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Protecting Preachers from Prejudice: Methods for Improving Analysis of the Ministerial Exception to Title VII

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PROTECTING PREACHERS FROM PREJUDICE: METHODS FOR IMPROVING ANALYSIS OF THE MINISTERIAL EXCEPTION TO TITLE VII

ABSTRACT

Since the early 1970s, an increasing number of courts have held that religious organizations have an absolute right to treat core employees, or "ministers," however they please without fear of being held accountable by secular courts. Though anti-discrimination legislation explicitly allows a religious institution to discriminate by hiring only ministers who practice the same religion as the hiring organization, such legislation prohibits both non-religious and religious employers from engaging in racial discrimination, gender discrimination, or sexual harassment. Federal circuit courts uniformly grant immunity to religious institutions from these neutral laws, basing their decisions on the First Amendment religion clauses, but the constitutional foundation for this immunity has been severely undermined by the Supreme Court.

Instead of the current approach, which defers to religious organizations, this Comment argues that any right to church autonomy should be balanced against the government's interest in enforcing anti-discrimination laws. The need for an appropriate balancing test is confirmed by recent lower court opinions that have struggled to justify a deferential approach in the face of employment decisions by religious institutions that violate federal law and lack any religious justification. After arguing for a more sound constitutional approach, this Comment ultimately proposes an amendment to Title VII that would protect ministers from non-religious discrimination while shielding religious organizations from intrusion on religious expression.

INTRODUCTION

In 2005, Father Justinian Rweyemamu, a black Catholic priest from Tanzania, sued his diocese and his superior, Bishop Michael Cote, alleging that he had been passed over for promotion and fired due to racial discrimination in violation of Title VII of the Civil Rights Act.[1] Despite his high approval ratings among church members, the promotion was given to a white male whom Rweyemamu alleged to be less qualified than him.[2] The church countered that it had a right, grounded in the First Amendment, to be free from government intrusion into management of its internal affairs.[3] The Second Circuit agreed and dismissed the case, without any further investigation of Rweyemamu's claims, to avoid "plung[ing] the [court] into a maelstrom of Church policy, administration, and governance."[4]

By rejecting Rweyemamu's claims without researching their validity or weighing the government's interest in prohibiting racial discrimination, the Second Circuit joined the majority of circuit courts, deciding that federal employment legislation cannot be applied to religious organizations without violating the First Amendment, even in the face of blatant discrimination.[5] This judicially recognized constitutional limitation on federal employment law, termed the "ministerial exception,"[6] is overly deferential to religious organizations, especially in light of Supreme Court opinions favoring the application of laws neutral toward religion, even when they may substantially burden the free exercise of religion.[7]

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[1] Rweyemamu v. Cote, 520 F.3d 198, 200 (2d Cir. 2008); *see also* 42 U.S.C. § 2000e-2(a)(1) (2006) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.").

[2] *See* Rweyemamu v. Cote, No. 3:05CV00969, 2006 WL 306654, at *1 (D. Conn. Feb. 8, 2006), *aff'd*, 520 F.3d 198 (2d Cir. 2008) (setting out the facts of the case more extensively).

[3] *Rweyemamu*, 520 F.3d at 201.

[4] *Id.* at 209 (quoting Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1578 (1st Cir. 1989)).

[5] *See* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1040–41 (7th Cir. 2006) (noting that ministers should only be allowed to proceed in claims against religious employers in situations where a church is "subject[ing] its clergy to corporal punishment or requir[ing] them to commit criminal acts").

[6] *See Rweyemamu*, 520 F.3d at 206.

[7] *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990) (allowing application of neutral laws that meet particular criteria even if doing so substantially burdens the free exercise of religion), *superseded by statute*, 42 U.S.C. § 2000bb-1 (2006); Jones v. Wolf, 443 U.S. 595, 602 (1979) (holding that application of neutral laws to intra-church disputes is constitutional even though it interferes with church autonomy).

This broad deference to religious organizations has been labeled by one journalist as the "most sweeping of [the] judicial protections" for religious employers against suits by employees.[8] Indeed, Judge Posner, advocated for the ministerial exception as a constitutional limitation on Title VII, holding that religious employers should only be liable to ministers if their actions force ministers into criminal action or subject them to corporal punishment.[9] While the First Amendment's protection of religious organizations' hiring and firing of ministers, who are considered core employees,[10] based on genuine disputes over core doctrinal questions is undisputed,[11] it is much less clear whether religious organizations should be absolutely immune from claims alleging sexual harassment,[12] unfair wages,[13] child labor,[14] or discrimination[15] when there is no religious justification. Furthermore, in light of the Supreme Court's willingness to look past pretextual religious justifications and hold organizations responsible for racial discrimination,[16] even a religious organization's right to fire a minister based on a limited religious justification, such as mediocre homilies,[17] becomes unclear when there is overwhelming

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[8] Diana B. Henriques, *Where Faith Abides, Employees Have Few Rights*, N.Y. TIMES, Oct. 9, 2006, at A1.

[9] *Tomic*, 442 F.3d at 1040–41.

[10] *See infra* notes 51–54 and accompanying text.

[11] *See, e.g.*, Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1167 (4th Cir. 1985) (discussing how precedent establishes that churches have freedom to decide matters of church governance, faith, and doctrine).

[12] *See* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948 (9th Cir. 1999) (deciding that the government's interest in eliminating sexual harassment outweighed the church's right to autonomy absent religious justification for the church's actions).

[13] *See* EEOC v. Tree of Life Christian Sch., 751 F. Supp. 700, 716 (S.D. Ohio 1990) (applying the Equal Pay Act to a Christian school).

[14] *See* Brock v. Wendell's Woodwork, Inc., 867 F.2d 196, 197 (4th Cir. 1989) (balancing interests to decide that a church's right to autonomy under the Free Exercise Clause did not outweigh the government's interest in prohibiting child labor).

[15] *See* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1040–41 (7th Cir. 2006) (refusing to balance interests even when no religious justification was put forward for the discrimination because justifications were imaginable without the defendants having to put them forward).

[16] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 603–05 (1983) (deciding that the IRS properly revoked Bob Jones University's tax-exempt status due to its prohibition of interracial relationships, which the university claimed was based on a biblical mandate, notwithstanding the university's free exercise challenge); *see also* Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 628 (1986) (stating that in the employment discrimination area, an agency does not violate the Constitution by seeking to determine whether a religious justification is actually pretext).

[17] Some of the alleged reasons for firing Father Rweyemamu included "complaints regarding his homilies, complaints regarding his interaction with parish staff, . . . and the necessity of giving a unified and positive witness to the people of the parish." Rweyemamu v. Cote, 520 F.3d 198, 204–06 (2d Cir. 2008) (quoting Prot. No. 20042458 (Sept. 6, 2005)).

evidence that the justification is mere pretext.[18] According to the Ninth Circuit, churches should not be "free from *all* of the secular legal obligations that currently and routinely apply to them."[19]

Rweyemamu illustrates the major weakness in this majority approach to the ministerial exception: there is no clear constitutional foundation for it.[20] After briefly mentioning the arguments over which procedural mechanism is appropriate for the exception,[21] the *Rweyemamu* court recognized that the roots of the exception "remain[] a matter of some debate."[22] The court discussed, but never fully embraced, the three foundations commonly used to support the deferential approach: the Free Exercise Clause, the Establishment Clause, and an independent "right to choose ministers without government restriction," or a right to organizational autonomy that implicates both clauses.[23] The court cited cases showcasing the full spectrum of the debate over the ministerial exception.[24] These cases include, on one end of the spectrum, decisions holding that federal courts lack jurisdiction to hear even blatant claims of discrimination by ministers against their employers[25] and, on the other end, decisions allowing ministers to proceed as long as their claims do "not infringe upon [an employer]'s freedom to select its ministers."[26] Then, by analogizing to other cases, the *Rweyemamu* court granted deference to the church without explicitly stating its justification.[27]

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[18] *See* Petruska v. Gannon Univ., No. 05-1222 (3d Cir. 2006), http://www.ca3.uscourts.gov/opinarch/051222p.pdf, *vacated on grant of rehearing*, 462 F.3d 294 (3d Cir. 2006) ("Employment discrimination unconnected to religious belief, religious doctrine, or the internal regulations of a church is simply the exercise of intolerance, not the free exercise of religion that the Constitution protects.").

[19] Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948 (9th Cir. 1999) (emphasis added).

[20] *See Rweyemamu*, 520 F.3d at 204–06 (discussing all the various approaches to the exception).

[21] *Id.* at 206 n.4. There are two distinct views on how the exception should operate procedurally. *See, e.g.*, Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 227 (6th Cir. 2007) (dismissing under Rule 12(b)(1) for lack of jurisdiction); Petruska v. Gannon Univ., 462 F.3d 294, 302 (3d Cir. 2006) (dismissing under Rule 12(b)(6) for failure to state a claim upon which relief can be granted). Some courts do not directly address the procedural mechanism but dismiss based on the constitutional question. Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1302–04 (11th Cir. 2000) (upholding summary judgment for a church after deciding the religion clauses of the First Amendment "prohibit a church from being sued under Title VII by its clergy").

[22] *Rweyemamu*, 520 F.3d at 205.

[23] *Id.* at 204–06 (quoting Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1167–68 (4th Cir. 1985)).

[24] *Id.*

[25] *See* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1040–41 (7th Cir. 2006) (granting deference to a religious body before any religious justification for the discrimination was put forth).

[26] *Petruska*, 462 F.3d at 310.

[27] *See Rweyemamu*, 520 F.3d at 209 ("We need not attempt to delineate the boundaries of the ministerial exception here, as we find that [the plaintiff]'s Title VII claim easily falls within them.").

Without clarifying the foundation for the exception, the majority of circuit courts, like the Second Circuit in *Rweyemamu*, defer to religious organizations whenever a minister brings suit.[28] Deference becomes especially troubling when certain unique or complex situations arise, such as when a church has possibly breached a minister's employment contract[29] or when a minister claims sexual harassment.[30] An emerging minority of courts thus resort to balancing church and government interests when employees of religious organizations claim non-religious discrimination.[31] For example, in *Bollard v. California Province of the Society of Jesus*, the Ninth Circuit chose to balance the interests of the parties to evaluate a minister's claim of sexual harassment where the church could "not offer a religious justification for the harassment" and actually "condemn[ed the harassment] as inconsistent with [its] values and beliefs."[32]

This Comment argues that the emerging minority view is the correct constitutional approach because Supreme Court precedent has eroded all three foundations used to support the deferential approach. First, *Employment Division, Department of Human Resources of Oregon v. Smith*[33] allows courts to apply neutral laws of generally applicability, such as Title VII,[34] even when

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[28] *See, e.g.*, Starkman v. Evans, 198 F.3d 173, 175 (5th Cir. 1999) (using neither a Free Exercise nor an Establishment Clause test, yet vaguely basing dismissal on the First Amendment).

[29] Welter v. Seton Hall Univ., 608 A.2d 206, 208, 212 (N.J. 1992) (holding that two nuns bringing suit for breach of contract were not actually "ministers," but leaving open the possibility that their suit could proceed even if they were ministers as long as the suit did not involve religious doctrine).

[30] *See, e.g.*, Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 947 (9th Cir. 1999) ("The Jesuits do not offer a religious justification for the harassment [the plaintiff] alleges; indeed, they condemn it as inconsistent with their values and beliefs.").

[31] *See, e.g.*, *id.* (balancing competing interests to evaluate a minister's sexual harassment claim against a religious employer).

[32] *Id.*

[33] 494 U.S. 872 (1990).

[34] *See* 42 U.S.C. § 2000e-2 (2006) (Title VII of the Civil Rights Act of 1964). Many commentators support the proposition that no matter what standard is used to define "neutral laws of generally applicability," Title VII—with its religiously neutral goal of eliminating discrimination—likely satisfies this standard. *See, e.g.*, Jamie Darin Prenkert, *Liberty, Diversity, Academic Freedom, and Survival: Preferential Hiring Among Religiously-Affiliated Institutions of Higher Education*, 22 HOFSTRA LAB. & EMP. L.J. 1, 46 (2004) ("Title VII, though not a criminal law like the one at issue in *Smith*, is almost certainly a neutral law of general applicability." (citation omitted)). As Professor Joanne Brant explains:

> While the identifying characteristics of a "neutral and generally applicable" law remain uncertain, federal anti-discrimination laws like Title VII are likely to qualify under any of the proposed standards.
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> . . . .

the law substantially burdens free exercise of religion.[35] Though nearly all of the circuit courts have distinguished *Smith* as addressing individual free exercise versus a church's right to autonomy,[36] the clear language of *Smith* suggests it may override the ministerial exception. Second, the Court's decision in *Zelman v. Selman-Harris* decided that if a law is neutral on its face and in its application, like Title VII, it does not violate the Establishment Clause.[37] Third, a right-to-autonomy claim has been eroded by the Court's most recent decision directly involving intra-church disputes, *Jones v. Wolf*, where it held that neutral principles of law could be applied to religious organizations despite infringing organizational autonomy.[38]

To the extent a right to church autonomy survives these cases, this Comment argues that it certainly does not exist in the deferential form of the current ministerial exception. This Comment contends that strict scrutiny review should be applied to church autonomy defenses and that courts should be allowed to consider evidence as to whether a proffered religious justification is merely pretext for discrimination. Finally, this Comment proposes an amendment to Title VII that protects ministers whose suits can be determined using neutral principles of law and also accommodates the need to limit intrusion into church affairs. Commentators have argued that a similar neutral-principles approach is needed but have failed to justify such an approach or demonstrate its feasibility.[39]

> . . . [G]iven the independent purpose of the anti-discrimination laws and the exemptions provided to religious employers, it is difficult to imagine that those laws would not qualify as neutral laws of general application within the meaning of *Smith.*

Joanne C. Brant, *"Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275, 308–09 (1994).

[35] *See* Black v. Snyder, 471 N.W.2d 715, 719 (Minn. Ct. App. 1991) (deciding that *Smith* overrides the ministerial exception).

[36] Hankins v. N.Y. Annual Conference of the United Methodist Church, 516 F. Supp. 2d 225, 230 (E.D.N.Y. 2007) ("[M]ost, if not all, ... courts have found that the ministerial exception survives *Smith* because the ministerial exception addresses the rights of the *church* while *Smith* addressed the rights of *individuals*.").

[37] 536 U.S. 639, 662–63 (2002) (upholding a law that is neutral on its face and in application); *see also* JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT, 200–01 (2d ed. 2005) (describing the *Zelman* test as a two-pronged evaluation to see if a law is neutral both on its face and in application).

[38] 443 U.S. 595, 602 (1979) (allowing court interference with church governance in a church property dispute "so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith").

[39] *See* Laura L. Coon, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481 (2001) (arguing for adjudication of ministers' claims not implicating religious doctrine but grounding the

Part I of this Comment describes the birth of the ministerial exception and the right to autonomy. Part II demonstrates that the deferential approach is not supported by the Supreme Court's current approach to the Free Exercise Clause, the Establishment Clause, or a right to church autonomy. Part III argues that, without further guidance from the Supreme Court, any existing First Amendment right to church autonomy should be weighed against the government's compelling interest in applying neutral laws. Finally, because of the current trend toward congressional standards of religious liberty, Part IV advocates an amendment to the current exceptions to Title VII to accommodate the interests of both ministers and religious organizations.

I. THE MAJORITY DEFERENTIAL APPROACH TO THE MINISTERIAL EXCEPTION

The current majority approach to conflicts between application of neutral employment laws and a religious organization's right to deal with its ministers as it wishes is to defer automatically to the organization's employment decision and dismiss the minister's suit.[40] This approach is harsh in its application and inadequate to address situations where there is no genuine religious justification for the organization's actions, such as when ministers claim sexual harassment.[41] To understand how analysis of the ministerial exception can be improved, it is important to understand the flawed reasoning behind why such excessive deference is being granted. This Part first explains the history and the contours of the majority deferential approach. It then criticizes this approach for lacking precedential foundation and being unfairly harsh in its application.

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approach in Ninth Circuit case law struggling with sexual harassment cases rather than Supreme Court precedent, and failing to mention *Jones v. Wolf* or how this approach could be feasibly implemented); Shawna Meyer Eikenberry, *Thou Shalt Not Sue the Church: Denying Access to Ministerial Employees*, 74 IND. L.J. 269 (1998) (arguing a similar approach but failing to link *Jones v. Wolf* to the intra-church dispute cases, address the possible applicability of strict scrutiny review, or recognize the need for a legislative solution); Lauren P. Heller, *Modifying the Ministerial Exception: Providing Ministers with a Remedy for Employment Discrimination Under Title VII While Maintaining First Amendment Protections of Religious Freedom*, 81 ST. JOHN'S L. REV. 663 (2007) (arguing for a neutral-principles approach but hastily dismissing the *Sherbert* test; failing to address an independent right to autonomy and the implications of *Jones v. Wolf*; and never offering a legislative solution).

[40] *See, e.g.*, Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 363 (8th Cir. 1991) (siding with the majority of circuits in dismissing a minister's case by deferring to the religious organization).

[41] *See* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999) (involving a claim of sexual harassment against a religious organization).

A. The History of a Peculiarly-Named Doctrine: The Ministerial Exception

While a statutory exemption to Title VII allows religious organizations to make hiring decisions based upon religious denominational preferences,[42] Title VII does not allow religious organizations "to make those same [hiring] decisions on the basis of race, sex, or national origin."[43] The current approach to the ministers' discrimination claims is not an extension of the statutory exemption, held constitutional in 1987,[44] but a separate, judicially recognized constitutional limitation to federal employment law.[45] Religious organizations may raise a defense to ministers' non-religious discrimination claims by invoking a constitutional right to make employment decisions regarding ministers without any interference from secular courts.[46] Under this exemption, even claims against religious employers for sexual harassment[47] or failure to meet obligations under an employment contract,[48] infringe those employers' right to church autonomy.

Since the early 1970s, an increasing number of circuit courts have recognized this constitutional right, naming it the "ministerial exception" to Title VII.[49] According to judges on the Ninth Circuit, this name causes confusion because it "is not really an 'exception' at all; rather, it is a limitation on Title VII imposed by the Constitution."[50] The phrase further causes confusion because it applies to positions that are not typically seen as ministerial, such as a kitchen manager at a Jewish nursing home,[51] a church

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[42] Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 800 (9th Cir. 2005) (en banc) (Kleinfeld, J., dissenting from denial of petition for panel rehearing en banc) (noting that the statutory exemption protects, for example, a Catholic church from a discrimination suit brought by a Presbyterian applying to be a priest).

[43] Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985).

[44] *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987) (holding Title VII's exemption of religious organizations from religious discrimination suits to be constitutional).

[45] *Elvig*, 397 F.3d at 800 (denoting the differences between the statutory exemption and the constitutional limitation).

[46] Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1037 (7th Cir. 2006) ("Federal courts are secular agencies [and] therefore do not exercise jurisdiction over the internal affairs of religious organizations.").

[47] Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999) (involving a sexual harassment claim against a religious organization).

[48] *See* Welter v. Seton Hall Univ., 608 A.2d 206, 208 (N.J. 1992) (addressing ministerial exception concerns when two nuns sued for violations of their employment contracts).

[49] McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972) (recognizing the ministerial exception for the first time while addressing a sex discrimination claim by a minister).

[50] *Elvig*, 397 F.3d at 800 (describing the background of the confusion surrounding the ministerial exception).

[51] *See* Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 301 (4th Cir. 2004) (applying the ministerial exception to the kosher supervisor of the kitchen in a Jewish nursing home).

organist,[52] a church press secretary,[53] and an executive at a religious college.[54] The exception also applies beyond Title VII due to its constitutional grounding.[55] It applies in cases where employees of religious organizations bring age discrimination claims under the Age Discrimination in Employment Act (ADEA),[56] disability discrimination claims under the Americans with Disabilities Act (ADA),[57] and unfair wage claims under the Fair Labor Standards Act (FLSA).[58]

Most circuit courts take an approach, first articulated by the Fifth Circuit in *McClure v. Salvation Army*,[59] that defers to the religious organization—without regard to the government's interest in prohibiting discrimination—due to the inherently spiritual nature of the appointment of clergy.[60] The *McClure* court's reasoning, repeated verbatim by many of the circuits adopting the exception,[61] describes "the relationship between an organized church and its ministers" as its "lifeblood."[62] Since ministers are the "chief instrument by which the church seeks to fulfill its purposes," all aspects of ministerial employment are within the "religious mission of [a] church."[63] Accordingly, this "lifeblood" justification holds that "because ministerial employment is inextricably tied to the organization's functions as a religious entity, judicial review of ministerial employment decisions is tantamount to the review of

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[52] *See* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1040–41 (7th Cir. 2006) (applying the ministerial exception to an organist/music director).

[53] *See* Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 704 (7th Cir. 2003) (applying the ministerial exception to a press secretary).

[54] *See* Petruska v. Gannon Univ., 462 F.3d 294, 312 (3d Cir. 2006) (applying the ministerial exception to an administrator at a Christian university).

[55] *See* Hankins v. Lyght, 441 F.3d 96, 106 (2d Cir. 2006) (discussing application of the ministerial exception beyond Title VII).

[56] *See id.* (applying the ministerial exception to a claim under the ADEA).

[57] *See* Rosati v. Toledo, Ohio Catholic Diocese, 233 F. Supp. 2d 917, 922 (N.D. Ohio 2002) ("[J]ust as there is a ministerial exception to Title VII, there must also be a ministerial exception to ADA claims.").

[58] *See* Schleicher v. Salvation Army, 518 F.3d 472, 478 (7th Cir. 2008) (applying the ministerial exception to a claim under the FLSA).

[59] 460 F.2d 553, 558 (5th Cir. 1972).

[60] *See, e.g.*, Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 363 (8th Cir. 1991) (using *McClure* as support for the idea that "[p]ersonnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts").

[61] *See, e.g.*, Minker v. Baltimore Annual Conference of the United Methodist Church, 894 F.2d 1354, 1357–58 (D.C. Cir. 1990) (quoting the *McClure* reasoning and dismissing the case without balancing the government's interest).

[62] McClure v. Salvation Army, 460 F.2d at 558.

[63] *Id.* at 559.

religious belief and practice, and consequently violates the religious organization's free exercise rights."[64]

By relying on *McClure*, courts dismiss suits by ministers fired under suspicious circumstances without ever addressing the merits of the ministers' claims.[65] Even after acknowledging that sex discrimination had occurred against a minister who was fired after experiencing pregnancy complications, the Fifth Circuit still dismissed the suit based on *McClure*.[66] The Seventh Circuit has held that, once a court has determined that an employee is a minister, it should dismiss the minister's suit against the religious organization even if no justification is offered for the discrimination, and the merits of the discrimination claim could be decided without violating the First Amendment.[67] The Fourth Circuit has agreed, finding that "the church need not . . . proffer any religious justification for its decision, for the Free Exercise Clause 'protects the act of a decision rather than a motivation behind it.'"[68]

The precedent relied on by these courts is a series of Supreme Court decisions regarding intra-church disputes,[69] especially language in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America* that churches have a right "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[70] Implicating a principle of separation of church and state,[71] this right is often called a "right to church autonomy" in religious organization governance.[72]

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[64] Heller, *supra* note 39, at 671.

[65] *See* Starkman v. Evans, 198 F.3d 173, 177 (5th Cir. 1999) (dismissing a music director's claim under the ADA that she was abruptly fired after suffering a number of disabilities); EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 582 F. Supp. 2d 881, 883 (E.D. Mich. 2008) (dismissing a claim by a teacher in a religious school who alleged she was fired after being diagnosed with narcolepsy and trying to return to work).

[66] *See* Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 344 (5th Cir. 1999) (concluding that illegal sex discrimination did in fact occur against a minister after she experienced post-partum depression, but relying on *McClure* to dismiss the suit).

[67] *See* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1040 (7th Cir. 2006); Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 702 (7th Cir. 2003) (deciding that a federal court could hear discrimination claims were it not for the employee's position as a minister).

[68] EEOC v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 801 (4th Cir. 2000) (quoting Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985)).

[69] *See Combs*, 173 F.3d at 346–47 (citing *McClure* and listing the Supreme Court cases *McClure* relied on).

[70] Kedroff v. St. Nicholas Cathedral of Russ. Orthodox Church in N. Am., 344 U.S. 94, 116 (1952).

[71] *See* WITTE, *supra* note 37, at 160 (discussing how a principle of separation of church and state was implicated by the intra-church property cases).

[72] 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, 1388–89 (1981).

Modern courts, following *McClure*, often do not specify whether this right is derived from the Free Exercise Clause, the Establishment Clause, or some combination of the two.[73] Often courts, including the *Rweyemamu* court, mention one or both of the religion clauses when using this right to autonomy to dismiss a minister's claim.[74] While the Supreme Court has never clearly enunciated the details of this right,[75] the doctrine has been recognized in a series of intra-church disputes starting in 1871 with *Watson v. Jones*.[76] In *Watson v. Jones* and similar subsequent cases, the Court deferred to the highest governing body of the church when faced with choosing a side in a dispute between religious factions arguing over the true leader of the church or matters of church doctrine.[77] As held in *Serbian Eastern Orthodox Diocese v. Milivojevich*, "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law."[78]

B. Deficiencies in the Deferential Approach

Though relied on as the primary support for the deferential approach, Supreme Court decisions dealing with intra-church disputes never dealt with a conflict between neutral, generally applicable government regulations, like Title VII, and religious organizations.[79] In the intra-church dispute cases, the

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[73] *See, e.g.*, Rweyemamu v. Cote, 520 F.3d 198, 209 (2d Cir. 2008) (discussing both religion clauses and dismissing the claim using reasoning similar to *McClure*).

[74] *Id.* ("We need not attempt to delineate the boundaries of the ministerial exception here, as we find that Father Justinian's Title VII claim easily falls within them.").

[75] *See* Laura S. Underkuffler, *Thoughts on* Smith *and Religious-Group Autonomy*, 2004 BYU L. REV. 1773, 1774–75 ("[T]he Court has never directly addressed the scope of free exercise protections when government interferes with religious-group affairs."); Laycock, *supra* note 72, at 1395 ("The doctrinal details of this right to autonomy are in flux and not entirely clear.").

[76] Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

[77] *See id.* at 734 (deferring to the governing church body in a dispute between two factions over church property); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 441 (1969) (involving a dispute over church property after two local churches seceded from the larger church body); Kedroff v. St. Nicholas Cathedral of Russ. Orthodox Church in N. Am., 344 U.S. 94, 119–20 (1952) (deciding that a state legislature cannot transfer control of property from the Russian to American Orthodox Church); Serb. E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696, 698 (1976) (dismissing the case of a minister who was defrocked following a dispute over control of an orthodox church).

[78] *Serb. E. Orthodox Diocese for the U.S. & Can.*, 426 U.S. at 713.

[79] EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463 (D.C. Cir. 1996) ("We acknowledge that *Kedroff* and the other Supreme Court cases that we and other courts have cited in support of the ministerial exception did not involve neutral statutes of general application."); *see also* Underkuffler, *supra* note 75, at 1774–75 ("[T]he Court has never directly addressed the scope of free exercise protections when government interferes with religious-group affairs.").

interests colliding were those of two competing religious factions.[80] In those cases, it was clear that the Court should not favor one religious doctrine or practice over another.[81] Yet when the issue is whether a neutral law conflicts with a right to free exercise of religion, there are judicial tests—such as the strict scrutiny test addressed in Part II—that the Court can use to determine whether the law at issue infringes religious liberty.[82] Lower courts adopting the deferential approach err by failing to base their deference on the Supreme Court precedent most analogous to the situation where neutral federal employment law conflicts with religious liberty.

Along with lacking precedential support, the deferential approach is also unfairly harsh in its application when a religious organization puts forward no genuine religious justification for its actions.[83] When faced with a situation where a minister claimed sexual harassment against her religious employer, the Ninth Circuit engaged in the emerging minority approach of balancing the church's interest in autonomy with the government's interest in enforcing its laws.[84] After balancing those interests, the court allowed the minister to proceed in her claim, since the church had no religious justification for the harassment.[85] In a second case invoking the decision, the judges argued that a right to church autonomy could not be absolute[86] and that "[a] church is required to comply with Title VII when a minister is sexually harassed by another minister employed by the church, just as a church is required to comply with state tort laws when a parishioner is sexually abused by a minister employed by the church."[87] The court further suggested that churches should not be free from minimum wage laws or child labor laws.[88] If a court granted

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[80] *See, e.g.*, *Milivojevich*, 426 U.S. at 698 (dismissing a case brought by a bishop who claimed that under church doctrine he was the true bishop of a certain diocese and thus had control of the diocese's assets despite the contrary claims of the higher church governing body).

[81] *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) ("The government may not . . . lend its power to one or the other side in controversies over religious authority or dogma.").

[82] *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (applying strict scrutiny review).

[83] *See* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948 (9th Cir. 1999) (resorting to a balancing of interests rather than conceding the harsh results of deference).

[84] *See id.* (deciding that the government's interest in eliminating sexual harassment outweighs a right to church autonomy).

[85] *Id.*

[86] Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 790–95 (9th Cir. 2005) (en banc) (W. Fletcher, J., concurring in the order denying petition for panel rehearing en banc).

[87] *Id.* at 795.

[88] *Id.* at 792 ("The First Amendment does not exempt religious institutions from all statutes that regulate employment."). "For example, the First Amendment does not exempt religious institutions from laws that regulate the minimum wage or the use of child labor, even though both involve employment relationships." *Id.* (citing Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 888 (1990)).

deference to a religious organization in this type of case, the result would be exceedingly harsh.

Along with being overly harsh, absolute deference is a dangerous misunderstanding of the right to church autonomy, which, according to scholars, "is not absolute."[89] As *Kedroff* states, the First Amendment grants religious organizations "[f]reedom to select . . . clergy" only "where no improper methods of choice are proven."[90] The Supreme Court reinforced the non-absolute nature of this right in the context of enforcing Title VII against a religious institution, stating that such institutions "cannot claim to be wholly free from some state regulation."[91] Echoing the reasoning of the Supreme Court in *Smith*, it contradicts "both constitutional tradition and common sense" to allow religious organizations to become a law unto themselves, only obliged to obey laws that agree with their religious beliefs.[92] If a church's actions towards its ministers are untouchable by secular courts due to the inherently religious nature of the ministerial position, then a church would be allowed to engage in all manners of inhumane or abusive conduct against its ministers without being held accountable in a court of law. Absolute deference to religious organizations, without any balancing of the most basic and fundamental governmental interests, should not be acceptable in our society.

II. LACK OF MODERN CONSTITUTIONAL FOUNDATION FOR THE DEFERENTIAL APPROACH

Along with the infirmities of the deferential approach mentioned in Part I, the approach is also undermined by important Supreme Court precedent on every constitutional foundation on which it attempts to stand. Three primary constitutional foundations are used by courts to justify the ministerial exception: the Free Exercise Clause, the Establishment Clause, and a right to autonomy based generally in the First Amendment.[93] This Part first argues that

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89 Laycock, *supra* note 72, at 1394.

90 Kedroff v. St. Nicholas Cathedral of Russ. Orthodox Church in N. Am., 344 U.S. 94, 116 (1952).

91 Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 628 (1986).

92 *See Smith*, 494 U.S. at 885 ("To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs . . . —permitting him, by virtue of his beliefs, 'to become a law unto himself,'—contradicts both constitutional tradition and common sense." (citation omitted)).

93 *See* Rweyemamu v. Cote, 520 F.3d 198, 205–06 (2d Cir. 2008) (discussing the wide diversity of different foundational justifications for the ministerial exception). Caroline Corbin has argued that the exception survives based on the First Amendment right of expressive association based on *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), but acknowledges that this approach still allows ministers' suits if the discrimination is not justified by religious doctrine. Caroline Mala Corbin, *Above the Law? The*

free exercise jurisprudence has been reduced to a neutrality test that invalidates the deferential approach. Next, it demonstrates why the Establishment Clause fails to support the deferential approach, since it also requires only that laws pass a test of neutrality. Finally, this Part contends that the Supreme Court has concluded that the right to church autonomy is not absolute and can be intruded upon by neutral principles of law.[94]

A. The Deferential Approach Is Invalidated by Modern Free Exercise Jurisprudence

Many courts ground the protection of religious organizations in an organization's right under the Free Exercise Clause to express its religious beliefs through its choice of ministers.[95] This section first examines the history of free exercise jurisprudence leading up to *Employment Division v. Smith*, the decision enumerating the Supreme Court's current approach to the Free Exercise Clause. If *Smith* applies to ministerial exception cases, as only a few commentators have argued,[96] then the deferential approach is rejected, and Title VII, as a generally applicable neutral law,[97] will always be applied to religious organizations. Yet most courts have used convoluted reasoning to distinguish *Smith* from the ministerial exception cases.[98] After examining the history of the Free Exercise Clause, this Part argues that the two primary methods courts use to distinguish *Smith* are flawed. The most widely used of these arguments is that *Smith* applies to individuals and not to organizations. A few courts have advanced a secondary, and arguably weaker, argument that

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Constitutionality of the Ministerial Exemption from Antidiscrimination Law, 75 FORDHAM L. REV. 1965, 1972 (2007).

[94] Scholars also debate whether the Founders ever intended a right to church autonomy; this debate evidences a lack of clear original intent. *Compare* Joshua D. Dunlap, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 NOTRE DAME L. REV. 2005, 2021–23 (2007) (supporting the ministerial exception using Madison's writings), *with* Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. Rev. 391, 418–20 (1987) (acknowledging Madison's writing but contrasting it with Jefferson's and arguing that there was no original intent for a right to church autonomy).

[95] *See, e.g.*, Starkman v. Evans, 198 F.3d 173, 175 (5th Cir. 1999) (citing *McClure* and deciding, without performing traditional Free Exercise Clause analysis, that any encroachment into the relationship between minister and religious employer violates the Free Exercise Clause).

[96] Brant, *supra* note 34, at 320 ("After *Smith*, it appears religious employers will be unable to obtain constitutional exemptions from employment discrimination laws.").

[97] *See* 42 U.S.C. § 2000e-2 (2006).

[98] *See, e.g.*, Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1302–03 (11th Cir. 2000) (joining the D.C. and Fifth Circuits in holding that the ministerial exception survived *Smith*). *But see* Black v. Snyder, 471 N.W.2d 715, 719 (Minn. Ct. App. 1991) (deciding that a religious organization could not assert the free exercise ministerial exception rights that it could have asserted before the *Smith* case).

Smith does not apply to cases where elements of both religion clauses are violated.

1. The Traditional Approaches to the Free Exercise Clause

In most of the early free exercise cases, the Supreme Court applied a low level of scrutiny to laws burdening religious freedom and usually found for the government.[99] Starting in 1940, the Court began applying a heightened standard of review when analyzing cases involving the Free Exercise Clause.[100] In 1963, the Court further heightened this analysis, applying a "strict scrutiny" approach in *Sherbert v. Verner*.[101] This approach, as affirmed in subsequent cases,[102] "asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."[103] *Sherbert* provides an example of the application of the strict scrutiny balancing test that could be applied to religious group autonomy cases.[104]

Ms. Sherbert, the plaintiff, was fired because she would not work on Saturdays due to her faith as a Seventh-day Adventist; she then applied for unemployment benefits.[105] Based on a law that denied benefits to anyone who failed to accept suitable work when offered, the South Carolina Employment Security Commission denied Ms. Sherbert's claim for unemployment benefits.[106] Ms. Sherbert appealed, claiming that the statute abridged her right to the free exercise of her religion under the Free Exercise Clause.[107] The Supreme Court held that this denial of benefits did constitute a substantial burden on the free exercise of Ms. Sherbert's faith.[108] The Court then examined the state's interest in enforcing the provision against Ms. Sherbert.[109]

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[99] WITTE, *supra* note 37, at 149 ("In [its first free exercise case], the Court applied a very low level of scrutiny. . . . Every early religious liberty case that applied this standard of review found for the government." (citing Reynolds v. United States, 98 U.S. 145 (1879))).

[100] *See* Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) (holding that regulation of free exercise is legal only if it is non-discriminatory and not unduly burdensome to the free exercise of religion).

[101] 374 U.S. 398, 406 (1963).

[102] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 220–21 (1972) (affirming and further articulating the *Sherbert* approach).

[103] Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) (citing *Yoder*, 406 U.S. at 220–21) (utilizing the balancing test articulated in *Sherbert*).

[104] *Sherbert*, 374 U.S. at 402.

[105] *Id.* at 399.

[106] *Id.* at 400–01.

[107] *Id.* at 401.

[108] *Id.* at 404.

[109] *Id.* at 406.

The state argued that it had to enforce the statute to avoid being inundated with false claims.[110] The Court did not view this as compelling, especially due to the availability of regulatory schemes that could achieve the government's purpose without infringing free exercise rights.[111] The Court thus found the state's law unconstitutional as applied.[112]

The strict scrutiny balancing test employed by the *Sherbert* Court was used as the prevailing test for analyzing claims involving violations of the Free Exercise Clause until 1990.[113] The Supreme Court used this test ten times, finding for the religious claimant six times and the government four times.[114] Aside from these cases, during this period the Court also addressed a religious employer's First Amendment objection to application of Title VII and reasoned that an agency "violates no constitutional rights by merely investigating the circumstances of [the] discharge [of an employee of a religious institution] . . . if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge."[115]

In 1990, the Supreme Court issued its landmark decision in *Smith*, formally rejecting the *Sherbert* strict scrutiny test for analyzing religiously neutral laws.[116] In *Smith*, a state agency fired two members of the Native American Church for use of peyote, an illegal controlled substance that members used in religious ceremonies.[117] The members were denied unemployment benefits and appealed on the ground that the peyote prohibition violated their free exercise rights.[118] The Supreme Court decided that individuals should be forced to abide by any "valid and neutral law of general applicability," even if it conflicts with or burdens their religious beliefs, as long as there is a rational basis for the law.[119]

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110 *Id.* at 407.

111 *Id.*

112 *Id.* at 401, 410.

113 *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 894–95 (1990) (O'Connor, J., concurring in the judgment) (discussing how the case would affect the strict scrutiny test).

114 WITTE, *supra* note 37, at 149.

115 Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 628 (1986).

116 *Smith*, 494 U.S. at 884–85.

117 *Id.* at 874.

118 *Id.* at 874–76.

119 *Id.* at 879.

The decision in *Smith* was met with criticism from both outside and inside the Supreme Court.[120] Justice O'Conner and the dissenting Justices felt that the majority's rejection of strict scrutiny was a misinterpretation of free exercise case law.[121] These Justices continued to call for the *Smith* decision to be overturned in favor of the *Sherbert* approach.[122] Outside the Court, some critics claimed that *Smith* obliterated protection for religious liberty under the Free Exercise Clause,[123] while others tried to mitigate the damages by restricting *Smith* to its facts.[124] Though courts have tried, *Smith* is difficult to confine to its facts because the opinion states that the First Amendment is not "offended" if "prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision"[125] and that "the government's ability to enforce *generally applicable prohibitions of socially harmful conduct*, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"[126]

Congress responded in 1993 by passing the Religious Freedom Restoration Act (RFRA).[127] The Act sought to reinstate the *Sherbert* test by requiring strict scrutiny analysis when a party claimed free exercise had been substantially burdened.[128] The Supreme Court struck the Act down as an unconstitutional overreaching by Congress as applied to states but allowed it to stand when applied to federal action.[129] The Court has applied RFRA to federal statutes,[130]

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120 *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409 (1992) ("Members of the media, academics, members of Congress, and religious interest groups greeted the [*Smith*] decision with condemnation and despair.").

121 *Smith*, 494 U.S. at 895 (O'Connor, J., concurring in the judgment) (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

122 *See* City of Boerne v. Flores, 521 U.S. 507, 547 (1997) (O'Connor, J., dissenting); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring in the judgment).

123 *See* John W. Whitehead, *The Conservative Supreme Court and the Demise of the Free Exercise of Religion*, 7 TEMP. POL. & CIV. RTS. L. REV. 1, 116, 121 (1997) (discussing how *Smith* limited religious liberty protection); Leslie L. Dollen, Casenote, *The Free Exercise Clause Redefined: The Eradication of Religious Liberties in* Employment Div., Dept. of Human Res. of Oregon v. Smith, 12 HAMLINE J. PUB. L. & POL'Y 143, 144 (1991) (arguing *Smith* "drastically limited" religious liberties).

124 Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1040 (7th Cir. 2006) (limiting the reach of *Smith* by using it only as support for the proposition that religious organizations are not allowed to force criminal activity upon their ministers).

125 *Smith*, 494 U.S. at 878.

126 *Id.* at 885 (emphasis added) (citations omitted).

127 *Boerne*, 521 U.S. at 512 (recognizing that Congress enacted RFRA "in direct response" to *Smith*).

128 42 U.S.C. § 2000bb-1(a)(b) (2006) (reinstating the *Sherbert* strict scrutiny test).

129 *Boerne*, 521 U.S. at 536.

but the statute is arguably inapplicable in many circumstances, including all suits to which the government is not a party, which would include cases such as *Rweyemamu*.[131]

Smith also held that if a law is not neutral, it will be allowed to stand only if it passes the *Sherbert* strict scrutiny analysis.[132] The Court subsequently affirmed this approach in *Church of Lukumi Babalu Aye v. City of Hialeah*,[133] a case addressing a state law that prohibited animal sacrifices in a manner that primarily affected one particular religious sect.[134] The Court decided that since this law applied solely to a particular religious group, the law was not neutral.[135] It then applied strict scrutiny and decided that the government interests in maintaining public health and preventing animal cruelty were not compelling enough to justify substantially burdening this particular religious group, especially in light of regulatory options that were less restrictive than a complete animal sacrifice ban.[136]

2. Smith *Likely Applies to Organizations and Impedes Arguments for Deference*

When presented with the question, most courts have decided that *Smith* does not undermine the ministerial exception, reasoning that *Smith* applies only to the rights of *individuals*, while the ministerial exception applies to the rights of the *religious organization*.[137] These courts argue that *Smith* only applies to the free exercise rights of an individual to carry out religious activity and not to religious organizations' rights to manage ministers without government oversight.[138]

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130 *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 432 (2006) (deciding that the government could not enforce the Controlled Substance Act against a religious group using a controlled substance because the government failed to show a compelling interest in regulating sacramental use of the substance).

131 *See* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006) ("RFRA is applicable only to suits to which the government is a party.").

132 Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 888 (1990).

133 Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

134 *Id.* at 526.

135 *Id.* at 535.

136 *Id.* at 539.

137 Hankins v. N.Y. Annual Conference of the United Methodist Church, 516 F. Supp. 2d 225, 230 (E.D.N.Y. 2007) ("[M]ost, if not all . . . courts have found that the ministerial exception survives *Smith* because the ministerial exception addresses the rights of the *church* while *Smith* addressed the rights of *individuals*.").

138 Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 348–49 (5th Cir. 1999) (agreeing with the D.C. Circuit Court that *Smith* is inapplicable to questions of church autonomy).

Proponents of this distinction point to two aspects of the language in *Smith*.[139] First, when discussing its holding, the Court consistently refers to the rights held by individuals.[140] Second, the *Smith* Court exempts from its holding situations where the government is asked to lend "its power to one or the other side in controversies over religious authority or dogma."[141] Proponents argue that this language preserves an absolute right to church autonomy without any interference from neutral laws.[142] Courts championing the deferential approach point out that *Smith* cites cases involving intra-church disputes—the precedential foundation of the right to church autonomy—as support for this exemption.[143]

Although they serve as the basis for exempting organizations from *Smith*, none of the Supreme Court cases dealing with intra-church disputes address whether a neutral, generally applicable law should apply to a religious organization.[144] The *Smith* majority and subsequent courts primarily cite three Supreme Court cases as examples of "controversies over religious authority" where the *Smith* holding would not apply.[145] Each of these cases involved a dispute over church control after a split, but none of them involved religiously neutral laws.[146] Only one of the cases, *Kedroff*, actually involved a challenge

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[139] *See* Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1782 (2008) (arguing that *Smith* was only concerned with individuals and was not intended to undermine the right to church autonomy).

[140] The Court states that "we have never held that an *individual's* religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878–79 (1990) (emphasis added). Later, the Court comments that making "an *individual's* obligation to obey such a law contingent upon the law's coincidence with his religious beliefs . . . contradicts both constitutional tradition and common sense," *id.* at 885 (emphasis added), and that it is not "possible to limit the impact of respondents' proposal by requiring a 'compelling state interest' only when the conduct prohibited is 'central' to the *individual's* religion." *Id.* at 886. (citations omitted) (emphasis added).

[141] *Id.* at 877.

[142] *See* Note, *supra* note 139, at 1782 (arguing that the language in *Smith* preserves the ministerial exception as a protection of the autonomy of religious organizations).

[143] EEOC v. Catholic Univ. of Am., 83 F.3d 455, 462 (D.C. Cir. 1996) (quoting Kedroff v. St. Nicholas Cathedral of Russ. Orthodox Church in N. Am., 344 U.S. 94, 116 (1952)).

[144] *See id.* at 463 ("We acknowledge that *Kedroff* and the other Supreme Court cases that we and other courts have cited in support of the ministerial exception did not involve neutral statutes of general application.").

[145] *See Smith*, 494 U.S. at 877.

[146] *See* Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 441 (1969) (involving a dispute over church property after two local churches seceded from the larger church body); *Kedroff*, 344 U.S. at 119–120 (holding that a state legislature cannot transfer control of property from the Russian to American Orthodox Church); *see also* Serb. E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696, 697–98 (1976) (dismissing the case of a minister who was defrocked following a dispute over church control).

to a statute, but the statute explicitly attempted to remove control of church property from a hierarchical religious body and thus was neither neutral nor generally applicable.[147] The D.C. Circuit has acknowledged this discrepancy between the precedent cited by *Smith* and ministerial exception cases but says it simply "cannot believe" that the Supreme Court would get rid of the protection of religious liberty recognized by the ministerial exception.[148] Despite the D.C. Circuit's surprise at the apparent scope of the *Smith* decision, the astonishment of a circuit court is inadequate to overturn the clear language of a Supreme Court majority.[149] These courts also ignore that *Smith* relied on precedent that allowed neutral government action—compelling or not—to substantially burden an organization's free exercise of its religious beliefs.[150]

In addition to pointing out the lack of precedent, opponents of exempting the ministerial exception from *Smith* argue that it is a better policy to apply the Free Exercise Clause equally to churches and to individuals.[151] For example if different standards were applied to churches and individuals, churches might be allowed to give peyote to members in a religious ceremony, but individuals would be outlawed from ingesting it.[152] Clearly, *Smith* at least makes the ministerial exception's survival more difficult, especially the Court's refusal to weigh the government's interest.[153] The entire doctrine, in many circuits, now rests on the unique, but unclear, judicial treatment of church autonomy.[154] The Supreme Court may eventually acknowledge that *Smith* overrides the ministerial exception, but until it explicitly does so, circuit courts are likely to continue using the distinction between individuals and organizations to keep the ministerial exception alive.

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147 *Kedroff*, 344 U.S. at 97.

148 *See Catholic Univ. of Am.*, 83 F.3d at 463 (acknowledging that the church dispute cases did not involve neutral laws, yet stating, "we cannot believe that the Supreme Court in *Smith* intended to qualify this century-old affirmation of a church's sovereignty over its own affairs").

149 *See* Hutto v. Davis, 454 U.S. 370, 375 (1982) ("[P]recedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").

150 *Smith*, 494 U.S. at 883 (noting that in Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988), the Court had allowed the government to pave a road through a Native American sacred site that was used for "religious purposes," despite its substantial burden on the tribes).

151 *See, e.g.*, Underkuffler, *supra* note 75, at 1787 ("[T]here is no convincing basis for distinguishing individual religious exemptions, struck down in *Smith*, from aggressive forms of religious-group autonomy.").

152 Corbin, *supra* note 93, at 1989.

153 *See Catholic Univ. of Am.*, 83 F.3d at 462–63 (attempting to distinguish *Smith*).

154 *See, e.g.*, Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 348–49 (5th Cir. 1999) (relying solely on the precedential history of special treatment of intra-church disputes to sustain the ministerial exception post-*Smith*).

3. Smith*'s "Hybrid-Rights" Language Is Dicta and Unworkable*

Because of the weakness of the individual-versus-organization distinction, some courts try to exempt ministerial exception cases from *Smith*'s holding by using *Smith*'s exemption for "hybrid situations."[155] This distinction is even weaker than the individual-versus-organization distinction but warrants discussion because lower courts have advanced it to justify the survival of the deferential approach.

In dicta, the *Smith* majority mentioned that if a claim "involve[d] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press," then courts could use the First Amendment to bar application of a neutral law.[156] Such claims were termed "hybrid situation[s]."[157] In trying to distinguish *Smith*, the D.C. Circuit, in *EEOC v. Catholic University of America*, posited that ministerial exception cases are hybrid situations.[158] According to the D.C. Circuit, the question of whether neutral laws can be applied to religious organizations invokes Free Exercise Clause concerns, and the question of whether courts can be entangled in deciding religious disputes invokes Establishment Clause concerns.[159] After distinguishing *Smith*, the court used the deferential approach to dismiss the minister's suit.[160]

Even assuming that ministers' claims are hybrid situations—a debatable proposition[161] —both scholars and courts have animadverted on the propriety of ever using the hybrid situation theory, with many ultimately rejecting it as

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155 *See, e.g.*, *Catholic Univ. of Am.*, 83 F.3d at 467 ("[T]his case presents the kind of 'hybrid situation' referred to in *Smith* that permits us to find a violation of the Free Exercise Clause even if our earlier conclusion that the ministerial exception survived *Smith* should prove mistaken."). The *Smith* court explicitly held that the *Smith* facts did not present a "hybrid situation," and thus the decision did not address those situations where the claim implicated two different rights. *Smith*, 494 U.S. at 882.

156 *Smith*, 494 U.S. at 881.

157 *Id.* at 882.

158 *See Catholic Univ. of Am.*, 83 F.3d at 467 (deciding that ministerial exception cases are hybrid situations); *see also* Smith v. Raleigh Dist. of N.C. Conference of the United Methodist Church, 63 F. Supp. 2d 694, 706 (E.D.N.C. 1999) (describing a church employee's sexual harassment claim as a "hybrid situation" but denying church autonomy defenses because the plaintiffs were "secular, lay employees who performed non-religious, administrative tasks for a religious institution").

159 *Catholic Univ. of Am.*, 83 F.3d at 467 (arguing that ministerial exception cases involve both establishment and free exercise concerns).

160 *Id.* (using hybrid situations to distinguish the case and then granting deference).

161 *See* Julie Manning Magid & Jamie Darin Prenkert, *The Religious and Associational Freedoms of Business Owners*, 7 U. PA. J. LAB. & EMP. L. 191, 209 (2005) (arguing that ministerial exception cases may not be hybrid situations because they do not involve two distinct fundamental rights).

either dicta or an unworkable legal standard.[162] Since the *Smith* court gave no further instruction on how hybrid situations affect free exercise claims, some courts have decided it is illogical to vary standards of religious liberty based on whether additional constitutional provisions are implicated.[163] Other courts say that an independently viable claim is required, essentially rendering the free exercise claim superfluous.[164] A third group of courts have attempted to fabricate a middle standard by requiring that the free exercise claim have a "colorable" companion claim.[165] The widespread confusion over the theory and the theory's inability to garner majority support in subsequent Supreme Court free exercise cases[166] has led many circuit courts to reject the hybrid situation theory outright as unworkable dicta.[167]

B. Mistaken Reliance on the Establishment Clause

A number of courts base the ministerial exception on the ground that picking a side in a dispute centered on religion would violate the Establishment Clause by excessively entangling the court in religious matters.[168] Some

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[162] *See* Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 247 (3rd Cir. 2008) ("Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta."); Ryan M. Akers, *Begging the High Court for Clarification: Hybrid Rights Under* Employment Division v. Smith, 17 REGENT U. L. REV. 77, 78 (2004) (describing the confusion caused by the theory); Note, *supra* note 139, at 1781 n.38 (recognizing that the theory "is almost universally despised").

[163] *E.g.*, Kissinger v. Bd. of Trs. of the Ohio State Univ. Coll. of Veterinary Med., 5 F.3d 177, 180 (6th Cir. 1993).

[164] *Combs*, 540 F.3d at 245–46 ("This stringent approach requiring an independently valid companion claim has received criticism, most notably that such a requirement would make the free exercise claim superfluous."); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring) ("[I]f a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.").

[165] *See* Axson-Flynn v. Johnson, 356 F.3d 1277, 1296–97 (10th Cir. 2004) (criticizing the many courts that have used an independently viable approach and articulating a colorable claim approach).

[166] *See Combs*, 540 F.3d at 246–47 ("Since Smith, a majority of the Court has not confirmed the viability of the hybrid-rights theory."). Specifically, the Third Circuit notes Justice Souter's concurrence in *Hialeah*, which "criticized the hybrid-rights theory," and the majority opinion in *Boerne* which seemed to gloss over a hybrid situation issue. *Id.* at 246 n.23.

[167] *See id.* at 246–47 (finding the language to be unworkable dicta in agreement with Sixth and Second circuit decisions).

[168] Rweyemamu v. Cote, 520 F.3d 198, 205 (2d Cir. 2008) ("[T]aking sides in a religious dispute would lead an Article III court into excessive entanglement in violation of the Establishment Clause.") (citing Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1038 (7th Cir. 2006)); *see also* Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1304 (11th Cir. 2000) (basing the exception on the Establishment Clause along with the Free Exercise Clause); Scharon v. St. Luke's Episcopal Presbyterian

commentators suggest analyzing these cases under both Free Exercise and Establishment Clause doctrines,[169] but in the wake of *Smith*, others have reasoned that the Establishment Clause may be the only remaining religion clause on which the ministerial exception can be grounded.[170] Indeed, in dismissing Rweyemamu's discrimination claim, the Second Circuit reasoned that it was better to dismiss the case than entangle the court in deciding religious matters.[171] The court reasoned that this approach is fair since courts would still be able to decide secular cases like fraudulent employment practices.[172]

The idea of excessive entanglement derives from the dominant test used to analyze Establishment Clause claims, which was first articulated by the Supreme Court in *Lemon v. Kurtzman*.[173] This test consists of three prongs: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[174] Most circuit courts focus on the third prong—excessive government entanglement—when using the Establishment Clause to support the ministerial exception.[175] In explaining its focus on entanglement, the Ninth Circuit noted that "Title VII has an obvious secular legislative purpose, and . . . its principal effect neither advances nor inhibits religion. The only open question is whether applying Title VII in the circumstances of this case would foster an impermissible government entanglement with religion."[176]

Hosps., 929 F.2d 360, 363 (8th Cir. 1991) (dismissing the case primarily based on the Establishment Clause test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971), but also based on the Free Exercise Clause).

169 *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 465 (D.C. Cir. 1996) (analyzing whether deciding the case would result in "entanglement" and also using a right to church autonomy); William P. Marshall & Douglas C. Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L.J. 293, 295 (1986) (recognizing that "[t]he [F]ree [E]xercise [C]lause traditionally has been the constitutional provision under which alleged government infringement upon religious liberty has been examined," but arguing that these claims should also involve an Establishment Clause analysis).

170 Note, *Ecclesiastical Abstention and the Crisis in the Catholic Church*, 19 J.L. & POL. 109, 116 (2003). *But see* Perry Dane, *"Omalous" Autonomy*, 2004 BYU L. REV. 1715, 1718 (2004) (arguing that grounding the ministerial exception completely in the Establishment Clause is "counterintuitive").

171 *Rweyemamu*, 520 F.3d at 208–09.

172 *Id.*

173 403 U.S. 602, 612–13 (1971).

174 *Id.*

175 *See, e.g.*, Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948 (9th Cir. 1999) (addressing whether the Establishment Clause supports the ministerial exception).

176 *Id.* (citations omitted).

Some courts assume that a government entity's investigation into church employment would create excessive entanglement with church management.[177]

Yet even though some courts have classified almost any intrusion into church affairs as excessive entanglement,[178] in 1997, the Supreme Court in *Agostini v. Felton* noted that "[i]nteraction between church and state is inevitable."[179] The Court decided that entanglement that has "the effect of advancing or inhibiting religion" is excessive entanglement.[180] Title VII neither advances nor inhibits religion of its own accord because courts are only forced to interact with a church's ability to freely make hiring decisions when claimants use the courts to enforce Title VII.

It is the Free Exercise Clause, instead of the Establishment Clause, that has historically been used to decide whether a court can enforce a particular law that restricts a religious organization's autonomy.[181] While intervention by the judiciary may incidentally have the appearance of endorsing or disapproving of a religion, the entanglement concerns in ministerial exception cases *primarily* affect a religious organization's free exercise rights by restricting the way it exercises its spiritual functions; hence these questions should be analyzed under the Free Exercise Clause.[182] Similarly, religious liberty scholar Douglas Laycock argues that because "entanglement" is a phenomenon that occurs under both Free Exercise and Establishment Clause analysis, commentators have been misled into thinking government intrusion into church autonomy is an establishment concern when it is really a free exercise question.[183]

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177 *See* Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1304 (11th Cir. 2000) (deciding that "[i]nvestigation by a government entity into a church's employment of its clergy would almost always entail excessive government entanglement into the internal management of the church" in violation of the Establishment Clause); *see also* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 466 (D.C. Cir.1996) ("An excessive entanglement may occur where there is a sufficiently intrusive investigation by a government entity into a church's employment of its clergy.").

178 *See Gellington*, 203 F.3d at 1304.

179 521 U.S. 203, 233 (1997).

180 *Id.*

181 *See* Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952) ("Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference."); *see also* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976) (using the Free Exercise Clause to analyze a case concerning the defrocking of a minister after a dispute over church control).

182 *See* Heller, *supra* note 39, at 689 (arguing that ministerial exception cases should be analyzed under the Free Exercise Clause despite incidental endorsement concerns).

183 Laycock, *supra* note 72, at 1394 (arguing that church autonomy should be analyzed under the Free Exercise rather than the Establishment Clause).

In 2002, the Supreme Court further refined its Establishment Clause jurisprudence and dealt a final blow to use of the Establishment Clause as the justification for the ministerial exception in *Zelman v. Simmons-Harris*.[184] In *Zelman*, the Court synchronized its Establishment Clause jurisprudence with its Free Exercise Clause jurisprudence in *Smith* by reducing Establishment Clause analysis to a neutrality inquiry.[185] As distilled by scholars, *Zelman*'s two-part test simply asks whether a law is (1) neutral on its face and (2) neutral in its application.[186] Title VII does not single out a particular religion; it is generally applicable and facially neutral. Since *Zelman* is the most recent articulation of the general rule for evaluating whether a law violates the Establishment Clause, it should no longer be claimed that the Establishment Clause supports the ministerial exception.[187]

C. Replacement of Strict Church Autonomy with a Neutral Principles of Law Approach

Post-*Smith* courts have rested the ministerial exception almost entirely on the right to church autonomy.[188] Yet an alternative theory, endorsed by the Supreme Court, strikes at the heart of the autonomy doctrine.[189] The theory—that courts can intrude on church autonomy when applying neutral principles of law—allows ministers' claims to proceed if no genuine religious justification is presented by their religious employer.[190] Judge Edward Becker of the Third Circuit Court of Appeals attempted to apply such an approach in *Petruska v. Gannon University*.[191] The Third Circuit held that when a religious organization makes an employment decision based on "religious belief, religious doctrine, or church regulation," it is "immune from a Title VII suit."[192] In contrast, "[e]mployment discrimination unconnected to religious

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184 536 U.S. 639 (2002).

185 *See* WITTE, *supra* note 37, at 200 (describing how *Zelman*'s test is "closely parallel" to *Smith*'s).

186 *See id.* at 200–01 (summarizing the *Zelman* test).

187 *C.f.* Rweyemamu v. Cote, 520 F.3d 198, 205 (2d Cir. 2008) (discussing reliance on the Establishment Clause post-*Zelman*).

188 Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1037 (7th Cir. 2006).

189 *See* Jones v. Wolf, 443 U.S. 595, 602 (1979) (allowing courts to apply neutral principles of law even if they infringe a church's autonomy).

190 *See* Heller, *supra* note 39, at 696 (proposing a requirement that religious organizations put forth a religious justification to be protected by church autonomy); Elizabeth R. Pozolo, *One Step Forward, One Step Back: Why the Third Circuit Got It Right the First Time in* Petruska v. Gannon University, 57 DEPAUL L. REV. 1093, 1106 (2008) (endorsing the Third Circuit opinion that discussed such an approach).

191 Petruska v. Gannon Univ., No. 05-1222 (3d Cir. 2006), http://www.ca3.uscourts.gov/opinarch/051222p.pdf, *vacated on grant of rehearing*, 462 F.3d 294 (3d Cir. 2006).

192 *Id.* at 25–26.

belief, religious doctrine, or the internal regulations of a church is simply the exercise of intolerance, not the free exercise of religion that the Constitution protects."[193] Judge Becker grounded his opinion in the observation that if a religious justification for the discrimination has not been advanced, then the First Amendment has not been offended.[194] When Judge Becker died shortly after the opinion was issued,[195] the Third Circuit granted a rehearing of the case before a reconstituted panel of judges.[196] This panel vacated Judge Becker's original opinion and dismissed the case based on the deferential approach.[197]

Yet Judge Becker's concern with avoiding "compulsory deference" to the church was well-founded, as such "compulsory deference" was expressly rejected by the Supreme Court in *Jones v. Wolf*.[198] In *Jones*, the Supreme Court's most recent case dealing with a church property dispute, the Court determined that lower courts could use a "neutral principles" approach to decide internal church disputes.[199] As lower courts use older intra-church dispute precedent to uphold the ministerial exception, this case demonstrates that the Court has not always been supportive of compulsory deference to religious organizations.[200] A majority of states that have decided on a test following *Jones* have chosen the "neutral principles" approach for addressing intra-church disputes.[201] Many recent circuit court opinions and commentators who support an absolute deferential approach fail even to mention the *Jones*

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193 *Id.* at 5.

194 Pozolo, *supra* note 190, at 1117–18 ("[T]he court was able to avoid any serious conflict with the First Amendment Religion Clauses and still seriously consider Petruska's sexual discrimination claim.").

195 Henriques, *supra* note 8, at 1.

196 Petruska v. Gannon Univ., 462 F.3d 294 (3d Cir. 2006) (rehearing before a reconstituted panel).

197 *Petruska*, 462 F.3d at 307–08 ("[A]pplication of Title VII's discrimination and retaliation provisions to Gannon's decision to restructure would violate the Free Exercise Clause."). Judge Becker's opinion was thereafter withdrawn. 448 F.3d 615 (3d Cir. 2006).

198 443 U.S. 595, 605 (1979) ("We cannot agree, however, that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority . . . even where no issue of doctrinal controversy is involved."); *see also* Pozolo, *supra* note 190, at 1113 n.173 (discussing Judge Becker's use of this phrase and his understanding of *Jones*).

199 *Jones*, 443 U.S. at 605.

200 *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 461–63 (D.C. Cir. 1996) (citing some of the church property cases cited in *Smith* as the precedential foundation of the ministerial exception to demonstrate that the exception survives *Smith*).

201 Jeffrey B. Hassler, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife*, 35 PEPP. L. REV. 399, 457 (2008) (listing all states' approaches to church property disputes and arguing for a strict neutral-principles approach).

decision, despite basing such deference largely or completely on the Supreme Court's approach to intra-church disputes.[202]

In *Jones*, a local church body had purchased property completely with funds raised from the local parishioners.[203] When a majority of the church decided to split from the governing body of the denomination, the minority, who had left the church to worship elsewhere, brought suit claiming that the church property belonged to the hierarchical governing body.[204] The Georgia Supreme Court found for the majority by applying a "neutral principles of law" approach similar to the one applied by Judge Becker.[205] On appeal, the U.S. Supreme Court, the Court held that Georgia's approach was constitutional.[206] The Court held that states are free to determine intra-church disputes if the dispute does not implicate religious doctrine and practice.[207] Accordingly, courts were given permission to intrude into church autonomy by applying a "neutral principles of law" approach when a court does not need to determine matters of religious doctrine.[208] The Court distinguished its prior cases on intra-church disputes as only prohibiting courts from resolving disputes on the basis of "religious doctrine or polity."[209] The Court even encouraged lower courts to adopt a neutral-principles approach, saying the "primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity."[210] In light of the Court's approval of the neutral-principles approach in *Jones* and mandate of neutrality in *Smith*, it becomes clear that automatic deference to religious governing bodies is not the Supreme Court's required, or even preferred, method of dealing with church autonomy.

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202 *See, e.g.*, Schleicher v. Salvation Army, 518 F.3d 472, 475 (7th Cir. 2008) (citing *Serbian E. Orthodox Diocese* as support for complete deference but never mentioning *Jones*); Gregory A. Kalscheur, S.J., *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43, 51, 74–76 (2008) (arguing that there is no subject matter jurisdiction over a minister's claims by relying on intra-church property dispute cases but failing to mention *Jones*).

203 *Jones*, 443 U.S. at 597.

204 *Id.* at 597–98.

205 *Id.* at 599.

206 *Id.* at 597.

207 *Id.* at 602 ("'[A] State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.'" (quoting Md. & Va. Churches v. Sharpsburg Church, 396 U.S. 367, 368 (1970) (Brennan, J., concurring))).

208 *Id.*

209 *Id.* (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976)).

210 *Id.* at 603.

While some courts have been skeptical of whether *Jones* permits courts to hear employment discrimination claims against religious employers, further analysis suggests that the Court would allow such claims to be heard, especially if the religious employer has not put forth any religious justification for its actions.[211] When a similar claim was advanced by a petitioner in the Sixth Circuit in *Hutchinson v. Thomas*, the court responded that *Jones* was limited to property disputes and that a church employment decision regarding ministers "concerns internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law."[212] Yet, as previously mentioned, the Supreme Court in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.* held that the government does not violate constitutional rights simply by "investigating the circumstances" surrounding the discharge of an employee of a religious institution.[213] Moreover, the *Jones* majority specifically mentioned church employment, stating that the "neutral-principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods."[214]

Critics of *Jones* argue that applying neutral principles in suits against religious organizations may have unintended results, like encouraging suits against religious organizations to enforce regulations governing the structure of nonprofit organizations.[215] The solution is simple: legislatures should write nonprofit organization regulations specifically to exclude churches from rigid laws governing their internal structure. Unintended results may be avoided by careful drafting of legislation applicable to religious organizations. Nevertheless, this argument highlights a benefit of the strict scrutiny approach over the neutral-principles approach, since the government's interest in such business regulations would probably be outweighed by a church's right to decide its own structure.

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211 *Compare* Hutchinson v. Thomas, 789 F.2d 392, 396 (6th Cir. 1986) (refusing to apply *Jones* in the employment discrimination context), *with* Brant, *supra* note 34, at 294 (arguing that *Jones* undermines a right to church autonomy).

212 *Hutchinson*, 789 F.2d at 396. The Sixth Circuit added, "The neutral principles doctrine relating to church property is simply not applicable in the instant case." *Id.*

213 Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 628 (1986).

214 *Jones*, 443 U.S. at 606.

215 Dane, *supra* note 170, at 1745.

Other courts and commentators are also supportive of using *Jones* to undermine churches' absolute right to self-autonomy.[216] Scholars have argued that *Jones* "sharply undermines any claim that the Free Exercise Clause confers a wide-ranging right of autonomy upon religious organizations."[217] Courts have used the neutral-principles approach to counter arguments for a right to self-governance when tackling tough questions like sexual abuse claims against religious organizations.[218] The Supreme Court's recent embrace of neutral laws, even when doing so restricts free exercise, further strengthens the argument for lower courts to apply neutral principles and suggests that the Court is likely to apply this approach to a ministerial exception case.[219]

III. MODERN CONSTITUTIONAL ANALYSIS OF MINISTERS' EMPLOYMENT CLAIMS

Since the deferential approach is constitutionally unsound, the question remains how to deal with ministers' claims against their religious employers appropriately under neutral federal statutes. If no weight is given to church autonomy after *Jones*, then one option is applying generally applicable federal employment law to religious employers as long as it can be done by applying neutral principles.[220] Under this approach, when no religious justification for the church's action is put forward, as is often the case in suits for sexual harassment[221] or breach of an employment contract,[222] ministers could automatically proceed with their claims. Also, courts would be permitted to

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[216] *See* Brant, *supra* note 34, at 294 (acknowledging that *Jones* changes the right to church autonomy); Dane, *supra* note 170, at 1738 ("[S]ome courts have applied the 'neutral principles of law' mantra in a range of situations to erode the organizational self-governance . . . . This is most apparent in some of the context of sexual abuse and related claims . . . .").

[217] Brant, *supra* note 34, at 294.

[218] Dane, *supra* note 170, at 1738 ("[S]ome courts have applied the 'neutral principles of law' mantra in a range of situations to erode the organizational self-governance . . . this is most apparent in some of the context of sexual abuse and related claims.").

[219] *See* WITTE, *supra* note 37, at 200–01 (arguing that the Court is reducing religious liberty protection to a neutrality standard); Jennifer McLain, *Discrimination in the Religious Workplace—Should It Be Permitted to Continue*, 17 LAB. LAW. 517, 540 (2002) (suggesting that the Supreme Court would apply a neutral principles-of-law approach if it reviewed a ministerial exception case).

[220] *See* Lupu, *supra* note 94, at 401 (arguing that after *Jones*, "[e]ven in its more moderate form . . . the concept of church autonomy is not a defensible one").

[221] *See, e.g.*, Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 947 (9th Cir.1999) ("The Jesuits do not offer a religious justification for the harassment Bollard alleges; indeed, they condemn it as inconsistent with their values and beliefs.").

[222] *See* Welter v. Seton Hall Univ., 608 A.2d 206, 208, 212 (N.J. 1992) (deciding that two nuns bringing suit based on their employment contracts were not ministers but suggesting that they should have been allowed to proceed, even if they were ministers, if the suit did not involve religious doctrine).

engage in discovery to determine if a church's stated justification is merely pretext.[223] Yet many commentators argue that, in following *Jones*, there is still a place for a stronger free exercise right of church autonomy,[224] which even survives *Smith*, based on the organization-versus-individual distinction.[225] The Supreme Court has never addressed how to analyze whether a neutral law impermissibly infringes on church autonomy,[226] and the Court's dwindling docket suggests it likely will not address it soon.[227] If a right to church autonomy survives, it will not take a form of unfettered deference to the church regarding employment decisions.[228] This Part advocates the use the Court's pre-*Smith* test—balancing church and government interests—to analyze whether neutral laws impermissibly infringe on church autonomy.[229]

Smith clearly eliminates strict scrutiny review of neutral laws infringing upon *individual* free exercise rights, but since the majority of lower courts find that religious *organizations* are exempted from *Smith*,[230] it is logical to return

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[223] *See* Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 628 (1986) (allowing government entities to research whether a religious organization's stated religious justification for an employment decision is merely pretext).

[224] Many eminent religious liberty scholars argue that autonomy is a free exercise, rather than an establishment, concern. *See, e.g.*, Laycock, *supra* note 72, at 1394 (arguing that church autonomy should be analyzed under the Free Exercise rather than the Establishment Clause); Lupu, *supra* note 94, at 422 ("Rights of free exercise are quintessentially rights of autonomy.").

[225] *See, e.g.*, Dane, *supra* note 170, at 1718 ("The better question, then, is not whether institutional autonomy survives *Smith*, but rather . . . why, how, to what extent, and in what form, does a special, constitutionally required regime for churches survive *Smith*'s apparent rejection of the proposition that the Constitution demands a special regime for the free exercise of religion in general?"); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 118–22 (2009) (arguing for a continued right to church autonomy following *Jones* and *Smith*).

[226] *See* Underkuffler, *supra* note 75, at 1774–75 ("[T]he Court has never directly addressed the scope of free exercise protections when government interferes with religious-group affairs.").

[227] *See* Robert Barnes, *Justices Continue Trend of Hearing Fewer Cases*, WASH. POST., Jan. 7, 2007, at A04 (discussing the dwindling number of cases accepted by the Court during recent years).

[228] *See* G. Sidney Buchanan, *The Power of Government to Regulate Class Discrimination by Religious Entities: A Study in Conflicting Values*, 43 EMORY L.J. 1189, 1191, 1243–44 (1994) (not quite endorsing *Sherbert* strict scrutiny because of its recent disparagement in *Smith* but arguing that "[c]learly . . . in the area of class discrimination by religious entities, reconciling the religious freedom and equality values requires a careful balancing of the conflicting interests at stake").

[229] For an interesting legal theory explanation for applying this type of standard to these cases, see Cass R. Sunstein, *On the Tension Between Sex Equality and Religious Freedom* (Univ. of Chi. Pub. Law & Legal Theory, Working Paper No. 167, 2007), *available at* http://ssrn.com/abstract_id=995325 (arguing that while it is not rational to apply some laws burdening religion while not applying laws prohibiting discrimination, it is also not acceptable to apply all laws, and thus, a more correct analysis would apply something similar to strict scrutiny review).

[230] *E.g.*, Hankins v. N.Y. Annual Conference of the United Methodist Church, 516 F. Supp. 2d 225, 230 (E.D.N.Y. 2007) (recognizing that the argument that *Smith* eliminates the ministerial exception has been

to the prevailing approach to free exercise claims prior to *Smith*—the approach that still applies when a law is not neutral, the *Sherbert* strict scrutiny balancing test.[231] This test, the emerging minority approach to ministers' claims,[232] is sound because it does not automatically defer to either the church or the government, but rather it balances the interests involved, requiring the government to have a compelling interest relative to the infringement upon church autonomy for the law to apply.[233] This test takes into account the courts' concerns about church autonomy in applying the deferential approach as well as the governmental interest in enforcing generally applicable, neutral laws highlighted in *Smith*.[234]

Strict scrutiny analysis was used pre-*Smith* to analyze autonomy defenses to ministers' claims and is still used by courts to analyze autonomy defenses to non-ministerial employee claims.[235] The Fourth Circuit explicitly used the *Sherbert* balancing test pre-*Smith* to analyze a church's claim of autonomy.[236] While the court found that in that particular case the "balance weigh[ed] in favor of free exercise of religion," its use of the balancing test preserved a tool the court could use when the government is able to "'justify an inroad on religious liberty by showing that [the federal law] is the least restrictive means of achieving some compelling state interest.'"[237] The Ninth Circuit, in adopting strict scrutiny review for ministers' sexual harassment claims, decided that it "must apply the *Sherbert* balancing test in roughly the same manner as in cases involving lay employees in order to determine whether the application of Title VII in this case would violate" a right to church autonomy.[238]

"rejected by most, if not all, of the courts to have considered it" based on the justification that "the ministerial exception addresses the rights of the *church* while *Smith* addressed the rights of *individuals*").

231 Sherbert v. Verner, 374 U.S. 398, 406 (1963).

232 *See* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948 (9th Cir.1999) (using a balancing test to allow a minister's sexual harassment claim to proceed against a religious institution).

233 *See* Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989) (utilizing the *Sherbert* balancing test as rearticulated in *Yoder*).

234 *See* Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633, 1672 (arguing that while *Smith* may not apply to religious organizations, it definitely raises concerns over what should be done about government regulation that conflicts with church autonomy).

235 *See* Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985) (using strict scrutiny to analyze a ministerial exception claim).

236 *Id.*

237 *Id.* at 1168–69 (quoting Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707 (1981)). The Fourth Circuit noted that the Supreme Court recognized the caveat from *Yoder* that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Id.* at 1169 (quoting *Thomas*, 450 U.S. at 718).

238 Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948 (9th Cir. 1999).

While the D.C. Circuit has hinted that *Sherbert* strict scrutiny is implicit within the deferential approach,[239] it is dangerous not to explicitly apply strict scrutiny in every unique factual situation. In *EEOC v. Catholic University of America*, after applying the deferential approach to dismiss a nun's sex discrimination claim,[240] the court claimed that the ministerial exception essentially embodies the strict scrutiny approach:

> The ministerial exception is judicial shorthand for two conclusions: the first is that the imposition of secular standards on a church's employment of its ministers will burden the free exercise of religion; the second, that the state's interest in eliminating employment discrimination is out-weighed by a church's constitutional right of autonomy in its own domain.[241]

While the D.C. Circuit may understand this shorthand, most courts do not disclose the balancing they undertake.[242] As a result, their apparent absolute deference to religious organizations leaves no precedential tool for addressing complex situations where the weight of interests may change.

Aside from being constitutional, the primary benefit of the minority approach that routinely and explicitly acknowledges the strict scrutiny test is that it gives courts freedom to engage in fresh balancing when there is an especially compelling government interest.[243] The Fourth Circuit has twice resorted to *Sherbert* balancing to apply a neutral federal law in spite of religious justifications: first, to prohibit a church from using child labor in violation of federal employment laws,[244] and second, to stop a church from paying lower wages to female employees in violation of the Fair Labor Standards Act.[245] The Ninth Circuit has noted the need to balance interests when evaluating sexual harassment claims by ministers or other claims that do not invoke religious doctrines.[246] The Ninth Circuit has also stressed that churches should not be "free from all of the secular legal obligations that currently and routinely apply to them" and allowed a harassed minister to

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239 EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996).

240 *Id.* at 462.

241 *Id.* at 467.

242 *See, e.g.*, McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972) (mentioning the *Sherbert* strict scrutiny test but using the deferential approach to decide the case, ignoring a strict scrutiny analysis).

243 Brock v. Wendell's Woodwork, Inc., 867 F.2d 196, 197 (4th Cir. 1989) (using a balancing test to address a child labor situation).

244 *Id.*

245 Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1398 (4th Cir. 1990).

246 *See* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948 (9th Cir. 1999) (using a balancing test to allow a minister's sexual harassment claim to proceed against a religious institution).

proceed with her claim.[247] Closely balancing the government's interest before dismissing a minister's claim, the Tenth Circuit has echoed this sentiment, stating that the "church autonomy doctrine is not without limits . . . and does not apply to purely secular decisions, even when made by churches."[248] For church autonomy to be implicated, the alleged misconduct must first be "'rooted in religious belief.'"[249]

Even proponents of a strong right to church autonomy recognize that using strict scrutiny would legitimize a necessary analysis for balancing this right against the government's interest in applying neutral laws.[250] The church's right to autonomy would likely outweigh its adherence to administrative regulations regarding business structure and fee requirements for use of facilities.[251] Yet the church's right to autonomy is unlikely to outweigh the government's compelling interest in prohibiting non-doctrine-related violations of federal employment law, including sexual harassment,[252] child labor,[253] unfair wages,[254] and discrimination without religious justification.[255] Scholars point out that the state's interest in ending discrimination, rooted in the Fourteenth Amendment, is of "constitutional magnitude."[256] Also, if a court finds that an organization's religious justifications are merely pretext for discrimination, as the Supreme Court did when applying *Sherbert* strict scrutiny in *Bob Jones University v. United States*,[257] then the *Sherbert* test

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247 *Id.*

248 Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 657 (10th Cir. 2002).

249 *Id.* at 657 (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

250 *See* Laycock, *supra* note 72, at 1402 (supporting a broad right to church autonomy and recognizing that although "[t]he Court has not yet explicitly balanced interests in a church autonomy case, . . . sooner or later it will have to do so").

251 *See id.* at 1397–98 (arguing that "churches' interest in autonomy extends to routine administrative matters").

252 *See Bollard*, 196 F.3d at 948 (allowing a sexual harassment claim to proceed against a church).

253 *See* Brock v. Wendell's Woodwork, Inc., 867 F.2d 196, 199 (4th Cir. 1989) (deciding that a church's right to autonomy under the Free Exercise Clause did not outweigh the government's interest in prohibiting child labor).

254 *See* Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1398 (4th Cir. 1990) (holding that the government's interest in requiring fair wages outweighed a church's interest in autonomy).

255 *Bollard*, 196 F.3d at 947 (refusing to allow broad deference without balancing when there was no religious justification for the violation).

256 *See* Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1116 (1996) ("Job bias disputes are different from other religious conflicts because the state has a compelling state interest of constitutional magnitude that is absent in most other religious disputes.").

257 *See* Bob Jones Univ. v. United States, 461 U.S. 574, 603–604 (1983) (deciding that Bob Jones University would lose its tax-exempt status due to its prohibition of interracial relationships, which the university claimed was based on a biblical mandate).

weighs in favor of application of federal employment law to the religious organization.

Following *Smith*, Congress attempted through RFRA to legislatively require strict scrutiny analysis.[258] While the Second Circuit has decided that RFRA should be used to analyze a church's claim of a right to autonomy,[259] most courts and commentators find RFRA inapplicable to suits between private parties.[260] Some courts point to Section 2000bb-1(c), which states that a person may "obtain appropriate relief against a government."[261] Other courts point to language in Section 2000bb-1(b), which states that the "[g]overnment may substantially burden a person's exercise of religion only if *it demonstrates*" that the law satisfies strict scrutiny.[262] These courts argue that "demonstrate" is defined as "meet[ing] the burdens of going forward with the evidence and of persuasion"[263] and that when "the government is not a party, it cannot 'go[] forward' with any evidence."[264] Even if RFRA were amended to apply to religious organizations' defenses against ministers' claims, the results of RFRA analysis would be no more a bar to ministers' claims of non-religiously justified discrimination than *Sherbert* strict scrutiny review.[265]

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[258] 42 U.S.C. § 2000bb-1(a)-(c) (2006). The statute provides:

> (a) . . . Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section. (b) . . . Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. (c) . . . A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

[259] Hankins v. Lyght, 441 F.3d 96, 109 (2d Cir. 2006) (remanding a minister's claims for analysis under RFRA instead of the ministerial exception framework).

[260] *See* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006) ("RFRA is applicable only to suits to which the government is a party."); John LeVangie, *First Amendment Law*—Hankins v. Lyght *and the Unnecessary Intersection of the Religious Freedom Restoration Act and the Ministerial Exception*, 30 W. NEW ENG. L. REV. 641, 668 (2008) (arguing that RFRA is inapplicable to ministerial exception cases, pointing to its inapplicability to suits between private parties).

[261] 42 U.S.C. § 2000bb-1(c) (2006); *see also Tomic*, 442 F.3d at 1042 (citing 42 U.S.C. § 2000bb-1(c) as a reason why RFRA does not apply to suits between private parties).

[262] 42 U.S.C. § 2000bb-1(b) (emphasis added).

[263] 42 U.S.C. § 2000bb-2(3).

[264] Rweyemamu v. Cote, 520 F.3d 198, 203 n.2 (2d Cir. 2008).

[265] *Cf.* Guinan v. Roman Catholic Archdiocese of Indianapolis, 42 F. Supp. 2d 849, 853 (S.D. Ind. 1998) (recognizing that when the ministerial exception is inapplicable to the claim of a religious employee against her employer and neutral federal law is correspondingly applicable to the religious institution's relationship with the employee, the employee's claim automatically survives any RFRA defense by the religious institution as well).

IV. LEGISLATIVE PROPOSAL IMPROVING ANALYSIS OF MINISTERS' EMPLOYMENT CLAIMS

Though guidance from the Supreme Court as to the correct approach to ministers' claims against their employers would be ideal,[266] scholars have suggested that the Court, by setting a low "neutrality" level of free exercise protection, may be shifting primary responsibility for protecting religious liberty to state courts.[267] This trend positions Congress as the dominant enunciator of national, rather than state-specific, parameters of religious liberty.[268] Accordingly, a second approach to address the difficulties courts face in deciding ministers' claims would be for Congress to establish a test for these types of cases by amending federal employment laws. Using Title VII as an example, this Part first shows that the current version of Title VII is intended to apply to religious organizations. Second, this Part argues that under the proposed statutory amendment, ministers' Title VII claims, when dismissed, should be dismissed according to Federal Rule of Civil Procedure 12(b)(6). Finally, this Part proposes an amendment to Title VII that would address courts' concerns about protecting religious organizations while also giving more protection to ministers.

A. Statutory Application of Title VII to Religious Organizations

As noted previously, Title VII explicitly exempts religious employers from suits for religious discrimination.[269] The text of Title VII, however, never exempts religious organizations from suits against them for alleged racial or gender discrimination.[270] The *expressio unius* canon of statutory interpretation

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[266] Whitney Ellenby, *Divinity vs. Discrimination: Curtailing the Divine Reach of Church Authority*, 26 GOLDEN GATE U. L. REV. 369, 412 (1996) (making the case for the Supreme Court to provide more protection to ministers).

[267] *See generally* Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235 (1998) (arguing that the Supreme Court's decisions in *Smith* and *Boerne* have had the effect of inciting state courts to provide stronger religious liberty jurisprudence and noting that this would be in line with Justice Scalia's federalist viewpoint).

[268] *See* Douglas Laycock, *Federalism as a Structural Threat to Liberty*, 22 HARV. J.L. & PUB. POL'Y 67, 76 (1998) ("Congress can grant more liberty with respect to federal law than the Court says it has to . . . .").

[269] *See* 42 U.S.C. § 2000e-1(a) (2006) ("This subchapter shall not apply to . . . a religious [organization] with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [organization] of its activities.").

[270] *See* 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer **. . .** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .").

holds that expression of one thing implies exclusion of another.[271] This canon suggests that because Congress expressly exempted religious employers from religious discrimination suits, but not from claims of other forms of discrimination, Congress intended for other types of discrimination suits to proceed against religious employers.

Additionally, commentators have suggested that the legislative history of the statutory exemption from Title VII reveals that Congress intended to make religious organizations subject to discrimination suits on the basis of race, sex, or national origin.[272] According to commentators, Congress explicitly "considered and rejected a blanket exemption that would have placed religious employers outside the scope of covered 'employers.'"[273] The original version of the legislation before the House of Representatives "provided a religious organization with a blanket exemption from the provisions of Title VII."[274] In rejecting this blanket exemption, the principal sponsor of the narrower language that eventually was adopted in Title VII commented that the general exemption for religious groups was limited to those practices relating "to the employment of individuals of a particular religion to perform work connected with [the employer's] religious activities."[275]

The *McClure* court recognized the broad language of Title VII but still chose to apply deference.[276] After examining the Supreme Court church property dispute cases,[277] the *McClure* court held that "Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister."[278] Despite the seminal nature of the *McClure* decision, other courts have

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[271] *See* EVA H. HANKS, MICHAEL E. HERZ & STEVEN S. NEMERSON, ELEMENTS OF LAW 323–28 (1994) (discussing and defining the statutory interpretation canon of *expressio unius*).

[272] Brant, *supra* note 34, at 284–85 ("Instead, Congress chose to tailor the exemption narrowly, exempting religious institutions only from the law's prohibition of religious discrimination."); *see also* Vigars v. Valley Christian Ctr. of Dublin, Cal., 805 F. Supp. 802, 807 (N.D. Cal. 1992) ("[A]lthough Congress permitted religious organizations to discriminate in favor of members of their faith, religious employers are not immune from liability for discrimination based on race, sex, national origin, or for retaliatory actions against employees who exercise their rights under the statute.").

[273] Brant, *supra* note 34, at 284.

[274] McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972).

[275] 110 CONG. REC. 12,818 (1964).

[276] *McClure*, 460 F.2d at 560–61.

[277] For examples of cases involving deference to religious organizations in property disputes, see *id.* at 559 (examining Watson v. Jones, 80 U.S. 679 (1871), Kedroff v. St. Nicholas Cathedral of Russ. Orthodox Church in N. Am., 344 U.S. 94 (1952), and Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 441 (1969)).

[278] *McClure*, 460 F.2d at 560–61.

emphatically declined to embrace this portion of the *McClure* reasoning due to the weight of evidence against such reasoning.[279]

B. Ministers' Title VII Claims Should Be Dismissed Pursuant to Rule 12(b)(6)

As a precursor to proposing changes to the text of Title VII, it is important to address a civil procedure dispute over the appropriate mechanisms for dismissal in ministerial exception cases. Courts are currently split over whether to use Rule 12(b)(1) (lack of subject matter jurisdiction) or Rule 12(b)(6) (failure to state a claim upon which relief can be granted) to dismiss these cases.[280] The standard for a facial attack based on the ministerial exception under 12(b)(1) is virtually the same as that under 12(b)(6).[281] Both rules require the court to take all the plaintiff's allegations as true and draw all inferences in favor of the plaintiff.[282] Because, as the Third Circuit has concluded, the "exception may serve as a barrier to the success of a [minister]'s claims, but it does not affect the court's authority to consider" claims arising under federal law, the best rule for analyzing the exception is likely 12(b)(6).[283] It has been noted by the Tenth Circuit that assertion of the "church autonomy doctrine . . . is similar to a government official's defense of qualified immunity, which is frequently asserted in a motion to dismiss under Rule 12(b)(6)."[284]

Furthermore, Rule 12(b)(1) is the incorrect procedural mechanism because it is better policy to allow courts to have subject matter jurisdiction to hear cases alleging violation of federal employment law under federal question

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279 *See* Petruska v. Gannon Univ., 462 F.3d 294, 303 n.4 (3d Cir. 2006) (noting that while courts like the one in *McClure* "have derived the ministerial exception from the doctrine of constitutional avoidance," other courts "have determined that, under its plain language, Title VII applies to ministerial employment decisions").

280 *See* Rweyemamu v. Cote, 520 F.3d 198, 206 n.4 (2d Cir. 2008) (discussing differing approaches to dismissal of ministerial exception cases and stating that the most common approach has been dismissal according to Rule 12(b)(6)). *But see* Kalscheur, *supra* note 202, at 87 (discussing the dispute over the proper ground for dismissal and endorsing dismissal according to Rule 12(b)(1) based on a right to church autonomy, but ignoring Jones v. Wolf, 443 U.S. 595 (1979)).

281 *Petruska*, 462 F.3d at 299 n.1 ("Although we conclude that it is most properly construed as a Rule 12(b)(6) motion, we note that the standard is the same when considering a facial attack under Rule 12(b)(1) or a motion to dismiss for failure to state a claim under Rule 12(b)(6).").

282 *See* Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d. Cir. 1977) (discussing in detail the differences between Rule 12(b)(1) and Rule 12(b)(6)).

283 *Petruska*, 462 F.3d at 302–03.

284 Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 654 (10th Cir. 2002).

jurisdiction.[285] Those who argue that 12(b)(1) should be used instead of 12(b)(6) reason that secular courts should never intrude upon church autonomy.[286] Yet as argued in this Comment, the Supreme Court has foreclosed the option of an absolute right to autonomy.[287] First, *Jones* allows courts to hear matters involving church governance as long as they can be determined using neutral principles of law.[288] Second, the Court has allowed secular governmental agencies to intrude upon church autonomy for purposes of employment claims to determine if a religious organization's justifications for its actions are merely pretext.[289] Even aside from these constitutional infirmities, it is dangerous policy to allow the church to have the unfettered ability to mistreat its ministers without any fear of accountability in secular courts due to lack of subject matter jurisdiction.

C. Amendment of Title VII

Turning to the statute's text, Section 2000e-1(a) of Title VII currently does "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 [religious organization]."[290] The Supreme Court upheld this provision exempting religious organizations from claims of religious discrimination because it was created for the "secular purpose of 'assuring that the government remains neutral'" and "effectuates a more complete separation" of church and state.[291]

To provide appropriate protection for both religious organizations and their ministers, a new paragraph should be added to Title VII that shifts to religious organizations the burden of producing a religious justification for their alleged employment discrimination. If no such religious justification is produced, the court can proceed in evaluating the minister's claim. If a religious justification

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[285] *See* Arbaugh v. Y&H Corp., 546 U.S. 500, 503 (2006) ("[T]he Judicial Code gives federal courts subject-matter jurisdiction over all civil actions 'arising under' the laws of the United States. Title VII actions fit that description." (quoting 28 U.S.C. § 1131 (2006) (citation omitted)).

[286] Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1037 (7th Cir. 2006) ("Federal courts are secular agencies [and] therefore do not exercise jurisdiction over the internal affairs of religious organizations.").

[287] *See supra* footnotes 79–82 and accompanying text; *supra* Part II.C.

[288] Jones v. Wolf, 443 U.S. 595, 602 (1979) (holding that the application of neutral laws to intra-church disputes is constitutional even though it interferes with church autonomy).

[289] Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 628 (1986).

[290] 42 U.S.C. §2000e-1(a) (2006).

[291] Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 332, 339 (1987) (quoting Amos v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 594 F. Supp. 791, 812 (D. Utah 1984)).

is produced, the court's inquiry will be limited to determining whether the evidence proves that the religious justification is merely pretext.[292] Since the current version of Title VII does not limit courts in this manner, this amendment would "effectuate[] a more complete separation" of church and state and '"assur[e] that the government remains neutral.'"[293] This amendment could be placed after the current exemption in section 2000e-1(a) and could read:

> A claim under § 2000e-2 is allowed to proceed against a religious corporation, association, educational institution, or society unless such organization produces a religious justification for their discriminatory employment decision. If such a justification is produced, judicial inquiry is limited to examining whether the justification is merely pretext for discrimination. If the justification is not pretext, then the claim should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

If *Smith*, *Zelman*, and *Jones* have in fact overridden a constitutional to church autonomy in church governance, this new amendment will apply in every case brought by a minister against a religious employer. If a right to church autonomy in general church governance has survived those cases, before dealing with the statute, courts will need to deal with the religious institution's general right to be free from government interference in its administrative decisions. This will require courts to apply strict scrutiny in individual cases and balance, case-by-case, the interest of the government in enforcement of this new amendment and the church's interest autonomy. In many cases the government's compelling interest in eliminating racial and gender discrimination that has no genuine religious justification will override a church's claim of autonomy,[294] and since this amendment is the least restrictive means of achieving that goal, most claims will pass strict scrutiny review. Yet in cases where enforcement of the provision would violate core doctrines of the church or require ongoing monitoring of church management by the court, a surviving right to autonomy may be infringed.[295] Overall, this

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[292] *See* Corbin, *supra* note 93, at 2017 (giving examples of how evidence concerning a teacher's claim against a religious school could be gathered without invoking determinations of church doctrine).

[293] *See Amos*, 483 U.S. at 339 (quoting *Amos*, 594 F. Supp. at 812) (holding that the current exemption for religious organizations from claims of religious discrimination is constitutional for this reason).

[294] *See* Rutherford, *supra* note 256, at 1116 ("The state's interest in eliminating job bias is even stronger than most interests it asserts as compelling, because it is supported by the egalitarian language in the Fourteenth Amendment and federal statutes.").

[295] *See* Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) (allowing exemption for the Amish from compulsory school attendance rules because the matter was "not merely a matter of personal preference, but

amendment would protect ministers and other religious employees from discrimination by religious organizations, while still allowing religious organizations the freedom to make employment decisions based on core religious beliefs.

CONCLUSION

The deferential approach currently gives churches free rein to engage in actions that are repugnant to our national conscience: racial discrimination, gender discrimination, and even sexual harassment. The harsh results of deference and the refusal of most circuit courts to examine the government's interest in these cases provide clear evidence of the need for a better test. Moreover, the deferential approach relies upon precedent that does not deal with neutral laws, such as Title VII, and has been stripped of every constitutional foundation it might otherwise be based upon. *Smith* reduced free exercise protection to an easily passed neutrality test; *Zelman* reduced disestablishment protection to a similarly weak neutrality analysis; and *Jones* severely undermined the idea of a strong right to church autonomy.

A federal right to church autonomy may not exist under modern First Amendment jurisprudence, but this does not mean federal employment law should be hastily applied to religious employers without any regard for religious liberty. With the low standard of neutrality that has been set by the Supreme Court, Congress should act to amend Title VII to strike a balance between protecting ministers on the one hand and preserving the autonomy of religious organizations on the other. Title VII should apply to religious organizations unless they have a genuine religious justification for their actions. Courts should be allowed to hear evidence that the religious justification is mere pretext, but they should be forced to dismiss a minister's claims if a genuine religious justification is put forward.

If a limited right to church autonomy remains, courts should engage in strict scrutiny review, balancing the government's interest against religious organizations' First Amendment rights. This would allow ministers to proceed with their claims when judicial action would do little to infringe upon a church's autonomy, especially in situations where a church has engaged in

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one of deep religious conviction, shared by an organized group, and intimately related to daily living"); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 660 (10th Cir. 2002) (holding that when a church's core doctrine condemns homosexual activity, a minister's suit under Title VII alleging discrimination because of her homosexuality was barred by a right to church autonomy).

egregiously unacceptable activity, such as child labor, unfair wages, or sexual harassment. After a court has engaged in strict scrutiny analysis and decided a minister can proceed, it could then use the suggested amendment to Title VII to determine if there is any permissible justification for the organization's actions.

To preserve a decent society, religious organizations must be neither above the law nor subject to unnecessary government oversight. The current deferential approach allows religious organizations to engage in repugnant employment activities without any accountability in secular courts. The plight of pastors whose claims of unfair employment activities are being rejected by the judiciary demands that courts and the legislature reconsider this approach. This Comment demonstrates that our constitutional jurisprudence compels a more fair approach than the current deference model and that the inadequacy of federal employment law necessitates congressional action to protect ministers while addressing court concerns regarding intrusion into church governance.

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