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Leaving Secular Rights on the Church Steps: The Court of Appeals "Tinkers" with the Church-Minister Employment Relationship

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I. INTRODUCTION

In recent years, claims of sexual harassment in the workplace have increased. This increase has occurred, in part, because a larger number of women have entered once male-dominated professions. In the realm of religion, the ministry has traditionally been a male-

dominated profession. Notwithstanding this fact, women, more than ever, are entering the ranks of the clergy. Currently, over 20,000 women serve among the 250,000 Protestant clergy in the United States.

As more women enter what was once an all-male bastion, sexual harassment of female clergy members, too, has increased. Both federal and state civil rights laws recognize sexual harassment as a form of gender discrimination. However, civil courts have been reluc-


3. In 1971, there were only 3358 women enrolled in Christian seminaries in North America. Id. During the 1990-1991 school year, more than 50,000 students were enrolled in seminary programs; approximately 25,000 of those students were enrolled in the Masters of Divinity programs which lead to ordination. Women entrants accounted for twenty-four percent of the students enrolled in Masters of Divinity programs. Id. The number of men enrolled in seminaries has declined steadily since 1975. Id.


5. A study by the United Methodist Church's General Council on Ministries found that seventy-seven percent of its female clergy have reported some form of sexual harassment. Id. Of this seventy-seven percent, forty-one percent were harassed by fellow clergy members. Id. In a 1987 survey, conducted by the United Church of Christ, forty-three percent of the female clergy reported incidents of sexual harassment, either by fellow clergy or parishioners. No Sanctuary from Sex Bias, CHI. TRIB., Jan. 15, 1987, at C2. Rev. Judith Gerlitz, a pastor of the Lutheran Church of America (ELCA), asserts that "the church has done little" about sexual harassment. Lutherans Allow Dissent in Pronouncements, N.Y. TIMES, Aug. 27, 1989, Section 1, at 22. However, at its first church-wide assembly, the ELCA stated that it "will not tolerate any form of sexual abuse or harassment by any of its personnel." Id.


In addition, the Minnesota Human Rights Act defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct of a sexual nature . . . ." MINN. STAT. § 363.01, subd. 41 (1990). During the Anita Hill-Clarence Thomas confrontation, the Minnesota Department of Human Rights developed a list to inform people what sort of conduct may constitute sexual harassment in the workplace. The list includes:

1. Unwanted or unnecessary touching;
2. Grabbing;
3. Cornering;
4. Kissing or hugging;
5. Sexual remarks or suggestions;
6. Unwanted sexual compliments;
7. Pornographic pictures or stories, dirty jokes;
8. Offensive displays of sex-related objects;
tant to recognize discrimination claims brought by clergy members against the religious institutions that employ them.8

Claims of sexual harassment against religious institutions have been relatively rare.9 However, a recent Minnesota Court of Appeals decision has opened the door a bit wider for future litigants. In Black v. Snyder,10 the court of appeals departed from clearly established precedent and held a church accountable for the misconduct of its ministers.11 The Black court allowed a female minister to pursue a

9. Demanding sexual favors accompanied by implied or overt threats, such as those regarding conditions of employment;
10. Repeated belittling, demeaning, insulting remarks because of sex;
11. Unequal application of performance standards, discipline or work rules because of sex;
12. Sabotaging an employee’s character, reputation, work efforts because of sex;
13. Unequal assignment of the “dirty work,” less responsible or less challenging duties not based on abilities, because of sex.


7. Throughout this Note, the term “civil courts” shall refer to federal and state courts to distinguish them from ecclesiastical courts.

8. See, e.g., Little v. Wuerl, 929 F.2d 944, 947 (3d Cir. 1991) (finding that “courts have consistently found that Title VII does not apply to the relationship between ministers and the religious organizations that employ them, even where the discrimination is alleged on the basis of race or sex.”).


In one widely reported case, a church disciplinary body considered a claim for sexual harassment. Laura Sessions-Stepp and Molly Sinclair, United Methodist Church Puts Minister on Trial on Sex Charges, Wash. Post, Sept. 10, 1985, at C1. A United Methodist minister was charged with “immorality and disobedience to the order and discipline of the United Methodist Church,” for alleged sexual harassment of five female employees. Id. He was tried pursuant to procedures in the Church’s Book of Discipline, by a court of thirteen ministers. Id. He was convicted for disobeying church law, but acquitted of the immorality charge. Laura Sessions-Stepp, Methodist Minister Guilty of One Charge, Wash. Post, Sept. 18, 1985, at A1. The minister was suspended from the ministry for three years. Id.


11. Id.
sexual harassment claim against the Lutheran church that employed her and rejected the church's argument that the claim was barred by federal and state guarantees of religious freedom. In applying discrimination legislation to a religious institution, the court faces the dilemma of balancing the church's right to religious freedom against the individual's right to be free from discrimination. Such conflicts are not easily resolved.

This Comment will discuss the application of employment discrimination legislation to religious institutions and examine the underlying constitutional principles implicated in this context. Further, this Comment will examine the reasoning of the Black decision and analyze subsequent Minnesota developments. This Comment concludes that when a member of the clergy alleges gender discrimination, the church's right to religious freedom should take precedence over the individual's right to be free from discrimination.

II. HISTORY OF THE LAW

The First Amendment of the United States Constitution mandates the separation of church and state. Despite the seemingly inviolate language of the constitution, this "wall of separation" is not impenetrable. Since the adoption of the constitution, changes in American society have made it virtually impossible for government and religion to occupy completely separate spheres. The expansion by

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12. Id. at 718.
13. The religion clause provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.
14. The Supreme Court has used this phrase to describe the relationship between government and religion: Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State. Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting 26 THE WRITINGS OF THOMAS JEFFERSON 281-82 (Andrew A. Lipscomb, ed., 1905) containing a letter from Thomas Jefferson to the Danbury Baptist Association dated January 1, 1802).
15. See, e.g., Walz v. Tax Comm'n, 397 U.S. 664, 676 (1970) (noting that the "complexities of modern life inevitably produce some contact" between the church and the government). But see Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 212 (1948) (stating that "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere"). The growing diversity of religious groups in the United States and the movement of religious groups into areas that were once primarily secular has been cited as one of the causes of the increase in litigation involving church and state. Carl H. Esbeck, Establishment Clause Limits on
DISCRIMINATION AND RELIGIOUS FREEDOM

religious organizations into areas previously considered secular\textsuperscript{16} and the demands of modern society have subjected religious organizations to increased government regulation.\textsuperscript{17}

A. The Principle of Deference

Despite increasing regulation, religious institutions retain a high level of autonomy over internal religious matters. The First Amendment bars civil courts from interfering in the internal disputes of religious institutions.\textsuperscript{18} Disputes over control of church property, the selection of clergy,\textsuperscript{19} and the discipline of members are "ecclesiastic-
cal" disputes and thus fall outside the jurisdiction of civil courts.20 These ecclesiastical disputes may also include conflicts arising out of the church-minister employment relationship.21

Traditionally, civil courts have deferred to the decisions of church bodies on matters involving ecclesiastical disputes. The principle of judicial deference while not originally grounded in the Constitution,22 dates back to 1871. In Watson v. Jones,23 the Supreme Court refused to intervene in a dispute between church factions, holding that civil courts have no jurisdiction where intervention would require review of decisions made by an ecclesiastical body.24 The court offered three justifications in support of this holding. First, it noted that when an individual voluntarily joins a hierarchical religious organization,25 the individual impliedly consents to that form of church government and agrees to be bound by its decisions.26 Second, judicial review of the decisions of ecclesiastical bodies threatens the integrity of religious institutions.27 Third, because a hierarchical church operates under its own body of ecclesiastical law,28 civil court judges are not competent to interpret that law.29

20. In Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929), the court held that, "[i]n the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise." Id. at 16. In Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 713 (1976), the court held that civil courts may not review the decisions of the judicial bodies of hierarchical religious organizations "on matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law." Id. at 713.

21. See, e.g., Kaufmann v. Sheehan, 707 F.2d 355, 358 (8th Cir. 1983) (refusing to consider a priest's defamation claim against the Roman Catholic Church, because his "claims relate[d] to his status and employment as a priest, and ... [went] to the heart of internal church discipline, faith, and church organization, all involved with ecclesiastical rule, custom and law."); Simpson v. Wells Lamont Corp., 494 F.2d 490, 493 (5th Cir. 1974) (noting that the relationship between a church and its minister is ecclesiastical in nature).

23. 80 U.S. (13 Wall.) 679 (1871).
24. Id. at 729.
25. A hierarchical church is one that is "but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control ..." Id. at 722. In contrast, a congregational church is one which is independent of any higher religious authority. Id. See generally 66 Am. Jur. 2d Religious Societies § 3 (1973) (discussing the hierarchical and congregational church organizations).
26. Watson, 80 U.S. at 729.
27. Id.
28. Several hierarchical churches have well-established legal systems, including ecclesiastical courts and extensive legal codes. See generally Carl H. Esbeck, Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations, 89 W. Va. L.
Notwithstanding the Court's recognition of the deference principle, the Supreme Court did not accord constitutional status to this principle until 1952. In *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, the Court recognized that "[l]egislation that regulates church administration, the operation of the churches, [or] the appointment of clergy [is] prohibited by the free exercise [clause]."\(^{31}\)

**B. Neutral Principles Exception**

In 1979, the Supreme Court developed a narrow exception to the principle of deference through a "neutral principles" approach to resolving property disputes.\(^{32}\) In *Jones v. Wolf*,\(^{33}\) the Supreme Court, in essence, stated that, where the issue at hand does not involve church doctrine and would not require a court to delve into traditional church matters, civil courts may resolve specified religious matters.\(^{34}\) The dispute in *Jones* arose over control of property between two churches—both formally associated with the Presbyterian Church—and the governing body of the Presbyterian Church.\(^{35}\) The Court held that a civil court could examine documents relating to church property ownership.\(^{36}\)

Applying "neutral principles of law," the Court noted that resolution of a property dispute "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges," and is therefore "flexible enough to accommodate all forms of religious organization and polity."\(^{37}\) Thus, through the *Jones v. Wolf* test, the Supreme Court granted civil courts jurisdiction to determine who held title to the property. The Court concluded that this "neutral principles" approach did not violate the constitutional prohibition against interfering in ecclesiastical disputes.\(^{38}\)

Since *Jones*, the Court of Appeals for the District of Columbia has gone one step further and extended this rationale to encompass

\(^{29}\) *Watson*, 80 U.S. at 729.
\(^{31}\) *Watson*, at 107-08.
\(^{34}\) *Id.* at 604.
\(^{35}\) *Id.* at 598-99.
\(^{36}\) *Id.* at 604.
\(^{37}\) *Id.* at 603. Minnesota courts have applied the *Jones v. Wolf* test to determine whether a religious dispute may be resolved in the state court system. See, e.g., *Piletich v. Deretich*, 328 N.W.2d 696, 701 (Minn. 1982) (applying neutral principles approach to church property dispute); *Patterson v. Bethel Baptist Church*, 389 N.W.2d 729, 732 (Minn. Ct. App. 1986) (holding that the civil court was an inappropriate forum for doctrinal disputes where church members sue for reinstatement).
specified contract claims. In *Minker v. Baltimore Annual Conference of United Methodist Church*, a potential pastoral appointee sued the United Methodist Church, claiming discrimination on the basis of his age and breach of his employment contract. The court concluded that an employment contract dispute may be resolved through "neutral methods of proof." The use of "neutral methods of proof" would enable the court to avoid a "searching and therefore impermissible inquiry into church doctrine." The court noted that "the line between such proscribed lawsuits and legitimate claims for commercial obligations of a church is a thin one" and concluded that the employee was "entitled to prove up his claim of breach of an oral contract to the extent that he can divine a course clear of the Church's ecclesiastical domain."

C. The First Amendment

1. The Free Exercise Clause

The Free Exercise Clause provides the foundation for the principle of noninterference with religious institutions. The Free Exercise Clause also guarantees an individual the right to hold whatever religious beliefs he or she chooses. In effect, however, the Free Exercise Clause does not guarantee an absolute right to practice those beliefs.

Under First Amendment doctrine, courts may exempt individuals from compliance with facially neutral laws which burden religious beliefs upon a demonstration that the individual's free exercise of a religious belief outweighs the state's interest in enforcing these laws. Courts have traditionally required the state to demonstrate a

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40. Minker, 894 F.2d at 1355.
41. Id. at 1360. *But see* Simpson v. Wells Lamont Corp., 494 F.2d 490, 493-94 (5th Cir. 1974) (declining to apply a "neutral principles of law" analysis to a church-minister employment dispute).
42. Minker, 894 F.2d at 1355 (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 723 (1976)).
43. Id. at 1361.
44. Id.
47. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166-67 (1878) (rejecting a Mormon church member's claim that statute criminalizing polygamy infringed on his religious beliefs because state was exercising its inherent power to promote health, safety, and general welfare).
48. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 234-36 (1972) (holding that Amish parents' sincerely held belief against formal high school education outweighs government's interest in compulsory education); Sherbert v. Verner, 374 U.S. 398,
compelling state interest in enforcing the law. The compelling state interest test requires the court to examine (1) the degree to which the statute impairs the exercise of the religious belief; (2) the degree of state interest in enforcing the statute; and (3) the extent to which an exemption from the statute would impede state objectives.

Recently, however, the United States Supreme Court departed significantly from this traditional standard. In Employment Division Department of Human Resources v. Smith, the Court held that the state need not show a compelling interest to enforce a facially neutral law that burdens religious practices. After Smith, the state need only demonstrate the existence of a compelling state interest if the law expressly prohibits religious conduct or implicates the Free Exercise Clause.

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49. See, e.g., Yoder, 406 U.S. at 234-36.
50. See id. While the Supreme Court has grounded the principle of noninterference with the internal affairs of religious institutions firmly in the Free Exercise Clause, subsequent Supreme Court decisions have not explicitly relied on either the Free Exercise Clause, but ambiguously state that non-interference is grounded in the First Amendment. See e.g., Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976) (holding that the First Amendment prohibits civil courts from disturbing the decisions of an ecclesiastical tribunal). As a result, the principle of deference, which has its basis in the Free Exercise Clause, has evolved into the concept of excessive entanglement, which is one of the central elements of Establishment Clause analysis. See Kenneth F. Ripple, The Entanglement Test of the Religion Clauses—A Ten Year Assessment, 27 UCLA L. REV. 1195, 1210-14 (1980) (discussing the development of the "entanglement concept" in free exercise cases beginning with Watson v. Jones, 80 U.S. 679 (1871) and its subsequent transfer to Establishment Clause); see also Douglas Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 COLUM. L. REV. 1373 (1981). Laycock argues that the Supreme Court has not applied a consistent general theory to the religion clauses. Id. He argues that the Establishment Clause is only implicated where government provides support for religion. Id. at 1378-88.

The incorporation of the doctrine of excessive entanglement into the Lemon test has caused courts to incorrectly associate this concept only with the Establishment Clause. This negatively affects the autonomy of religious institutions in two ways. First, courts tend to favor Free Exercise Clause interests over those associated with the Establishment Clause. Ripple, supra note 50, at 1212. Second, while the Supreme Court has been aggressive in preventing government sponsorship of or aid to religious groups, it has not been as aggressive in protecting religious groups from government interference. See Carl H. Esbeck, Establishment Clause Limits on Governmental Interference with Religious Organizations, 41 WASH. & LEE L. REV. 347, 349 (1984).

52. Id. at 882-90. Prior to Smith, the Supreme Court had held that the regulation must serve a compelling state interest that outweighed the detrimental impact on the religious practice. See supra note 48 and accompanying text. See also Bob Jones University v. United States, 461 U.S. 574, 603-04 (1983); see generally Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. CHI. L. REV. 1109 (1990) (criticizing the court's abandonment of the compelling interest standard).
Clause and another constitutional right, such as freedom of speech.\textsuperscript{53} With its decision in \textit{Smith}, the Supreme Court had radically altered what was "a settled and inviolate principle of . . . First Amendment jurisprudence."\textsuperscript{54}

2. The Establishment Clause

Even where free exercise interests are not implicated, government regulation of religious institutions may violate the Establishment Clause.\textsuperscript{55} In evaluating government regulation under the Establishment Clause, the United States Supreme Court has noted that "the men who wrote the Religion Clauses of the First Amendment connoted the establishment of a religion with sponsorship, financial support, and active involvement of the sovereign in religious activity."\textsuperscript{56} Later Court decisions offered a more restrictive interpretation of the Establishment Clause.\textsuperscript{57} In \textit{Lemon v. Kurtzman},\textsuperscript{58} the Court held that a valid regulation affecting religion must (1) have a secular purpose; (2) neither advance nor inhibit religion in its primary effect;\textsuperscript{59} and (3) not foster excessive governmental entanglement\textsuperscript{60} with religion.\textsuperscript{61} Under the \textit{Lemon} test, laws that benefit a particular religion or imply government sponsorship or endorsement will generally run afoul of the "primary effect" prong.\textsuperscript{62} The "excessive entanglement" prong

\textsuperscript{53} \textit{Smith}, 494 U.S. at 881 (citing \textit{Cantwell} v. Connecticut, 310 U.S. 303, 304-07 (1940) (freedom of speech); \textit{Wisconsin} v. Yoder, 406 U.S. 205 (1972) (rights of parents to educate their children as they choose)).

\textsuperscript{54} \textit{Id.} at 908 (Blackmun, J., dissenting).

\textsuperscript{55} The Establishment Clause provides: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.


\textsuperscript{58} 403 U.S. 602 (1971).

\textsuperscript{59} Nearly any government action that exempts a religious organization from complying with a generally applicable law can be said to advance religion and thus implicate the Establishment Clause. However, "[f]or a law to have forbidden 'effects' under \textit{Lemon}, it must be fair to say that the government itself has advanced religion through its own activities and influence." Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 337 (1987) (emphasis in original).

\textsuperscript{60} The concept of excessive entanglement was first introduced in \textit{Walz} v. Tax Comm'n, 397 U.S. 664, 674 (1970). \textit{See generally Ripple, supra} note 50, at 1195.

\textsuperscript{61} \textit{Lemon}, 403 U.S. at 612-13.

\textsuperscript{62} \textit{See, e.g.}, Allegheny County v. ACLU, 492 U.S. 573, 656-57 (1989) (holding that display of crèche and menorah in courthouse violates the Establishment Clause); \textit{Edwards} v. Aguillard, 482 U.S. 578, 596-97 (1987) (overturning Louisiana's "crea-
is generally implicated either when the government takes action that benefits particular religious organizations or attempts to regulate religious institutions.

D. The Minnesota Constitution

A state court’s reliance on the state constitution as an alternative source for protecting individual rights is a practice supported by the United States Supreme Court. Because of the Smith Court’s dramatic reinterpretation of the Free Exercise Clause, the Minnesota Supreme Court has turned to its own constitution to restore religious protections lost as a result of the Court’s decision in Smith.

Recently, the Minnesota Supreme Court has interpreted church and state provisions of the Minnesota Constitution more expansively than similar provisions of the Federal Constitution. For example,  

63. See, e.g., Aguilar v. Felton, 473 U.S. 402 (1985) (holding that although primary effect was not to advance or inhibit religion, law that made Title I funds available to religious schools caused excessive entanglement).

64. See Michigan v. Long, 463 U.S. 1032, 1044 (1983) (holding that the Supreme Court will not review decisions of state courts when based on an adequate and independent state ground); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (holding that state courts must follow the United States Supreme Court on federal constitutional law, but are free to interpret their laws to provide greater protection of individual liberties).

Former Justice Brennan is a strong proponent of this approach. Justice Brennan stated:

State supreme courts are increasingly evaluating their state constitutions and concluding that those constitutions should be applied to confer greater civil liberties than their federal counterparts. We can and should welcome this development in state constitutional jurisprudence—indeed, my own view is that rediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions is probably the most important development in constitutional jurisprudence of our times. For state constitutional law will assume an increasingly more visible role in American law in the years ahead.

Robert Abrams, Introduction to 1 Emerging Issues in State Constitutional Law xi (1988) (quoting address by Justice Brennan, “The Fourteenth Amendment” (Aug. 8, 1986)). In addition, Justice Rehnquist has added: “in the fields of liberty as well as property, the states must be left to work out their destinies within broad limits.” George Lardner, Jr., ’50s Memos Illustrate Rehnquist Consistency, WASH. POST, July 20, 1986, at 14.

65. See supra notes 51-53 and accompanying text.

66. In State v. French, 460 N.W.2d 2, 8 (Minn. 1990), the court stated, “in light of the unforeseeable changes in established first amendment law set forth in recent decisions of the United States Supreme Court, justice demands that we analyze the present case in light of the protections found in the Minnesota Constitution.” Id.

67. See, e.g., Friedman v. Commissioner of Pub. Safety, 473 N.W.2d 828 (Minn. 1991) (holding that the right to counsel under the Minnesota Constitution provides greater protection than the United States Constitution); State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990) (stating that “Minnesotans are afforded greater pro-
in *State v. French*, the court held that the Minnesota Constitution's freedom of conscience clause offers significantly greater protection than the First Amendment of the United States Constitution. Under the freedom of conscience clause, the state may only interfere with religious practices when such practices are "licentious" or "inconsistent with the peace or safety of the state."  

While the *French* court clearly stated that government may not interfere with an individual's right to freely practice his religious beliefs absent a compelling state interest, the Minnesota Supreme Court has not directly addressed the issue of whether the state may regulate religious institutions in ways that do not implicate religious beliefs or practices. Because Minnesota lacks a large body of case law interpreting its constitution, Minnesota courts have turned to

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68. *French*, 460 N.W.2d at 8.

69. MINN. CONST. art. I, § 16. The freedom of conscience clause provides:

> The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

Id.

70. See *French*, 460 N.W.2d at 9. See also State v. Hershberger, 462 N.W.2d 393, 400 (Minn. 1990) (characterizing the freedom of conscience clause as both an "enumeration of primordial rights and a limitation on the power of the state."). See generally Rita C. DeMeules, *Minnesota's Variable Approach to State Constitutional Claims*, 17 WM. MITCHELL L. REV. 163 (1991) (discussing the Minnesota court's "haphazard approach to applying its state constitution.").

71. State v. French, 460 N.W.2d 2, 9 (Minn. 1990). In *French*, a landlord had refused to rent a home to an unmarried couple. *Id.* at 3. He claimed an exemption from compliance with Minnesota Human Rights Act, claiming that renting to an unmarried couple violated his religious beliefs. *Id.* at 3-4. The court held that the state had failed to establish a compelling interest that would override the landlord's interest in practicing his religion. *Id.* at 9.

In *Hershberger*, 462 N.W.2d 395, Amish citizens sought exemption from compliance with a statute requiring a slow-moving vehicle emblem on their horse-drawn carriages. *Id.* at 395. The supreme court held that where the state has shown a compelling interest, the challenged regulation must be the least restrictive means available to protect its interest. *Id.* at 399. The court concluded that the state had failed to demonstrate the use of the least restrictive alternative. *Id.*

72. There are few resources available to discern the intent of the framers of the Minnesota Constitution. See William Anderson, *The Constitution of Minnesota*, 5 MINN.
federal constitutional doctrine as well as state history for guidance in interpreting the state constitution. 73

E. Statutory Protections

1. Federal Statutory Protections: Title VII

Title VII of the Civil Rights Act of 1964 bars discrimination in public and private employment on the basis of race, color, religion, gender, or national origin. 74 Under Title VII, sexual harassment is a form of gender discrimination because an individual subjected to sexual harassment is treated differently based on the individual’s gender. 75 The statute advances two theories under which sexual harassment claims may be brought. 76 The first theory—quid pro quo sexual harassment—applies in situations where employment “involves the conditioning of . . . concrete employment benefits on sexual favors.” 77 The second theory—“hostile environment” the-

L. REV. 407 (1921). When the Minnesota Constitution was enacted in 1858, the constitutional convention met in two separate factions, the Democrats and the Republicans. Id. at 409. No minutes exist from the meetings of the ten member conference committee that hammered out the final compromise version of the constitution. Id. at 430. However, some evidence of intent may be derived from the debates of the constitutional convention. See generally EARLE S. GOODRICH, THE DEBATES AND PROCEEDINGS OF THE MINNESOTA CONSTITUTIONAL CONVENTION (1857).

73. See, e.g., Friedman v. Commissioner of Pub. Safety, 473 N.W.2d 828 (Minn. 1991) (applying federal “critical stage” analysis); State v. Hershberger, 462 N.W.2d 393, 396 (Minn. 1990) (applying federal “compelling state interest” and “least restrictive alternative” standards).

Some have noted that the Minnesota Supreme Court has not grounded its interpretation of the Minnesota Constitution in historical evidence but rather in “generalities.” See Friedman, 473 N.W.2d at 846 (Coyne, J., dissenting).

Additionally the French court cited a Wisconsin case, Weiss v. District Bd. of School Dist. No. 8, 76 Wis. 177, 197-98, 44 N.W. 967, 974-75 (1890), to reinforce its assertion that freedom of religion was fundamental to the framers of the Minnesota Constitution. State v. French, 460 N.W.2d 2, 9 (Minn. 1990).

74. 42 U.S.C. § 2000e-2(a)(1) (1988)). Title VII provides, in relevant part, that it is unlawful “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex or national origin . . . .” 42 U.S.C. § 2000e-2(a)(1) (1988).

75. See Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987). The Hicks court defined sexual harassment as “any harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees.” Id. at 1415 (quoting McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985)). Not all commentators agree that sexual harassment is a form of discrimination. See Ellen Frankel Paul, Sexual Harassment as Sex Discrimination: A Defective Paradigm, 8 YALE L. & POL’Y REV. 333 (1990). Paul argues that sexual harassment should not be actionable as a form of discrimination, but rather as a tort similar to intentional infliction of emotional distress. Id. at 361.


77. Id.
ory—arises in contexts where the sexually harassing conduct of a fellow employee has the “effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”

Once the claimant has established that harassment occurred, the court must determine whether the employer is liable for the acts of its employee. In doing so, the United States Supreme Court has directed lower federal courts to the principles of agency law. In order to avoid liability for sexual harassment, an employer must investigate an employee’s complaint and take reasonable action to prevent further harassment. An employer who takes no action is clearly liable. However, absent a complete failure to respond, no ex-

78. Id. at 65 (citing Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972)).


80. See Meritor, 477 U.S. at 72. In Meritor, the Court concluded that in formulating Title VII, the congressional intent was for “courts to look to agency principles for guidance” in the area of liability. Id. Under agency theory, the actions of the agent may be imputed to the principal even where the principal has no notice of the harassment. Id. Section 219 of the Second Restatement of Agency provides:

1. A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

2. A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

   a. the master intended the conduct or the consequences, or
   b. the master was negligent or reckless, or
   c. the conduct violated a non-delegable duty of the master, or
   d. the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Restatement (Second) of Agency § 219 (1958).

Where the harasser has no supervisory authority over the plaintiff, agency principles are generally not applicable. See, e.g., Hirschfeld v. New Mexico Corrections Dep’t, 916 F.2d 572, 579 (10th Cir. 1990) (holding correctional facility not liable for prison guard’s action towards non-supervisory secretary). In such cases, an employer may be held liable for the sexual harassment of an employee by a co-worker if it “had actual or constructive knowledge of the existence of a sexually hostile working environment” and failed to take prompt and adequate steps to alleviate it. See Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983). Knowledge on the part of the employer will be imputed if the harassment is “pervasive” or if harassment complaints were filed with the employer. Id. See also EEOC, Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(d) (1991) (stating that where the employer knows or should have known of the conduct, liability exists unless the employer can show that it took immediate and appropriate corrective action); Minn. Stat. § 363.01(41)(3) (1990) (stating that liability attaches where the employer knows or should know and fails to take timely appropriate action).

81. See, e.g., Swentek v. USAir, Inc., 830 F.2d 552, 558 (4th Cir. 1987) (holding that an employer need not discredit all allegations, and that a written warning is an adequate response if done in a timely manner).
explicit guidelines exist to establish what type of response is necessary to insulate an employer from liability. One circuit court of appeals has held that an employer must do more than indicate that it has formulated policies forbidding sexual harassment; the employer must show that it took actions “reasonably calculated to end the harassment.

2. Minnesota Human Rights Act

The Minnesota Human Rights Act (the Act) provides additional protection to persons alleging discrimination on the basis of sex. Because of the similarity between Title VII and the Act, Minnesota courts have applied the principles developed in Title VII cases, when construing the Act.

The Minnesota Supreme Court has applied the Act in situations arising under the hostile work environment theory. In Continental Can v. State, the Minnesota Supreme Court developed the following test:

To determine whether actionable sex discrimination exists in a given case, all the circumstances surrounding the conduct alleged to constitute sexual harassment, such as the nature of the incidents and the context in which they occurred, should be examined. In addition, the facts alleged to constitute notice to the employer of the employee’s conduct as well as the circumstances surrounding those facts should be considered. Finally, the timeliness and appropriateness of the employer’s response, if any, to the conduct complained of should be examined.

In the year following Continental Can, the legislature amended the Act

82. See, e.g., Katz, 709 F.2d at 256.
83. Id.
84. MINN. STAT. § 363.01-.15 (1992). Specifically, the act prohibits employers from discharging, refusing to hire, or discriminating against employees with respect to the terms and conditions of employment “because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, or age.” MINN. STAT. § 363.03(1)(2) (1992).
86. 297 N.W.2d 241 (Minn. 1980).
87. Id. at 249. See also Klink v. Ramsey County, 397 N.W.2d 894, 901 (Minn. Ct. App. 1986). In Klink, the court of appeals established the elements of a prima facie case of sexual harassment. Id. The court adopted a test relied on by several other jurisdictions. The test was based on the analysis set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Id. A prima facie case requires that (1) the employee belongs to a protected group; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affects a “term, condition, or privilege” of employ-
to include definitions of sexual harassment and to reflect the fact that sexual harassment is a form of gender discrimination.88

3. The Application of Statutory Protections to the Church-Minister Relationship

Whether an individual may pursue an employment discrimination claim against the religious institution employing the individual depends largely upon the individual's role within the institution. Ministers are considered employees, whose primary duties involve "teaching, spreading the faith, church governance... or participation in religious ritual and worship."89 Historically, civil courts have not permitted ministers to pursue employment discrimination claims, because churches are considered to have complete discretion over the hiring of their ministers, regardless of the existence of civil rights violations.90 Accordingly, Title VII is not applicable to the employment relationship between ministers and the religious institutions they serve.91

For example, in McClure v. Salvation Army,92 an ordained female minister filed an action under Title VII alleging wage discrimination on the basis of gender.93 The employer terminated her after she filed a complaint with the Equal Employment Opportunity Commission; and (5) the employer is liable based on knowledge or imputed knowledge of the harassment and failure to take remedial action. Id.


89. Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985), cert. denied, 478 U.S. 1020 (1986). Whether a particular individual has acted in a ministerial capacity is often the decisive factor in employment discrimination litigation. Compare EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 283-84 (5th Cir. 1981) (holding that Title VII was inapplicable to faculty members at a seminary, who were considered ministers because only religious subjects were taught), cert. denied, 456 U.S. 905 (1982) with EEOC v. Mississippi College, 626 F.2d 477, 485 (5th Cir. 1980) (holding that Title VII applied to non-ministerial faculty members at a college since they were not intermediaries between church and congregation and did not instruct students on matters of religious doctrine), cert. denied, 453 U.S. 912 (1981).

90. E.g., Gonzales v. Roman Catholic Archbishop, 280 U.S. 1, 16-17 (1929).


92. 460 F.2d 553 (5th Cir. 1972), cert. denied, 409 U.S. 896 (1972).

93. Id. at 555.
sion.\textsuperscript{94} The Fifth Circuit concluded that Title VII was not applicable to ministers, since its application "would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment."\textsuperscript{95} To the plaintiff's discrimination claim, the court responded that Congress had never intended to subject churches to Title VII claims.\textsuperscript{96}

In addition, Title VII contains an exemption for employment decisions made by religious institutions that are necessary to carry out the institution's religious activities.\textsuperscript{97} Title VII therefore applies to religious institutions only when discrimination targets nonministerial employees, and the discrimination is based on race or gender.\textsuperscript{98} Where an employment decision made by the church intertwines with religious doctrine, the decision is usually exempt from compliance with anti-discrimination laws.\textsuperscript{99}

III. BLACK v. SNYDER

A. The Facts

In 1989, Susan Black began working as an associate pastor of St. John's Lutheran Church of Washburn Park, Minnesota.\textsuperscript{100} The

\begin{itemize}
\item \textsuperscript{94} Id.
\item \textsuperscript{95} Id. at 560.
\item \textsuperscript{96} Id. (citing Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)).
\item \textsuperscript{97} In pertinent part, the Title VII provision reads:
This subchapter shall not apply to . . . a religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities.
42 U.S.C. § 2000e-1 (1988). This exemption is applicable to ministerial and nonministerial employees, as well as to the activities of religious institutions that are not religious in nature. Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987).
Like Title VII, the Minnesota Human Rights Act contains a provision permitting religious institutions to discriminate on the basis of religion. M N N. S TAT. § 363.02(1)(2) (1992).
\item \textsuperscript{98} EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 286 (5th Cir. 1981) (holding that because seminary's religious beliefs did not require discrimination on the basis of sex, race, color or national origin, its free exercise interests were not burdened by application of Title VII to non-ministerial employees), cert. denied, 456 U.S. 905 (1982).
\item \textsuperscript{99} See, e.g., Madsen v. Erwin, 481 N.E.2d 1160, 1165 (Mass. 1985) (holding that church's beliefs regarding homosexuality exempted it from compliance with ordinance barring discrimination on the basis of sexual orientation).
\end{itemize}
church was a member of the Evangelical Lutheran Church of America (ELCA). 101 Black was supervised by William Snyder, another pastor at the church. 102 When Snyder allegedly made sexual overtures toward Black, she brought her concerns to the attention of the personnel and call committees at St. John's. 103 After consulting with the bishop and the Synod's attorney, an investigation team convened to examine Black's complaint. 104 The team concluded that Black's allegations were "not worthy of church discipline" 105 and recommended that both pastors seek therapy to resolve what the team considered a lack of understanding as to Pastor Black's "boundaries." 106

Black responded by filing a complaint with the Minnesota Department of Human Rights (MDHR), alleging that Snyder had made repeated unwelcome sexual overtures. 107 Three months after Black filed her claim with the MDHR, the congregation voted to discharge her. 108 Black then withdrew her complaint from the MDHR 109 and filed suit in Hennepin County District Court, naming Snyder, the church, and the Synod as defendants. 110 The trial court dismissed the claims against the church and the synod, concluding that these claims were barred by the First Amendment. 111 Black appealed the dismissal to the Minnesota Court of Appeals. 112

B. The Court's Analysis

First, the court of appeals examined whether the application of the Minnesota Human Rights Act to the church violated the Free Exer-
cise Clause of the First Amendment. Applying the *Smith* analysis, the court concluded that Black's claims did not implicate laws that "expressly mandate or prohibit religious conduct or beliefs, or involve additional constitutional rights." Accordingly, Black's claim for sexual harassment did not violate the church's free exercise rights as that right was interpreted in *Smith*.

Second, the court considered whether the application of the Act would violate the Establishment Clause. Applying the *Lemon* test, the court determined that only the excessive entanglement prong of the *Lemon* test was in dispute.

The court acknowledged that where "core" questions of church discipline are involved, the Establishment Clause prohibits judicial review of the decisions of religious institutions. Further, the court noted that federal courts have consistently refused to question a church's reasons for hiring or dismissing its clergy. Judicial review of this nature would constitute "a searching and therefore impermissible inquiry" into church doctrine and thereby constitute excessive entanglement. Although the court stressed that the Establishment Clause does not grant religious institutions total immunity from judicial scrutiny, the court reasoned that where inquiries

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113. *Id.* at 718-19.
114. *Black*, 471 N.W.2d at 719. The court found that the Minnesota Human Rights Act and Minn. Stat. § 181.932 were "otherwise valid, generally applicable, and facially neutral." *Id.* For a discussion of the *Smith* test, see *supra* notes 51-53 and accompanying text.
115. *Id.*
118. The reference to "core" questions suggests that some matters of internal church administration are not precluded from judicial review. In Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), the Supreme Court stressed that it could not entangle itself in ecclesiastical questions that "involve a matter of internal church government, an issue at the core of ecclesiastical affairs." *Id.* at 721.
119. *Black*, 471 N.W.2d at 720. The dissent argued that, because the basis of Black's claim against St. John's addressed the issue of how the church "disciplines, transfers and terminates its religious personnel," allowing Black to pursue her claim would constitute excessive government entanglement with religion. *Id.* at 721 (Randall, J., dissenting). The dissent concluded that inquiry into Black's claims, after the church's decision not to discipline Snyder, would constitute an "improper examination of St. John's internal church values regarding pastoral qualifications" and therefore violate the Establishment Clause. *Id.* at 723.
120. *Id.* at 720 (quoting Milivojevich, 426 U.S. at 723). *See also* Minker v. Baltimore Annual Conf. of United Methodist Church, 894 F.2d 1354, 1361 (D.C. Cir. 1990) (holding that "[t]he decision to appoint a minister is uniquely within a church's ecclesiastical discretion"); Natal v. Christian and Missionary Alliance, 878 F.2d 1575, 1578 (1st Cir. 1989) (holding that Free Exercise Clause bars inquiry into reasons for minister's termination, since inquiry would involve impermissible scrutiny of church "policy, administration, and governance").
121. *Black*, 471 N.W.2d at 720.
into church doctrine were avoidable, a court may rely on “neutral methods of proof” to resolve the dispute. Here, the Establishment Clause did not bar judicial review.\(^{122}\)

By invoking the “neutral methods of proof” exception, the court reasoned that, since Black’s claim for sexual harassment was based purely on events occurring before and unrelated to her discharge and was “unrelated to pastoral qualifications or issues of church doctrine,” she could maintain a sexual harassment claim against the church without violating the Establishment Clause.\(^{123}\) The court noted that the level of government interference required to adjudicate Black’s sexual harassment claim would be no greater than in the case of laws requiring religious counselors to report incidents of child abuse.\(^{124}\) While recognizing that courts have frequently declined to examine discriminatory terminations asserted by members of the clergy, the court stressed that no court had ever expressly held that the Establishment Clause bars a clergy member’s suit for sexual harassment against a fellow clergy member.\(^{125}\) The court therefore reversed the trial court’s dismissal of Black’s sexual harassment claim against the church.\(^{126}\)

Third, the court examined the propriety of Black’s claims under the state constitution’s freedom of conscience clause.\(^{127}\) The court acknowledged that, under the state constitution, the state must demonstrate a compelling interest whenever religious rights are burdened, and the state interest must be carried out in the least restrictive manner possible.\(^{128}\) However, the court concluded that Black’s claim for sexual harassment would not burden the church’s religious practices, since ELCA policy itself prohibited sexual harassment.\(^{129}\)

\(^{122}\) Id. (citing Minker, 894 F.2d at 1360-61).

\(^{123}\) Black, 471 N.W.2d at 720-21.

\(^{124}\) Id. at 721. A statute requiring the reporting of child abuse by religious counselors is not a violation of the First Amendment, even if the statute does exempt clergy when they are counseling in their role as clergy. See State v. Motherwell, 788 P.2d 1066, 1074-76 (Wash. 1990).

\(^{125}\) Black, 471 N.W.2d at 721.

\(^{126}\) Id. at 720-21. The court did conclude, however, that Black’s claims for breach of contract, retaliatory termination, and violation of the “whistle blower” statute would necessitate judicial scrutiny into areas fundamentally related to church doctrine. Id. at 720. Therefore, dismissal of these claims was proper. Id.

\(^{127}\) Black, 471 N.W.2d at 721.

\(^{128}\) Id.

\(^{129}\) Id. Black’s claims against Snyder and the church went to trial in September 1992. See Margaret Zack, Jury Finds Former Pastor Wasn’t Victim of Harassment, Mpls. Star Trib., Oct. 10, 1992, at 4B. After five weeks of trial and one hour deliberation, the jury concluded that Susan Black was not sexually harassed by Pastor Snyder. Id. Despite the defeat, Black’s attorney, Gerald Laurie, stressed the significance of the appellate court’s decision. Mr. Laurie characterized the court’s decision as having established that “Black didn’t leave her secular rights on the church steps.” Id.
The court further held that even if the church’s religious practices were incidentally burdened, the state’s interest in eradicating sexual harassment was compelling. The court also posited that enforcement through the Minnesota Human Rights Act was the least restrictive means of accomplishing the state objective of eliminating discrimination. Therefore, Black’s sexual harassment claim was also a viable cause of action under the Minnesota Constitution.

IV. Analysis

In allowing Black to pursue her claim against the church, the court of appeals created an exception—for sexual harassment claims—to the general prohibition against clergy employment discrimination claims. This exception is not supported by precedent.

A. The Principle of Deference

Any dispute arising out of the church-minister employment relationship is ecclesiastical in nature, and necessarily involves an impermissible inquiry into church doctrine. The relationship between a church and its ministers is at the very core of the institution’s religious mission. While the court of appeals attempted to distinguish Black’s claims from similar discrimination claims because her claims were based on pre-discharge harassment, the distinction was illusory since prior decisions have uniformly characterized employment decisions as internal decisions, which are beyond permissible scrutiny by the court.

Inquiring into terms and conditions of employment that exist prior to termination is no less intrusive than inquiring into the reasons for hiring or firing a clergy member. While most decisions involve claims arising out of termination, prior decisions have not distinguished between claims arising out of termination and claims related

130. Black, 471 N.W.2d at 721.
131. Id.
132. See supra notes 19-21 and accompanying text.
133. See McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972) (stating that the “relationship between an organized church and its ministers is its life blood.”), cert. denied, 409 U.S. 896 (1972).
134. In McClure, the court noted:

[I]n addition to injecting the State into substantive ecclesiastical matters, or investigation and review of such matters, of church administration and government as a minister’s salary, his place of assignment and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment.

Id. at 560. See also Granfield v. Catholic Univ. of America, 530 F.2d 1035, 1047 (D.C. Cir. 1976) (holding that the determination of priests’ salaries is an internal religious matter), cert. denied, 429 U.S. 821 (1976).
to conditions during employment.\textsuperscript{135} Courts merely hold that such issues are ecclesiastical matters, beyond the jurisdiction of the courts.

In addition, judicial investigation of a claim for sexual harassment necessarily involves scrutiny of the church's internal disciplinary process,\textsuperscript{136} notwithstanding the court's assertion that the dispute could be resolved by relying on neutral methods of proof.

A claim for sexual harassment requires an intensive examination into matters of church policy. This is precisely the type of inquiry against which \textit{Minker} warned.\textsuperscript{137} A sexual harassment claim requires the court to evaluate the appropriateness of the employer's response to a complaint of sexual harassment.\textsuperscript{138} In doing so, the court must necessarily examine the church's constitution and written policies to determine whether the policies are adequate and whether the church acted in accordance with them. The Supreme Court has held that this type of scrutiny into the internal administration of a religious institution is forbidden by the First Amendment.\textsuperscript{139}

\section*{B. The Free Exercise Clause}

In examining the free exercise claim, the court erroneously applied the principles of \textit{Smith}\textsuperscript{140} in concluding that the church's free exercise rights were not violated. \textit{Smith} only restricts an individual's right to claim a religious exemption from "an otherwise valid law prohibiting conduct that the State is free to regulate."\textsuperscript{141} The state has never been free to regulate the employment relationship between a church and its ministers.\textsuperscript{142} Accordingly, \textit{Smith} is inapposite and does not nullify the precedent of deference established by \textit{Watson v. Jones} and its progeny, decisions which firmly support the autonomy of religious institutions in employment decisions.\textsuperscript{143}

\section*{C. The Establishment Clause}

In examining the Establishment Clause claim, the court applied the \textit{Lemon} test,\textsuperscript{144} yet the court failed to acknowledge the distinction between government actions that affect ministerial employees and

\begin{thebibliography}{9}
\bibitem{135} See McClure, 460 F.2d at 560.
\bibitem{136} See supra notes 82-84 and accompanying text.
\bibitem{137} See \textit{Minker v. Baltimore Annual Conf. of United Methodist Church}, 894 F.2d 1354, 1361 (D.C. Cir. 1990).
\bibitem{138} See Continental Can Co. v. State, 297 N.W.2d 241, 249 (Minn. 1980).
\bibitem{139} Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976).
\bibitem{140} 494 U.S. 872 (1990).
\bibitem{141} Id. at 879.
\bibitem{142} See supra note 20 and accompanying text.
\bibitem{143} See supra notes 23-38 and accompanying text.
\bibitem{144} See supra notes 52-57 and accompanying text.
\end{thebibliography}
DISCRIMINATION AND RELIGIOUS FREEDOM

those that affect nonministerial employees. The court noted that allowing Black to pursue her claim would not violate the Establishment Clause, since it would involve roughly the same level of scrutiny as laws requiring churches to report child abuse.145 To support its position, the court relied on a Washington state court decision holding that mandatory child abuse reporting laws did not violate the excessive entanglement prong.146

The court failed to note, however, that the Washington decision cited for support distinguished between ministerial and nonministerial employees.147 In fact, the Washington decision held that ministers who became aware of abuse while counseling their parishioners were exempt from reporting requirements.148

D. The Minnesota Constitution

By concluding that the freedom of conscience clause of the Minnesota Constitution did not preclude action under the Minnesota Human Rights Act, the court construed the phrase "religious practice" too narrowly.149 The definition of religious practice should not be limited only to those ritual activities motivated by religious doctrine.150 Rather, it should be construed broadly to include the internal decisions of religious institutions. Developing a consistent doctrine of noninterference with the internal administration of religious institutions is fundamental to the protection of religious freedom under the Minnesota Constitution151 and is supported by Minnesota case law.152

The court recognized that under the state constitution the state must demonstrate a compelling interest when church interests are burdened.153 However, the court concluded that St. John's religious practices were not burdened by application of the statute, since the church policy itself prohibited sexual harassment. As the dissent in

146. See State v. Motherwell, 788 P.2d 1066 (Wash. 1990). In Motherwell, the Washington Supreme Court held that mandatory child abuse reporting laws did not violate the excessive entanglement prong. The Washington court upheld the convictions of two religious counselors for failure to report incidents of child abuse to authorities. Id. at 1074.
147. Id. at 1069.
148. Id.
149. MINN. CONST. art. I, § 16.
150. See Laycock, supra note 50, at 1388-92. Professor Laycock argues that "[a]ny activity engaged in by a church as a body is an exercise of religion." Id. at 1390.
151. MINN. CONST. art. I, § 16. The freedom of conscience clause states that "control of or interference with the rights of conscience" shall not be permitted. Id.
152. See supra notes 67-73 and accompanying text.
Black pointed out, the majority ignored Minker, which dismissed a minister’s discrimination claim, despite the fact that discrimination was contrary to the church’s stated policy.

Finally, the court concluded that, even if religious practices were burdened, the state has a compelling interest in eradicating sexual harassment, and, here, the state’s interest outweighs the church’s interest. Again, this holding is contrary to Minnesota precedent. Minnesota courts have clearly stated that only practices which threaten the peace or safety of the state are sufficiently compelling to override the protections of the freedom of conscience clause.

V. Conclusion

Prior to Black, courts had consistently declined to examine discrimination claims involving the hiring and promotion of clergy members. In Black, the Minnesota Court of Appeals deviated from a long line of precedent requiring dismissal of discrimination claims brought by clergy members against their employers. This Note does not deny that sexual harassment is a serious problem for female clergy members. However, the rights of the individual are outweighed by the potential for harm when government is permitted to take an active role in disputes within the church.

Kathleen Milner

155. Black, 471 N.W.2d at 721.
* The author wishes to thank Reverand Paula V. Mehmel for her insight while preparing this article.