INSTITUTIONAL ORGANIZATIONS AND ACCOUNTABILITY

by Patty Gerstenblith

I. Introduction

One of the recent trends in social commentary addressing the concerns of modern American society is communitarianism. As American society drifts toward what appears to be an ever-deepening morass of crime, violence, drug abuse, poor education, and increasing unemployment, devotees of communitarianism have sought to place the blame on a breakdown in the functioning of the social institutions which mediate between the individual and government, such as the family, schools, and religious organizations.[1] The demise of these mediating institutions is linked to increasing dependency on government to solve social problems and an abdication of individual responsibility for one's actions. Communitarians seek the solution to these societal ills in the fostering of these mediating institutions often, perhaps ironically, through governmental support and subsidy of these institutions.

In the legal academic field, communitarianism has found many adherents, particularly among those who criticize the expanding role of governmental regulation throughout modern American life. Some also

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[1] See generally Amitai Etzioni, The Spirit of Community: Rights, Responsibilities, and the Communitarian Agenda (1993).

place blame on the shift in constitutional jurisprudence towards emphasized recognition of the individual's civil rights and liberties, which happened to coincide historically with the rise of the modern welfare state and the pervasiveness of government following the Depression and World War II. These scholars fault the Supreme Court for its interpretation of constitutional liberties as primarily protecting individual rights, while not recognizing the rights of institutions and organizations.[2]

In the field of law and religion, this debate has been particularly trenchant, giving rise to a wealth of academic literature and considerable debate concerning the appropriate relationship among government, individuals, and religious institutions. In the hope of fostering the role of one of the fundamental mediating institutions--religious organizations--some scholars have recently advocated that government must play a more limited role in its attempts to regulate the conduct of religious affairs.[3] On the other hand, particularly those who would question the link between modern societal ills and the increased role of individual

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[2] See, e.g., Frederick Mark Gedicks and Roger Hendrix, Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America, 60 S. Cal. L. Rev. 1579, 1582-87 (1987).

[3] See, e.g., Mary Ann Glendon and Raul F. Yanes, Structural Free Exercise, 90 Mich. L. Rev. 477 (1991).

liberties continue to urge an individual rights-based constitutional jurisprudence.

The question of accountability and responsibility of religious organizations under the law is a complex and intriguing one which illustrates well the conflict between an individual-oriented and an institutionally-oriented constitutional jurisprudence of civil liberties. The extent to which laws can require or prohibit conduct which contradicts religious mandate is central to the questions of the relationship among religious institutions, individuals, society and government and has recently been transformed by decisions of the United States Supreme Court which will force a reevaluation of this entire area of constitutional jurisprudence and interpretation. In light of this reevaluation, it is particularly appropriate to undertake a study of the relationship between religious organizations and two of the most intractable problems confronting our society today--questions of discrimination and questions of the treatment of children. This paper will begin with a background discussion of the first amendment religion clauses and then proceed to apply these general principles to these two controversial topics.

II. Background of Religion Clause Jurisprudence

The first amendment to the United States Constitution provides: "Congress shall make no law respecting an Establishment of religion or

prohibiting the free exercise thereof." The Supreme Court has generally treated this provision as embodying two distinct clauses and two distinct values pertaining to the status of religion and its relationship to the government. However, their interpretation and their interconnectedness are complex and produce little agreement among constitutional scholars, Supreme Court justices, historians, religious leaders and ordinary people. While questions of accountability are most generally evaluated under traditional Free Exercise Clause jurisprudence, it is quite clear that the Establishment Clause is also relevant and, in fact, for the immediate future, may play a larger role than the Free Exercise Clause in determining when an individual or religious organization must accord with general legal mandates.

While the Free Exercise Clause was originally intended to apply to Congress, this prohibition was extended to the state governments through the process of incorporation of the fourteenth amendment which gradually applied several of the rights guaranteed in the Bill of Rights to the states. This process of incorporation took many years and the Free Exercise clause was incorporated only in 1940 in the decision Cantwell v. Connecticut.[4] The free exercise clause raises a significant

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[4] 310 U.S. 296 (1940). State courts had previously protected free exercise values to some extent, relying on their state constitutions of their interpretation of the federal Constitution. See, e.g., Hardwick v. Board of School Trustees, 54 Cal. App. 696, 704-05, 205 P. 49, 52 (1921), and (continued...)

tension in our modern society between religious organizations and individuals, on the one hand, and the needs of society in general which are expressed through the legislative determinations of duly elected representatives. The question, then, of when should an individual or organization be exempted from compliance with such laws brings out a fundamental conflict between two deeply rooted values in our society--the desire to protect freedom of religion and the desire to hold all equally accountable under the law.

The requirement to submit to governmental regulation has always applied only to conduct and not to religious belief, the latter being entirely exempt from governmental interference.[5] The Supreme Court has, however, held that individuals and religious organizations are, at least to some extent, accountable to society under governmental regulation.[6] The proponents of religious free exercise and many

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[4](...continued)
general discussion in Laurence H. Tribe, American Constitutional Law 1156 n.4 (2d ed. 1988).

[5] The freedom of belief, whether grounded in what would be generally recognized as a religious belief or in a more secular conscientious belief, has been given absolute protection under both the free exercise clause and the free speech clause. See, e.g., School Dist. of Abington Township v. Schempp, 374 U.S. 203, 231 (1963)(Brennan, J., concurring).

[6] See, e.g., Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940); Sherbert v. Verner, 374 U.S. 398, 403 (1963); Intercommunity Center for Justice and Peace v. INS, 910 F.2d 42, 44 (2d Cir. 1990)("These clauses have been interpreted as providing full protection for religious beliefs but only limited protection for overt acts prompted by those beliefs"). For criticisms of this (continued...)

Supreme Court and other judicial opinions have asserted the need for a "constitutionally compelled" or, what I shall call, a "judicially created" exemption from such regulation when the regulation unduly burdens the free exercise of religion.[7] The argument for such an exemption is essentially that the attempt to impose governmental regulation in conflict with religious mandate creates a violation of the rights constitutionally guaranteed in the Free Exercise Clause.

Throughout modern constitutional jurisprudence until 1990, the determination of the boundaries of such accountability was premised on a three-part test enunciated in such Supreme Court decisions as Sherbert v. Verner[8] and Wisconsin v. Yoder.[9] This test evaluated: 1) the extent of the governmental interference with sincerely held religious belief; 2) the existence of a compelling state interest to justify the burden imposed on the free exercise of religion; and 3) the extent to which an exemption

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[6](...continued)
belief/action dichotomy in First Amendment jurisprudence, see, e.g., Shelley K. Wessels, Note, The Collision of Religious Exercise and Governmental Nondiscrimination Policies, 41 Stan. L. Rev. 1201, 1207-08 (1989).

[7] For a strong presentation in support of a broad interpretation of accommodation and exemptions for religious interests, see, e.g., Michael W. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 Geo. Wash. L. Rev. 685 (1992). For the opposing view, see William P. Marshall, The Case against the Constitutionally Compelled Free Exercise Exemption, 40 Case Western Res. L. Rev. 357 (1990)[hereinafter Marshall, Case].

[8] 374 U.S. 398 (1963).

[9] 406 U.S. 205 (1972).

from the regulation would impede the objectives which the government sought to advance through the regulation.[10] This formulation is substantially similar to the "compelling government interest" test used to evaluate the legitimacy of governmental interference with other fundamental freedoms, particularly freedom of speech.[11]

Through the application of this test and its predecessors, the Supreme Court produced a bewildering patchwork of permissible and impermissible forms of governmental regulation. For example, parents could direct their children's education,[12] and individuals could not be denied unemployment compensation when their jobs required them to work on their religiously-mandated day of rest or employment demands conflicted in other ways with their religious beliefs.[13] On the other hand, individuals could be required to comply with various government

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[10] Sherbert, 374 U.S. at 403.

[11] See, e.g., Burson v. Freeman, 112 S. Ct. 1846 (1992); Sable Communications of California v. FCC, 492 U.S. 115, 126 (1989).

[12] Wisconsin v. Yoder, 406 U.S. 205 (1972)(mandating exemption for members of Old Order Amish religious group from state statute requiring school attendance until age sixteen).

[13] Sherbert v. Verner, 374 U.S. 398 (1963)(denial of unemployment benefits because of refusal to work on Sabbath); Hobbie v. Unemployment Appeals Com., 480 U.S. 136 (1987)(same); Thomas v. Review Bd of Indiana Employment Secur. Div., 450 U.S. 707 (1981)(denial of unemployment benefits to applicant whose religion forbade manufacture of weapons).

regulations, including social security laws;[14] they could be required to keep their businesses closed on a state-mandated day of rest,[15] and the government could construct a road and permit timber-harvesting in a sacred area.[16]

It was this inconsistent patchwork which led the Supreme Court in 1990, under the leadership of Justice Scalia, to change fundamentally the evaluation of claims to exemption from governmental regulation based on the right to religious free exercise. In 1990, in Employment Division, Department of Human Resources v. Smith, the Supreme Court disclaimed the applicability of the compelling government interest test to evaluate laws which made no distinctions based on religion and were thus generally applicable.[17] Facially neutral governmental regulation which had a disproportionate impact on particular religious practices would be evaluated under the lowest level of judicial scrutiny which

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[14] Bowen v. Roy, 476 U.S. 693 (1986)(federal statute requiring states to use social security numbers in administering welfare programs did not violate Native American Indians' religious rights).

[15] Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Market, Inc., 366 U.S. 617 (1961).

[16] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

[17] 494 U.S. 872 (1990). Arguably, the Supreme Court had already abandoned the compelling government interest test, for example, in Lyng and Bowen, in which the Court had followed a path of considerable deference to legislative and executive judgments.

requires only that the government have a legitimate interest in the regulation and that the regulation be rationally related to that interest.

Because it is rare for a regulation to target only particular religious practices,[18] the result of Smith seems to be the virtually total elimination of the constitutionally-compelled exemption for individuals from otherwise valid, generally applicable governmental regulation. The application of Smith thus opens a new era of accountability for religious organizations in that they are shielded from such regulation only when it is motivated by an animus against particular religious practices and or when it creates a denominational preference. While Congress is now considering enactment of the Religious Freedom Restoration Act, which would require the courts to revive the compelling government interest test, and Justice Souter has called for a reevaluation of Smith in a subsequent Supreme Court decision,[19] Smith has already had its effect

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[18] But see Church of Lukumi Babalu Aye, Inc. v. Hialeah, 113 S. Ct. 2217 (1993)(striking down ordinance prohibiting killing of animals only in connection with sacrifice and ritual purpose as motivated by anti-religious animus).

[19] Id. at 4598-4603.

in lower court opinions[20] and seems likely to continue to do so until Congressional action is assured.

The aftermath of Smith has caused three analytical shifts in religion clause jurisprudence which need to be evaluated. The first of these is the use of the Establishment Clause to invalidate governmental regulation when it conflicts with religious beliefs now that the Free Exercise Clause has been virtually eliminated as an avenue of relief. The Establishment Clause was originally intended to prevent the federal government from interfering with the state religious establishments which existed at the end of the eighteenth and into the first half of the nineteenth centuries.[21] Thus, unlike many of the other rights guaranteed by the Bill of Rights, the Establishment Clause was not intended to protect individuals or even religious institutions, in general, but rather to protect state government-sponsored religious activity from interference by the federal government. The process of incorporation

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[20] See, e.g., Black v. Snyder, 471 N.W.2d 715, 719 (Minn. Ct. App. 1991), pet. for rev. denied, (Minn. Aug. 29, 1991)(rejecting Church's claim to be exempted from state human rights act based on right to free exercise); NLRB v. Hanna Boys Center, 940 F.2d 1295 (9th Cir. 1991), cert. denied, 112 S. Ct. 2965 (1992)(discussing application of Smith in denying free exercise claim to be exempt from NLRB jurisdiction).

[21] Kauper and Ellis, Religious Corporations and the Law, 71 Mich L. Rev. 1499 (1973); Tribe, supra note 4 at 1156 n.5. For example, Connecticut taxed for the support of the Congregational Church until 1818; Massachusetts permitted towns to maintain ministers until 1833; New Hampshire did so until the twentieth century, and New Jersey limited full civil rights to Protestants until 1844. Tribe, supra note 4, at 1161 n.25.

for the Establishment Clause, which applied this restriction to the state governments, thus required a bigger leap than the incorporation of the other fundamental freedoms and, although generally accepted today, is considerably more controversial from an historical perspective.[22]

The Establishment Clause is used to evaluate situations in which the government may create an endorsement or support of a particular religious viewpoint, as in the cases of public religious symbols,[23] prayer in schools and other forms of government-sponsored prayer,[24] and

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[22] The Establishment Clause was incorporated in Everson v. Board of Education, 330 U.S. 1 (1947). See discussion of Justice Brennan in his concurring opinion in School Dist. of Abington Township v. Schempp, 374 U.S. 203, 254-58 (1963); Tribe, supra note 4, at 1156 n.5. For criticism of incorporation of the Establishment Clause and of the reasoning in Everson, see, e.g., Glendon and Yanes, supra note 3, at 480-92.

[23] Lynch v. Donnelly, 465 U.S. 668 (1984); County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573 (1989).

[24] The subject of religious activity in public schools has been considered by the Supreme Court in several cases, including Engel v. Vitale, 370 U.S. 421 (1962), School District of Abington Township v. Schempp, 374 U.S. 203 (1963)(state-sponsored daily prayer, even if denominationally neutral and voluntary, violated the Establishment Clause because such prayer served to advance religion); Epperson v. Arkansas, 393 U.S. 97 (1968)(striking down statute which prohibited teaching of evolution in public schools); Wallace v. Jaffree, 472 U.S. 38 (1985)(silent prayer or meditation in schools); Stone v. Graham, 449 U.S. 39 (1980)(posting of Ten Commandments required in classrooms); Edwards v. Aguillard, 482 U.S. 578 (1987)(striking down statute mandating balanced treatment for evolution science and creation science); Lee v. Weisman, 112 S. Ct. 2649 (1992)(prohibiting state-sponsored "nondenominational" prayer at public school graduation)

public aid to parochial schools.[25] The Supreme Court has fashioned a three-part test, enunciated in its decision, Lemon v. Kurtzman,[26] to determine when a government action constitutes an impermissible "establishment" of religion: 1) whether the statute or other government action has a secular purpose; 2) whether its principal or primary effect neither advances nor inhibits religion; and 3) whether the government action creates an excessive entanglement between government and religion.[27] This test is not generally relevant to questions of accountability of religious organizations. The excessive

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[25] Various forms of government aid to parochial schools have been considered in Lemon v. Kurtzman, 403 U.S. 602 (1971)(salary supplements for parochial school teachers); Aguilar v. Felton, 473 U.S. 402 (1985)(striking down federal funding for salaries of public school employees assigned to provide remedial services to low-income children in parochial schools); School Dist. v. Ball, 473 U.S. 373 (1985)(public funding of full-time parochial school teachers to teach secular subjects held unconstitutional); Everson v. Board of Education, 330 U.S. 1 (1947)(upholding publicly funded transportation to parochial school); Mueller v. Allen, 463 U.S. 388 (1983)(upholding a Minnesota tax deduction for parochial school expenses); Zobrest v. Catalina Foothills School Dist., 113 S. Ct. 2462 (1993)(reimbursement for expenses for signer for child attending parochial school permissible). The requiring of equal access to public school and university facilities for religious organizations has been approved in Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981); and, most recently, in Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993). See also Bowen v. Kendrick, 487 U.S. 589 (1988)(upholding federal grants program to public and private social service agencies, including religious agencies).

[26] 403 U.S. 602 (1971).

[27] Id. at 612-13. Although the viability of the Lemon test has been hotly debated, it was recently reaffirmed in Lee v. Weisman, 112 S. Ct. 2649 (1992).

entanglement prong has, however, been borrowed by those who would challenge attempted governmental regulation, even though this prong was meant to evaluate the granting of a governmental benefit to, rather than the imposition of a burden on, religious organizations.[28] Thus, although not part of a free exercise analysis, the excessive entanglement question has recently been used to strike down governmental regulation which is otherwise considered permissible under the Smith formulation of a free exercise analysis. The test for excessive entanglement has itself been split into three factors: 1) the character and purpose of the institution involved; 2) the nature of the regulation's intrusion into religious affairs; and 3) the resulting relationship between the government and the religious authority. This use of excessive entanglement is ironic because, at least initially, it only referred to the monitoring required when a benefit was conferred[29] and does not address the question of accountability and responsibility under societal norms, as expressed in legislative enactments.

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[28] For discussions of the use of excessive entanglement to gain exemption from government regulation before the Smith decision, see Ira Lupu, Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination, 67 Boston Univ. L. Rev. 391, 409-11 (1987)[hereinafter, Lupu, Free Exercise], and William P. Marshall and Douglas C. Blomgren, Regulating Religious Organizations Under the Establishment Clause, 47 Ohio State L.J. 293 (1986).

[29] Lupu, supra note 28, at 409-10.

The second analytical shift caused by the Smith decision has produced the ironic consequence that only institutions and no longer individuals will be able to attain exemptions from government regulation. Excessive entanglement analysis, as demonstrated by the formulation of the three factors to be considered, emphasizes almost exclusively the relationship between government and religious institutions, not individuals who are carrying out religious dictates. While some have argued that the right of religious free exercise only belongs to individuals and not to institutions at all,[30] the fact that excessive entanglement applies only to institutions means that they may

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[30] Lupu, supra note 28, at 419-31; see, e.g., School District of Abington Township v. Schempp, 374 U.S. 203, 223 (1963)(characterizing the purpose of the free exercise clause as "to secure religious liberty in the individual"). For criticisms of this view, see Glendon and Yanes, supra note 3, at 495-96. The idea that the Free Exercise clause protects only individuals and not organizations makes an appealing basis for arguments in favor of increased accountability of religious organizations because it eliminates a large category of free exercise challenges to governmental regulation. However, it is difficult to ignore that at times individuals who belong to a group may only be able to fulfill their religious dictates through an organizational structure. As applied to the problems which I shall address, for example, an individual who wants to engage in prayer led exclusively by male clergy will have difficulty fulfilling that right unless religious organizations are permitted the free exercise right to discriminate in the ordination and employment of exclusively male clergy. In addition, for some faiths, worship may only be engaged in as part of a group or community. Glendon and Yanes, id. at 501 n.120. It is necessary therefore to recognize that free exercise rights are at issue and then to determine whether they must give way before other compelling interests and rights. Nonetheless, this is not a reason to grant free exercise rights exclusively to religious organizations, while effectively denying them on an individual, minoritarian basis, as seems to be happening in the aftermath of Smith.

at times be exempted from governmental regulation, while individuals, with only the Smith test for evaluation of free exercise claims available, will generally lose any challenge to governmental regulation. In confronting the dichotomy of protection to be granted to individuals and institutions, the result is the opposite of what should be--institutions will be granted free exercise rights, although presented in the guise of an excessive entanglement challenge, while individuals will be largely denied any right to free exercise based on religious beliefs.

The third effect of the Smith decision is to reverse another dichotomy inherent in evaluation of the fundamental freedoms of the Bill of Rights. The protections granted to these fundamental freedoms are phrased as negative rights--that is, the government and primarily the legislature cannot interfere with these rights, it does not create the rights. The judiciary, through its interpretation of the Constitution can strike down legislative enactments which interfere with these rights. If one assumes that the legislature and, to a large extent, the executive branches are repositories of majoritarian power, then their actions will generally reflect the will of the majority. Those actions which are struck down by the court are invalidated, even though they represent the will of the majority. The judiciary is thus the only protector of the minority's right to these fundamental freedoms. In his Smith decision, Justice Scalia largely eliminated the courts as protectors of these minoritarian

rights but reiterated that the legislature is still free to create legislative exemptions from such regulation for particular religious practices. Thus, religious groups with large numbers of adherents or with greater amounts of political influence will be able to win protection of their free exercise rights through legislatively-created exemptions, while smaller and less influential religious groups will be unable to achieve either legislatively-created or judicially-created exemptions. The fact, then, that legislatively-created exemptions are permissible while judicially-created exemptions are virtually eliminated, at least for protection of individuals, raises the question of whether legislatively-created exemptions constitute an establishment of religion. Some Supreme Court opinions have intimated this but none has in fact held this to be the case, while Justice Scalia seems to have specifically disavowed such a result.[31] Nonetheless, it seems that the Establishment Clause implications of legislatively-created exemptions need to be addressed anew in light of these jurisprudential developments.

This paper will present the argument that religious organizations need to be held to a higher degree of accountability, not only under generally applicable laws but also in evaluating the permissibility of

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[31] 494 U.S. 872, 890 (1990). That constitutionally-compelled exemptions based on free exercise claims raise Establishment Clause problems has been suggested by William P. Marshall, The Case Against the Constitutionally Compelled Free Exercise Exemption, 40 Case Western Res. L. Rev. 357, 358 (1990).

legislatively-created exemptions based on the religion clauses. The reasons for the need for greater accountability focus specifically on the shift to predominantly majoritarian and institutional protection of constitutional rights. The argument for greater accountability will be evaluated in light of two current and controversial topics--employment discrimination, particularly based on gender, race and age, and the clergy privilege, particularly in connection with child abuse reporting requirements.

III. Accountability of Religions Organizations for Employment Discrimination

In considering the question of equal responsibility for religious organizations, we may look first to the question of employment discrimination. In 1964, Congress passed the Civil Rights Act and included, as Title VII, the equal employment opportunity provisions which prohibited employers from engaging in discrimination in their employment practices based on race, color, religious, sex, or national origin.[32] In § 702, Congress exempted religious organizations, permitting them to discriminate on the basis of religion in connection with performance of their religious activities.[33] This exemption,

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[32] Section 703(a), Title VII, 42 U.S.C. §2000e-2(a).

[33] This exemption, at the time it was enacted, stated: "This subchapter shall (continued...)

however, did not permit religious organizations to discriminate on any of the other prohibited bases, including sex, race and national origin.

Nonetheless, in the first case brought under Title VII alleging sex discrimination against a religious organization in the dismissal of a female minister, the Fifth Circuit held that Congress must have intended a blanket exemption for religious organizations to discriminate in the church-clergy relationship on any basis.[34] The Fifth Circuit employed this statutory construction in an effort to avoid what it viewed as an unconstitutional clash with the religion clauses of the first amendment. The court further relied on the line of internal church dispute cases which seemed to hold that no court could examine matters of internal church doctrine or discipline.[35]

Two subsequent developments occurred, one legislative, one judicial, which fleshed out the contours of this application of Title VII. In 1972, Congress amended the §702 exemption so as to permit religious organizations to discriminate on the basis of religion in any of

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not apply to ... a religious corporation, association, 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 or society of its religious activities ...." §702, 42 U.S.C. § 2000e-1. See infra notes 36 and 48-49 and accompanying text for discussion of the 1972 amendments.

[34] McClure v. Salvation Army, 460 F.2d 553, 560-61 (5th Cir. 1972), cert. denied, 409 U.S. 896 (1972).

[35] See infra notes 47-48 and accompanying text.

their activities.[36] Although the constitutionality of this expansion was questioned by courts, on the ground that it might violate the Establishment Clause,[37] this provision was held to be constitutional by the Supreme Court in Corporation of Presiding Bishop of the Church of Jesus Christ Latter-Day Saints v. Amos.[38] The second development was that the judicial expansion of the exemption to permit other forms of prohibited discrimination has remained narrowly restricted to the clergy-minister relationship so that religious entities can not discriminate in their non-clergy activities on any basis other than religion.[39]

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[36] The amended version reads: "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." Title VII, § 702, 42 U.S.C. § 2000e-1, as amended. The amendment removed the word "religious" from before the word "activities" and included educational institutions within the same sentence. This had the result of bringing educational institutions within the proscriptions of Title VII but permitting those educational institutions with religious affiliation to discriminate only on the basis of religion.

[37] King's Garden, Inc. v. Federal Communications Com., 498 F.2d 51, 55-57 (D.C. Cir. 1974), cert. denied, 419 U.S. 996 (1974); Feldstein v. Christian Science Monitor, 555 F. Supp. 974, 978-79 (D. Mass. 1983).

[38] 483 U.S. 327, 338 (1987). The subject of discrimination based on religion will not be discussed in this paper, but see infra note 41. As one commentator has noted, "discrimination based on religion is distinct from the other types: The same interest collides with itself." Wessels, supra note 6, at 1203 n.4.

[39] EEOC v. Pacific Press Pub. Asso, 676 F.2d 1272, 1277-81 (9th Cir. 1982)(Title VII applies to sex discrimination suit brought by editorial secretary alleging wage discrimination and retaliatory discharge); EEOC v.

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Despite these two apparently clear principles, several definitional distinctions have remained somewhat fuzzy. The two most controversial questions have been, first, exactly which employment relationships are to be classified as involving a "minister",[40] and, second, which forms of

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Southwestern Baptist Theological Seminary, 651 F.2d 277, 283-85 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982)(Title VII applies to non-clergy employees of Southern Baptist seminary but not to its clergy employees); EEOC v. Mississippi College, 626 F.2d 477, 484-86, 488-898 (5th Cir. 1980), cert. denied, 453 U.S. 912 (1981)(Title VII may apply to suit alleging sex and race discrimination against college owned and operated by Mississippi Baptist Convention); Vigars v. Valley Christian Ctr, 805 F. Supp. 802 (N.D. Cal. 1992)(school librarian at parochial school can bring gender discrimination suit); Elbaz v. Congregation Beth Judea, Inc., 812 F. Supp. 802, 806-08 (N.D. Ill. 1992)(Title VII applies to suit by educational director alleging discrimination based on gender and national origin and retaliatory discharge); Dolter v. Wahlert High School, 483 F. Supp. 266, 270-71 (N.D. Iowa 1980)(Title VII applies to sex discrimination suit by teacher in a private Roman Catholic high school); Ritter v. Mt. St. Mary's College, 495 F. Supp. 724, 729 (D. Md. 1980), aff'd in part without op. and rev'd in part without op., 738 F.2d 431 (4th Cir. 1984), appeal after remand, 814 F.2d 986 (4th Cir.), cert. denied, 484 U.S. 913 (1987)(Title VII applies to sex and age discrimination suit brought by professor against religiously-affiliated college); Whitney v. Greater New York Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1368 (S.D.N.Y. 1975)(Title VII applies to race discrimination suit brought by typist-receptionist).

[40] In EEOC v. Southwestern Baptist Theological Seminary, the court had to consider exactly which seminary employees were to be classified as "ministers." The court stated that the legal definition of minister differed from the religious definition and that the former is based on the employment functions and services performed by the individual rather than on the individual's status as a member of the ordained clergy of the particular denomination. The court then concluded that all of the faculty fit the definition of "minister," none of the support staff did, and the District Court would need to determine on remand which of the administrative staff were "ministers" and which were not. 651 F.2d at 283-85. Cf. Alicea v. New Brunswick Theological Seminary, 128 N.J. 303, 608 (continued...)

discrimination are to be classified as based on religion.[41] The third aspect which has occasionally been litigated is the availability of the bona

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A.2d 218 (1992)(concluding that male plaintiff, who was ordained minister, functioned as a minister because he taught theology and served as intermediate between church's adherents and the church so as to bar his contract claim against seminary) with Welter v. Seton Hall University, 128 N.J. 279, 608 A.2d 206 (1992)(holding that nuns who taught computer science were not "ministers" because they served no theological role so that they could bring contract claim against religiously-affiliated university).

Flexibility in the judicial or legal definition of "clergy" may open the door to a court's hostility or bias against non-mainstream religious groups. For example, one may contrast the courts' consistent definition of teachers at fundamentalist Christian schools as non-ministers, despite their self-definition and the denomination's definition as such, see, e.g., EEOC v. Fremont Christian School, 781 F.2d 1362, 1369-1370 (9th Cir. 1986), with one court's determination that the organist of a Roman Catholic Church qualified as clergy, Assemany v. Archdiocese of Detroit, 173 Mich. App. 752, 434 N.W.2d 233, 237-38 (1988). See also Walker v. First Orthodox Presbyterian Church of San Francisco, 22 Fair Empl. Prac. Cases 762 (Cal. Super. 1980)(claim of discrimination based on sexual preference brought by church organist dismissed because organist was part of "worship team"). I am grateful to my colleague, Professor Jane Rutherford, for this insight.

[41] This question has not been as frequently litigated, but see EEOC v. Kamehameha Schools/Bishop Estate, 990 F.2d 458 (9th Cir. 1993)(denying protection of exemption for religious discrimination to schools required to hire only Protestant teachers under terms of trust which established the schools); see also Pime v. Loyola University of Chicago, 803 F.2d 351, 351-52, 354-56 (7th Cir. 1986)(Posner, J., concurring)(considering but not deciding whether the limitation of some tenured slots in the Philosophy Department to members of the Jesuit Order constituted religious discrimination), and Maguire v. Marquette University, 814 F.2d 1213, 1216 (7th Cir. 1987)(refusing to determine scope of the religious preference or exemption for religiously-affiliated university and dismissing complaint on narrower ground that plaintiff failed to establish prima facie claim of sex discrimination under Title VII). The exemption for discrimination based on religion was given a broad interpretation in Little v. Wuerl, 929 F.2d 944, 950 (3d Cir. 1991), in which the court determined that the exemption includes permission to employ only those "whose beliefs and conduct are consistent with the employer's religious precepts."

fide occupational qualification defense.[42] Finally, in confronting the applicability of other labor regulatory statutes to a variety of employees of religious organizations and religiously-affiliated institutions, including schools and hospitals, courts have reached somewhat contradictory results. For example, the National Labor Relations Act has been held not to apply to teachers of religiously-affiliated secondary schools but does apply to all other employees of religious-affiliated institutions.[43] Courts

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[42] See, e.g., Kamehameha Schools, 990 F.2d 458 (rejecting bfoq defense based on requirements of trust establishing schools to claim of religious discrimination); Pime, 803 F.2d at 353-54 (restriction of tenured faculty positions in Philosophy Department to members of Jesuit Order held to constitute a bfoq defense); Vigars, 805 F. Supp. at 808 n.4 (rejecting moral preferences of parents and other teachers as a bfoq defense to sex discrimination suit); Elbaz, 812 F. Supp. at 807 n.4 (discussion of narrow interpretation of the bfoq defense); Dolter, 483 F. Supp. at 271 (validity of bfoq defense is issue of fact for trial court; a bfoq must, nonetheless, be applied in an otherwise nondiscriminatory manner). The reasoning of Pime concerning the applicability of the bfoq defense in gender discrimination suits against religiously-affiliated educational institutions was questioned recently by the Ninth Circuit in Kamehameha Schools in light of the Supreme Court's decision in International Union, United Auto, etc. v. Johnson Controls, Inc., 499 U.S. 187 (1991).

[43] In NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 506-07 (1979), the Supreme Court held that the NLRB did not have jurisdiction over church-affiliated high schools which train students to enter seminary in the absence of a clearly expressed Congressional intent to grant such jurisdiction because of the constitutional questions which jurisdiction would raise. Catholic Bishop is discussed extensively in Douglas Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right of Church Autonomy, 81 Colum. L. Rev. 1373 (1981). One should note that this decision is not premised on the finding of an unconstitutional conflict between NLRB jurisdiction and the religion clauses but only on the Court's desire to avoid resolving the constitutional question in the absence of a clearer expression of Congressional intent to

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[43](...continued)
raise the question.

The Catholic Bishop reasoning was followed in Christ the King Regional High School v. Culvert, 815 F.2d 219, 222 (2d Cir.), cert. denied, 484 U.S. 830 (1987)(Catholic Bishop applied to deny NLRB jurisdiction over church-run school), NLRB v. Bishop Ford Central Catholic High School, 623 F.2d 818, 821, 823 (2d Cir. 1980), cert. denied, 450 U.S. 996 (1981)(following Catholic Bishop that NLRB does not have jurisdiction over religiously-affiliated high school, although it was no longer under direct control of Diocese), and in McCormick v. Hirsch, 460 F. Supp. 1337, 1340 (M.D. Pa. 1978)(holding NLRB has no jurisdiction over Catholic parochial high school). State labor relations boards have, however, been permitted jurisdiction over parochial schools and their lay teachers. Catholic High School Asso. of Archdiocese v. Culvert, 753 F.2d 1161 (2d Cir. 1985), and Hill-Murray Federation of Teachers v. Hill-Murray High School, 487 N.W.2d 857 (Minn. 1992)(en banc)(relying on Smith analysis but also finding a compelling state interest in the application of state labor relations act).

Courts have consistently refused to apply the Catholic Bishop analysis beyond the secondary school setting and thus have held that NLRB jurisdiction exists for religiously-affiliated institutions offering a range of social services. See, e.g., Volunteers of America v. NLRB, 777 F.2d 1386 (9th Cir. 1985)(variety of social services offered); NLRB v. Salvation Army of Massachusetts Dorchester Day Care Center, 763 F.2d 1, 6 (1st Cir. 1985)(day care center); Volunteers of America-Minnesota-Bar None Boys Ranch v. NLRB, 752 F.2d 345 (8th Cir.), cert. denied, 472 U.S. 1028 (1985)(religiously-affiliated residential treatment center for children); Denver Post of Nat. Soc. of Volunteers of America v. NLRB, 732 F.2d 769 (10th Cir. 1984)(religiously-affiliated residential and out-patient social service facility); St. Elizabeth Hospital v. NLRB, 715 F.2d 1193 (7th Cir. 1983)(hospital controlled by order of the Franciscan Sisters of the Sacred Heart); St. Elizabeth Community Hospital v. NLRB, 708 F.2d 1436 (9th Cir. 1983)(religiously-affiliated hospital); Tressler Lutheran Home for Children v. NLRB, 677 F.2d 302 (3d Cir. 1982)(nursing home affiliated with Lutheran Church); NLRB v. St. Louis Christian Home, 663 F.2d 60 (8th Cir. 1981)(religiously-affiliated home for abused and neglected children). The Ninth Circuit read Catholic Bishop as not only restricted to the school setting but also as applying only to the teachers and faculty employees, so that the NLRB would have jurisdiction over non-teacher employees, including child care workers, of a residential school for boys owned and operated by the Roman Catholic Church. NLRB v. Hanna Boys Center, 940 F.2d 1295 (9th Cir. 1991). Labor regulatory statutes also clearly apply to commercial
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have been inconsistent in their application of the Age Discrimination in Employment Act to religious organizations[44] but have consistently applied the Equal Pay Act and the Fair Labor Standards Act, which were later incorporated into Title VII, to any employees whom the court labelled as non-clergy.[45]

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[43](...continued)
operations undertaken by religious organizations. Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 298-99, 305-06 (1985); NLRB v. World Evangelism, Inc., 656 F.2d 1349, 1354 (9th Cir. 1981).

[44] Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 362-63 (8th Cir. 1991)(ADEA does not apply to suit by hospital chaplain); Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1356-58 (D.C. Cir. 1990)(ADEA does not apply to suit by minister). Most courts have held that the ADEA applies to religious organizations when the plaintiff is not classified as clergy and have distinguished these claims from Catholic Bishop because of their interpretation of Congress' intent to include religiously-affiliated institutions and the ADEA's structural similarity to Title VII. See, e.g., DeMarco v. Holy Cross High School, 1993 U.S. App. LEXIS 22423 (2d Cir. Sept. 1, 1993); Lukaszewski v. Nazareth Hospital, 764 F. Supp. 57, 59-61 (E.D. Pa. 1991)(ADEA applies to plant operation director of hospital affiliated with Roman Catholic Church); Soriano v. Xavier University Corp., 687 F. Supp. 1188, 1189 (S.D. Ohio 1988)(ADEA applied to religiously-affiliated university); Ritter v. Mt. St. Mary's College, 814 F.2d 986 (4th Cir. 1987)(teacher at religiously-affiliated college can sue under ADEA). Contra Cochran v. St. Louis Preparatory Seminary, 717 F. Supp. 1413 (E.D. Mo. 1989)(relying on Catholic Bishop analysis to refuse to extend ADEA to religiously-affiliated institutions).

[45] See, e.g., Elbaz v. Congregation Beth Judea, Inc., 812 F. Supp. 802 (N.D. Ill. 1992)(Fair Labor Standards Act held to apply to claim of retaliatory discharge of religious education director); Russell v. Belmont College, 554 F. Supp. 667, 670-72 (M.D. Tenn. 1982)(Equal Pay Act applies to assistant professor alleging sex discrimination against college affiliated with Baptist Convention); Ritter v. Mt. St. Mary's College, 495 F. Supp. 724, 727-28 (D. Md. 1980)(Equal Pay Act applies to suit alleging gender discrimination brought by professor against religiously-affiliated college). The Supreme Court first held that the Fair Labor Standards Act, 29 U.S.C. §201 et seq., (continued...)

For purposes of this paper, however, I will not engage in argumentation over these borderline, although certainly significant, distinctions because I wish to confront directly the question of employment discrimination, based not on religion but on gender, race, and age in the church-clergy relationship. I shall consider first the

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[45](...continued)
applied to the non-ministerial employees of religious organizations in Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985). The Court relied on clear Congressional intent to construe the Act's coverage as broadly as possible and distinguished Catholic Bishop because the lack of intrusiveness of the FLSA eliminates any excessive entanglement concerns. Id. at 305 and n.31.

The Equal Pay Act, re-enacted as the Fair Labor Standards Act and later incorporated into Title VII, has been applied to the teachers of parochial schools, even when they are considered by the denomination to be ministers and even when the discrimination in pay or other working conditions is viewed as a fulfillment of religious doctrine. See, e.g., Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir.), cert. denied, 498 U.S. 846 (1990); EEOC v. Fremont Christian School, 781 F.2d 1362 (9th Cir. 1986); EEOC v. First Baptist Church of Mishawaka, F. Supp. (N.D. Ind. 1991); EEOC v. Tree of Life Christian Schools, 751 F. Supp. 700 (S.D. Ohio 1990). The Fair Labor Standards Act specifically exempts ministers while the Labor Department's guidelines also exempt members of established religious orders "who serve pursuant to their religious obligations in the schools" from its coverage. Shenandoah, 899 F.2d at 1396. Nonetheless, courts have rejected the defendants' claim that a refusal to recognize their teachers as clergy or the functional equivalent of members of a religious order constitutes religious discrimination and bias against particular faiths. Id. at 1399. Following Alamo, courts distinguish these cases from Catholic Bishop by relying on the clear expression of Congressional intent to include all schools and to interpret the Equal Pay Act as broadly as possible. Applicability of other statutes to religious organizations have been considered in such cases as King's Garden, Inc. v. Federal Communications Com., 498 F.2d 51 (D.C. Cir. 1974)(FCC's rules are not required to grant same exemptions to religious organizations as does Title VII); Archbishop of Roman Catholic Apostolic Archdiocese v. Guardiola, 628 F. Supp. 1173 (D.P.R. 1985)(Puerto Rico's minimum wage act applies to lay Catholic Church employees).

question of the statutory language of the Title VII exemption and its judicial interpretation and second the question of the underlying constitutionality of such an exemption for religious organizations. Finally, I shall apply these concepts both to those religious groups which claim no longer to discriminate and to those which openly profess discrimination as an expression of their religious faith.

A. Statutory Interpretation

As previously noted, the explicit wording of the §702 exemption does not grant any exemption for religious organizations to discriminate in any of their employment practices except on the basis of religion. The expansion of this exemption was judicially created on the basis of presumed Congressional intent that Congress would want to avoid the constitutional question of whether the omission of such an exemption would create a conflict with the first amendment religion clauses. While some of the language in McClure implies that the court thought that Title VII would be unconstitutional without the exemption, in its actual holding the court stated only that Congress "did not intend, through the non-specific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister."[46] Thus the

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[46] McClure v. Salvation Army, 460 F.2d 553, 560-61 (5th Cir. 1972). McClure has been followed by every court that has considered the (continued...)

creation of this expanded exemption is based on Congressional intent, even if merely presumed, rather than on constitutional necessity.[47]

This interpretation, that Congress intended to grant the broader exemption to religious organizations, seems to be an incorrect conclusion. First, Congress clearly knew how to create an exemption when it wanted to do so and did exactly that in permitting religious organizations to discriminate on the basis of religion. The fact that Congress expressly included one form of discrimination and not others should lead to the conclusion that Congress specifically intended to

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[46](...continued)
applicability of Title VII to any employment relationship which the court classified as involving "clergy." See Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 362-63 (8th Cir. 1991); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168-71 (4th Cir. 1985), cert. denied, 478 U.S. 1020 (1986); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 282-83 (5th Cir. 1981); Young v. Northern Ill. Conference of United Methodist Church, 818 F. Supp. 1206 (N.D. Ill. 1993).

[47] This exemption of religious organizations from governmental regulation based on Congress' presumed desire to avoid even a constitutional question, rather than the necessity to avoid an actual unconstitutionality of a statute, is echoed later in NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), in which the Supreme Court held that the NLRA could not be applied to regulate the labor practices of religious organizations without a clearer expression of Congressional intent to do so, because such application had the potential of raising a constitutional question. However, no court has used the Catholic Bishop analysis to exclude religious organizations from the operation of Title VII, see, e.g., EEOC v. Pacific Press Pub. Asso., 676 F.2d 1272, 1276-77 (9th Cir. 1982); DeMarco v. Holy Cross High School, 1993 U.S. App. LEXIS 22423 (2d Cir. Sept. 1, 1993)(distinguishing both Title VII and ADEA from Catholic Bishop analysis).

prohibit other forms of discrimination. Second, legislative history indicates that when the § 702 exemption was expanded in 1972 to encompass all activities of religious organizations, and not merely the religious ones, there was also an attempt to modify the statutory language so as to permit religious organizations to discriminate on any basis.[48] This attempted expansion, however, failed, and so Congressional intent to prohibit other forms of discrimination seems clear.[49] Third, the application of the reasoning from NLRB v. Catholic

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[48] Senators Ervin and Allen originally proposed an amended version of §702 which stated: "This title shall not apply ... to the employment of any individuals by any educational institution or by any religious corporation, association, or society." Senate Bill 2515, Amendment No. 815, Legislative History of the Equal Employment Opportunity Act of 1972, at 881 (1972). See also comments of Senator Ervin, id. at 1227. Nonetheless, Senator Ervin implied that even without adoption of his amended version, Title VII would not apply to the employment of clergy, id., that is, he seemed to assume that the McClure-type exemption was valid with or without his expanded exemption.

[49] After the failure of Senator Ervin's attempt to change § 702 so as to permit both discrimination on any bases and in any activity, the more limited expansion was approved so that religious organizations could discriminate based on religion in any of their activities. See Legislative History of the Equal Employment Opportunity Act of 1972, 843-52, 1665-67 (1972). For discussion of this legislative history, see EEOC v. Kamehameha Schools/Bishop Estate, 990 F.2d 458 (9th Cir. 1993); Pacific Press, 676 F.2d at 1276-77; King's Garden, 498 F.2d at 53-54 and n.6; Feldstein v. Christian Science Monitor, 555 F. Supp. 974, 976, (D. Mass. 1983). It could perhaps be argued, in the absence of this specific legislative history, that Congress, aware of the judicial expansion in McClure, implicitly adopted the McClure holding by not overturning it. However, Congress' explicit consideration of this expansion and its failure to enact it would seem to form a more specific evidentiary basis for interpreting Congressional intent and thus provide more persuasive reasoning. This use of legislative history does not (continued...)

Bishop that Congress would want to avoid raising the constitutional question unless it clearly intended to do so seems negated by these other indications of Congressional intent.[50]

Finally, the approach to judicially-created exemptions for religious organizations has changed dramatically since the Supreme Court's decision in Employment Div., Dept. of Human Resources v. Smith.[51] In Smith, the Supreme Court held that there is no constitutionally compelled exemption from generally applicable, otherwise valid governmental regulation on the basis of a free exercise claim and that the legitimacy of such regulation should be evaluated under the lowest standard of rational relationship scrutiny.[52] Smith thus has the effect of

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[49](...continued)
present contradict the actual text of the statute and so does not present the same interpretive difficulties as have recently been the subject of controversy among commentators in their evaluation of the Supreme Court's use of textualism and legislative history in its interpretation of Title VII. See, e.g., William T. Mayton, Law among the Pleonasms: The Futility and Aconstitutionality of Legislative History in Statutory Interpretation, 41 Emory L.J. 113 (1992); Ronald L. Rotunda, A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation, 68 Notre Dame L. Rev. 923, 951-52 (1993); Stephen A. Plass, Bedrock Principles, Elusive Construction, and the Future of Equal Employment Laws, 21 Hofstra L. Rev. 313, 349-50 (1992); Steven R. Greenberger, Civil Rights and the Politics of Statutory Interpretation, 62 U. Colo. L. Rev. 37, 55-63 (1991); William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 670-78 (1990).

[50] See, e.g., the discussion of the nexus between the holding of NLRB v. Catholic Bishop and the legislative history of the §702 exemption in Pacific Press, 676 F.2d at 1276-77.

[51] 494 U.S. 872 (1990).

[52] Id. at 883-86.

negating all judicially-created or constitutionally compelled exemptions for religious organizations or individuals on the basis of religious belief. Because Title VII is a neutral, generally applicable regulation which passes minimal scrutiny (if not also heightened scrutiny), the judicially-created McClure exemption from Title VII for clergy must be invalid.[53] Thus, at this time, the application of Smith to Title VII clearly prevents a religious organization from discriminating in any of its employment practices on any basis other than religion.

I do not wish, however, to rely exclusively on this application of Smith in my argument. First, the Smith holding may be changed by Congressional enactment of the Religious Freedom Restoration Act so as to require any statute which regulates religious conduct to pass strict scrutiny analysis.[54] However, even if Congress enacts the Religious

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[53] For example, in Black v. Snyder, the Minnesota appellate court held that application of the state Human Rights Act to the gender discrimination claim of a female minister did not violate the free exercise clause of the First Amendment under the Smith analysis, although it would violate the excessive entanglement prong of the establishment clause analysis. 471 N.W.2d 715, 719-20 (Minn. Ct. App. 1991). In NLRB v. Hanna Boys Center, the Ninth Circuit considered the effect of Smith on a religious organization's claim of exemption from NLRB jurisdiction but held that such a claimed exemption would have failed even under pre-Smith analysis. 940 F.2d 1295, 1305 (9th Cir. 1991). See also Lukaszewski v. Nazareth Hospital, 764 F. Supp. 57, 61 (E.D. Pa. 1991)(religiously-affiliated hospital's claim to exemption from ADEA on free exercise grounds precluded by Smith).

[54] The Religious Freedom Restoration Act would only permit governmental regulation of religious organizations under the compelling government (continued...)

Freedom Restoration Act, Title VII could still prohibit discrimination as it now does because such a prohibition would pass a strict scrutiny/compelling government interest test, in light of the strong national interest in the elimination of discrimination in all aspects of life.[55] Second, both Smith and the Religious Freedom Restoration Act would permit Congress to enact a McClure-type exemption so as to allow religious organizations to discriminate on any bases in the employment of clergy--an exemption which I shall argue later would itself be unconstitutional. Finally, under current constitutional analysis, even if a claim to exemption from anti-discrimination regulations is precluded by Smith, a religious organization would likely prevail by presenting an excessive entanglement claim based on establishment clause analysis.

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[54](...continued)
interest test which is otherwise normally applied to governmental regulation of a fundamental freedom. I would suggest that, for the same reasons that such a legislatively created Title VII exemption would be unconstitutional, Title VII without the expanded exemption should still pass a compelling government interest test. The Supreme Court recently affirmed the use of the compelling government interest test in evaluating the constitutionality of a statute which is not neutral or generally applicable. Church of Lukumi Babalu Aye, Inc. v. Hialeah, 113 S. Ct. 2217 (1993)(striking down an ordinance which had as its actual purpose the suppression of a central practice of a particular religion)

[55] See, e.g., discussion of the strong national policy in elimination of discrimination in EEOC v. Mississippi College, 626 F.2d 477, 488-89 (5th Cir. 1980).

B. Constitutional Interpretation

More complex is the question of whether a legislatively-enacted exemption to Title VII which would permit religious organizations to discriminate on any basis in their employment of clergy would itself be constitutional. The majority of academic commentators seem to advocate that legislatively-enacted accommodations of religious practices is permissible under current constitutional analysis, and that government should respect religious practices in this manner. The Supreme Court has, however, also held that under the Establishment Clause the government cannot, at a minimum, favor one religious group or practice over another. More controversial, however, is the issue of whether interpretation of the Establishment Clause would also prohibit the favoring of religious groups in general over non-religious groups. As applied to the field of employment discrimination, the question would focus on whether the legislature could specifically permit religious organizations to engage in a practice which is prohibited to other forms of not-for-profit and charitable institutions.

A few commentators have recently ventured to suggest that not only would there be no constitutionally compelled exemption to the enforcement of generally applicable regulations, including anti-discrimination regulation, but that, in fact, the constitution would prohibit even a legislatively mandated exemption. The first of these

commentators is William Marshall, who, although not addressing this question directly, has propounded the view that the religious free exercise clause extends no further than the free speech clause of the first amendment.[56] One is therefore free to believe and advocate any religious belief on an equal basis with a non-religious belief. However, special protection for religion-based conduct, which extends beyond the protection granted under the free speech clause, would constitute a favoring of religion over non-religion and therefore violates the establishment clause.[57]

The second commentator who has advocated the application of anti-discrimination regulation to religious organizations is Ira Lupu, who suggested that the free exercise clause should be coterminous with the right of free association, also guaranteed in the first amendment, although less explicitly than the rights of free speech and religious exercise.[58] Lupu relies on an interpretation of the religion clauses that they are premised on the goal of equal religious liberty and are intended

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[56] Although addressing primarily the question of constitutionally-compelled exemptions to legislative enactments, Marshall's arguments would seem to apply equally to legislatively-enacted exemptions which have substantially the same effect. William P. Marshall, Case, supra note 7, at 358 (noting the potential for conflict between the Free Exercise and Establishment Clauses); William P. Marshall, Solving the Free Exercise Dilemma: Free Exercise as Expression, 67 Minn. L. Rev. 545 (1983).

[57] Marshall, Case, supra note 31, at 360-65.

[58] Lupu, Free Exercise, supra note 28, at 431-42.

to prevent the enactment of laws which are motivated by a hostility specifically toward religion and laws which favor one religious group or practice over another.[59] Finally, he also argues that free exercise claims belong only to individuals and cannot be asserted by religious organizations or institutions; thus, religious groups are subject to the same regulatory laws as other institutions and organizations and should not be singled out for preferential treatment based solely on their religiously-based preferences.[60]

A third constitutional basis for the prohibition of such discrimination, even by religious organizations in a central practice of their faith, lies in the Equal Protection Clause of the fourteenth amendment. This approach evolves from a reevaluation of the Civil War era and, in particular, the Civil War constitutional amendments. Several works of scholarship, approaching the subject from different perspectives, have cast a new light on the Civil War-Reconstruction era. These studies will force us to realize that this era forged not only a rebirth and fundamental change in our concepts of freedom and

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[59] Id. at 415-19 (relying on Larson v. Valente, 456 U.S. 228, 244-46 (1982)(applying strict scrutiny to a state law which granted a denominational preference). See also Ira C. Lupu, Reconstructing the Establishment Clause: The Case against Discretionary Accommodation of Religion, 140 U. Penn. L. Rev. 555, 580-96 (1991).

[60] Lupu, Free Exercise, supra note 28, at 422-30.

democracy from what had preceded but that this era was in fact a re-creation of our nation and our Constitution.

The first of these studies is Garry Wills' book, **Lincoln at Gettysburg: The Words that Remade America**. In his in-depth analysis of Lincoln's Gettysburg Address, Wills demonstrates that Lincoln reached back before the time of the Constitution to the Declaration of Independence in order to transcend the Constitution which, in Lincoln's view, was fatally flawed because of its acceptance of slavery. As Wills wrote,

> Lincoln [came] not only to sweeten the air of Gettysburg but to clear the infected atmosphere of American history itself, tainted with official sins and inherited guilt. He would cleanse the Constitution-- not ... by burning an instrument that countenanced slavery. He altered the document from within, by appeal from its letter to the spirit, subtly changing the recalcitrant stuff of that legal compromise, bringing it to its own indictment. By implicitly doing this, he performed one of the most daring acts of open-air sleight-of-hand everwitnessed by the unsuspecting. Everyone in that vast throng of thousands was having his or her intellectual pocket picked. The crowd departed with a new thing in its ideological baggage, that new constitution Lincoln had substituted for the one they brought with them. They walked off, from those

> curving graves on the hillside, under a changed sky, into a different America. Lincoln had revolutionized the Revolution, giving people a new past to live with that would change their future indefinitely.[61]

Lincoln's evocation of the Declaration of Independence, rather than the Constitution, affirmed the former's guiding and aspirational principle that "all men are created equal." It was quite clear that at the time the Declaration was written all men were not treated as equal and the Constitution did not remedy this. However, Lincoln believed that the Declaration enunciated the true and unchanging principles which guided this nation and which superseded even the Constitution. The Constitution and the nation would evolve toward the ideals of the Declaration. The Gettysburg Address was thus a reaching back to the Declaration to bring it up to the present moment to serve as the model on which the nation would purify itself and re-create itself through the process of war. This analysis shows us that the Constitution, as originally enacted and even with its first ten amendments, was not to remain for all time the essential principle of the Republic. Rather, the Constitution would need fundamental alteration before it could achieve the promise and ideals of the Declaration.

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[61] Wills, Lincoln at Gettysburg: The Words that Remade America at 38 (1992).

That promise was subsequently vindicated in the Civil War amendments. Bruce Ackerman, in his study We the People, has argued that in addition to the formation of the Constitution at the founding of the Republic, there have been two other periods of Constitutional formation in our history.[62] The first of these, the Reconstruction Era, has been generally acknowledged as departing in significant substantive principles from the preceding era. However, he argues that the procedural methodology of the amendment process was also a significant departure from the process as permitted by the Constitution itself, thus echoing the procedural irregularities of the Constitutional Convention which violated its mandate under the Articles of Confederation. The widespread acceptance of these significant changes, brought about by a method not sanctioned in the existing Constitution, demonstrates that the people of the United States recognized a fundamental change in the government, in fact, a revolution which caused a superseding of prior constitutional principles by subsequent formulations. The Reconstruction Era amendments were thus a product of higher law-making, not merely adding incrementally to the prior Constitution but revolutionizing and replacing its earlier principles. As Ackerman wrote,

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[62] Bruce Ackerman, We The People: Foundations 42-46 (1991).

> The Republican Reconstruction of the Union was an act of constitutional creation no less profound than the Founding itself: not only did the Republicans introduce new substantive principles into our higher law, but they reworked the very process of higher lawmaking itself.[63]

To apply these principles to current jurisprudence interpreting the religion clauses, a significant re-interpretation becomes necessary. The sanctity of the religion clauses must be re-evaluated in light of subsequent constitutional principles, in particular the Equal Protection Clause of the fourteenth amendment. This process parallels that by which various of the rights secured in the Bill of Rights were incorporated through the due process clause of the Fourteenth Amendment so as to make the state governments subject to the same prohibitions as the federal government. That a subsequent amendment can contradict and thus supersede an earlier amendment is not only demonstrated by this incorporation process but also by such examples as the fact that the Thirteenth Amendment could free the slaves, thus depriving the slave owners of their property without payment of just compensation, a direct contradiction of the Fifth Amendment's Takings Clause. Thus when a contradiction between constitutional amendments occurs, the subsequent amendment is the one which prevails since the

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[63] Id. at 46.

subsequent action should be viewed as repealing the earlier to the extent of the contradiction. This is particularly true where the subsequent amendment, like the Thirteenth and Fourteenth Amendments, is not an ordinary amendment but is part of a profound reformulation of the entire Constitution and its principles.

C. Application

1. Religious Organizations that profess not to discriminate

Several religious sects in the United States over the past twenty-five years have moved voluntarily toward egalitarian treatment in the ordination and employment of their clergy.[64] The question of whether

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[64] Half of Christian denominations, including the United Church of Christ, the United Methodist Church, the Episcopalian Church and the Presbyterian Church, as well as Reform, Reconstructionist, and Conservative Judaism, now ordain women on an equal basis with men. Cullen Murphy, Woman and the Bible, The Atlantic Monthly, vol. 272, no. 2, 39, 41 (Aug. 1993). The question of racial discrimination, at least in terms of ordination, has not been directly raised, while the question of discrimination based on sexual preference is also now being debated in many denominations. At least Reform and Reconstructionist Judaism disavow any discrimination in ordination based on sexual preference. The question of discrimination in employment has been dealt with differently, however, in that some religious groups which ordain women will nonetheless explicitly permit individual congregations to discriminate against women clergy in their hiring practices, such as in Conservative Judaism, while there are widespread complaints of discrimination in practice throughout these sects even when not officially permitted. In a recent survey of female rabbis in the United States, 70% reported that they have been the subject of sexual harassment in connection with their employment. These results parallel those of a survey of female United Methodist Church ministers in which

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an employment discrimination suit under Title VII or an applicable state or local ordinance may be brought against such a congregation or religious organization raises very different and considerably more limited constitutional questions than those implicated by a religious group which openly professes discrimination against women or other groups as a matter of sincerely held religious belief.[65]

The argument raised by such a religious group when subjected to a claim of discrimination in clergy employment focusses on their first amendment claim of a right to be free of either governmental regulation or even governmental scrutiny into what may be regarded as the most central of religious practices--the clergy relationship. Nonetheless, it is necessary to examine the true scope of the constitutional right to be free from governmental regulation under a free exercise claim to determine its appropriate application to this scenario.

In light of the free exercise analysis and establishment analysis (which lends the excessive entanglement prong to what is otherwise essentially only a free exercise claim), the salient features which are

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[64](...continued)
77% reported sexual harassment. These surveys seem to indicate that various forms of gender discrimination persist even in those denominations which specifically disavow any form of discrimination. Ari L. Goldman, Religion Notes, New York Times, Sat., Aug. 28, 1993, p.5, col.5-6.

[65] The most obvious examples include the Roman Catholic Church and the Mormon Church which clearly prohibit the ordination of women as members of their respective clergies.

deduced are primarily only the claim to be free from all government scrutiny because this burdens the free exercise of religion and the claim that courts must accept the decisions of a religious organization's highest internal authority based on the line of cases involving internal church disputes.

The first basis, that is the right to be free from governmental scrutiny, Lupu labels as a claim of administrative or process immunity so as to avoid the excessive entanglement question.[66] This "process immunity" he defines as the interest in being free from unwanted interaction with government agents, "independent of the substance of the government mission."[67] However, process immunity should extend no further than the underlying substantive right,[68] because otherwise it

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[66] Lupu, Free Exercise, supra note 28, at 413-16. Courts have considered this question and have almost uniformly concluded that, when clergy employment is concerned, religious organizations have an absolute right to be free from government scrutiny, but in the employment of non-clergy, the burden is not so great when balanced against the strong national interest in eradicating employment discrimination. Some courts have distinguished the degree of scrutiny required by application of the NLRA, see NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), and that required by recognition of EEOC jurisdiction over religious organizations.

[67] Lupu, Free Exercise, supra note 28, at 413.

[68] Id. relying on Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986), in which the Supreme Court held that the inquiry of a state human rights commission into allegations of gender discrimination by a parochial school was a sufficient state interest that the federal courts must refrain from interfering. One could conclude, based on this decision, that there is no inherent constitutional right to be free from the governmental inquiry into the conduct of a religious organization, although

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becomes only a shield for what is not, in fact, discrimination based only on sincerely held religious belief or ideology.[69] If process immunity extends further than the substantive right then it protects only the pretext or excuse for discrimination, which is clearly not permissible under Title VII analysis.[70]

The second response to the claim of process immunity comes from judicial opinions which have stated that analysis of the burden

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[68](...continued)
the ultimate imposition of a governmental regulation might infringe on first amendment free exercise rights.

[69] Id. at 415.

[70] In Ritter v. Mt. St. Mary's College, the court stated that it could inquire into the good faith of a religious preference granted by a church-affiliated college in faculty hiring decisions. 495 F. Supp. 724, 729 (D. Md. 1980). However, those courts considering claims by clergy have held that the First Amendment "protects the act of a decision rather than a motivation behind it," Rayburn v. General Conference of Seventh- Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985), thereby precluding any inquiry into the good faith of an assertion that an employment practice is based on religious belief. In Scharon v. St. Luke's Episcopal Presbyterian Hosp., the court conceded that abstention from adjudicating clergy claims of discrimination permits religious organizations to use the First Amendment as a "pretextual shield" for otherwise impermissible employment practices. 929 F.2d 360, 363 n.3 (8th Cir. 1991). Another example of the use of religious belief as a pretext for discrimination may be illustrated by a claim brought by a cantor, who had served a Reform Jewish congregation for over twenty years and was replaced by a male cantor because, as an officer of the congregation told her, the congregation preferred a male over a female. The female cantor sued under the Chicago Human Rights Ordinance which permits religious organizations to discriminate in their employment practices only in furtherance of their religious mission or beliefs. The Hearing Officer found for the cantor because discrimination against women is not a tenet of Reform Judaism. This case is now, however, on appeal in the Illinois state courts. Diamond v. Kol Ami Congregation.

prong of the free exercise test requires the evaluation of the extent of the burden placed on religious belief, and not the extent of the burden placed on the religious institution in complying with governmental regulation.[71] Thus, even while excluding claims brought by clergy, courts have subjected institutions to EEOC jurisdiction, based both on specific complaints of discrimination and on need to collect data as requested by Congress, for their non-clergy positions. Nevertheless, it would seem that the burden placed on the institution for such compliance is identical, regardless of the type of position in question.

Those who claim process immunity also rely on the argument that application of Title VII in this context would necessitate judicial scrutiny of religious doctrine to determine whether any alleged discrimination was the product of sincerely held religious beliefs. This, again, is not the case. First, courts have consistently had no problem in determining whether religious doctrine mandates or permits discrimination in non-clergy, as well as clergy, employment practices.[72] Second, courts can

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[71] See, e.g., NLRB v. Hanna Boys Center, 940 F.2d 1295, 1305 (9th Cir. 1991); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 286 (5th Cir. 1981); EEOC v. Mississippi College, 626 F.2d 477, 488 (5th Cir. 1980).

[72] In EEOC v. Pacific Press Pub. Asso., the court stated:

> Preventing discrimination can have no significant impact upon the exercise of Adventist beliefs because the Church proclaims that it does not believe in discriminating against women or minority groups, and that its policy is to pay wages without discrimination on

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look to objective criteria, including whether the denomination admits students to its theological seminaries on a non-discriminatory basis, ordains individuals on a non-discriminatory basis, and even hires clergy on a non-discriminatory basis. Even this last point is evident from many of the cases because most of those reported cases alleging discrimination have involved claims of discrimination in pay, retention or firing, rather than claims of failure to hire in the first place.[73] The court thus has an entirely objective basis from which to conclude that there is no burden on religious belief in holding those religious organizations which claim not to discriminate to accountability under Title VII. Courts have also referred to statements of the religious organizations themselves as to

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[72](...continued)

> the basis of race, religion, sex, age, or national origin. Thus, enforcement of Title VII's equal pay provision does not and could not conflict with Adventist religious doctrines, nor does it prohibit an activity "rooted in religious belief."

676 F.2d 1272, 1279 (9th Cir. 1992). Accord Southwestern Baptist, 651 F.2d at 286 (no religious tenet requires discrimination based on sex, race, color or national origin); Mississippi College, 626 F.2d at 488 (no religious tenets justify sex or race discrimination in hiring of faculty at religiously-affiliated college).

[73] For cases involving firing and other forms of post-hiring employment practices involving clergy, as opposed to claims of discrimination in initial hiring, see, e.g., McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972); Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990); Scharon, 929 F.2d 360. As the court stated in Russell v. Belmont College, a case involving a female teacher at a Baptist college, the question was not whether her employment was contrary to the Baptist faith, but only whether "having hired a female, must the College refrain from discriminatory compensation?" 554 F. Supp. 667, 672 (M.D. Tenn. 1982).

their policies concerning discrimination. For example, the Methodist Book of Discipline, quoted in Minker, states the denomination's policy concerning non-discrimination based on gender, age, race, color or ethnic origin.[74]

The claim to process immunity has also been utilized by religious organizations which profess non-discrimination to avoid litigation brought on other bases. In Minker, a Methodist minister brought a suit against the church for age discrimination and for breach of contract.

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[74] Minker, 894 F.2d at 1356, quoting from the 1984-88 Book of Discipline, §529.1. The court, nevertheless, concluded that the denomination's policy concerning age discrimination was unclear because other sections of the Book of Discipline stated that age could be used as a factor in determining the suitability of a minister for appointment. Id. Other denominations, such as the Reform movement in Judaism, in addition to their policy statements, require congregations to agree not to discriminate on the basis of gender in order to participate in the placement process. It is interesting to note here the extensive analysis recently offered by the Second Circuit in the context of a teacher's suit against a parochial school based on the ADEA in discussing a court's ability to analyze a defendant's proffered reason for an employee's discharge without violating religion clause principles. The court explained that the wisdom of the defendant's reason did not need to be justified so that if the defendant offered a religious reason, the court would have to accept the validity of the religious belief involved. The court would need only to determine whether the proffered reason was the real reason or only a pretext for discrimination. The court stated

> The pretext inquiry thus normally focuses upon factual questions such as whether the asserted reason for the challenged action comports with the defendant's policies and rules, whether the rule applied to the plaintiff has been applied uniformly, and whether the putative non-discriminatory purpose was stated only after the allegation of discrimination.

DeMarco v. Holy Cross High School, 1993 U.S. App. LEXIS 22423 (2d Cir. Sept. 1, 1993).

Because of concern for violation of the first amendment, the court refused to adjudicate the age discrimination claim and the breach of contract claim based on the nondiscriminatory policies of the denomination. The court, nonetheless, held that the breach of contract claim based on a statement by the superintendent could be adjudicated.[75]

The court first emphasized that religious organizations are to be held liable, just like any other entity, for their contracts, tort responsibilities and property transactions.[76] The court then carefully analyzed which types of evidence could be presented at trial without violating the first amendment. In particular, we should note that the court could consider whether other appropriate congregations had become available but were not offered to the plaintiff. If the court is competent to consider suitability of congregational appointments without implicating the religion clause strictures, then it should be possible to adjudicate claims of breach of employment contracts by clergy. In a clear response to the process immunity argument, the court

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[75] The superintendent had allegedly promised to find a more suitable position for the plaintiff "at the earliest time." 894 F.2d at 1355.

[76] The court stated that "[a] church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court." 894 F.2d at 1359. The court also quoted the Supreme Court in Jones v. Wolf, that "courts may always resolve contracts governing 'the manner in which churches own property, hire employees, or purchase goods.'" Id. (emphasis added).

stated that "[m]aintaining a suit, by itself, will not necessarily create an excessive entanglement.... [W]e see no potential for distortion of church appointment decisions from requiring that the Church not make empty, misleading promises to its clergy."[77]

The lesson to be drawn from Minker is that religious organizations are not automatically immune from suit by their employees, including their clergy employees, although the remedy fashioned may at times need to be particularly sensitive to the clergy employment situation. Emphasis on remedies should therefore perhaps be on monetary damages and prospective injunctions, rather than on reinstatement to a particular clergy position. Furthermore, if religious organizations can voluntarily enter into contracts through the oral statements of their representatives, then surely they can also enter into implied contracts based on their written representations and clear statements of policies, even though the Minker court refused to do so based on the statements in the Methodist Book of Discipline.

These policy statements are representations which are relied upon by those entering the clergy of the particular denomination and seeking positions of employment. They are also relied upon by those who

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[77] Id. at 1360. Because the plaintiff had subsequently received a suitable appointment, he was not asking for a particular employment position, only monetary damages. The request for monetary damages did not, therefore, constrain the church's appointment decisions in the court's view.

adhere to and join the particular denomination. For example, if a black or a woman is willing to become part of a denomination only if that denomination does not engage in discrimination based on race or gender, then that individual is entitled to rely upon the representations of nondiscriminatory policies. The individual can, of course, always leave that denomination. However, if the denomination covertly engages in employment discrimination and then hides behind the shield of the first amendment, it will be very difficult for individuals to learn the falseness of the denomination's professed nondiscriminatory policies. At the very least, religious organizations which claim not to discriminate should be forced either to state openly that they do, in fact, discriminate or to defend such cases on their merits. Removal of the first amendment shield would expose the falsity of the denomination's misrepresentations to their members and their clergy.

There is thus clear reliance on the representations of such denominations by both individuals who adhere to that faith and individuals who enter the clergy of that denomination. There is also clearly misrepresentation by such denominations when they utilize the first amendment as a way of evading the real issues underlying the particular employment dispute in question. Finally, Minker demonstrates that it is not difficult and certainly not a violation of the

first amendment for courts to adjudicate employment disputes, even when these involve members of the clergy.

There is an increasing trend, particularly in state courts, to permit clergy to sue within their denomination for breach of various employment-related duties, although not specifically on the basis of alleged discrimination. In Black v. Snyder, the court permitted the former associate pastor at a Lutheran Church to sue her supervising pastor for sexual harassment, although it dismissed her claims for defamation, breach of contract and retaliatory discharge.[78] The court distinguished these claims from the sexual harassment claim because the latter related only to predischarge conduct which allegedly created a hostile working environment and had no bearing on the plaintiff's pastoral qualifications or church doctrine. The court specifically stated that while sex discrimination has been permitted under the first amendment, the first amendment does not protect sexual harassment during the employment relationship. The court also emphasized that the plaintiff, like in Minker, sought only monetary damages and not reinstatement.[79]

In Molberg v. Apostolic Bible Institute, the court permitted the plaintiff, who had worked as a teacher, officer manager, and pastor's

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[78] Black v. Snyder, 471 N.W.2d 715 (Minn. Ct. App. 1991).

[79] Id. at 720-21.

assistant, to sue for breach of a covenant of good faith in discharge, while dismissing his claims based on a violation of his right to religious free exercise, religious discrimination and defamation.[80] In Marshall v. Munro, the court permitted the plaintiff, a Presbyterian minister, to sue the Executive Presbyter, who was responsible for responding to inquiries about the fitness of ministers who are seeking employment, based on defamation and intentional interference with contract but dismissed the claim for breach of contract.[81] Finally, in Drevlow v. Lutheran Church, Missouri Synod, the court permitted the plaintiff, a Lutheran minister, to sue the Synod for libel, negligence, and intentional interference with legitimate expectancy of employment when the Synod maintained an employment file with false information concerning the minister's background.[82] All these cases emphasize the need of the factfinder to examine only objective evidence and not to question the validity of an asserted religious doctrine. Nonetheless, the courts all expressed the belief that factfinders were capable of this type of inquiry without violating the first amendment and that religious organizations are not entitled to some type of absolute immunity from judicial scrutiny of their

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[80] Molberg v. Apostolic Bible Institute, 1992 Minn. App. LEXIS 354 (unpublished opinion).

[81] Marshall v. Munro, 845 P.2d 424 (Alaska 1993).

[82] Drevlow v. Lutheran Church, Missouri Synod, 991 F.2d 468 (8th Cir. 1993).

employment practices. While not all courts are following this trend,[83] it is nonetheless clear that the vulnerability of religious organizations to suit based on their employment practices, even in the clergy relationship, will increase.

The second defense utilized by religious organizations which claim not to discriminate rests on the line of judicial opinions stating that courts must abstain from adjudicating internal disputes of religious organizations. McClure and virtually all its progeny have relied on the principles enunciated in the decisions involving internal church disputes. These disputes almost invariably involve the disposition of church-owned property following a schism within a particular denomination. The losing side, in leaving the denomination, then becomes involved in a dispute with the hierarchical organization as to the ownership of the property.[84] Beginning with the decision in Watson v. Jones,[85] the Supreme Court and lower federal and state courts have enunciated

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[83] In a recent case, the Sixth Circuit dismissed a minister's entire complaint, which included claims for breach of contract, promissory estoppel, intentional infliction of emotional distress and loss of consortium. Lewis v. Seventh-Day Adventists Lake Region Conference, 978 F.2d 940 (6th Cir. 1992).

[84] These disputes often involve changes in religious dogma in response to political and social pressures, including, for example, division between pro- and anti-slavery factions during the Civil War; anti-communism in the post-World War II era; the decision to ordain women; involvement in the Vietnam War; advocacy of civil rights in the 1960's. These disputes have occasionally involved changes in the liturgy.

[85] 80 U.S. (13 Wall.) 679 (1871).

conflicting policies. These policies concern the need, on the one hand, for courts to abstain from interpreting religious doctrine and secondguessing ecclesiastical decisions in the desire to carry out the dictates of the free exercise clause. On the other hand, courts have also recognized the need to apply neutral principles of contract, property, trust and corporate law to resolve such disputes in order to avoid violating the establishment clause by favoring one religious group over another.

Courts have tended to settle these disputes by deferring to the decision of the highest ecclesiastical tribunal in hierarchically organized denominations, while applying neutral principles of law to congregationally organized denominations. However, even this limited approach has caused potential constitutional problems because of difficulties in determining, for example, the organizational structure of the denomination involved in a particular dispute and identifying the highest appropriate church authority. The constitutionality of such deference, even in the internal church dispute controversies, has been questioned for reasons including the fact that it produces differential treatment among denominations depending on their organizational and corporate structure and favors the religious group which identifies with the hierarchy over the split-off faction, thus possibly violating the establishment and equal protection clauses. For these reasons, it has

been suggested that neutral principles of law, derived from other legal contexts, should be applied regardless of the organizational structure of the religious group before the court.[86]

Regardless of the questionable constitutionality and propriety of utilizing a deference approach in the resolution of internal church disputes, the use of deference in the employment context is singularly misplaced. First, deference to religious groups with hierarchical organizations grants differing treatment to denominations based on their organizational structure, producing unequal treatment among religious groups. Deference thus grants to certain religious groups an "establishment" of their religious ideology at the expense of a clearly mandated legislative, and perhaps even constitutionally-required, priority. Second, employment discrimination implicates matters of very strong national interest and is therefore not an internal matter at all.[87]

Third, deference denies equal protection of the laws to those who may wish to adjudicate the propriety of decisions and actions of religious

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[86] The Supreme Court held in Jones v. Wolf, 443 U.S. 595 (1979), that it was constitutionally permissible, but not required, for a state court to apply neutral principles of law to resolve such disputes. See also Gerstenblith, Civil Court Resolution of Property Disputes among Religious Organizations, 39 Am. U. L. Rev. 513 (1990); Ellman, Driven from the Tribunal: Judicial Resolution of Internal Church Disputes, 69 Calif. L. Rev. 1378 (1981).

[87] Lupu, Free Exercise, supra note 28, at 404-09.

groups.[88] A court's denial of jurisdiction over a dispute is not in reality a neutral abstention from making a judicial decision. The decision not to resolve a dispute is, in fact, still a decision--a decision in favor of the status quo and generally in favor of those with greater bargaining and other forms of power,[89] just as reliance on legislatively-created religious exemptions is an outright favoring of those religious groups with greater political power than other groups.[90]

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[88] Ellman, supra note 86, at 1382-83, 1414. In advocating the adoption of neutral principles, particularly of contract law, to the resolution of internal church disputes, Ellman wrote

> courts serve neither the church nor its members by placing their affairs in a special law-free zone. Law-free is also lawless, and the consequence is that neither the faithful, nor the church or those with which it deals, can rely on the other parties playing by the rules, for there are then no enforceable rules.

Id. at 1414.

[89] Jane Rutherford, The Myth of Due Process, 72 Boston U. L. Rev. 1, 36-42 (1992)(discussing judicial determinations of personal jurisdiction as a method of allocating power).

[90] The Supreme Court's decision in Smith negates most, if not all, judicially-created religious exemptions while leaving intact the legislatively-created religious exemption. The judicially-created religious exemption is a fulfillment of the minoritarian protectionism enunciated in the free exercise clause. The legislatively-created religious exemption protects the larger, better-organized and better-funded religious groups. The Smith decision thus illustrates the favoring of majoritarian over minoritarian interests, a direct inversion of the supposed purpose behind the Bill of Rights. This may be exemplified by the fact that during Prohibition, Jewish and Catholic groups were able to obtain an exemption for the sacramental use of wine, while Native American Indian religious groups have not always been successful in obtaining legislative exemptions for the sacramental use of peyote.

Reliance on the internal dispute cases by McClure and its progeny to justify refusal to adjudicate discriminatory employment practices in religious groups which otherwise claim not to discriminate in the ordination and hiring of clergy is misplaced. The logic of deference may be questioned even in the internal dispute cases; its application to problems of discrimination and the use of other claims to process immunity from judicial scrutiny only serve to protect those who would use the free exercise clause as a shield to hide their pretextual use of religious belief for their non-religiously based discriminatory practices. In conclusion, there is no constitutional basis for courts' refusal to apply Title VII and the limited exemption granted in §702 in their evaluation of claims of discriminatory employment practices in the treatment of clergy by religious groups which otherwise claim not to discriminate as a matter of their religious belief, mission or theology.

2. Religious organizations which do profess discrimination

The more difficult constitutional question is raised by those religious organizations which do openly profess their right to discriminate in the employment of clergy based on either gender or race. While the question of prohibiting such discrimination might seem to be a flagrant violation of their free exercise rights, it is necessary to take a closer look before jumping to this conclusion.

The first suggested solution following from my prior discussion of the constitutionality of an exemption for religious organizations is Lupu's thesis that a religious organization should be free to select its membership on any basis, including race and gender discrimination, but that it must open its clergy hiring practices on a non-discriminatory basis to its entire membership.[91] While this suggestion is appealing because, as he points out, it is unlikely that a religious organization would openly exclude all females or all blacks from its membership, there are two flaws in his reasoning. The first flaw is that it does ultimately permit discrimination and, while religious organizations may hesitate to exclude half the population from their membership based on gender discrimination, they might well choose to discriminate in their membership on the basis of race. His suggestion therefore does little to eradicate flagrant race discrimination.

The second flaw is that not all religious organizations have a clearly defined or the same sense of "membership." Some religious organizations have a clearly defined sense of "member" in that individuals pay annual fees or dues, receive specific privileges and move in and out of membership throughout their lives. This concept of membership bears little relationship to either one's religious self-identification or the identification which an organization might bestow

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[91] Lupu, Free Exercise supra note 28, at 430-40.

on an individual. Other religious groups define membership in a more amorphous manner so that membership is synonymous with identification and which individual congregation or parish one belongs to is relatively unimportant. While this conceptual difficulty may seem to take his use of the word "membership" too literally,[92] it is clear that there is significant variation in the meaning of this word among religious groups and its use would therefore be a confusing standard for courts to apply in the enforcement of anti-discrimination laws.

Lupu's emphasis on membership does, however, add the concept that a religious organization is free to carry out a religious or canonical penalty. In some reported cases employment in non-clergy positions required good-standing in a particular religious organization or church.[93] The court emphasized that employment was a secular issue, appropriate for the court to adjudicate, but that membership in a religious organization was for the appropriate religious body to

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[92] Lupu does concede some of the problems which could be caused by religious organizations' lack of sincerity in their definitions of membership or their manipulation of different categories of "membership" but seems confident that courts could see through such subterfuge. Id. at 431-42.

[93] See, e.g., EEOC v. Pacific Press Pub. Asso., 676 F.2d 1272 (9th Cir. 1982), in which employment at publishing house affiliated with the Seventh-Day Adventist Church required membership in good standing in an employee's local church. The discharged plaintiff had maintained this status, but the court noted that the local church was free to undertake ecclesiastical discipline, such as censure or expulsion, which would then constitute an unreviewable ecclesiastical decision. Id. at 1275, 1281.

determine. Thus a particular action which violated religious precepts could be a valid reason for religious penalty, censure or expulsion from the religious group. However, it did not constitute, by itself, a valid reason for loss of employment.[94]

A second approach adopts the view that, although religious organizations are free to discriminate in their selection of clergy, it is constitutionally impermissible for the federal and state governments to grant to organizations which openly discriminate the significant tax and other forms of financial subsidies which religious organizations are routinely granted at every level of government.[95] Mary Becker has pointed out that many of the freedoms protected by the Bill of Rights, including the first amendment's Free Exercise clause, were intended to protect a small group of primarily propertied, white males.[96] The religion clauses protected women even less than black males because women are not treated equally in many Western religions (and certainly

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[94] The court characterized the dispute as involving enforcement of federal regulatory policies rather than the resolution of an internal church dispute or interpretation of religious doctrine. Id. at 1280-81.

[95] Mary Becker, The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective, 59 U. Chi. L. Rev. 453 (1992).

[96] Id. at 454-58. Jennifer Nedelsky had earlier made the point that the minoritarian protection of the Bill of Rights was intended, to a large extent, to protect the propertied class from the majority (unpropertied) population. Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy 220-22 (Chicago, 1990).

in no religion as practiced in the colonies at the time of the Revolution).

With the enactment of the income tax, religious organizations, along with many other forms of charitable organizations, were granted exemptions from the payment of income tax and deductions for those who contributed money to such organizations.[97] Although the argument was attempted that the granting of subsidies to religious organizations violated the Establishment Clause, the Supreme Court has held that such tax benefits are constitutional.[98] Nonetheless, in Bob Jones University v. United States, the Supreme Court held that the Internal Revenue Service could refuse to grant §501(c)(3) status to a university which maintained a racially discriminatory policy in that it refused to permit interracial dating.[99] The decision was based on the

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[97] In addition to exemption from the payment of corporate income tax and deductibility of contributions for their contributors, religious organizations also receive in most states exemptions from the payment of sales tax and property taxes, sometimes employment taxes, and reduced postal fees. While not-for-profit organizations of many types are not taxed on their income under both federal and state laws, the other forms of tax benefits are reserved for narrower categories of organizations, generally including only educational, religious, and eleemosynary organizations and hospitals, although there is considerable variation at the state level. Only members of the clergy, however, receive a parsonage allowance which allows the exclusion from income of the value of housing given to ministers.

[98] Walz v. Tax Com. of New York, 397 U.S. 664 (1970).

[99] 461 U.S. 574 (1983). The IRS had denied favorable tax treatment to Bob Jones University which then had standing to contest this decision in court. In Heckler v. Mathews, the Supreme Court stated that the mandate of equal treatment could be accomplished either by a granting of the benefit to the disfavored group or by a denial of the benefit to those who have been

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Court's interpretation of the term "charitable" in §501(c)(3) as meaning not against public policy and thus constituting an additional requirement which organizations, although otherwise fitting into another § 501(c)(3) category, had to satisfy. The practices of Bob Jones University were then categorized as racially stigmatizing and thus against clearly stated national policy. By analogy, the same public policy would demand that

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[99](...continued)
favored. 465 U.S. 728, 740 (1984) (citing Bob Jones). The Supreme Court subsequently held in Allen v. Wright, 468 U.S. 737, 750-61 (1984), that parents who wished to contest the granting of tax-exempt status to a racially discriminatory private school lacked standing to bring the suit. In Allen, the Court distinguished Heckler because in Heckler, "the causation component of standing doctrine was satisfied with respect to the claimed benefits" and the injury was directly traceable to the challenged governmental action. 468 U.S. at 757. The enforcement of a Bob Jones policy thus depends on the IRS to deny tax-exempt status, a policy which the federal government openly disavowed even before Bob Jones was decided. The IRS also denied tax exemption on policy grounds in National Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983), to an avowedly neo-Nazi organization on the grounds that it satisfied the criteria for neither a charitable nor educational organization. The court held in National Alliance that the government could select or reject certain forms of speech for subsidy without violating the first amendment's free speech guarantees. 710 F.2d at 875. In McGlotten v. Connally, 338 F. Supp. 448 (D.C. Cir. 1972), tax-exempt status was denied to a fraternal organization which excluded non-whites from membership. State court decisions demonstrate that state authorities which grant not-for-profit corporate status have at times denied this status in accord with their interpretation of public policy. See, e.g., State v. Grant, 39 Ohio St. 2d 112, 313 N.E.2d 848 (Ohio 1974)(affirming refusal of Secretary of State to grant charter on ground that organization advocating homosexuality as a valid life style was contrary to public policy). At this time, however, any enforcement of a nondiscriminatory policy through the denial of tax benefits will depend on Congressional amendment of §501(c)(3), reversal of IRS policy (which is possible in light of the Democratic administration), or expansion of the Supreme Court's notions of standing.

§ 501(c)(3) organizations accord with the national policy concerning non-discrimination in employment enunciated in Title VII and the equal protection policies of the Fourteenth Amendment.

The stumbling block to Becker's analysis is that, at least as currently interpreted, Bob Jones requires the IRS to make the judgment to deny § 501(c)(3) status before the issue can be litigated. No one has standing to challenge the grant of tax-exempt status to an organization which arguably violates public policy. Becker tries to nullify this difficulty by arguing that tax-exemption is a form of state action and thus the granting of such benefits to organizations which openly profess discrimination violates the constitution.[100] She nonetheless does not advocate the position that discrimination by religious organizations can or should be outright prohibited because such governmental control would inhibit the full development of religion as an extra-governmental force.[101] Nevertheless, the denial of tax benefits, at least to openly

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[100] Becker, supra note 95, at 484-86. Becker states that this change could be accomplished by re-interpreting the First and Fourteenth Amendments, without elaborating on the conflict between these two amendments, other than stating "[r]eligious liberty cannot justify the exemption, since these organizations deny women the religious liberty they offer men." Id. at 485-86. In other words, the crux of the matter remains that free exercise requires permission for discrimination, while equal protection prohibits it. It is this conflict which must be resolved before the particular solution, whether denial of tax benefits or outright enforcement of nondiscriminatory practices, can be adopted.

[101] Id. at 486.

discriminatory institutions,[102] would prevent the government from fostering and encouraging the growth of such institutions and might perhaps encourage some to develop into more egalitarian institutions.[103] While Becker's proposal is one appealing solution to the problems raised by discriminatory religious groups, the solution to be adopted still awaits a fuller explication of the constitutionally required elimination of such discrimination.

The third approach, to be suggested here, examines the strong governmental interest and, indeed, constitutional mandate that discrimination based on gender, race, and age be eliminated. According to this view, even if legislatively-enacted exemptions for religious

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[102] Becker notes the concern that denial of favorable treatment only to those religious groups which openly discriminate could raise Establishment Clause problems, id. at 486 n.148. However, if one adopts the view which I presented earlier, that the free exercise clause does not grant process immunity, then religions which claim not to discriminate would be subject to the full regulation of Title VII and the various state and local anti-discrimination and human rights regulations. This should produce equality of treatment among religious groups.

[103] That various forms of governmental pressure can be correlated with change in religious doctrine may be demonstrated by the example of the Mormon Church's banning of the practice of polygamy in conjunction with Utah's admission to the Union and the Supreme Court's decision in Reynolds v. United States, 98 U.S. 145 (1878), which upheld a statute criminalizing the practice of polygamy. See also Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 161, 182 (1990). A more recent illustration involves the changes in Roman Catholic canonical law in response to the increasing allegations of child sexual abuse by members of the Roman Catholic clergy. Peter Steinfels, Pope Endorses Bishops' Attempts to Rid Clergy of Child Molesters, New York Times, p.1, col.1 (June 22, 1993).

organizations do not violate the Establishment Clause, such an exemption permitting discrimination would violate the Equal Protection Clause of the fourteenth amendment and therefore be unconstitutional.

Before the Supreme Court's Smith decision, the first amendment religion clauses, particularly the free exercise clause, had been limited by identification of the government's interest as "compelling," and this is the standard which would be reintroduced if the Religious Freedom Restoration Act is passed. Thus, the free exercise clause has been limited by governmental interests in prohibiting the practice of polygamy, the need for maintaining the social security system and other governmental tax programs, and even the need for placing a logging road through a Native American Indian religious site. The national interest in eradication of discrimination based on race has clearly been recognized as "compelling" and, in Bob Jones, the Supreme Court held that the prohibition against racial discrimination and stereotyping would supersede the religious principles of the University.

The strong national interest in eradication of gender discrimination has also been recognized, although the exact level of scrutiny to be given to governmental classifications based on gender is not entirely clear.[104] As the Supreme Court stated not long after

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[104] In its last statement directly on the question of the level of scrutiny to be given governmental actions involving gender discrimination, the Court (continued...)

enactment of the Fourteenth Amendment, Congress has broad power to enforce the command of the amendment and "to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion...."[105] The Ninth Circuit has recently held that the Veterans Administration cannot require ordination of applicants to fill chaplaincy positions because this has the clear effect of perpetuating gender discrimination.[106] Citing Bob Jones, the court stated that the government's interest in eradicating discrimination could not yield to the discriminatory practices of religious organizations.[107]

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[104](...continued)
applied intermediate-level scrutiny, that is the classification had to serve "important governmental objectives" and the discriminatory means employed must be substantially related to the achievement of those objectives. Mississippi University for Women v. Hogan, 458 U.S. 718, 723 (1982). This standard was cited approvingly in Heckler v. Mathews, 465 U.S. 728, 744 (1984), Clark v. Jeter, 486 U.S. 456, 460 (1988), and Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 459 (1988). However, Justice O'Connor, writing for the majority in Hogan, left open the question whether strict scrutiny might appropriately be utilized in cases of gender discrimination because she found the intermediate level sufficient to strike down the governmental action under consideration. 458 U.S. at 724 n.9. Justice Ginsburg referred to this comment of Justice O'Connor during her confirmation hearings this past summer, and so it may be safely assumed that the level of scrutiny to be applied to gender discrimination is at this time an open question.

[105] Ex parte Virginia, 100 U.S. 339, 346 (1880), cited in Hogan, 458 U.S. at 732.

[106] Murphy v. Derwinski, 990 F.2d 540 (10th Cir. 1993).

[107] Id. at 547. The court did not invalidate the VA's requirement that chaplain applicants have the endorsement of their religious denomination so that, ostensibly, the effect of gender discrimination on the part of the (continued...)

The Equal Protection Clause establishes a direct constitutional mandate to guarantee persons equal protection before the law which must override or preempt the free exercise clause and the establishment clause of the first amendment. The equal protection clause requires a recasting of all the rights guaranteed in the earlier constitutional amendments so that these conform to the egalitarian principles enunciated in the Fourteenth Amendment.[108] The strong national interest in eradication of discrimination, particularly in employment, and its foundation in the Equal Protection Clause have been recognized by courts. Therefore, enactment of a legislative exemption for religious organizations to permit discrimination on the basis of gender or race would be a violation of the Equal Protection Clause.

In light of my prior discussion of the recreation of the Constitution through the Civil War amendments, the Equal Protection Clause would supersede and represent a more compelling governmental interest than do the religion clauses of the first amendment. Yet the

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[107](...continued)
religious organization can continue to be carried over into the employment practices of the VA. Nonetheless, the court pointed out that the plaintiff was not challenging the endorsement requirement and so that issue was not before the court. On the other hand, the court left open the possibility that if the denominational endorsement "serves as a pretext for sex discrimination" it could also be challenged under Title VII. Id. at 543 n.10.

[108] Jane Rutherford, "Equal Faith: Initial Thoughts on Applying the Mandate of the Fourteenth Amendment to Religion" (unpublished paper presented at Duke University, April 1993).

failure of courts to apply this constitutional equal protection directive against the religion clauses is bewildering and can itself only be the product of racial and gender stereotyping which Title VII was intended to eliminate from the employment field. More appropriate, however, would be the recognition that the elimination of discrimination on the part of religious institutions is necessary if members of disadvantaged and minority groups are to achieve access to the political and social power which these institutions possess. Furthermore, a reevaluation of the proper role of the first amendment religion clauses and their relationship to the other rights guaranteed under the Constitution is necessary.

IV. The Clergy Privilege

A second area of the law which touches on controversial and sensitive issues as well as representing significant changes in the accountability demanded of religious organizations is that involving the confidentiality of information disclosed to members of the clergy. Every state recognizes some variation of the clergy-confider evidentiary privilege. Nonetheless, the proliferation of statutes which require individuals engaged in various professions to report information concerning possible child abuse or neglect to appropriate state authorities has raised new areas contention. When this requirement is

applied to clergy we have once again a potential conflict between the achievement of a compelling governmental interest in the protection of children's welfare and the clergy's claim to exemption based on a free exercise right because the revealing of such information may violate the clergy's religious dictate of confidentiality.

A. Background of the Clergy Privilege

The background of this conflict evolves from the notion of privileged communications. Procedural rules and laws of evidence protect various types of communication which are made in the course of particular relationships. These relationships include those of doctor and psychotherapist-patient, attorney-client, and clergy-confider. The history of these privileges is long and the extent to which they are still honored today is variable and beyond the scope of this study. However, the background of the clergy privilege will be briefly discussed so that the context in which exemption from reporting statutes may be established.

The history of the clergy evidentiary privilege in the United States begins with a New York court decision in 1813 which permitted a Roman Catholic priest to refuse to testify at a criminal trial. The court based its decision on the free exercise right guaranteed in the state

constitution, rather than on a common law privilege.[109] The clergy privilege did not exist at common law, but every state now recognizes, by statute or by procedural rule of evidence, some form of clergy privilege. While the Federal Rules of Evidence do not specifically include such a privilege, it is recognized by federal courts as grounded in the federal common law.[110] The major questions raised by the existence of this privilege include what is the underlying purpose of the privilege, what is the scope of the privilege, to whom does the privilege belong, and to what extent should these factors depend upon the denominational framework of the individuals involved in a particular case.

Perhaps the most important of these questions is that involving the underlying purpose of the privilege because this should help us in resolving the other definitional questions. It is necessary to recall that the clergy privilege does not exist in a vacuum but, rather, is one of

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[109] People v. Phillips (N.Y. Ct. Gen. Sess. 1813), discussed in Mary H. Mitchell, Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion, 71 Minn. L. Rev. 723, 737 (1987). The common law privilege had gradually dropped out of British law following the Reformation and was therefore not part of the American common law at the time of the Revolution. Id. at 735-37. Any basis for a clergy privilege must therefore be grounded in a statute or constitutional right.

[110] Id. at 738-40. See Trammel v. United States, 445 U.S. 40 (1980); In re Grand Jury Investigation, 918 F.2d 374 (3d Cir. 1990)(discussing extensively the existence, history, and scope of the federal common law clergy-communicant privilege).

several evidentiary privileges which more generally are considered to serve various societal functions. However, because society clearly has a significant interest in obtaining as much evidence as possible so that the truth of any matter can be fairly determined, the privileges which permit the exclusion of evidence must serve some greater societal purpose and must be narrowly construed. These benefits to society include the fostering of various confidential relationships and the help which a person, who otherwise would not come forward to seek assistance out of fear of retribution and public humiliation, may get by seeking counseling or healing through disclosure with clergy, medical personnel, psychotherapists, spouses and attorneys.[111]

The first rationale, which applies to all evidentiary privileges, is a utilitarian-based one in that society benefits by encouraging the confidentiality of various relationships. Wigmore identified what he viewed as four factors essential for the recognition of such a privilege:

(1) The communications must originate in a confidence that they will not be disclosed.

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[111] The Supreme Court stated in Trammel v. United States, that "The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return." 445 U.S. at 51.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[112]

While the first requirement must be met by definition, in that the law only protects communications made in confidence, and the second seems intuitive, although sometimes the subject of debate, the third and fourth requirements depend on evaluations of society's judgments embodying the privileges' utilitarian function and which are always difficult to make.

The third factor, concerning the value which the community places on the relationship, seems satisfied any time the privilege is created by statute, because the legislative determination may be viewed as a proxy for a majoritarian judgment. Even those privileges created by

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[112] 8 John Henry Wigmore, Wigmore on Evidence § 2285 (McNaughton rev. ed. 1961)(emphasis in original); Mitchell, supra note 109, at 762.

court rule seem to track the statutorily based ones closely enough to conclude that these also reflect a majoritarian judgment as to the value of the relationship which the privilege protects.[113]

The fourth requirement, that the injury from breaking the confidence must outweigh injury from withholding the evidence, should again be viewed from a societal perspective, which seems best evaluated by the legislative decision. This factor must also be judged from a general perspective with consideration for the chilling effect which disclosure would have on other confiders. In most individual circumstances, it will seem preferable to have the additional evidence available; however, from the broader perspective, the effect of disclosure not only on the individuals involved but on other individuals who may never become involved in a legal proceeding must be considered. The fourth factor of benefit to society outweighing the injury from nondisclosure is thus generally satisfied in these types of relationships. However, as I shall discuss later, this factor weighs differently when the question of child abuse reporting is raised.

The second offered rationale for privileges in general is that of the right to privacy. The right to privacy would focus more on the expectations and interests of the parties involved than on society's

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[113] But see State v. Sypult, 304 Ark. 5, 800 S.W.2d 402 (1990)(in interpreting statute's abrogation of physician and psychotherapist-client privilege, court modifies statute to conform to its own rules).

interest, except to the extent that society indirectly benefits from the fostering of the particular relationship involved and the protection of individuals' privacy expectations. While the right to privacy could arguably have a constitutional basis,[114] this right has never yet been applied by the Supreme Court to recognize a privilege in the withholding of information.[115] Another aspect to a right to privacy justification for this privilege is that it would support the view that the privilege belongs only to the patient, confider or client, and not to the physician, clergy, or attorney.[116]

The third justification for the clergy privilege is based on the first amendment right to free exercise of religion. According to this view, depending on the role which clergy confidences plays within the particular denominational faith, either a clergyperson or the confider could prevent the disclosure of information if disclosure would conflict with religious dictates. In addition, the principles of avoidance of entanglement and deference to church decisionmaking, which were previously discussed, would prevent a court from determining whether the denomination in fact prohibited such disclosure. Thus if the

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[114] See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965).

[115] See, e.g., Paul v. Davis, 424 U.S. 693 (1976), and discussion in Mitchell, supra note 109, at 768-76. The right to privacy has been almost exclusively reserved for matters involving individual autonomy, such as family issues, medical treatment, abortion, and sexual relations. Id. at 770-71.

[116] Id. at 775-76.

privilege were recognized as constitutionally-based, once either a member of the clergy or the confider claimed that disclosure would violate the free exercise rights of either, a court would be prohibited from compelling the disclosure or even inquiring further into the nature of the religious beliefs implicated by such disclosure.

A constitutionally-based free exercise rationale would require courts in some circumstances to grant the clergy privilege even when it has not been legislatively created or to interpret a statutorily-created privilege more broadly than the legislature has indicated. Furthermore, the privilege would not need to satisfy the utilitarian-based notions inherent in the Wigmore factors nor to achieve general community recognition of its value. However, such constitutionally-compelled exemptions now seem to have been eliminated under the Smith decision, as has been previously discussed.

On the other hand, a legislatively-created clergy privilege does not seem to raise the same potential Establishment Clause problems as does a legislatively-created exemption from nondiscrimination employment laws. The latter applies only to religious organizations and thus constitutes a preference of religion over nonreligion. Instead, in this case, the government is placing the clergy-confider relationship in a protected class along with several other comparable relationships which society has viewed as worthy of similar protection, rather than singling

out this relationship as unique and more valuable than even the most valued of other secular relationships.[117] Thus, as long as the clergy privilege is legislatively-created and its contours remain comparable to those of the other evidentiary privileges then the granting of this exemption does not seem to raise establishment problems. However, if the privilege were viewed as having a constitutional basis, then its features would look quite different from the other recognized evidentiary privileges.

The second fundamental question raised is to whom does the privilege belong. The answer to this may depend on the rationale chosen. If the privilege has a constitutional rationale, then the privilege must presumably belong to both the clergyperson involved and the communicant because the communication presumably took place in the context of a religious function. Furthermore, as previously stated, once either party claimed that disclosure violated his or her religious beliefs, then disclosure would be constitutionally prohibited. If, on the other hand, the rationale remains primarily utilitarian, then society's interest

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[117] The justification here might be similar to some of the rationales offered to explain why the granting of tax exemptions to religious organizations does not violate establishment principles. While all would not necessarily agree with this justification, it is nonetheless clear that the government has placed the activities of religious organizations into a larger category of other (secular) activities which are to be encouraged because of their value to society in general. See, e.g., Walz v. Tax Com. of New York, 397 U.S. 664 (1970).

may only require that the privilege belong to the confider. This would mean that if the confider waived the privilege, then the clergyperson would have no separate basis for claiming the privilege and the disclosure could be compelled.

The approaches used by the various states fall into three general categories and reflect these significant differences in the underlying rationale. In the largest number of states, the privilege belongs only to the communicant.[118] The relevance of this is that disclosure requires the consent or waiver of the communicant and, once such consent or waiver is given, the clergyperson cannot assert any separate privilege. This formulation accords most closely to the other privileges granted, such as the doctor-patient and attorney-client privileges.[119] While these formulations would clearly not raise any establishment-type issues,

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[118] These states include: Arizona; Colorado; Connecticut; Idaho; Iowa; Kentucky; Louisiana; Massachusetts; Minnesota; Montana; Nevada; New Hampshire; New York; North Carolina; Oregon; Pennsylvania; Rhode Island; South Carolina; Tennessee; Washington; West Virginia; and District of Columbia. See, e.g., New York: 45 CPLR § 4505 (McKinney's Con. Laws Ann. 1992), which states "Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed [to] disclose a confession of confidence made to him in his professional character as spiritual advisor." See also Arizona: Ariz. Rev. Stat. Tit. 12, ch. 13, §12-2233 (West 1982); Massachusetts: Mass. Gen. Laws Ann. ch. 233, § 20A ((West 1986).

[119] The Iowa code, for example, simply includes the clergyperson within the same provision as attorneys, counselors, physicians and their clerks. Iowa Code Ann. Tit. 31, § 622.10 (West).

its limited nature could arguably raise a free exercise challenge by the clergyperson who may be required to divulge confidences which he or she may view as in conflict with religious dictates.

The second largest group of states follows basically the same rationale as that previously discussed but expands the role of the clergyperson so that he or she may claim the privilege on behalf of the communicant.[120] While apparently utilizing the same rationale and confronting the same constitutional issues, this approach will nonetheless permit the privilege to be claimed in more situations.

The third group of states, which itself may be subdivided, explicitly recognizes the particular nature of the clergy privilege by granting the privilege against disclosure to the clergyperson. In two states (Alabama and California), as well as Puerto Rico, the privilege belongs to both the communicant and to the clergyperson.[121] Thus, the clergyperson can claim the privilege, even when it has been waived by the communicant. The Comments to the California statute explicitly state that the question of whether a clergyperson should disclose such

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[120] These states include: Alaska, Arkansas, Delaware, Florida, Hawaii, Kansas, Maine, Mississippi, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wisconsin. This is also the formulation adopted by the ABA in the Uniform Rules of Evidence. See, e.g., Kan. Stat. Ann. § 60-429 (1992); Wis. Stat. § 905.06 (1991-92); ; Fla. Stat. § 90.505 (1992).

[121] Ala. Code §12-21-166 (Michie 1986); Cal. Ann. Code ch. 299, §§ 1033 and 1034 (West 1966).

communications is "better left to the discretion of the individual clergyman involved and the discipline of the religious body of which he is a member."[122] An additional state, Ohio, makes disclosure of a communication subject to the consent of the communicant, thus implying that the privilege belongs primarily to the communicant, but then exempts the clergyperson from disclosure when this would be "in violation of his sacred trust"[123]--that is, the disclosure can be prevented by the clergyperson in accordance with the authority of religious mandate.

Perhaps the most peculiar formulation is that of the remaining states which grant the privilege exclusively to the clergyperson.[124] While this group of states clearly recognizes the significance of the clergyperson's free exercise rights, one may question whether it is an appropriate resolution of the policies which underlie the grant of such

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[122] Comment, Cal. Ann. Code, ch. 299, § 1034.

[123] Ohio Rev. Code Ann. § 2317.02(C) (Anderson 1991).

[124] These states include: Georgia, Illinois, Indiana, Maryland, Michigan, Missouri, Vermont, Virginia, and Wyoming. See, e.g., Ill. Comp. Stat. Ann. ch. 735 § 8-803 (Smith-Hurd 1992). The New Jersey statute was recently construed to confer the privilege only the clergyperson. State v. Szemple, 263 N.J. Super. 98, 106-16, 622 A.2d 248, 252-57 (N.J. Ct. App. 1993). The court justified its decision by referring both to the ability of the confider to manipulate the admissibility of a particular confession if the privilege were held by the confider and to the possible view that the privilege is a "product of the clergyperson's free exercise of religion and a desire to protect that clergyperson's religious tenets." Id. at 111 n.5, 622 A.2d at 254-55 n.5.

privileges. On the other hand, in at least two decisions, this interpretation of the privilege led to disclosure of the evidence because the clergyperson had waived the privilege.[125] Courts may thus view the granting of the privilege exclusively to the clergyperson as a way of limiting the applicability of the privilege.

The next question raised by the clergy-communicant privilege is how to define a member of the clergy. Most statutes employ the broadest definitions possible, so as to avoid according special privileges to particular denominations, although the statutes also seem to embody some concern that the clergyperson must be part of a "recognized" religion.[126] While this concern seems legitimate to prevent the use of religion as a facade simply to avoid divulging a communication which is needed to achieve the truth, this also opens the Pandora's box of how to define religion and how to avoid preferring mainstream religions over smaller, nontraditional religions which should be accorded equal treatment under both statutes and the Constitution.[127]

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[125] Seidman v. Fishburne-Hudgins Educ. Foundation, Inc., 724 F.2d 413 (4th Cir. 1984); State v. Szemple, 263 N.J. Super. 98, 622 A.2d 248 (N.J. Super., App. Div. 1993).

[126] For example, the Ohio statute states that the clergyperson must be part of "an established and legally cognizable church, denomination, or sect." Ohio Rev. Code § 2317.02(C).

[127] A constitutional problem could be raised, for example, by the Kansas statute which requires that the communicant be a "penitent" who is defined as "a person who recognizes the existence and the authority of God." Kan Stat. Ann. § 60-429 (1992).

A comparable question is also raised by the question of the necessary characteristics of the communication itself for it to qualify as protected by the privilege. The characteristic which is shared by the other privileges generally involves an expectation of privacy and confidentiality by the communicant. The statutes vary as to the details, including, for example, whether the presence of a third party destroys that expectation. Nonetheless, the principle that a communicant must have had an expectation of privacy seems to accord with all the various rationales common to privileges. The question of protecting the clergyperson's free exercise rights might not involve that rationale, but privacy is usually also an element of the religious character of protected communications.

This question of characteristics seems closely linked to the last definition which must be considered--must the communication have been part of a particular religious act and, if so, must the communication be required by religious mandate. Some statutes again treat the clergyperson in a manner comparable to other privileges--that is, simply requiring that the communication be made to the clergyperson in his or her professional capacity.[128] If a religious mandate is a qualifying

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[128] See, e.g., the Ohio statute which states that the "confession [be] made, or any information confidentially communicated, to him for a religious counseling purpose in his professional character." Ohio Rev. Code § 2317.02(C).

factor, then the clergy privilege would perhaps be limited to the Roman Catholic faith--a result which never seems to have been explicitly recognized by either statute or case law.[129] Restricting the availability of the privilege to those religious denominations which require confession as part of their religious mandate would serve the public policy of restricting the privilege, while permitting the free exercise rights of members of that denomination. On the other hand, such a narrow definition would undermine the general availability of confidences which the communicant expects to remain private and may run the risk of violating establishment clause principles by favoring one religious denomination over another.

Under current constitutional analysis, the presence of the clergy privilege seems to illustrate a balance between free exercise rights and establishment concerns. Under Smith, legislatively-created exemptions are permissible, while judicially-created or constitutionally compelled exemptions are not. Deference to the legislative determination is appropriate, even in cases where the statutory formulation seems to

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[129] For example, the Arizona statute applies the privilege when the "confession" is made to the clergyperson "in his character as clergyman or priest in the course of discipline enjoined by the church to which he belongs." Ariz. Rev. Stat. Ann. § 12-2233. The earlier California statute, on which the Arizona statute was modelled, also required that the communication be a "confession", Comment, Cal. Ann. Code Ann. § 1032.

contradict the generally recognized rationales.[130] The judicial trend to interpret narrowly the clergy privilege, like all other privileges, thus fits within the Smith rule. However, two questions may be raised--first, is such blanket deference to legislative determinations appropriate when there are risks of raising establishment clause concerns in that some of the statutes, at least, seem to evince favoritism of one religious sect over another. Second, should such exemptions be permitted when another class of individuals--that is, children--are involved who are recognized as needing considerably greater protection from our society than any other segment.

B. The Clergy Privilege and Child Abuse Reporting Requirements

In recent years, the problem of child abuse and neglect has received greater recognition. As a result, each of the fifty states now has some form of a child abuse reporting statute which is intended to

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[130] For example, those states which grant the privilege to both the clergyperson and the communicant may be both protecting the communicant's expectation of confidentiality (a characteristic of all privileges) and accommodating the clergyperson's free exercise rights. However, those states which grant the privilege only to the clergyperson protect only the latter interest and do not accord with generally recognized principles underlying the creation of evidentiary privileges. See Seidman v. Fishburne-Hudgins Educ. Foundation, Inc. 724 F.2d 413, 415-16 (4th Cir. 1984)(refusing to allow privilege to be claimed on behalf of communicant when clergyperson testified voluntarily and distinguishing other privileges, such as the physician-patient and psychologist-client privileges, which belong to the communicant).

protect the safety and welfare of children. Because children are naive and practically defenseless in this area, the legislature places a legal duty on specified individuals who are likely to come into contact with children, such as medical officials, psychologists, school personnel, social workers and certified child care workers, to report any signs or suspicions of child abuse to appropriate authorities.

Those professionals who are granted an evidentiary privilege so as to exempt them from testifying in court proceedings concerning confidential communications may have that privilege abrogated through the reporting requirement statute. Thus, if an individual would ordinarily be protected by such a privilege, he or she should be mentioned specifically in the reporting statute in order to come under the reporting requirement. On the other hand, any possessor of such a privilege who is not mentioned in the reporting requirement would presumably not be subject to the requirement. Despite these general principles, in applying them courts have varied their interpretations and, furthermore, have at times relied on their notions of free exercise considerations to expand upon the statutory language.

The various state statutes differ considerably in their specificity as to who is subject to the reporting requirement. Some states place the responsibility as broadly as possible, including not only clergy but also "any other person having reason to suspect that a child has been abused

or neglected."[131] The most commonly preserved privilege is the attorney-client privilege[132], while several states specifically preserve both the attorney-client and clergy-confider privileges.[133]

On the other hand, some state statutes do not specifically mention clergy, and the court must then interpret whether members of the clergy are subject to the requirement. For example, the Washington statute does not include clergy among those who are required to report. The state Supreme Court therefore concluded that the reporting requirement did not apply to clergy.[134] Nonetheless, it interpreted this omission as narrowly as possible so that social workers, a specifically included group, were subject to the reporting requirement even when they claimed to be acting in the role of religious counselors. Although the court considered extensively the counselors' claim to exemption on both free religious

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[131] The New Hampshire statute states:

> Any physician, surgeon, county medical examiner, psychiatrist, resident, intern, dentist, osteopath, optometrist, chiropractor, psychologist, therapist, registered nurse, hospital personnel (engaged in administration, examination, care and treatment of persons), Christian Science practitioner, teacher, school official, school nurse, school counselor, social worker, day care worker, any other child or foster care worker, law enforcement official, priest, minister, or rabbi, or any other person having reason to suspect that a child has been abused or neglected shall report the same ....

N.H. Rev. Stat. Ann. §169-C:29. See also W. Va. Code §49-6A-2 (1993); Ark Stat. Ann. §12-12-518 (1992).

[132] See, e.g., Louisiana, LSA-R.S. 14:403F.

[133] See, e.g., Missouri statute, §211.459.4.

[134] State v. Motherwell, 114 Wash. 2d 353, 788 P.2d 1066 (1990).

exercise and establishment bases, the court determined that the reporting requirement violated no constitutional principles. In exempting the defendant-minister, the court relied exclusively on statutory interpretation and the general policies underlying the existence of evidentiary privileges. In not exempting the social workers, the court specifically rejected their claim to an exemption based on their right to free exercise of religion.[135]

A California court came to a similar conclusion in a case involving teachers at a church-affiliated school who were also ministers. In People v. Hodges, the court considered a statute which, like the Washington one, did not place any reporting requirement on clergy but did subject child-care custodians.[136] The court upheld the defendants' conviction for failure to report on the ground that they were serving as child-care custodians, even though they had chosen to deal with the report of sexual abuse as a religious matter. The court also relied on the compelling government interest in protection of children which would

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[135][135] Id. at 361-69, 788 P.2d at 1070-74. The court conceded, however, that if the reporting requirement were in direct conflict with religiously-mandated confidentiality, it might reach a different conclusion based on the coercive nature of the reporting. Id. at 363 n.8, 788 P.2d at 1071 n.8.

[136] 13 Cal. Rptr. 2d 412 (Cal. App. 1992).

outweigh the defendants' claims to rights of free exercise of religion and free speech.[137]

Finally, in construing the relationship between the state's rules of evidence, which confer evidentiary privileges, and the legislatively-enacted reporting statute, an Alaska court had to determine which applied to statements made to an individual who was both a minister and a certified counselor.[138] The reporting statute required reports by "practitioners of the healing arts," while evidentiary privileges existed for both psychotherapist-patient and clergy-communicant relationships. In concluding that the evidence attained based on the report did not need to be suppressed, the court drew two interesting distinctions. First, it concluded that the court rules of procedure should give way to the legislatively-enacted statute and bolstered its position by differentiating between those privileges which have a constitutional basis, like the attorney-client privilege and the right against self-incrimination, and those which have no constitutional basis. The latter, like the psychotherapist-client and clergy privileges, have only the court rules as

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[137] See also Pesce v. J. Sterling Morton High School, 830 F.2d 789, 797-98 (7th Cir. 1987)(discussing compelling state interest in protection of children which outweighs any right to confidentiality).

[138] Walstad v. State, 818 P.2d 695 (Alaska App. 1991).

their basis and must be construed narrowly.[139] Second, the court distinguished the court rule and the reporting statute based on their functions; the court rule applied only to court proceedings, primarily to testifying, while the reporting statute applied to communications in general.[140]

Yet another approach is presented in the Utah reporting statute which, although explicitly creating an exemption for conversations between clergy and confider, requires the clergyperson to report any abuse when he or she receives the information about the abuse from any source other than the offender's confession.[141] The Utah legislature seems to have balanced the importance of the clergy-confider relationship but limits its protection to situations in which the offender has sought help, presumably with the encouragement of the expectation of confidentiality. On the other hand, society's interest in protecting

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[139] Id. at 697. This result may be compared with that in State v. Sypult, in which the Arkansas reporting statute abrogated all privileges except the clergy privilege. In considering whether statements made to a physician and psychotherapist were privileged, the court concluded that in court proceedings against the offender the statements could not be used. 304 Ark. 5, 8, 800 S.W.2d 402, 404 (1990). The court distinguished between the purpose of protecting the child through the report and punishing the offender through the later proceeding. The goal of punishing the offender should give way to the value of the rehabilitative efforts of the offender in seeking treatment. Accord State v. Andring, 342 N.W.2d 188 (Minn. 1984)(physician privilege preserved in court proceedings, although the report made pursuant to the reporting statute could be used).

[140] 818 P.2d at 698.

[141] Utah Code Ann. §62A-4-503 (1993).

children outweighs the protection of the clergy privilege when the clergyperson receives information about a child's abuse from another source and the offender has not sought help.

The difficulties in construing the clergy privilege and reporting requirements become more complex as the definitional variables discussed previously are considered. This complexity may be illustrated by a case which occurred this past year in Chicago. The Cook County state's attorney sought to subpoena information which the Archdiocese of Chicago had gathered in an internal investigation of allegations of sexual abuse committed by priests. While the Archdiocese turned over much of the information, it claimed a clergy privilege to keep some of the material confidential. The Illinois reporting statute includes a wide range of professionals within its ambit but does not mention clergy. Furthermore, as previously discussed, Illinois is one of the states which permits the clergy privilege to be claimed exclusively by the clergyperson.

In quashing the subpoena, the court determined that the clergy privilege extends beyond the confessional and the privilege should be interpreted as broadly as possible. The state's attorney, on the other hand, argued that the information was gathered pursuant to an investigation and not as part of the religious practices of the church or the communicants. When the Illinois Supreme Court refused to hear the

state's attorney's appeal, the state's attorney and various legislators proposed modifications to both the reporting statute and the contours of the clergy privilege. While the Archdiocese of Chicago has announced the appointment of an administrator who will be a mandated reporter of allegations of child abuse, the new statute would specifically abrogate the clergy privilege in cases of suspected child abuse, although possibly not when the information is obtained in religious confession. Ironically, this exception could create a religious establishment problem through its explicit favoring of one denomination, although it would also serve the purpose of restricting those situations in which the clergy privilege could be claimed to prevent the reporting of such suspicions.

While the controversy over the conflict between the clergy privilege and state reporting requirements is likely to continue, the Chancellor of the Archdiocese commented that

> A further consequence would be that people would no longer approach clergy for assistance in addressing this problem. This has already been the case with psychiatrists and psychologists, currently mandated reporters, who have indicated that people have stopped seeking professional help voluntarily since they know that they cannot seek such help confidentially.

Ironically,the safety of children might be more gravely threatened by this legislation.[142]

While it is not possible to resolve the question of which approach--mandated reporting or broad evidentiary privileges--better serves society's interests and the welfare of the children at stake, it does seem that the problems involving the scope of the evidentiary privileges are, and have generally been treated by the courts as, the same regardless of which specific privilege is at issue. Thus, the clergy privilege raises largely the same policy concerns as do the privileges involving physicians, psychotherapists, and attorneys. Very few of the courts, in confronting the question, have chosen to distinguish the clergy privilege solely on the basis of its constitutional relationship to the first amendment's religion clauses. I would suggest that this is the appropriate analysis because it manages to tread the fine line between the Establishment Clause and the Free Exercise Clause--a line which has, on the other hand, largely been violated in the area of employment discrimination.

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[142] Rev. Thomas J. Paprocki, Respect Confidentiality in Abuse Cases, Chi. Trib. (Apr. 11, 1993) pg. 2.