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THE APPLICATION OF ANTI-DISCRIMINATION LAWS TO RELIGIOUS INSTITUTIONS: THE IRRESISTIBLE FORCE MEETS THE IMMOVEABLE OBJECT

Oliver S. Thomas[1]

Introduction

The application of anti-discrimination laws to churches and other religious institutions pits a fundamental constitutional principle against what may be the most compelling public policy interest in post World War II America. On one hand stands the First Amendment's "wall of separation" between church and state as expressed in the constitutional doctrines of non-establishment, free exercise and church autonomy[2]; on the other is a national commitment to eradicate discrimination on the basis of race, sex, national origin, and more recently age and handicap.[3] The clash between this constitutional principle and the commitment to equal opportunity for all Americans has spawned some of the most difficult-and controversial-cases in constitutional law.

Courts, as the final arbiters of the Constitution, must decide which of these fundamental principles will prevail. Shall they sacrifice religious liberty in the name of civil rights, or shall they preserve church autonomy to the detriment of individual rights? Is the answer to be found in the language of the Constitution itself, or must courts look elsewhere in making their decision?

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[2]The term "church" is used generically in this paper to refer to churches, temples, synagogues and other ecclesiastical bodies.

[3]It is not the purpose of this paper to discuss the application of laws prohibiting discrimination on the basis of religion to religious institutions. While the Supreme Court has not held that religious organizations have a constitutional right to discriminate on the basis of religion in hiring those individuals who perform purely "secular" as opposed to "religious" functions, the Court, in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), held unanimously that the following exemption, contained in Title VII of the Civil Rights Act of 1964, does not violate the First Amendment's prohibition against laws "respecting an establishment of religion":

> This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. 42 U.S.C. § 2000e-1.

The author's goal is to construct a useful analytical framework for predicting how future cases should and will be decided. It is not within the scope of this paper to address state or municipal anti-discrimination laws. The constitutional and policy arguments set forth in this paper, however, should apply with equal weight to state and local questions.

I. THE CONSTITUTIONAL PRINCIPLE

The First Amendment to the United States Constitution begins: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." These sixteen words provide religious institutions with a formidable barrier to governmental regulation.[4] The protections provided by the religion clauses can be classified into three distinct categories: those arising under (1) the establishment clause, (2) the free exercise clause and (3) the church autonomy cases.

A. The Establishment Clause

The establishment clause governs the delicate relationship between the institutions of government and religion. It provides what many have come to refer to as the "separation of church and state." The controlling principle is one of governmental neutrality–both between religions and between religion and irreligion. The value underlying the establishment clause is, of course, the voluntary nature of religion. Authentic religion must be wholly uncoerced.

Influenced by John Locke's Letter of Toleration as well as the writings of Baptist leader Roger Williams and other colonial dissenters, James Madison and Thomas Jefferson set out to enshrine these values in the law. In its 1947 decision of *Everson v. Board of Education*,[5] the Supreme Court, relying heavily upon the writings of Madison and Jefferson, stated:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in

[4]Esbeck, Establishment Clause Limits on Governmental Interference With Religious Organizations, 41 Wash. and Lee L. Rev. 347 (1984); Gedicks, Toward a Constitutional Jurisprudence of Religious Group Rights, 1989 Wis. L. Rev. 99 (1989); Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L. Rev. 1373 (1981).

[5]330 U.S. 1.

> any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[6]

In *Lemon v. Kurtzman*,[7] the Court fashioned a three-part test to assist it in analyzing cases arising under the establishment clause. Despite strident criticism by less separationist members of the Court,[8] the test has been utilized in all but one of its establishment clause cases decided since 1971.[9]

In order to pass muster under the *Lemon* test, a law (1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion and (3) must not foster excessive entanglement between government and religion.[10] While part two of the test forbids laws that have a primary effect of inhibiting religion and, therefore, would seem to protect religious organizations from burdensome governmental regulations, this portion of the test has never been used to invalidate any such governmental action. This is due in part to the fact that despite *Lemon*'s reciprocal language of advancing "or inhibiting" religion, most

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[6] *Id.* at 15-16. Despite the strong separationist dicta in *Everson*, the Court upheld a state program whereby parents were reimbursed for transportation costs incurred in sending their children to parochial schools.

[7] 403 U.S. 602 (1971).

[8] *County of Allegheny v. A.C.L.U.*, ____ U.S. ____, ____, 109 S.Ct. 3086, 3134 (1989) (Kennedy, J., dissenting); *Edwards v. Aquillard*, 482 U.S. 578, 610 (1987) (Scalia, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

[9] *See Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding the long-standing practice of legislative chaplaincies on the rationale that the same Congress which passed the First Amendment created the first legislative chaplaincy).

[10] 403 U.S. 672, 612-13

lawyers and judges tend to view the establishment clause as prohibiting governmental aid to religion and the free exercise clause as prohibiting governmentally imposed burdens.[11]

Lemon's third prong, on the other hand, would seem to provide some assistance to religious entities seeking excusal from generally applicable statutes and regulations. The prohibition against laws creating excessive governmental entanglement with religion arose in the 1970 decision of *Walz v. Tax Commission of the City of New York*.[12] The plaintiff in *Walz* challenged the long-standing municipal practice of granting property tax exemptions to religious and charitable organizations. Chief Justice Burger, writing for the Court, stated that one of the primary purposes of the establishment clause was to prevent government entanglement with religion. According to Burger, taxing religious institutions would lead to a greater likelihood of impermissible entanglement than would exempting them.[13] Because the exemptions at issue in *Walz* were not provided exclusively to religious organizations, and because they amounted to nothing more than a refusal on the part of government to tax religious and charitable organizations, the Court held that the exemptions did not violate the establishment clause.

While the Supreme Court to date has not used the prohibition against excessive entanglement to strike down the application of generally applicable government regulations to churches,[14] the dicta in *Walz* hints at this possibility.[15] Moreover, the Court has been extremely zealous in its enforcement of the non-entanglement principle in the context of government aid to parochial schools, striking down even those programs with the mere potential for excessive entanglement.[16] It would seem, therefore, and at least one commentator has argued, that the non-entanglement principle should provide some protection against the application of anti-discrimination laws to churches.[17] However, the courts' reluctance to interpret the establishment clause as a shield against governmentally imposed burdens on religion means that churches should look elsewhere for their primary constitutional defense. A far more likely source of protection was, until recently, found in the free exercise clause.

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[11] *E.g.*, Laycock, *supra* note 4.

[12] 397 U.S. 664.

[13] *Id.* at 674.

[14] The Court has refused, for example, to exempt churches from the minimum wage and record-keeping requirements of the Fair Labor Standards Act. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1987).

[15] "[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Walz*, 397 U.S. at 675.

[16] *Aguilar v. Felton*, 473 U.S. 402 (1985).

[17] Esbeck, *supra* note 4.

B. The Free Exercise Clause

The free exercise clause prohibits, insofar as possible, government interference with religious belief and conduct. While the freedom to believe is absolute, the freedom to act is not.[18] Religiously motivated conduct, therefore, is subject to some degree of government regulation. For example, a religious group may believe in human sacrifice, but the state is free to outlaw the practice in order to protect the safety and welfare of its citizens.[19] On the other hand, the Court has recognized that the freedom to believe is a shallow freedom, indeed, if one may not act upon one's beliefs.[20] For that reason, the Court has traditionally subjected laws that burden religious conduct to the strictest form of judicial scrutiny.[21]

The fountainhead for modern free exercise analysis is *Sherbert v. Verner*, decided in 1963.[22] Ms. Sherbert, a member of the Seventh-Day Adventist Church, was discharged from her employment because she refused, for religious reasons, to work on Saturdays. When she applied for unemployment compensation benefits, the State of South Carolina denied her claim, holding that she "failed, without good cause . . . to accept suitable work."[23] Ms. Sherbert sought judicial review of the state's decision on the ground that it violated her constitutional right to the free exercise of religion. The Supreme Court agreed, holding that a state may not force an individual to make the "cruel choice" between violating her sincere religious beliefs on the one hand or forfeiting her government benefits on the other.[24] In sustaining Ms. Sherbert's claim, the Court fashioned a separate test to assist it in analyzing free exercise claims.

Under the Sherbert test, as it has been refined in subsequent cases,[25] a *prima-facie* case is established if the claimant can show that (1) his conduct is motivated by a sincere religious belief, and (2) the government has directly or indirectly burdened this

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[18] *Cantwell v. Connecticut*, 310 U.S. 296, 303-4 (1940).

[19] *Reynolds v. U.S.*, 98 U.S. (8 Otto) 145, 166 (1878).

[20] *Wisconsin v. Yoder*, 406 U.S. 205, 219-20 (1972).

[21] *West Virginia v. Barnette*, 319 U.S. 624, 639 (1943). *See also Murdock v. Pennsylvania*, 319 U.S. 103 (1943) (stating that religious liberty is a "preferred" freedom).

[22] 374 U.S. 398.

[23] *Id.* at 401.

[24] *Id.* at 404.

[25] *See Frazee v. Illinois Department of Employment Security*, ____ U.S. ____, 109 S.Ct. 1514 (1989); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987); *Thomas v. Review Board*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

conduct.[26] The burden of persuasion then shifts to the state to show that (1) its action is justified by a compelling state interest, and (2) no less restrictive or less burdensome means of accomplishing its interest exists.[27] The magnitude of the state interest necessary to justify a burden on the free exercise of religion has been described as being "of the highest order"[28] and involving "some substantial threat to public safety, peace, and order."[29] "Only the gravest concerns, endangering paramount interests, give occasion for permissible limitation."[30]

While the Court has crafted a test that would appear to give free exercise claims an extraordinarily high degree of constitutional protection, claimants, in fact, have fared rather poorly. The Court has refused to apply *Sherbert* in a number of cases and instead has substituted a lower standard of scrutiny requiring a mere rational basis for acts burdening the free exercise of religion.[31] Even in those cases where *Sherbert* has been held to apply, the test has yielded results that belie its libertarian language.[32] Native Americans in particular have received little relief from the Court.[33] This has left some lawyers and judges wondering if *Sherbert* has real significance outside the unemployment compensation area.[34]

Civil libertarians' worst fears came to pass on April 17, 1990, with the landmark free exercise decision *Employment Division v. Smith*.[35] The Court in *Smith* made clear that the *Sherbert* test was no longer applicable to claims raised against facially neutral, generally

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[26] *Sherbert*, 374 U.S. at 403-04.

[27] *Id.* at 406-07.

[28] *Thomas*, 450 U.S. at 718.

[29] *Sherbert*, 374 U.S. 398, 406 (1963).

[30] *Id.*

[31] *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (involving prisoners); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (involving military personnel).

[32] *See, e.g., U.S. v. Lee*, 455 U.S. 252 (1982).

[33] *Lyng v. Northwest Indian Cemetery Protective Association*, ____ U.S. ____, 108 S.Ct. 1319 (1988); *Bowen v. Roy , 476 U.S. 693 (1986).*

[34] *E.g., Equal Employment Opportunity Commission v. Townley Engineering and Manufacturing Company*, 85 F.2d 610, 622 (1988) (Noonan, J., dissenting).

[35] 494 U.S. ____, 110 S.Ct. 1595.

applicable laws.[36] Despite strident criticism by commentators[37] and universal condemnation by religious and civil liberties groups,[38] *Smith* leaves little protection for churches from generally applicable anti-discrimination laws.

C. The Church Autonomy Cases

A third source of constitutional protection for religious institutions arises from a line of Supreme Court decisions involving church doctrine, governance, policy and administration. Beginning in 1871, the Court has held that such ecclesiastical questions lie beyond the jurisdiction of civil authorities.[39] Commentators differ over whether these decisions should be considered as arising under the free exercise or establishment clauses,[40] but the cases themselves tend to be couched in general language usually referring simply to the First Amendment or to the religion clauses. The author will not attempt to pigeonhole the church autonomy cases under either clause but will discuss them on their own merits.

In *Watson v. Jones*,[41] the Court addressed the first in a series of cases involving property disputes between proslavery and antislavery forces within the churches. The Presbyterian denomination, like many others, had split over the slavery issue, and the proslavery forces at the Walnut Street Presbyterian Church in Louisville, Kentucky, were trying to seize control of the church property in violation of the orders of the General Assembly, the denomination's highest judicatory body. The Kentucky Court of Appeals held for the proslavery majority, but the Supreme Court reversed. In a decision one church leader has described as the "manifesto" of

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[36] *Id.* at ____.

[37] *E.g.*, Laycock, The Remnant of Free Exercise, 1990 S.Ct. Rev. ____; Laycock, The Supreme Court's Assault on Free Exercise and the Amicus Brief That Never Was Filed, 8 J. L. and Relig. 71 (1990); McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109 (1990); Gordon, Free Exercise on the Mountain Top, 79 Calif. L. Rev. ____ (1991).

[38] *See e.g.*, New York Times, May 11, 1991, at A16.

[39] *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). It should be noted that courts may hear a church property dispute if the case can be decided on "neutral principles" of law and without examining church doctrine. *Jones v. Wolf*, 443 U.S. 595 (1979). This limited exception should not apply to cases involving discrimination by religious institutions which inevitably involve questions of doctrine.

[40] Compare Laycock, *supra* note 4 with Esbeck, *supra* note 4.

[41] 80 U.S. (13 Wall.) 679 (1871).

church autonomy rights,[42] the Court held that the ecclesiastical decisions of the highest ranking judicatory of a particular denomination must be accepted by civil courts:

> The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.[43]

Decided prior to the application of the religion clauses to the states via the Fourteenth Amendment,[44] *Watson* is based upon federal common law. Notwithstanding, it is the first decision recognizing the autonomy of religious institutions and continues to be cited by the Court.[45]

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[42]D. Kelley, The Proper Relations of Government and Religion 391 (ABA conference on "Tort and Religion," 1988).

[43]*Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1872).

[44]*See Cantwell v. Connecticut*, 310 U.S. 296 (1940) (applying the free exercise clause); *Everson v. Board of Education*, 330 U.S. 1 (1947) (applying the establishment clause).

[45]*E.g., Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).

The Court revisited church property disputes in *Kedroff v. St. Nicholas Cathedral*,[46] this time grounding its opinion solidly in the First Amendment. The facts of the case underscore the strength of the autonomy principle.

The Bolshevik Revolution of 1917 had altered radically the status of churches in Russia. The Russian Orthodox Church went from a position of power and privilege in Russian society to one of weakness and subordination. The Patriarch was imprisoned, and the church's administration was brought under the control of a state that was openly hostile toward religion. Predictably, the upheaval of the Russian church caused serious repercussions in the North American diocese. A widespread movement for independence from the mother church was launched, and the New York legislature responded by passing a statute which undertook to transfer control of the Russian Orthodox churches in New York from the church's hierarchy in Moscow to the governing bodies of the "Russian Church in America." The statute was challenged by the mother church and upheld by the Supreme Court of New York. The United States Supreme Court, citing *Watson v. Jones*, reversed, holding that in cases involving ecclesiastical questions civil courts must defer to the decisions of the highest ranking judicatory body of the church.[47] Because the appointment of clergy and control of church assets are ecclesiastical questions, said the Court, the New York statute is barred by the First Amendment.[48]

The Court's decision is significant not only because of its unusual facts, but also because of its date. As Professor Gedicks has stated:

> *Kedroff* is startling because it was handed down, not in an era of glasnost or even detente, but in 1952, in the midst of post-war American fear of Soviet world domination and communist conspiracies. The Court's holding left religious property that was located in the United States and that served the spiritual needs of its citizens, under the effective control of the Soviet Union at the very time that Joseph McCarthy was traversing the country ruining reputations and careers with the mere accusation of Soviet complicity.[49]

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[46] 344 U.S. 94 (1952).

[47] *Id.* at 110-121.

[48] *Id.*

[49] Gedicks, *supra* note 4, at 133.

Moving beyond church property disputes, the Court in *Gonzalez v. Roman Catholic Archbishop of Manila*[50] broadened the autonomy principle to include church employment. At issue in the case was the refusal of the Archbishop of Manila to appoint the plaintiff to the chaplaincy. Said the Court:

> Because the appointment [of a chaplain] is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.[51]

The Court further closed the door on civil adjudication of church employment disputes when it refused to recognize the exception for arbitrary and capricious employment decisions that had been suggested by the Court in *Gonzalez*. The case, *Serbian Eastern Orthodox Diocese v. Milivojevich*,[52] makes clear that even the most egregious church employment disputes lie beyond the jurisdiction of civil authorities.

A recent decision by the Eleventh Circuit Court of Appeals provides insight into how lower courts are applying the church autonomy doctrine. In *Crowder v. Southern Baptist Convention*,[53] the Eleventh Circuit Court of Appeals demonstrated how far courts may be willing to go in order to avoid involvement in ecclesiastical questions. At the annual meeting of the Southern Baptist Convention in 1985, convention moderates, dissatisfied with the nominations of the fundamentalist-controlled Committee on Boards, Commissions and Standing Committees, sought to offer a substitute slate of nominees for consideration by the "messengers" (i.e., delegates). The president of the convention, himself a fundamentalist, ruled the effort to nominate an alternate slate of candidates out of order despite convention bylaws giving to the messengers "the right to consider and amend the body of all reports."[54] Although the president's ruling was appealed and overruled, he remained adamant in his refusal to allow the alternate list of names

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[50] 280 U.S. 1 (1929).

[51] *Id.* at 16.

[52] 426 U.S. 696 (1976).

[53] 828 F.2d 718 (11th Cir. 1987), *cert. denied*, 108 S.Ct. 1028 (1988).

[54] *Id.* at 720

to be placed in nomination. Moreover, he repeatedly failed to recognize those messengers who sought to raise points of order.[55] The candidates nominated by the Committee on Boards, Commissions and Standing Committees subsequently were elected.

Enraged over what they perceived as the president's unwillingness to abide by convention rules, several moderates sued the convention, asking that the election be rescinded. They cited in support of their position *Jones v. Wolf*, which holds that courts may resolve church property disputes if it can be done through the application of "neutral principles" of law.[56] The plaintiffs argued that their case, like *Jones*, involved a simple interpretation of non-doctrinal convention bylaws as well as Roberts Rules of Order.

Despite a series of state court decisions requiring churches to follow their own procedural rules,[57] the Eleventh Circuit refused to enter the Southern Baptist fray. Restricting *Jones* solely to church property disputes, the court stated:

> This controversy is one step removed from a major doctrinal conflict between two factions within the Southern Baptist Convention. Although a civil court might be able to avoid questions of religious beliefs or doctrines in ruling on the issue of whether the Southern Baptist Committee on Boards elected at the 1985 Convention was entitled to serve in this capacity, "questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern." (citation omitted)[58]

Crowder is ample testimony to the continued viability of the church autonomy principle.

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[55] *Id.*

[56] 443 U.S. 595, 604 (1979).

[57] *E.g., In re Baptist Church*, 186 So.2d 102 (Ala. 1966); *Randolph v. First Baptist Church*, 53 Ohio App. 2d 288, 120 N.E.2d 485 (1954); *Taylor v. Jackson*, 273 F. 345 (D.C. 1921).

[58] 828 F.2d 718, 726.

II. THE EMERGENCE OF ANTI-DISCRIMINATION LAWS AS A COMPELLING STATE INTEREST

Beginning with the 1954 decision of *Brown v. Board of Education*,[59] the concept of equal opportunity for all Americans without regard to race has emerged as a fundamental national policy. Decisions such as *Baker v. Carr*[60] and *Runyon v. McCrary*[61] would lead one to conclude that the eradication of racial discrimination is perhaps the most compelling state interest in the constellation of American public policy.[62]

> Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.[63]

In *Bob Jones University v. United States*, the Court made clear how far it is willing to go to enforce this policy. Despite the absence of clear statutory authority,[64] the Court upheld the Internal Revenue Service 's position that an organization exempt from taxation under I.R.C. § 501(c)(3) must act in accordance with the established public policy of nondiscrimination.[65] The Court dismissed the constitutional arguments made on Bob Jones University's behalf asserting: "The government interest at stake here is compelling."[66]

Those concerned about the use of *Bob Jones* to uphold the application of anti-discrimination laws to churches can take some consolation in the fact that: (1) the Court expressly limited its holding to schools, stating: "We deal here only with religious schools-not with churches or other purely religious institutions,"[67] and (2) the withdrawal of an organization's

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[59] 347 U.S. 483.

[60] 369 U.S. 186 (1962) (upholding the right of Black voters to challenge a state reapportionment scheme under the equal protection clause).

[61] 427 U.S. 160 (1976) (interpreting 42 U.S.C. § 1981 as applying to private schools under the Thirteenth Amendment's "badge of slavery" rationale).

[62] *See* Gedicks, *supra* note 4, at 131.

[63] *Bob Jones University v. United States*, 461 U.S. 574, 593 (1983)

[64] *Id.* at 612 (Rehnquist, J., dissenting).

[65] *Id.* at 595.

[66] *Id.* at 604.

[67] *Id.* at 604 n.29. It should be noted, however, that the Internal Revenue Service has sought to apply the decision in *Bob Jones* to a local church. *Second Baptist Church of Goldsboro v. Commissioner*, T.C. Doc. No. [illegible] (settled July 11, 1989).

tax-exempt status does not constitute as severe a burden on the free exercise of religion as ordering it to employ particular persons.

While the Court has been unwilling to treat sex as a suspect classification for purposes of the equal protection clause,[68] laws prohibiting sex discrimination have been upheld in the face of First Amendment challenges based upon freedom of association. In *Roberts v. United States Jaycees*,[69] the Court upheld the Minnesota Department of Human Rights exercise of jurisdiction over the all-male Jaycees and reached a similar decision in a case involving the Rotary Club.[70]

More than likely the Court would treat laws prohibiting other forms of discrimination (e.g., national origin, sexual orientation) similarly. In each instance the court is likely to consider the state's underlying interest "compelling." This is particularly troubling for religious organizations whose religious doctrines may prohibit the employment of some individuals such as homosexuals.

III. THE CONFLICT

Difficulty arises when the state's efforts to eliminate discrimination conflict with the constitutional principles of free exercise, non-establishment and church autonomy. These cases force courts to choose between the relative importance of mediating structures[71] and the separation of church and state on the one hand and individual rights to participate fully in every aspect of society on the other.

The Supreme Court has been particularly reluctant to make this choice and has employed a number of legal doctrines to avoid reaching the underlying constitutional issues. Several lower courts, however, have addressed the fundamental policy choices presented by this conflict.

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[68] *Frontiero v. Richardson*, 411 U.S. 677 (1973).

[69] 468 U.S. 609 (1984).

[70] *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987). *See also New York State Club Association v. City of New York*, ____ U.S. ____, 108 S.Ct. 2225 (1988).

[71] *See* Gedicks, *supra* note 4 for the importance generally of mediating structures.

A. Deferring to State Authorities

In 1986, the Court was presented with an opportunity to decide the extent to which a parochial school is subject to a state's anti-discrimination laws.[72] Linda Hoskinson had filed a complaint with the Ohio Civil Rights Commission charging the Dayton Christian Schools, a fundamentalist primary and secondary school, with sex discrimination contrary to Ohio law.[73] The school had terminated Hoskinson's teaching contract after she had her first child on the basis of the school's religious belief that mothers with small children should not be employed outside the home. The state initiated an inquiry into the school's employment policies but was stymied when the school filed an action in federal court seeking to enjoin the investigation. While the district court held for the commission,[74] the Court of Appeals reversed, holding that the Commission's exercise of jurisdiction over the school was barred by the First Amendment.[75]

In a unanimous opinion authored by the Chief Justice, the Supreme Court reversed but, at the same time, refused to decide whether Ms. Hoskinson could be ordered reinstated.[76] Invoking the abstention doctrine set forth in *Younger v. Harris*,[77] the Court held that the district court erred in hearing the case insofar as Dayton Christian Schools would have ample opportunity to assert its constitutional defenses in the state proceedings which already had been initiated by the Commission.[78] Although the Court held that the mere exercise of jurisdiction over and investigation of a parochial school does not violate the First Amendment,[79] it expressly reserved the school's right "to level constitutional challenges against the potential sanctions for the alleged sex discrimination."[80]

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[72] *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986).

[73] Ohio Rev. Code Ann. § 4112.02 (Supp. 1985).

[74] 578 F. Supp. 1004 (S.D. Ohio 1984).

[75] 766 F.2d 932 (6th Cir. 1985).

[76] 477 U.S. 619 (1986).

[77] 401 U.S. 37 (1971).

[78] *Id.* at 625, 628.

[79] *Ibid.*

[80] *Ibid.* at 629. The case was settled prior to an adjudication by the state court of the school's constitutional claims. A decision similar to that of the Supreme Court in *Dayton Christian Schools* was reached by the Second Court of Appeals in *Christ the King Regional High School v. Culvert*, 815 F.2d 219 (1987).

B. Construing Statutes to Avoid the Conflict

Although the abstention doctrine has been invoked so as to avoid deciding the extent to which the First Amendment shields religious institutions from anti-discrimination claims, the Court has given some indication of how it might interpret legislation in this sensitive area. In *National Labor Relations Board v. Catholic Bishop of Chicago*,[81] the Court was asked to decide whether lay teachers in parochial schools[82] are subject to the jurisdiction of the National Labor Relations Board and, if so, whether this would violate the religion clauses of the First Amendment. After examining the legislative history surrounding the enactment of the National Labor Relations Act,[83] the Court concluded that despite its sweeping definition of "employer," the Act did not confer jurisdiction over parochial schools. In the words of the Court:

> [I]n the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.[84]

The decision evoked a scathing dissent by Justice Brennan who, joined by Justices White, Marshall and Blackmun, accused the Court of interpreting the Act in a manner that ignored the intent of Congress.[85]

Despite the Court's sharp division in *Catholic Bishop*, the general principle of construing a statute so as to avoid deciding constitutional questions is well settled in the law.[86] It is the additional requirement of a "clear expression of an affirmative intention of Congress" that troubled Justice Brennan and his colleagues.[87] Brennan's objections notwithstanding, the

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[81] 440 U.S. 490 (1979).

[82] The term "parochial school" is used generically to describe any primary or secondary school owned and operated by a church or other religious organization.

[83] 29 U.S.C. § 151 *et seq.* (1973).

[84] *Catholic Bishop*, 440 U.S. at 507.

[85] *Id.* at 518 (Brennan, J., dissenting).

[86] *E.g., Murray v. The Charming Betsy*, 2 Cranch 65 (1804).

[87] *Catholic Bishop*, 440 U.S. at 509 (Brennan, J., dissenting).

application of *Catholic Bishop* to anti-discrimination laws that do not express a clear legislative intent to regulate pervasively sectarian institutions[88] would appear an attractive alternative to courts.[89] At least one federal appeals court has been willing to invoke *Catholic Bishop* to protect even religiously affiliated colleges and universities from employment regulation,[90] but a far more likely result is that *Catholic Bishop* will be interpreted to shield only those institutions that are pervasively sectarian. This appears to be the approach taken by the Fourth Circuit Court of Appeals in *Ritter v. Mount St. Mary's College.*[91] The district court in *Ritter,* like the First Circuit Court of Appeals in *Universidad Central De Bayamon v. NLRB,* held that the Equal Pay Act and Age Discrimination in Employment Act did not apply to a religiously affiliated institution of higher learning.[92] In reversing, the Court of Appeals stated that the threshold inquiry under *Catholic Bishop* is whether the application of a statute to a religious institution "presents 'a significant risk that the First Amendment will be infringed . . . .'"[93] Because Mount St. Mary's College was not pervasively sectarian and enforcement of the Equal Pay and Age Discrimination in Employment Acts would not involve the college's "religious tenets and practices," the court found *Catholic Bishop* inapplicable. "[W]e simply hold that comparisons of lay teachers with other lay teachers at a religiously affiliated institution of higher learning under the provisions of the EPA and ADEA fail to raise the kind of 'serious First Amendment questions' envisioned by the Supreme Court in *Catholic Bishop.*"[94]

Conversely, a recent decision by the United States District Court for the Eastern District of Missouri holds that the Age Discrimination in Employment Act does not apply to a Roman Catholic seminary. Finding the seminary to be pervasively sectarian, the court

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[88]The Supreme Court repeatedly has distinguished between institutions that are pervasively sectarian and those that are merely affiliated with a religious organization. *E.g., Bowen v. Kendrick,* ____ U.S. ____, 108 S.Ct. 2562 (1988). The term "pervasively sectarian" is used to refer to houses of worship, parochial schools and other institutions in which religion so permeates the institution that it is impossible to separate the entity's secular activities from its religious activities. *Roemer v. Board of Public Works,* 426 U.S. 736, 755 (1976); *Hunt v. McNair,* 413 U.S. 734, 743 (1973).

[89]Included in this category of laws would seem to be the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, the Equal Pay Act of 1963, 29 U.S.C. § 206(d), and the Civil Rights Act of 1866, 42 U.S.C. § 1981 *et seq.*

[90]*Universidad Central De Bayamon v. NLRB,* 793 F.2d 383 (1st Cir. 1985).

[91]No. 81-1534, slip op. (4th Cir. June 8, 1984).

[92]*Ritter v. Mount St. Mary's College,* 495 F. Supp. 724 (1980).

[93]*Ritter,* No. 81-1534, slip op at 5 (4th Cir. June 8, 1984) (quoting *Catholic Bishop,* 440 U.S. at 502).

[94]*Id.* A similar result was reached in *Soriano v. Karver University Corporation,* 687 F. Supp. 1188 (S.D. Ohio 1988).

concluded that application of the ADEA would give rise to "serious constitutional questions" and was, therefore, barred by *Catholic Bishop*.[95]

C. Resolving the Problem When Legislative Intent is Clear

For more difficult to resolve are those cases involving anti-discrimination laws that do express a clear legislative intent to regulate religious institutions. For example, Title VII of the Civil Rights Act of 1964 provides explicit exemptions for religious institutions from those provisions of the Act prohibiting discrimination on the basis of religion.[96] Moreover, efforts to exempt religious institutions from the Act in its entirety were defeated by Congress.[97] Thus, there is no doubt that Congress intended the prohibitions against discrimination on the basis of race, color, sex and national origin[98] to apply to religious institutions. Similarly, Title I of the

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[95] *Cochran v. St. Louis Prepatory Seminary*, 717 F. Supp. 1413, 1446 (E.D. Mo. 1989).

Distinguishing between "religiously affiliated" and "pervasively sectarian" institutions for purposes of applying *Catholic Bishop* also is consistent with a long line of Supreme Court decisions involving aid to parochial schools. *See supra* note 88. With few exceptions, [*See, Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980) (upholding a state program providing reimbursement to parochial schools for cost of administering state required tests). The Court also has upheld a variety of programs for students who attend parochial schools under the so-called "child benefit theory." *Wolman v. Walter*, 433 U.S. 229 (1977) (diagnostic services); *Board of Education v. Allen*, 392 U.S. 236 (1968) (textbooks); *Everson v. Board of Education*, 330 U.S. 1 (1947) (bus transportation)] the Court has disqualified parochial schools from eligibility for virtually all state and federal aid programs designed to assist primary and secondary schools, *e.g., Meek v. Pittenger*, 421 U.S. 349 (1975); *Lemon v. Kurtzman*, 403 U.S. 602 (1971), on the theory that religion so permeates these institutions that it is impossible to isolate and fund their secular activities, *see supra* note 88. Having disqualified pervasively sectarian institutions from receiving government funding, it is reasonable to assume that courts will refrain from regulating these institutions unless forced to do so by unambiguous legislative intent. Thus, it appears that *Catholic Bishop* will remain a considerable barrier to the application of particular civil rights laws (i.e., those not indicating a clear intent to regulate religious institutions) to pervasively sectarian institutions. While courts might be expected to refrain from applying the Equal Pay Act or Age Discrimination in Employment Act to pervasively sectarian institutions, the Ninth Circuit held otherwise in *Equal Employment Opportunity Commission v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986). Assuming *arguendo* that other circuits follow suit, the extent of coverage (i.e., degree of regulation) would be similar to that of Title VII's prohibitions against discrimination on the basis of race, color, sex or national origin. *See infra* text accompanying notes 96-136.

[96] 42 U.S.C. § 2000e-1.

[97] *See Equal Employment Opportunity Commission v. Fremont Christian School*, 781 F.2d 1366 (9th Cir. 1986).

[98] 42 U.S.C. § 2000e-2.

Americans With Disabilities Act[99] is certain to apply to pervasively sectarian institutions. By providing religious organizations with a limited exemption from Title I,[100] the bill makes clear that Congress intended for religious organizations to be subject to the general prohibitions on discriminating against the handicapped in employment.[101]

Obviously, state and federal anti-discrimination laws are applicable to religious institutions only to the extent they do not conflict with the First Amendment.[102] The difficulty, of course, lies in determining the precise amount of protection conferred upon religious organizations by the First Amendment. Stated differently, what portion of a religious organization's employment practices are wholly immune from governmental regulation?[103]

The author suggests that to resolve the question of how much protection from employment regulation the First Amendment gives religious organizations, two important factors must be considered: (1) the nature of the institution, and (2) the nature of the specific position and/or activity.[104] The use of these factors will result in four rather distinct categories of cases: those involving (1) ministerial functions in pervasively sectarian institutions, (2) ministerial functions in religiously affiliated institutions, (3) non-ministerial functions in religiously affiliated institutions, and (4) non-ministerial functions in pervasively sectarian institutions.

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[99] 42 U.S.C. § 12101 *et seq.*

[100] 42 U.S.C. § 12113(c) provides (1) In General-This title shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities; and (2) Qualification Standard-A religious organization may require, as a qualification standard to employment, that all applicants and employees conform to the religious tenets of such organization. *Id.* at 10703.

[101] The inclusion of persons having contagious diseases (e.g., AIDS) under the term "handicap" insures that some religious groups will contest the application of this statute to their organizations. *See School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

[102] *See Marbury v. Madison*, 1 Cranch 137 (1801).

[103] A variety of approaches to answering this question has been suggested. *E.g.*, Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations, 79 Colum. L. Rev. 1514, 1539 (1979); Laycock, *supra* note 4, at 1403.

[104] The United States Court of Appeals suggests a similar approach in *Equal Employment Opportunity Commission v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981).

1. Ministerial Functions in Pervasively Sectarian Institutions

On one end of the spectrum are those cases involving the employment of ministers by a church or other pervasively sectarian institution. No doubt such cases lie beyond the jurisdiction of civil authorities.[105] The Supreme Court's opinion in *Serbian Eastern Orthodox v. Milivojevich*[106] demonstrates the strength of this principle, and there appear to be no compelling policy arguments that would dictate a contrary result. Simply put, courts are unwilling to inject themselves into labor disputes between a church and those who minister in its name. In the words of one federal appeals court, "The relationship between an organized church and its ministers is its lifeblood."[107] More recently, the Fourth Circuit Court of Appeals has stated, "The right to choose ministers without government restriction underlies the well-being of a religious community, for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message and interpret its doctrines both to its own membership and to the world at large (citations omitted)."[108] Of particular interest are recent lower court decisions interpreting the constitutionally based exemption for ministers broadly so as to include church organists[109] and others involved in the ecclesiastical or liturgical functions of the church.

2. Ministerial Functions in Religiously Affiliated Institutions

Similar to the cases involving the employment of ministers by churches are those involving the employment of persons performing ministerial functions for institutions that are not pervasively sectarian. Despite the fact that these institutions are engaged primarily in providing "non-sectarian" services,[110] such as health care or higher education, courts generally

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[105] *See supra* text accompanying notes 39-58.

[106] 426 U.S. 696 (1976).

[107] *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972) (holding that an officer in the Salvation Army was not protected by Title VII despite the fact that most of her duties were clerical).

[108] *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir. 1985). *Accord Hutchinson v. Thomas*, 789 F.2d 392 (6th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986).

[109] *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233 (Mich. App. 1989); *Walker v. First Orthodox Presbyterian Church of San Francisco*, 22 Fair Empl. Prac. Cases 762 (Cal. Super. 1980).

[110] It should be noted that even these non-religious, secular services are religiously motivated.

are unwilling to regulate the employment of a minister to perform essentially religious functions.[111] Hospital chaplains[112] and theology teachers at religiously affiliated colleges and universities[113] are among those whose positions lie beyond the reach of anti-discrimination laws. Again, exclusion of these positions is consistent with principles of church autonomy and appears unlikely to change. The policy arguments that might compel a different result are rejected for the same reasons as with pervasively sectarian institutions. Although religiously affiliated institutions perform numerous secular services, to the degree they wish to advance their religious mission they should be permitted to do so. In short, if a Catholic hospital wishes to employ a Catholic chaplain to minister in its name, any claims alleging discrimination–on the basis of race, gender, sexual orientation or otherwise–in the selection of that chaplain should be barred by the First Amendment.

3. Non-Ministerial Functions in Religiously Affiliated Institutions

On the other end of the spectrum are those cases involving the employment of non-ministerial staff by institutions that are not pervasively sectarian but merely affiliated with religious organizations. As noted, the most prolific examples are church hospitals, colleges and universities. The vast majority of courts has been unwilling to recognize a First Amendment defense to discrimination claims filed against this type of institution.[114] If, however, the alleged discriminatory action is in fact based upon religious doctrine, courts may be compelled to decline jurisdiction.[115]

Many reasons can be given as to why the free exercise clause should not be interpreted to exempt all religiously affiliated institutions from generally applicable anti-

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[111]Obviously, if the minister were hired to coach, to tend the grounds or to perform other services unrelated to the institution's religious mission, he would be protected by most anti-discrimination laws including Title VII. If, however, his employer were pervasively sectarian, a different result might be reached. *See infra* text accompanying notes 118-136.

[112]*O'Connor Hospital v. Superior Court*, 195 Cal. App. 3d 546, 240 Cal. Rptr. 766 (1987); *Scharon v. St. Luke's Episcopal Presbyterian Hospital*, 929 F.2d 360 (8th Cir. 1991).

[113]*Maguire v. Marquette University*, 627 F. Supp. 1499 (E.D. Wis. 1986), *modified*, 814 F.2d 1213 (7th Cir. 1987); *Pime v. Loyola University of Chicago*, 803 F.2d 351 (1986).

[114]*E.g., Equal Employment Opportunity Commission v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982) (editorial secretary at church-affiliated publishing house); *Equal Employment Opportunity Commission v. Mississippi College*, 626 F.2d 477 (5th Cir 1980) (psychology teacher at Baptist college); *Russell v. Belmont College*, 554 F. Supp. 667 (N.D. Tenn. 1982) (education professor at Baptist college). *But see Madsen v. Erwin*, 481 N.E.2d 1160 (Mass. 1985).

[115]*Mississippi College*, 626 F.2d at 485; *see also Bishop v. Amos*, 483 U.S. 327 (1987).

discrimination laws: such institutions provide essentially secular services; they are not so permeated with religion that religious and non-religious activities cannot be separated; they are eligible for and generally receive federal financial assistance either directly or indirectly; unlike the church, they are not engaged primarily in worship and core religious functions; unlike elementary and secondary religious schools, the primary goal of church colleges and universities is education, not indoctrination; they are open to the general public and are widely attended and supported by persons not affiliated with the sponsoring church and their services generally are offered at market prices and are not provided gratuitously as in the case of most church ministries.[116] Given the nature of such institutions, any burden imposed upon their religious exercise would appear minimal in light of the state's compelling interest in eradicating discrimination on the basis of race, color, sex and national origin.[117] For this reason, courts are unlikely to strike down legislative efforts to regulate the employment relationship between these institutions and their non-ministerial employees.

4. Non-Ministerial Functions in Pervasively Sectarian Institutions

The most difficult cases involve non-ministerial employees of pervasively sectarian institutions. Is, for example, the church secretary protected by Title VII, or does the First Amendment shield the church from all claims of discrimination? Few courts have addressed this complex issue.

In *Equal Employment Opportunity Commission v. Fremont Christian School*[118] and *Dolter v. Wahlert High School*,[119] the courts sustained sex discrimination claims filed by faculty against parochial schools.[120] In each case, the school's First Amendment defense was rejected. Similarly, the court in *Whitney v. Greater New York Corporation of Seventh-Day*

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[116]The author concedes that a particular religiously affiliated college or university might not fit this general profile and in fact might be pervasively sectarian and, therefore, entitled to the additional protections described in the text accompanying notes 136-155. *See, e.g., Habel v. Industrial Dev. Authority*, ____ S.E.2d ____ (Va. 1991).

[117]Again, even institutions that are merely religiously affiliated, as opposed to pervasively sectarian, continue to enjoy the right to discriminate on the basis of religious doctrine. *See* 42 U.S.C. §§ 2000e-1 and 2000e-2(e).

[118]781 F.2d 1362 (9th Cir. 1986).

[119]483 F. Supp. 266 (N.D. Iowa 1980).

[120]Even more disturbing than the decisions sustaining employment discrimination claims against parochial schools is a 1978 decision forcing a church school to admit Blacks. The decision, *Brown v. Dade Christian School*, 556 F.2d 310 (5th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1063 (1978), avoided addressing the constitutional issue by finding that the school's racial policy was not religiously motivated. The court's finding ignores the principal's testimony to the contrary. *Id.* at 312.

Adventists[121] upheld the sex discrimination claim of a typist-receptionist despite the church's constitutional protestations.

Presumably, the church's defense would have been stronger in each of these cases if its alleged discriminatory actions were compelled by its religious doctrines. Few churches, however, could make such a claim, as doctrinal discrimination on the basis of race, color, sex or national origin is usually confined to the employment of ministers. Indeed, the author knows of no religious organization whose formal doctrines would compel it to pay Black or female support staff less than their white male counterparts. On the other hand, laws prohibiting discrimination on the basis of sexual orientation would be likely to conflict with the doctrines of many churches, even at the support staff level. For example, the Southern Baptist Convention, the nation's largest Protestant denomination, recently passed a resolution indicating the staunch doctrinally-based opposition of many evangelical churches to homosexuality.[122] Obviously, forcing such a church to employ homosexuals would constitute a substantial burden on its free exercise of religion.

That religious institutions are more likely to prevail when their alleged discriminatory action is based upon religious doctrine is demonstrated by a recent decision of the Massachusetts Supreme Court. The court, in *Madsen v. Erwin,*[123] held that a church newspaper employee's claim for alleged discrimination on the basis of sexual orientation was barred by the First Amendment. Said the court: "[I]f Madsen 'were allowed to collect damages from defendants because [she] was discharged for being gay, defendants would be penalized for their religious belief that homosexuality is a sin for which one must repent . . . .' Requiring the defendants to pay damages to maintain their religious beliefs would constitute 'a substantial burden on defendant's right to free exercise of religion.'" (citations omitted)[124]

The single most important case addressing the application of anti-discrimination laws to non-ministerial staff in pervasively sectarian institutions would appear to be *Equal Employment Opportunity Commission v. Southwestern Baptist Theological Seminary.*[125] In *Southwestern Seminary,* the Court of Appeals found that Title VII's jurisdiction extended even to the employment practices of a theological seminary. Characterizing the seminary as wholly

[121] 401 F. Supp. 1363 (S.D.N.Y. 1975).

[122] Resolution No. 6-On Homosexuality, Annual of the Southern Baptist Convention, 71 (1988).

[123] 481 N.E.2d 1160 (Mass. 1985).

[124] *Id.* at 1166.

[125] 651 F.2d 277 (5th Cir. 1981), *cert. denied,* 456 U.S. 905 (1982).

sectarian and the legal equivalent of a church,[126] the court nonetheless held that application of Title VII's reporting requirements to the seminary's "support" (i.e., non-ministerial) staff did not violate the First Amendment.[127] This was true despite the fact that at least four of the support staff were ordained.[128] The court, citing *McClure v. Salvation Army*,[129] acknowledged, however, that support staff might well lie beyond the scope of Title VII if they performed ministerial functions.[130] This would include "swearing in officers [i.e., ordaining other ministers], conducting weddings and funerals, and dedicating babies."[131] Presumably, it would also include preaching, teaching, baptizing, serving communion and performing other tasks the court considered ecclesiastical or religious. One commentator has stated: "As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she would be considered 'clergy.'"[132]

Obviously, such line drawing between religious and non-religious functions involves significant governmental entanglement with religion and, therefore, is highly suspect under the First Amendment.[133] In the words of the Fourth Circuit Court of Appeals: "There is the danger that churches, wary of EEOC or judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve . . . their members."[134] Moreover, the Supreme Court itself has stated that "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[135]

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[126]"Since the Seminary is principally supported and wholly controlled by the Convention for the avowed purpose of training ministers to serve the Baptist denomination, it too is entitled to the status of 'church.'" *Id.* at 283.

[127]*Id.* at 286-87. The court did hold that an exemption from Title VII for faculty and administrative staff was constitutionally required.

[128]*Id.* at 284.

[129]460 F.2d 553 (5th Cir. 1972).

[130]*Southwestern Seminary*, 651 F.2d at 284.

[131]*Id.*

[132]Bagni, *supra* note 103, at 1545.

[133]*See, e.g., Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[134]*Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985).

[135]*McCollum v. Board of Education*, 333 U.S. 203, 212 (1948).

Such considerations have led Professors Esbeck, Gedicks and Laycock to recommend that the First Amendment be interpreted so as to exempt entirely churches and other pervasively sectarian institutions from anti-discrimination laws.[136] While the author agrees with these recommendations, the fact that numerous lower courts have interpreted the First Amendment more narrowly than these professors demands that close attention be paid to the policy considerations implicated by these decisions.

IV. POLICY CONSIDERATIONS

As noted, courts are virtually unanimous in their decision to refrain from regulating the employment relationship between ministers and religious institutions.[137] The constitutionally based right of a religious organization to exercise control over the selection of those who will minister in its behalf is deemed superior to the rights of aspiring ministers to be free from invidious discrimination. While many may wince at a church's decision not to ordain female ministers, principles of church-state separation demand that churches be permitted to make this decision free from state interference. To hold otherwise would arrogate to the state the power to determine doctrinal issues at the very core of a church's religious identity.

Conversely, courts are nearly unanimous in their decision to exercise some degree of regulation over the relationship between religiously affiliated institutions and their employees. If, for example, Congress passes a statute prohibiting discrimination against the handicapped, courts are unlikely to find that the First Amendment compels an exemption for a Baptist college that discriminates in the hiring of its law faculty.[138] The policy arguments for applying anti-discrimination laws to these employment relationships are, in the view of most judges, compelling.[139]

In sharp contrast to the unanimity of opinion concerning the above-mentioned categories are those cases involving the relationship between pervasively sectarian institutions and their non-ministerial employees. In this unsettled area of the law,[140] policy arguments are likely to be critical. As noted, the operative legal principles in these cases are sufficiently flexible that courts can easily justify a decision on either side. At bottom, the court

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[136]Esbeck, *supra* note 4; Gedicks, *supra* note 4; Laycock, *supra* note 4.

[137]The term "religious institutions" includes both pervasively sectarian and religiously affiliated institutions.

[138]A different result would be reached with regard to the religion faculty. Most likely a theology teacher at a Baptist college would be treated as a "minister" for the purposes of the First Amendment. *See supra* note 113.

[139]*See* text accompanying note 114, *supra*.

[140]*See* text accompanying notes 118-136, *supra*.

must choose between group religious rights on the one hand and individual civil rights on the other.

One of the most compelling arguments on behalf of group autonomy rights is the overall importance of mediating structures in society. Scholars correctly have pointed out that mediating structures provide meaning to their adherents as well as a check on the power of the state.[141] Such groups are in effect a buffer between the modern nation-state and the individual.[142] Aside from the family, the largest and most significant mediating structures in American society are religious institutions. Invading the integrity of these institutions by regulating their employment policies compromises and limits their role as checks on government power.

Philosophical consistency is another strong policy argument in favor of exempting churches entirely from anti-discrimination laws. If pervasively sectarian institutions are disqualified from receiving government funding, as the Supreme Court repeatedly has held,[143] they likewise should be exempt from government regulation. In short, if even the "secular" activities of pervasively sectarian institutions are so inundated with religion that they cannot be funded, it follows that all staff, including lay employees, are substantially involved in the organization's religious mission and, therefore, exempt from anti-discrimination laws by virtue of the First Amendment.

Exempting churches in their entirety also is consistent with the Supreme Court's disinclination toward a case-by-case analysis of pervasively sectarian institutions in other contexts. Despite numerous pleas to the contrary, the Court has been unwilling to examine or analyze a particular teacher, class or activity within a parochial school to determine whether it is nonsectarian. Instead, the Court has decided that religion so permeates the institution it is impossible to isolate and fund purely secular activities.[144]

Closely related is the notion of workability or, perhaps in this case, impossibility. How does a court determine which employees of a pervasively sectarian institution actually perform secular as opposed to religious functions? Suppose, for example, the church secretary is expected to meet the general public and to answer questions about the nature of the church and its ministry to the community. Suppose further that the secretary is instructed to "share his faith" with those who visit the church. Such an employee hardly could be

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[141] *See*, e.g., Gedicks, *supra* note 4. *See also* L. Tribe, American Constitutional Law (2d ed. 1988), at 1297.

[142] *Id.*

[143] *E.g., Bowen v. Kendrick*, ____ U.S. ____, 108 S.Ct. 2562 (1988).

[144] *Meek v. Pittenger*, 421 U.S. 349 (1975); *Lemon* v. Kurtzman, 403 U.S. 602 (1971).

characterized as performing a purely secular function. Similarly, the church librarian, child care director or even maintenance engineer might be contributing to the organization's religious, as opposed to secular, purpose. Any attempt by the courts to divide the functions of church employees into their religious and secular components is fraught with practical as well as constitutional concerns. The Supreme Court has found such a case-by-case evaluation of pervasively sectarian institutions to be unworkable in the context of aid to parochial schools, and a persuasive argument can be made that the same principle should apply to the employment policies of pervasively sectarian institutions.

Equally attractive policy arguments can be made that churches should not be exempt from anti-discrimination laws with regard to their non-ministerial employees.

First, society's overall sense of justice is offended by any act of invidious discrimination even if committed by the church. In fact, the social justice argument may be stronger when the perpetrator of the wrong is an institution that purports to serve as a moral and ethical guidepost for the community. The Constitution may require courts to tolerate discrimination when the employment of ministers is at issue, but courts are less likely to countenance such practices at the support staff level.

In addition to the general lack of sympathy for churches that practice discrimination, a court's concern for protecting the free exercise of religion is diluted the farther one moves from the purely religious functions of the church. For example, some judges simply could not be convinced that a custodian is engaged in anything other than a purely secular function. To a lesser degree, courts also might be resistant to characterizing the church secretary's job as ministerial in nature. In short, any act of discrimination is frowned upon, and the courts are likely to enforce a statute prohibiting such conduct if at all possible.

V. ADVISING CLIENTS

Advising clients about the extent to which anti-discrimination laws apply to religious institutions can be exceedingly difficult. With a proper analytical framework, however, clients can understand where the legal uncertainties lie and may adjust their employment policies accordingly. A religious institution may choose to ignore the advice of counsel and base its employment decisions solely upon what it perceives to be the will of God. Notwithstanding, the institution should have accurate information about the potential costs, financial and otherwise, before it makes its decision.

At the outset, counsel should distinguish between laws that express affirmative legislative intent–"clearly expressed"–to regulate religious institutions and those that do not. Because *Catholic Bishop* has not been overturned or even modified, it is unlikely that the latter category of statutes would be interpreted as applying to churches or other pervasively

sectarian institutions.[145] The ascension of more conservative justices to the United States Supreme Court makes it even less likely that *Catholic Bishop* will be overruled. Counsel should not assume, however, that *Catholic Bishop* will be interpreted to shield religiously affiliated colleges, hospitals and other non-pervasively sectarian institutions from these statutes. To the contrary, courts probably will treat these institutions like their secular counterparts.

For those laws, such as Title VII, that do express a clear legislative intent to regulate religious institutions, counsel should use the four categories set forth in Part III-C in rendering legal advice. Categories 1-3 tend toward relatively clear answers and should pose little difficulty for counsel. Generally, any religious institutions–pervasively sectarian or otherwise–may exercise unfettered discretion in the employment of its ministerial staff. Discrimination on any basis (e.g., age, race or sex), therefore, would seem to be permissible. An equally clear message can be given to religiously affiliated institutions with regard to the employment of their non-ministerial staff: discrimination other than on the basis of religious beliefs and practices will not be permitted by the courts.

The final category (i.e., non-ministerial employees in pervasively sectarian institutions) is, as noted, not amenable to easy answers. To the contrary, courts, scholars and practitioners alike are divided over whether the religious group or the individual claimant should prevail. The difficulties associated with a case-by-case analysis of the functions of a particular church employee to determine whether his duties are primarily "religious" (and, therefore, exempt) or "secular" (and, therefore, covered) and the Supreme Court's obvious commitment to eschew such an approach in cases involving aid to parochial schools support the notion that the Supreme Court would find a church to be wholly beyond the jurisdiction of anti-discrimination laws. On the other hand, more activist decisions by lower courts suggest a different result.[146] Even if one could convince the Supreme Court that churches should be exempted entirely from coverage, vindication of a constitutional right is an expensive and time-consuming process. Given the remote chance of a particular case reaching the Supreme Court, the counsel of prudence would seem to suggest strict adherence to principles of non-discrimination in the employment of non-ministerial staff. By advising non-discrimination in these positions, the author does not suggest that churches cease to enforce their religious doctrines and practices among their non-ministerial staffs. To the

[145] Assuming *arguendo* that a court would interpret these statutes as applying to pervasively sectarian institutions, the extent of coverage (i.e., degree of regulation) would be the same as that of Title VII and other statutes expressing a clear legislative intent to regulate religious institutions.

[146] *See* text accompanying notes 118-125, *supra*.

contrary, all religious organizations are free to discriminate against those who do not share the religious beliefs as well as the moral and ethical standards of the organization.[147]

The term "non-ministerial staff" should not be confused with "support staff" or even "lay employees." An employee may be both support staff as well as non-ordained and nonetheless function primarily as a minister. Similarly, ordination alone will not place an individual beyond the jurisdiction of anti-discrimination laws if his primary functions are non-ministerial.

The author suggests three criteria to assist religious institutions in determining whether a particular employee's function should be considered ministerial.[148] First, does the employee perform any sacerdotal functions such as baptisms, communion, weddings or funerals? Performance of these "priestly" functions on even an occasional basis will almost guarantee that an employee's job is ministerial. Second, does the employee perform other functions, such as preaching, worship leadership, evangelism or visiting the sick, that traditionally are associated with ministers? Even if the employee does not perform sacerdotal functions, most judges are likely to view one who performs these additional functions as being a minister. This is particularly true in Protestant churches where each member of the congregation is considered a priest,[149] and the distinction between laity and clergy is minimal. Finally, is the employee ordained, licensed or commissioned by the church? While ordination is by no means dispositive, as noted above, it is nonetheless a factor judges may take into account when determining whether a particular employee's functions are ministerial.

Conclusion

The application of anti-discrimination laws to religious institutions will continue to spawn some of the most interesting and controversial cases in constitutional law. Civil rights activists likely will argue for more regulation of religious institutions while advocates of religious liberty will argue for less. Balancing the competing interests of church autonomy versus equal opportunity will prove a difficult assignment for even the most astute judges as fundamental social values are at stake.

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[147] *Bishop v. Amos*, 483 U.S. 327 (1987); *Little v. Weurl*, ____ F.2d ____ (3d Cir. 1991)

[148] These criteria originally were suggested to the author by veteran church practitioner James P. Guenther (GUENTHER & JORDAN, Nashville, Tennessee) whose clients include the Southern Baptist Convention, several theological seminaries and numerous religiously affiliated colleges and universities.

[149] The doctrine of the "priesthood of every believer" is set forth in W. Shurden, The Priesthood of All Believers (1988); L. McBeth, The Baptist Heritage (1987); and R. Bainton, The Travail of Religious Liberty (1958).

The four categories suggested by the author provide an analytical framework for thinking clearly about these policy choices. Applied with the three criteria set forth in Section V for determining ministerial functions, they should enable religious organizations to predict with reasonable certainty whether particular positions will be subject to anti-discrimination laws.

While the Supreme Court eventually may vindicate the church's constitutional claim to exemption from anti-discrimination laws, its denial of *certiorari* in cases such as *Southwestern Seminary* indicates a reluctance on its part to do so. Moreover, when it has been faced directly with the issue, as in *Catholic Bishop* and *Dayton Christian Schools*, the Court has invoked various doctrines to avoid deciding the ultimate question. Prudence suggests, therefore, that until and unless the Court alters its course, pervasively sectarian institutions adjust their employment policies accordingly.