MINISTERIAL EXCEPTION AND TITLE VII CLAIMS: CASE LAW GRID ANALYSIS

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> The court is confronted with the clash of two deeply held American convictions. One, embodied in the Civil Rights Act of 1964 and 1991, is to prevent discrimination; the other, embodied in the First Amendment to the Constitution of the United States, is to protect the free exercise of religion.[1]

> This case presents a collision between two interests of the highest order: the Government's interest in eradicating discrimination in employment and the constitutional right of a church to manage its own affairs free from governmental interference.[2]

> This case involves the interrelationship between two important governmental directives – the congressional mandate to eliminate discrimination in the workplace and the constitutional mandate to preserve the separation of church and state.[3]

The above excerpts from recent case law convey a common predicament that the courts face when dealing with Title VII claims brought by religious organizations' employees. The problem dates back to the Civil Rights Act of 1964 that was designed to eradicate discrimination based on religion, race, color, sex, and national origin.[4] The courts endorsed this lofty goal, as evidenced by the widely quoted statement from *EEOC v. Pacific Press*, affirming that "[b]y enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a 'highest priority.'"[5] Yet, notice the circumspect "a" rather than the more emphatic "the" in the court dicta. This subtle grammatical point captures an ambivalence on the part of the courts which have struggled to reconcile the goal of equality enunciated by Congress with the equally honored commitment to religious freedom.

Congress recognized that applying Title VII to religious organizations may violate their First Amendment rights; henceforth, it exempted religious employers from the statute's provision prohibiting religion-based discrimina-

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[1] EEOC v. Roman Catholic Diocese, 48 F. Supp. 2d 505, 507 (E.D.N.C. 1999).

[2] EEOC v. Catholic Univ. of Am., 83 F.3d 455, 460 (D.C. Cir. 1996).

[3] Combs v. Conference of the United Methodist Church, 173 F.3d 343, 351 (5th Cir. 1999).

[4] Congress deemed this goal to be urgent, pointing out that "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color." S. REP. NO. 88-872, pt. 2, at 2370 (1964).

[5] EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1280 (9th Cir. 1982) (citing S. REP. NO. 88-872, pt. 1, at 11, 24 (1964)).

tion by enacting § 702.[6] Section 702, however, did not relieve religious employers from liability for employment discrimination in other protected categories. Thus, when Mrs. Billie McClure, a commissioned church officer of the Salvation Army, sued the Church because it paid a higher salary to its male employees than to its female ones,[7] it was up to the court to determine if she had a legitimate claim under Title VII. The *McClure* court conceded that the legislative history of § 702 suggests that religious organizations are prohibited from discriminating against its employees on the basis of race, color, sex, or national origin.[8] Nonetheless, the court found Mrs. McClure's federal action under Title VII impermissible on First Amendment grounds, citing a long string of cases stretching from *Watson v. Jones*[9] to *Kedroff v. St. Nicholas Cathedral*[10] that upheld church autonomy against government interference. Rather than declaring the statute unconstitutional, the court argued that since the "relationship between an organized church and its minister is its lifeblood,"[11] Congress could not have possibly intended to regulate church-minister employment relationships,[12] and such a relationship must therefore be immune to Title VII scrutiny.[13]

This historical holding provided a constitutional mooring for what is variously referred to as "the ministerial exception,"[14] "the *McClure* exemption,"[15] "the *McClure* exception,"[16] "the church-minister . . . exception,"[17] "the religious employer exemption,"[18] and what has been construed as a blanket exemption from Title VII judicial review of the employment relationship between a religious organization and its clergy. The 1999 case of *Bollard v. California Province of the Society of Jesus*[19] is the first by a circuit court to reject a ministerial exception defense and exercise jurisdiction in a Title VII claim brought by a ministerial employee. Significantly, the *Bollard* court used the grammatically more convincing "the" in its reference to "highest priority" to highlight the urgency with which Congress set out to fight employment discrimination in its 1964 Civil Rights Act.[20]

During the nearly thirty years between *McClure* and *Bollard*, the courts have whittled away at the ministerial exception, trying to square off congres-

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[6] Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (1964).
[7] McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).
[8] *Id.* at 558.
[9] *Id.* at 559 (citing Watson v. Jones, 80 U.S. 679 (1871)).
[10] *Id.* at 559 (citing Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952)).
[11] *Id.* at 558.
[12] *Id.* at 560-61.
[13] *Id.* at 560.
[14] Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985).
[15] EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1278 (9th Cir. 1982).
[16] Bollard v. Cal. Province of the Soc'y of Jesus, 1998 WL 273011, at *3 (N.D. Cal. May 15, 1998).
[17] Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church, 63 F. Supp. 2d 694, 703 (E.D.N.C. 1999).
[18] Treaver Hodson, *The Religious Employer Exemption Under Title VII: Should a Church Define Its Own Activities*, 1994 BYU L. REV. 571 (1994).
[19] 196 F.3d 940, 945 (9th Cir. 1999).
[20] *Id.*

sional intent to stamp out employment discrimination with the constitutional proscription against government interference in church affairs.[21] This article examines the tension between these two conflicting objectives. It differs from prior studies on the ministerial exception, which fall into two broad categories, one focusing on individual cases and emerging trends in Title VII judicial construction,[22] and the other advancing a theoretical model illustrated by select cases.[23] By contrast, the present research attempts to identify the entire universe of relevant cases – actions filed in federal and state courts under Title VII by employees working for religious organizations where the employer invoked the ministerial exception and the court ruled on its applicability to the case at bar. Part I examines the landmark cases that interpret § 702 and develop the rationale for the ministerial exception. Part II introduces a Case Law Grid Analysis (CLGA), a social science methodology for managing large databases, and shows how the CLGA can be used to track historical trends, spot tensions in court holdings, identify variables most predictive of case outcomes, and suggest possible alternatives to the *Lemon* and *Sherbert* tests currently used for the First Amendment analysis.

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[21] *See, e.g.*, EEOC v. Miss. Coll., 626 F.2d 477 (5th Cir. 1980); EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272 (9th Cir. 1982); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985); Ninth & O St. Baptist Church v. EEOC, 616 F. Supp. 1231 (W.D. Kan. 1985); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church, 63 F. Supp. 2d 694 (E.D.N.C. 1999).

[22] Barry Burleson, *The Applicability of Title VII to Sectarian Schools*, 33 BAYLOR L. REV. 380 (1981); Duane E. Okamoto, *Religious Discrimination and Title VII Exemption for Religious Organizations: A Basic Values Analysis for the Proper Allocation of Conflicting Rights*, 60 S. CAL. L. REV. 1375 (1987); James C. Duda, *The Constitutional Analysis of a "Ministerial Exception" to Title VII:* Rayburn v. General Conference of Seventh Day Adventists, 28 B.C. L. REV. 181 (1987); Scott Klundt, *Permitting Religious Employers to Discriminate on the Basis of Religion: Application to For Profit Activities*, 1988 BYU L. REV. 221 (1988); Shelley K. Wessels, *The Collision of Religious Exercise and Governmental Nondiscrimination Policies*, 41 STAN. L. REV. 1201 (1989); Karen M. Crupi, *The Relationship Between Title VII and First Amendment Religion Clauses: The Unconstitutional Schism of* Corporation of the Presiding Bishop v. Amos, 53 ALB. L. REV. 421 (1989); Shawna M. Eikenberry, *Thou Shall Not Sue the Church: Denying Court Access to Ministerial Employees*, 74 IND. L.J. 269 (1998).

[23] *See* Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Rights of Church Autonomy*, 81 COLUM. L. REV. 1373 (1981); David A. Fielder, *Serving God or Caesar: Constitutional Limits on the Regulation of Religious Employers*, 51 MO. L. REV. 779 (1986); Sidney Buchanan, *The Power of Government to Regulate Class Discrimination by Religious Entities: A Study in Conflicting Values*, 43 EMORY L.J. 1189 (1994); Hodson, *supra* note 18.

PART 1. CIVIL RIGHTS ACT OF 1964 AND JUDICIAL CONSTRUCTION OF § 702

1.1. Title VII, Section 702, and the Religious Employer Exemption

On June 26, 1963, President John Kennedy sent a civil rights bill to Congress, urging its members to give the nascent legislation their immediate attention.[24] The message accompanying the bill read in part:

> The legal remedies I have proposed are the embodiment of this nation's basic posture of common sense and common justice. They involve every American's right to vote, to go to school, to get a job and be served in a public place without arbitrary discrimination – rights which most Americans take for granted.[25]

The congressional majority concurred with this judgment:

> We believe in the inherent dignity of man. He is born with certain inalienable rights. His uniqueness is such that we refuse to treat him as if his rights and well-being are bargainable. All vestiges of inequality based solely on race must be removed in order to preserve our democratic society, to maintain our country's leadership, and to enhance mankind.[26]

The Civil Rights Act of 1963, as the bill was known in its early days, was substantially different from the measure Congress enacted a year later. The bill sent to the House Judiciary Committee sought protection from discrimination based on "race, color, religion, national origin, or ancestry."[27] Controversy surrounding the bill escalated when Congressman Howard Smith, a staunch opponent of the civil rights bill, offered an amendment that included sex among the protected categories, a measure aimed to prevent discrimination against what he gleefully called a "minority sex."[28] When Congressman Smith introduced his measure, "[t]he House erupted in shock as the full import of the amendment sank in."[29] As Smith made clear, this was part of a calculated strategy to make the Civil Rights Act "as full of booby traps as a dog is full of fleas."[30]

Congressman Emmanuel Cellar, Chairman of the House Judiciary Committee and a strong supporter of the civil rights movement, opposed the amendment. He cited the Presidential Committee on the Status of Women to the effect that "discrimination based on sex involves problems sufficiently different from discrimination based on the other factors listed to make separate treatment preferable."[31] Clearly, Cellar spurned the amendment for the same reason that Smith advocated it: the measure was widely believed to be certain to kill the

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[24] CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE 2 (1985).

[25] *Id.* at 1 (quoting John Kennedy, *The Legal Remedies*, PUBLIC PAPERS OF THE PRESIDENTS 493 (1963)).

[26] 1974 U.S.C.C.A.N. 2 at 2517. Some proponents of the Civil Rights Act were reluctant to use such strong language, having found it anachronistic: "Religious prejudices have largely disappeared. Ethnic origin discrimination is no longer existent. Race prejudice is rapidly being stamped out." Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974) (quoting H.R. REP. NO. 87-1370, at 22 (1974)).

[27] H.R. REP. NO. 88-914, at 87 (1974).

[28] 110 CONG. REC. 2484 (1964).

[29] WHALEN, *supra* note 24, at 115.

[30] *Id.* at 116.

[31] 110 CONG. REC. 2485 (1964).

entire bill. Ultimately, Smith's poison pill strategy backfired. The amendment passed the House with a vote of 168 to 133. Women, who were not initially among Title VII direct beneficiaries, formed a "new constituency that successfully worked for retention of the sex protection clause as well as for Senate passage of the measure."[32]

Several other controversial amendments to the Civil Rights Act were offered on the House floor, some meant to expand the statute's reach, others to create new discrimination classes. Congressman John Dowdy urged his colleagues to include "age" among the protected categories, castigating age bias as the "worst kind of discrimination."[33] This amendment was defeated by a vote of 123 to 94. The motions to exclude communist party members and atheists from the Title VII protection against "unlawful employment practices" carried; the former would eventually become law and the latter would be struck down by the Senate as a provision of "doubtful constitutionality."[34]

Once House Bill 7152 made it to the Senate floor, a group of southern senators began a filibuster, one of them calling the bill "a punitive expedition into the South."[35] In response, the nation's religious leaders weighed in on the debate, adding a strong voice in support of the bill. Civil rights activists from around the nation descended on Capitol Hill and mounted a massive lobbying campaign. Two hundred clergymen from forty-one states traveled to Washington D.C. to solicit their representatives. Seminaries from different parts of the country dispatched their students to conduct a round-the-clock vigil at the Lincoln Memorial.[36] The protesters' prayers were answered on June 10, 1964, when the Senate finally mustered the sixty-seven votes to end the 534-hour filibuster, the longest in our nation's history, and passed the Civil Rights Act of 1964 – a statute unprecedented in its depth and scope. This legislation put every employer and federal agency on notice that racism would no longer be tolerated. It provided an enforcement mechanism in the form of the Equal Employment Opportunity Commission endowed with subpoena power and the right to sue biased employers. And, it gave blacks, women, and religious minorities strong protections against discrimination in the workplace.

Among the many ironies that marked this national debate was the exemption for religious employers from Title VII strictures. The House version of the bill contained a § 703, which gave religious employers blanket exemption from Title VII provisions: "This title shall not apply . . . to a religious corporation, association, or society."[37] Much of the lobbying that clergymen conducted on behalf of the bill was done on the assumption that this exemption would become the law of the land. Hopes were dashed on May 18, 1964, when the Senate debate on the pending bill got under way. Senator Hubert Humphrey offered Substitute Senate Amendment No. 656 which drastically narrowed the

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[32] WHALEN, *supra* note 24, at 234.
[33] 110 CONG. REC. 2503 (1964).
[34] 110 CONG. REC. 12,297 (1964).
[35] WHALEN, *supra* note 24, at 184.
[36] *Id.* at 184.
[37] EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1276 (9th Cir. 1982) (quoting H.R. REP. No. 88-914, at 10 (1963), *reprinted in* EEOC, Legislative History of Title VII and XI of Civil Rights Act of 1964 at 2010 (1968) ("1964 Legis. Hist.") 1964 U.S.C.C.A.N. 2355).

original exemption by permitting religious organizations to discriminate in employment matters only on religious grounds, and then, only in connection with religious activities carried out by such institutions. Section 703, renumbered as § 702, now reads as follows:

> This title shall not apply to an employer with respect to the employment of aliens outside any State, or 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 or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.[38]

In 1972, Congress revisited the statute, with several Senators endeavoring to revive the original version of § 702 that exempted religious institutions from Title VII claims. Senator Allen contended that, under the existing statute, atheists could sue parochial schools for refusing to hire them.[39] To stamp out such an oddity, Senators proposed to delete the word "religious" in the phrase "religious activities" contained in § 702 of the 1964 Civil Rights Act.[40] The "Ervin-Allen Amendment," as the measure would be dubbed, extended the religious exemption to parochial schools and educational institutions of higher learning and allowed religious employers to discriminate in favor of coreligionists in a wide range of church-related activities regardless of such activities' religious content. Senator Erwin explained, "this amendment is to take the political hands of Caesar off of the institutions of God, where they have no place to be."[41]

As amended in 1972, § 702 gave religious employers greater latitude in hiring and firing their employees who did not conform to their ecclesiastical beliefs, yet it also left religious employers liable for other forms of job-related discrimination. Thus, while Title VII had the potential to revamp employment relations in the religious domain by making the church vulnerable to EEOC subpoena powers, it also threatened to breach the wall between church and state. As such, this legislation was bound to raise serious questions regarding the statutes' constitutionality under the First Amendment's Free Exercise and Establishment Clauses. *McClure v. Salvation Army*[42] and *King's Garden, Inc. v. Federal Communications Commission*[43] offered two different modes of judicial construction used by courts for Title VII claims.

1.2. McClure, King's Garden, *and the Religious Employer Exemption*

Title VII, as enacted in 1964, had one particularly startling implication that seems to have escaped notice at the time: the statute was at loggerheads with the venerable institution of an all-male clergy. Taken literally, Title VII prohibitions could be invoked against sex-based preferences in clergy appointments. Hence, the statute made the church vulnerable to claims by female

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[38] Pub. L. No. 88-352, § 702, 1964 U.S.C.C.A.N. 287, 304 (78 Stat.) 241.
[39] King's Garden, Inc. v. FCC, 498 F.2d 51, 55 n.6 (D.C. Cir. 1964) (LEGISLATIVE HISTORY OF EQUAL OPPORTUNITY ACT OF 1972, 844 (Nov. 1972)).
[40] *Id.* (quoting Amendment 809 to S. 2515, LEGISLATIVE HISTORY, at 789).
[41] *Id.* (quoting Amendment 809 to S. 2515, LEGISLATIVE HISTORY, at 1645).
[42] McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).
[43] *King's Garden*, 498 F.2d at 51.

employees who found their working conditions inferior to men. It was only a matter of time before such claims found their way to the courts.

McClure v. Salvation Army[44] is the first case where a female pastor challenged church employment policies privileging male employees. Mrs. McClure, a church officer, brought a federal action under Title VII alleging that her employer, the Salvation Army, engaged in discriminatory practices based on sex by offering her less salary and fewer benefits than to her male counterparts.[45] She also alleged that the church discharged her because of complaints to her supervisors and the Equal Employment Opportunity Commission, and later filed a supplementary complaint that asked the court to consider the suit as a class action on behalf of all current and former female officers of the Salvation Army.[46] McClure lost in the lower court, then appealed to the Fifth Circuit. The church moved for summary judgment, claiming a religious exemption under § 702 of Title VII.

The *McClure* court examined § 702 and confirmed that "Congress did not intend that a religious organization be exempted from liability for discriminating against employees on the basis of race, color, sex or national origin."[47] Yet, such a literal construction inevitably raised a constitutional question: "Does the application of Title VII to the relationship between The Salvation Army and Mrs. McClure (a church and its minister) violate either of the Religion Clauses of the First Amendment?"[48] To salvage the statute from the constitutional turmoil, the court gave § 702 a broad interpretation that immunized religious employers from the type of claims brought by McClure. The court held that "Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister."[49]

According to the Fifth Circuit's construction of § 702, a religious entity can discriminate against its ministers based on any and all Title VII protected categories. Dismissing Mrs. McClure's claim "for lack of jurisdiction,"[50] the court established a standard for subsequent rulings construing the church-minister employment relationship as invulnerable to Title VII challenges.

The *McClure* court observed that ever since the 1871 *Watson v. Jones* decision, "the Supreme Court began to place matters of church government and administration beyond the purview of civil authorities."[51] In 1929, the Supreme Court reaffirmed this precept in *Gonzales v. Roman Catholic Archbishop.* The Court held that the decisions of church leaders on purely ecclesiastical matters must be accepted as conclusive, despite their effect on civil rights.[52] In *Kedroff v. St. Nicholas Cathedral*, the *McClure* court further observed that "the principle announced by *Watson* and *Gonzalez* became a con-

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[44] *McClure*, 460 F.2d at 553.
[45] *Id.* at 555.
[46] *Id.* at 555-56.
[47] *Id.* at 558.
[48] *Id.*
[49] *Id.* at 560-61.
[50] *Id.* at 554.
[51] *Id.* at 559.
[52] Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929).

stitutional prohibition,"[53] as the Supreme Court held that legislation regulating church administration, operations or clerical appointments prohibits the free exercise of religion.[54]

More recently, in *Sherbert v. Verner*, the Supreme Court reiterated its strong support for church autonomy, pointing out that,

> [o]nly in rare instances where a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate" is shown can a court uphold state action which imposes even an "incidental burden" on the free exercise of religion. In this highly sensitive constitutional area, "[o]nly the gravest of abuses, endangering paramount interests, give occasion for permissible limitation."[55]

The *McClure* court then issued what is probably the most quoted opinion in this line of cases:

> The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of primary ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission.[56]

Two years after *McClure*, *King's Garden, Inc. v. Federal Communications Commission* construed § 702 in a way that raised questions about the constitutionality of the religious employer exemption as amended by Congress in 1972.[57] In *King's Garden*, the plaintiff was not an ordained minister seeking to resolve an intra-church dispute, but a job applicant who applied for a position at an interdenominational, religious, nonprofit radio station and who was beset by questions about his religious beliefs.[58] The plaintiff contacted the Federal Communications Commission (FCC), which filed a lawsuit on his behalf, alleging religion-based discrimination, an actionable offense under Title VII. The FCC determined that King's Garden, a beneficiary of the federal broadcasting license operating outside of the traditional religious realm, discriminated in its employment practices on religious grounds.[59] King's Garden appealed to the D.C. Circuit based on the religious employer exemption under § 702 of Title VII.[60] The D.C. Circuit court affirmed the FCC's ruling in language that bares animosity toward § 702 and religious employers trying to shield themselves from Title VII scrutiny:

> The 1972 exemption is of very doubtful constitutionality. . . . In covering all of the "activities" of any "religious corporation, association, educational institution, or society," the exemption immunizes virtually every endeavor undertaken by a religious organization.[61]

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[53] *McClure*, 460 F.2d at 559.
[54] Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).
[55] *McClure*, 460 F.2d at 558-59 (quoting Sherbert v. Verner, 374 U.S. 398 (1963)).
[56] *Id.* at 558-59.
[57] 498 F.2d 51 (D.C. Cir. 1974).
[58] *Id.* at 52.
[59] *Id.*
[60] *Id.* at 53.
[61] *Id.* at 53-55.

In an allusion to the *McClure* court reading of the statute, the court opined that

> [w]hile it is not uncommon for courts to come very close to rewriting statutes so as to save their constitutionality, the 1972 exemption is a poor candidate for such a salvage operation. . . . In creating this gross distinction between the rules facing religious and non-religious entrepreneurs, Congress placed itself on collision course with the Establishment Clause. Laws in this country must have a secular purpose and a "primary effect" which neither advances nor inhibits religion.[62]

Having concluded that this exemption amounts to government sponsorship,[63] the *King's Garden* court granted the FCC, a federal agency, enforcement rights to bring King's Garden in line with the Title VII requirements. The court concludes with the admonishment that

> it is very dangerous indeed to inflate a constitutionally doubtful statute into a "national policy" having force beyond the statute's literal command. The customary, and more prudent, course is to construe statutes so as to avoid, rather than aggravate, constitutional difficulties.[64]

McClure and *King's Garden* do not lend themselves to a ready comparison, for the fact patterns they address are substantially different. What makes these two cases relevant for the present purpose is the direction the two circuit courts move in construing the religious employer exemption. On the one hand, *McClure* expands the religious employer exemption and makes it unlimited insofar as it applies to church-minister employment. On the other hand, *King's Garden* heaps scorn on the exemption, using it as an example of legislative activism of dubious constitutionality designed to subvert the intent behind the Civil Rights Act of 1964. Whereas one court is leaning on the First Amendment Religion Clauses to prove that the state should leave administrative decisions concerning employees to the church, the other argues that the state loses its neutrality vis-a-vis religious organizations when the state allows them to discriminate in hiring for its less sectarian enterprises. The *McClure* court was trying to save § 702 from constitutional challenges by expanding its reach. *King's Garden* followed the same constitutional agenda by advocating the statute's radical reduction. Both rationales would figure prominently in subsequent decisions.

1.3 Mississippi College, Rayburn, *and the Ministerial Exception*

In *Equal Employment Opportunity Commission v. Mississippi College*,[65] the Fifth Circuit clarified its reasoning in *McClure* in light of the Free Exercise holdings in *Sherbert* and *Lemon*,[66] two landmark Supreme Court decisions. The court also affirmed the EEOC's right to enforce Title VII against religious

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[62] *Id.* at 55. The *King's Garden* court also found the religious exemption "unconstitutional on Fifth Amendment grounds. To the extent that the non-religious commercial enterprises of religious organizations directly compete with those of non-religious organizations, the 1972 exemption forces the Government to discriminate between business rivals in applying the Civil Rights Act's constraint on sectarian hiring." *Id.* at 57.

[63] *Id.* at 55.

[64] *Id.* at 57.

[65] 626 F.2d 477 (5th Cir. 1980).

[66] *Id.* at 486-88.

institutions discriminating against nonreligious function employees.[67] For its part, *Rayburn v. General Conference of Seventh-Day Adventists*[68] codified the ministerial exception and applied it to non-ordained church employees engaged in predominantly religious activities.

In *Mississippi College*, Dr. Patricia Summers, a part-time assistant professor teaching psychology at a college run by the Mississippi Baptist Convention, filed a sex discrimination suit against her employer after her application for a full-time position in the Department was turned down and a male psychologist was hired for the job. She later amended her complaint to include additional charges that the college discriminated against women as a class in matters involving employment qualifications, promotions, recruitment, salary, and race.[69]

The EEOC asked the college to provide relevant personnel information, and after the administration declined to do so, issued a subpoena seeking data about race, salary, and promotion on every faculty and staff member in the college. The college urged the EEOC to rescind its subpoena, arguing that the administration's hiring decision was based on the fact that Mrs. Summers joined a Presbyterian Church (the faith of her husband), and that the psychology department was looking for an instructor specializing in experimental psychology, not Mrs. Summers' primary area of expertise.[70]

At that point, the EEOC turned to the district court to enforce the subpoena. The district court held that since Mississippi College was a religious educational institution under § 702, the EEOC could not investigate Summers' employment discrimination claims as it would inhibit the college's preference in hiring Baptists and thus entangle church and state.[71] With the district court declining to enforce the subpoena, the EEOC filed a motion with the Fifth Circuit to confirm its authority to inquire into potential employment discrimination under § 710 of Title VII.

The Fifth Circuit vacated the lower court's decision. It held that the plaintiff – a white woman – had standing to file a charge asserting that Mississippi College discriminates against blacks.[72] With regard to religion-based discrimination, the Fifth Circuit declined to grant the college a ministerial exception, pointing out that the college's reliance on *McClure* was unfounded:[73]

> The College is not a church. The College's faculty and staff do not function as ministers. . . . They neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine. . . . The employment relationship between Mississippi College and its faculty and staff is one intended by Congress to be regulated by Title VII.[74]

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67 *Id.* at 483.

68 772 F.2d 1164 (4th Cir. 1985).

69 *Miss. Coll.*, 626 F.2d at 479-80.

70 *Id.* at 480.

71 *Id.* at 481.

72 *Id.* at 483.

73 *Id.* at 485.

74 *Id.*

The ministerial exception must be granted, the Fifth Circuit court continued, only if the district court determines on remand that the college preferred Baptists over non-Baptists in its hiring practices.[75]

The *Mississippi College* court reiterated the First Amendment argument it deployed in *McClure* by drawing on two recent Supreme Court decisions. While in its *McClure* ruling, the Fifth Circuit concentrated on the Free Exercise Clause rationale for the ministerial exception, this time the court gave equal attention to the Establishment Clause argument in *Lemon v. Kurtzman*, where the Supreme Court issued guidelines for ascertaining whether a congressional mandate violates the establishment clause.[76] Paraphrasing the Supreme Court's argument in *Lemon*, the Fifth Circuit articulated a three-prong test for determining if the statute passed constitutional muster. One must establish: "(1) whether the statute has a secular legislative purpose, (2) whether the principal or primary effect of the statute is neither to advance nor inhibit religion, and (3) whether the statute fosters 'an excessive government entanglement with religion.'"[77]

Drawing on the 1972 Supreme Court decisions in *Wisconsin v. Yoder* and *Sherbert v. Verner*, the Fifth Circuit elaborated on its Free Exercise analysis advanced in *McClure* with another three-pronged test for the constitutionality of the governmental actions.

> In determining whether a statutory enactment violates the free exercise of a sincerely held religious belief, the Supreme Court has examined (1) the magnitude of the statute's impact upon the exercise of the religious belief, (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief, and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state.[78]

Having applied these two tests to Mississippi College's claim to protection under § 702, the court held that the compelling interest test, in eradicating discrimination, justifies the minimal burden the government imposes upon the college.[79]

In *Rayburn v. General Conference of Seventh-Day Adventists,*[80] the Fourth Circuit supported *McClure* by granting an exemption from Title VII scrutiny to a church, while at the same time reaffirming *Mississippi College's* emphasis on the limited nature of the religious employer exemption. The case involved a woman who was denied a pastoral position in the Seventh-Day Adventist Church and who charged her employer "with sexual and racial dis-

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[75] *Id.*

[76] *Id.* at 486.

[77] *Id.* (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).

[78] *Id.* at 488 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)); Sherbert v. Verner, 374 U.S. 398 (1963).

[79] *Id.* at 489. The court's rationale was the following:

> Although the number of religious educational institutions is minute in comparison to the number of employers subject to Title VII, their effect upon society at large is great because of the role they play in educating society's young. If the environments in which such institutions seek to achieve their religious and educational goals reflect unlawful discrimination, those discriminatory attitudes will be perpetuated with an influential segment of society. *Id.*

[80] 772 F.2d 1164 (4th Cir. 1985).

crimination under Title VII."[81] Carole Rayburn, a white female member of the church with a Ph.D. in psychology and Master of Divinity degree from Andrew University, simultaneously applied for an Associate Pastoral Care internship and Associate Pastor position at the Sligo Seventh-Day Adventist Church. The associate pastor position was open to women, although "women may not stand for ordination" as ministers in this church.[82] After the position was offered to another woman, plaintiff filed a civil action "alleging discrimination on the basis of her sex, her association with black persons, her membership in black-oriented religious organizations, and her opposition to practices made unlawful by Title VII."[83] The EEOC examined Rayburn's complaint and issued a right-to-sue letter, upon which plaintiff filed a suit in district court. Having established that plaintiff had a commissioned minister license, the court held that the First Amendment barred a Title VII suit in this case.[84] Rayburn appealed to the Fourth Circuit, maintaining that she was not an ordained minister and that, consequently, the *McClure* exception does not shield the church from Title VII scrutiny.[85]

The application of Title VII to this case raises constitutional questions, the *Rayburn* court noted, for the record indicates that Congress intended to exempt religious institutions only in connection with the church's religious activities and in regard to employment discrimination based on religion. The *Rayburn* court grounded its position in First Amendment cases justifying the religious employer exemption in the name of church autonomy and religious freedom.[86]

After balancing state interests against First Amendment rights, the *Rayburn* court concluded that even though Rayburn was not an ordained minister, her claim under Title VII must be denied, for the church's freedom to choose its officers charged with pastoral duties outweigh the officers' rights under Title VII.[87] In issuing its decision, the *Rayburn* court used, apparently for the first time in case law history, the expression "ministerial exception": "The fact that an associate in pastoral care can never be an ordained minister in her church is likewise immaterial. The 'ministerial exception' to Title VII first articulated in *McClure v. Salvation Army* . . . does not depend on ordination but upon the function of the position. . . ."[88]

The court quoted an influential article by Bruce N. Bagni which offered guidelines in ascertaining which church-sponsored activity had a bona-fide pastoral content and conferred on a church employee a ministerial function, and by implication, immunized such an employment relationship from Title VII scru-

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[81] *Id.* at 1164-65.

[82] *Id.* at 1165.

[83] *Id.*

[84] *Id.* at 1165-67.

[85] *Id.*

[86] The *Rayburn* court noted:

> The "wall of separation" between church and state . . . has become a "variable barrier," . . . , as Congress has enacted comprehensive legislation to achieve desirable goals. Tensions have developed between our cardinal Constitutional principles of freedom of religion, on the one hand, and our national attempt to eradicate all forms of discrimination, on the other.

Id. at 1167 (citations omitted).

[87] *Id.* at 1167-68.

[88] *Id.* at 1168.

tiny. "As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he should be considered 'clergy.'"[89]

There is a dual agenda propelling the *Mississippi College* and *Rayburn* courts in their construction of Title VII and the § 702 exemption. Both courts reaffirmed that the religious employer exemption is solidly grounded in the First Amendment Religion Clauses, both drew attention to the religious content of the job performed, and both took pains to emphasize the narrow nature of the exemption granted to religious institutions. The fact that the institution in question is religious does not automatically confer on it the right to claim a § 702 exemption. While both holdings problematized the job function as key to determining the availability of the ministerial exception defense, neither settled the issues of which activities are genuinely religious, which employees are ministerial in their primary duties, and which behavior by pastoral workers can be held against them as inconsistent with their ministerial responsibilities. It was left to subsequent judicial findings to delineate the practical scope of the ministerial exception and the range of employment situations within its reach.

1.4. Amos, Smith, *and Religious Freedom Restoration Act*

Ever since Congress granted an exemption to religious employers, doubts about § 702 and its constitutionality continued to surface in various court dicta. As one strongly worded opinion stated:

> The exemption presently afforded by Title VII, 42 U.S.C. § 2000e-1, is a remarkably clumsy accommodation of religious freedom with the compelling interests of the state, providing on the one hand far too broad a shield for the secular activities of religiously affiliated entities with not the remotest claim to first amendment protection while on the other hand permitting intrusions into wholly religious activities.[90]

It was in light of such lower courts' animosity toward § 702 that the Supreme Court agreed to review a religious exemption case in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos.*[91] The case involved a district court decision to refuse a religious employer exemption to a Mormon church-operated gymnasium that had discharged a nonreligious function employee – a building engineer – who lost his church accreditation.[92] According to the lower court opinion, the fact that plaintiff "failed to qualify for . . . a certificate that he is a member of the Church" does not deprive him of Title VII protection against religion-based discrimination, nor does the instant fact situation entitle the employer to the ministerial exception defense.[93] The district court took a close look at § 702 and "declared the statute unconstitutional as applied to secular activity . . . and ordered [plaintiff] reinstated with back pay."[94]

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[89] *Id.* at 1169 (quoting Bagni, *supra* note 23, at 1545).
[90] Feldstein v. Christian Sci. Monitor, 555 F. Supp. 974, 979 (D. Mass 1983); *see also* Dolter v. Wahlert High Sch., 483 F. Supp. 266, 269 (N.D. Iowa 1980).
[91] 483 U.S. 327 (1987).
[92] *Id.*
[93] *Id.* at 330.
[94] *Id.*

The Supreme Court reversed and remanded. Citing the recent holding in *Hobbie v. Unemployment Appeals Commission of Florida*, the Court pointed out that the government can accommodate religious practices without violating the Establishment Clause.[95] The Court went on to state that "[t]he limits of permissible state accommodation to religion are by no means coextensive with noninterference mandated by the Free Exercise Clause,"[96] and that "[t]here is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'"[97] The Court concluded that the judiciary should not be placed in the position of trying to figure out which church activity constitutes a genuine religious exercise, nor should the courts make churches guess the likely ruling in the matter.[98] *All* church-related activities have a spiritual dimension and thus can be filled by those who share the church's tenets, with § 702 shielding the employer from Title VII scrutiny:

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and the organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. . . . It cannot be seriously contended that § 702 impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in this case. The statute easily passes muster under the third part of the *Lemon* test.[99]

Not every Supreme Court Justice was ready to grant § 702 a clean bill of health. Justice O'Connor wrote a concurring opinion in which she expressed reservations about the majority position insofar as it blurred the distinction between profit and nonprofit organizations and failed "to separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations."[100] The key point Justice O'Connor made was that the courts cannot let the church be the sole judge of which of its enterprises are religious in nature without the risk of giving church-sponsored for-profit enterprises an unfair advantage in the market place. The *Lemon* inquiry into the possible state interference in church affairs must be conducted first in order to determine whether "lifting from religious organizations a generally applicable regulatory burden . . . does have the effect of advancing religion."[101]

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[95] *Id.* at 334 (quoting Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144-45 (1987)).

[96] *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970)).

[97] *Id.* (quoting *Walz*, 397 U.S. at 669).

[98] *Id.*

[99] *Id.* at 336-39.

[100] *Id.* at 346-48. This opinion echoes the *King's Garden* court's warning that "the wholesale exemption for religious organizations alone can only be seen as a special preference . . . [insofar as] the exemption's benefits clearly extend to the non-religious, commercial enterprises of sectarian organizations." King's Garden, Inc. v. FCC, 498 F.2d 51, 55-57 (D.C. Cir. 1974).

[101] Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 348 (1987).

Justice O'Connor's reference to "a generally applicable regulatory burden" is indicative of the subsequent history of § 702 construction. It anticipates the language the Supreme Court would use two years later in *Employment Division, Department of Human Resources of Oregon v. Smith*,[102] a controversial decision potentially impacting the ministerial exemption. This case involved two Native Americans fired from their jobs and denied unemployment benefits after they smoked peyote in a traditional religious ceremony at their Native American Church – an illegal act under the Oregon law prohibiting peyote use of any kind. The Supreme Court held that as long as the Oregon law defined peyote as an illegal substance and proscribed its use, the state unemployment agency could deny plaintiffs' unemployment benefits in the case at bar, even though the practice in question had an undeniable sacramental significance.[103] The defendants asked for a compelling state interest test to be applied to their case in the hope that their First Amendment rights would outweigh the Oregon prohibition, but the Court demurred: "We have never invalidated any government action on the basis of the *Sherbert* test except the denial of unemployment compensation . . . . In recent years we have abstained from applying the *Sherbert* test . . . at all."[104] The correct question, the Court declared, is whether "a neutral, generally applicable regulatory law"[105] prohibiting certain behavior can be superseded by religious belief prescribing such behavior. The Court gave a resounding "no" to this question, citing several cases dating back to the 1879 *Reynolds v. United States* case where this general precept was upheld: "We have never held that an individual's religious beliefs excuses him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[106]

This ruling created some confusion, for it appeared to have waived the *Sherbert* test in any area outside the unemployment compensation field and mandated a "neutral, generally applicable regulatory law" standard for deciding whether religiously inspired practice could be banned. Drawing upon this logic, some claimants suing religious employers argued that "Title VII is just such a generally applicable law and that under *Smith*, [a religious entity] should not be insulated from its mandate."[107] However, the argument fell on deaf ears. Courts were unwilling to go against precedent and invalidate the constitutionally-mandated religious employer exemption in the face of the congressional ban on employment discrimination. The EEOC recognized this fact in

[102] 494 U.S. 872 (1989).

[103] *Id.* at 878-79.

[104] *Id.* at 883.

[105] *Id.* at 880.

[106] *Id.* at 878-79. *See* Reynolds v. United States, 98 U.S. 145 (1879).

[107] Van Osdol v. Vogt, 908 P.2d 1122, 1130 (Colo. 1996). In *Vigars v. Valley Christian Ctr.*, Justice Henderson made this characteristic remark:

> Had this case come before me two years ago, I would have had to employ a three part balancing test . . . . However, in 1991, the Supreme Court "dramatically altered the manner in which we evaluate free exercise complaints . . . ." American Friends Service Committee v. Thornburgh, 951 F.2d 957 (9th Cir. 1991). As recognized by the 9th Circuit in American Friends, free exercise claims must now fail "if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision . . . ."

805 F. Supp. 802, 809 (N.D. Cal. 1992) (citations omitted in part).

its 1990 policy statement, reaffirmed in 1998, which directed the agency's employees to examine the relationship between the individual and the church on a case by case basis before deciding which individual qualifies as clergy under the ministerial exception.[108]

Upset by the implication of *Smith*, Congress sought to revive the *Sherbert* test as a tool for weighing state interests against Free Exercise rights. The Religious Freedom Restoration Act of 1993 (RFRA) was expressly designed "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[109] This statute cast a long shadow over the ministerial exception, adding legal ammunition to plaintiffs seeking remedies against employment discrimination under Title VII,[110] until RFRA was held to be unconstitutional in *City of Boerne v. F.F. Flores.*[111] Henceforth, courts have typically upheld § 702 out of deference to the religious employers' constitutional rights.

Looking back at the judicial construction of § 702 in *Amos*, it is hard to disagree with Justice O'Connor's opinion that the majority "seems to . . . obscure far more than to enlighten."[112] The Court's holding that the judiciary should not second guess the church as to which of its enterprises are religious in nature, begs the question as to where permissible "accommodation" of religion becomes an impermissible "establishment" thereof. To be impermissible under *Lemon*, according to the *Amos* majority, the law must actively promote a particular religion.[113] But the Court's hands-off policy that allows churches to decide which of their activities are religious, and consequently reserve them for coreligionists, does confer on religious entities unfair advantages when it comes to their profit-making ventures. Under the guise of avoiding entanglement, the *Amos* ruling tacitly aids churches competing with nonreligious commercial enterprises by denying the latter the benefits that § 702 bestows on religious employers. In this sense, § 702 transpires not so much as a neutral statute but as a special treatment law that applies only to religious institutions and privileges their for-profit ventures over similar secular undertakings.

The confrontation between the judiciary and the legislative branches occasioned by *Smith* further clouded the matter by sowing doubts about the *Sherbert* test's relevance to Title VII jurisprudence. If a "neutral" statute of "general applicability" overrides free exercise considerations, then Title VII is a prime candidate for the part. If the ministerial exception outweighs the state interest in nondiscrimination, then First Amendment rights take precedence over compelling state interests. Alas, both interests are *compelling*, each represents the government's *highest priority*, and neither can be subordinated to the

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[108] EEOC v. Roman Catholic Diocese, 48 F. Supp. 2d 505, 506 n.2 (E.N.D.C. 1999) (quoting EEOC POLICY STATEMENT, NO. N-915.049, 2/1/90).

[109] 42 U.S.C. § 2000(b) (Supp. V 1993).

[110] *See Van Osdol*, 908 P.2d 1122.

[111] 521 U.S. 507 (1997).

[112] Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 347 (1987).

[113] *Id.* at 337.

other without a *meaningful test* – a test that the majority in *Smith* found to be unnecessary, if not wrong-headed. Given this confusion, it is not surprising that in *Bollard v. California Province of the Society of Jesus*, the Ninth Circuit reverted to the *Sherbert* test in its landmark 1999 decision which added a new twist to the § 702 judicious construction.

1.5. Van Osdol, Bollard, *and the Limits of the Ministerial Exception*

The last two cases to be introduced in this survey of the § 702 judicial construction are *Van Osdol v. Vogt*[114] and *Bollard v. California Province of the Society of Jesus*.[115] These two cases stand out because they entail nearly identical fact situations – a ministerial function employee filing a Title VII claim alleging sexual harassment – yet each produced a different outcome, with the ministerial exception granted in the former case and denied in the latter.

Van Osdol worked as a minister at the United Churches of Religious Sciences under the supervision of a senior minister, Hugh Vogt, who also happened to be her stepfather.[116] Plaintiff alleged that her stepfather sexually harassed her as a child. When Van Osdol informed the Ecclesiastical Committee about these events and suspected similar abuses involving other church employees, defendant denied the charges, after which the Ecclesiastical Committee revoked her novitiate license and reversed its earlier decision allowing her to open a new church.[117]

The Supreme Court of Colorado granted certiorari on two issues:

> (1) whether the First Amendment precludes a court from exercising jurisdiction over a minister's tort and Title VII claims against her church and another minister, and (2) whether the "fraud" and "collusion" exceptions to the First Amendment defense are viable claims when a minister is discharged in retaliation for reporting the misconduct of another minister.[118]

After applying the *Sherbert* and *Lemon* tests,[119] the court declined to exercise jurisdiction over the claims pertaining to the employment termination because a decision to hire or fire a minister entails religious judgments concerning the extent to which a clerical worker embodies the church doctrine.[120] The *Van Osdol* court affirmed and remanded the lower court decision with instruc-

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[114] *Van Osdol*, 908 P.2d 1122.

[115] 196 F.3d 940 (9th Cir. 1999).

[116] *Van Osdol*, 908 P.2d at 1124-25.

[117] *Id.* The defendants – Mr. Vogt, the Mile Hi Church of Religious Science, et al. – moved to dismiss the case. The trial court denied the motions to dismiss on several claims, including breach of contract, assault, outrageous conduct, and breach of fiduciary duty, but disclaimed jurisdiction on claims of negligent hiring, negligent supervision, negligent retention of Vogt, compensatory and punitive damages, back pay, and future pay in lieu of reinstatement on the ground that such claims are barred by the First Amendment. *Id.*

[118] *Id.*

[119] *Id.* at 1127-31.

[120] *Id.* at 1128-29. *See* Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1357 (D.C. Cir. 1990) (holding that it does not matter whether the factors relied upon by the church were independently ecclesiastical or not, for since they relate to a pastoral appointment decision they are automatically intertwined with religious doctrine).

tions to review the case consistent with this judgment of the Supreme Court of Colorado.[121]

In *Bollard*, a novice at a Roman Catholic order brought a Title VII claim against his church and immediate supervisors who sent him pornographic materials, made sexual advances, and engaged him in unwelcome sexual discussions.[122] Plaintiff filed a complaint, charging a hostile work environment so severe that he left the Jesuits prior to taking his vows.[123] The district court applied the ministerial exception to the case, invalidating Bollard's Title VII claim.[124] Plaintiff appealed to the Ninth Circuit which granted jurisdiction over the claims.

Knowing that this was the first time the Ninth Circuit was asked to define the scope of § 702,[125] the judges held that the "so-called 'ministerial exception' . . . insulates a religious organization's employment decisions regarding its ministers from judicial scrutiny under Title VII."[126] The court stressed that the "source of the ministerial exception is the Constitution rather than the statute."[127] The court went on to explain:

> Because the plain language of Title VII purports to reach a church's employment decisions regarding its ministers, courts have had to carve a ministerial exception out of Title VII in order to reconcile the statute with the Constitution. Despite of the lack of a statutory basis for the ministerial exception, and despite Congress's apparent intent to apply Title VII to religious organizations as to any other employer, courts have uniformly concluded that the Free Exercise and Establishment Clauses of the First Amendment require a narrowing construction of Title VII in order to insulate the relationship between a religious organization and its ministers from constitutionally impermissible interference by governments.[128]

Up to this point, the *Bollard* court took the familiar route, citing the *Kedroff* line of cases[129] that anchor church autonomy in the Constitution and warn against state interference in the church's administrative affairs. Thereafter, however, the judges proceeded to lay out a rationale that would allow a ministerial function employee to prevail in his Title VII action against the standard ministerial exception defense. In spite of the fact that the *Sherbert* and *Lemon* tests came under critical scrutiny in *Smith*, the court applied both to the case at bar.

With regard to the issue of free exercise, the judges wove a carefully reasoned argument demonstrating that there is no danger of "substantive entanglement" in this case, since the trial calls for "a restricted inquiry" where "[n]othing in the character of this defense will require a jury to evaluate religious doctrine or the reasonableness of religious practices followed within the Jesuit order."[130] No First Amendment problems impede this case with regard

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121 *Id.* at 1134.
122 Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 944 (9th Cir. 1999).
123 *Id.*
124 *Id.*
125 *Id.* at 945.
126 *Id.* at 944.
127 *Id.* at 945.
128 *Id.* at 946-47
129 *Id.* at 945-46.
130 *Id.* at 950.

to "procedural entanglement," as well, for the plaintiff "seeks neither reinstatement nor any other equitable relief that might require continuing court surveillance."[131]

Weighing the free exercise issues, the *Bollard* court concluded that "the Free Exercise rationales supporting an exception to Title VII are missing" in this case, since "Jesuits do not offer a religious justification for the harassment Bollard alleges."[132] While relying heavily on *Sherbert* and *Lemon*, the Ninth Circuit also alluded to *Smith*, as it rejected the defendant's argument about the inevitable entanglement the ruling for the plaintiff would entail:

> And while we recognize that applying any laws to religious institutions necessarily interferes with the unfettered autonomy churches would otherwise enjoy, this sort of generalized and diffuse concern for church autonomy, without more, does not exempt them from the operation of secular laws. Otherwise, churches would be free from all of the secular legal obligations that currently and routinely apply to them.[133]

"Taken as a whole," the court held,

> we conclude that the procedural entanglement between church and state that will result from allowing Bollard to pursue his claim is no greater than that attendant on any other civil suit a private litigant might pursue against a church. Accordingly, we fail to see an Establishment Clause violation in applying the commands of Title VII to this case.[134]

Comparing the above two cases, we can see why Van Osdol failed where Bollard prevailed. Van Osdol focused the complaint on her discharge and sought remedies that threatened to involve the court in ecclesiastical matters. By contrast, Bollard's legal team carefully avoided framing the issues in terms that could involve the court in the church's administrative decisions. The accusations made and remedies sought in this case centered on predischarge events and did not cast aspersion on the church's right to make administrative decisions about its clergy; nor did they drag the state into the religious corporation's ecclesiastical affairs. After carefully navigating through this constitutional minefield, the *Bollard* court felt satisfied that granting jurisdiction to the plaintiff would not deprive the church of the protection afforded by the § 702 religious employer exemption.

In the course of its deliberations, the court conducted a *Sherbert* test – a decision that might seem puzzling after the Supreme Court questioned its validity outside the unemployment compensation field. Why did the *Bollard* court do so? One explanation is that it is hard, if not impossible, to construct the § 702 exemption in a manner favorable to the aggrieved ministerial function employee without recourse to a state interest compelling enough to override the religious employer's First Amendment rights. But then, the court did not predicate its holding on the outcome of the balancing test. Rather, it found that adjudicating the case would simply not raise any significant First Amendment problems. Whatever the reason behind the court's decision to use the *Sherbert* test, the results were unusual. It was the first time that a circuit level court granted a clergy employee jurisdiction under a Title VII claim and turned down

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[131] *Id.*
[132] *Id.* at 947.
[133] *Id.* at 948.
[134] *Id.* at 950.

the ministerial exception defense in an employment relationship involving a church and its ministerial function employee.

There is one more reason we need to take a closer look at the way the *Bollard* court constructed the religious employer exemption. The court opened a potentially fruitful avenue for legal analysis by focusing on substantive and procedural entanglement. The novelty of this approach might escape a casual reading because the argument appears embedded in the familiar context of the Establishment Clause analysis. Yet, this line of reasoning might help us move the discussion beyond the *Sherbert* test and suggest new ways of balancing state interests and First Amendment rights. The rest of this article examines this avenue for judicial inquiry within the framework of Case Law Grid Analysis.

PART 2. CASE LAW GRID, JURIDICAL VARIABLES, AND CASE OUTCOMES

2.1. Database, Key Juridical Variables, and Coding Procedures

A legal inquiry typically begins with a few seminal cases that are commonly cited by legal scholars. Additional research is likely to turn up less-known cases which may add a few wrinkles to the legal analysis. Less commonly found in legal research are studies where the researcher identifies and systematically examines the universe of cases meeting certain criteria.

The present study charts a "case law set" in which Title VII cases and the ministerial exception defense intersect in the adjudication process. More specifically, this project attempts to identify all cases that meet the following five criteria: (1) employees working for religious organizations (2) who file Title VII civil actions (3) against their religious employers where (4) the employer claims the § 702 exemption or ministerial exception, and where (5) the court rules on whether the § 702 exemption or ministerial exception defense is appropriate for the case at bar.

As of February 7, 2000, a computer search yielded twenty-eight cases that met the five criteria defining this case law set, from the 1972 *McClure v. Salvation Army* to the 1999 *Bollard v. California Province of the Society of Jesus*.[135] It should be stressed that this set does not comprise a completely self-contained universe. There are kindred cases that did not meet one or more criteria but that contain similar facts and produce the same line of defense. Among the excluded cases are claims filed under different federal statutes – the Age Discrimination in Employment Act (ADEA), Fair Labor Standards Act (FLSA), Americans With Disabilities Act (ADA), and Equal Pay Act (EPA). The database also excludes cases where the religious employer relied exclusively on Bona Fide Occupational Qualification (BFOQ) defense under § 703e of the Civil Rights Act of 1964.[136] Such cases are included in the database

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[135] See Table 1 for the complete list of cases. Summaries for each case can be found in Table 2.

[136] Amended in 1991 as 42 U.S.C. §2000e-(2e).

only when they appear in conjunction with Title VII claims and the ministerial exception defense.[137]

Once the relevant cases were identified, they were assembled chronologically and cross-tabulated against key juridical variables.[138] Of the five protected categories specified in Title VII, only religion, race, and sex discrimination charges figure prominently among the cases under review.[139] Tables 3 and 4 also include information about plaintiffs' employment and "case outcome," i.e., whether the court granted to the religious employer the § 702 exemption or the ministerial exception.

Table 5 brings together fourteen cases where plain sex discrimination was alleged. It specifies the charges brought by plaintiffs, remedies sought, the presence or absence of substantive and procedural entanglement, and case outcomes. Table 6 lists five cases where plaintiff alleged sexual harassment, including one important case that is not in the database because the charges were brought not under Title VII but under a state law similar to a relevant Title VII claim.[140] Table 7 delineates the type of First Amendment analysis deployed by the courts. Table 8 features the *Lemon* and *Sherbert* tests undertaken by the courts. Table 9 distinguishes cases by a substantive and procedural entanglement analysis, as gleaned from the case record. Table 10 represents federal employment statutes and the categories of employees they were designed to protect. Table 11 offers a one page summary that lists key variables and case outcomes in all twenty-eight cases, with each case identified by a number.

To facilitate coding, each variable was associated with a "test question" that permitted the coder to enter a "Yes" or "No" value for a given data unit. Thus, the "ministerial function" variable has a test question: "Are plaintiff's

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[137] There is one instructive case where a plaintiff brought a sexual harassment charge against a religious employer that did not make it into the database because the charges were filed under state law rather than Title VII (a federal statute). Black v. Snyder, 471 N.W.2d 715 (Minn. Ct. App. 1991). Although the case does not meet the selection criteria, it is added to a supplementary grid and discussed at length when the issue of sexual harassment comes under review. By the same token, the database excludes employment disputes involving "sexual preference" discrimination. *See* Madsen v. Erwin, 481 N.E.2d 1160, 1161 (Mass. 1985); Walker v. First Presbyterian Church, 22 Fair. Empl. Prac. Cas. (BNA) No. 762 (Cal. Super. Ct. 1980); Lews *ex rel.* Murphy v. Buchanan, 21 Fair. Empl. Prac. Cas. (BNA) No. 696 (D. Minn. 1979). Sexual preference discrimination is not covered under Title VII. Finally, there was a limited number of cases where plaintiff filed an action under Title VII and defendant invoked the ministerial exception defense, but the courts disposed of the cases on unrelated grounds. *See, e.g.*, Himaka v. Buddist Churches of Am., 917 F. Supp. 698, 707 (N.D. Cal. 1995) ("[g]iven the lack of evidentiary basis, plaintiff cannot survive summary adjudication of her hostile environment claim."). *See also* Russell v. Belmont Coll., 554 F. Supp. 667, 681 (M.D. Tenn. 1982) ("plaintiff has failed to show essential elements of her pendant state claims . . . [and] establish . . . that disputed issues of material fact exist. . . .").

[138] *See* Tables 3 and 4.

[139] Discrimination on the basis of "color" appeared once. But since it was listed in the complaint as "race and/or color," Carter v. Baltimore Annual Conference, 1987 WL 18470, at *1 (D.D.C. Oct. 5, 1987), and did not figure as an independent variable in the court's reasoning, it was not included in the grid. This is also the case with a "national origin" discrimination claim: it appears once in the data set and does not figure in the court's holding.

[140] *Black*, 471 N.W.2d at 718.

duties primarily ministerial in nature?" A dash in a grid cell indicates that the relevant data is missing and could not be inferred from available information. In most cases, the answer to the test question is easy to glean or infer from the facts; in some cases it is clearly missing; and in a few cases, the recorded facts yield conflicting attributions, which will be highlighted in the following analysis.

Table 9 is the only table featuring ordinal variables "Risk of Substantive Entanglement" and "Risk of Procedural Entanglement," each allowing for three readings – "high," "medium," and "low."[141]

2.2. Case Law Dynamics, Time Lines, and Court Systems

Title VII became law in 1964, but the first case satisfying the database criteria, *McClure v. Salvation Army* (1),[142] did not reach the Court until 1972. In the eight intervening years, the Supreme Court delivered several important church autonomy decisions, including *Epperson v. Arkansas*,[143] *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[144] *Walz v. Tax Commission*,[145] *Lemon v. Kurtzman*,[146] and *Wisconsin v. Yoder*.[147] The first two cases in the grid, *McClure v. Salvation Army* (1) and *King's Garden, Inc. v. Federal Communications Commission* (2), continue this ongoing inquiry into the balance between church autonomy and state regulatory responsibilities. The 1970s would add only one more case to the grid, *Whitney v. Greater New York Corp. of Seventh-Day Adventists* (3). By contrast, eleven cases were filed in the 1980s, with fourteen in the 1990s. The historical dynamics indicate an increased willingness by religious institution employees to seek legal remedies for employment discrimination.

The twenty-eight case database assembled for this analysis reveals uneven Title VII activity among circuits.[148] Among the seventeen circuit level cases in the grid, more than half are from three appellate courts: the Fifth Circuit (1, 5, 6, 27), the D.C. Circuit (2, 12, 23, 26), and the Ninth Circuit (7, 11, 28). Another six appellate level decisions come from the Fourth (10, 24), Seventh (13, 21), Eighth (16), and Third (17) Circuits. Only one case, from the Tenth Circuit, *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* (14), was granted certiorari by the Supreme Court.

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[141] *See infra* § 2.6. The present study does not apply statistical analysis to the database because the grids track a limited number of variables and are fairly easy to scan. But oversized case law sets with hundreds of variables would call for sampling techniques and multivariate analysis.

[142] Here and below, the number after each case indicates the case law number in the grid (see Table 1 for full citation and Table 2 for case summaries).

[143] 393 U.S. 97 (1968) (warning that democracy must be equally impartial toward religion or nonreligion).

[144] 393 U.S. 440 (1969) (calling on civil courts to stay out of church property disputes).

[145] 397 U.S. 664 (1970) (reminding that the Establishment Clause militates against the state conferring financial benefits on religion).

[146] 403 U.S. 602, 612-13 (1971) (spelling out a three-part test for judging whether neutral statutes violate the Establishment Clause).

[147] 406 U.S. 205, 220-21 (1972) (urging caution in granting religious institutions an exemption from state regulations).

[148] See Table 2 for case summaries.

The nine district holdings on Title VII claims filed by religious employees include two cases from the Ninth Circuit (19, 20), two from the Seventh Circuit (15, 18), and one case each from the First (8), Second (3), Sixth (9), Eighth (4), and Tenth Circuits (22). Only one case in the grid, *Van Osdol v. Vogt* (22), was routed through the state court system.

The uneven distribution of relevant case law among circuits calls for further analysis. The Civil Rights Act of 1964 had a particularly strong impact in the South, where the Fifth Circuit took the lead in clarifying the law. Three out of four cases that came from this circuit – *McClure v. Salvation Army* (1), *EEOC v. Mississippi College* (5), and *EEOC v. Southern Baptist* (6) – appeared early in case law history under review and resulted in key holdings that defined the law in this important segment of First Amendment jurisprudence. Seventeen years passed before the Fifth Circuit reviewed another Title VII claim by a religious institution employee in *Clapper v. Chesapeake Conference of Seventh-Day Adventists and Gruesebeck* (24). One time this appellate court overturned the lower court decision (5) and one time reversed and remanded in part (6). The "ministerial exception" codified by the Fifth Circuit is the most important contribution this circuit made to the case law. Not surprisingly, each time a ministerial function employee filed an action under Title VII in this appellate court system, the Fifth Circuit held for the church.

The D.C. Circuit is also active in the grid. Two decisions by this court should be noted, *King's Garden, Inc. v. Federal Communications Commission* (2), which cast doubt on the constitutionality of the § 702 exemption, and *EEOC v. Catholic University of America* (23), which upheld the constitutionality of RFRA (later found unconstitutional by the Supreme Court).[149] Only once did the D.C. Circuit reverse and remand the lower court decision (2). When it came to ministerial function employees, the D.C. Circuit followed precedent and exempted religious employers from Title VII scrutiny.

The Ninth Circuit decisions are consistent; all held for Title VII petitioners (7, 11, 28). Recently, the Ninth Circuit overturned a lower court decision in *Bollard v. California Province of the Society of Jesus* (28), the only circuit level holding that recognized a ministerial function employee's Title VII claim. Another influential Ninth Circuit holding is *EEOC v. Pacific Publishing Ass'n* (7), which offered a detailed analysis of Title VII claims by religious workers in light of the *Sherbert* and *Lemon* tests and showed where a compelling state interest may override the church's First Amendment rights.

The Eleventh Circuit contributed no case law to the grid, one possible explanation being that it followed the trail blazed by its sister circuit, the Fifth. Two other underrepresented circuits in the grid are the First (8) and the Second (3). I would hypothesize that this particular underrepresentation may be due to the fact that plaintiffs residing in this area prefer to file their claims under comparable state laws in state courts rather than through the federal court system.

Judging from the grid, the lower courts are more sympathetic to Title VII petitioners than circuit courts. Six out of nine claims filed in district courts were decided against employers (3, 4, 15, 18, 20, 25), including two cases with

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[149] City of Boerne v. Flores, 521 U.S. 507 (1997).

ministerial function employees, *Nigrelli v. Catholic Bishop of Chicago* (15) and *Dolter v. Wahlert High School* (4), and one case involving a parochial school principal where the court, going against precedent, classified plaintiff as a non-religious duty employee, *Elbaz v. Congregation Beth Judea, Inc.* (18).

Sometimes the circuits issue conflicting rulings, as happened with *Vigars v. Valley Christian Center of Dublin, California* (20), where the court explicitly took issue with a ruling issued by another circuit in a similar case, *Little v. Wuerl* (17).[150] More often than not, the discrepancies in the circuit holdings go unnoticed, and with the Supreme Court remaining silent on certain contentious issues, the circuits continue to differ on their construction of § 702.

The case law grid analysis also helps us determine the circuits where the EEOC has been the most aggressive in its push against employment discrimination.[151] The EEOC filed suit in federal court against a religious employer eight times; five times the courts upheld the Title VII suit brought by the EEOC (5, 6, 7, 9, 11) and three times the decision went against the EEOC (19, 23, 27). All the decisions supporting EEOC subpoenas took place in the 1980s. The EEOC filed suit three more times in the 1990s, but lost each case. The EEOC was most active in the Fifth Circuit, where it sought Title VII jurisdiction on behalf of employees working for religious organizations, winning once (5), losing once (27), and taking a split decision in the third case (6).[152]

2.3. *Religious Employer, Religious Office, and Religious Job Content*

Title VII defined "religion" in the broadest terms as including "all aspects of religious observance and practice, as well as belief."[153] This tautological definition did not seem problematic at the time, yet it was soon put to the test, as courts struggled to clarify who qualified as a religious employer, which department in a church-run enterprise represented a religious office, and what job could be considered a bona fide religious activity.

In a couple of cases, defendants sought to evade judicial review with claims that they were not "employers" within the meaning of the statute. Thus, in the first case to have ruled on the ministerial exception, *McClure v. Salvation Army* (1), the defendant claimed that "it was neither an 'employer' nor a person

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[150] The court noted that:

> [Defendant] rel[ies], almost exclusively, on a recent 3rd Circuit decision, *Little v. Wuerl*, 929 F.2d 944 (1991), in which the court came to exactly the opposite decision . . . . This case signals a developing split in the circuits which the Supreme Court will have to address. However, because this Circuit finds the 9th Circuit's reasoning far more persuasive, and because the law in this Circuit is settled on this issue, *Little* holds little significance for our inquiry.

Vigars v. Valley Christian Ctr., 805 F. Supp. 802, 807 n.3 (N.D. Cal. 1998).

[151] Title VII requires the petitioner to report a grievance to the EEOC, which then reviews the complaint, determines whether the charge has merit, works with the employer to rectify the situation, and, if these efforts fail, issues a right to sue letter. 42 U.S.C. § 706b-e. Even when the EEOC finds the complaint without merit, it is obliged to issue a right to sue letter. The EEOC is also authorized to bring action on behalf of an employee who files a class action suit. 42 U.S.C. § 706f.

[152] There is one documented case in the grid where the EEOC found a Title VII claim without merit and still issued plaintiff a right to sue letter, which resulted in a court proceeding that went against the plaintiff. Combs v. Cent. Texan Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999).

[153] Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-17, § 701(j).

engaged in an 'industry affecting commerce' within the meaning of §§ 701(b) and (h) . . . ."[154] The court brushed aside the defendant's argument, pointing out that with its 3,000 employees, 1,330 officers, "gross annual earnings . . . over $7,000,000," and "property holdings worth more than $62,000,000," the organization comes well within the statute's purview.[155] The court held that the institution involved in commerce may not be exempt from the effect of social legislation simply because it was created for fraternal purposes.[156] In *Elbaz v. Congregation Beth Judea, Inc.* (18),[157] another religious employer sought to evade Title VII scrutiny by claiming less than twenty five employees, which would place it outside the statutory definition of "employer." The court turned down this defense, stating that the matter was in dispute and that it was up to the jury to decide this issue of fact.[158]

In the majority of cases, defendants argued that *any* employment affiliated with the church (no matter how tenuous) was exempt from Title VII scrutiny under the ministerial exception. Yet in only half of the cases represented in the case law grid did the court accept this argument. Thus, in *EEOC v. Mississippi College* (5), the court held:

> The College is not a church. The College's faculty and staff do not function as ministers. The faculty members are not intermediaries between a church and its congregation. . . . The employment relationship between Mississippi College and its faculty and staff is one intended by Congress to be regulated by Title VII.[159]

The only exception the court allowed was in cases where the defendant demonstrated that the questionable employment practice was grounded in religious doctrine.[160]

The Fifth Circuit issued a similar holding in *EEOC v. Southern Baptist Theological Seminary* (6), where it accepted the lower court's distinction between "three categories of seminary employees: faculty, administrative staff, and support staff" but vacated the district court judgment that the employment relationships in the first two categories are shielded from judicial review, finding instead that the § 702 exemption covers only the seminary faculty.[161] The court issued what amounted to a warning to parochial institutions that the "status of these employees as ministers for the purpose of *McClure* remains a legal conclusion subject to plenary review. . . . While religious organizations may designate persons as ministers for their religious purposes free from any government interference, bestowal of such a designation does not control their extra-religious status."[162]

In *EEOC v. Pacific Press* (7), the Ninth Circuit reinforced this judgment by denying a religious publishing house a § 702 exemption in a suit brought by

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[154] 460 F.2d 553, 555 (5th Cir. 1972).
[155] *Id.* at 557.
[156] *Id.*
[157] 812 F. Supp. 802, 805 (N.D. Ill. 1992).
[158] *Id.*
[159] 626 F.2d 477, 485 (5th Cir. 1980). The court ordered defendant to comply with the EEOC subpoena and produce documents needed to investigate whether the College discriminated on the basis of race and sex.
[160] *Id.*
[161] 651 F.2d 277, 283 (5th Cir. 1981).
[162] *Id.*

an editorial secretary charging that female employees received fewer benefits than similarly situated males.[163] "Administrative" activities and "discretionary" responsibilities performed by a religious office worker did not automatically certify the job as primarily religious. The court held that because plaintiff's duties were more similar to those of the staff and faculty than to the duties of a minister, the publisher was not exempt from Title VII.[164]

In *Feldstein v. Christian Science Monitor* (8), the court started with the familiar premise that "not every endeavor that is affiliated . . . with a recognized religious body may qualify as a religious activity,"[165] but nonetheless held for the employer. Unlike earlier cases where plaintiffs charged discriminatory practice based on factors other than religion, Feldstein contested the decision by the *Christian Science Monitor* to deny him a reporting job because he was not affiliated with the church. "I find the conclusion inescapable," wrote the judge, "that the *Monitor* is itself a religious activity of a religious organization," and that "it is permissible for the *Monitor* to apply a test of religious affiliation to candidates for employment."[166]

The same logic, however, failed to carry in *Ninth & O Street Baptist Church v. EEOC* (9). The court held that the EEOC has the right to conduct an inquiry into whether an entity's policy is inconsistent with Title VII. Hence, the employer must furnish the EEOC with all relevant documents.[167]

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos (14) added a substantially new element to the debate about the religious nature of the office and the religious character of job content when it held that it would be too onerous a burden to require religious entities to prove the spiritual significance of their activities. Thus, religious employers should be given the benefit of the doubt when it comes to defining the nature of their nonprofit undertakings. The Court observed that its ruling favoring religious employers did not undermine congressional intent because § 702 "exempted only the religious activities of such employers from the statutory ban on religious discrimination."[168] The *Amos* holding gave religious employers further incentive to invoke religious infractions as a reason for dismissing nonreligious function employees.

In several cases (4, 15, 9), the defense uses this strategy by citing plaintiff's failure to conform to one or another religious precept and claimant alleging "pretext" for prohibited discriminatory practices. Thus, in *Vigars v. Valley Christian Center of Dublin, California* (20), a pregnant librarian claimed to have been fired on account of her pregnancy (sex discrimination), while the defendant maintained that she was fired for adultery (a violation of church doctrine).[169] Similarly, in *Dolter v. Walhert High School* (4), a pregnant teacher blamed her dismissal on sex discrimination and defendant urged that the dis-

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[163] EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1277 (9th Cir. 1982).
[164] *Id.* at 1278.
[165] Feldstein v. Christian Sci. Monitor, 555 F. Supp. 974, 978 (D. Mass. 1983).
[166] *Id.* at 978-79.
[167] Ninth & O St. Baptist Church v. EEOC, 616 F. Supp. 1231-32 (W.D. Ky. 1985).
[168] Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335-36 (1987).
[169] Vigars v. Valley Christian Ctr., 805 F. Supp. 802, 804 (N.D. Cal. 1992).

missal was on religious grounds since plaintiff was "intricately involved in its [school's] religious pedagogical mission" and obligated to follow "a code of religious moral conduct . . . ."[170] The court found that Dolter had a legitimate Title VII claim.

Almost one third of all cases represented in the case law grid were filed by parochial school employees (4, 9, 11, 15, 17, 18, 20, 24). The defendants prevailed only where they succeeded in implicating religious reasons for the dismissal (17, 24) or when the employer was a religious college or university (5, 6, 13, 23). The grid contains three cases where plaintiffs' work was unmistakably secular. In one instance the court ruled for a plaintiff who charged racism (3), and in two others for the defense, alleging religious infractions (14, 19).

In the cases discussed above, courts wrestle with two key variables in reaching their decision: the status of employer and employee and the job functions of the employee. With the passage of time, however, the courts increasingly focus on the employee's job content and functions in determining whether a plaintiff's claim to protection under Title VII has merit.

2.4. Ministerial Ordination, Ministerial Function, and the "Primary Duties" Test

The Civil Rights Act of 1964 says nothing about "ministers," a "minister-church relationship," or "ministerial function." On its face, Title VII was meant to apply to all employees working for religious institutions; the sole exception allowed under § 702 was the religious employers' bias toward same-faith employees. The *McClure* court (1) singled out the church-minister relationship as a special bond, the one meriting a blanket exemption from Title VII scrutiny, when it formulated and applied the ministerial exception to a civil action brought by an ordained minister.[171] Five more times after *McClure* an ordained minister initiated a Title VII action (12, 16, 21, 22, 26) and lost in every case.

Although in its original form the ministerial exception applied to ordained clergy exclusively, it was soon extended to non-ordained employees working for religious organizations. *EEOC v. Mississippi College* (5) paved the way for this expansion by determining that workers must serve as "intermediaries between a church and its congregation" before their ministerial status is established and their Title VII claims are exempted from judicial review.[172] In *EEOC v. Southwestern Baptist* (6), the Fifth Circuit further clarified the issue when it distinguished the question of who performs "a ministerial function" from that of who are "'ministers in the formal sense."[173] It was *Rayburn v. General Conference of Seventh-Day Adventists* (10), however, that codified the principle when it held that the "'ministerial exception' to Title VII first articulated in *McClure v. Salvation Army* . . . does not depend upon ordination but upon the function of the position."[174] Seventh-Day Adventists are a church

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[170] Dolter v. Wahlert High Sch., 483 F. Supp. 266, 271 (N.D. Iowa 1980).
[171] McClure v. Salvation Army, 460 F.2d 553, 558-59 (5th Cir. 1972).
[172] EEOC v. Miss. Coll., 626 F.2d 477, 485 (5th Cir. 1980).
[173] EEOC v. S.W. Baptist Theological Seminary, 651 F.2d 277, 283 (5th Cir. 1981).
[174] Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168-69 (4th Cir. 1985).

where "women may not stand for ordination," but the job Ms. Rayburn held in her church was nevertheless ministerial in function.[175]

This progressive problematization of the worker's duties has raised the possibility that ordained ministers serving in a nonministerial capacity could find access to the courts with their employment discrimination claims.[176] The database does not support this supposition. In *Carter v. Baltimore Annual Conference* (12), an African-American minister serving "under the administrative arm of the church in a non-religious capacity"[177] tried to convince the court that the congressional intent behind Title VII was to protect employees like himself from race-based discrimination, but failed: "As strong and compelling as this interest is," the court concluded,

> it does not override the church's interest in an employment relationship with its minister which is free from interference and review. Regardless of the capacity in which a minister fulfills his duties, the minister serves as a church's lifeblood because the minister acts as the chief instrument through which the church performs its purposes.[178]

We cannot generalize from this case, for it is the only one of its kind in the grid. Still, it casts doubt on the premise that "function" rather than "ordination" drives the court's decision on the ministerial exception.

As one can glean from Table 3, nonordained employees performing ministerial functions faired better with their Title VII claims than ordained employees. On three different occasions, in *Dolter* (4), *Nigrelli* (15), and *Bollard* (28), the court found that such employees were entitled to judicial review under this statute. But that is three out of fifteen cases where plaintiffs with a court authenticated ministerial function won the right to air their grievances in a court of law. Even this ratio does not paint the full picture, for it obscures the problematic nature of the act through which the judiciary assigns plaintiffs a ministerial function status.

Take *Elbaz v. Congregation Beth Judea, Inc.* (18), for example. Here, the principal in a synagogue-affiliated school filed action against her employer alleging sex and national origin discrimination after the congregation refused to renew her employment contract following her complaint about her retirement account.[179] The defendant raised a host of objections, ranging from not qualifying as an employer, "[u]ntimeliness of [c]harge," and "failure to state a cause of action" to "lack of subject matter jurisdiction"[180] and the infringement of its "First Amendment [rights]."[181] Unimpressed by defendant's arguments, the court denied its motion to dismiss on every ground, including defendant's con-

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[175] *Id.* at 1168.

[176] In *EEOC v. S.W. Baptist*, 651 F.2d at 284, the defendant cited four relevant cases involving ordained minsters working in nonministerial capacities. "Unlike Officer McClure," the court observed, "these workers' ordination is not an integral part of their total vocation. These support personnel are not engaged in activities traditionally considered ecclesiastical or religious." *Id.*

[177] Carter v. Baltimore Annual Conference, No. 86-2543 SSH, 1987 WL 18470, at *1 (D.D.C. Oct. 5, 1987).

[178] *Id.*

[179] Elbaz v. Congregation Beth Judea, Inc., 812 F. Supp. 802, 804 (N.D. Ill. 1992).

[180] *Id.* at 803-04.

[181] *Id.* at 807.

tention that "any attempt . . . to 'restrain a synagogue's free choice of its religious education personnel would constitute an infringement on the synagogue's free exercise of rights protected by the First Amendment.'"[182] The court declined to classify plaintiff as a ministerial function employee, pointing out that in contrast to the present case, "*Rayburn* . . . involved an applicant in a pastoral position."[183]

This ruling came on the heels of another holding from the Northern District of Illinois, in *Nigreli v. Catholic of Chicago* (15) where the court denied the defendant's motion to dismiss, holding that the termination of a Catholic school principal may have been a pretext for sex discrimination, alleging sexual harassment and wrongful constructive discharge.

If a religious school principal can be a nonministerial employee, you might think this must be *a fortiori* true about religious school teachers. Throughout the circuits, however, judges have classified school teachers as pastoral workers. The *Dolter* (4) court saw no reason to question the church's position that plaintiff, a Catholic lay teacher of English, was involved in the pedagogical ministry.[184] Another judgment went against an elementary school teacher in *Clapper v. Chesapeake Conference of Seventh-Day Adventists* (24), when the court disclaimed jurisdiction in plaintiff's race discrimination charge, agreeing with the defendant that all its teachers engage in spiritual work since their schools "have an express and avowedly sectarian purpose . . . [to secure] the salvation of each student's soul through his or her indoctrination in Seventh-day Adventist theological beliefs."[185] A similar disposition was reached in *EEOC v. Roman Catholic Diocese of Raleigh, North Carolina* (25), where a music minister claiming to have been unfairly demoted to a part-time school teacher maintained that her prior job at the cathedral was ministerial, but her role as a teacher in the school was not.[186] The court held that the "music program at the school encompasses school liturgies, prayer services and the school choirs" and is thus a pastoral undertaking.[187]

The courts have tried different strategies in formulating and applying "the primary duties test."[188] The *Mississippi College* court did not see fit to call employees "ministerial" unless they serve as "intermediaries between a church and its congregation," "attend to the religious needs of the faithful," or "instruct students in the whole of religious doctrine."[189] The Fifth Circuit added a new twist to the test in *EEOC v. Southwestern Baptist Theological Seminary* (6) by pointing out that seminary teachers are ministerial when the "faculty models the ministerial role for the students."[190] The *Rayburn* (10) court determined that "[a]s a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be

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[182] *Id.*
[183] *Id.* at 807-08.
[184] Dolter v. Wahler High Sch., 483 F. Supp. 266, 270 (N.D. Iowa 1980).
[185] 1998 WL 904528, at *1 (4th Cir. Dec. 29, 1998).
[186] 48 F. Supp. 2d 505, 514 (E.D.N.C. 1999).
[187] *Id.*
[188] *Clapper*, 1998 WL 904528, at *6 (4th Cir. Dec. 29, 1998).
[189] EEOC v. Miss. Coll., 626 F.2d 477, 485 (5th Cir. 1980).
[190] 651 F.2d 277, 284 (5th Cir. 1981).

considered 'clergy.'"[191] The *Little* (17) court followed these guidelines in determining a parochial school teacher's ministerial status, quoting in particular the Parish school manual that the "integration of religious truth and values with the rest of life is brought about in the Catholic school . . . ."[192]

In *EEOC v. Roman Catholic Diocese of Raleigh, North Carolina* (27), the court ascertained plaintiff's "primary duties" using a rationale laid out in scholarly articles by Sidney Buchanan who emphasized "inner core activities of a religious organization"[193] and by Bruce N. Bagni who focused on the "core religious beliefs framework."[194] This approach envisions that the religious function employee's "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship."[195] Buchanan adds that the "activities [must be] tied *uniquely* to the teachings, doctrine, and worship forms of a religious entity" before they pass the test as belonging to the religious entity's "inner core."[196] The point here is that genuinely ministerial functions "have no significant parallel in the secular world," while nonminsterial functions do.[197]

Applying these guidelines to specific cases has not yielded consistent results. Thus, Mr. Clapper, an elementary school teacher, reckoned that "the time he spent instructing his students in the Bible and leading them in worship constituted only 10.6 percent of his work week" and that "of the thirteen general responsibilities of full-time elementary school teachers in the Education Code, only one is explicitly religious, none are sacerdotal and none involve church governance."[198] The court paid no heed to his argument, finding him a ministerial function employee whose "primary duties . . . [are] teaching and spreading the Seventh-day Adventist faith. . . ."[199] Similarly, in *EEOC v. Roman Catholic Diocese of Raleigh, North Carolina* (27), the court zeroed in on "the purely religious role of music within the Catholic church" when applying the primary duties test to a music teacher in a parochial school.[200] But, as we saw earlier, the primary duties test yielded opposite results when the *Elbaz* (18) court applied it to a school principal and the *Vigars* (20) court applied the test to a parochial school teacher. Both plaintiffs were assigned a nonministerial status by the courts.

The situation is further complicated by the premise that religious employees must embody church doctrine not only in their beliefs and affiliations, but also in their everyday conduct. The case in point is when the *Little* (17) court

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[191] Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985).
[192] Little v. Wuerl, 929 F.2d 944, 948 n.5 (3rd Cir. 1991).
[193] EEOC v. Roman Catholic Diocese, 48 F. Supp. 2d 505, 515 (E.D.N.C. 1999) (citing G. Sidney Buchanan, *The Power of Government to Regulate Class Discrimination by Religious Entities: A Study in Conflicting Values*, 43 EMORY L.J. 1189, 1207-15 (1994)).
[194] *Id.* (citing Bagni, *supra* note 23).
[195] Bagni, *supra* note 23, at 1545.
[196] Buchanan, *supra* note 23, at 1210 (emphasis added).
[197] *Id.*
[198] Clapper v. Chesapeake Conference of Seventh-Day Adventists, 166 F.3d 1208 (Table), 1998 WL 904528, at *6 (4th Cir. Dec. 29, 1998).
[199] *Id.* at *7.
[200] EEOC v. Roman Catholic Diocese, 48 F. Supp. 2d 505, 514 (E.D.N.C. 1999).

granted a motion to dismiss to the church that fired a religious school teacher who failed to pursue a proper annulment procedure. The court cited as a justification for its decision *NLRB v. Catholic Bishop of Chicago*, where the Supreme Court pointedly noted that "[i]n recent decisions involving aid to parochial schools we have recognized the critical and unique role of the teacher in fulfilling the mission of the church-operated school."[201] In its holding, the district court determined that "the permission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts."[202]

Similarly, the *Van Osdol* (22) court disclaimed jurisdiction in a sexual harassment suit after concluding that a minister is "the embodiment of the churches religious beliefs" and that only the church can determine whether "a particular person embodies or does not embody the religious beliefs of the church."[203]

The parochial school administrators tried the same logic in *Vigars v. Valley Christian Center of Dublin, California* (20), arguing that a librarian who became pregnant while in transition between two marriages violated a signed agreement in which she pledged "that she and her children would be bound by the moral values, codes, doctrines and beliefs of the church."[204] But the *Vigars* court was not swayed by this fact, holding that legitimate doubts remain as to whether the decision to fire plaintiff was driven by religious considerations and that the church would have to prove in court whether its representatives fired plaintiff because she committed adultery or because she became pregnant outside marriage.[205]

The question these cases raise is where do employers – or the courts – draw the line between ecclesiastically significant public behavior and constitutionally protected private conduct. The extent to which a pastoral employee must model the church doctrine is open to divergent interpretations. All in all, the question remains unsettled as to whether plaintiff's job must be purely ecclesiastical, primarily religious, or simply involve some sectarian functions for the worker to qualify as a ministerial function employee. As such, no party in Title VII litigation can be certain about the outcome of the "primary duties" test. The Case Law Grid attests to this conclusion.

Thus, among the fifteen cases in the database where plaintiff's position was deemed to be ministerial, we find five ordained ministers (1, 4, 16, 21, 26), three college or university instructors (13, 23, 27), four school teachers (4, 10, 17, 24), one religious school principal (15), one reporter for a religious publication (8), and one novitiate in a seminary (28). By contrast, among the eleven cases where the courts did not confirm plaintiff's ministerial status are four

[201] Little v. Wuerl, 929 F.2d 944, 948 n.6 (3d Cir. 1991) (quoting NLRB v. Catholic Bishop, 440 U.S. 490, 501 (1979)). The *Little* court also quoted approvingly Senator Erwin's justification for his 1972 amendment to § 702: "I would allow the religious corporation to do what it pleases. That is what my amendment would allow it to do. It would allow it liberty. It would take it out from under the control of the EEOC entirely." *Id.* at 950 (quoting 118 CONG. REC. 1982 (1972)).

[202] *Id.* at 951.

[203] Van Osdol v. Vogt, 908 P.2d 1122, 1128 (Colo. 1966).

[204] Vigars v. Valley Christian Ctr., 805 F. Supp. 802, 804 (N.D. Cal. 1992).

[205] *Id.* at 810.

receptionists-secretaries (3, 7, 19, 25), two college instructors (5, 13), one school principal (18), one school librarian (20), one religious school employee (11), one radio station employee (2), and one assistant building engineer (14). In two more cases the relevant data about plaintiffs are missing: one involves an employee at a sectarian child development center (9) and another covers employees in a denominational college where no plaintiff initiated a suit (6). If there is a common logic behind these adjudications of ministerial function, it escapes an easy grasp.

All parties involved in Title VII litigation face considerable uncertainty in the high stakes game of defining primary duties. Thus, religious employers may find themselves in the awkward position of trying to convince the courts that a job applicant opposed to the Catholic Church's views on abortion is not well suited for a theology professorship at a Catholic university, or that an unmarried pregnant teacher does not help promulgate the church doctrine of chastity and marital fidelity. The religious employer's position in some of these cases is open to criticism, but this does not obviate the predicament religious organizations face trying to fathom how the courts might rule on an employee's ministerial function.

The situation is still more debilitating for religious function employees consigned to a discrimination category called "clergy." Once plaintiffs are classified as ministerial function workers, they become de facto, if not de jure, "at will" category employees. The clergy's privacy is bound to be invaded under these circumstances because the legal process gives employers an incentive to expand the range of behavior imbued with ecclesiastical significance and to increase the store of doctrinal infractions which can be invoked to justify discriminatory employment practices. Whenever the church cites a religious infraction, the court is likely to be blindsided and take the charge for granted. This is what the ministerial exception demands, for as the *Rayburn* (10) court observed in its sober dicta, the ministerial exception "protects the act of a decision rather than a motivation behind it."[206]

2.5. *Charges, Remedies, and Title VII Claims*

Tables 3 through 6 correlate plaintiffs' grievances, ministerial status, demographic characteristics, and case outcomes. The grid also helps track the Title VII claim dynamics over time, specific charges brought, and remedies sought by religious institutions' employees. By far the most common claim in the grid is plain sex discrimination – it was raised fourteen times (1, 4, 5, 7, 10, 11, 13, 16, 18, 20, 21, 23, 26, 27). The other two common claims are religion-based discrimination – which occurred six times (2, 8, 9, 14, 17, 19), and race discrimination complaints which appeared in the grid six times (3, 5, 10, 12, 21, 24). Four times plaintiffs charged sexual harassment (15, 22, 25, 28), once national origin discrimination (18), and once color discrimination (12). In five cases, plaintiff brought two Title VII discrimination claims: race and sex (5, 10, 7), race and color (12), and sex and national origin (18). In several cases, a Title VII grievance has been accompanied by another federal statutory claim:

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[206] Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985).

the Age Discrimination in Employment Act (16, 23, 24), Pregnancy Discrimination Act (20, 26), Fair Labor Standards Act (18), and Equal Pay Act (11).[207] Fifteen times the courts exempted defendants from Title VII scrutiny (1, 8, 10, 12, 13, 14, 16, 17, 19, 21, 22, 23, 24, 26, 27); twelve times accepted jurisdiction over Title VII claims (2, 3, 4, 5, 7, 9, 11, 15, 18, 20, 25, 28); among these twelve cases were three ministerial function employees (4, 15, 28), and in one case that featured no individual claimant (6) the court made a split decision.

Most Title VII claims against religious organizations – twenty-one out of twenty-seven – were brought by women,[208] and all fourteen plain sex discrimination complaints were initiated by female plaintiffs.[209] Three out of four sexual harassment charges were also filed by women.[210] Men claimed religion-based discrimination claims three times (2, 8, 14), race discrimination twice (12, 24), and sexual harassment once (28).

The divergent time lines for Title VII claims also reveal certain historical patterns. While plain sex discrimination charges are distributed evenly throughout the examined period, most of the race discrimination charges (3, 5, 10, 12) were filed between 1975 and 1987, with the other two filed in 1994 (21) and 1998 (24). This may be a sign that race discrimination in religious institutions is now less prevalent than sex-based discrimination, the conclusion born out by the fact that women, who comprise over half of the U.S. population, account for 11.7 percent of the nation's clergy, compared with 11.2 percent of the nation's clergy who are black – the number roughly equal to the percentage of the black population in the U.S.[211]

Religion-based discrimination claims follow a similar trajectory, with four suits brought between 1975 and 1987 (2, 8, 9, 14) and two more between 1988 and 1999 (17, 19). This drop reflects the Court's holding in *Amos* (14), which expanded the scope of § 702 by granting religious employers broad rights to favor coreligionists in employment, making it more difficult to bring religion-based discrimination claims against religious employers. Indeed, after *Amos*, no petitioner succeeded in having the court recognize a religion-based discrimination claim, whereas two times in the earlier period the claimants won jurisdiction (2, 9).

By contrast, all four sexual harassment claims (15, 22, 25, 28) were filed in the 1990s, starting with the 1991 *Nigrelli* case. This can be explained by the fact that the 1991 Civil Rights Act added new language to the statute prohibiting "unlawful harassment in the workplace."[212] The trend should also be assessed against the backdrop of the general rise in the nation's sexual harassment litigation following two Supreme Court holdings in *Meritor Savings Bank, FSB v. Vinson*[213] and *Harris v. Forklift Systems, Inc.*[214]

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207 In several cases, employers mounted a BFOQ defense alongside the familiar ministerial exception defense (2, 11, 13, 18, 20), and the courts turned it down each time, disposing of the cases on unrelated grounds.
208 *See* Tables 3-4.
209 *See* Table 5.
210 *See* Table 6.
211 U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES.
212 Pub. L. No. 102-166, 105 Stat. 1071 (1991).
213 477 U.S. 57 (1986).
214 510 U.S. 17 (1993).

Race Discrimination

One claim was filed by a white plaintiff alleging discrimination against whites (24). Five other race discrimination claims involved individuals charging the employer with anti-black bias (3, 5, 10, 12, 21), three of them brought by white individuals (3, 5, 10). In *Whitney v. Greater New York Corp. of Seventh-Day Adventists* (3), a white typist-receptionist alleged that her church fired her "solely because she was maintaining a casual social relationship with one Samuel Johnson, a black man."[215] The court denied the defendant's motion to dismiss, holding that the alleged discrimination was not based on any religious doctrine and thus did not exempt the employer from Title VII scrutiny.[216]

In *EEOC v. Mississippi College*, Mrs. Summers, a white part-time psychology instructor at a denominational college, charged that her employer showed a pattern of discrimination in recruitment practices.[217] On the § 702 defense asserted by the college, the court ruled that the relationship between a college instructor teaching a nonreligious subject and a religious employer was not purely religious, as required for the *McClure* exception, and was therefore not immune from Title VII scrutiny.

Another white plaintiff, Carole Rayburn, an associate pastor at the Seventh-Day Adventist Church, charged discrimination stemming from her association with blacks; her affiliation with black-oriented religious organizations.[218] This time the court declined to exercise jurisdiction over the case because plaintiff's job, in addition to her Sunday school teaching responsibilities, involved conducting classes, ministering to the singles group, and preaching at various churches.[219]

Two race discrimination suits were brought by blacks, with both plaintiffs losing their cases. In *Carter v. Baltimore Annual Conference* (12), an ordained minister serving in a church's financial office brought action charging "race and/or color" discrimination, but the court declined to exercise jurisdiction, holding that the church-minister relationship is protected by the First Amendment "[r]egardless of the capacity in which a minister fulfills his duties."[220] In *Young v. Northern Illinois Conference of United Methodist Church* (21), a black female serving as "a probationary minister of the United Methodist Church" brought a race discrimination action after she was passed up for promotion, charging that her church "did not follow the procedure it has previously 'always' followed in such cases."[221] The court granted defendant a motion to dismiss for lack of subject matter jurisdiction on First Amendment grounds, pointing out that "religious bodies may make apparently arbitrary decisions affecting the employment status of their clergy members and be free from civil review having done so."[222]

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[215] 401 F. Supp. 1363, 1365 (S.D.N.Y. 1975).
[216] *Id.*
[217] 626 F.2d 477, 480 (5th Cir. 1980).
[218] Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1165 (4th Cir. 1985).
[219] *Id.*
[220] 1987 WL 18470, at *1 (D.D.C. Oct. 5, 1987).
[221] 21 F.3d 184, 184-85 (7th Cir. 1994).
[222] *Id.* at 187.

One more plaintiff came forward with a race discrimination claim – elementary school teacher, Donald Clapper – who alleged, inter alia, "discriminatory discharge . . . on account of his . . . race (Caucasian)."[223] Plaintiff sought reinstatement as a remedy. The Fourth Circuit held that Clapper's action was "barred by the First Amendment's Free Exercise of Religion Clause . . . ."[224]

In sum, two out of six race discrimination Title VII claims were accepted by the courts, both filed by whites, and both involving nonministerial employees. Not once did a ministerial function employee filing a race discrimination claim win a jurisdiction decision. Two times when plaintiffs charging race discrimination sought reinstatement, the defendants received an exemption from Title VII scrutiny.

Religion-Based Discrimination

Six times plaintiffs charged their employers with religion-based discrimination, winning two cases (2, 9) and losing four (14, 17, 19, 8). In *King's Garden Inc. v. Federal Communications Commission* (2),[225] a job applicant beset by questions about his religious beliefs filed suit under Title VII. The court refused to grant defendant a § 702 exemption because "[a] religious sect has no constitutional right to convert a licensed communications franchise into a church."[226]

This holding runs contrary to *Feldstein v. Christian Science Monitor* (8) where a plaintiff, who was denied a reporting job at a church affiliated publication, failed to convince the court to accept his Title VII claim. Having sided with the defense that "the Monitor was a religious organization entitled to favor coreligionists in its employment practices,"[227] the court saw no constitutional impropriety in the *Monitor*'s job application form which explicitly stated that the "First Church of Christ, Scientist, may by law apply the test of religious qualifications to its employment policies."[228]

The second and last time the court accepted a religious discrimination claim was in 1985, in *Ninth & O Street Baptist Church v. EEOC* (9), an employee at a sectarian child development center was dismissed after she failed to join the church with which her center was affiliated and inquired about her rights with the EEOC.[229] Without initiating an inquiry into plaintiff's ministerial status, the district court ordered the defendant to comply with the EEOC subpoena.[230]

Two years later, the Supreme Court issued its *Amos* (14) decision, affirming the legitimacy of the broad reading of § 702. It is not altogether clear whether *Amos* overturned *King's Garden* (2) and *Ninth & O* (9), since the fact pattern in the latter case can be distinguished from *Amos*, but two other cases in

223 Clapper v. Chesapeake Conference of Seventh-Day Adventists, 166 F.3d 1208 (Table), 1998 WL 904528, at *1 (4th Cir. Dec. 29, 1998).
224 *Id.*
225 498 F.2d 51 (D.C. Cir. 1974).
226 *Id.* at 60.
227 555 F. Supp. 974, 976 (D. Mass. 1983).
228 *Id.* at 975.
229 616 F. Supp. 1231, 1232 (W.D. Ky. 1985) ("other employees who had not contacted the EEOC were not discharged.").
230 *Id.* at 1234.

the grid featuring a failed religion-based discrimination claim followed the *Amos* logic. In *Little v. Wuerl* (17), a sectarian school teacher could not win jurisdiction on her Title VII claim after she failed to obtain an annulment before her remarriage.[231] The court did not directly cite *Amos*, but based its decision on a First Amendment argument, even though the facts were similar in both cases, involving lapsed church membership.

And finally, in *EEOC v. Presbyterian Ministries, Inc.* (19),[232] the court held that a Christian church-run retirement home could keep a Muslim receptionist from wearing her religious head covering.[233] After the 1987 *Amos* decision, no religion-based discrimination claim by a person working in a religious organization has been accepted for judicial review under Title VII.

Plain Sex Discrimination

Fourteen plain sex discrimination claims were brought by individuals working in religious organizations, yielding six decisions favoring plaintiffs, only one of them recognized by the courts as a ministerial function employee. Nine employees charging plain sex discrimination asked to be reinstated, but their Title VII claims were accepted in only two cases, *Dolter* (4) and *Ninth & O* (9). The connection between case outcome and a church's policy on female ordination turns out to be somewhat counterintuitive. Among six religious employers known to allow women ordination, five lost their motions to dismiss (1, 13, 16, 21, 26), and only three out of six employers whose denominations ordained women won their cases (4, 5, 11). It is also noteworthy that among six ordained ministers in the grid, five are women (1, 16, 21, 22, 26), with four female ministers bringing their civil actions between 1991 and 1999. We may be witnessing a trend that encourages female church officers to step forward with their Title VII claims.

McClure (1) established precedent when it dismissed Billie McClure's claim for lack of jurisdiction based on § 702, irrespective of the sex discrimination evidenced by the smaller salaries accorded to the female officers.[234] In six more cases when petitioners failed to win jurisdiction on a plain sex discrimination claim (13, 16, 21, 23, 26, 27), the courts determined that plaintiffs were ministerial function employees and that prosecuting the claim would infringe on the church's right to administer its affairs without state interference. In five of these losing claims, plaintiffs sought reinstatement (13, 16, 21, 23, 27).[235] The courts' rationales for dismissing these claims were anchored in the First Amendment. The Seventh Circuit noted the Constitution "forbids a review of a church's procedures when it makes employment decisions affecting its clergy"[236] and guarantees the religious institution's right "to pursue its own

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[231] 929 F.2d 944 (3d Cir. 1991).

[232] EEOC v. Presbyterian Ministries, Inc., 788 F. Supp. 1154 (W.D. Wash. 1992).

[233] *Id.* at 1156 ("It is PMI's right and prerogative to determine how its mission at Exeter House is to be carried out though there may be employed persons whose jobs may be considered by some to be secular.").

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

[235] The relevant information about the other case in this category (26) is not available.

[236] Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184, 187 (7th Cir. 1994).

path without concession to the views of a federal agency"[237] and without an invasive "inquiry into the good faith of the position asserted by the clergy-administrators."[238]

Five times the courts agreed to review plain sex discrimination in cases involving nonministerial function employees. In *EEOC v. Mississippi College* (5), the Fifth Circuit vacated and remanded the lower court's decision to grant the employer a § 702 exemption from scrutiny of a sex discrimination charge with the following rationale:

> If the district court determines on remand that the College applied its policy of preferring Baptists over non-Baptists in granting the faculty position to Bailey rather than Summers, then § 702 exempts that decision from the application of Title VII. . . . On the other hand, should the evidence disclose only that the College's preference policy could have been applied, but in fact it was not considered . . . in determining which applicant to hire, § 702 does not bar the EEOC's investigation of Summers' individual sex discrimination claim.[239]

In *EEOC v. Pacific Press Publishing Ass'n* (7), an editorial secretary prevailed in her claim stemming from her employer's policy of paying higher benefits to "married men [whom the church considered to be heads of households]" than to "female employees regardless of their marital status."[240] The court pointed out that Mrs. Tobler was a church member in good standing, that she did not occupy a "critically sensitive position within the church that McClure sought to protect,"[241] and that "Congress' purpose to end discrimination is equally if not more compelling than other interests that . . . burdened the exercise of religious convictions."[242]

The Ninth Circuit arrived at a similar judgment in *EEOC v. Fremont Christian School*.[243] Here, a married female school employee filed a complaint with the EEOC contesting Fremont School's policy of offering health insurance coverage only to employees who were the male heads of households. The school defended itself on the First Amendment grounds,[244] but the appellate court held for plaintiff because the latter's job did not entail ecclesiastical functions.[245]

The *Elbaz* (18) court turned down a congregation's motion to dismiss a sex discrimination claim by a school principal who claimed her dismissal was in "retaliation for her retirement plan complaint."[246] The court stated that "it is a violation of 42 U.S.C. § 2000e-(3a) to fire an employee because he opposed

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

238 Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 363 (8th Cir. 1991) (quoting NLRB v. Catholic Bishop, 440 U.S. 490, 502 (1979)).

239 EEOC v. Miss. Coll., 626 F.2d 477, 485-86 (5th Cir. 1980).

240 EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1275 (9th Cir. 1982).

241 *Id.* at 1278.

242 *Id.* at 1280.

243 EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986).

244 *Id.* at 1365.

245 *Id.* at 1369.

246 Elbaz v. Congregation Beth Judea, Inc., 812 F. Supp. 802, 804 (N.D. Ill. 1992).

discrimination against a fellow employee, even if he was mistaken and there was no discrimination."[247]

In *Vigars v. Valley Christian Center of Dublin, California* (20), a pregnant employee fired by a parochial school won jurisdiction in a sex discrimination claim after the court determined that the school manual requiring its teachers to be role models did not apply to the position of librarian.[248] The court left it to the lower court to decide whether the employer was punishing plaintiff because of her "pregnancy" or because of her "adultery."[249]

And finally, there is *Dolter v. Wahlert High School* (4), a case with a similar fact pattern, involving a pregnant teacher who convinced the court to accept her sex-bias charge for adjudication.[250] The case is notable for the logic the court used to construct the case in a manner that did not threaten the church's First Amendment rights. The court refused to grant summary judgment, holding that an issue of material fact existed as to whether the sectarian school was applying its ban on premarital sex equally to male and female employees.

Sexual Harassment

The database contains four cases featuring sexual harassment charges filed by religious institutions' employees – *Nigrelli* (15), *Van Osdol* (22), *Smith* (25), and *Bollard* (28). All but one, *Van Osdol*, resulted in a decision favorable to plaintiffs. Table 6 also includes a pioneering case cited by most other petitioners in this claim category, *Black v. Snyder*,[251] which upheld a ministerial function employee's right to bring a Title VII sexual harassment claim. With four out of five court decisions favoring plaintiffs, sexual harassment is clearly the claim category where religious institutions' employees have the best chance to uphold their rights under Title VII.

All five cases have remarkably similar facts. All plaintiffs alleged hostile work environments related to sexual misconduct by superiors, charged wrongful constructive discharge and retaliation, asked for punitive damages, and sought class action remedies. Four out of five cases involved ministerial function employees, the one exception being *Smith*. In three out of four cases where information is available, plaintiffs did not seek reinstatement. Judging from the grid, the only difference between the four plaintiffs winning jurisdiction and the one who lost was the reinstatement sought by the plaintiff in *Van Osdol*.

In *Nigrelli*, a school principal at St. Mary Star of the Sea Parish School alleged a wrongful termination following quid pro quo sexual harassment by

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[247] *Id.* at 806 (quoting Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1182 (7th Cir. 1982)).

[248] 805 F. Supp. 802, 804 (N.D. Cal. 1992).

[249] *Id.* at 810.

[250] 483 F. Supp. 266, 270 (N.D. Iowa 1980).

[251] 471 N.W.2d 715 (Minn. Ct. App. 1991). The suit was brought under Minnesota state laws rather than under Title VII, a federal statute, and thus was excluded from the main grid.

her supervisor.[252] Similarly, in *Black v. Snyder*, an associate pastor at a Lutheran Church alleged that her supervisor made unwelcome sexual advances toward her and, in spite of her objections, repeatedly touched her in a sexual manner.[253] The Court of Appeals of Minnesota dismissed plaintiff's breach of contract, retaliation, and statutory "whistle blower" claims but upheld plaintiff's claim for sexual harassment, noting that because "she does not seek reinstatement but only monetary damages, any prospective remedy would not require extensive court oversight."[254]

In *Van Osdol*, Justice Mullarkey noted in a concurring opinion that plaintiff "may have a claim under the rationale of *Black v. Snyder*,"[255] even though he agreed with the majority that the First Amendment "precludes our jurisdiction over Van Osdol's Title VII and intentional torts claims."[256] What landed plaintiff on the losing side in this case was the fact that she focused her complaint on the discharge itself – a protected decision fully within the church's prerogative – rather than on the defendant's tortious conduct which enjoys no constitutional or statutory protection.

In *Smith* (25), the court confronted a less controversial case where two nonministerial workers charged their supervisor with assault and battery.[257] Citing *Black* as precedent, the court distinguished the case at bar from *Van Osdol's* facts and accepted plaintiff's cause of action.[258] After an extensive First Amendment analysis, the *Smith* court held that "the primary effect of this court's exercise of jurisdiction over plaintiffs' hostile environment claims will not inhibit religion and that jurisdiction in this matter is not barred by the Establishment Clause of the First Amendment."[259]

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[252] Nigrelli v. Catholic Bishop, No. 84C-5564, 1991 WL 36712, at *1 (N.D. Ill. March 15, 1991). In holding for the plaintiff the court insisted that the defense could not hide behind the First Amendment to avoid Title VII liability:

> [I]t is undisputed that Ms. Nigrelli was the principal of a Catholic school. However, plaintiff is not being terminated because of her failure to fulfill her duties as a Catholic teacher. . . . Liability for a possible Title VII violation cannot be avoided by using the First Amendment. . . . There is also no doubt that in order to determine if the plaintiff was sexually harassed, the court need not inquire into the doctrines and religious goals of the Catholic Church nor of the school.

Id. at *4.

[253] *Black*, 471 N.W.2d at 717-18.

[254] *Id.* at 720-21. The *Black* court invoked the 1990 Supreme Court judgment that "an individual's religious beliefs may not excuse compliance with an otherwise valid law prohibiting conduct that the state is free to regulate." *Id.* at 719 (paraphrasing Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990)).

[255] Van Osdol v. Vogt, 908 P.2d 1122, 1135 (Colo. 1996).

[256] *Id.* at 1125. The majority agreed with Justice Mullarkey that "if Van Osdol had brought a claim regarding a hostile work environment instead of claims directly related to the church's decision not to hire her, such a claim might have survived a First Amendment bar." *Id.* at 1129 n.11.

[257] Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church, 63 F. Supp. 2d 694, 696 (E.D.N.C. 1999). The court did state that one of the two plaintiffs working as a personal secretary to a minister presented a "hybrid situation" so far as her ministerial status was concerned, *id.* at 706, but this opinion appears to be at odds with most of the precedents. The court took note of *Meritor Savings Bank FSB v. Vinson*, where the Supreme Court confirmed that "[c]laims of hostile environment sexual harassment constitute a form of sex discrimination under Title VII." *Id.* at 701 (citing 477 U.S. 57 (1986)).

[258] *Smith*, 63 F. Supp. 2d at 712.

[259] *Id.* at 719.

And finally, John Bollard managed to convince the Ninth Circuit that his sexual harassment action could be adjudicated without dwelling on doctrinal matters or undermining the church's First Amendment rights.[260] The *Bollard* court broke new ground in more than one area, starting with the fact that it is the first federal appellate court to accept a Title VII claim by a ministerial function employee. The *Bollard* court turned down the employer's Religion Clause defense, arguing that "the Jesuits most certainly do not claim that allowing harassment to continue unrectified is a method of choosing their clergy,"[261] and that the court faces a "restricted inquiry," a doctrine-neutral trial that "will require a jury to . . . make secular judgments about the nature and severity of the harassment and what measures, if any, were taken by the Jesuits to prevent or correct it."[262] The *Bollard* court reversed the lower court decision not only on substantive but also on jurisdictional grounds, holding, against precedent, that the district court ruling on subject matter jurisdiction was procedurally unsound:

> Upon finding that the ministerial exception applies to Bollard's claim under Title VII, the district court dismissed his complaint under Federal Rule of Civil Procedure 12(b)(1) for want of subject matter jurisdiction. We reverse that dismissal, but we also wish to make clear that, had Bollard's claim indeed been barred, it should have been dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). . . . As the Supreme Court wrote in *Bell v. Hood,* 327 U.S. 678, 682, 90 L.Ed 939, 66 S.Ct. 773 (1946), "Jurisdiction is not defeated . . . by the possibility that the averments might fail to state the cause of action on which petitioner could actually recover. . . . If the Court . . . exercises its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction."[263]

The *Bollard* decision might seem puzzling if we take "subject matter jurisdiction" to mean "the extent to which a court can claim to affect the conduct of persons or the status of things."[264] When the court dismisses a Title VII federal action on account of § 702 or the ministerial exception, it acknowledges precisely that it is precluded by law from intervening in the dispute and compelling the parties to comply with its orders. But the *Bollard* court's reasoning that the district court decision to dismiss should have been for failure to state a claim rather than for want of subject matter jurisdiction has merit. If nothing else, it renders explicit that Title VII claimants - even if statutory or constitutional reasons bar the court from reviewing the merit of their action and offering relief - have brought non-frivolous complaints that seek to vindicate a compelling state interest.

In summary, sexual harassment claims by religious employees stand the best chance of all Title VII claims to be accepted by the courts as valid Title VII actions. Three out of four such claims in the main grid have been granted judicial review, compared to two out of six race discrimination claims, two out of six religion-based discrimination claims, and six out of fourteen plain sex

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260 Bollard v. Cal. Province of the Soc'y of Jesus, 196 F. 3d 940, 944-50 (9th Cir. 1999).
261 *Id.* at 947.
262 *Id.* at 950.
263 *Id.* at 950-51.
264 BLACK'S LAW DICTIONARY 857 (7th ed. 1999).

discrimination claims. Moreover, two out of three cases in the database where the courts allowed a Title VII suit by a ministerial function employee to go forward were in this claim category. What is critical here is that a civil action alleging hostile work environment has a chance to succeed as long as plaintiffs do not contest the church's right to hire and fire ministerial workers and focus instead on the pre-discharge conditions injurious to plaintiff's well-being and inconsistent with the religious institution's own policies. The *Black* and *Bollard* holdings can be seen as carving an "exception to the ministerial exception," insofar as these decisions point the way to a doctrine-neutral and entanglement-free adjudication of Title VII actions brought by the clergy.

The final section focuses on First Amendment issues and raises the question of whether the *Black* and *Bollard* logic can be generalized and extended to other Title VII claim categories brought by ministerial workers.

2.6. *Free Exercise Clause, Establishment Clause, and the Forms of Entanglement*

The case law grid shows what kind of First Amendment analysis the courts have undertaken in the course of their deliberation on Title VII claims.[265] In twenty-four cases the courts made Free Exercise Clause and Entanglement Clause analyses. In three instances, the Entanglement Clause analysis is missing (3, 13, 15), two times the courts skipped the Free Exercise analysis (13, 16), and in one case, the court did not touch upon either of the First Amendment Religion Clauses (13).[266]

As one can gather from the grid, the First Amendment court rulings are most predictive of case outcome. Courts have disclaimed jurisdiction whenever they determined that accepting it would impede the free exercise of religious beliefs or impermissibly entangle church and state. This result is hardly surprising. Concluding that the adjudication process will infringe on the First Amendment rights of a religious organization amounts to granting defendant an exemption from Title VII scrutiny. Less obvious is the fact that each time judges found a Title VII claim barred by one Religion Clause, they found the other Clause to preclude judicial review as well. It is also instructive that the courts have differed in their determination of which Title VII complaints run afoul of the First Amendment and which do not.

Table 7 shows that the courts never split their decisions on the First Amendment Religion Clauses. All high-entanglement-risk cases were also judged to pose a high threat to free exercise, and vice versa. The fact that the measured variables are perfectly correlated suggest that they may not measure two separate realities. One of the two tests appears to be redundant, since either inquiry predetermines the other inquiry's outcome. Indeed, some judges

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265 *See* Table 3.

266 Maguire v. Marquette Univ., 814 F.2d 1213 (7th Cir. 1987). This case can be considered marginal in the present data base, for the court did not reach the ministerial exception in its holding (the case was dismissed because plaintiff "failed to make out a valid claim of sex discrimination under Title VII.") *Id.* at 1216. Nonetheless, the case is included in the grid because the court did "assume arguendo" and determined in its dicta that the claim would have failed on constitutional grounds even if it were factually valid.

highlighted "[t]he similarity of the discrete inquiries"[267] underneath the surface differences characterizing the *Lemon* and *Sherbert* tests.

The *Lemon* test ascertains whether a federal statute violates the First Amendment Establishment Clause. It calls on the judges to "examine the character and purpose of the institution involved, the nature of the regulation's intrusion into church affairs, and the resulting relationship between the government and the religious authority."[268] To pass the test, the statute first "must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . [and third] the statute must not foster 'an excessive government entanglement with religion.'"[269] Paraphrasing the *Lemon* test (designated below by the letter "L"), we can say that to be permissible under the Establishment Clause, a statute must be secular in purpose (L1), neutral in stance (L2), and entanglement-free in outcome (L3).

The *Sherbert* test determines whether a statutory enactment violates the Free Exercise Clause. In applying this test, the court weighs three factors:

> (1) the magnitude of the statute's impact upon the exercise of the religious belief, (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief, and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state.[270] These precepts are harder to apply, for their language is not explicitly prescriptive. One clue comes from *Thomas v. Review Board of the Indiana Employment Security Division*, where the Supreme Court advised that "[t]he State may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."[271]

Given its judicial history, we can paraphrase the *Sherbert* test (designated below by the letter "S") in this way: the state can regulate religious institutions without violating the Free Exercise Clause if its regulatory scheme does not impede free exercise (S1), serves a compelling state interest (S2), and represents the least restrictive means of enforcing the state interest (S3).

To withstand the First Amendment scrutiny, therefore, a Title VII claim has to satisfy the three prongs of each test.[272] A court accepting jurisdiction over a civil action by a religious institution employee must establish that the Title VII statute is secular in purpose (L1), neutral in stance (L2), and entanglement-free in outcome (L3), and that its enactment does not impede free exercise (S1), serves a compelling state interest (S2), and is the least restrictive enforcement option (S3). *Mississippi College* and *Rayburn* exemplify different First Amendment test outcomes the courts have reached while trying to determine whether plaintiff has a legal recourse under Title VII.

The *Mississippi College* court is the first in case law history to deploy both three-pronged tests and use them to confirm that an employee from a

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[267] Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church, 63 F. Supp. 2d 694, 704 n.9 (E.D.N.C. 1999).
[268] EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1282 (9th Cir. 1982) (paraphrasing Lemon v. Kurtzman, 403 U.S. 602, 614-15 (1971)).
[269] *Lemon*, 403 U.S. at 612-13.
[270] *Id.* at 488 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)); Sherbert v. Verner, 374 U.S. 398 (1963).
[271] 450 U.S. 707, 718 (1981).
[272] *See* Table 8.

religious institution has a legitimate claim under Title VII.[273] The *Mississippi College* court did not conduct an extensive inquiry when it applied L1 and L2 to a discrimination claim brought by a psychology instructor in a denominational college. The court simply noted that defendant "does not contend that Title VII has no secular legislative purpose," nor does it claim that the statute "inhibits or advances religion as its primary effect."[274] On L3, the court determined that "the EEOC subpoena does not clearly implicate any religious practices of the College," that the burden a Title VII inquiry imposes "would be largely hypothetical," and that consequently, the "application of the statute would not foster excessive government entanglement with religion."[275]

Applying S1, the *Mississippi College* court found that the relevant inquiry is "the impact of the statute upon the institution's exercise of its sincerely held religious beliefs" and that the employment practices under review (race and sex discrimination) "d[id] not embody religious beliefs," from which the court inferred that "the impact of Title VII on the free exercise of religious beliefs is minimal."[276]

Moving to S2, the court established that by enacting Title VII, Congress enunciated "a compelling interest in eradicating discrimination in all forms" and that "the government's compelling interest in eradicating discrimination is sufficient to justify the minimal burden imposed upon the College's free exercise of religious beliefs."[277]

On S3, the court concluded that "creating an exemption from the statutory enactment greater than that provided by § 702 would seriously undermine the means chosen by Congress to combat discrimination and is not constitutionally required."[278] Having thus balanced the religious employer's First Amendment rights against the State's interest in creating a nondiscriminatory work environment, the *Mississippi College* court held "that the application of Title VII to educational institutions such as Mississippi College does not violate the free exercise clause of the first amendment."[279]

Rayburn v. General Conference of Seventh-Day Adventists is an example of a First Amendment analysis yielding the judgment nonreviewable on a Title VII petition by a pastoral worker. With respect to L1 and L2, the *Rayburn* court stated that "there is no question that Title VII meets the first two of these tests."[280] On L3, the court determined that a "Title VII action is potentially a lengthy proceeding, involving state agencies and commissions," that "[e]ven after entry of judgment, questions of compliance may result in continued court

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[273] Earlier cases in the grid invoke both First Amendment Religion Clauses, but none engaged all six prongs of the *Sherbert* and *Lemon* tests. The *McClure* court referred to both Religion Clauses in its deliberation, McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972), but conducted no independent Entanglement Clause analysis. *See* Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church, 63 F. Supp. 2d 694, 704 n.9 (E.D.N.C. 1999).

[274] EEOC v. Miss. Coll., 626 F.2d 477, 486 (5th Cir. 1980).

[275] *Id.* at 487-88.

[276] *Id.* at 488.

[277] *Id.* at 488-89.

[278] *Id.* at 489.

[279] *Id.*

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

surveillance," and that the "application of Title VII to employment decisions of this nature would result in an intolerably close relationship between church and state."[281]

Applying S2, the *Rayburn* court conceded that it is "difficult to exaggerate the magnitude of the state's interest in assuring equal employment opportunities for all, regardless of race, sex, or national origin."[282] Regarding S1, the court established that an associate pastor has no valid sex or race discrimination claims because "[a]ny attempt to restrict a church's free choice of its leaders . . . constitutes a burden on the church's free exercise rights."[283] And finally on S3, the court determined that the "introduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state."[284] Hence, the *Rayburn* court ruled against the plaintiff.[285]

While both courts abide by the spirit of the First Amendment, neither follows the letter of the required tests. *Mississippi College* does not subject Title VII and its § 702 provision to the first and second prong analyses stipulated by the *Lemon* test before the court pronounces the statute secular in purpose and neutral in stance. Nor does this court contemplate the full range of statutory enforcement options available to the state before the court concludes that imposing Title VII requirements on a denominational college is the least restrictive enforcement option available under S3.

The *Rayburn* court also accepts without demonstration that Title VII passes muster under L1 and L2. It expresses its concern about the length of the legal proceedings and the need for continuing surveillance (L3) and holds that the impermissible church-state entanglement is likely to result from the judicial review.

On the S2 prong, the *Rayburn* court acknowledges that the state's interest in nondiscrimination is great but finds more compelling the church's constitutional right under the Free Exercise Clause. There is no discernable judgment on S3, as the court makes no attempt to analyze the range of statutory enactment options and to show that other, less restrictive enforcement means, can be used to accomplish the state's compelling regulatory objective articulated in Title VII.

We should not overlook the characteristic language overlap in the *Rayburn* court's First Amendment analyses. On L1, the court finds that the "application of Title VII to employment decisions of this nature would result in an intolerably close relationship between church and state,"[286] while on the S3

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[281] *Id.* at 1170-71.

[282] *Id.* at 1168.

[283] *Id.*

[284] *Id.* at 1169.

[285] The *Rayburn* court found:

> [T]he courts must distinguish incidental burdens on free exercise in the service of a compelling state interest from burdens where "inroad on religious liberty" is too substantial to be permissible. . . . The balance of values thus weighs against Rayburn's suggestion that the government may question the decision of the Seventh-Day Adventist Church to hire another candidate as an associate in pastoral care.

Id. (citation omitted).

[286] *Id.* at 1171.

prong the court determines that the "introduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state."[287] This rhetorical overlap shows how difficult it is to disentangle the substantive arguments and logical procedures set forth in the *Lemon* and *Sherbert* tests. A closer look at the First Amendment analyses undertaken by other courts in the present database reveals similar inconsistencies.

While *Mississippi College* and *Rayburn* took for granted that Title VII satisfies the *Lemon* test's first two prongs, *King's Garden* expressed serious doubts about the statute's validity, for a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality."[288] Pronouncing the § 702 exemption to be of "very doubtful constitutionality,"[289] the *King's Garden* court opined that "[i]n creating this gross distinction between the rules facing religious and non-religious entrepreneurs, Congress placed itself on a collision course with the Establishment Clause. Laws in this country must have a secular purpose and a 'primary effect' which neither advances nor inhibits religion."[290]

The *Feldstein*[291] and *Dolter*[292] courts raised similar objections, the latter case involving a ministerial function employee. This line of reasoning, which can be called "the reverse entanglement argument," takes the government to task for its hands-off policy with respect to discriminatory employment practices because the facially neutral stance may, and in the instant cases does, tacitly confer on the church unfair advantages in competition with secular employers.

The Supreme Court confronted this argument and struck it down in *Amos* when it reversed the district court judgment that "§ 702 fails the second part of the *Lemon* test because the provision has the primary effect of advancing religion."[293] In doing so, the Court reiterated its long-standing conclusion that "[t]here is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'"[294] The issue has not been laid to rest, however, and it is

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[287] *Id.* at 1169.

[288] King's Garden, Inc. v. FCC, 498 F.2d 51, 56 (D.C. Cir. 1974).

[289] *Id.* at 53.

[290] *Id.* at 55.

[291] The *Feldstein* court concluded:

> The exemption presently afforded by Title VII, 42 U.S.C. § 2000e-1 is a remarkably clumsy accommodation of religious freedom with the compelling interests of the state, providing on the one hand far too broad a shield for the secular activities of religiously affiliated entities with not the remotest claim to first amendment protection while on the other hand permitting intrusions into wholly religious activities.

Feldstein v. Christian Sci. Monitor, 555 F. Supp. 974, 979 (D. Mass. 1983) (citing EEOC v. S.W. Baptist Theological Seminary, 485 F. Supp. 255, 260 (N.D. Tex. 1980)).

[292] "Indeed, to construe that [sic] section 2000e-1 to exempt All Forms [sic] of discrimination in sectarian schools would itself raise first amendment [sic] problems since it would imply the government's special preference of sectarian schools over nonsectarian schools." Dolter v. Wahlert High Sch., 483 F. Supp. 266, 269 (N.D. Iowa 1980).

[293] Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

[294] *Id.* at 334 (citing Waltz v. Tax Comm'n, 397 U.S. 664, 669 (1970)).

likely to surface again, given the reservations that Justices O'Connor, Brennan, Marshall, and Blackman expressed in their concurring opinions about the majority's tendency to conflate a church's profit and nonprofit enterprises.[295]

The courts have differed in the ways they applied the *Lemon* test and passed judgments on the prospects for an entanglement-free outcome. The *Ninth & O* court acknowledged that the subpoena it authorized against a child development center was "broad and sweeping," yet called the EEOC inquiry only "somewhat burdensome" and the investigation process "minimally intrud[ing] upon the center's and Ninth & O's religious beliefs [notice the *Sherbert* language in the last locution]."[296] *Pacific Press* also minimized the burden that the EEOC investigation would impose on a religious publishing house, suggesting that it falls short of "continuous supervision of the kind the Supreme Court sought to avoid in *Catholic Bishop*."[297]

By contrast, the courts that decline to review petitions by religious workers and turn down the EEOC subpoena requests routinely cite *NLRB v. Catholic Bishop of Chicago*, where the Supreme Court expressed concern that the very process of judicial inquiry may lead to the entanglement.[298] Thus, the *Maguire* court specifically noted the burden that the legal inquiry imposed on "the defendant [who] had already been subjected to two years of extensive and burdensome discovery."[299] Other courts expressed similar concerns.[300]

With regard to the *Sherbert* test, the adjudication process has focused on the question of whether the contested employment practice is grounded in church doctrine (S1) and whether the state interest embodied in Title VII is compelling enough to override the church's free exercise rights (S2). The *Fremont* court did not grant the religious employer exemption to the defendant fighting off a sex discrimination suit because

> Fremont Christian has previously abandoned a policy of paying the "head of household" at a rate higher than similarly situated female employees . . . because they felt that it may have been illegal to continue to do so. We find this to be evidence that there would be no substantial impact upon religious beliefs by forcing Fremont Christian to drop a similar policy of giving heads of household health insurance, to the exclusion of similarly situated women.[301]

In *Pacific Press*, the court held that granting judicial review would not violate defendant's free exercise rights because "Congress' purpose to end discrimination is equally if not more compelling than other interests that have

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[295] *Id.* at 340-49. See *supra* Section 1.4 for discussion.

[296] Ninth & O St. Baptist Church v. EEOC, 616 F. Supp. 1231, 1234 (W.D. Ky. 1985).

[297] EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1282 (9th Cir. 1982). *See also* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999).

[298] EEOC v. Catholic Univ. of Am., 83 F.3d 455, 466 (D.C. Cir. 1996) (quoting NLRB v. Catholic Bishop, 440 U.S. 490, 502 (1979)).

[299] Maguire v. Marquette Univ., 814 F.2d 1213, 1216 n.1 (7th Cir. 1987).

[300] The *Rayburn* court singled out the "lengthy proceeding" and "the questions of compliance [which] may result in continued court surveillance." Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985). *See also* Little v. Wuerl, 929 F.2d 944, 949 (3d Cir. 1991).

[301] EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1368 (9th Cir. 1986).

been held to justify legislation that burdened the exercise of religious convictions."[302]

In *Ninth & O*, the judges turned down employer's claim that its decision is not subject to the interference by the EEOC,[303] holding that "plaintiff has failed to show that its interest in religious freedom under the facts is superior to the public interest in having Title VII administered in a manner that protects all employees to whom it extends its protection."[304]

In *Vigars*, the court acknowledged the negative impact that its decision to accept a Title VII petition from a pregnant employee working in a religious school would have on the church's free exercise rights, but it still turned down a doctrine-based discrimination defense with this characteristic post-*Smith* rationale:

> [I]t is clear that Title VII is a secular, neutral statute [notice the *Lemon* language in the midst of the *Sherbert* test analysis] which, in this case, incidentally has a profound impact on defendants' free exercise of their religion. As in *Smith*, however (where that "incidental impact" was devastating), such incidental impact does not constitute a violation of the Free Exercise Clause.[305]

The court's ruling in favor of claimants bringing forward a sexual harassment suit are especially apt to emphasize that there is "no doubt that in order to determine if plaintiff was sexually harassed, the court need not inquire into the doctrines and religious goals of [a religious entity]."[306] "[W]here the church provides no doctrinal nor protected-choice based rationale for its alleged action, and indeed expressly disapproves of the alleged actions, a balancing of interests strongly favors application of the [Title VII] statute.[307]

When the courts decline to review a Title VII petition, the *Sherbert* balancing scale tips in the opposite direction. In *Young*, plaintiff sought to convince the court that reviewing her petition did not constitute "an 'extensive inquiry' into 'religious law and polity,'" but the court disagreed, holding that the deliberations about "hiring or firing of clergy . . . are in themselves an 'extensive inquiry' into religious law and practice, and hence forbidden by the First Amendment. Young's argument, that Title VII may be applied to decisions by churches affecting the employment of their clergy, is fruitless."[308] In turning down a sex discrimination claim, the *Combs* court observed that any inquiry into a grievance by a clergy member "would be necessarily coercive, even if the alleged discrimination were purely nondoctrinal."[309] The outcome that the *Sherbert* balancing test yielded in this case is typical of all cases where religious employers receive the § 702 exemption:

> This case involves the interrelationship between two important governmental directives – the congressional mandate to eliminate discrimination in the workplace and

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[302] *Pac. Press*, 676 F.2d at 1272.
[303] Ninth & O St. Baptist Church v. EEOC, 616 F. Supp. 1231, 1232 (W.D. Ky. 1985).
[304] *Id.* at 1235.
[305] Vigars v. Valley Christian Ctr., 805 F. Supp. 802, 809-10 (N.D. Cal. 1992).
[306] Nigrelli v. Catholic Bishop, 1991 WL 36712, at *3 (N.D. Ill. Mar. 15, 1991).
[307] Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 948 (9th Cir. 1999).
[308] Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184, 187 (7th Cir. 1994).
[309] Combs v. Cent. Texan Annual Conference of the United Methodist Church, 173 F.3d 343, 350 (5th Cir. 1999).

> the constitutional mandate to preserve the separation of church and state. As this court previously observed in *McClure*, both of these mandates cannot always be followed. In such circumstances, the constitutional mandate must override the mandate that is merely congressional.[310]

Several conclusions can be drawn from this overview, pinpointing the weaknesses of the existing paradigm for the First Amendment Religion Clauses' analyses.

(1) The First Amendment analyses in the cases comprising the present database routinely mix the language of the *Lemon* and *Sherbert* tests. The rhetoric of "entanglement" distinguishing the *Lemon* test is echoed in the language of "impediment" that characterizes the *Sherbert* test. While the *Lemon* test focuses on case outcome, the deliberations frequently touch upon the chilling effect that the very process of inquiry is likely to have on the church's free exercise rights. The *Sherbert* test was intended to measure the impact that judicial review has on religious beliefs, yet it may well end up with the warning against the impermissibly close relationship between church and state.

(2) The current Free Exercise test does not provide clear guidance for weighing state interest in nondiscrimination against the constitutional rights of religious organizations. In the words of one scholar, "[S]uch a test provides no norm for determining how much or at what point a compelling interest can interfere with a group's religious interests."[311] Nor does the Free Exercise test help predict where the court can order a church to alter a discriminatory practice rooted in church doctrine, and where it has to defer to the church's First Amendment rights.

(3) Not all parts of the *Sherbert* and *Lemon* tests have been given equal attention by the courts. S3 is the least engaged prong in the judicial review process. None of the courts in the twenty-eight case database have considered less restrictive options available to the state pursuing its interest in nondiscrimination before entering judgment on a Title VII claim. Yet, without such deliberation, there is no meaningful way to measure "the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state."[312] The *Mississippi College* court came closest to thematizing this issue when it observed that "[a]lthough the number of religious educational institutions is minute in comparison to the number of employers subject to Title VII, their effect upon society at large is great because of the role they play in educating society's young."[313] Even this holding does not elucidate the criteria behind the court's judgment or spell out the alternatives open to the state enforcing its interest in nondiscrimination.

(4) S2 does not pull its weight in the *Sherbert* analysis, either. No court has ever quibbled with the premise that creating a nondiscriminatory work environment is a state interest of highest priority. To the extent that the inquiry confirms this self-evident fact, it begets a truism. The real issue is whether this is "the" highest priority or "a" highest priority, whether the interest in question is compelling enough to override the church's rights under the First Amend-

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[310] *Id.* at 351.
[311] Okamoto, *supra* note 22, at 1416.
[312] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
[313] EEOC v. Miss. Coll., 626 F.2d 477, 489 (5th Cir. 1980).

ment. Such an inquiry is wholly dependent on the outcome of the S1 analysis, which determines whether the regulatory scheme impedes free exercise. If the answer to the S1 question is affirmative, the answer to the S2 query is irrelevant.

(5) The L1 and L2 prongs in the *Lemon* test have also lost much of their punch after the *Amos* court determined that Title VII is a "secular" and "neutral" statute fully compliant with the *Lemon* test. The doubts that the *King's Garden* court aired about the statute's neutrality in its reverse entanglement argument may resurface if someone challenges in court the designation "religious" that churches attach to their allegedly nonprofit undertakings. For the time being, we have to assume that, as a matter of law, Title VII and its § 702 provision constitute a statute that is secular in purpose and neutral in stance.

(6) S1 and L3 are the only practical guidelines we have in ascertaining whether the court has jurisdiction over an employment discrimination claim by a religious function employee or whether the court should grant the religious employer an exemption from Title VII scrutiny. To meet the logical requirements and fulfill their judicial role, these inquiries should be sufficiently separate to yield independent outcomes. This brings us back to the *Bollard* court's innovative reasoning on substantive and procedural entanglement.

For the most part, *Bollard* follows a well-trodden path in its First Amendment analysis when it brings the *Sherbert* and *Lemon* tests to bear on the sexual harassment claim brought under Title VII by a novitiate in a Jesuit religious order.[314] The court issues familiar warnings against state meddling in ecclesiastical matters, such as the "church's selection of its own clergy" and the "ecclesiastical self-governance with which the state may not constitutionally interfere."[315] However, the *Bollard* court does not contend that plaintiff is not a ministerial function employee, insisting only that by refusing to contest the church's right to fire him and by foreswearing injunctive relief and reinstatement as a remedy, John Bollard deprived the church of the "protected-choice based rationale" under the Free Exercise Clause and tipped the "balanc[e] of interests strongly [in favor of the] application of the statute."[316]

After disposing of S1 and S2 and completely bypassing S3, the *Bollard* court moves to the *Lemon* test. The court cites *Minker v. Baltimore Annual Conference of United Methodist Church* with its memorable dicta reiterating the district court statement that the "determination of 'whose voice speaks for the church' is per se a religious matter. . . . We cannot imagine an area of inquiry less suited to a temporal court for decision; evaluation of 'gifts and graces' of a minister must be left to ecclesiastical institutions."[317] Then, the *Bollard* court departs from the familiar path by adding a fresh wrinkle to the Entanglement Clause analysis. "[E]ntanglement has both substantive and procedural dimensions."[318] Substantive entanglement refers to the fact that the

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314 Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 944 (9th Cir. 1999).
315 *Id.* at 946.
316 *Id.* at 947-48.
317 *Id.* at 949 (citing Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354, 1356-57 (D.C. Cir. 1990)).
318 *Id.* By way of antecedents, we should note that the *Rayburn* court spoke in similar terms about "an intolerably close relationship between church and state both on substantive and

judicial review may require trial courts to dwell on ecclesiastical reasons behind the church's decision to retain, promote, demote, or fire its clergy, and thereby to foster "a constitutionally impermissible entanglement with religion . . . [where] the church's freedom to choose its minister is at stake."[319] Procedural entanglement refers to the protracted legal proceedings, as well as to the fact that the "remedies that a district court may impose . . . may be far-reaching in their impact upon religious organization."[320] Neither substantive nor procedural entanglement poses a problem in *Bollard*, because "in discussing the Free Exercise Clause, such substantive concerns are absent from this case,"[321] and "[w]here such a concern is absent, procedural entanglement considerations are reduced to the constitutional propriety of subjecting a church to the expense and indignity of the civil legal process."[322] The plaintiff's Title VII action could go forward, the court concluded, since the trial proceedings would involve only a restricted inquiry that would not "require a jury to evaluate religious doctrine or the 'reasonableness' of the religious practices followed within the Jesuit order," and because the claimant does not seek remedies that "might require continuing court surveillance."[323]

We can see that the Entanglement Clause and Free Exercise Clause analyses get entangled in *Bollard*, with the protected-choice rationale figuring prominently in both *Lemon* and *Sherbert* test deliberations, and church-state entanglement making an appearance once in section "A" titled "The Free Exercise Clause"[324] and the second time in section "B" titled "The Establishment Clause."[325] The protected-choice rationale safeguards the church's right to select its clergy without state interference as well as the possibility of a doctrine-neutral trial. I would argue that both are intricately tied. Dwelling on the ecclesiastical criteria for selecting ministers engenders substantive entanglement, just as second-guessing a church's clergy appointments is bound to implicate the spiritual criteria for selecting ministers. By the same token, the church-state relationship violates the no-entanglement provision insofar as it draws the court into monitoring the church's compliance with court orders, and impedes free exercise insofar as it blocks doctrine-based conduct. Once again, it is hard to envision the church-state relationship impermissibly entangled under one First Amendment Religion Clause that would not logically entail a violation of the other First Amendment Religion Clause.

I propose that we adopt the *Bollard* language, using "substantive entanglement" to designate a doctrine-neutral/doctrine-entangled adjudication process and "procedural entanglement" to stand for a judicial process outcome that imposes an incidental-burden/heavy-burden on the defendant. Substantive

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procedural level," one pertaining to the unreviewable spiritual criteria which the church uses to select its clergy, and the other referring to the length of court proceedings and the pervasive monitoring that the court decisions might bring in their wake. Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1170-71 (4th Cir. 1985).

[319] *Bollard*, 196 F.3d at 949.

[320] *Id.*

[321] *Id.*

[322] *Id.*

[323] *Id.* at 950.

[324] *Id.* at 945-48.

[325] *Id.*

entanglement is evident in cases where the courts have to ponder ecclesiastical matters, second-guess the church's administrative decisions, judge the religious employer's good faith, consider conduct grounded in church doctrine, weigh the extent to which a plaintiff embodies church teachings, or deliberate on the seriousness of a religious infraction. Empirical indicators signaling procedural entanglement would then include the length of legal proceedings, the sweep of the subpoena, the need for continuous monitoring and surveillance, and the request for prospective relief and class action remedies.

This approach to a First Amendment analysis and the proposed substantive/procedural entanglement tests have several advantages.

(1) The emphasis on substantive and procedural entanglement upholds the First Amendment spirit, allowing the church to maintain its ecclesiastical autonomy and select its clergy without government intrusion, and at the same time, vindicating the state interest in nondiscrimination embodied in the Civil Rights Act of 1964. The substantive and procedural entanglement measurements are consistent with the Religion Clause jurisprudence insofar as they build on and preserve the vital parts of the *Lemon* and *Sherbert* tests, with the substantive entanglement test embodying the Free Exercise objective and the procedural entanglement test fulfilling the Entanglement Clause agenda.

(2) The model advocated in this paper insures that the Free Exercise and Entanglement tests do not duplicate each other. The suggested procedures allow the legal test to produce outcomes independent from each other. We can envision cases where a doctrine-neutral trial will result in excessive procedural entanglement and ecclesiastically-entangled court deliberations pose no danger of excessive procedural entanglement.

(3) The key juridical variables tracked by the proposed First Amendment tests are not necessarily nominal – they lend themselves to interval scaling. We can measure a low, moderate, and high procedural burden that the adjudication process imposes on the religious employer, just as we can ascertain the minimal, moderate, and maximum extent to which judicial inquiry would require courts to dwell on doctrinal matters.

(4) The new paradigm for the First Amendment Religion Clause analyses is likely to increase the clergy's access to the courts by shifting attention away from the ministerial status of religious workers and toward the conditions under which the judicial review process is framed in such a way that the court can deliberate on the facts without trespassing on constitutionally-protected ecclesiastical ground and imposing an excessive procedural burden on religious institutions. The *Bollard* logic may be extended beyond sexual harassment actions to sex and race discrimination claims by clergy members, who form one of the least protected employment groups in the United States.

(5) Finally, the proposed scheme for adjudicating Title VII claims by religious workers would relieve the courts from making the invidious comparison between the right of clergy to work in an environment free from discrimination and harassment and the right of the church to exercise religious beliefs without state interference. Both rights represent interests equally compelling and fully entitled to constitutional and statutory protection.

Table 9 represents the case outcomes reconsidered in line with the substantive and procedural entanglement tests laid out in this section. The coding

guidelines show how the cases were assigned to a particular quadrant in the grid. The empirical indicators for substantive entanglement highlight the cases where judicial review is likely to involve (a) evaluating the church's administrative decisions, (b) judging the employer's good faith, (c) dealing with conduct grounded in church doctrine, (d) weighing the extent to which plaintiff embodies church teachings, and (e) pretextual defense. Empirical indicators signaling procedural entanglement mark the cases distinguished by (a) length of legal proceedings, (b) breadth of subpoena, (c) monitoring compliance, (d) class action, and (e) prospective remedies. The case is rated "high" on substantive entanglement, designated below by the letters SE, when three or more empirical indicators suggest that judicial inquiry will require a ruling on ecclesiastical matters. Two empirical indicators point to the "medium" and one or none to "low" score on substantive entanglement. The same guidelines have been used to identify cases with the "high" (three or more relevant empirical indicators), "medium" (two indicators) and "low" (one or none) levels of procedural entanglement, marked below with the letters PE.

The objection can be raised that the PE/SE test compromises the dichotomous quality of the variables in question, that there might be permissible and impermissible shades of entanglement, that "a moderately entangled government" is like "moderately fresh fish" – both stink to high heaven. Alas, the language the courts have actually used in analyzing the relevant case law suggests that the government's entanglement in church affairs is indeed a matter of degree that does not lend itself readily to an either/or judgment. There will always be cases too close to call, as well as the ones with genuinely unique fact patterns, but the PE/SE model might help determine how the case is to be disposed.

In Table 9, cases found in the quadrants PE3/SE3, PE3/SE2, and PE2/SE3 are supposed to be nonreviewable – they represent a high risk of church-state entanglement and pose an intolerably high threat to the church's free exercise rights. At the opposite pole, cases in the quadrants PE1/SE1, PE2/SE1, and PE1/SE2 can be readily accepted for review without violating the religious employers' First Amendment rights. The middle quadrant – PE2/SE2 – harbors cases that may be held reviewable or nonreviewable, depending on the fact situation which may tip the balance in one direction or the other. Quadrants PE1/SE3 and PE3/SE1 contain cases that score high on one of the measurements and low on the other. If plaintiff is a nonministerial function employee, the balancing of rights favors plaintiff over defendant, and if plaintiff is a pastoral worker, the balance of values goes to the religious employer.

Comparing the actual court holdings on the reviewability of the cases in the grid with the PE/SE test outcomes, we can see that the proposed model is consistent with most court decisions. Ten out of sixteen cases (1, 10, 13, 14, 16, 17, 19, 21, 23, 27) where the courts rejected ministerial function employee Title VII claims and granted defendants' motions to dismiss are situated in the quadrants PE3/SE3, PE3/SE2, PE2/SE3 representing the high-to-moderate entanglement risk and/or high-to-moderate threat to free exercise. Three more cases (6, 8, 22) where the defendants received an exemption from Title VII scrutiny are located in the PE1/SE3 and PE3/SE1 quadrants and score high on one of the two dimensions and low on the other. The remaining three cases

(12, 24, 26) where defendants won the motion to dismiss are in the middle quadrant PE2/SE2. These cases include two claims by ministerial function employees (24, 26) and one by an ordained minister working in a nonpastoral capacity (12). This is where the courts could have taken a closer look at the possibility of a doctrine-neutral and procedurally unentangled inquiry and accepted the case for review. Accepting petition for review is not the same thing as finding merit in the claim and granting plaintiff relief. Still, allowing the trial court to conduct a doctrine-neutral review would increase the clergy's access to the courts and vindicate their equal protection rights.

Most cases where the courts accepted a Title VII claim for judicial review (5, 25, 3, 15, 18, 28) are situated in the PE1/SE1, PE1/SE2, PE2/SE1 quadrants, marking low-to-medium levels of substantive and procedural entanglement. Two more cases are located in the PE1/SE3 quadrant (11, 20), and one each in the PE2/SE2 quadrant (2), the PE2/SE3 quadrant (7), PE3/SE2 quadrant (9), and PE3/SE1 quadrant (4). Two ministerial function employees who managed to convince the courts that their Title VII claims were reviewable (15, 28) are situated in the PE1/SE1 quadrant, designating the fact situation with the lowest threat to free exercise and the lowest risk of entanglement – a decision consistent with the proposed adjudication scheme. The third pastoral plaintiff who won the decision to proceed with the Title VII claim belongs to the PE1/SE3 quadrant which stands for the high procedural and low substantive entanglement fact pattern (4). This is *Dolter v. Wahlert High School*[326] where plaintiff persuaded the court that the material issue of fact existed as to whether the church ban on premarital sex was equally applied to both unmarried men and unmarried women. This is a good example of how the court can lay out a blueprint for a doctrine-neutral trial which is deferential to the church's free exercise rights and sympathetic to the clergy's right to be protected from employment discrimination.

Table 9 shows that not all court judgments that favored Title VII claimants were beyond criticism. The PE3/SE3 quadrant includes *Ninth & O Street Baptist Church v. EEOC.* If plaintiff in this case was a pastoral worker (the court did not rule on plaintiff's ministerial status), then the decision should have favored defendant, given the sweeping nature of the EEOC subpoena, the likelihood of court surveillance, and a religious infraction with which the defendant justified its adverse employment decision. One could also quibble with the decision favoring the plaintiff in *EEOC v. Pacific Press Publishing Ass'n*, where the religious employer justified unequal health insurance provisions by the ecclesiastical reasons favoring male heads of household (7). Otherwise, the balancing of rights in similar cases involving nonministerial employees working for religious organizations should have favored plaintiffs.

Table 9 can also clue pastoral workers on how they can increase their chance to have courts recognize their Title VII petitions, learning in particular from sexual harassment cases. Most such cases involve "but for" cause pretextual hearings where the defendant tries to counter a sexual harassment claim with a religious infraction argument as justification for an adversarial employment decision. Several recent court decisions indicate that a doctrine-neutral

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[326] 483 F. Supp. 266, 271 (N.D. Iowa 1980).

trial can be successfully constructed for pastoral workers as well.[327] Whatever the ultimate outcome, these clergy members know that they have won their day in court and that their rights under Title VII have been vindicated.

Conclusion

Law is a system of preferences and exclusions that privileges some groups while discriminating against others. The history of federal employment statutes testifies to this conclusion. A look at key legislation reveals how federal employment statutes passed by Congress in the last few decades have progressively expanded legal protection to new groups while preserving discrimination classes through exemptions granted to selected employers.[328]

The Civil Rights Act of 1964 was aimed at rooting out employment discrimination based on race, color, religion, sex and national origin, but it excused the U.S. Congress, Judiciary, and Executive Branch from compliance with this lofty goal. It was not until the Civil Rights Act of 1991 that the federal government extended Title VII provisions to its employees. It took years for Title VII protection to cover individuals working for small business with less than fifty, twenty-five, and eventually, fifteen employees. Private membership clubs and overseas enterprises are still exempted from the statute's reach. And federal laws offer no protection to gay and lesbian workers and to employees with unpopular political beliefs.

American clergy that crusaded for the Civil Rights Act did so with the full knowledge that Title VII guarantees of discrimination-free work environment would not extend to the clergy. And while church activists did not receive the blank exemption they expected, clergy is one discrimination class that did not secure protection under Title VII. The ministerial exception exempted religious institution employment decisions involving clergy from Title VII scrutiny on First Amendment grounds.[329] Yet, the actual scope of the ministerial exception and § 702 exemption for religious employers has varied from one judicial holding to another, as the courts have struggled to determine under what circumstances state interest in nondiscrimination overrides the church's rights under the First Amendment.

While the question "whose voice speaks for the church"[330] has been answered conclusively, the question "whose voice speaks for the government" is still a source of contention. In our tripartite political system, Congress legislates, the judiciary adjudicates, and the executive branch enforces statutory mandates as interpreted by the legal authority. One thing that the historical overview of Title VII and § 702 judicial construction makes clear is that the state does not speak in one voice. The three branches of U.S. government have disagreed over the scope of the religious employer exemption.

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[327] *See* Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church, 63 F. Supp. 2d 694, 704 (E.D.N.C. 1999); *see also Bollard*, 196 F.3d at 945; Vigars v. Valley Christian Ctr., 805 F. Supp. 802, 807 (N.D. Cal. 1992).

[328] *See* Table 10.

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

[330] Minker v. Baltimore Annual Conference United Methodist Church, 894 F.2d 1354, 1356-57 (D.C. Cir. 1990).

With one exception,[331] all Title VII claims reviewed in this paper were backed by the Equal Employment Opportunity Commission, an agency operated by the executive branch, yet less than half were accepted for judicial review. This fact indicates that the executive branch sided with Congress in its belief that the state mandate to ensure a workplace free from discrimination trumps the religious employers' rights to do business without state interference.

For its part, Congress saw dissension within its ranks regarding the scope of Title VII. In its 1963 legislative act, the House exempted religious employers from all judicial review under Title VII, but the Senate found this measure unjustified and drastically narrowed the scope of the religious employer exemption.[332] The 1972 amendment broadened the scope of § 702 with respect to religion-based discrimination but kept religious organizations accountable for violations of Title VII prohibitions against race, color, sex and national origin discrimination. The *McClure* court found a way to reconcile § 702 with the First Amendment Religion Clauses,[333] while the *King's Garden* court held Title VII inconsistent with the Establishment Clause prohibiting regulations that favor religion over nonreligion.[334] The Supreme Court settled the issue in 1987 by holding Title VII fully compliant with the Establishment Clause requirements inscribed in the *Lemon* test, extending § 702 to all religious enterprises and immunizing them against religion – based discrimination claims.[335]

In 1989, the pendulum appeared to have swung back toward a broader interpretation of Title VII protections, as the Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith* cast doubt on the need to balance the church's First Amendment rights with state interests articulated by "a neutral, generally applicable regulatory law."[336] Congress countered with the Religious Freedom Restoration Act that required the judiciary to use the *Sherbert* balancing test before it imposed on religious employers statutory regulations infringing on their Free Exercise rights.[337] And once again, the Supreme Court ruled that Congress overstepped the bounds of its authority and declared RFRA unconstitutional.[338]

This multivocal history of Title VII construction need not be construed as political cacophony. Rather, what we witness is a constitutional polyphony mandated by our political system that gives each branch of government its own sphere of authority and assures the ongoing balancing between competing political interests. By the same token, the contradictions in the courts' decisions are

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331 Clapper v. Chesapeake Conference of the Seventh-Day Adventists of the United Methodist Church, 166 F.3d 1208 (Table), 1998 WL 904528 (4th Cir. Dec. 29, 1998).

332 *See supra* Section 1.2.

333 *McClure*, 460 F.2d 553.

334 King's Garden, Inc. v. FCC, 498 F.2d 51, 56 (D.C. Cir. 1974).

335 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

336 494 U.S. 872, 880 (1989).

337 *See supra* section 1.4.

338 It should be noted that the *Smith* holding, though facially neutral, is open to criticism under the *Lemon* rationale, insofar as it reveals a cultural bias against the ritual use of peyote, a generally harmless practice wide-spread in the Native American Church, while a far more destructive substance – alcohol – remains readily available for both ritual and nonritual use to members of the Anglo-Saxon majority culture.

to be seen not as a sign of judicial disarray but as evidence that the U.S. judiciary remains sensitive to competing voices embedded in our constitutional and legislative history. "The life of law has not been logic," said Justice Holmes, "[i]t has been experience."[339] We need to remind ourselves of this dicta as we trace the history of federal statutes, their legislative, judicial, and executive construction. It is incumbent upon legal scholars to identify the tensions endemic to the judicial process and search for ways to make the outcome of judicial reviews transparent and fair. The Case Law Grid Analysis (CLGA) developed in this paper offers a tool for analyzing judicial construction, tracking historical trends in the judicial review process, and devising new ways for assessing civil action's admissibility under the First Amendment.

Building on the strength of the existing typological approaches, the CLGA seeks to avoid their shortcomings. The best typological schemes isolate several juridical variables and organize them into a general taxonomy, which is then overimposed on empirical reality, with individual cases best exemplifying the theoretical model selected from the universe of relevant case law to interpret the theoretical model.[340] Such a methodology offers useful guidelines for navigating among disparate cases, treated as exemplars of standard situations governed by general principles. Powerful and intellectually stimulating, this approach has several weaknesses, insofar as it does not explicate the coding procedures for assigning cases to particular taxons, glosses over inconsistencies in allegedly similar fact situations, uses individual cases as illustrations, rarely spells out parameters of the case law under review, and fails to consider the entire universe of relevant cases.

The CLGA starts with defining the parameters of the case law set and then maps the cases into a conceptual grid. Insofar as such a grid is formed by key juridical variables abstracted from individual cases, the CLGA stalks familiar methodological grounds. It moves beyond ad hoc typology by cross-tabulating information and correlating all juridical variables. This procedure reveals patterns barely discernable when we pick the cases on an ad hoc basis. The CLGA focuses attention on the act of classification and fact pattern identification. While traditional legal research tends to take this act for granted, social scientists have shown that coding procedures entail systematic misattribution reflecting the classifier's biases.[341]

More than a device allowing the analyst to scan many variables at a glance, the grid is a useful tool for discovering hidden patterns, inconsistencies, and paradoxes. Which juridical variables are included in the grid depends on the task at hand. For the present study, I have focused on the variables commonly used in Title VII legal studies and First Amendment jurisprudence devoted to the state-church relationship, such as religious employer type, ministerial status, discrimination claims, and Religion Clause analysis. In addition to these variables, the case law grid tracks charges filed, remedies sought, plaintiffs' gender, the right of women to stand for ordination, and related character-

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[339] OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881).

[340] For representative examples, see Bagni, *supra* note 23; Laycock, *supra* note 23; Buchanan, *supra* note 23.

[341] *See, e.g.*, H. GARFINKEL, STUDIES IN ETHNOMETHODOLOGY (Prentice-Hall 1967). (*See* Part IV, "Some Rules of Correct decisions that Jurors respect.")

istics. There are other juridical variables bearing on case outcome, including court levels, systems, and venues; judges, prosecutors, and attorneys working in the case law field; defendants' and plaintiffs' legal strategies; type and quality of legal representation; institutional resources available to the litigants; evidentiary characteristics distinguishing the case; and many other legal and extra-legal variables which can be used as a powerful predictive tool by the parties to the dispute.

Much of the insight that the CLGA has to offer will probably be known to good legal scholars and practitioners working in a given field, but some surprises may well be in stock, particularly when we deal with large databases and track long time periods. In such cases, a standard CLGA may be complemented by sampling techniques and multivariate analysis designed to track clusters of variables with high interpretive-predictive power. This technique can also be used to study macroscopic trends across legal fields, compare the developments in neighboring areas of jurisprudence, identify areas where the law is unsettled, pinpoint domains requiring additional legal resources, as well as for other lines of legal inquiry.

Finally, CLGA methodology might help scholars develop new legal tests and adjudication models that would aid the judiciary in its never-ending quest for clarity, consistency, predictability, and fairness. The procedural/substantive entanglement inquiry – the PE/SE model for the First Amendment analysis developed in this paper as an alternative to the traditional *Lemon* and *Sherbert* tests – is an example of what CLGA methodology has to offer legal research. While practical value of this test is far from certain, it is my hope that the approach suggested in this paper will stimulate further work in this vital area of First Amendment jurisprudence.

TABLE 1. LIST OF CASES

No	Case Name	Citation	Court	Year
1	*McClure v. Salvation Army*	460 F.2d 553	5th Cir.	1972
2	*King's Garden, Inc. v. Fed. Communication Comm'n*	498 F.2d 51	D.C. Cir.	1974
3	*Whitney v. Greater New York Corp. of Seventh-day Adventists*	401 F. Supp. 1363	S.D.N.Y.	1975
4	*Dolter v. Wahlert High Sch.*	483 F. Supp. 266	N.D. Iowa	1980
5	*EEOC v. Mississippi College*	626 F.2d 477	5th Cir.	1980
6	*EEOC v. Southwestern Baptist Theological Seminary*	651 F.2d 277	5th Cir.	1981
7	*EEOC v. Pacific Press Publ'g Ass'n*	676 F.2d 1272	9th Cir.	1982
8	*Feldstein v. Christian Science Monitor*	555 F. Supp. 974	D. Mass.	1983
9	*Ninth & O Street Baptist Church v. EEOC*	616 F. Supp. 1231	W.D. Ky.	1985
10	*Rayburn v. Gen. Conference of Seventh-day Adventists*	772 F.2d 1164	4th Cir.	1985
11	*EEOC v. Fremont Christian Sch.*	781 F.2d 1362	9th Cir.	1986
12	*Carter v. Baltimore Ann. Conference*	1987 WL 18470 SSH	D.D.C.	1987
13	*Maguire v. Marquette Univ.*	814 F.2d 1213	7th Cir.	1987
14	*Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*	483 U.S. 327, 107 S.Ct. 2862	U.S.	1987
15	*Nigrelli v. Catholic Bishop of Chicago*	1991 WL 36712	N.D. Ill.	1991
16	*Sharon v. St. Luke's Episcopal Presbyterian Hosp.*	929 F.2d 360	8th Cir.	1991
17	*Little v. Wuerl*	929 F.2d 944	3d Cir.	1991
18	*Elbaz v. Congregation Beth Judea, Inc.*	812 F. Supp. 802	N.D. Ill.	1992
19	*EEOC v. Presbyterian Ministries, Inc.*	788 F. Supp. 1154	W.D. Wash.	1992
20	*Vigars v. Valley Christian Ctr. of Dublin, California*	805 F. Supp. 802	N.D. Cal.	1992
21	*Young v. Northern Illinois Conf. of United Methodist Church*	21 F.3d 184	7th Cir.	1994
22	*Van Osdol v. Vogt*	908 P.2d 1122	Colo.	1996
23	*EEOC v. Catholic Univ. of America*	83 F.3d 455	D.C. Cir.	1996
24	*Clapper v. Chesapeake Conference of Seventh-day Adventists and Gruesebeck*	1998 WL 904528	4th Cir. (Md.)	1998
25	*Smith v. Raleigh Dist. of the North Carolina Conference of the United Methodist Church*	63 F. Supp. 2d 694	E.D.N.C.	1999
26	*Combs v. Cen. Texan Ann. Con. of the United Methodist Church*	173 F.3d 343	5th Cir	1999
27	*EEOC v. Roman Catholic Diocese of Raleigh, North Carolina*	48 F. Supp. 2d 505	E.D.N.C.	1999
28	*Bollard v. California Province of the Soc'y of Jesus*	196 F.3d 940	9th Cir.	1999

TABLE 2. CASE SUMMARIES

No	Case Name	Summary
1	*McClure*	An ordained minister brought a civil action against her church alleging sex discrimination as evidenced by the smaller salary and fewer benefits provided to the female officers. The court dismissed plaintiff's suit, holding that the relationship between a church and its ministers is its lifeblood, that it is the means by which the church fulfills its goals, and that the application of Title VII to the employment relationship under the circumstances would encroach on religious freedom in violation of the First Amendment.
2	*King's Garden*	A non-profit, interdenominational radio station licensee filed petition for review of the FCC's order to stop religion-based employment discrimination. The court found the FCC's regulatory scheme to be sound and refused to grant defendant the exemption under § 702 in a strongly worded statement that questioned the statute's constitutionality.
3	*Whitney*	A white typist-receptionist brought suit against her church alleging that she had been discharged because of her relationship with a black man. The court denied the defendant's motion to dismiss, holding that the alleged discrimination was not based on any religious doctrine and thus did not exempt the employer from Title VII scrutiny.
4	*Dolter*	An unmarried English teacher at a sectarian high school alleged sex discrimination after she was dismissed due to her pregnancy. The court refused to grant summary judgment holding that an issue of material fact existed as to whether the sectarian school was applying its ban on premarital sex equally to male and female employees.
5	*Mississippi College*	A white female instructor sought to enforce a subpoena issued by the E.E.O.C. after the College failed to hire her for a full-time position. The court held that plaintiff had standing to pursue her claim of racially motivated hiring and sex discrimination and that prosecuting these Title VII claims would not abridge the religious institution's constitutional rights.
6	*Southwestern Baptist*	The E.E.O.C. brought suit against the seminary demanding that it file a Higher Education Staff Information (EEO-6) report. The court held that the seminary may refuse to file forms for faculty and staff members whose primary job function was ministerial but had to supply the requisite information about support and administrative employees whose primary job content was not religious.
7	*Pacific Press*	An editorial secretary working for a non-profit publishing house affiliated with the Seventh-Day Adventist Church brought a sex discrimination suit against her employer. The court held that the application of Title VII did not violate the First Amendment since she was not a minister and her duties did not entail ministerial responsibilities.
8	*Feldstein*	Plaintiff filed an employment discrimination suit against a sectarian publishing house alleging that his job application was summarily dismissed because he was not a Church member. The court held that since the newspaper operated for a religious purpose, it was permissible for the Church to require all applicants to be Church members.
9	*Ninth & O*	A teacher was discharged from her position at a church-sponsored Early Childhood Development Center because she failed to join the church. Plaintiff filed a complaint with the E.E.O.C., charging retaliatory discharge after she contacted the E.E.O.C. office regarding the church's personnel policy. The court held that the E.E.O.C had the right to conduct an inquiry into whether the Center's policy was inconsistent with Title VII.
10	*Rayburn*	A white member of the Seventh-Day Adventist Church denied a pastoral position brought action against her church, alleging sex discrimination and race discrimination stemming from her association with black persons and black religious organizations. The court held that the ministerial exception shields the religious employer from Title VII scrutiny, which would violate the defendant's free exercise rights and result in excessive church-state entanglement.

11	*Fremont*	A married female school employee brought a civil action against a church which offered health insurance coverage to employees who were the male heads of households, but denied it to married female employees. The court held the church liable and allowed suit to proceed since the required Title VII inquiry would not interfere with the church's constitutional rights.
12	*Carter*	A Methodist minister serving in a non-religious administrative capacity filed suit alleging race and color discrimination after he was disciplined and subsequently dismissed by his employer. The court held for the defendant, stating that adjudicating the employment dispute between the church and its minister would entangle the government in church affairs.
13	*Maguire*	A woman denied promotion to associate professorship in theology at Marquette University filed a Title VII claim charging sex discrimination and a supplementary claim alleged that plaintiff was treated unfairly because of her views on abortion. The court dismissed the suit after being satisfied that the defense had nondiscriminatory reasons for denying the promotion.
14	*Amos*	A building engineer at the Deseret Gymnasium, a Mormon Church nonprofit facility, was discharged after he failed to qualify as a church member in good standing. Plaintiff brought a class-action suit against his employer alleging religious discrimination. The Supreme Court granted the employer § 702 exemption, holding that courts should not second guess churches as to which of their activities are genuinely religious and that churches should be allowed to discriminate in favor of coreligionists in their hiring practices.
15	*Nigrelli*	A female principal at St. Mary Star of the Sea Parish school brought an action alleging sexual harassment and wrongful constructive discharge. The court denied the defendant's motion for summary judgment, holding that the termination could have been a pretext for sex discrimination and that a Title VII inquiry was not barred by the First Amendment considerations, since it could be conducted without reference to the church doctrine.
16	*Scharon*	An ordained priest serving as chaplain at a Presbyterian hospital was fired for violating canonical law. Plaintiff sued, charging age and gender discrimination. The court granted the hospital's motion for summary judgment, holding that the hospital was a religious organization and a chaplain's duties were primarily ministerial.
17	*Little*	A Catholic parochial school refused to renew a job contract with a teacher after she remarried without following the canonical process required by the church. Plaintiff filed suit alleging religious discrimination. The court found the claim to be without merit, holding that the church was within its rights to require that its employees conform to the canonical standards.
18	*Elbaz*	An education director in a religious day school alleged sex and national origin discrimination after the Congregation refused to renew her employment contract following her complaint about the employer's tardy payments to her retirement plan. Going against precedent involving religious-function employees, the court denied the Congregation's motion to dismiss, holding that Title VII bars discrimination based on sex, race, or national origin.
19	*Presbyterian Ministries*	A receptionist working at a Christian church-operated retirement home was not allowed to wear her Muslim headgear. Following her discharge, plaintiff alleged constructive wrongful termination. The court granted defendant the § 702 exemption, holding that Title VII did not require a religious organization to accommodate religious symbols of another faith.
20	*Vigars*	An unmarried librarian at a parochial school was fired from her job after she became pregnant. Plaintiff brought Title VII action charging sex discrimination. The court denied defendant's motion for summary judgment, holding that the application of Title VII would not require an ongoing scrutiny of school operations and thus risk excessive church-state entanglement.

21	*Young*	An African-American woman serving as probationary minister sued her church for race and sex discrimination, as well as retaliation, after the church denied her a promotion. The court held for the defense, asserting that Title VII inquiry would violate the religious employer's First Amendment rights.
22	*Van Osdol*	A female minister sued her supervisor and church, alleging that her novitiate minister license was rescinded and the prior agreement allowing her to open a church was terminated following her complaint that she was sexually abused by her supervisor. The court held that her suit against the church was barred by the First Amendment that allows religious organizations to hire and fire clergy at will.
23	*Catholic University*	A Catholic nun working as an associate professor at Catholic University brought a Title VII sex discrimination claim against her employer after the Department of Cannon Law denied her tenure. After establishing that plaintiff's duties were ecclesiastical in nature, the court held that the Title VII claim was barred by the First Amendment and by RFRA.
24	*Clapper*	A white elementary school teacher at a church-run school brought several claims, including a Title VII action alleging discriminatory discharge and failure to transfer on account of race. The court held that the enforcement of plaintiff's claim would infringe on the employer's Free Exercise rights and thus should be dismissed.
25	*Smith*	A secretary and a receptionist at a church filed claims against the Senior Pastor and the church alleging that they were sexual harassed and that the church failed to stop the pastor's offensive behavior following the complaint. The court denied defendant's motion to dismiss on substantive and procedural grounds, stating that the church itself condemned sexual harassment and that the jury could evaluate plaintiffs' claims without engaging church doctrine and by applying a neutral law to the case at bar.
26	*Combs*	A female pastor alleged sex discrimination after she was terminated from her position following her return from a maternity leave. The court dismissed the case, holding that the First Amendment barred judicial inquiry into the Church's administrative affairs related to ministerial appointments.
27	*Roman Catholic Diocese*	A Director of Music Ministry alleged sex discrimination after she was demoted and reassigned new duties. The court granted the defendant's motion to dismiss, holding that governmental intrusion into a church employment decision would lead to excessive church-state entanglement and violate the Free Exercise Clause.
28	*Bollard*	A seminary student holding a novitiate license alleged that he was sexually harassed for several years by his superiors. After applying the *Lemon* and *Sherbert* tests, the court vacated the lower court decision to dismiss, holding that plaintiff's Title VII claim would not violate the church's right under the Entanglement and the Free Exercises Clauses because the plaintiff did not seek reinstatement and because the jury could evaluate the claim without weighing doctrinal matters.

TABLE 3. MINISTERIAL EXCEPTION AND TITLE VII CLAIMS CASE LAW GRID ANALYSIS

	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Key Juridical Variables and Test Questions	*McClure* 5th Cir. 1972	*King's Garden* D.C. 1974	*Whitney* S.D.N.Y. 1975	*Dolter* N.D. Iowa 1980	*Missis-sippi College* 5th Cir. 1980	*South-western Baptist* 5th Cir. 1981	*Pacific Press* 9th Cir. 1982	*Feldstein* D. Mass. 1983	*Ninth & O* W.D. Ky. 1985	*Rayburn* 4th Cir. 1985	*Fremont* 9th Cir. 1986	*Carter* D.C. 1987	*Maguire* 7th Cir. 1987	*Amos* U.S. 1987
Religious Office Is plaintiff working for religious office?	YES	YES	NO	YES	NO	--	YES	YES	YES	YES	YES	YES	YES	NO
Ministerial Ordination Is plaintiff an ordained minister?	YES	NO	NO	NO	NO	--	NO	NO	NO	NO	NO	YES	NO	NO
Ministerial Function Are plaintiff's duties primarily religious (pastoral) in nature?	YES	NO	NO	YES	NO	--	NO	YES	--	YES	NO	NO	YES	NO
Claim Under Title VII Does plaintiff allege religious discrimination?	NO	YES	NO	NO	NO	NO	NO	YES	YES	NO	NO	NO	NO	YES
Claim Under Title VII Does plaintiff allege racial discrimination?	NO	NO	YES	NO	YES	NO	NO	NO	NO	YES	NO	YES	NO	NO
Claim Under Title VII Does plaintiff allege plain sex discrimination?	YES	NO	NO	YES	YES	NO	YES	NO	NO	YES	YES	NO	YES	NO
Claim Under Title VII Does plaintiff allege sexual harassment?	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Free Exercise Do free exercise rights outweigh state interests?	YES	NO	NO	NO	NO	YES/NO	NO	YES	NO	YES	NO	YES	--	YES
Entanglement Does the judicial inquiry entangle church and state?	--	NO	--	NO	NO	YES/NO	NO	YES	NO	YES	NO	YES	--	YES
Case Outcome Is exemption from Title VII scrutiny granted?	YES	NO	NO	NO	NO	YES/NO	NO	YES	NO	YES	NO	YES	YES	YES

	15	16	17	18	19	20	21	22	23	24	25	26	27	28
Key Juridical Variables and Test Questions	*Nigrelli* N.D. Ill. 1991	*Scharon* 8th Cir. 1991	*Little* 3^{d} Cir. 1991	*Elbaz* N.D. Ill. 1992	*Presb. Ministries* W.D. Wash. 1992	Vigars N.D. Cal. 1992	*Young* 7th Cir. 1994	*Van Osdol* Col. 1996	*Catholic Univ.* D.C. 1996	*Clapper* 4th Cir. 1998	*Smith* E.D.N.C. 1999	*Combs* D.C. 1999	*Roman Catholic Diocese* 5th Cir. 1999	*Bollard* 9th Cir. 1999
Religious Office Is plaintiff working for religious office?	YES	YES	YES	YES	YES	NO	YES	YES	YES	YES	YES	YES	YES	YES
Ministerial Ordination Is plaintiff an ordained minister?	NO	YES	NO	NO	NO	NO	YES	YES	NO	NO	NO	YES	NO	NO
Ministerial Function Are plaintiff's duties primarily religious (pastoral) in nature?	YES	YES	YES	NO	NO	NO	YES	YES	YES	YES	NO	YES	YES	YES
Claim Under Title VII Does plaintiff allege religious discrimination?	NO	NO	YES	NO	YES	NO	NO	NO	NO	NO	NO	NO	NO	NO
Claim Under Title VII Does plaintiff allege race discrimination?	NO	NO	NO	NO	NO	NO	YES	NO	NO	YES	NO	NO	NO	NO
Claim Under Title VII Does plaintiff allege plain sex discrimination?	NO.	YES	NO	YES	NO	YES	YES	NO	YES	NO	NO	YES	YES	NO
Claim Under Title VII Does plaintiff allege sexual harassment?	YES	NO	NO	NO	NO	NO	NO	YES	NO	NO	YES	NO	NO	YES
Free Exercise Do free exercise rights outweigh state interests?	YES	YES	--	NO	YES	NO	YES	YES	YES	YES	NO	YES	YES	NO
Entanglement Does the judicial inquiry entangle church and state?	--	YES	YES	NO	--	NO	YES	YES	YES	YES	NO	YES	YES	NO
Case Outcome Is exemption from Title VII scrutiny granted?	NO	YES	YES	NO	YES	NO	YES	YES	YES	YES	NO	YES	YES	NO

TABLE 4. MINISTERIAL EXCEPTION AND TITLE VII CLAIMS CASE LAW GRID ANALYSIS

	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Key Juridical Variables and Test Questions	*McClure* 5th Cir. 1972	*King's Garden* D.C. 1974	*Whitney* S.D.N.Y. 1975	*Dolter* N.D. Iowa 1980	*Missis-sippi College* 5th Cir. 1980	*South-western Baptist* 5th Cir. 1981	*Pacific Press* 9th Cir. 1982	*Feldstein* D. Mass. 1983	*Ninth & O* W.D. Ky. 1985	*Rayburn* 4th Cir. 1985	*Fremont* 9th Cir. 1986	*Carter* D.C. 1987	*Maguire* 7th Cir. 1987	*Amos* U.S. 1987
Ministerial Function Are plaintiff's duties primarily religious (pastoral) in nature?	YES	NO	NO	YES	NO	--	NO	YES	--	YES	NO	YES	YES	NO
Plaintiff's Gender Is plaintiff a female?	YES	NO	YES	YES	YES	--	YES	NO	YES	YES	YES	NO	YES	NO
Type of Workplace Does plaintiff work in a church/media office?	YES	YES					YES	YES		YES		YES		
Type of Workplace Does plaintiff work for a college or university?					YES	YES							YES	
Type of Workplace Does plaintiff work in a parochial school?				YES					YES		YES			
Type of Workplace Does plaintiff work for a secular office?			YES											YES
Remedies Sought Does plaintiff seek reinstatement?	YES	--	--	YES	--	--	YES	YES	YES	--	NO	YES	YES	YES
Remedies Sought Does plaintiff seek punitive damages?	YES	--	YES	NO	--	--	--	--	--	--	NO	NO	NO	NO
Lower Court Decision Does the court affirm lower court judgment?	YES	YES	--	--	NO	YES/NO	YES	--	--	YES	YES	--	YES	NO
Case Outcome Is exemption from Title VII scrutiny granted?	YES	NO	NO	NO	NO	YES/NO	NO	YES	NO	YES	NO	YES	YES	YES

	15	16	17	18	19	20	21	22	23	24	25	26	27	28
Key Juridical Variables and Test Questions	*Nigrelli* N.D. Ill. 1991	*Scharon* 8th Cir. 1991	*Little* 3d Cir. 1991	*Elbaz* N.D. Ill. 1992	*Presb. Ministries* W.D. Wash. 1992	Vigars N.D. Cal. 1992	*Young* 7th Cir. 1994	*Van Osdol* Col. 1996	*Catholic Univ.* D.C. 1996	*Clapper* 4th Cir. 1998	*Smith* E.D.N.C. 1999	*Combs* D.C. 1999	*Roman Catholic Diocese* 5th Cir. 1999	*Bollard* 9th Cir. 1999
Ministerial Function Are plaintiff's duties primarily religious (pastoral) in nature?	YES	YES	YES	NO	NO	NO	YES	YES	YES	YES	NO	YES	YES	YES
Plaintiff's Gender Is plaintiff a female?	YES	YES	YES	YES	YES	YES	YES	YES	YES	NO	YES	YES	YES	NO
Type of Workplace Does plaintiff work in a church/media office?		YES					YES	YES			YES	YES	YES	YES
Type of Workplace Does plaintiff work for a college or university?									YES					
Type of Workplace Does plaintiff work in a parochial school?	YES		YES	YES		YES				YES				
Type of Workplace Does plaintiff work in a secular office?					YES									
Remedies Sought Does plaintiff seek reinstatement?	--	YES	YES	NO	NO	--	YES	YES	YES	YES	NO	--	YES	NO
Remedies Sought Does plaintiff seek punitive damages?	YES	NO	NO	--	YES	--	YES	YES	--	NO	YES	--	--	YES
Lower Court Decision Does the court affirm lower court judgment?	--	YES	YES	--	--	--	YES	--	YES	YES	YES/NO	YES	YES	NO
Case Outcome Is exemption from Title VII scrutiny granted?	NO	YES	YES	NO	YES	NO	YES	YES	YES	YES	NO	YES	YES	NO

TABLE 5. MINISTERIAL EXCEPTION AND PLAIN SEX DISCRIMINATION CASE LAW GRID ANALYSIS

	1	4	5	7	10	11	13	16	18	20	21	23	26	27
Key Juridical Variables and Test Questions	*McClure* 5th Cir. 1972	Dolter N.D. Iowa 1980	*Missis-sippi College* 5th Cir. 1980	*Pacific Press* 9th Cir. 1982	*Rayburn* 4th Cir. 1985	*Fremont* 9th Cir. 1986	*Maguire* 7th Cir. 1987	*Scharon* 8th Cir. 1991	*Elbaz* N.D. Ill. 1992	Vigars N.D. Cal. 1992	*Young* 7th Cir. 1994	*Catholic Univ.* D.C. Cir. 1996	*Combs* D.C. 1999	*Roman Catholic Diocese* 5th Cir. 1999
Ministerial Function Are plaintiff's duties primarily religious (pastoral) in nature?	YES	YES	NO	NO	YES	NO	YES	YES	NO	NO	YES	YES	YES	YES
Wrongful Discharge Does plaintiff allege wrongful constructive discharge?	YES	YES	NO	YES	NO	NO	NO	YES	YES	YES	YES	--	YES	NO
Retaliation Does plaintiff allege retaliation?	YES	NO	NO	YES	YES	NO	NO	NO	YES	NO	YES	--	YES	YES
Breach of Contract Does plaintiff allege breach of contract?	NO	NO	NO	--	NO	NO	NO	YES	YES	YES	YES	NO	NO	NO
Compensatory Damages Does plaintiff seek compens. damages?	YES	YES	--	--	--	YES	NO	YES	YES	YES	YES	--	YES	--
Punitive Damages Des plaintiff seek punitive damages?	YES	NO	--	--	--	NO	NO	NO	--	--	YES	--	--	--
Reinstatement Does plaintiff seek reinstatement?	YES	NO	NO	NO	YES	NO	YES	YES	NO	--	YES	YES	--	YES
Class Action Remedies Does plaintiff seek class-action relief?	YES	NO	YES	NO	YES	--	NO	NO	NO	NO	--	NO	--	NO
Doctrine-Based Gender Preference Does current church doctrine allow ordination of women?	YES	NO	NO	YES	NO	NO	YES	YES	--	--	YES	NO	YES	NO
Substantive Entanglement Does the adjudication entangle the court in doctrinal matters?	YES	NO	NO	NO	YES	NO	YES	YES	NO	NO	YES	YES	YES	YES
Procedural Entanglement Does the judicial inquiry impose an undue burden on religious employer?	YES	NO	NO	NO	YES	NO	YES	YES	NO	NO	YES	YES	YES	YES
Case Outcome Is exemption from Title VII scrutiny granted?	YES	NO	NO	NO	YES	NO	YES	YES	NO	NO	YES	YES	YES	YES

TABLE 6. MINISTERIAL EXCEPTION AND SEXUAL HARASSMENT CASE LAW GRID ANALYSIS

Key Juridical Variables and Test Questions	***Nigrelli*** N.D. Ill. 1991	***Black*** Minn. 1991	***Van Osdol*** Col. 1996	***Smith*** E.D.N.C. 1999	***Bollard*** 9th Cir. 1999
Ministerial Function Are plaintiff's duties primarily religious (pastoral) in nature?	YES	YES	YES	NO	YES
Wrongful Constructive Discharge Does plaintive allege wrongful constructive discharge?	YES	YES	YES	YES	YES
Retaliation Does plaintive allege retaliation?	YES	YES	YES	YES	YES
Breach of Contract Does plaintiff allege breach of contract?	YES	YES	YES	NO	YES
Compensatory Damages Does plaintiff seek compensatory damages?	NO	YES	YES	YES	YES
Punitive Damages Does plaintiff seek punitive damages?	YES	YES	YES	YES	YES
Reinstatement Does plaintiff seek reinstatement?	--	NO	YES	NO	NO
Class Action Remedies Does plaintiff seek class-action remedies?	NO	NO	NO	NO	NO
Substantive Entanglement Does the adjudication presuppose ruling on doctrinal matters?	NO	YES/NO	YES	NO	NO
Procedural Entanglement Does the judicial inquiry impose an undue burden?	NO	YES/NO	YES	NO	NO
Case Outcome Is exemption from Title VII scrutiny granted?	NO	YES/NO	YES	NO	NO

TABLE 7. FREE EXERCISE AND ESTABLISHMENT CLAUSES

(Bolded Case Numbers Indicate Where Ministerial Exception Has Been Granted; Asterisks Mark a Ministerial Function Employee, and Underlined Numbers Designate a Religion-Based Discrimination Title VII Claim)

<table>
<tr><td colspan="2" rowspan="2"></td><td colspan="2">Risk of Entanglment</td></tr>
<tr><td>High</td><td>Low</td></tr>
<tr><td rowspan="2">Threat to Free Exercise</td><td>High</td><td>1*, <u>8</u>*, 10*, 12*, <u>14</u>, 16*, <u>17</u>*, <u>19</u>, 21*, 22*, 23*, 24*, 26*, 27*</td><td></td></tr>
<tr><td>Low</td><td></td><td><u>2</u>, 4*, 5, 6, 7
<u>9</u>, 11, 15*, 18
20, 25, 28*</td></tr>
</table>

TABLE 8. *LEMON* AND *SHERBERT* TESTS

	LEMON TEST (L) **Establishment Clause**	*SHERBERT* TEST (S) **Free Exercise Clause**
1st Prong	The statute "must have a secular legislative purpose" L1. Statute Must Be **Secular in Purpose**	Consider "the magnitude of the statute's impact upon the exercise of the religious belief" S1. Regulation Must **Not Impede Free Exercise**
2nd Prong	The statute's "principal or primary effect must be one that neither advances nor inhibits religion" L2. Statute Must Be **Neutral in Stance**	Consider "the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief" S2. Regulation Must **Serve Compelling State Interest**
3rd Prong	The statute "must not foster 'an excessive government entanglement with religion'."[i] L3. Statute Must Be **Entanglement-free in Outcome**	Consider "the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state."[ii] S3. Regulation Must **Be Least Restrictive Enforcement Option**

I. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

II. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (*citing Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963)).

TABLE 9. PROCEDURAL AND SUBSTANTIVE ENTANGLEMENT

(Bolded Case Numbers Indicate Where Ministerial Exception Has Been Granted and Asterisks Mark a Ministerial Function Employee)

		Risk of Procedural Entanglement (PE)		
		High (3)	Medium (2)	Low (1)
Risk of Substantive Entanglement (SE)	High (3)	**1***, 9, **10***, **14**,	7, **16***, **17***, **19**, **21***, **23***, **27***	**8***, 11, 20, **22***
	Medium (2)	**13***	2, **12**, **24***, **26**,*	
	Low (1)	4*, **6***	5, 25	3, 15*, 18, 28*

	SUBSTANTIVE ENTANGLEMENT	PROCEDURAL ENTANGLEMENT
Empirical Indicators	A. Evaluating church's administrative decisions	A. Length of legal proceedings
	B. Judging the employer's good faith	B. Breadth of subpoena
	C. Dealing with conduct grounded in church doctrine	C. Monitoring compliance
	D. Weighing the extent to which plaintiff embodies church teachings	D. Class action suit
	E. Pretextual defense	E. Prospective remedies

TABLE 10. PROTECTION UNDER FEDERAL EMPLOYMENT STATUTES*

CATEGORIES PROTECTED UNDER STATUTE	CRA (1964)	ADEA (1967)	PDA (1978)	ADA (1990)	CRA (1991)
Race	Yes				Yes
Color	Yes				Yes
Religion	Yes				Yes
National Origin	Yes				Yes
Sex	Yes				Yes
Age		Yes			
Pregnancy			Yes		
Disability				Yes	
EMPLOYERS EXEMPTED FROM STATUTE	**CRA (1964)**	**ADEA (1967)**	**PDA (1978)**	**ADA (1990)**	**CRA (1991)**
U.S. Government	Yes	No	No	No	No
Religious Institutions (partially exempted)	Yes	Yes	Yes	Yes	Yes
Private Membership Clubs	Yes	No	No	No	Yes
Enterprises Outside U.S.	Yes	Yes	Yes	Yes	Yes
Small Businesses (less than 50 employees)	No	Yes	No	No	No
Small Businesses (less than 25 employees)	Yes	Yes	No	No	No
Small Businesses (less than 15 employees)	Yes	Yes	Yes	Yes	Yes

*__CRA__—Civil Rights Act; **ADEA**—Age Discrimination in Employment Act; **PDA**—Pregnancy Discrimination Act; **ADA**—Americans With Disabilities Act.

TABLE 11. MINISTERIAL EXCEPTION AND TITLE VII CLAIMS: SUMMARY TABLE CASE LAW GRID ANALYSIS

Key Juridical Variables and Test Questions	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28
Religious Office Is plaintiff working for religious office?	Y	Y	N	Y	N	--	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	N	Y	N	Y	Y	Y	Y	N	Y	Y	Y
Ministerial Ordination Has plaintiff been ordained as minister?	Y	N	N	N	N	--	N	N	N	N	N	Y	N	N	N	Y	N	N	N	N	Y	Y	N	N	N	Y	N	N
Ministerial Function Are plaintiff's duties primarily religious (ministerial) in nature?	Y	N	N	Y	N	--	N	Y	--	Y	N	N	Y	N	Y	Y	Y	Y	N	N	Y	Y	Y	Y	N	Y	Y	Y
Claim Under Title VII Does plaintiff allege religious discrimination?	N	Y	N	N	Y	N	N	Y	Y	N	N	N	Y	Y	N	N	Y	N	Y	N	N	N	N	N	N	N	N	N
Claim Under Title VII Does plaintiff allege racial discrimination?	N	N	Y	N	N	N	N	N	N	Y	N	Y	N	N	N	N	N	N	N	N	Y	N	N	Y	N	N	N	N
Claim Under Title VII Does plaintiff allege plain sex discrimination?	Y	N	N	Y	Y	N	Y	N	N	Y	N	N	Y	N	N	Y	N	Y	N	Y	Y	N	Y	N	N	Y	Y	N
Claim Under Title VII Does plaintiff allege sexual harassment?	N	N	N	N	N	N	N	N	N	N	N	N	N	N	Y	N	N	N	N	N	N	Y	N	N	Y	N	N	Y
Free Exercise Do free exercise rights override state interests?	Y	N	--	N	N	Y/N	N	Y	N	Y	N	Y	--	Y	--	Y	--	N	--	N	Y	Y	Y	Y	N	Y	Y	N
Entanglement Does the judicial inquiry entangle church and state?	--	N	N	N	N	Y/N	N	Y	N	Y	N	Y	--	Y	N	Y	Y	N	Y	N	Y	N	Y	Y	N	Y	Y	N
Case Outcome Is exemption from Title VII scrutiny granted?	Y	N	N	N	N	Y/N	N	Y	N	Y	N	Y	Y	N	N	Y	Y	N	Y	Y	Y	Y	Y	Y	N	Y	Y	N