security

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challenged in contexts such as domestic violence and marital rape. *See* Eisgruber & Sager, *supra* note 27, at 1248-49, 1276.

241. Hamilton, *supra* note 120, at 1189.

242. 198 U.S. 45 (1905) (striking down a protective labor law as violating individuals' liberty and right of free contract), *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

243. Eisgruber & Sager, *supra* note 27, at 1248-49, 1276.

244. *See* Stopler, *supra* note 29, at 507. A megachurch's assertion of a right to intimate association would seem especially problematic. For more on this right, see *infra* note 415.

245. Gillette v. United States, 401 U.S. 437 (1971).

246. Goldman v. Weinberger, 475 U.S. 503 (1986).

247. Reynolds v. United States, 98 U.S. 145 (1878).

248. Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985).

taxes for his employees.[249] The state's child labor laws could keep a young Jehovah's Witness from her religious duty to preach in the streets.[250] All these examples predate *Smith*, which banned a religious sacrament.

Despite this backdrop, courts and commentators still find it unimaginable that the Catholic Church or Southern Baptist Convention might be required to comply with antidiscrimination law.[251] At some visceral level, it is considered an impossibility. Why is this? It cannot be because a more central religious tenet or greater burden is at issue. After all, for Native Americans, *Smith* forbade performance of a sacrament,[252] and another ruling potentially destroyed a group of Native Americans' ability to practice their religion altogether.[253] The Jehovah's Witnesses believed their failure to fulfill their religious duty would condemn them to "everlasting destruction at Armageddon,"[254] and the Mormons once believed that failing to practice polygamy would lead to "damnation in the life to come."[255] Nor could it be that the state's countervailing interest is less compelling with Title VII. Ending centuries of discrimination seems at least as important a goal as uniform appearance in the military[256] or a mandatory social security system.[257]

Part of the answer may be that these cases involved minority religions, and for most readers, not their own religion.[258] Roman Catholicism or Southern Baptism, on the other hand, are established, mainstream religions. In fact, the Catholic Church, with over sixty-six million members and the Southern Baptist Convention, with over sixteen million, are the two largest religious bodies in the United States.[259] Almost 25% of Americans are Catholic, and over 5% are Southern Baptist,[260] meaning that close to a third

249. United States v. Lee, 455 U.S. 252 (1982).

250. Prince v. Massachusetts, 321 U.S. 158 (1944).

251. *See, e.g.*, Lupu & Tuttle, *Distinctive Place*, *supra* note 164, at 41 ("It should not be surprising that courts would be loathe to permit the civil rights laws to undo centuries-old tradition of a male-only clergy in certain faiths."); McConnell, *Singling Out Religion*, *supra* note 25, at 20 ("Most people would find it shocking for the government to tell the Catholic Church or an Orthodox synagogue that it must hire women as priests or rabbis.").

252. *See supra* note 100 and accompanying text.

253. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451-52 (1998).

254. *Prince*, 321 U.S. at 163.

255. Reynolds v. United States, 98 U.S. 145, 161 (1978).

256. Goldman v. United States, 475 U.S. 503, 507-08 (1986).

257. United States v. Lee, 455 U.S. 252, 258 (1982).

258. According to a survey of American religion conducted by the Graduate School of the City of New York with a sample size of 50,000, approximately 1.3% of Americans are Jewish; 1.3% belong to the Church of the Latter Day Saints; .6% are Jehovah's Witnesses, and .05% practice a Native American faith. *See* Barry A. Kosmin et al., American Religious Identity Survey 12-13 (2001), *available at* http://www.gc.cuny.edu/faculty/research_studies/aris.pdf.

259. Adherents.com, Largest Religious Groups in the USA, http://www.adherents.com/rel_USA.html (last visited Feb. 22, 2007) (citing 2005 Yearbook of American and Canadian Churches, National Council of Churches).

260. *See* Kosmin, *supra* note 258, at 12; *see also* Adherents.com, *supra* note 259 (citing a 2001 Gallup Poll reporting that 25% of respondents self-identified as Catholic and 6% as Southern Baptist).

of Americans belong to a religion that teaches that women cannot be ordained. Furthermore, these two churches have a strong presence in most of the country: The Catholic Church is the largest denomination in thirty-six states, and the Southern Baptist Convention is the largest in another ten.[261] Because they are mainstream, they are more familiar and better understood. And because they are more mainstream and more powerful, they have greater influence on shaping cultural norms. Ultimately, it is the difference between agreeing intellectually that it is wrong to forbid Native Americans from observing their sacrament and feeling that is wrong to forbid Catholics or Southern Baptists from observing theirs. The mere suggestion is felt to be sacrilegious. Nonetheless, the Constitution does not, in theory, protect Catholics and Southern Baptists more than Native Americans.

III. CRITIQUE OF THE ESTABLISHMENT CLAUSE JUSTIFICATION

Because the free exercise clause after *Smith* cannot justify the ministerial exemption, several commentators have turned to the establishment clause. Carl H. Esbeck, for example, observes that "critics of *Smith*, seemingly reeling from their loss, are forgetting that a structuralist Establishment Clause also affords considerable autonomy to religion and religious organizations."[262] Esbeck asserts that the ministerial exemption is necessary "because of the government's lack of power to regulate religious societies in areas within their exclusive province, a jurisdictional restraint that dates to America's disestablishment."[263] Others, including Lupu and Tuttle, agree that the ministerial exemption flows from the jurisdictional limits imposed by the establishment clause.[264]

Proponents of the exemption find the establishment clause justification attractive for at least two reasons. First, unlike the free exercise clause, establishment clause strictures cannot be overcome by a compelling state interest.[265] Second, establishment clause concerns dovetail with concerns raised in *Smith*. As Lupu and Tuttle observe, the establishment clause's structural restraints "rest[] on considerations of judicial competence highly akin to those on which *Smith* rests."[266] The *Smith* Court thought courts

261. Adherents.com, *supra* note 259.

262. Esbeck, *Structural Restraint*, *supra* note 26, at 101 n.435.

263. Esbeck, *Dissent and Disestablishment*, *supra* note 26, at 1583-84; *see also* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J. L. & Pol. 445, 462 (2002) ("The 'ministerial exemption' from federal and state employment nondiscrimination statutes is also reflective of the reluctance of courts to thrust their jurisdictional oversight into matters wholly within the province of religious organizations.").

264. Lupu & Tuttle, *Sexual Misconduct*, *supra* note 26, at 1815 ("[E]cclesiastical immunities are the entailments of the jurisdictional limitations that the Establishment Clause imposes on the state's role.").

265. Esbeck, *Structural Restraint*, *supra* note 26, at 3 (stating that while individual rights under free exercise can be waived, structural limits on power cannot).

266. Lupu & Tuttle, *Faith-Based Initiative*, *supra* note 186, at 34.

should not evaluate the centrality of the exemption seekers' religious tenets or balance their religious needs against the state's secular interests.[267] In a similar vein, it is argued that the ministerial exemption eliminates the need for civil courts to weigh religious considerations or resolve disputes waged in religious terms.[268]

The establishment clause unquestionably provides some degree of church autonomy from state intervention. As explained in Part II, the shift from distinctiveness to neutrality for the establishment clause is not, and can never be, complete because even a threadbare reading of the establishment clause prohibits the government from inculcating or endorsing religion or dictating the content of religion.[269] Most obviously, the government cannot run worship services or declare Christianity the official religion of the United States.[270] Most relevant for the ministerial exemption, the establishment clause bars the government from dictating doctrine and spirituality, a risk run when the state becomes too entangled with religion.[271] In other words, the government can no more say, "these are the true and official beliefs of the Christian church," than it can declare Christianity the official state religion.

Courts and commentators fear that applying Title VII to ministerial employees risks exactly this entanglement.[272] They assume that in adjudicating an employment discrimination claim, courts will pass judgment on whether the plaintiff sufficiently embodies the church and its teachings—a decision only the church itself is competent to make.[273] The court further entangles itself if it exercises its power to reinstate or promote a successful Title VII claimant. Some also claim, often under the rubric of

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267. Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 Cardozo L. Rev. 565, 575 (1999).

268. *See* Lupu & Tuttle, *Faith-Based Initiative*, *supra* note 186, at 34; *see also id.* ("*Smith* rejects the compelling interest test because that standard requires judicial evaluation of the weight and import of religious considerations . . . . By comparison, the judicial decisions refusing to intervene in internal religious disputes similarly renounce jurisdiction over theological matters.").

269. *See supra* Part II.C.2.a.

270. The anti-endorsement prong of the establishment clause also means the government cannot favor religion over non-religion, or favor one particular religion over another. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion."). Thus, a law cannot allow religious but not secular organizations to apply for social service grants or allow Christian groups but not Muslim ones.

271. *See supra* Part II.B.

272. *See, e.g.*, *supra* notes 80-81 and accompanying text.

273. *See, e.g.*, Thomas C. Berg, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 BYU L. Rev. 1593, 1613 ("[O]ne of the most common rationales for exempting churches' decisions concerning ministers from the anti-discrimination laws is that such lawsuits would require courts to decide religious questions concerning the minister's competence or suitability."); Lupu & Tuttle, *Faith-Based Initiative*, *supra* note 186, at 36-37 (stating that the ministerial exemption avoids "judicial resolution of questions, such as the qualifications of a leader or spokesperson, uniquely entrusted to the internal deliberations of religious entities").

"procedural entanglement," that merely forcing a religious organization to defend itself against a Title VII claim violates the establishment clause.[274]

This section begins by explaining that the theory of procedural entanglement has been essentially abandoned by the Supreme Court and therefore cannot support the ministerial exemption. It next addresses arguments based upon substantive entanglement, which have more traction since, at least in theory, the prosecution and defense of a Title VII lawsuit *could* lead to courts evaluating issues concerning religious doctrine. But no one has closely examined actual Title VII litigation to determine how likely this is. As I explain below, were the ministerial exemption to disappear, the prototypical situation regularly invoked by commentators and courts alike—that of the secular court making spiritual evaluations beyond its jurisdictional sphere and competence—would rarely, if ever, occur under current Title VII doctrine. This section concludes by demonstrating that applying the ministerial exemption creates as much, if not more, direct entanglement with doctrine than applying Title VII.

A. *Procedural Entanglement*

Arguments based upon excessive procedural entanglement—i.e., that any extensive government interaction with the church is constitutionally problematic[275]—are no longer viable under the Supreme Court's current understanding of the establishment clause. Like the ministerial exemption, the theory of procedural entanglement was born during the height of separationism.[276] Because it depends on the idea that church and state must be as separate as possible, it has largely died in the shift towards neutrality.

In *Lemon v. Kurtzman*,[277] the Supreme Court articulated a three-prong analysis to determine whether a government program ran afoul of the establishment clause.[278] The last prong forbade "an excessive government entanglement with religion."[279] At issue in *Lemon* were two state statutes that provided aid to private parochial schools, including teacher salary supplements.[280] Both statutes included monitoring requirements to ensure that the state money was not diverted for religious indoctrination—or more specifically, that the state-subsidized teachers did not teach religion in their classes.[281] The Court invalidated the statutes, holding that the

274. *See, e.g.*, *supra* notes 81-85 and accompanying text.
275. *See supra* notes 80-81 and accompanying text.
276. *See infra* notes 277-285 and accompanying text.
277. 403 U.S. 602 (1971).
278. *See id.* at 612-13 ("Three such tests may be gleaned from our cases. 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.'" (citations omitted)).
279. *Id.* at 613.
280. *See id.* at 607-11.
281. *Id.* at 607-10.

comprehensive and enduring surveillance[282] necessary to prevent any unconstitutional diversion was itself unconstitutional entanglement.[283] In a similar vein, the Court in *Aguilar v. Felton*[284] found aid to parochial schools fostered excessive entanglement because it required (1) pervasive monitoring by the state, and (2) administrative cooperation between the state and parochial school to ensure that the aid was not misused for religious purposes.[285]

Although lower court cases upholding the ministerial exemption still cite procedural entanglement as one of the bases for its continued existence,[286] the Supreme Court has all but abandoned it. The move towards equal treatment of secular and religious organizations necessitates this defection. Once permissible aid to religious organizations was expanded, so too was the need for surveillance to ensure the aid was not diverted to indoctrination.[287] Relations between church and state, even extensive ones, became unavoidable. Accordingly, in *Bowen v. Kendrick*,[288] the Court upheld social service grants to religious organizations, even though the grantees' programs and materials were subject to state review and the grantees themselves were subject to periodic visits. Similarly, in *Agostini v. Felton*,[289] the Court overruled *Aguilar* and found that unannounced monthly visits by public supervisors in the parochial schools did not amount to excessive entanglement.[290] In so doing, the Court emphasized that the interaction between church and state was unavoidable and not automatically unconstitutional: "Interaction between church and state is inevitable, and

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282. Pervasive surveillance included invasive auditing of the school's financial records. *Id.* at 621-22.

283. *Id.* at 619 ("These prophylactic contacts will involve excessive and enduring entanglement between the state and church.").

284. 473 U.S. 402 (1985).

285. *Id.* at 409-10 (finding that the school aid program necessitated an excessive government entanglement with religion because public employees who teach on religious school premises must be closely monitored to ensure that they do not inculcate religion); *see also* Meek v. Pittenger, 421 U.S. 349 (1975) (asserting that the comprehensive system of supervision will inevitably lead to an unconstitutional administrative entanglement between church and state). The assumption that state involvement with teachers in parochial schools would lead to entanglement also informed the Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (holding that the National Labor Relations Act did not cover lay teachers in religious schools). *NLRB* relied heavily on *Lemon* and *Meek*. *NLRB*, 440 U.S. at 501-02.

286. These cases often cite *Rayburn v. General Conference of Seventh-Day Adventists*, which held that applying Title VII to ministerial employment decisions resulted in entanglement "[o]n a procedural level" because of, among other things, a protracted legal process and pervasive monitoring. 772 F.2d 1164, 1171 (4th Cir. 1985). *Rayburn*, in turn, relied heavily on *Lemon*, *Aguilar*, and *NLRB*. *Id.* at 1170-72.

287. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 615 (1988) ("There is no doubt that the monitoring of [Adolescent Family Life Act] grants is necessary if the Secretary is to ensure that public money is to be spent in the way that Congress intended and in a way that comports with the Establishment Clause.").

288. 487 U.S. 589 (1988).

289. 521 U.S. 203 (1997).

290. *See id.* at 209.

we have always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause."[291] Furthermore, *Agostini* explicitly recognized the diminished force of excessive entanglement in establishment clause jurisprudence, acknowledging that mere "administrative cooperation" between church and state, without more, now failed to create an excessive entanglement.[292] *Agostini* further downgraded procedural entanglement by eliminating it as a separate prong for establishment clause claims and subsuming it within another prong.[293] Notably, no Supreme Court decision in the past twenty years has relied upon procedural entanglement as a ground for invalidating a government program or regulation.

Whatever the forbidden threshold for interaction between church and state, assuming there still is one, a Title VII suit against a religious organization would not cross it. The Supreme Court has already approved routine regulatory interaction with religious organizations[294] as well as continuing surveillance by regulatory bodies.[295] In comparison, the antidiscrimination inquiry is much more limited, requiring no extensive intrusion or ongoing surveillance into the functions of a religious institution. The sole question is whether an employment action was based on forbidden criteria.[296] In short, it is the difference between "pervasive supervision and simple prohibition."[297] If there is any entanglement argument, it is not that the state and church are *interacting*, but that the state is *interfering* with religious matters.

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291. *Id.* at 233 (citation omitted).

292. *Id.* Other shifts in establishment clause jurisprudence noted by *Agostini* include the following: (1) The danger of political divisiveness warned of in *Lemon* is now insufficient in itself to cause excessive entanglement, *id.* at 233-34; (2) the presence of public schoolteachers in parochial schools is no longer considered to create a symbolic union between church and state, *id.* at 223; (3) the assumption that teachers on parochial school grounds would be tempted to inculcate religion has been undermined, *id.* at 224, 227; and, of course, (4) the fact that government aid directly assists the educational function of religious schools is not automatically invalid, *id.* at 225.

293. *Agostini*, 521 U.S. at 233; *see also* Mitchell v. Helms, 530 U.S. 793, 808 (2000) (stating that *Agostini* recast the entanglement prong as one criterion in the religious effect prong).

294. Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378 (1990); Hernandez v. Comm'r, 490 U.S. 680 (1989); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985).

295. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 615-16 (1998); *Agostini*, 521 U.S. at 224. Both of these cases call *NLRB* into question.

296. DeMarco v. Holy Cross High Sch., 4 F.3d 166, 169-70 (2d Cir. 1993) (finding no excessive entanglement in an ADEA suit).

297. Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324, 328 (3d Cir. 1993) (finding no excessive entanglement in an ADEA suit).

B. *Substantive Entanglement*

Courts and commentators assume Title VII suits will lead to substantive entanglement in two principal ways.[298] First, they believe that in evaluating whether discrimination or true religious qualities motivated an employment decision, courts will question a church's credibility and second-guess a church's evaluation of a candidate's spirituality.[299] For example, the Seventh Circuit declined to hear a discrimination suit brought by the music director/organist at a Roman Catholic Church because the court assumed that it would end up resolving theological questions beyond its competence:

> [T]he church [is] likely to defend its employment action on grounds related to church needs rooted in church doctrine .... In this case ... the diocese would argue that [plaintiff] was dismissed for a religious reason—his opinion concerning the suitability of particular music for Easter services—and the argument could propel the court into a controversy, quintessentially religious, over what is suitable music for Easter services .... The court would be asked to resolve a theological dispute.[300]

Second, the ability of a court to compel an employer to hire, promote, or reinstate an unwanted candidate compounds this entanglement and affects the church's development of doctrine.[301] Both problems are exacerbated if the court errs in its spiritual assessment of the plaintiff.[302] As the case law

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298. A third argument is that Title VII actions would unduly influence religious organizations to make employment decisions based on litigation concerns rather than spiritual needs. *See, e.g.*, EEOC v. Catholic Univ., 83 F.3d 455, 467 (D.C. Cir. 1996) ("[W]e think it fair to say that the prospect of future investigations and litigation would inevitably affect to some degree the criteria by which future vacancies in the ecclesiastical faculties would be filled."); *see also* Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 798-806 (9th Cir. 2005) (Kleinfeld, J., dissenting from denial of rehearing); Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 703 (7th Cir. 2003); Rayburn v. Gen. Conference of Seventh Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985). Because religious organizations are not otherwise immune from lawsuits, a church that takes litigation costs into account already makes employment decisions with litigation in mind. For example, if a ministerial position includes driving the church van, a church may forgo hiring the more spiritual applicant for one who has never been in an auto accident to avoid tort liability. Thus, "it cannot be that the First Amendment prohibits suits simply because they have the potential to affect (or 'regulate') churches' hiring and firing decisions." *Elvig*, 397 F.3d at 792.

299. Lupu and Tuttle, who approve of the ministerial exemption, agree with courts that "have consistently ruled that to permit adjudication of such pretext claims would be to invite judicial second-guessing of institutional judgments about the performance of agents in leadership roles." Lupu & Tuttle, *Sexual Misconduct*, *supra* note 26, at 1811.

300. Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1040 (7th Cir. 2006).

301. *See, e.g.*, Laycock, *Church Autonomy*, *supra* note 19, at 1391 ("When the state interferes ... with the allocation of authority and influence within a church, it interferes with the very process of forming the religion as it will exist in the future."); Lupu & Tuttle, *Distinctive Place*, *supra* note 164, at 91-92 ("Judicially-ordered reinstatement of clergy ... allows the state to influence the content of the entity's religious message over the objection of those who are authorized to speak for the religious community.").

302. *See, e.g.*, Laycock, *Church Autonomy*, *supra* note 19, at 1391 (discussing risks of error on the part of secular courts); Lupu & Tuttle, *Distinctive Place*, *supra* note 164, at 63.

often repeats, even the most well-meaning court lacks the competence to properly evaluate the "gifts and graces" of a minister.[303]

An examination of Title VII suits in the next sections illustrates that these fears are overstated because Title VII law is already structured to avoid both problems. But before further discussion, it is useful to understand exactly how a Title VII case unfolds. Because the vast majority of clergy cases are individual disparate treatment suits, where the claim is that the plaintiff was treated differently than other similarly situated people because of her protected characteristic or protected activity, I focus on those types of cases.

1. Primer on Title VII Claims

Title VII claims can be broken down into three categories: harassment, discrimination, and retaliation. To establish harassment through the creation of a hostile work environment (the most common fact pattern), a plaintiff must show that the harassment was (1) because of race or sex; (2) unwelcome; and (3) severe or pervasive enough to alter the terms and conditions of employment.[304] If the plaintiff succeeds, the employer is liable if the harasser was sufficiently senior to be deemed the alter ego of the employer.[305] Otherwise, the employer may avoid liability if it establishes that it reasonably tried to prevent and promptly correct any harassing behavior, and the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.[306]

To establish discrimination, the plaintiff must show that the employer took an adverse employment action (such as firing or refusing to hire or promote) because of race or sex.[307] These claims may be proven by either direct or circumstantial evidence.[308] If the plaintiff adduces direct evidence of a discriminatory motive and the factfinder credits it, the plaintiff will prevail.[309] If the plaintiff lacks direct evidence, as in the majority of suits, the plaintiff's circumstantial evidence is evaluated in a three-stage approach known as the *McDonnell Douglas* test.[310] In the first stage, the plaintiff must establish a prima facie case of race or sex discrimination by showing that (1) she belongs to a protected class; (2) she was qualified for the position at issue; (3) she was rejected for the position; and (4) the position

303. EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463 (D.C. Cir. 1996) (stating that the "evaluation of the 'gifts and graces' of a minister must be left to ecclesiastical institutions").

304. *See generally* Harris v. Forklift Sys. Inc., 510 U.S. 17 (1993); Meritor Sav. Bank FSB v. Vinson, 477 U.S. 57 (1986).

305. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 758 (1998).

306. Faragher v. Boca Raton, 524 U.S. 775, 807 (1998); *Ellerth*, 524 U.S. at 764-65 (1998).

307. 42 U.S.C. § 2000e-2(a) (2000).

308. *See, e.g.*, Desert Palace, Inc. v. Costa, 539 U.S. 90, 99-100 (2003).

309. *See infra* notes 313-315 and accompanying text.

310. The test derives from the eponymous *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *See also* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 134-35 (2000) (applying the *McDonnell Douglas* framework).

remained open or was filled by someone else.[311] Next, the defendant must offer a legitimate nondiscriminatory reason for the employment decision.[312] This is merely a burden of production and not persuasion, as the ultimate burden of persuasion remains at all times with the plaintiff.[313] Finally, the plaintiff must rebut the employer's stated reason with circumstantial evidence demonstrating that the defendant relied on an illegitimate reason for its decision.[314] Circumstantial evidence of discrimination comes in many forms, including the following:

- Evidence that the defendant's proffered reason was unworthy of credence or false;[315]
- Evidence that stereotypical beliefs influenced the decision;[316]
- Evidence, including statistics, that employees similarly situated to the plaintiff received systematically better treatment;[317]
- Evidence that the plaintiff was not given the same opportunities as other employees, including deviations from the employer's normal procedures;[318] and
- Evidence that the plaintiff was more qualified than the successful candidate.[319]

This is not an exhaustive list,[320] and the strongest cases are those in which a combination of the above exists. "The key consideration is the totality of these pieces of evidence[,] none [necessarily] conclusive in itself

311. *McDonnell Douglas*, 411 U.S. at 802. A plaintiff that establishes these elements eliminates the most obvious nondiscriminatory reasons for the employment decision—that plaintiff did not apply, that the plaintiff was unqualified, or that there was no position available—and raises an inference of discrimination. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-56 (1981); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 Ala. L. Rev. 741, 752-53 (2005).

312. *McDonnell Douglas*, 411 U.S. at 802.

313. *Reeves*, 530 U.S. at 142-43; *Burdine*, 450 U.S. at 254-55.

314. Raytheon Co. v. Hernandez, 540 U.S. 44, 49-50, 49 n.3 (2003).

315. *Reeves*, 530 U.S. at 147-48; *see also id.* at 147 ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive . . . . [O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation . . . .").

316. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (asserting that "stereotyped remarks [by decision-makers] can certainly be *evidence* that gender played a part").

317. Walker v. Bd. of Regents of the Univ. of Wis. Sys., 410 F.3d 387, 394 (7th Cir. 2005).

318. *See, e.g.*, Holt v. KMI-Cont., Inc., 95 F.3d 123, 130 (2d Cir. 1996); Hart, *supra* note 311, at 751.

319. Hart, *supra* note 311, at 751.

320. Other evidence that may be helpful but perhaps not enough on its own includes a discriminatory atmosphere, *see, e.g.*, Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 55 (1st Cir. 2000), or statistical evidence about the percentage of women in the workforce that suggests an unwillingness to hire women or a tendency to segregate them into lower-status jobs, Hart, *supra* note 311, at 752.

but together composing a convincing mosaic of discrimination against the plaintiff."[321] The defendant is liable if the factfinder concludes that plaintiff provided sufficient circumstantial evidence that race or sex was a motivating factor in the adverse action.[322] The fact that the employer may also have had legitimate reasons may limit the remedy, but not liability.[323]

Finally, to establish retaliation, the plaintiff must show that the employer took adverse action because the employee "has opposed any practice made an unlawful employment practice" by the Act.[324] Statutorily protected activity includes complaining to superiors about discrimination or harassment in the workplace, lodging complaints with the Equal Employment Opportunity Commission (EEOC), and filing or participating in a discrimination lawsuit. As with discrimination claims, a plaintiff may prove retaliation either by direct evidence or by circumstantial evidence using the *McDonnell Douglas* approach. A plaintiff relying on circumstantial evidence establishes her prima facie retaliation claim by showing that (1) she engaged in a protected activity, (2) she suffered a materially adverse action,[325] and (3) there was a causal link between the protected activity and the adverse action.[326] Once the plaintiff has established a prima facie case, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for the challenged employment action, and then back to the plaintiff to rebut this claim. Again, the ultimate burden of persuasion rests on the plaintiff's shoulders.[327]

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321. *Walker*, 410 F.3d at 394 (internal quotation marks omitted).

322. Under the Civil Rights Act of 1991, liability may be established "even though other factors also motivated the [adverse] practice." 42 U.S.C. § 2000e-2(m) (2000). Note that while employment decisions were originally understood as either the result of legitimate criteria or of illegitimate ones, *Price Waterhouse* acknowledged that a decision may be informed by both, and the Civil Rights Act of 1991 expressly stated that such "mixed motives" decisions were illegal. *See, e.g.*, Russell v. Microdyne, 65 F.3d 1229, 1235-37 (4th Cir. 1995) (explaining how the Civil Rights Act of 1991 explicitly provided that employment decisions based on discrimination violated Title VII even if legitimate factors were also involved in the decision).

323. If an employer demonstrates that it "would have taken the same action in the absence of the impermissible motivating factor," the court "shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment." 42 U.S.C. § 2000e-5(g)(2)(B).

324. 42 U.S.C. § 2000e-3(a).

325. The Supreme Court defined this as an action that might have "dissuaded a reasonable worker from making or supporting a charge of discrimination." Burlington N. & Santa Fe R.R. Co. v. White, 126 S. Ct. 2405, 2415 (2006) (internal quotation marks omitted); *see also, e.g.*, Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164, 1171 (10th Cir. 2006).

326. *See, e.g.*, Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987) ("Causation sufficient to establish the third element of the prima facie case may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision.").

327. *Id.* (citing Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

2. The Risk that Courts Will Substitute Their Judgment for That of Religious Institutions on Matters of Spirituality and Doctrine

Title VII ministerial employee suits can be decided without the court substituting its judgment for that of the religious institution on spiritual and doctrinal matters. Supporters of the ministerial exemption assume mistakenly that religious employers always defend a discrimination suit by asserting a religious reason such as "lack of spirituality" or "misunderstanding theology." But some suits do not involve religious disputes at all,[328] and in others, the religious reason can be objectively tested.[329] Moreover, they overlook a substantial body of Title VII jurisprudence that already ensures that courts evaluate only matters within their competence.[330] To illustrate these points, I have categorized by employer's defense potential Title VII lawsuits brought by ministers:

	Defense	**Risk of Deciding Religious Issue**
Type A	Defendant does not deny discrimination but asserts that its religious doctrine requires such discrimination. *e.g., "because they are head of household, we must pay married men more than married women."*	None
Type B	Defendant denies discrimination but does not assert a religious justification. *e.g., "sexual harassment did not occur"*	None
Type C	Defendant denies discrimination and asserts objectively testable religious justification. *e.g., "plaintiff violated tenet against adultery"*	None
Type D	Defendant denies discrimination and asserts subjective religious justification. *e.g., "plaintiff lacked requisite spirituality"*	Low

Contrary to lower courts' and commentators' assumptions, not all Title VII cases will be defended on religious grounds. In addition, not all religious-based defenses raise questions about religious doctrine or spirituality. As indicated in the last column and as explained below, the risk of deciding a religious issue exists only in the last category of cases and, even then, the risk is not sufficiently high to warrant a prophylactic measure such as the ministerial exemption.

328. *See infra* Part III.B.2.a-b.
329. *See infra* Part III.B.2.c.
330. *See infra* notes 351-357 and accompanying text.

a. *Type A Cases: Defendant's Religion Requires Discrimination*

In Type A and B cases, the court cannot entangle itself in religious controversies because there are no religious questions to decide. Though it may sound counterintuitive at first, cases in which the defendant religious organization overtly discriminates based upon religious doctrine do not implicate religious questions. If the risk posed by a Title VII claim is that judging whether an employment decision was based on race or sex rather than true qualifications will require a court to determine a religious organization's tenets and who best embodies them, that risk disappears where the religious organization admits that sex or race played a role. For example, if a religious organization states that according to its tenets, married men are the head of household and therefore are paid more than married women,[331] it has conceded discrimination. The court can find that it violated Title VII while deferring completely to the religious organization on doctrinal questions.

One might argue, however, that by preventing the church from realizing its doctrinal requirements, whether it be an all-male clergy or higher compensation for married men versus married women, the state will subtly force the church to conform its religious doctrine to the state's values.[332] But under this reasoning, the state could never declare a religious practice illegal, and that is clearly not the case after *Smith*.[333] In allowing Title VII claims against religious organizations, the court is not declaring that antidiscrimination represents an organization's true beliefs. It is merely declaring that antidiscrimination is the secular law and must be complied with. Whatever indirect influence the state may have on the development of religious doctrine,[334] it does not equate to authoritatively declaring its content, and it is the latter that violates the establishment clause.

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331. The EEOC has successfully sued religious schools for such practices under the Equal Pay Act. *See, e.g.*, EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986); EEOC v. Tree of Life Christian Schs., 751 F. Supp. 700 (S.D. Ohio 1990). These cases did not rule on whether the ministerial exemption applied.

332. *See, e.g.*, Mark E. Chopko, *Stating Claims Against Religious Institutions*, 44 B.C. L. Rev. 1089 (2003) (arguing that imposing secular duties in church sex abuse cases risks subtly altering the church's internal structure). A related complaint is that the remedy of reinstatement, which changes the makeup of the clergy, also subtly affects church doctrine because clergy may have the power to shape doctrinal development. This forced inclusion raises expressive association concerns, which are addressed in Part IV.

333. *See supra* notes 97-107 and accompanying text.

334. In any event, state influence is inevitable. One could equally argue that the ministerial exemption has inhibited the development of religious doctrine towards more egalitarian beliefs. Responding to a similar claim in the free speech context, Andrew Koppelman argues that even if antidiscrimination law influences attitudes, and even if done intentionally, it does not mean that it violates the First Amendment: "People's preferences are inevitably shaped in nonrational ways by their environment, and law is part of that environment." Andrew Koppelman, *Should Noncommercial Associations Have an Absolute Right to Discriminate?*, 67 Law & Contemp. Probs. 27, 57 (2004).

b. *Type B Cases: Defendant Offers No Religious Justification*

The court does not entangle itself in religious doctrine if the defendant offers no religious justification for its employment decision.[335] For example, sexual harassment claims sidestep religion entirely, as an organization is unlikely to claim that its religion requires sexual harassment. Immunity from suits seems particularly inappropriate on entanglement grounds in any case where no religious reason is proffered. Not surprisingly, clergy sexual harassment claims are the one instance where lower courts have declined to apply the ministerial exemption.[336]

A few dissenters, however, raise concerns about entanglement during the affirmative defense phase. In response to a hostile work environment claim, the religious institution can avoid liability if it proves that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and that the plaintiff unreasonably failed to take advantage of help provided by the employer.[337] But what is reasonable to a secular employer may not be to a religious one, as church doctrine often dictates the appropriate response to clergy misconduct. So, strictly speaking, this is not a case where religion never comes into play: The church's response may be "bound up in questions of religious doctrine about reconciliation, restoration, and penance."[338] Analogous arguments have arisen in sex abuse cases.[339] In one child molestation case, for example, the defendant Roman Catholic Church argued that canon law limited the church's ability to discipline priests. In particular, the Catholic belief in redemption and forgiveness prohibited the Catholic Church from summarily punishing abusive priests.[340] The rebuttal is the same for both, and echoes the rebuttal to religious organizations with discriminatory tenets: If the organization's beliefs require sexual harassment (or abuse) or require what would be an unreasonable response to a complaint of sexual harassment (or abuse) in the secular world, then the practice is illegal. As discussed above, declaring a religious practice illegal does not lead to entanglement because the court is not telling a church what its beliefs are;

335. *See, e.g.*, Eikenberry, *supra* note 122, at 269.

336. *See supra* note 68. Sexual harassment claims actually avoid both entanglement risks: There is no second-guessing of spirituality judgments, and the remedy is limited to damages.

337. *See supra* note 306 and accompanying text.

338. Chopko, *supra* note 332, at 1116; *see also* Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 Ind. L.J. 219, 228, 231 (2000) (claiming that tort liability violates First Amendment because the "court's ultimate determination may be tantamount to a state imprimatur—an official pronouncement on what is, and what is not, a reasonable interpretation and expression of the religious tradition in question").

339. *See, e.g.*, Eikenberry, *supra* note 122, at 289 (1998) (comparing ministerial exemption cases to clergy sex abuse cases).

340. Smith v. O'Connell, 986 F. Supp. 73, 78 (D.R.I. 1997).

rather, it is merely telling it that its practices are not allowed under the law.[341]

c. *Type C Cases: Defendant Offers an Objective Religious Justification*

The third category of cases that avoid entanglement are those in which the defendant offers an objective religious reason for the employment decision. Contrary to lower court and commentator assumptions, not all cases defended on religious grounds turn on subjective judgments about the plaintiff's spirituality. Instead, many are defended on religious grounds that are specific, objective, and easily tested.

A common defense pleaded by religious organizations is that the plaintiff failed to adhere to a particular religious tenet. For example, though Title VII sex discrimination includes discrimination based on pregnancy, several religious schools terminated female schoolteachers who became pregnant outside of marriage.[342] The schools argued that the teachers serve as religious role models for their students[343] and that the plaintiffs' violation of religious proscriptions against extramarital sex—a prohibition that applies equally to men and women—rendered them unsuitable role models.[344]

In these cases, the issue of whether sex discrimination has occurred depends upon whether the schools applied the religious policy equally to male and female teachers. Assuming that violation of a religious tenet is a legitimate reason for discharge,[345] punishing only women and not men for the same violation constitutes sex discrimination.[346] "Religious codes of morality must be applied equally to male and female teachers."[347] Courts have allowed claims brought by lay teachers because the court need not

341. And of course, *Smith* makes clear that the state may declare even a sacramental religious practice illegal.

342. Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir. 2000) (newly married teacher who began to show immediately after marriage did not have her contract renewed by a Catholic school); Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996) (single teacher fired by a Church of Christ school after she became pregnant); Redhead v. Conference of Seventh-Day Adventists, 440 F. Supp. 2d 211 (E.D.N.Y. 2006) (unmarried pregnant teacher fired by a Seventh-Day Adventist school); Ganzy v. Allen Christian Sch., 995 F. Supp. 340 (E.D.N.Y. 1998) (single pregnant teacher fired from a church-affiliated school); Vigars v. Valley Christian Ctr., 805 F. Supp. 802 (N.D. Cal. 1992) (school librarian fired by fundamentalist Christian school due to her out-of-wedlock pregnancy); Dolter v. Wahlert High Sch., 483 F. Supp. 266 (N.D. Iowa 1980) (unmarried pregnant teacher filed by a parochial school).

343. *Cf.* NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 501 (1979) (finding that the role of a teacher in fulfilling the mission of a religious school is "critical and unique").

344. In other words, the defendant religious schools did not argue that their religious beliefs required sex discrimination, such as a belief that mothers of preschool children should stay home with their children or a belief that extramarital affairs were sinful for women alone.

345. While this discharge would not be protected by free exercise, it might be covered by freedom of expressive association. *See infra* Part IV.

346. *See, e.g.*, *Cline*, 206 F.3d at 666-67.

347. *Ganzy*, 995 F. Supp. at 348.

resolve doctrinal disputes or otherwise evaluate the religious merit of the proffered reason: No one questions the school's religious belief that sex outside marriage is forbidden. The court need not evaluate the plaintiff's spirituality because no one disputes that she engaged in forbidden conduct. The only question to be decided falls well within the competence of the courts: determining whether the plaintiff's evidence established that men and women were treated the same on this issue. The outcomes of these suits have varied,[348] but in no case has a court found unconstitutional entanglement. The analysis is no different if a religious (ministerial) teacher rather than a lay (non-ministerial) teacher is the plaintiff. Nor would it be different if the proffered reason were adultery or some other objectively verifiable violation of a religious tenet.

Nonetheless, many lower courts express great reluctance about ruling on the credibility of a religious reason.[349] This discomfort is misplaced. Take another example: A divorced teacher at a religious school is fired after she helps a colleague with a sexual harassment suit against the school. The teacher files a Title VII retaliation suit, and the school claims that it terminated the plaintiff because she violated its religious proscription against divorce. In ruling on the credibility of this proffered reason, it is important to be clear about what the court is deciding. The court is not deciding the ultimate truth of a religious belief, i.e., whether divorce is sinful or not. It is not even deciding whether the school's religion in fact espouses that divorce is wrong. Both would entangle the court in questions of doctrine. But this is not what courts do. Instead, the court is deciding whether, assuming the school's religion condemns divorce, this condemnation motivated the termination, or whether it was motivated by illegal retaliation for protected conduct, or both.[350] There is nothing inherently entangling about asking whether a religious reason was in fact the sole reason motivating a decision.

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348. *Compare Cline*, 206 F.3d at 667 (holding that a plaintiff survived summary judgment because she produced evidence that the policy was not applied equally among men and women—school officials "acknowledged in their depositions that Cline's pregnancy alone had signaled them that she engaged in premarital sex, and that the school does not otherwise inquire as to whether male teachers engage in premarital sex"), *with* Boyd v. Harding Acad. of Memphis, Inc., 88 F. 3d 410, 412 (6th Cir. 1996) (finding that the plaintiff failed to establish discrimination because the president of the school terminated men and women for sexual immorality, and no instances of extramarital sex went unpunished).

349. This reluctance is particularly acute with courts that still fear "procedural entanglement," which as discussed *supra* Part III.A, has faded as a constitutional concern.

350. As with the pregnant teachers, the plaintiff could show that similarly situated teachers were treated differently, i.e., other divorced teachers had not been fired. Alternatively, she could establish that the school did not discover she was divorced until after deciding to terminate her. In the further alternative, she could establish that her marriage did not end in divorce but annulment, and that the school deviated from standard procedures by denying her the usual pretermination hearing. All of these arguments may be asserted without putting into issue the validity, truthfulness, or substance of Catholic religious teaching, in other words, without entangling the state in questions of dogma or spirituality.

Not surprisingly, the Supreme Court has stated that scrutinizing a religious organization's proffered religious reason does not automatically result in entanglement. In *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*,[351] a born-again Christian school told a pregnant teacher she could not return the following year because of its religious belief that mothers should stay home with their preschool children. When the teacher threatened litigation, the school fired her for violating an internal dispute resolution provision in her contract, which stemmed from the school's religious belief that Christians should not take other Christians into secular courts.[352] The Sixth Circuit enjoined a state administrative action in part because exercising jurisdiction in this matter would result in excessive entanglement under the establishment clause.[353] The Supreme Court reversed the Sixth Circuit, ruling that it should have abstained since the state court could address the constitutional issues.[354] The Court added, "[T]he Commission violates no constitutional rights by merely investigating the circumstances of [the schoolteacher's] discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge."[355]

d. *Type D Cases: Defendant Offers a Subjective Religious Justification*

It is the final category that skirts closest to entanglement—Title VII cases in which the religious reason proffered is that the plaintiff was not hired because she lacked the requisite spirituality, could not properly interpret church doctrine, or failed to meet some other subjective religious qualification that cannot be easily tested and neatly rebutted.[356] As a preliminary matter, the existence of a few cases that might pose entanglement problems does not justify the ministerial exemption for all ministerial employee suits. In any event, the fear that a court will independently evaluate the spiritual qualities, or "gifts and graces," of a minister and substitute its judgment for that of a religious institution relies on two flawed assumptions. First, it assumes mistakenly that secular courts must directly assess a plaintiff's qualifications in order to resolve a Title VII case. Most Title VII cases, however, involve more than competing claims about a plaintiff's abilities. Second, it assumes mistakenly that courts will second-guess employers regarding subjective qualifications. But

351. 477 U.S. 619 (1986).

352. *Id.* at 623.

353. *Id.* at 621-22, 625. The Sixth Circuit also held that it would violate the free exercise clause. *Id.*

354. *Id.* at 625.

355. *Id.* at 628.

356. Unlike objective reasons (e.g., employee fired due to adultery), which can be measured and discredited directly (e.g., plaintiff did not commit adultery or men equally guilty were not terminated), subjective reasons (e.g., insufficient spirituality) cannot. As will be seen, they can, however, be rendered suspect by pointing to other reasons (e.g., timing suggests retaliation).

there is little evidence to support this fear. Courts in secular Title VII cases already defer to employers on judgment calls outside their expertise,[357] and courts are likely to be equally, if not more, deferential in cases against religious employers.

The second assumption is belied by courts' treatment of suits brought by professionals whose qualifications, such as academic scholarship for a professorship or analytic ability for a law firm partnership, are not easily measured. In these cases, courts do not presume to know what qualities are necessary for professor or partner, nor do they second-guess subjective judgments about whether a plaintiff possesses these qualities. Instead, they defer to the employer's judgments on subjective professional qualifications.[358]

Courts readily acknowledge their greater deference in discrimination cases involving subjective professional qualifications. In tenure cases, for example, "[t]he federal courts have adhered consistently to the principle that they operate with reticence and restraint."[359] Courts have declined to sit as "Super-Tenure Review Committees,"[360] and regularly echo the Third Circuit's concern that courts vigilantly guard against "substitut[ing] their judgment for that of the college with respect to the qualifications" because such determinations are subjective and "involve inquiry into aspects of arcane scholarship beyond the competence of individual judges."[361] Courts

357. *See infra* notes 357-367 and accompanying text.

358. *See, e.g.*, Tracy Anbinder Baron, *Keeping Women Out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. Pa. L. Rev. 267, 268 (1994) ("When the position at stake is a prestigious white-collar job, courts tend to defer to the employer, expressing fears of second-guessing the employer or infringing on the employer's professional judgment."); Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945, 962, 973-74 (1982) (stating that upper level employment decisions usually rest on subjective evaluations, and "[i]n upper level cases . . . courts often profess their lack of expertise and refuse to assess candidates' qualifications"); Mark Bartholomew, *Judicial Deference and Sexual Discrimination in the University*, 8 Buff. Women's L.J. 56, 57 (1999-2000) ("Tenure discrimination plaintiffs confront a judiciary that regularly defers to the administrative judgments of universities."); John D. Copeland & John W. Murry, Jr., *Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance*, 61 Mo. L. Rev. 233, 246 (1996) ("For the most part, the courts have viewed the evaluation of academic performance as an exercise outside the expertise of the courts and one better left to academicians.").

359. Jiminez v. Mary Washington Coll., 57 F.3d 369, 377 (4th Cir. 1995).

360. Weinstock v. Columbia Univ., 224 F.3d 33, 47 (2d Cir. 2000) (internal quotation marks omitted).

361. Kunda v. Muhlenberg Coll., 621 F.2d 532, 548 (3d Cir. 1980). This quote has been cited in, for example, *Bickerstaff v. Vassar College*, 196 F.3d 435, 455 n.7 (2d Cir. 1999), and *Jiminez*, 57 F.3d at 377. *See also* Bina v. Providence Coll., 39 F.3d 21, 26 (1st Cir. 1994) ("[R]eview of tenure decisions should be guided by an appropriately deferential standard. A court may not simply substitute its own views concerning the plaintiff's qualifications for those of the properly instituted authorities."); Fields v. Clark Univ., 966 F.2d 49, 54 (1st Cir. 1992) (emphasizing the "high degree of deference due to" the University's tenure decision); Brousard-Norcross v. Augustana Coll. Ass'n, 935 F.2d 974, 975-76 (8th Cir. 1991) ("Our review of a tenure decision is approached with trepidation . . . . We do not profess to possess the expertise required to evaluate such decisions for their merit.").

have also declined to review law firms' partnership decisions on the grounds that they lack competence to evaluate associates' analytical abilities[362]—even though one might think that a judge, if anyone, would be capable of making such an evaluation.[363]

There is no reason to believe that courts would be less deferential to religious organizations regarding subjective qualifications like spirituality. If anything, judges are likely to be more deferential since, generally speaking, they do not have any nonjudicial experience in this area. While judges' extreme deference is questionable in contexts such as disputes about legal ability,[364] it is particularly apt in the case of a ministerial claim given the establishment clause strictures against resolving religious disputes.

In sum, given conflicting accounts of a candidate's spirituality, a court will not second-guess a religious organization's evaluation or contest that spirituality was a necessary quality. Thus, while evidence that the plaintiff is more qualified than a successful candidate, without more, may suffice to establish a discriminatory motive in theory,[365] in practice, it will not, and courts will grant summary judgment to the defendant.[366] The plaintiff needs additional circumstantial evidence.[367] So the fear that courts will independently review and substitute their judgment of a candidate's gifts and graces has no basis in the reality of Title VII case law.

In any event, the belief that all cases boil down to an "employee-said versus employer-said" competition regarding subjective qualifications is another mistaken assumption. As the list of circumstantial evidence demonstrates,[368] offering evidence of a plaintiff's superior qualifications is

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362. Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509 (3d Cir. 1993). The law firm claimed that it rejected plaintiff's partnership bid because of a "subtle and subjective consensus among the partners, that she did not possess sufficient legal analytic ability to handle complex litigation." *Id.* at 526. Unlike the district court, the appeals court deferred to the law firm's assertion that outstanding courtroom ability and client relations could not compensate for less than superior analytic ability. *Id.* at 528. And, with no objective criteria to measure legal analytic ability, the appeals court deferred to the law firm's evaluation. *Id.* at 530.

363. After all, judges are often former law firm partners and also analyze analytic ability when they hire law clerks.

364. *See generally* Baron, *supra* note 358; Bartholet, *supra* note 358; Bartholomew, *supra* note 358; Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 Berkeley J. Emp. & Lab. L. 1, 3-4 (2006).

365. "Under this Court's decisions, qualifications evidence may suffice, at least in some circumstances, to show pretext." Ash v. Tyson Foods, Inc., 126 S. Ct. 1195, 1197 (2006).

366. The one exception is if the qualification lends itself to objective measure and the disparity is obvious. While the Supreme Court recently ruled that the disparity need not be "so apparent as virtually to jump off the page and slap you in the face," and declined to articulate the proper standard, the Supreme Court also cited, seemingly with approval, other standards currently in use, including proof that the "plaintiff's qualifications are clearly superior to those of the selected job applicant" or that the "plaintiff was significantly better qualified." *Id.* at 1197-98 (internal quotation marks omitted).

367. *See supra* notes 315-320 and accompanying text.

368. *See id.*

only one method of proving discriminatory motive without direct evidence. Plaintiffs can offer a range of evidence unrelated to subjective qualifications. Courts can evaluate whether this other evidence—besides evaluation of scholarship or analytic ability or spirituality—gives rise to the suspicion that the proffered reason was either pretextual or not the sole reason behind the adverse employment decision. So, while courts will not independently evaluate subjective qualifications, they can without risking entanglement judge the *plausibility* of a defendant's evaluation based upon all circumstantial evidence.[369]

The lack of entanglement can be illustrated with an actual Title VII retaliation claim that the plaintiff was not allowed to pursue because of the ministerial exemption. In *Gellington v. Christian Methodist Episcopal Church, Inc.*,[370] the plaintiff was an ordained minister of the Christian Methodist Church.[371] One of his coworkers, Veronica Little, another minister, confided in him that her immediate supervisor had made sexual advances towards her, and asked for guidance.[372] Lee Otis Gellington helped her prepare an official complaint to the church elders.[373] After she was fired, he helped her take legal action.[374] A church bishop, Bishop Bass, asked Gellington to persuade Little to drop her complaint. Gellington refused.[375] Shortly thereafter, Bishop Bass reassigned Gellington to a church 800 miles away from his home and at half his salary.[376] Gellington was not able to comply with this assignment and was forced to resign.[377] Because the court applied the ministerial exemption, the church never had to articulate a legitimate reason for the transfer, for example that Gellington's spiritual temperament and abilities were a better match to the new church. If the same fact pattern had occurred in a secular context, most courts would find a strong circumstantial case of retaliation. Thus, even if Gellington's employer had claimed that he was better suited for his new

369. This task is even easier in direct evidence cases. Take a church that hires a male applicant rather than a highly competitive female one because, it claims, she was not a spiritual match. Plaintiff presents evidence that the decision-maker said, "I don't care if plaintiff is better qualified, I don't want to have to look for a replacement again in three years when she has children." This comment undermines the defendant's credibility and makes clear that discrimination based on pregnancy motivated the decision. Attaching liability in this circumstance does not implicate spiritual or doctrinal concerns. Indeed, Kent Greenawalt, who otherwise supports the ministerial exemption, has suggested that Title VII suits meeting some high threshold of proof, such as direct evidence of intentional discrimination, ought to be allowed. Kent Greenawalt, Religion and the Constitution: Free Exercise and Fairness 386 (2006).

370. 203 F.3d 1299 (11th Cir. 2000).

371. *Id.* at 1301.

372. *Id.*

373. *Id.*

374. *Id.*

375. Brief for Petitioner at 5, *Gellington*, 203 F.3d 1299 (11th Cir. 1999) (No. CV-97-P-2719-W), 1999 WL 33619168.

376. *Gellington*, 203 F.3d at 1301; Brief for Petitioner, *supra* note 375, at 5-6.

377. *Gellington*, 203 F.3d at 1301.

assignment, the case could be decided solely upon the circumstances surrounding his reassignment.

One might nonetheless argue that merely determining whether the defendant's stated reason is pretextual entangles the court in a religious dispute.[378] This reasoning misses the mark. First, the court's decision as to whether the employer's proffered justification is plausible is well within its competence. While a law firm or university or church may have expertise in knowing who is best suited for a job, courts have expertise in evaluating circumstantial evidence to ferret out discrimination. Second, apart from comparing evidence of qualifications, the techniques courts use to assess credibility are the same whether the proffered legitimate reason is nonreligious, religious and measurable, or religious and subjective. Indeed, examining circumstantial evidence surrounding an employment decision[379] can be considered applying a neutral principle of secular law, and resolution of religious disputes by neutral methods was specifically approved in *Jones v. Wolf*,[380] the most recent church property case.[381] Since an employee's claims may be resolved by relying on neutral methods of proof, religious organizations should not be shielded from having their reasons scrutinized just because they proffer a subjective religious reason. Finally, if the circumstantial evidence is lacking, the courts will defer to the defendant's evaluation.

3. The Risk that Title VII Remedies Will Lead to Entanglement

The second substantive entanglement argument focuses on remedies. Title VII allows a range of remedies, including reinstatement.[382] Perhaps what distinguishes cases brought by ministers as opposed to non-ministers is not so much the analysis of the substantive claim, but the remedy. It is one thing to force a religious organization to hire, promote, or retain someone without religious duties, it is quite another to foist onto that organization ministers it has deemed spiritually wanting. Especially troubling is the prospect that the court could make a mistake.

The first question to ask is in what way does forcing a religious organization to hire or promote a minister, teacher, or music director against

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378. Lupu & Tuttle, *Distinctive Place*, *supra* note 164, at 91 (arguing that the ministerial exemption is justified because "[t]he dangers of entanglement seem to us particularly acute when the state's agents are attempting to discern the 'true' reason why religious officials have taken a particular action, with the attendant risk of mistake concerning the officials' motivations").

379. Circumstantial evidence may include documentary and testimonial evidence about credibility, stereotyping, disparate treatment, procedural deviations, and timing, among other things. *See supra* notes 317-23, 329 and accompanying text.

380. 443 U.S. 595 (1979).

381. In some respects, there was more risk of entanglement in *Jones* because the neutral principles of secular law (*e.g.*, well-established trust and property common law principles) were being used to interpret religious documents. *Cf. id.* at 602. In contrast, a Title VII case does not necessarily require the court to examine any religious documents at all.

382. *See infra* note 394.

its will violate the establishment clause? According to proponents of the ministerial exemption, the answer is obvious: The state ought not interfere with the church's selection and placement of its own representatives.[383] The church, not the state, should decide who will best embody and disseminate its teachings.[384] Installing a church's minister is only one step away from declaring what the church's beliefs are.

But what if a candidate was rejected because of discrimination and not because of any spiritual failings? What if in *Gellington* a remorseful Bishop Bass confessed that he transferred Gellington in anger, and that Gellington's gifts and graces had nothing to do with his reassignment? What harm is done by returning Gellington to his former congregation? The church had at one time believed that he was suited to this position and has now admitted that he was not transferred because of any failings relevant to the position. Consequently, Gellington will not misrepresent the church or warp the development of religious doctrine. Indeed, if discrimination distorted the decision-making process, reinstatement might actually benefit the church. Reinstatement in this situation restores to the church someone who would have been chosen but for discrimination and aligns church practices with beliefs. In other words, for churches that do not claim that their tenets require discrimination, a decision influenced by discrimination is a mistake (or worse) from the church's point of view, and the state is merely requiring the church to fix it.[385] Granted, reinstatement by the state might offend the idea that churches should be completely autonomous in internal affairs, but, as argued above, the religion clauses do not guarantee church autonomy in internal affairs; instead, they merely forbid the state from discriminating against religion (free exercise clause) or becoming entangled with religion by resolving doctrinal disputes or otherwise engaging in spiritual evaluations (establishment clause).

A more difficult case arises when there is a reasonable possibility that the court might be wrong. After all, most cases rely on circumstantial evidence and the employee, like any other civil plaintiff, need only prove her case on a balance of probabilities. Direct evidence of discrimination is rare,

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383. *See supra* notes 87-88 and accompanying text.

384. *See id.*

385. An analogy can be drawn to tenure cases. In *Brown v. Trustees of Boston University*, 891 F.2d 337, 360 (1st Cir. 1989), for example, the university argued that awarding tenure to rejected candidates infringed its First Amendment right to academic freedom because it does not allow the university to determine for itself who may best teach. The First Circuit rejected this argument, stating,

> Academic freedom does not include the freedom to discriminate against tenure candidates on the basis of sex or other impermissible grounds. . . . While we have been and remain hesitant to interfere with universities' independent judgment in choosing their faculty, we have said that we will respect universities' judgment only "so long as they do not discriminate."

Id. (quoting Kumar v. Bd. of Trs., Univ. of Mass., 774 F.2d 1, 12 (1st Cir. 1985) (Campbell, C.J., concurring)). Similarly, a religious institution's freedom to choose its spiritual leaders does not include the freedom to illegally discriminate against ministerial employees on grounds unrelated to spirituality.

especially since discriminatory decisions are so often the result of unconscious processes rather than conscious animosity.[386] What if in relying on circumstantial evidence, the factfinder concludes that discrimination played a role when it did not? Or, what if the factfinder correctly finds that an employment decision was motivated by legitimate and illegitimate reasons, but erroneously rejects the defendant's claim that it would have made the same decision regardless? Specifically, what if Bishop Bass felt some anger towards Gellington, but would have transferred him anyway because Gellington really was better suited for the lower-paid congregation? Cases like *Gellington*, where the proffered reason is subjective, seem particularly vulnerable to error: Since there is no way to measure it, one can never be quite certain of its role.

First, reinstatement is not automatically available any time a plaintiff proves that discrimination motivated an adverse employment action. While a defendant is automatically liable, it can limit the remedies if it establishes that it would have made the same decision even without the discrimination.[387] Thus if Gellington's employer proves it would have reassigned Gellington even without the retaliation, the court could not reinstate him.

Second, to the extent that any mistakes will be made, they will likely be in the other direction. That is, in Title VII cases brought by ministerial employees, factfinders are much more likely to miss discrimination than to find discrimination where there is none. To start, the plaintiff always bears the burden of proving that discrimination motivated a decision.[388] In addition, courts' great deference regarding subjective qualifications[389] carries over into the evaluation of other circumstantial evidence. In other words, in cases where the defendant's asserted reason implicates a professional subjective qualification, courts seem to demand stronger evidence than they might otherwise require. The First Circuit has explicitly stated that the deferential standard in tenure decisions means that the circumstantial evidence "'must be of such strength and quality as to permit a reasonable finding that the denial of tenure was "obviously" or "manifestly" unsupported.'"[390] The Third Circuit has explained that "cautions against 'unwarranted invasion or intrusion' into matters involving professional judgments about an employee's qualification . . . inform the

386. *See generally* Linda Hamilton Kreiger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161 (1995); Lawrence, *supra* note 219.

387. *See supra* note 323 and accompanying text.

388. *See supra* note 311 and accompanying text.

389. *See supra* notes 359-367 and accompanying text.

390. Bina v. Providence Coll., 39 F.3d 21, 26 (1st Cir. 1994) (quoting *Brown*, 891 F.2d at 346); Villanueva v. Wellesley Coll., 930 F.2d 124 (1st Cir. 1991); *see also* Jimenez v. Mary Washington Coll., 57 F.3d 369 (4th Cir. 1995); Sidique v. Univ. of Pittsburg Dep't of Dermatology, No. 02-365, 2003 WL 22290334 (W.D. Pa. Oct. 3, 2003) (recognizing the "Third Circuit Court's longstanding recognition that decisions made by university faculties . . . are entitled to heightened deference").

remainder of [the court's] analysis."[391] In short, a ministerial plaintiff is unlikely to prevail without unmistakable evidence of discrimination.[392]

Finally, courts can always limit plaintiff's recovery to monetary relief.[393] Under Title VII, a prevailing party may obtain backpay, reinstatement, or other equitable relief.[394] Awards, however, are entrusted to the trial court's discretion. Reinstatement is the preferred remedy, as it best realizes the make-whole goal of Title VII.[395] But when reinstatement is not possible or

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391. Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 527 (3d Cir. 1993). Similarly, in *Weinstock v. Columbia University*, 224 F.3d 33 (2d Cir. 2000), the Second Circuit found that the University Provost's denial of tenure to a Barnard assistant chemistry professor because "her scholarship was not up to snuff," *see id.* at 39, was not discriminatory despite evidence of the following:

- Weinstock received tenure support from the Barnard Chemistry Department, the Barnard Committee of Appointments, Tenure, and Promotions, the Barnard President, and the Columbia Chemistry Department. *Id.* at 38.
- The ad hoc tenure committee voted 3-2 in favor of tenure. *Id.* at 39.
- The Provost attended ad hoc committee meetings, where members who had never met Weinstock referred to her by her first name and observed that Weinstock seemed nice and nurturing. As the dissent noted, "[A] stereotypically 'feminine' person is not viewed in a male dominated field as a driven, scientifically-minded, competitive academic researcher." *Id.* at 38-39, 57.
- The tenure process was marred by procedural irregularities. *Id.* at 40.
- The Provost wrote a letter erroneously stating that the ad hoc committee voted *against* tenure 3-2 and incorrectly charging that one professor had criticized rather than complimented Weinstock's work. *Id.* at 43.
- The Provost had published a book titled "Fair Science: Women in the Scientific Community" in 1979, arguing that women scientists were not subject to sex discrimination in matters of promotion. *Id.* at 55.
- Women were underrepresented in the faculty. For example, only fifteen percent of natural science professors at Columbia were women, a number that had not changed during the provost's twelve-year tenure. *Id.* at 52.

The deferential Second Circuit concluded that "the record at best indicates a difference of opinion in evaluation of scholarly merit, and not gender discrimination." *Id.* at 46 (internal quotation marks omitted).

392. Again, while this demanding level of proof is problematic for secular cases, *cf. supra* notes 307-327 and accompanying text, it does protect against establishment clause violations for religious cases.

393. Rutherford, *supra* note 29, at 1125-26 (suggesting the remedy in hiring suits should be limited to monetary damages).

394. Title VII authorizes a court to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1) (2000). With the passage of the Civil Rights Act of 1991, a plaintiff also may recover compensatory damages "for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," *id.* § 1981a(b)(3), and punitive damages if the defendant acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Id.* § 1981a(b)(1).

395. As the Supreme Court has explained, the goals of Title VII include "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). To make a plaintiff whole, the court should place her in the position she would have occupied but for the discrimination. As the Third Circuit has recognized, monetary damages are often inadequate: "'When a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole. The psychological benefits of work are intangible, yet they are real and cannot be ignored. . . .' Thus . . . reinstatement is the

practicable,[396] courts have opted to provide frontpay in lieu of reinstatement.[397] There is also precedent for courts limiting relief to frontpay based on the strength of the evidence.[398] Courts' deference to professional employers also reappears at the remedy stage, with courts reluctant to award to victorious Title VII plaintiffs tenure or firm partnership or other promotions dependent on subjective evaluations.[399] In a similar fashion, courts could easily choose frontpay over reinstatement for cases giving them pause. Given the strong preference for reinstatement, I would not recommend frontpay as the default remedy when ministerial employees win Title VII suits. However, its availability as an option for close cases helps ensure that courts reinstate only those ministers, teachers, music directors, and other ministerial employees that they are confident the religious organization itself would have selected in a discrimination-free decision-making process.

C. *Entanglement Problems of Applying the Ministerial Exemption*

To close, I observe that application of the ministerial exemption can entangle a court in religious doctrine more than application of Title VII. In determining whether a plaintiff counts as a "minister" who triggers the ministerial exemption, courts must decide whether the plaintiff plays an important religious role.[400] In so doing, courts are deciding directly questions of religious doctrine in a way they never do when deciding whether discrimination occurred.

For the ministerial exemption to apply, the plaintiff in a discrimination suit must be a "ministerial" employee. If courts limited the application of the exemption to ordained clergy, it would be easy to apply and raise no entanglement concerns. Courts do not, however, simply defer to a religious entity's characterization of a position, as it could simply characterize all its

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preferred remedy in the absence of special circumstances militating against it." Squires v. Bonser, 54 F.3d 168, 173 (3d Cir. 1995) (citation omitted) (quoting Allen v. Autauga County Bd. of Educ., 685 F.2d 1302, 1306 (11th Cir. 1982)).

396. For example, reinstatement may not be viable "because of continuing hostility between the plaintiff and the employer or its workers, or because of psychological injuries suffered by the plaintiff as a result of the discrimination." Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 846 (2001). In such cases, "[c]ourts recognize[] . . . that an award of front pay as a substitute for reinstatement . . . was a necessary part of the 'make whole' relief mandated by Congress and by this Court in *Albemarle*." *Id.* at 850.

397. *See, e.g.*, *id.* at 846-47.

398. Che v. Mass. Bay Transp. Auth., 342 F.3d 31, 43 n.1 (1st Cir. 2003) ("In the past, we have indicated a number of special considerations that influence the district court determination [to deny reinstatement] in specific cases, including . . . the strength of the evidence . . . ." (citation omitted)).

399. For example, only a handful of academic plaintiffs have prevailed with a judicial award of tenure. *See* Kathyrn R. Swedlow, *Suing for Tenure: Legal and Institutional Barriers*, 13 Rev. Litig. 557, 595 (1994); *see also* Gutzwiller v. Fenik, 860 F.2d 1317, 1333 (6th Cir. 1988) (stating that tenure is awarded in "only the most exceptional cases").

400. *See infra* notes 401-412 and accompanying text.

employees as ministers.[401] Thus, courts have taken a functional approach to determining who counts as a minister; if an 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."[402] Not every job with religious overtones is a ministerial position; otherwise, everyone working for an organization with a spiritual mission would be exempt. For example, parochial schools often list their mission as "instill[ing] in our children the Gospel message of Jesus Christ"[403] and expect their teachers to model for students the school's religious values.[404] Yet, a math teacher is probably not a minister. A theology teacher probably is. But what about a school choir director or school principal?[405] In order to decide whether this position is ministerial, the court must determine whether a plaintiff's job "is important to the spiritual and pastoral mission of the church."[406]

In order to decide "whether a position is important to the spiritual and pastoral mission of the church,"[407] a court must delve into the religious beliefs and doctrine of a particular religion.[408] In ruling that a church's musical director was a minister, for example, the Fourth Circuit analyzed the religious significance of music. The plaintiff argued that she was merely "a lay choir director and teacher, charged with the responsibility of

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401. *See, e.g.*, Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1396 (4th Cir. 1990) (describing a religious school's statement that all "teachers consider teaching to be their personal ministry"); EEOC v. Sw. Baptist Theological Seminary, 651 F.2d 277, 283 (5th Cir. 1981) (explaining that the Seminary urges that all its employees, including support staff, serve a ministerial function).

402. Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (internal quotation marks omitted).

403. Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 656 (6th Cir. 2000) (internal quotation marks omitted).

404. *See, e.g., id.* at 656 n.1 (stating that teachers are "expected to uphold, by word and example, all truths, values, and teachings of the Roman Catholic church" (internal quotation marks omitted)).

405. As the Ninth Circuit observed,

> [W]e routinely have to ask what function is served by alter servers, choirboys, lay ministers, lay deacons, ushers, acolytes and cruficers. Rabbis are clearly ministerial, but what about the gabbai, the shames, the cook in the synagogue's kitchen (who may have unorthodox views about whether swordfish is kosher)? . . . Religions vary drastically in their hierarchical and organizational structure, and it is often a tricky business to distinguish spiritual from administrative officials and clergy from congregation.

Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 797 (9th Cir. 2005).

406. *Rayburn*, 772 F.2d at 1169.

407. *Id.*

408. *Cf.* Scott D. McClure, *Religious Preferences in Employment Decisions: How Far May Religious Organizations Go?*, 1990 Duke L.J. 587, 595. In explaining why the § 702 exception to Title VII (allowing religious organizations to discriminate based on religion) should apply to religious and nonreligious positions, McClure argues that the court's reservation of the "final say as to what is religious and what is secular entangles the government in religion." *Id.*

training people to sing and perform music."[409] The court disagreed, holding that

> [music] serves a unique function in worship by virtue of its capacity to uplift the spirit and manifest the relationship between the individual or congregation and the Almighty. . . .
>
> . . . We cannot say . . . that the reading of scripture or the reciting of prayers is any more integral to religious worship than the singing of hymns or the intonation of chants. Whether spoken or sung, psalms lift eyes unto the hills.[410]

The court therefore concluded that the music director's job was "an integral part of Catholic worship and belief."[411] In reaching this conclusion, the court did exactly what the establishment clause forbids: choose between competing religious visions. In the plaintiff's vision of the Roman Catholic faith, music's significance did not rise to the level of ministry, such that teaching it made her a minister. In the defendant's vision, it did. The court essentially resolved a religious dispute about the role of music. As one circuit judge has observed, "The very invocation of the ministerial exemption requires us to engage in entanglement with a vengeance."[412]

In contrast, application of Title VII never requires that kind of direct grappling with religious doctrine or beliefs. In a Title VII case, the court does not decide what is important to a religion. Instead, it decides whether a legitimate religious reason or an illegitimate secular reason (discrimination) motivated a decision.[413] In other words, the court judges the credibility of a religious reason, rather than whether something is religiously true.[414] And it makes that decision not by judging competing religious visions, but by judging circumstantial evidence, exactly the same kind of evidence it would evaluate in a nonreligious case. In sum, evaluating the credibility of proffered religious reasons based on circumstantial evidence is within the court's role, and within its expertise. Resolving religious questions—even if correctly—is not.

IV. LIMITATIONS OF THE FREEDOM OF EXPRESSIVE ASSOCIATION JUSTIFICATION

While the focus of this Article is on the continued vitality of the ministerial exemption under the Constitution's religion clauses, Part IV

409. EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 802 (4th Cir. 2000) (internal quotation marks omitted).

410. *Id.*

411. *Id.*

412. Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 797 (9th Cir. 2005).

413. *Cf. supra* Part III.B.1.

414. Courts avoid any questions about religious truth, i.e., that a position requires spirituality or adherence to religious tenets, by deferring to the religious organization.

briefly analyzes an alternate constitutional justification for the ministerial exemption: the First Amendment freedom of expressive association.[415]

Proponents of the ministerial exemption claim that religious organizations must have autonomy in order to ensure that they are able to freely "designate leaders and spokespersons for the faith."[416] This freedom may be supported by the First Amendment right of expressive association, which protects the right of all associations—religious and nonreligious—to choose leaders who will properly represent and convey an association's messages.[417] Following the Supreme Court decision in *Boy Scouts of America v. Dale*,[418] which strengthened this right considerably, several commentators have either approved or conceded reluctantly the sway of this justification.[419] While I do not necessarily disagree, I believe it important to note that two important consequences flow from grounding the ministerial exemption in the right to expressive association. First, this right will not exempt all religious organizations from Title VII, only those that espouse discrimination. Second, even for them, coverage is not automatic but potentially subject to a compelling state interest in eliminating sex and race discrimination in paid employment.

A. *The Right of Expressive Association*

Implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of

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415. The Constitution also recognizes a constitutional right of intimate association. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 617-18 (1984). This right is grounded in the substantive due process prong of the Fourteenth Amendment and guarantees "highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id.* at 618. This privacy right applies to close emotional affiliations like family relationships. *Id.* at 619-20. Employment associations likely fall outside its purview: "[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees." *Id.* at 620. To the extent the right to intimate association covered employment in any context, the employment relationship must, at the very least, be "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* A family-run business with a few employees or an extremely small and close-knit religious organization might qualify. But an association small enough to have such intimate relationships is not likely to be covered by Title VII in the first place, as Title VII does not apply to organizations with fewer than fifteen employees. *See* 42 U.S.C. § 2000e(b) (2000).

416. Lupu & Tuttle, *Sexual Misconduct*, *supra* note 26, at 1809; *see id.* (stating that religious leaders "regulate [a religious community's] worship life, preside over changes in its liturgy and sense of values, and communicate its stories, beliefs, ethics, and sense of continuity from one generation to the next"); *see also supra* note 89 and accompanying text.

417. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).

418. *Id.* at 640.

419. *See supra* notes 26-27 and accompanying text; *see also* Lupu & Tuttle, *Distinctive Place*, *supra* note 164, at 72-74; Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women's Equality*, 10 Wm. & Mary J. Women & L. 459, 476 (2004) ("[I]t seems safe to say that in light of its recent decision in *Boy Scouts*, the Supreme Court will embrace the position that religious institutions should be exempt from anti-discrimination laws.").

the same activities.[420] Expressive associations further free speech's marketplace of ideas because "by collective efforts individuals can make their views known, when, individually, their voices would be faint or lost."[421] According to the Supreme Court, for the marketplace of ideas to flourish, all speech must be protected, including unpopular expression: "[T]he fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view."[422]

The state can burden an association's expression by outright suppression as it might with individual speech. The state can also intrude by interfering with the association's membership or leadership decisions. As Justice Sandra Day O'Connor explained, "[T]he formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."[423] Accordingly, despite a state public accommodation law barring discrimination on the basis of sexual orientation, the Boy Scouts were allowed to reject a gay man as a Scout leader because it claimed his presence would significantly affect the group's ability to advocate antihomosexual views.[424]

Boy Scouts of America v. Dale[425] signaled heightened protection for expressive associations. In a significant departure from prior precedent, the Supreme Court exhibited great deference to the defendant association's claims about its expression. The Court accepted that homosexuality was inconsistent with values the Boy Scouts sought to instill, despite the lack of any clear policy on the matter.[426] The Court also accepted the Boy Scouts' claim that allowing Dale to serve as an assistant scoutmaster would significantly interfere with its message, even if Dale never discussed his sexuality: "As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's

420. *Roberts*, 468 U.S. at 623.

421. Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 294 (1981); *see also* William P. Marshall, *Discrimination and the Right of Association*, 81 Nw. U. L. Rev. 68, 77 (1986) [hereinafter Marshall, *Association*] ("Limiting the right of expression to the cries of a lone speaker hardly would promote the interchange of ideas envisioned in the first amendment.").

422. *Dale*, 530 U.S. at 660.

423. *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring); *see also Dale*, 530 U.S. at 648 (stating that suppression may result from state intrusions into the internal structure or affairs of an association by, for example, foisting an unwanted member upon the association).

424. *Dale*, 530 U.S. at 648; *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 580 (1995) (holding that compelling organizers of a private St. Patrick's Day parade to include Irish-American gay, lesbian, and bisexual groups would violate the parade organizers' First Amendment rights).

425. 530 U.S. 640.

426. *See Dale*, 530 U.S. at 651 ("The Boy Scouts assert that . . . it does not want to promote homosexual conduct as a legitimate form of behavior. . . . We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality." (internal quotation marks omitted)).

view of what would impair its expression."[427] *Dale* does, however, make clear that an association seeking protection must actually have a message that would in some way be impaired.[428]

B. *Religions Without Discriminatory Messages*

Dale's protection matches the ministerial exemption for religious institutions whose religious doctrines require race or sex discrimination. Churches that limit ordination to men, for example, can argue that antidiscrimination law interferes with their message about the proper roles of men and women. Given *Dale*'s insistence on deference to organizations regarding the content and possible impairment of their message, there is little risk of excessive entanglement with doctrine.[429]

On the other hand, *Dale* cannot shield from Title VII organizations without discriminatory beliefs. As a free speech right, the right is implicated only if expression is at risk.[430] Religious organizations whose beliefs are consistent with the goals of Title VII, or even silent on the issue of discrimination,[431] cannot complain that compliance interferes with their expression.[432] Deference to an asserted message requires a message: Even the *Dale* Court is unlikely to allow the Boy Scouts to expel a gay scoutmaster if it asserted no message against homosexuality.[433] Likewise,

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427. *Dale*, 530 U.S. at 653. In contrast, the Supreme Court had previously rejected claims that inclusion of blacks or women would undermine an association's expressive message. *See infra* note 441. The dissent criticized the *Dale* Court's deference as "an astounding view of the law. I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further." *Dale*, 530 U.S. at 686 (Stevens, J., dissenting).

428. *Dale*, 530 U.S. at 648 (majority opinion) ("[T]o come within [the freedom of expressive association] ambit, a group must engage is some sort of expression."); *see also id.* at 655 (stating that an "association must . . . engage in expressive activity that could be impaired in order to be entitled to protection").

429. An exemption based on associational rights would lead to less entanglement than the current ministerial exemption because it would depend upon the religious organization's declaring that it had a discriminatory message, not on the court's deciding who is a ministerial employee. And while the Court's deference to the Boy Scouts has met with significant criticism, deference to religious organizations about their doctrine would be appropriate in light of lingering establishment clause concerns.

430. *See supra* note 422 and accompanying text.

431. Some question the constitutionality of compelling expressive associations that have not taken a position on discrimination to articulate their beliefs, suggesting that an association should not have to state that it believes in discrimination in order to practice it. *See* Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 Minn. L. Rev. 1515, 1542, 1555-57 (2001). But Carpenter cannot mean that associations need never assert their discriminatory message. After all, even the Boy Scouts announced their antihomosexuality stance. If Carpenter were correct, any entity could invoke freedom of expressive association against a Title VII claim without ever committing to a (probably socially unpopular) stance, a result not countenanced by *Dale*, which recognized that an association must at least have a message burdened by state action.

432. *See* Lupu & Tuttle, *Distinctive Place*, *supra* note 164, at 73-74 (noting that supporters of the neutrality paradigm do not think the ministerial exemption is justified for religions without discriminatory policies).

433. *See supra* notes 418-25 and accompanying text.

churches cannot claim an expressive association right of exemption from Title VII unless they profess a belief in sex or race discrimination.

C. *Religions with Discriminatory Messages*

While *Dale* seems to apply to those religious organizations that have discriminatory beliefs, these organizations will not necessarily receive a free pass to discriminate. As acknowledged in *Dale*, the freedom of association is not absolute.[434] A law may burden the right to freedom of association if the law furthers a compelling state interest that cannot be achieved by significantly less restrictive means.[435] The Boy Scouts succeeded because the Supreme Court held that New Jersey's interest in preventing discrimination against gays and lesbians was not compelling enough to outweigh the Boy Scouts' interest in shaping and delivering their antihomosexuality message.[436]

The ministerial exemption from Title VII differs in at least two significant respects. First, it implicates race and sex discrimination as opposed to sexual orientation discrimination. At the time *Dale* was decided, the Court had recognized only limited constitutional protection for homosexuality:[437] Sexual orientation was not a suspect or quasi-suspect classification for equal protection purposes,[438] and the elimination of discrimination against gays and lesbians was not a compelling state interest. On the contrary, it was still constitutional to criminalize homosexual sexual activity.[439]

In contrast, race and sex classifications are suspect under the equal protection clause,[440] and eradication of race and sex discrimination has long been recognized as a compelling state interest.[441] Because Title VII

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434. Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) ("But the freedom of expressive association, like many freedoms, is not absolute."); *see also* Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

435. *Dale*, 530 U.S. at 648.

436. *Id.* at 659.

437. *See generally* Romer v. Evans, 517 U.S. 620 (1996) (holding that an amendment to the Colorado Constitution prohibiting any legal action to protect homosexuals from discrimination failed rational review and violated equal protection).

438. *Id.* (applying rational basis review); *see also* Carpenter, *supra* note 431, at 1526 n.45 (describing the equal protection clause as impotent in protecting gays and lesbians).

439. Bowers v. Hardwick, 478 U.S. 186 (1986) (concluding that a statute criminalizing sodomy did not violate the fundamental rights of homosexuals), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003) (concluding that homosexuals have a constitutional right to engage in private consensual sexual activity). *Lawrence*, which also condemned *Bowers* as "demean[ing] the lives of homosexual persons," and noted that homosexual sexual activity "can be but one element in a personal bond that is more enduring," suggests greater protection in the future. *Lawrence*, 539 U.S. at 575, 567.

440. In the equal protection context, race classifications trigger strict scrutiny, Korematsu v. United States, 323 U.S. 214, 216 (1944), and sex classifications trigger intermediate scrutiny, Craig v. Boren, 429 U.S. 190, 197 (1976).

441. *See, e.g.*, Univ. of Pa. v. EEOC, 493 U.S. 182, 193 (1990) ("Few would deny that ferreting out . . . invidious [sex and race] discrimination is a great, if not compelling, governmental interest."); N.Y. State Club Ass'n v. New York, 487 U.S. 1, 14 n.5 (1988)

advances the egalitarian goals of the Fourteenth Amendment, Title VII's antidiscrimination objectives are "even stronger than most [state] interests . . . assert[ed] as compelling."[442] In fact, the Supreme Court has found eradication of race and sex discrimination important enough to override freedom of association challenges in the past.[443] While the Supreme Court may countenance a Boy Scouts of America with no gay scoutmasters, it is less clear that it would tolerate exclusion of black scoutmasters.[444]

Second, the ministerial exemption involves paid employment, not voluntary membership. This commercial setting is significant, but not only for the reasons generally acknowledged. Most commentators track Justice O'Connor's conclusion that an organization's characterization as commercial or expressive, determined by its primary goals/activities, decides the weight of its interests.[445] If the association's main focus is business, then its expression warrants less protection.[446] Therefore, according to Justice O'Connor, a lawyer at a large for-profit commercial firm is better shielded by antidiscrimination law[447] than one at a

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("[T]he Court has recognized the State's 'compelling interest' in combating invidious discrimination"); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (stating that the government's "fundamental, overriding interest in eradicating racial discrimination in education . . . substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs").

442. Rutherford, *supra* note 29, at 1116.

443. *See N.Y. State Club Ass'n*, 487 U.S. at 13 (sex); Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) (sex); Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) (sex); *Bob Jones Univ.*, 461 U.S. at 604 (race); Runyon v. McCrary, 427 U.S. 160, 175-76 (1976) (race). *Cf.* Hishon v. King & Spalding, 467 U.S. 69 (1984) (sex). The Court justified its ruling in these cases by finding the antidiscrimination interest compelling and the burden on expression limited.

444. The exclusion of girls raises slightly different questions. Unlike the exclusion of women from ministerial positions, exclusion of girls from Boy Scouts is arguably not invidious, since they can join the roughly equivalent Girl Scouts, making the scout clubs more akin to single-sex schools, which the Supreme Court has not condemned, *see* United States v. Virginia, 518 U.S. 515 (1996), as opposed to segregated schools, which the Court obviously has.

445. According to Justice Sandra Day O'Connor, "An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas." *Roberts*, 468 U.S. at 636; *see, e.g.*, Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. Davis L. Rev. 821, 832-35 (2002) (finding that nonprofit status is a necessary but not sufficient condition for expressive association protection); Carpenter, *supra* note 431, at 1564 ("[T]he distinction between expressive associations (generally protected from the application of anti-discrimination law) and primarily commercial associations (not strongly protected) appears to drive the results in this area."); Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 Minn. L. Rev. 1917, 1924-25 (2001) (arguing that the Jaycees lost in *Roberts* because of commercial context—the primary purpose of that organization was business networking).

446. *See, e.g.*, Carpenter, *supra* note 431, at 1566-70 (detailing "relaxed protection" for commercial activity and commercial speech).

447. *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring) (citing Hishon v. King & Spalding, 467 U.S. 69 (1984) (rejecting the associational claims of a large commercial law firm)).

(presumably) nonprofit legal advocacy group.[448] If this were the only role commerce played, then it would favor associational protection for religious organizations, most of which are not commerce-oriented or profit-making ventures.[449]

But with the ministerial exemption, the significance of commerce really lies on other side of the scale: the state's antidiscrimination interest.[450] The state's antidiscrimination interests are affected by the commerce/non-commerce divide in two ways. To start, whether justified or not, regulation of private actors is considered more acceptable when they act in the public sphere than in the private sphere,[451] and paid employment belongs in the public sphere in a way that membership in a private association does not.[452] In other words, whether an attorney works at a large commercial firm or a small public interest nonprofit, as someone who is paid for her services, she

448. Justice O'Connor describes the latter as "[l]awyering to advance social goals." *Id.* at 636. Even though the Jaycees organization was not itself a for-profit business, its main purpose was commercial: "Recruitment and selling are commercial activities, even when conducted for training rather than for profit." *Id.* at 640.

449. More than one commentator has pointed out that the "for profit/nonprofit" dichotomy only roughly maps onto "commercial/expressive," especially since organizations can be both commercial and expressive. *See, e.g.*, Brody, *supra* note 445, at 893-94; Carpenter, *supra* note 431, at 1576 (suggesting a third category of quasi-expressive associations); Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 Minn. L. Rev. 1483, 1500 (2001). Examples include public interest law firms that wish to make money and further social goals and for-profit religious newspapers.

450. In other words, on one side of the scale is the private organization's associational interests, and on the other side of the scale is the state's antidiscrimination interests. The weighing of both interests are affected by a commerce/non-commerce divide. For private organizations' interests, the divide is between commercial and nonprofit. For the state's interests, the divide is between paid employment and unpaid volunteering.

451. *See, e.g.*, Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 Am. U. L. Rev. 1, 9 (1999) (arguing that the master legal paradigm in the U.S. is liberalism, where "there is a public sphere and a private sphere, and that the state may act legitimately within the public sphere but not within the private sphere"). *See generally* Michael C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 Fordham L. Rev. 2161 (2001) (critiquing the distinction between public economic activities and private noneconomic activities made by recent Supreme Court cases); Elizabeth M. Schneider, *The Violence of Privacy*, 23 Conn. L. Rev. 973, 976-79 (1991) (describing how the dichotomy between the regulated public sphere and the unregulated private sphere facilitates violence against women). Note that the Supreme Court described the ordinance at issue in *Roberts* as reaching "*public*, quasi-commercial conduct." *Roberts*, 468 U.S. at 625 (emphasis added).

452. Dale Carpenter touches on this when he states that "[e]ven non-profit associations may be commercial" if, among other things, "they employ a vast array of persons." Carpenter, *supra* note 431, at 1572. But Carpenter does not explain why the employer of "a vast array of persons" is more commercial than the employer of over fifteen (the number used to define an employer under Title VII). *Id.*

is involved in commerce and is part of the public sphere.[453] In contrast, *Dale* involved unpaid volunteering.[454]

Of course, even membership in a private association is never a purely private matter. The Boy Scouts' policy does not just exclude individuals, but like a country club's whites-only admission policy, conveys a message of inferiority[455] and perpetuates subordination of the stigmatized group.[456] However, it is exactly this expressive message that the First Amendment presumably protects.[457] But the public repercussions of discriminatory employment policies are worse in the employment (as opposed to volunteer) context: They extend beyond harmful messages to economic impact. After all, Title VII would not cover ministerial employees if their employment were not an economic activity that substantially affected interstate commerce.[458] Even the court that created the ministerial

453. *See* Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 Minn. L. Rev. 1591, 1628 (2001) ("The currently dominant view would be that the term 'public,' as applied to the private sector, connotes an expansive market, including services as well as goods, and intangible as well as tangible benefits.").

454. *See Boy Scouts of Am.*, 530 U.S. 640. In fact, the Court complained that New Jersey's public accommodation laws ought not to have reached the Boy Scout volunteers. *See id.* at 108-29.

455. *See, e.g.*, Koppelman, *supra* note 334, at 45 (arguing that exclusion is a marker of inferiority and stigmatizes those excluded); Deborah L. Rhode, *Association and Assimilation*, 81 Nw. U. L. Rev. 106, 108 (1986) ("As a symbolic matter, exclusion of women, like that of racial or religious minorities, carries a stigma that affects individuals' social status and self-perception."); *cf.* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (asserting that exclusion of black schoolchildren from white schools "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

456. *See, e.g.*, Rhode, *supra* note 455, at 122 ("[T]hese symbols of inferiority . . . often . . . become self-perpetuating."); *see also* Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, the Politics of (Disability) Civil Rights*, 89 Va. L. Rev. 825, 842 (2003) ("The most important harm of stigma is . . . the way it reproduces exclusion and inequality across a range of spheres of public, civic, and social life."); Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 Vill. L. Rev. 787, 795 (1992) ("[V]erbal and symbolic acts form integral links in historically ingrained systems of social discrimination. They work to keep traditionally victimized groups in socially isolated, stigmatized and disadvantaged positions through the promotion of fear, intolerance, degradation and violence.").

457. Whether free speech goals justify these harms is a long-standing debate. *Compare* Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. Cal. L. Rev. 119, 119-20 (2000) (arguing that the *Dale* majority reached the right decision in a classic conflict between freedom of association and freedom from discrimination), *and* Paulsen, *supra* note 445, at 1919 (asserting that *Dale* "should have been a relatively easy" case), *with* Andrew Koppelman, *Signs of the Times:* Dale v. Boy Scouts of America *and the Changing Meaning of Nondiscrimination*, 23 Cardozo L. Rev. 1819, 1835 (2002) (stating that First Amendment values are important but that "it doesn't follow that these values should always take priority over the effort to break up entrenched patterns of discrimination"), *and* Erwin Chemerinsky & Catherine Fisk, *The Expressive Interests of Associations*, 9 Wm. & Mary Bill Rts. J. 595, 595 (2001) (arguing that *Dale* was wrongly decided because antidiscrimination law was narrowly tailored and advanced a compelling interest).

458. Congress passed the Civil Rights Act of 1964 under its Commerce Clause power. *See* U.S. Const. art. I, § 8, cl. 3. Congress may exercise this power only over economic

exemption in *McClure v. Salvation Army* acknowledged that the Salvation Army is an "employer" engaged in "an industry affecting commerce."[459] And remember that the ministerial exemption covers not just churches, but nonprofit religious entities that are even less like private voluntary associations such as hospitals, nursing homes, schools, and universities.[460] Whatever reluctance the Court may have with respect to state regulation of a private club, such reluctance has not yet extended to regulation of commerce.

More importantly, the state's commitment to eradicating private discrimination has always been strongest when it concerns individuals' access to housing, education, and employment—areas where equal access is crucial to fulfilling the nation's avowed goal of equal opportunity.[461] After all, "[ab]olishing state-created discrimination would be a hollow victory if those formerly subject to that discrimination were not afforded access to opportunities in the private sector."[462] Indeed, as has been noted, the Supreme Court has never found that freedom of association trumps employment opportunities.[463] In fact, the Supreme Court has rejected expressive association defenses in part because they would compromise economic advancement.[464] In these cases, the Court held that guaranteeing women equal access to the acquisition of leadership skills and business contacts overcame burdens on associational rights.[465] One could certainly argue that if ensuring women access to job skills and connections is a compelling state interest, how much more so is access to jobs themselves.[466]

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activities that substantially affect interstate commerce. *See* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

459. McClure v. Salvation Army, 460 F.2d 553, 557 (5th Cir. 1972) (internal quotation marks omitted). The *McClure* court noted that the Salvation Army annually grossed over $7,000,000; managed property worth more than $62,000,000; and employed approximately 3000 people. *Id.*

460. *See supra* note 67 and accompanying text.

461. *See, e.g.*, Marshall, *Association*, *supra* note 421, at 68 (stating that a right-to-discriminate argument will fail in "employment, accomodations, or education—essentially those areas which, though privately controlled, involve access to publicly available opportunities").

462. *Id.* at 92.

463. *See* Lupu & Tuttle, *Faith-Based Initiative*, *supra* note 186, at 53 ("[C]ourts have not generally extended principles of freedom of association to the employment relation.").

464. *See* Bd. of Directory of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987); Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984); *cf.* Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (rejecting an expressive association defense in the context of a commercial law firm). The Supreme Court has also rejected associational challenges in the context of education. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Runyon v. McCrary, 427 U.S. 160, 176 (1976).

465. *Duarte*, 481 U.S. at 549; *Roberts*, 468 U.S. at 626; *see also* Rhode, *supra* note 455, at 121 (describing the importance of men's associations in professional success).

466. Indeed, the diversity of expression that is the raison d'être for constitutional protection of expressive associations cannot be achieved without, and in fact presumes, equality of opportunity. The marketplace of ideas can only succeed if it is open to everyone. But access to the marketplace requires market power, which Title VII seeks to secure for all.

This may be why in another clash between Title VII and the free speech clause—the limits on speech created by outlawing hostile work environments[467]—the Supreme Court has indicated in dicta that in the workplace, antidiscrimination would prevail.[468] In that case, the Court invalidated an ordinance barring hate crimes motivated by race, religion, or sex bias as an unconstitutional viewpoint-based speech regulation.[469] Nonetheless, the Court stated that Title VII prohibitions against harassment motivated by sex or race were not similarly unconstitutional.[470] Driving this conclusion may be the compelling interest in equal opportunity.[471] "If workplace harassment could not be prohibited, the promise of equal employment opportunity could prove to be an empty promise for many: an employer might be required to hire minorities or women, but its employees could drive them away."[472] Again, if an individual's free speech rights can be curtailed in paid employment, it follows that an association's free speech can be curtailed in the context of paid employment.

One rejoinder to these points is that the case law involved secular expressive associations, such as the Rotary Club.[473] The ministerial exemption, however, is meant to protect religious expressive associations, and the calculus is different for religious interests. Under this reasoning, the free speech clause would provide more protection for religious speech than any other kind of speech. But this would contravene the fundamental free speech principle prohibiting differential treatment based on

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467. *See, e.g.*, Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 Ohio St. L.J. 481 (1991) (questioning the constitutionality of Title VII's ban on hostile work environment).

468. *See* R.A.V. v. St. Paul, 505 U.S. 377 (1992).

469. *Id.* at 391.

470. *Id.* at 389 (finding Title VII's ban on "sexually derogatory" words constitutional "since words can in some circumstances violate laws directed not against speech but against conduct" and stating that "a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech"); *see also* Mary Becker, *How Free Is Speech at Work?*, 29 U.C. Davis L. Rev. 815, 833 (1996) (describing how *R.A.V.* "stated that Title VII's ban on sexual harassment is not a constitutional problem"); Mark Oring & S.D. Hampton, *When Rights Collide: Hostile Work Environment vs. First Amendment Free Speech*, 31 UWLA L. Rev. 135, 147 (2000) ("As a practical matter, *R.A.V.* makes clear how the current Court will rule on a first amendment challenge to hostile environment regulation—it will uphold the law and reject the challenge.").

471. Not everyone is convinced by Justice Scalia's attempt to distinguish a ban on race or sex-based expression creating a hostile work environment from a race or sex-based expression amounting to a hate crime. *See, e.g.*, Oring & Hampton, *supra* note 470, at 146; Guy-Uriel E. Charles, *Colored Speech: Cross Burning, Epistemics, and the Triumph of the Crits?*, 93 Geo. L.J. 575, 594 (2005). In his concurrence, Justice Byron White observed that "there is a simple explanation for the Court's eagerness to craft an exception to its new First Amendment rule . . . . Title VII hostile work environment claims would suddenly be unconstitutional." *R.A.V.*, 505 U.S. at 409 (White, J., concurring).

472. Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791, 1845 (1992).

473. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).

viewpoint.[474] And as discussed in Part II, it is also at odds with the change in the religion clause paradigm, where religious and secular organizations are treated much more equally.

A full-fledged discussion of whether antidiscrimination laws trump churches' free speech rights is the subject of another article.[475] It suffices to say, however, that it is far from a foregone conclusion that religious employers may discriminate with impunity under the auspices of freedom of expressive association.

CONCLUSION

As applied by the lower courts, the ministerial exemption currently grants religious organizations full immunity from Title VII claims brought by ministerial employees. This Article demonstrates, however, that the constitutional justifications offered by courts and commentators alike do not support this broad exemption.

There is no valid constitutional basis to apply the ministerial exemption to religious organizations whose religious beliefs do not require race or sex discrimination. Title VII claims against organizations with no discriminatory practices or messages do not implicate free exercise[476] or freedom of expressive association. A small subset of Title VII claims may raise establishment clause issues, but any unconstitutional entanglement may be avoided by deferring to religious employers on matters of subjective professional evaluations and by limiting remedies.

The ministerial exemption stands on firmer footing when invoked by religious organizations with discriminatory tenets, but ironically not because of the religion clauses. The free exercise clause is not violated by Title VII claims against these employers, because Title VII is a neutral law of general applicability that does not target religion. The establishment clause is not violated because there are no doctrinal questions to settle. After *Dale*, however, these employers may find refuge in the right of expressive association,[477] although this is not a foregone conclusion.

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474. Marshall, *In Defense of* Smith, *supra* note 208, at 320 ("[A] constitutional preference for . . . [religion] cuts at the heart of the central principle of the Free Speech Clause—that every idea is of equal dignity and status in the marketplace of ideas.").

475. Such a discussion would have to grapple with, for example, the fact that the state's interests in Title VII are greater than they were compared to *Dale*, but at the same time, the state's deference to associations is also greater following *Dale*.

476. In any event, Title VII is a neutral law of general applicability, so it is irrelevant if it burdens religious practices.

477. Notably, any protection to religious organizations would also extend to their secular counterparts with similar messages. Moreover, even if the Supreme Court concluded that these organizations' expressive rights outweigh the state's interest in combating discrimination, it would not follow that these organizations are entitled to government contracts or grants. Indeed, the state has long refused to fund secular organizations that engage in invidious sex and race discrimination, and the rules should be no different for religious organizations. A uniform policy of not publicly funding organizations that discriminate dovetails with the new emphasis on equal treatment between religious and secular organizations.