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Divinity vs. Discrimination: Curtailing the Divine Reach of Church Authority

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I. INTRODUCTION

Church authority to practice gender discrimination in employment decisions represents the collision of principles of religious liberty on one hand, and the need to eradicate invidious discrimination on the other. In order to secure the free exercise of religion, the First Amendment prohibits legislation which interferes with or significantly abridges religious belief or conduct.¹ To the extent that employment decisions represent the extension of religious belief, churches have a strong claim of immunity from judicial review of their decisions. Title VII of the Civil Rights Act of 1964² thus exempts religious entities from civil liability when their discriminatory conduct is religiously motivated. Specifically, 42 U.S.C. § 2000e-1(a) states:

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² 1. U.S. CONST. amend. I.

369
This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.  

While such accommodation arguably runs afoul of non-establishment principles of the First Amendment, the Supreme Court in Corporation of the Presiding Bishop v. Amos unanimously held that the exemption did not rise to the level of a law respecting an establishment of religion.  

Although the Supreme Court has not recognized a constitutional right to discriminate on the basis of religion against individuals who perform purely "secular" functions, the court has upheld Title VII's statutory exemption for discriminating with respect to "religious" functions. Title VII has been interpreted to bar race and sex discrimination by religious organizations toward their non-minister employees; yet, attempting to forbid religious discrimination against non-minister employees where the position involved has any religious significance is uniformly recognized as constitutionally suspect, if not forbidden.  

Notwithstanding Amos, the statutory exemption still engenders considerable controversy among federal courts left to

4. See infra notes 104-160 discussing the Establishment Clause.
6. Id. at 338. In Amos, a building engineer was discharged by The Church of Jesus Christ of Latter-day Saints after 16 years of service because he failed to qualify for a church certificate. Id. at 330. The District Court held that the exemption applied thereby allowing the Church to discriminate against the building engineer. See id. at 333. The Supreme Court reversed after reasoning that "[w]here, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities. Id. at 338.
7. Id. at 338. See also McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972), cert. denied 409 U.S. 896 (1972); infra notes 25-67 and accompanying text discussing McClure.
interpret its precise scope.\textsuperscript{9} While the statute permits religious institutions to engage in religious discrimination, the legal boundaries between religious and other forms of prohibited discrimination, such as gender discrimination, remain unclear. Specifically, the vague guidelines give rise to such questions as how "religious" an institution must be to qualify for the exemption, or whether employment decisions constitute the type of "activities" courts are precluded from overseeing.

Under current federal court jurisprudence, church authority to discriminate along gender lines, and the corresponding authority of courts to review and regulate such conduct, turns largely on two considerations: the nature of the institution and the nature of the employment position.\textsuperscript{10} The various employment positions can be broken down into four distinct categories of cases: (1) ministerial functions in pervasively sectarian institutions; (2) ministerial functions in religiously-affiliated institutions; (3) non-ministerial functions in pervasively sectarian institutions; and (4) non-ministerial functions in religiously-affiliated institutions.\textsuperscript{11} Such classifications are useful in determining at precisely what level the responsibilities assumed by employees are so secular in nature that state regulation of employment decisions regarding those positions cannot be contested on religious grounds.

Church authority to discriminate in employing ministers in both pervasively sectarian and religiously-affiliated institutions is undisputed.\textsuperscript{12} Such decisions involve religious deter-
minations which lie at the "core" of church doctrine, and thus, all courts agree that these decisions are covered by the church autonomy doctrine. The courts' position with respect to non-ministerial functions, however, remains unclear. In general, federal courts reviewing employment decisions at this level continue to resort to case-by-case analysis of the particular facts at hand. In the absence of any meaningful guidelines from the Supreme Court, lower courts, which must determine the religious nature of an employee's position, must rely upon standards set by previous courts grappling with this issue. This method of resolving discrimination disputes has led courts to reach different conclusions on ostensibly similar facts.

Given the need for a coherent policy in this area, courts should look to the recent line of federal cases which apply Title VII and the Age Discrimination in Employment Act (hereinafter "ADEA") to employment discrimination disputes. These decisions, along with the strong policy arguments against gender discrimination, mandate that both religiously-affiliated and pervasively sectarian institutions cannot justify sex discrimination with respect to employees who perform non-

courts finds ample support in Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), and remains uncontested by federal courts as well as proponents of the application of anti-discrimination law to religious institutions. In Milivojevich, the Court addressed the decision of the Mother Church of the Serbian Orthodox Church in Yugoslavia to suspend and defrock Bishop Milivojevich. Id. at 697-98. The Illinois Supreme Court had ordered reinstatement of the Bishop based upon its finding that the Church had failed to comply with prescribed Church procedure. Id. at 698. The Supreme Court, in a seven-to-two vote, reversed and determined that the decision by the Illinois Court, to substitute its interpretation of the Church's doctrine for that of the Church itself, represented an impermissible encroachment of civil authority into ecclesiastical law. Id. at 720.

13. See McClure, 460 F.2d 553 (holding that "the relationship between an organized church and its ministers is its lifeblood.").


16. See infra note 28 listing federal cases.
ministerial functions. Such a judicial policy not only survives scrutiny under First Amendment principles, but is consistent with recent federal decisions concerning church autonomy.

This comment will first demonstrate that compliance with Title VII at the non-ministerial level does not infringe upon the Free Exercise rights of a religious institution absent specific doctrinal authority within the institution compelling discrimination at that level. This comment will next argue that not only does the Establishment Clause permit compliance with Title VII, but allowing religious institutions to avoid Title VII requirements contradicts the non-establishment principle which the clause itself prohibits. Finally, this comment will argue that principles of church autonomy do not constrain judicial resolution of employment disputes under Title VII, because such disputes represent essentially secular rather than ecclesiastical controversies.

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17. A related topic to the one discussed involves those incidents in which non-ministerial employees are discriminated against based on religion and indirectly on gender. For instance, an issue might arise in which a single woman employed by a church in a non-ministerial capacity is found to have committed a religious violation, i.e. becoming pregnant or having an abortion, which is uniquely gender-based as well. If she is fired on the basis of her religious violation, an interesting issue is whether given the unique nature of her violation, Title VII should allow her to sue the church for wrongful termination on the basis of gender. Although this presents a complicated issue which lies beyond the scope of this paper, it is the author's opinion that a Title VII claim would not be appropriate under such circumstances. Where the employee has agreed to follow the religious doctrine in issue, it would seem that the church's Free Exercise right to demand adherence to official doctrine would, despite competing Title VII mandates, be seriously jeopardized if those who purport to follow or in any way carry out that religious doctrine are permitted to challenge it on civil grounds when they violate that doctrine.

18. See supra notes 21-103 and accompanying text discussing the Free Exercise Clause.

19. See supra notes 104-160 and accompanying text discussing the Establishment Clause.

20. See supra notes 166-237 and accompanying text discussing church autonomy principles.
II. FREE EXERCISE ANALYSIS

The Free Exercise Clause\(^{21}\) ensures that those who hold religious beliefs are not impermissibly burdened by government regulation in the exercise of those beliefs. This right to remain free of state interference applies not only to beliefs, but extends to religious conduct as well.\(^{22}\) The relevance of this “belief-action” distinction to the employment context is clear: a belief which presumes inferior status and capability of women is hollow unless it is translated into practice by denying women access to positions commensurate with men. While the Free Exercise Clause governs such practice, it is not clear that it protects it.

In applying anti-discrimination laws such as Title VII to religious authorities under the traditional Free Exercise test crafted by the Supreme Court, courts may consider: first, the magnitude of the statute’s burden upon the exercise of the religious belief; second, the possible existence of a compelling state interest justifying the burden imposed; and finally, the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state.\(^{23}\) Such an analysis demonstrates that holding religious institutions accountable for gender discrimination at the non-ministerial level does not run afoul of their Free Exercise rights; to the contrary, because churches in the vast majority

\(^{21}\) U.S. CONST. amend. I.

\(^{22}\) See Wisconsin v. Yoder, 406 U.S. 205 (1972). Yoder involved a claim by the Amish parents of elementary-aged children that Wisconsin’s compulsory school-attendance statute abridged their Free Exercise right to educate their children in a manner consistent with their religious beliefs. Id. at 207. Holding in favor of the parents, the Court recognized that the guarantee of Free Exercise was a shallow freedom absent the right to engage in religious conduct. Id. at 219-20.

\(^{23}\) Sherbert v. Verner, 374 U.S. 398, 403-10 (1963). At issue in Sherbert was the right of state law to deny unemployment compensation to a Seventh-Day Adventist who failed to obtain employment because of her religiously-motivated refusal to work on Saturday. Id. at 399-402. The Court recognized that the effect of the state law was to force the individual to make a cruelt choice between foregoing government benefits or violating her religious beliefs. Id. at 404. The Court thus held the statute invalid, reasoning that a state statute which seeks to advance legitimate secular goals is required to use the least-restrictive means available for achieving its legislative goal. Id. at 407. In this case, the Court determined that exemption from the statute for religiously-compelled refusal to work presented such an alternative. Id. at 408-409.
of cases cannot defend such practice on religious grounds, requiring them to use non-discriminatory criteria imposes little, if any, burden on their actual beliefs.

A. DETERMINING WHETHER APPLICATION OF TITLE VII IMPERMISSIBLY BURDENS FREE EXERCISE OF RELIGION

To determine the magnitude of the burden imposed by anti-discrimination laws at the nonministerial level, courts must address two interrelated inquiries: whether sex discrimination at the non-ministerial level may be justified on religious grounds, and, if so, the extent to which the religious purpose of an institution will be undermined if it is forced to accommodate Title VII objectives. Because the Supreme Court has not directly addressed this issue, however, the most useful guidelines for addressing such inquiries appear in recent lower federal court decisions.

1. The “Church-Minister” Exception To Application Of Title VII Under McClure

The Fifth Circuit’s decision in *McClure v. Salvation Army* is particularly instructive on the magnitude of the burden imposed by anti-discrimination laws at the nonministerial level because it established the standards for determining which religious entities and employment positions should be exempted from Title VII strictures. In *McClure* the Fifth Circuit reviewed a sex discrimination claim of a female officer employed by the Salvation Army. Alleging a Title VII violation, the officer sought review of unequal wage compensation and her subsequent discharge after reporting the unequal payment. In an opinion which influenced a significant line of case law, the Fifth Circuit denied review of unequal wage

24. The first of these inquiries reflects the statutory exemption principles of 42 U.S.C. § 2000e-1(a) which exempts religiously motivated discriminatory conduct. The second inquiry reflects the extent to which compliance with Title VII would result in an impermissible burden on the Free Exercise rights of the religious institution involved.


27. *Id.*

28. The far-reaching significance of *McClure* is demonstrated by the progeny of
compensation. Concluding that the Salvation Army was a religious association, the court relied upon Free Exercise principles to carve out a "church-minister" exception to Title VII. The court identified the "church-minister" relationship as representing the "lifeblood" of the church; thus, any attempt to resolve the present employment dispute would be an impermissible intrusion into a "prime ecclesiastical concern." Because the officer's duties included clergy-like responsibilities, her position fell within the exception.

Following McClure, a substantial number of federal and state courts have similarly approached employment discrimination disputes by first determining whether the institution is so pervasively sectarian as to be classified a "church" and then determining whether the nature of the employment position is sufficiently related to "core" religious doctrine so as to justify discrimination. Where the employee's position advances an institution's religious mission, it is more likely to be covered by the exception.


29. Id. at 560-61.
30. Id. at 560.
31. Id. at 558-59.
32. See id. at 555, 560.
35. See McClure, 460 F.2d at 559-60.
the church. The tendency in the federal courts, however, has been to adopt a restrictive interpretation of what constitutes "ministerial functions." This interpretation demonstrates the courts' unwillingness to permit both religiously-affiliated and pervasively sectarian institutions fail to overcome even the initial hurdle of the Free Exercise test.

2. Narrow Construction Of The "Church-Minister" Exception

Soon after the McClure decision, the Fifth Circuit once again confronted the application of anti-discrimination laws to a religious entity in EEOC v. Southwestern Baptist Theological Seminary. In Southwestern Baptist, the Equal Employment Opportunity Commission (hereinafter "EEOC") sued to enforce the Seminary's compliance with the Commission's reporting requirements. The Seminary had resisted on the grounds that the reports sought by the EEOC concerned employees who fell under the church-minister exception. Finding the seminary to be a "church" for McClure purposes, the court nevertheless rejected the Seminary's argument.

The Fifth Circuit demonstrated how narrowly it was willing to construe the "ministerial" exception when it held that maintenance and plant employees were not encompassed by the exception even though four of these staff members were actually ordained ministers. Because its employees were excluded from the "church-minister" exception, the Seminary

39. Id. at 277.
40. Id. at 281-82.
41. Id. at 283.
42. Id. at 283-85. The court's narrow construction of the McClure approach is demonstrated by its reasoning that, "those administrators whose function relates exclusively to the Seminary's finance, maintenance, and other non-academic department, though ordained ministers by the Seminary, are not ministers as we used that label in McClure. . . . " Id. at 285. Significantly, the Fifth Circuit went on to explain that, "when churches expand their operations beyond the traditional functions essential to the propagation of their doctrine, those employed to perform tasks which are not traditionally ecclesiastical or religious are not 'ministers' of a 'church' entitled to McClure-type protection." Id.
could resist compliance with the reporting requirements only if it could demonstrate that the burden imposed by the requirements would inhibit the exercise of their religious beliefs. 43

Employing the tripartite Free Exercise test, the court in *Southwestern Baptist* determined that no such burden existed. 44 Dispositive of the court’s holding was the fact that the Seminary did not hold any religious tenet which required gender discrimination regarding the employee positions at issue. 45 The court thus reasoned that, because “the relevant inquiry is not the impact of the statute upon the institution, but . . . upon the institution’s exercise of its sincerely held beliefs,” 46 application of Title VII reporting requirements did not impose an impermissible burden for Free Exercise purposes. 47

Only one year later, the Ninth Circuit confronted a sex discrimination challenge lodged against a publishing association in *EEOC v. Pacific Press Publishing Ass’n*. 48 On facts similar to *McClure*, a female employee charged her former employer, a church-affiliated publishing house, of unequal payment of similarly situated male and female employees. 49

Despite its affiliation with the Seventh Day Adventist Church, and the fact that it published only religious materials, the Ninth Circuit found that the publishing house did not constitute a “church” for *McClure* purposes. 50 Moreover, the employee’s position as editorial secretary did not “go to the

43. *Id.* at 286-87.
44. *Id.* at 285-87.
45. *Id.* at 286 (“Since the Seminary does not hold any religious tenet that requires discrimination on the basis of sex, . . . the application of Title VII reporting requirements to it does not directly burden the exercise of any sincerely held religious belief.”).
46. *Id.* at 286 n.8 (quoting *EEOC v. Mississippi College*, 626 F.2d 477, 488 (5th Cir. 1980).
47. *Id.*.
48. 676 F.2d 1272 (9th Cir. 1982).
49. *Id.* at 1274.
50. *Id.* at 1281. In determining the sectarian nature of the publishing house, the court used the standards established earlier in *Southwestern Baptist*. In comparing the publishing house to the seminary in *Southwestern Baptist*, it found that, “Press’ character and purpose clearly are somewhat less sectarian than those of a seminary.” *Id.* at 1282.
heart of the church's function in the manner of a minister or seminary teacher.\textsuperscript{51} This was true even though she held both administrative and discretionary responsibilities as editor of the religious magazine.\textsuperscript{52}

In disposing of the publishing house’s Free Exercise challenge, the court concluded that “enforcement of Title VII’s equal pay provision does not and could not conflict with Adventist religious doctrines. . . .”\textsuperscript{53} The court based this conclusion on the fact that the Church could point to no religious tenets allowing wage discrimination on the basis of sex.\textsuperscript{54} Thus, the Fifth Circuit reasoned, “preventing discrimination could have no significant impact upon the exercise of Adventist belief.”\textsuperscript{55}

3. State Adoption Of The McClure Doctrine

Most recently, in 1992, the Supreme Court of New Jersey reaffirmed the viability of the McClure approach to resolving employment disputes over gender. In \textit{Welter v. Seton Hall University},\textsuperscript{56} the Court upheld a jury award of $45,000 in compensatory damages to four nuns who were unfairly dismissed by a religiously-affiliated university.\textsuperscript{57} The university had defended its decision to terminate the nuns’ teaching contracts based on an order of the Roman Catholic Church which required the nuns to return to their covenant in Toledo, Ohio.\textsuperscript{58} The University admitted that firing the women violated their employment contracts, but argued that their decision was nevertheless motivated by religious concerns.\textsuperscript{59}

In rejecting the University’s assertion, the Supreme Court of New Jersey found the reason advanced by the University to

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\textsuperscript{51} Id. at 1278. \\
\textsuperscript{52} See id. at 1277. \\
\textsuperscript{53} Id. at 1279. \\
\textsuperscript{54} Id. \\
\textsuperscript{55} Id. \\
\textsuperscript{56} 608 A.2d 206 (N.J. 1992). \\
\textsuperscript{57} Id. at 208. \\
\textsuperscript{58} Id. at 208-09. \\
\textsuperscript{59} Id. at 209.
be pretextual. Moreover, while the court acknowledged the authority of the University to designate persons as ministers free from governmental interference, it adopted Fifth Circuit reasoning that "bestowal of such a designation does not control [an institution's] extra-religious legal status." Thus, finding that the nuns "performed no ministerial duties for Seton Hall," the Welter Court decided that the University must be judged similar to any other employer who engaged in unlawful discrimination in violation of Title VII.

Because the employment contracts did not contain any canons of the Roman Catholic faith, the court in Welter did not have to reach the issue of whether the Catholic faith actually motivated the University's behavior. The court hinted at the outcome, however, when it observed that, "although the sincerity of a religious institution's belief may relate to a Court's decision whether to grant a First Amendment-based exemption from neutral and involuntary regulation, it rarely disposes of a Free Exercise challenge to voluntarily assumed contractual obligations."

In this sense, the Welter Court took application of anti-discrimination law a step further than the federal courts; even if religious beliefs condoned the University's behavior, the court nonetheless would allow their civil, contractual obligations to govern. Notwithstanding the controversial nature of this idea, the Welter decision demonstrates the willingness of both federal and state courts to hold religious employers liable for discriminatory conduct that cannot be justified on religious grounds.

60. Id. at 216.
61. Welter, 608 A.2d at 215 (quoting Southwestern Baptist, 651 F.2d at 283).
62. Id.
63. Id.
64. See id. at 217.
65. Id. at 217 (internal citations omitted).
66. Id.
4. The Minimal Burden Of Compliance With Title VII On Free Exercise

While claimants in Title VII cases have not been uniformly successful, the modern tendency of federal courts is to deny efforts by religious entities to justify discriminatory employment decisions on religious grounds. In those federal and state courts which follow McClure, this approach has significant legal implications for churches claiming exemption under the initial inquiry of Free Exercise test. First, the narrow view taken by courts of “ministerial” functions indicates that a wide range of employment positions thought to be beyond the ambit of judicial resolution in fact lie within the courts’ jurisdiction. Moreover, federal courts’ use of the McClure test in determining what constitutes a “church” demonstrates that even pervasively sectarian institutions may be subject to judicial review. The practical consequence of finding that gender discrimination by a church is unsupported by religious doctrine at the non-ministerial level means that application of anti-discrimination laws is not only justified, but critical to ensuring the fair treatment of women in all facets of the employment context that can be reached without violating the Free Exercise Clause.

More fundamentally, the legal consequence of applying Title VII to employment decisions is that the less able a church is to defend sex discrimination on religious grounds, the more likely it is that any burden on its overall exercise of beliefs will be regarded as minimal. Along the same lines, it is important to note that the adoption by the majority of federal courts of a narrow view of ministerial function manifests their disapproval

67. See, e.g., Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991). In Wuerl, a Protestant school teacher contested the non-renewal of her teaching contract by her Catholic Church employer. Id. at 945. The Church’s decision was based upon its belief that Little violated core religious doctrine when she remarried without pursuing the prescribed process available from the Roman Catholic Church for validating the marriage. Id. at 945-46. Although the Third Circuit acknowledged the issues of religious and gender discrimination at state, it nonetheless construed the Title VII exemption for religiously-motivated discrimination broadly to encompass employee performance of both “religious activities” as well as indirect religious functions. Id. at 950. The court thus held in favor of the Church, citing both Free Exercise and Establishment Clause justifications for its decision. Id. at 951.
of the practice of gender discrimination. The approach under McClure could easily have resolved ambiguities regarding the nature of the employment position in favor of the religious authority. However, as the decision in Southwestern Baptist proves, courts are willing to overlook even the fact that an employee is ordained as a minister if doing so permits the state to supervise a greater number of employment decisions. Moreover, as courts increasingly come to view sex discrimination as intolerable, the United States Supreme Court will have difficulty justifying its current neutral stance towards the mounting importance of this issue.

B. DETERMINING WHETHER A COMPELLING STATE INTEREST EXISTS WHICH WOULD JUSTIFY THE MINIMAL BURDEN ON FREE EXERCISE

1. Supreme Court Recognition of State Interest In Eliminating Invidious Forms of Discrimination

In evaluating Free Exercise challenges, courts often utilize a “balancing test” in which the magnitude of the burden on Free Exercise is weighed against the state’s justification in regulation. Historically, only those state interests deemed to be “of highest order” have withstood Constitutional scrutiny when they are found to burden free exercise rights. Reliance

68. This test originated in Sherbert v. Verner, 374 U.S. 398, 403-10 (1963); see supra note 23 discussing Sherbert.

69. Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981). In Thomas, the Court was asked to rule on the validity of a law denying unemployment compensation to a Jehovah’s Witness who quit his job due to religious conflict when his employer assigned him to work on military weaponry. Id. at 709. The argument against allowing him to recover compensation was the state mandate which routinely denied benefits to any person voluntarily leaving a job “without good cause [arising] in connection with [his] work.” Id. at 712. The Indiana Supreme Court had found that no undue burden would be imposed in Thomas’ Free Exercise rights if he were forced to comply with the state law. Id. at 713. It further held that ruling in Thomas’ favor would effectively violate the Establishment Clause. In an eight-to-one opinion, the Supreme Court reversed both findings. Chief Justice Burger confirmed its prior ruling in Sherbert stating that

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden on religion exists.
on this standard has led the United States Supreme Court to strike down conduct, otherwise protected by the First Amend­
ment, which poses a substantial threat to public safety, peace
and order.70 Moreover, the Court has found “certain govern­
ment interests so compelling as to allow even regulations pro­
hibiting religiously based conduct.”71

A good example of the type of state interest the Court
considers sufficiently compelling to override a Free Exercise
claim is demonstrated in Bob Jones University v. United
States.72 In Bob Jones, the Court reviewed a state decision
denying tax-exempt status to a university that discriminated
in its selection procedures on basis of race.73 Recognizing “the
overriding interest in eradicating racial discrimination in edu­
cation,” the Court upheld the state action, finding no First
Amendment violation.74

In 1984, the Supreme Court extended its policy of eradi­
cating invidious discrimination when it denied the right of a
private organization to discriminate its membership on the
basis of sex. In Roberts v. United States Jaycees,75 the Court
considered the constitutionality of subjecting a non-profit na­
tional organization to State anti-discrimination law.76 The
First Amendment rights of free speech and association were at
issue.

In an opinion notable for its candor, the Court recognized
the magnitude of its holding by stating: “There can be no clear­
er example of an intrusion into the internal structure or affairs

Id. at 717-18. In addressing the Establishment Clause issue, Chief Justice Burger
quoted directly from Sherbert in finding that payment of benefits represented “the
governmental obligation of neutrality in the face of religious differences. . . . ” Id.
at 720 (quoting Sherbert, 374 U.S. at 409).
73. Id. at 577. Based on its belief that the Bible forbids interracial dating and
marriage, the University completely denied admission to Blacks until 1971. Id. at
580. Although the University repealed this policy, its revised policy permitted only
blacks married within their race to apply. Id.
74. Id. at 604.
76. Id. at 614-15.
of an association than a regulation that forces the group to accept members it does not desire.\textsuperscript{77} Nonetheless, the Court found the state interest in eliminating gender discrimination to be "of highest order," and the abridgment of speech and association rights incidental.\textsuperscript{78} This was true even though imposing the regulation might "impair the ability of the original members to express only those views that brought them together."\textsuperscript{79}

Critical to the Court's holding in \textit{Roberts} was its determination that the club's objective to foster the development of young men's civic organizations would not be undermined if they were forced to admit women.\textsuperscript{80} Using language strikingly similar to that of lower federal courts, the \textit{Roberts} Court articulated a test for balancing the club's right of expressive association against the state interest in regulation.\textsuperscript{81} Under this test, a club's expressive association right is not overridden by the competing interest in eradicating unlawful discrimination when that interest does not impede the ability of the club to express its ideals.\textsuperscript{82}

Put another way, if membership in a particular organization is not conditioned upon adherence to a philosophy of sex discrimination, that organization cannot posit its belief in that philosophy as a justification for resisting state regulation of gender discrimination. Thus, it would appear that, at the time the Supreme Court was developing the constitutional framework for judging gender discrimination by private associations, its reasoning was being applied simultaneously by the lower federal courts against religious institutions.

\textsuperscript{77} \textit{Id.} at 623.

\textsuperscript{78} \textit{Id.} at 623-24 ("We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms.").

\textsuperscript{79} \textit{Id.} at 623.

\textsuperscript{80} \textit{See} \textit{id.} at 624-25.

\textsuperscript{81} \textit{Id.} at 627.

\textsuperscript{82} \textit{Id.}
2. Legal Implications Of *Bob Jones* And *Roberts*: Regulating Discriminatory Conduct By Religious Institutions

The Supreme Court’s disposition in *Bob Jones* and *Roberts* has profound legal significance for the present dispute; to the extent that religious organizations cannot advance religious justifications for discriminating against women at the non-ministerial level, the state interest in providing equal access to those positions for men and women should outweigh the burden imposed by forcing compliance. Moreover, even when religious justification does exist, the Court’s constitutional jurisprudence with respect to sex discrimination renders Free Exercise arguments equally unpersuasive.

*Bob Jones* makes clear that in some instances even religious conduct may be regulated, while *Roberts* establishes that eliminating gender discrimination constitutes a state interest of the highest importance. Taken together, these cases stand for the proposition that the Free Exercise right to discriminate against women at the non-ministerial level may be overridden even when exercising that right is mandated by religious doctrine. Moreover, the fact that a church discriminates, as opposed to a private organization, does not change the analysis. On the contrary, as the federal cases demonstrate, even those institutions which are so pervasively sectarian that they resemble a church are not exempt from civil liability when they discriminate in an unlawful manner. Given the combined logic of the Supreme Court’s and the lower federal courts’ decisions, attempts by religious institutions to justify sex discrimination outside of those employees actually performing ministerial functions are unlikely to survive the Free Exercise “balancing” test even when the state interest is judged against the strictest standards used by the Supreme Court thus far.

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85. See supra notes 72-74 and accompanying text discussing *Bob Jones*.
86. See supra notes 75-82 and accompanying text discussing *Roberts*.
87. See EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981); see supra notes 38-47 discussing *Southwestern Baptist*. 
C. RELIGIOUS EXEMPTION FROM TITLE VII AS AN OBSTACLE TO THE ELIMINATION OF INVIDIOUS DISCRIMINATION

The final consideration of the Free Exercise test examines implementing the state objective. Sherbert requires that the regulation be the least restrictive means of accomplishing the state objective and that the state objective be compelling.\textsuperscript{88} If the state objective is sufficiently compelling, and exemption from the regulation would undermine that objective, religious authorities may be forced to comply with state regulation.\textsuperscript{89}

In the employment context, efforts to end unjust sex discrimination will be wholly unsuccessful if the church retains absolute discretion in choosing employees for non-ministerial functions. The incompatibility between such discretion and the state objective in eradicating unlawful discrimination is most clear when that interest is broken down into its two respective parts: the societal and the individual interest.\textsuperscript{90}

1. Societal Interests In Regulating Potentially Discriminatory Employment Decisions By Religious Institutions

A key state interest in regulating gender discrimination is the elimination of impermissible and unnecessary discrimination at all levels of employment. The nature of the social interest is such that the larger the segment of the population involved, the more important it is that access to these positions is not unduly restricted. When society permits churches to discriminate in the selection of ministers, it is recognizing that the right to choose religious leaders is distinct from other employment choices. Such decisions underlie the institution itself, and thus, "the perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its mes-

\textsuperscript{89} Id. at 406-07.
\textsuperscript{90} See Mark F. Kohler, Equal Employment or Excessive Entanglement? The Application Of Employment Discrimination Statutes To Religiously Affiliated Organizations 18 CONN. L. REV. 581, 612-14 (1986) in which the author similarly analyzes the state interest in employment discrimination statutes at the societal and individual level.
sage, and interpret its doctrines both to its membership and the world at large. 91

Conversely, the more attenuated a particular position is from the "core" of spiritual beliefs, the greater the state interest in regulating it. 92 This interest reflects the fact that the fewer religious duties involved, the less likely they are to advance the religious mission of the institution. 93 Similarly, the less a position involves the performance of religious responsibilities, the more likely it is that a broad segment of the population are qualified to fulfill it. Permitting religious institutions to discriminate at the non-ministerial level thus directly impedes the ability of the state to ensure that the individuals chosen for these positions are selected according to nondiscriminatory criteria.

2. Individual Interests In Regulating Potentially Discriminatory Employment Decisions By Religious Institutions

The second facet of the state interest involved in regulating church employment decisions is in providing a legal remedy for the individual employee who is injured by unlawful discrimination. 94 Indeed, Title VII itself outlines the procedures by which individuals may initiate proceedings against their employers. 95 Furthermore, the statutory remedies of reinstatement and back pay are available only to individuals. When courts overlook the importance of such remedies, they ultimately undermine the state objective in eliminating unfair discrimination.

91. Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985). The Rayburn decision addressed the issue of Title VII's application to sexual discrimination in pastoral hiring. Carole Rayburn brought the complaint against the Seventh-Day Adventist Church following its denial of her request for employment as an associate in pastoral care. See id. at 1165. Affirming the district court, the Fourth Circuit held that state scrutiny of Rayburn's claim would constitute both significant infringement on the Church's Free Exercise rights, as well as impermissible entanglement with its religious doctrine. Id. at 1171.
92. See Kohler, supra note 90, at 615.
93. Id.
94. See Kohler, supra note 90, at 613.
A primary example of this tendency is the Sixth Circuit's 1985 decision in *Dayton Christian Schs. v. Ohio Civil Rights Comm'n*.\(^{96}\) In *Dayton*, the court reviewed a sex discrimination claim by a school teacher dismissed from her teaching position shortly after becoming pregnant.\(^{97}\) Although a state statute made it unlawful for "any employer . . . to discharge without just cause, to refuse to hire, or otherwise to discriminate [on the basis of sex],"\(^{98}\) the Sixth Circuit declined to apply this statute to the school's actions.\(^{99}\) This action had the practical effect of dismissing the teacher's claim. Although the court identified the state interest in eliminating sex discrimination from employment as "substantial and compelling," it found that this state interest did not outweigh the burden on the school's Free Exercise right to dismiss its own employees.\(^{100}\) Moreover, the court estimated that the denial of tax exemptions and other public programs to the school represented less burdensome means of accommodating that state interest.\(^{101}\) By declining to review the individual sex discrimination charge at issue, the *Dayton* Court completely disregarded the individual interest at stake. Although the Sixth Circuit was later reversed on appeal, the Supreme Court merely reversed on procedural grounds, never addressing the merits of the teacher's claim.\(^{102}\)

3. The Legal And Practical Implications Of Denying Societal And Individual Interests In Ending Discrimination

Indeed, an issue frequently overlooked by courts and commentators alike, is the way in which judicial indifference to individual remedies undermines the larger social incentive.\(^{103}\)

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\(^{96}\) 766 F.2d 932 (6th Cir. 1985).

\(^{97}\) Id. at 934-35.


\(^{99}\) *Dayton* 766 F.2d at 961.

\(^{100}\) Id. at 953-56.

\(^{101}\) Id. at 955.


\(^{103}\) As one observer complained of the ruling in *Dayton Christian Sch. v. Ohio Civil Rights Comm'n*, 766 F.2d 932 (6th Cir. 1985), "the decision grossly underestimated the magnitude of the combined societal and individual state interest and the degree to which the accommodation of the school's free exercise would undermine [that] interest." See Kohler, *supra* note 90 at 614.
Deprivation of individual rights in the face of clear discrimination indirectly discourages others from bringing equally legitimate claims. Without these subsequent claims, the state objective in ending discrimination is not merely disabled, but is made legally impossible. Most importantly, in overlooking the combined impact of individual and social remedies, the Dayton decision makes the exercise of a religious right more important than both. In focusing exclusively upon the larger social interest in eliminating gender discrimination, it provides the vehicle by which a religious entity may, in certain circumstances, use their religious liberty to oppress individual rights. Such a result not only lacks support in language of the First Amendment Free Exercise Clause, but is repugnant to the Constitution itself.

III. ESTABLISHMENT CLAUSE ANALYSIS

Unlike the Free Exercise Clause, which rests on notions about deference to religious liberty, the Establishment Clause speaks more to the neutral stance taken by both religion and government with respect to each other. Specifically, the Establishment Clause forbids “sponsorship, financial support, and active involvement of the sovereign in religious activity.” Because most Establishment Clause claims concern challenges to government aid, the Supreme Court crafted a tripartite test to determine parameters of state involvement: first, a state law must have a secular purpose; second, it must have a primary effect that neither advances nor inhibits religion; and finally, it must not foster excessive entanglement between government and religion.

104. U.S. CONST. amend. I.

105. Walz v. Tax Comm'n., 397 U.S. 664, 668 (1970). The Court in Walz addressed the legality of tax exemptions for property used by religious organizations for worship. Concerned about the potential for “excessive entanglement,” the Court found the tax exemptions to be constitutional. Id. at 667-80. The Walz Court's main basis for concern was the manner in which the elimination of the tax exemption might embroil government officials in litigation against the churches regarding default on tax obligations. The Court thus concluded that such potential litigation posed the requisite level of "ongoing and continuous surveillance" leading to an impermissible degree of entanglement.

106. Lemon v. Kurtzman, 403 U.S. 602 (1971). Lemon involved the Court's review of two state programs which involved state funded salary payments to parochial school teachers of students from low socio-economic backgrounds. Chief Jus-
A. THE ENTANGLEMENT PRONG

When considering the application of anti-discrimination to religious institutions, it is the third prong which is most often implicated and on which opponents of application tend to rely. One commentator has argued that non-entanglement principles of the Establishment Clause lend substantial theoretical protection to churches who base their right to discriminate on religious doctrine. An analysis of the Supreme Court's jurisprudence with respect to entanglement reveals, however, that such claims misapprehend the entanglement issues involved in the employment discrimination context.

Past Supreme Court holdings indicate that when religious entities engage in commercial activity, some measure of regulatory oversight is permitted. As one might expect, in those instances where the Court has sanctioned such involvement, it has done so by finding that the regulation at hand "bear[s] no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion." In 1990, in Jimmy Swaggert Ministries v. Board of Equal-
ization of California,\textsuperscript{110} the Court reaffirmed its position on non-entanglement when it upheld a state's denial of sales tax exemption to a religious organization whose funding was generated in part by the sale of religious material.\textsuperscript{111} In \textit{Swaggert}, the Court determined that because the organization had a sufficient nexus with the state, it could be required to collect and report its mail-order sales to California purchasers.\textsuperscript{112} Critical to the Court's holding was the fact that imposing the tax did not require the state to evaluate the religious content of material sold, but only the sale of that material, "a question which involves only secular determination."\textsuperscript{113} In its holding the Court thus reaffirmed the principle that "generally applicable administrative and record keeping regulations may be imposed on religious organizations without running afoul of the Establishment Clause."\textsuperscript{114}

\section*{1. Swaggert Guidelines And Permissive Entanglement}

The \textit{Swaggert}\textsuperscript{115} decision is important for several reasons.\textsuperscript{116} First, \textit{Swaggert} stands for the proposition that generally applicable legislation is favored over that which has the effect of curtailing religious liberty.\textsuperscript{117} Because churches could potentially qualify as employers for Title VII purposes, requiring them to abide by its strictures is entirely consistent with the tenor and underlying policy of \textit{Swaggert} which requires religious institutions to comply with generally applicable laws. This is particularly true when such religious authorities are actually motivated by non-religious, rather than religious, factors. Furthermore, \textit{Swaggert} demonstrates that the Supreme Court will permit some level of state entanglement with

\begin{itemize}
  \item 110. 493 U.S. 378 (1990).
  \item 111. \textit{Id.} at 395.
  \item 112. \textit{Id.} at 394-95.
  \item 113. \textit{Id.} at 396.
  \item 114. \textit{Id.} at 395 (quoting Hernandez v. Commissioner, 490 U.S. 680, 696-97 (1989)).
  \item 116. \textit{See supra} notes 108-119 and accompanying text discussing \textit{Swaggert}.
  \item 117. The Court's reasoning depends largely on its belief that California's sales tax does not discriminate against sales of religious materials. As the Court explains, "there is no danger that appellant's religious activity is being singled out for special and burdensome treatment." \textit{Swaggert}, 493 U.S. at 390.
\end{itemize}
religious entities provided that such involvement is limited to regulating their secular activities.\textsuperscript{118}

Finally, the concerns of the Swaggert Court set forth useful guidelines for judging excessive entanglement in the employment context. In applying anti-discrimination laws, court must consider: first, whether the state is imposing a substantial administrative burden on the institution; next, whether the proposed regulation involves detailed monitoring and close administrative contact with the institution; and finally, whether the state must inquire into religious doctrine of the institution in order to regulate its decisions.\textsuperscript{119}

\textbf{a. The Minimal Administrative Burden Under Title VII}

So long as employment decisions at the non-ministerial level are not justified by religious tenets, the state does not violate Free Exercise principles when it reviews those decisions.\textsuperscript{120} Similarly, requiring church compliance with state investigative procedures does not represent an impermissible administrative burden in violation of the Establishment Clause. Because charges of sex discrimination involve a limited and highly specific inquiry, the burden imposed on an institution defending against the charge is substantially less than that in Swaggert.\textsuperscript{121} Thus, it is not surprising that the majority of federal courts who permit regulation find the corresponding burden to be minimal.\textsuperscript{122}

In the 1980 decision of \textit{EEOC v. Mississippi College},\textsuperscript{123} the EEOC had attempted to subpoena a university for records

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{118} See supra note 104 and accompanying text.
\item \textsuperscript{119} See \textit{Swaggert}, 493 U.S. at 392-99.
\item \textsuperscript{120} See supra notes 21-103 and accompanying text discussing the Free Exercise Clause.
\item \textsuperscript{121} The sales tax in \textit{Swaggert} extended to the daily operation of the religious organization in the sale of religious material. \textit{Swaggert}, 493 U.S. at 379-80. By contrast, the highly specific nature of an employment discrimination claim would require an institution to defend a single employment decision or, at most, a particular employment practice at issue.
\item \textsuperscript{122} See supra note 28.
\item \textsuperscript{123} 626 F.2d 477 (5th Cir. 1980).
\end{itemize}
\end{footnotesize}
regarding a hiring decision which passed over a qualified female employee.\footnote{124. \textit{Id. at} 478.} The University refused to comply with the order on the grounds that compliance would foster excessive entanglement in violation of the Establishment Clause.\footnote{125. \textit{Id. at} 480.} Recognizing that Title VII exempted only religious discrimination, and finding no religious tenet which sanctioned the university's conduct, the Fifth Circuit ordered the University to produce the documents.\footnote{126. \textit{Id. at} 487-88.} The subpoena demanded a list of all staff members showing their name, race, sex, religion, job description, pay and educational level.\footnote{127. \textit{Id.}} Information pertaining to faculty recruiting and promotion, and access to all administrative positions during the period in issue, were also required.\footnote{128. \textit{EEOC, 626 F.2d at} 480-81.} Despite the comprehensive nature of the investigation, compliance with the procedure was held to be only minimally burdensome.\footnote{129. \textit{Id. at} 487.}

The same result was reached by the Fifth Circuit one year later in \textit{EEOC v. Southwestern Baptist Theological Seminary,}\footnote{130. 651 F.2d 277 (5th Cir. 1981).} when the Court again reviewed the parameters of permissible regulation by the EEOC over religious institutions. Although the Seminary was not under investigation at the time, the Commission requested that the Seminary submit to biennial reporting requirements.\footnote{131. \textit{Id. at} 279-80.} The Fifth Circuit recognized that the compliance burden was more demanding than the burden which it upheld in \textit{Mississippi College}. Nevertheless, it regarded the Seminary's complaints as "largely hypothetical."\footnote{132. \textit{Id. at} 286.} Moreover, even though the regulation would be "ongoing" in a way which was not present in the previous case, the court determined that, "because it is not an ongoing interference with the Seminary's religious practices," the administrative burden was "consequently minimal."\footnote{133. \textit{Id.}} Because the government sought "merely to gather statistical information" from the church, the court concluded that an even stronger
case for allowing regulation existed than in Mississippi College.\textsuperscript{134}

Although the decisions of the Fifth Circuit appear to go beyond the guidelines set forth in Swaggert, a factual comparison proves that the federal decisions are in fact entirely consistent. In Swaggert, the Supreme Court found that the administrative and pecuniary burden did not rise to a "constitutionally significant level."\textsuperscript{135} Even though the administrative burden of submitting reports would continue on a regular basis and the costs of collecting and remitting the tax amounted to more than $150,000.\textsuperscript{136} Viewed against the facts of Swaggert, the burden imposed upon the religious institutions in Mississippi College and Southwestern Baptist can hardly be seen as commensurate. Even when the nature of the compliance burden is ongoing, as in Southwestern Baptist, such regulation still comports with the regulatory standards in Swaggert. More fundamentally, the burden imposed on religious entities engaged in gender discrimination is the same as that imposed on any other organization that discriminates unlawfully. Thus, in the absence of religious justification, such a result is entirely appropriate under the Establishment Clause.

b. \textit{Title VII's Avoidance Of Detailed Monitoring And Close Administrative Contact}

The Supreme Court’s decision to allow government surveillance in Swaggert\textsuperscript{137} rested upon its belief that the imposition of the neutral tax law did not create an overly invasive level of contact between secular and religious authorities.\textsuperscript{138} Specifically, the type of involvement prohibited by the state is “on-site continuous inspection of appellant’s day-to-day operations.”\textsuperscript{139} According to the Swaggert Court, such involvement represents

\begin{itemize}
  \item \textsuperscript{134} Id.
  \item \textsuperscript{135} Swaggert, 493 U.S. at 394.
  \item \textsuperscript{136} Id. at 382.
  \item \textsuperscript{137} 493 U.S. 378 (1990).
  \item \textsuperscript{138} See supra notes 108-119 and accompanying text discussing Swaggert.
  \item \textsuperscript{139} Swaggert, 493 U.S. at 395 (quoting Walz v. Tax Comm’n of the City of N.Y., 397 U.S. 664, 675 (1970)).
\end{itemize}
the kind of "official and continuing surveillance" which impermissibly entangles government in religious affairs.¹⁴⁰

Application of anti-discrimination laws to religious authorities successfully eschews this type of prohibited involvement. Insofar as church practices comport with the strictures of Title VII, their decisions remain wholly within their discretion, subject to investigative review only when an actual dispute arises. Courts struggling with the entanglement issue may thus rely, as did the Ninth Circuit,¹⁴¹ on the fact that EEOC actions must be initiated by an employee who files charges with the Commission. The EEOC itself lacks independent authority to initiate such actions or issue coercive orders to enforce Title VII.¹⁴²

Furthermore, as the Court held in Swaggert, "routine regulatory interaction" between secular and religious bodies "does not of itself violate the non-entanglement command."¹⁴³ Thus, if the collection of taxes and attendant record-keeping satisfies this command, it is difficult to see how entanglement is any more implicated by record-keeping of employment decisions. On the contrary, because the supervisory authority of the state typically extends only to situations where an actual dispute arises, the potential for significant administrative contact is considerably less than that posed in Swaggert. Federal courts have adopted this exact reasoning in the most recent decisions regarding church discrimination.

In 1993, for example, the Second Circuit concluded that there was no impermissible contact in the review of an age discrimination challenge to a pervasively sectarian high school.¹⁴⁴ In DeMarco, a school teacher contested the

¹⁴⁰ Id. at 393.
¹⁴¹ See EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272 (9th Cir. 1982) (finding EEOC actions did not violate excessive entanglement concern of the Establishment Clause).
¹⁴² See 42 U.S.C. § 2000e-5(b) (1988) (recognizing only charges "filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission").
¹⁴⁴ DeMarco v. Holy Cross High Sch., 4 F.3d 166 (2d Cir. 1993).
nonrenewal of his teaching contract under the ADEA.\textsuperscript{145} The school in turn argued that application of the ADEA to its employment decision violated the non-entanglement principle of the Establishment Clause by generating unwarranted interference with their labor relations policy.\textsuperscript{146}

Following a previous line of federal court decisions, the Second Circuit held that the "narrow focus of the ADEA" would not result in the type of "detailed monitoring and close administrative contact" prohibited under Hernandez v. Commissioner.\textsuperscript{147} The court instead characterized the investigation as a limited inquiry because the sole question at issue was whether the teacher was unjustifiably treated differently because of his age.\textsuperscript{148} The court cited Hernandez for the proposition that routine regulatory interaction is permitted under the Establishment Clause.\textsuperscript{149} Application of the ADEA, in the court's opinion, "requires just such routine regulatory interaction between government and a religious institution."\textsuperscript{150}

2. Title VII's Avoidance Of Inquiries Into Religious Doctrine

Because the Establishment Clause mandates that the government assume a neutral stance with respect to religion, the most important concern of the Supreme Court in addressing employment regulation is that courts do not become embroiled in ecclesiastical disputes, or, as one commentator put it, "difficult classifications of what is or is not 'religious,' 'correct doctrine,' or 'worship'."\textsuperscript{151} Some commentators argue that imposition of anti-discrimination law inescapably results in entanglement.\textsuperscript{152} Such an argument, however, fails to comprehend that the essential nature of the employment dispute

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{145} Id. at 168.
\item \textsuperscript{146} Id. at 169.
\item \textsuperscript{147} Id. at 170 (citing Hernandez v. Commissioner, 490 U.S. 680, 696-97 (1989)).
\item \textsuperscript{148} Id.
\item \textsuperscript{149} DeMarco, 4 F.3d at 170.
\item \textsuperscript{150} Id.
\item \textsuperscript{151} Esbeck, supra note 107, at 384-85.
\item \textsuperscript{152} See id. at 387; 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 (1981).
\end{enumerate}
\end{footnotesize}
remains the same regardless of the institution which discriminates. Even when a church is involved in the investigation, the precise issue—whether a particular employee was the victim of unlawful discrimination—is a procedural, rather than doctrinal, consideration.

At the non-ministerial level, the vast majority of gender discrimination cannot be defended on religious grounds. In these cases, a court reviewing a particular decision need not be familiar with particular religious faith at issue because evaluation of the employer’s motives resembles a secular determination. Thus, when a court applies anti-discrimination law to a religious entity, it is ensuring only that the process by which men and women are hired comports with legal strictures of Title VII. Moreover, even when a religious entity does advance a doctrinal justification, the inquiry may still be one of pretext rather than doctrine. As the Second Circuit reasoned in DeMarco, “the inquiry is directed toward determining whether the articulated purpose is the actual purpose for the challenged employment-related act.”

The strongest argument concerning the potential for excessive entanglement is set forth in Oliver Thomas’ analysis of EEOC v. Southwestern Baptist Theological Seminary. In Southwestern Baptist, the court determined that, although members of the Seminary staff were ordained as ministers, because they did not perform “ministerial duties,” decisions regarding their employment were subject to judicial scrutiny. The court delineated as “ministerial” those duties which included “swearing in offices, conducting wedding and funerals, and dedicating babies.” Although the Fifth Circuit found such standards workable, as Thomas observes, “such line drawing between religious and non-religious functions involves significant governmental entanglement with religion and,

153. See supra notes 21-103 discussing the Free Exercise Clause.
154. See DeMarco v. Holy Cross High Sch., 4 F.3d 166, 170-71 (2d Cir. 1993); see also supra notes 144-46 and accompanying text discussing DeMarco.
155. Id. at 171.
156. See Thomas, supra note 11, at 105 (analyzing EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981)).
157. Id. at 285.
158. Id. at 284.
therefore, is highly suspect under the First Amendment."\textsuperscript{159}

Insofar as the right of churches to discriminate depends on the nature of the employment position in issue, Thomas correctly perceives the potential for courts to become embroiled in complicated determinations of what constitutes ministerial versus non-ministerial functions. Nevertheless, it is important to recognize that "line-drawing" is crucial to the execution and enforcement of anti-discrimination law against religious institutions. Because legal determinations concerning employment discrimination by a religious entity depend on whether the employee position is ministerial, courts must have some means of distinguishing between ministerial versus non-ministerial duties. Absent a standard, nothing can prevent churches from prevailing against discrimination claims by defending every discriminatory decision on the grounds that the employee assumed at least some clergy-like responsibilities.

"Line-drawing" enables courts to differentiate among various employee positions, thereby aiding the process of resolving disputes where the employee's duties are not easily defined. In cases where employee responsibilities are clearly non-ministerial, "line-drawing" also reduces the need for particularized inquiries which the Supreme Court has traditionally sought to avoid. The Supreme Court's jurisprudence demonstrates that the state interest in eradicating invidious sex discrimination may override such First Amendment guarantees as free speech and the right to associate.\textsuperscript{160} If the elimination of gender discrimination is indeed so compelling,\textsuperscript{161} than this type of "line drawing" is necessary to accommodate both religious freedom and gender equality so that the preservation of one does not occur at the expense of the other.

\textsuperscript{159} Thomas, supra note 11, at 105.
\textsuperscript{160} See Roberts v. United States Jaycees, 468 U.S. 609 (1984); see also supra notes 21-103 and accompanying text discussing the Free Exercise Clause.
\textsuperscript{161} See Roberts, 468 U.S. at 623-24.
B. CONSTITUTIONAL RAMIFICATIONS OF THE FREE EXERCISE AND ESTABLISHMENT CLAUSE

In evaluating the employment dispute under the Establishment Clause, it is important to recognize the overlapping Constitutional considerations of the Free Exercise and Establishment Clause which theoretically compel the application of anti-discrimination law to religious entities. Under the First Amendment, private institutions cannot claim exemption from anti-discrimination laws when their conduct implicates state interests of the "highest order".162 Religious entities, on the other hand, are permitted to discriminate on the basis of religion.163

As the Free Exercise discussion demonstrates, however, gender discrimination at the non-ministerial level is generally not supported by religious doctrine, but rather, represents secular employment decisions. Therefore, when courts permit religious institutions to commit sex discrimination outside ministerial functions, the courts are not only allowing religious institutions to engage in illegal conduct, but they are insulating the institutions from liability when they do so.

From a constitutional perspective, religious institutions are being permitted to engage in "secular"-type decisions which are forbidden to their private counterparts. Consequently, this legal advantage elevates religious entities above private institutions with respect to generally applicable law; and as the Supreme Court jurisprudence demonstrates,164 this kind of unequal treatment is precisely the type of promotion and sponsorship "respecting an establishment of religion"165 that the Establishment Clause historically forbids.

162. See supra notes 21-103 and accompanying text discussing the Free Exercise Clause.
165. U.S. CONST. amend. I.
IV. CHURCH AUTONOMY ANALYSIS

Church autonomy, as the concept suggests, involves the right of religious institutions to function as autonomous, self-governing units when deciding matters of faith, governance or administration. The Supreme Court has viewed this decision-making authority as an extension of Free Exercise and Establishment Clause principles, and thus, resolution of ecclesiastical matters is traditionally unreviewable by civil authority. Such considerations as church governance and administration are seen as internal matters within the province of the institution itself.

Deference to church decision making in these ecclesiastical matters has lead Douglas Laycock to conclude that “the right of autonomy logically extends to all aspects of church operation.” While this notion is not entirely inconsistent with past Supreme Court rulings, later decisions are hardly as supportive of Laycock’s position as he would have us believe.

A. DECLINING STRENGTH OF THE CHURCH AUTONOMY PRINCIPLE

In arguing that all church decisions should be immune from judicial scrutiny, Laycock relies on seminal decisions such as Watson v. Jones and Serbian Eastern Orthodox Diocese.

166. See Thomas, supra note 11, at 89.
167. See Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871). Watson represents the Supreme Court’s first confrontation with internal church dispute. Litigation arose when the Walnut Street Presbyterian Church of Louisville, Kentucky, suffered a split due to an internal mandate that divided its members. In resolving the ensuing dispute, the Court looked to the hierarchial policy within the Presbyterian Church and determined that its highest authoritative body, the General Assembly, must issue the ultimate dispute resolution. Id. at 733-35. The Court adhered strongly to the notion that Federal Courts are inappropriate to resolve matters involving religious doctrine and thus it was binding on the courts to accept the final rulings of the General Assembly.
169. Laycock, supra note 152, at 1397.
170. 80 U.S. (13 Wall.) 679 (1871).
v. Milivojevich which reflect the Supreme Court’s early def­erential approach to the autonomy issue. In doing so, how­ever, Laycock ignores later cases which undercut his expansive notion of church autonomy.

The first in a line of cases to do so was Jones v. Wolf in which the Court dispensed with the notion of absolute defer­ence. In its place the Court expressly sanctioned the applica­tion of “neutral principles of law” to internal property dis­putes. The Supreme Court thus gave lower courts two alter­native methods of resolution when faced with property divi­sion disputes: courts could either defer to the “authoritative ecclesiastical body,” or examine religious documents them­selves in order to discern legal intent. Although the latter approach precluded courts from resolving questions of religious doctrine, this grant of discretion to civil courts, to “substitute this conventional dispute-resolution method in place of defer­ence,” significantly undermined any absolute notion of church autonomy.

1. Dayton And The Denial Of Investigative Immunity

Church autonomy was further eroded with the 1986 deci­sion of Ohio Civil Rights Commission v. Dayton Christian Schools. In Dayton, the Supreme Court finally confronted the application of anti-discrimination law to a parochial high school. The school had terminated the teaching contract of a female employee, Linda Hoskinson, based upon its religious belief that mothers of infant children should not assume work responsibility outside the home. In response to the teacher’s charge of sex discrimination, the state initiated an

172. Laycock, supra note 152 at 1397.
174. Id. at 602.
175. Id. at 601.
176. Id.
178. Id. at 621-22.
179. Id. at 623.
investigation of school employment policies. The school promptly refused to submit to the investigation.

The issue ultimately before the court was the right of the commission to exercise jurisdiction over the school under the First Amendment. Although the Supreme Court declined to review the school teacher's specific claim, it unanimously held that the exercise of jurisdiction over and the investigation of the parochial school did not violate the First Amendment.

The legal impact of the *Dayton* decision upon the present dispute is twofold. First, on its face, the opinion strongly undercuts positive law support for a theory of investigative immunity for religious institutions. This principle, as it translates in the employment context, means that churches who claim process-based immunity from enforcement of employment discrimination law must look to something other than legal precedent to support their claim. Moreover, any claim to autonomy which rests on entanglement principles is also likely to be unsuccessful after *Dayton*.

Although *Dayton* did not expressly deal with entanglement issues, and although the entanglement issue primarily raises Establishment Clause concerns, Laycock believes that "entanglement cases... support a broad rule of church autonomy." However, the removal of investigative immunity from the religious institution at issue, and the corresponding involvement between that institution and the state, indicate that Laycock's theory cannot find support in *Dayton*.

2. Erosion Of Catholic Bishop

Professor Laycock's reliance on the Supreme Court decision in *NLRB v. Catholic Bishop of Chicago* is equally unpersuasive. In *Catholic Bishop*, the Court examined wheth-

180. Id.
181. Id. at 624.
183. Laycock, supra note 152, at 1397.
185. See Laycock, supra note 152 at 1400.
er the National Labor Relations Act (hereinafter "the Act") would violate the First Amendment by granting the NLRB power to regulate labor relations between lay faculty and their parochial school employers. 186 The Court applied a test which initially looked at whether application of the Act would raise serious First Amendment concerns. 187 Because it did, the Court then decided whether Congress expressed an affirmative intent to apply the Act to religious institutions. 188 In the absence of such expression, the Court presumed that Congress did not intend the statute to apply to the case at issue. 189

Recognizing that NLRB supervision over the School could result in excessive entanglement of government with religion, the Court refused to allow the Board to exercise that power. 190 In a 5-4 opinion which provoked vigorous dissent, the Court held that, despite the Act's broad definition of "employer," Congress did not intend to bring the school within the jurisdiction of the Board. 191

Whether the Catholic Bishop Court was sincere in its statutory construction of the Act is questionable given the Court's later language: "We decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." 192 The Court instead focused upon the likelihood that resolution of labor practice complaints by the NLRB would "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." 193

Although Laycock emphasizes Catholic Bishop as supporting his argument, 194 narrow statutory constructions of Title

186. Catholic Bishop, 440 U.S. at 491.
187. Id. at 495-96.
188. Id.
189. Id.
190. Id. at 502.
191. Catholic Bishop, 440 U.S. at 507.
192. Id. at 507.
193. Id. at 502.
194. See Laycock, supra note 152, at 1399-1407.
VII have consistently led federal courts to reach the opposite conclusion. Catholic Bishop has thus been eroded, rather than followed, by most circuit courts deciding employment discrimination disputes.

In DeMarco v. Holy Cross High School, for example, the Second Circuit determined that application of the ADEA to a Catholic parochial school did not pose a serious risk of entanglement under Catholic Bishop. Although application of the ADEA would raise serious constitutional concerns, thus implicating the first prong of the Catholic Bishop test, the court found that ADEA actions did not violate the Establishment Clause. In comparing the facts of Catholic Bishop to the case at bar, the court noted “the important distinction between the ongoing government supervision of all aspects of employment required under labor relations statutes like the NLRA and the limited inquiry required in anti-discrimination disputes.” Significantly, the DeMarco court held that, even if the case did present serious entanglement concerns, the reasoning of Catholic Bishop still supported application of the ADEA because Congress implicitly intended to apply the ADEA to religious institutions. Following “principles of statutory construction enunciated by the Supreme Court in NLRA the Court found that “religious institutions that otherwise qualify as ‘employers’ are subject to Title VII provisions relating to discrimination based on race, gender and national origin.”

A result similar to DeMarco was reached only a month later by the Third Circuit in Geary v. Visitation of the Blessed Virgin Mary School. In holding the ADEA applicable to a church-operated elementary school, the Court once again considered the distinction between the “pervasive jurisdiction” in Catholic Bishop versus the “simple prohibitions” of the

195. 4 F.3d 166 (2d Cir. 1993).
196. Id. at 172.
197. Id.
198. Id. at 169.
199. Id. at 172.
200. DeMarco, 4 F.3d at 172-73.
201. Id. at 173.
202. 7 F.3d 324 (3d Cir. 1993).
ADEA. Unlike DeMarco, however, the Third Circuit did not reach the issue of Congressional intent, but instead focused upon the potential for entanglement if the institution was forced to comply with ADEA policy. Because the Third Circuit found “an absence of any direct conflict between the ADEA’s secular prohibition and the proffered religious doctrine,” it concluded that there was no need to invoke the interpretive rule of Catholic Bishop.

The Geary court’s analysis went beyond that of the Second Circuit in DeMarco by considering challenges to the good faith of an institution whose proffered reason for an employment decision may be pretextual. In the Geary court’s opinion, such a determination still would not run afoul of entanglement concerns in Catholic Bishop. Contrary to the Supreme Court’s concern that state regulation of labor relations “necessarily involve inquiry into the good faith of [religious entities],” the Third Circuit held that “a conclusion that the religious reason did not in fact motivate dismissal would not implicate entanglement since that conclusion implies nothing about the validity of the religious doctrine or practice and, further, implies very little about the good faith with which the doctrine was advanced to explain the dismissal.

Finally, while the Catholic Bishop Court was concerned with the “process of inquiry” involved in labor relations investigation and its attendant potential for judicial intrusion into church doctrine, the Third Circuit found such concerns unpersuasive. According to the Geary court, asking an institution about the motives behind its action, at most, calls upon that institution to explain the application of its own doctrine. Moreover, because courts are restricted from passing judgment on validity of this doctrine, “the burden of the religious institu-

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203. Id. at 328.
204. Id.
205. Id. at 331.
206. Id. at 330.
207. Geary, 7 F.3d at 330.
209. Geary, 7 F.3d 324 at 330.
tion to explain is considerably lighter than in a non-religious employer case.\textsuperscript{1210}

3. Dual Importance Of The Recent Cases Which Erode Catholic Bishop

While the language of the \textit{DeMarco}\textsuperscript{211} and \textit{Geary}\textsuperscript{212} decisions is not couched in terms of church autonomy, their holdings clearly affect the extent to which religious institutions may regard themselves as self-governing units insulated from government regulation. Common to both decisions is a tendency to regard discrimination investigations as only minimally invasive of church autonomy. This tendency in turn fosters a greater willingness of courts to challenge church authority in a manner previously reserved for non-religious institutions.

The dicta in \textit{Geary} is particularly damaging to the notion of church autonomy because it suggests that even pretextual inquiries into the good faith of an institution may be condoned as religiously neutral. Viewing such inquiries as neutral not only grants the courts greater latitude in investigating discrimination disputes, but an easier means of imposing liability when discriminatory motives are suspected. Moreover, these consequences are entirely consistent with the Supreme Court's \textit{Dayton}\textsuperscript{213} decision which similarly exposed religious institutions to investigative scrutiny. Taken together, the federal decisions seriously discredit religious institutions who might resist compliance with anti-discrimination regulation on church autonomy grounds.

It is important to realize that the \textit{DeMarco} and \textit{Geary} decisions, while ostensibly departing from traditional Supreme Court jurisprudence, are in fact supportive of the Court's general stance toward church autonomy. Autonomy principles are in place to ensure that there is no governmental encroachment into the “substantially religious activities and purpose” of secu-

\textsuperscript{210} Id.
\textsuperscript{211} 4 F.3d 166 (2d Cir. 1993).
\textsuperscript{212} 7 F.3d 324 (3d Cir. 1993).
lar entities;\textsuperscript{214} thus, the rationale which denies exemption from Free Exercise and Establishment Clause principles applies with equal force to church autonomy. A church which is unable to justify its non-ministerial employment decisions on religious grounds should not be permitted to argue in favor of autonomy concerning the "ecclesiastical" nature of the dispute.

Absent the necessary religious justification, courts are thus left to rule on the legality of an administrative choice based on secular considerations or, in other words, a civil issue.\textsuperscript{215}

\textbf{B. THE CIVIL NATURE OF RELIGIOUS EMPLOYMENT DISPUTES}

As the foregoing discussion implies, employment disputes are neither internal nor purely ecclesiastical. One example of the way in which religious employment disputes are not internal is the obvious situation when the plaintiff herself is not a member of the church which discriminates against her. Such a situation becomes increasingly difficult to classify as "internal" the more attenuated the position is from ministerial duties. More fundamentally, the interests protected in civil rights actions are not only those of the parties themselves, but those of the public at large. As one commentator observed: "The content of church policy is an 'internal matter'; the lawfulness of that policy is not."\textsuperscript{216} Thus, a compelling reason for holding churches accountable for their discriminatory behavior is that religious institutions have enormous capacity to influence behavior and moral convictions far beyond the church polity itself. Insofar as the treatment of women within a religious institution indirectly impacts other spheres of society, those who suffer the consequences of unfair treatment have a vital interest in the regulation of church behavior.

\textsuperscript{214} Catholic Bishop, 440 U.S. at 501.

\textsuperscript{215} See Young & Tigges, Into the Religious Thicket—Constitutional Limits on Civil Court Jurisdiction Over Ecclesiastical Disputes, 47 OHIO ST. L. J. 475 (1986) (identifying the resolution of such disputes as civil in nature).

1. Traditional Treatment Of Church Autonomy

In the church autonomy context, there is a strong case for deferring to a religious institution on matters that are genuinely internal to the institution and rest on religious principles. However, according to the Supreme Court in *Jones v. Wolf*, disputes over church property are not internal. If such disputes are outside the exclusive authority of the church, then the widespread deleterious effects of gender discrimination certainly removes it from being an internal church consideration. Rather, as one critic of church autonomy concludes, "If *Jones* undercuts ex post church autonomy in disputes that are substantially 'internal,' there can be no case left for such autonomy when external interests mount."218

Given the recent federal courts' hostile disposition toward church-dominated employment discrimination disputes, attempts to wrest church autonomy on ecclesiastical principles will also fail. In his argument concerning the continued viability of the church autonomy concept, Oliver Thomas looks to the 1987 decision in *Crowder v. Southern Baptist Convention*.219 In *Crowder*, the Eleventh Circuit refused to settle a procedural argument regarding the election of officers within the Southern Baptist Convention.220 This refusal to "enter the Baptist fray"221 led Thomas to conclude that "*Crowder* is ample testimony to the continued viability of the church autonomy principle."222

2. A Departure From Traditional Jurisprudence

Only five years before *Crowder*, however, the Supreme Court of New Hampshire proved that it was not only willing to resolve an intrachurch dispute, but willing to apply the legal

220. See *Crowder*, 828 F.2d at 719-21.
221. Thomas, *supra* note 11 at 93.
222. Id. at 93.
standard previously reserved only for private property disputes.\textsuperscript{224} In \textit{Reardon v. Lemoyne},\textsuperscript{225} four nuns contested the nonrenewal of their teaching contracts by their Catholic school employer.\textsuperscript{226} Their legal conflict with the authorities of the Roman Catholic diocese turned on the interpretation of specific provisions in the contract relating to termination of their employment. The issue was one of contract ambiguity.

Although the Roman Catholic authorities urged the court to apply the deference rule and deny jurisdiction, the \textit{Reardon} court instead cited \textit{Jones} for the proposition that religious entities are not totally immune from responsibility under civil law.\textsuperscript{227} Therefore, because the controversy at hand involved contractual rights outside the doctrinal realm, the court reasoned that accepting jurisdiction and rendering a decision would not violate the First Amendment.\textsuperscript{228} Moreover, the court concluded that it would be “unfair and illogical to deny access to the civil courts in non-doctrinal matters to parties who have voluntarily entered into civil contracts.”\textsuperscript{229}

The Supreme Court of New Hampshire authorized the trial court to resolve the dispute by applying ordinary standards of contract law.\textsuperscript{230} In addition to evaluating the reasons proffered by the school, the trial court could consider “extrinsic evidence of dismissal practices at the Sacred Heart School and elsewhere within the diocese.”\textsuperscript{231} The Supreme Court warned against passing judgment on contractual grounds which involved Roman Catholic doctrine, but empowered the trial court to rule on the sufficiency of “any secular reasons for non-renewal or dismissal.”\textsuperscript{232} Although it recognized the difficulty of the trial court’s task, it nonetheless affirmed that “this task can be facilitated by keeping in mind the distinction between

\begin{footnotes}
\footnotetext{224}{Reardon v. Lemoyne, 454 A.2d 428 (N.H. 1982).}
\footnotetext{225}{454 A.2d 428 (N.H. 1982).}
\footnotetext{226}{\textit{Id.} at 430.}
\footnotetext{227}{\textit{Id.} at 431 (citing \textit{Jones v. Wolf}, 443 U.S. 595 (1979)).}
\footnotetext{228}{\textit{Id.} at 431-32.}
\footnotetext{229}{\textit{Id.} at 432.}
\footnotetext{230}{The case was remanded for a hearing on the merits of plaintiffs’ petition as to the Sacred Heart School Board members and a hearing on the erroneous dismissal of two defendants. \textit{Id.} at 434.}
\footnotetext{231}{\textit{Id.}}
\footnotetext{232}{\textit{Id.} at 433.}
\end{footnotes}
non-doctrinal matters, wherein jurisdiction lies, and matters involving doctrine, faith or internal organization which are insulated from judicial inquiry. 233

3. Reardon's Impact On Church Autonomy

The Reardon 234 opinion is fascinating because it abides by the strictures of previous Supreme Court rulings, but points out the tension inherent in those decisions. Although nothing in past Supreme Court decisions contemplates the application of neutral principles of law to contractual disputes, such application is wholly consistent with their underlying policy. The Reardon court accurately concluded that, because the interests at stake involved employment and personal welfare, reviewing the contract did not violate the Supreme Court's prohibition against inquiry into ecclesiastical matters. On the contrary, by applying ordinary principles of contract law, the New Hampshire court confirmed the civil nature of the dispute.

The fact that the question at issue in Reardon did not involve a doctrinal matter also reveals the Establishment Clause problem inherent in an overly broad notion of "ecclesiastical" dispute. When a civil court either defers to church authority or dismisses an employment discrimination issue as nonjusticiable, it undermines the very principles of government neutrality the Establishment Clause was intended to guarantee. 235 Both methods of resolution, while ostensibly neutral in theory, have the practical effect of favoring religious entities because they allow the church to act as the final arbiter in determining the fairness of its own decisions. 236 Each employment decision made by a church represents an affirmation of its independent judgment and authority. Thus, whenever a court declines to address the merits of that decision on First Amendment grounds, it is essentially permitting that judgment

233. Id. While no mention is made by the Court of the level of insulation such internal matters might receive, the overall tenor of the decision implies that even doctrinal matters may not be insulated from judicial inquiry if they sanctioned discrimination.
236. Id. at 2021.
to dictate the direction of the law. More important from a constitutional perspective is that private institutional authority is being denied similar treatment by the courts as are religious institutions. This absence of similar legal treatment represents a direct affront to the Establishment Clause.

V. CONCLUSION

While policy arguments which underlie the proposed application of anti-discrimination law to churches are mentioned throughout the discussion, one particular notion raised by an opponent of such application is worth pointing out. Oliver Thomas regards religious institutions as important “mediating structures” not only because they provide meaning to their adherents, but because their very existence serves as a check on the power of the state. Thomas thus argues that “invading the integrity of these institutions by regulating their employment policies compromises and limits their role as checks on governmental power.”

The essential point overlooked by Thomas’ argument is that integrity of these institutions is not compromised by the regulation at the non-ministerial level. When the state is acting on behalf of an oppressed segment of society, it is those individuals, and not the oppressive religious agents, that are deserving of such protection. A harm which impacts over half the human population, denigrating them to a consistently inferior status can hardly be justified by the competing right of an institution to hire whomever it wants. No institution has ever, nor should ever, exist absolutely free of governmental authority to regulate its functions; at some point the autonomy of every institution must yield to the legitimate popular interest in gender equality as evidenced by Title VII. In the face of abusive forms of discrimination, religious agents hardly represent the “family-like buffers” that Thomas defends, but instead, a powerful obstacle to the administration of justice for women.

237. See id.
238. See Thomas, supra note 11, at 107.
239. Id. at 107.
240. Id.
To date, the Supreme Court has successfully avoided confronting this difficult issue. While the Dayton\textsuperscript{241} decision seemed to make resolution of the controversy inescapable, the Court's invocation of judicial abstention allowed them to postpone the decision at least a little longer. Nevertheless, given the resurgence of the issue in federal courts, as well as its elevation on the feminist agenda, this policy of judicial retreat is no longer tenable. Moreover, the need for the Court to resolve the issue is further compelled by the fact that churches, as the targets of an increasing volume of discrimination attacks, have a right to be informed of precisely what forms of conduct will expose them to liability.

Given the recent change in the Court's composition, one can at least assume that any decision reached regarding the issue will be informed by a feminist perspective.\textsuperscript{242} Indeed, while it is not absolutely certain how Justice Ginsburg will come out on the issue, her commentary concerning "Gender and the Constitution"\textsuperscript{243} provides some indication. In the article, she examines the traditional role of women in American history. With a coincidental choice of words, Justice Ginsburg laments what she perceives as a theme dominating Anglo-American literature: "women's place in a world controlled by men is divinely ordained."\textsuperscript{244} Throughout history, religious authorities have had a strong hand in perpetuating this theme. In the effort to loosen this "divine" grasp, federal courts have taken the lead and, as the tension between divinity and discrimination continue to mount, the Supreme Court is encouraged to follow.

\textsuperscript{242} On August 3, 1993, seven years after the Dayton decision, Justice Ruth Bader Ginsburg was appointed to the United States Supreme Court. She replaced Justice Byron White, becoming the second woman to sit on the nation's highest court.
\textsuperscript{243} JUDITH C. AREEN, CASES AND MATERIALS ON FAMILY LAW 125-26 (1992).
\textsuperscript{244} Id.