

**ONE STEP FORWARD, ONE STEP BACK: WHY THE
THIRD CIRCUIT GOT IT RIGHT THE FIRST TIME
IN *PETRUSKA V. GANNON UNIVERSITY***

INTRODUCTION

Alleged Title VII violations by employers are heavily litigated in the United States. While many such claims are valid, numerous claims are unfounded. Many of the large employers regularly facing Title VII lawsuits are familiar to us, including Wal-Mart, General Motors, and McDonald's.¹ However, there is one type of employer that does not immediately come to mind: religious organizations, including churches, religiously affiliated schools and universities, and charitable organizations. It is difficult to envision these types of employers engaging in invidious sexual or racial discrimination; however, it does occur. While it may be surprising to some that religious organizations engage in such offensive discrimination, what is even more surprising is that U.S. courts regularly allow them to do so. The judicially created "ministerial exception" to Title VII permits courts to summarily dismiss plaintiffs' claims once it has been established that the employer is a religious organization. The ministerial exception is overly broad, contradicts congressional intent, and is "at odds with American culture and legal tradition."²

For many people, the word "minister" encompasses pastors, priests, and nuns—those persons that play central roles in the livelihood of churches or other religious organizations. Pursuant to the ministerial exception, however, several circuit courts have adopted a broader meaning, finding that choir directors,³ organists,⁴ and communications managers⁵ also qualify as "ministers." Once an employee has been labeled a "minister" by the court, she is precluded from alleging that racial or sexual discrimination occurred in her place of employment.

1. See, e.g., *Moranski v. Gen. Motors Corp.*, 433 F.3d 537 (7th Cir. 2005); *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004); *Alberter v. McDonald's Corp.*, 70 F. Supp. 2d 1138 (D. Nev. 1999).

2. EDWARD R. BECKER, *Foreword, in* MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* xi (2005).

3. *Miller v. Bay View United Methodist Church, Inc.*, 141 F. Supp. 2d 1174, 1184 (E.D. Wis. 2001).

4. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006).

5. *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003).

As a result, churches and other religious organizations are free to engage in discrimination that is prohibited by Title VII for all other places of employment. While there have been U.S. Supreme Court cases discussing various aspects of the exception, the Court has yet to directly address the constitutionality of the ministerial exception.⁶

In a ground-breaking decision, the Third Circuit became the first federal court of appeals to look beyond the plaintiff's position and focus on whether the employment decision was a result of impermissible discrimination under Title VII.⁷ Unfortunately, this progressive decision was later vacated by the court when it joined other circuits in adopting the broader version of the ministerial exception.⁸ Despite this, the first *Petruska v. Gannon University* decision will be the subject of this Note. The Third Circuit's reasoning in its original decision should be adopted by courts, because it would end the problematic discrimination that religious organizations have been practicing without intruding on their First Amendment rights.⁹

6. The only Court decision in this area, *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), "turned on the constitutionality of a limited statutory exemption from Title VII" and, therefore, "there is no authoritative guidance on the most problematic issue of all: whether the First Amendment exempts religious institutions from the application of employment discrimination laws." Joanne C. Brant, "Our Shield Belongs to the Lord": *Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275, 276 (1994). Moreover, it does not appear that the Court will directly address the ministerial exception anytime soon. It denied certiorari on April 23, 2007. *Petruska v. Gannon Univ.*, No. 06-985, 2007 U.S. LEXIS 4357 (U.S. Apr. 23, 2007).

7. *Petruska v. Gannon Univ. (Petruska I)*, No. 05-1222, 2006 U.S. App. LEXIS 13135 (3d Cir. May 24, 2006), *vacated*, 2006 U.S. App. LEXIS 15088 (3d Cir. June 20, 2006). Although *Petruska I* was originally published at 448 F.3d 615, the opinion was withdrawn from the Federal Reporter when the court vacated its earlier opinion on June 20, 2006. Before its May 2006 decision, the Third Circuit, along with the Fifth Circuit, typically gave the ministerial exemption "a broader reading, holding that religious based employment practices should be given some deference, even when they violate Title VII on a nonreligious basis." Treaver Hodson, *The Religious Employer Exemption Under Title VII: Should a Church Define Its Own Activities?*, 1994 BYU L. REV. 571, 572 (citing *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991)).

8. *Petruska*, 2006 U.S. App. LEXIS 15088, at *2. The Honorable Edward R. Becker, the Third Circuit judge who authored the majority opinion, died on May 19, 2006. After his death, Gannon University's request for a rehearing by a new panel of judges was granted. This new panel vacated the original decision and subsequently authored an opinion joining the majority of circuit courts. See *Petruska v. Gannon Univ. (Petruska II)*, 462 F.3d 294, 299 (3d Cir. 2006).

9. A critical aspect of *Petruska I* was the court's ability to anticipate and successfully resolve the First Amendment issues that have surfaced in virtually every case involving the ministerial exception. Before authoring *Petruska I*, Judge Becker discussed several of the affirmative defenses utilized by religious institutions when faced with a Title VII claim: "In recent years, religious entities . . . have advocated a presumptive constitutional right to avoid the law pursuant to the federal and state free exercise of religion guarantees, arguing that the First Amendment, the Due Process Clause, and the separation of powers render them immune from some legal requirements and precepts." BECKER, *supra* note 2, at xi.

This Note continues in four parts. First, Part II discusses the Title VII statute and cases illustrating the inception and application of the ministerial exception.¹⁰ Part III examines the subject case, *Petruska v. Gannon University*, in greater detail, with particular emphasis on the facts of the case.¹¹ Next, Part IV analyzes a major underlying theme of the *Petruska* decision and essentially all ministerial exception cases: the inherent conflict between the First Amendment and the Fourteenth Amendment.¹² Finally, Part V considers why women, out of all of the named protected classes, are the most affected by this exception to Title VII.¹³

II. BACKGROUND

Before turning to the current application of the judicially created ministerial exception, it is necessary to understand how and why the exception was formed. Section A discusses the legislative history of Title VII and the section 702 religious exemption that Congress expressly included in the statute at its inception.¹⁴ Next, Sections B and C focus on the ministerial exception, the reasons for its formation, and how the definition of “minister” has expanded over the years.¹⁵ Finally, because one of the main arguments in favor of a broad application of the ministerial exception is that it prevents courts from violating the Religion Clauses of the First Amendment,¹⁶ Part D provides a brief overview of how the Free Exercise Clause and the Establishment Clause relate to the ministerial exception.¹⁷

A. History of the Ministerial Exception

The Civil Rights Act of 1964 was enacted to eliminate discrimination against individuals due to their race, color, religion, sex, or na-

10. See *infra* notes 14–103 and accompanying text.

11. See *infra* notes 104–187 and accompanying text.

12. See *infra* notes 188–222 and accompanying text.

13. See *infra* notes 223–237 and accompanying text.

14. See *infra* notes 18–33 and accompanying text.

15. See *infra* notes 34–76 and accompanying text.

16. See Joshua D. Dunlap, Note, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 NOTRE DAME L. REV. 2005, 2007 (2007) (“[T]he Free Exercise Clause mandates a broad ministerial exception to Title VII.”).

17. See *infra* notes 77–103 and accompanying text. The Establishment Clause is discussed in greater detail than the Free Exercise Clause, partly because many scholars believe that *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), rejects the Free Exercise Clause as a justification for the ministerial exemption. See Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 2004 (2007).

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tional origin.¹⁸ As enacted in 1964, section 702 of Title VII provided that its prohibitions should not apply “to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities.”¹⁹ Notably, Congress declined to “exempt religious employers entirely, [and] created instead a *tailored* exemption which exempts from operation of the statute only those hiring decisions made by religious employers on the basis of *religion*.”²⁰ Thus, the original religious exemption’s application was limited to discrimination regarding religious activities.²¹

However, in 1972, the exemption was broadened to include nonreligious activities as well.²² As amended, section 702 now exempts religious organizations from Title VII “with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”²³ Congress expanded the exemption to spare courts from deciding what constituted a “religious activity.”²⁴

18. Title VII of the Act addresses discrimination in the workplace:

It shall be an unlawful employment practice for an employer—(1) 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; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). When Congress enacted Title VII, it “decreed that the policy of outlawing discrimination in the workplace should be one of ‘highest priority’” and “intended to prohibit any form of discrimination in the workplace that would create inequality in employment opportunity.” Shawna Meyer Eikenberry, Note, *Thou Shalt Not Sue the Church: Denying Access to Ministerial Employees*, 74 IND. L.J. 269, 270–71 (1998) (citing *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976)).

19. 42 U.S.C. § 2000e-1 (1964).

20. *Miller v. Bay View United Methodist Church, Inc.*, 141 F. Supp. 2d 1174, 1180 (E.D. Wis. 2001) (emphasis added).

21. See generally Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391 (1987). For cases illustrating the exemption as originally enacted, see *Larsen v. Kirkham*, 499 F. Supp. 960 (D.C. Utah 1980), and *Fike v. United Methodist Children’s Home of Virginia, Inc.*, 547 F. Supp. 286 (E.D. Va. 1982).

22. Annotation, *Validity, Construction, and Application of Provisions of § 702 of Civil Rights Act of 1964*, 67 A.L.R. FED. 874 § 4 (West 2006).

23. 42 U.S.C. § 2000e-1 (2000).

24. See Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 35–36 (2005) (stating that “[t]o spare religious entities the burden of legal uncertainty, government inquiry, and possible litigation, Congress expanded the exemption in 1972 to cover hiring for all activities, rather than just ‘religious activities,’ of religious organizations”).

Yet it is important to recognize that, for the second time, Congress explicitly refused to construct the section 702 exemption in a manner that allows religious employers to consider race, sex, or national origin when making employment decisions.

The amended version of section 702 raised doubts among courts regarding the constitutionality of the religious exemption.²⁵ Some courts viewed this as granting preferential treatment to religious employers in violation of the Establishment Clause.²⁶ Eventually, the U.S. Supreme Court addressed whether the section 702 amendment exempting secular nonprofit activities of religious institutions was constitutional in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.²⁷ The plaintiffs in *Amos*, individuals employed by the church in nonreligious capacities, were discharged for failing to attain church membership.²⁸ The plaintiffs argued that “allow[ing] religious employers to discriminate on religious grounds in hiring for nonreligious jobs” violated the Establishment Clause of the First Amendment.²⁹

The Court disagreed.³⁰ Rather than viewing section 702 as bestowing a benefit on religious organizations, the Court found that Congress was acting “with the proper purpose of lifting a regulation that burdens the exercise of religion,” and, as a result, there was “no reason to require that the exemption come packaged with benefits to secular entities.”³¹ In short, the Court made a distinction between the government’s act of advancing religion in an unconstitutional manner and simply allowing religious employers “to define and carry out their re-

25. See Laura L. Coon, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481, 487–88 (2001) (“Because Congress did not limit the scope of the amendment’s application, exempted ‘activities’ could arguably extend to any for-profit endeavors pursued by a religious institution. . . . Congress also opened the door to constitutional challenges based on the amendment’s seemingly preferential treatment of religious institutions conducting non-religious activities.”).

26. See, e.g., *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266 (N.D. Iowa 1980). For further commentary on the view that states grant religion “privilege against legitimate governmental concerns,” see Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248–49 (1994).

27. 483 U.S. 327, 331 (1987).

28. *Id.* at 330. For instance, Mr. Mayson, the plaintiff whose claims were the subject of the appeal, was employed as a building engineer at the church’s gymnasium. The scope of Mayson’s employment did not include spreading or teaching religious doctrine or practices in any way.

29. *Id.* at 331.

30. *Id.* at 338.

31. *Id.*

ligious missions.”³² In upholding the amended version of section 702, the Court made it clear that religious employers were free to discriminate against any employee on the basis of her religion, without taking into account the scope, activities, or nature of her employment in the organization.³³

B. The Ministerial Exception and Other Forms of Discrimination

The U.S. Supreme Court has not yet decided whether the same is true for other forms of discrimination that are prohibited by Title VII, namely, whether religious employers can discriminate on the basis of race, color, sex, or national origin.³⁴ To date, the Court has left this issue for the federal courts of appeals to resolve. For example, in *McClure v. Salvation Army*, the Fifth Circuit expressly rejected the notion that Congress intended for religious organizations to be exempt from *all* forms of discrimination.³⁵ The court found that the language and legislative history of section 702 supported this finding.³⁶ However, placing the emphasis back on the relationship between the plaintiff and her religious employer, the court turned its analysis to the Religion Clauses of the First Amendment.³⁷ In so doing, the *McClure* court became the first to recognize the “ministerial exception” to Title VII employment discrimination claims.

Billie McClure, the plaintiff in this watershed case, was an ordained minister in the Salvation Army.³⁸ During her employment at the Salvation Army, McClure was paid less and received fewer benefits than similarly situated male officers.³⁹ As a result, she commenced a civil action, claiming that the Salvation Army’s discriminatory practices violated Title VII.⁴⁰ While the Fifth Circuit recognized that it is impermissible for a church to discriminate on the basis of sex, it fashioned

32. *Id.* at 339; accord Lupu & Tuttle, *supra* note 24, at 36 (“[T]he Court concluded that the legislative exemption fell in a zone of permission between what the Free Exercise Clause might require, and what the Establishment Clause would forbid.”).

33. See *Amos*, 483 U.S. at 330 (finding that applying the section 702 exemption to the secular nonprofit activities of religious organizations does not violate the Establishment Clause of the First Amendment).

34. Daniel J. Rosenthal, *Charitable Choice Programs and Title VII’s Co-Religionist Exemption*, 39 CREIGHTON L. REV. 641, 645 n.20 (2006).

35. 460 F.2d 553, 558 (5th Cir. 1972).

36. *Id.* (“The language and the legislative history of § 702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment.”).

37. *Id.*

38. *Id.* at 554.

39. *Id.* at 555.

40. *Id.*

an exception allowing it to do so by other means.⁴¹ The court found that, when a Title VII lawsuit involves an employee that is considered a “minister” of the church, courts should take a “hands-off” approach.⁴² In other words, the Fifth Circuit held that applying the provisions of Title VII to “the employment relationship existing between . . . a church and its minister 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.”⁴³ It concluded that, in drafting Title VII, Congress did not intend for courts to regulate employment disputes regarding a church and its minister.⁴⁴

Like the Fifth Circuit, other courts have chosen to interpret Title VII’s religious exemption broadly, mainly because they do not want to infringe on the Religion Clauses of the First Amendment.⁴⁵ For example, in *Rayburn v. General Conference of Seventh-Day Adventists*, the Fourth Circuit found that free exercise of religion easily overrides “the state’s interest in assuring equal employment opportunities for all.”⁴⁶ The court stated that a religious institution’s right to select the person who will lead its congregation is so fundamental that it should be completely free from government interference.⁴⁷ It emphasized that such employment decisions are crucial to “the well-being of religious community, for perpetuation of a church’s existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large.”⁴⁸ In addition to the infringement on free exercise, the court found that the risk of entanglement in this principal function of religion is too great.⁴⁹ Thus, the central holding of *Rayburn* focused on the functions that the employee served: “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

41. *McClure*, 460 F.2d at 560–61.

42. *Id.* at 560.

43. *Id.*

44. *Id.* at 560–61.

45. See *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) (holding that it was permissible for a Catholic school to refuse to rehire the plaintiff teacher, because she remarried outside of the church).

46. 772 F.2d 1164, 1168 (4th Cir. 1985).

47. *Id.* The nature of the Fourth Circuit’s finding conflicts with its earlier statement in the opinion that “[t]he language and the legislative history of Title VII both indicate that the statute exempts religious institutions *only to a narrow extent*.” *Id.* at 1166 (emphasis added).

48. *Id.* at 1167–68 (citation omitted).

49. *Id.* at 1170.

ritual and worship, he or she should be considered ‘clergy.’”⁵⁰ Thus, *Rayburn* provided a context in which to apply the ministerial exception created by the Fifth Circuit.

However, looking at the *Rayburn* test from a practical viewpoint, it does not succeed in narrowing the application of the ministerial exception to those cases that truly warrant it.⁵¹ Rather, in *Rayburn*, the Fourth Circuit made it clear that, when determining whether a particular employee is a “minister,” the court may not inquire into the church’s motive behind the employment action.⁵² For instance, the Seventh Circuit has interpreted *Rayburn*’s treatment of the ministerial exception as “preclud[ing] any inquiry whatsoever into the reasons behind a church’s ministerial employment decision. The church need not, for example, proffer any religious justification for its decision, for the Free Exercise Clause ‘protects the act of a decision rather than a motivation behind it.’”⁵³

C. *The Expanding Definition of “Minister”*

After the Fifth Circuit founded the ministerial exception in *McClure* and the Fourth Circuit clarified the definition of “minister” in *Rayburn*, other district and appellate courts utilized this test to dismiss numerous Title VII claims as soon as they discovered that the plaintiff served the religious organization in any capacity. For example, in *Starkman v. Evans*, the Fifth Circuit used the principles articulated in *McClure* and *Rayburn* to formulate its own three-prong test for determining whether a plaintiff is a “minister” for the purposes of the ministerial exception.⁵⁴ Upon concluding that the choir director did, in

50. *Id.* at 1169 (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979)).

51. Another student commentator pointed out that, alternatively, the ambiguous nature of *Rayburn*’s definition of minister has caused some courts to “occasionally misunderstand[and] the spiritual import of some employment positions.” See Dunlap, *supra* note 16, at 2012. Dunlap also cited *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. Unit A July 1981), as one case where the court arguably “failed to recognize the spiritual function of the administrative staff at the seminary.” Dunlap, *supra* note 16, at 2012 n.41; accord JULIA K. STRONKS, LAW, RELIGION, AND PUBLIC POLICY: A COMMENTARY ON FIRST AMENDMENT JURISPRUDENCE 71 (2002) (arguing that *Rayburn*’s use of the ministerial exception creates confusion and inconsistency among judges because “it allows [them] to decide for themselves what definition of ‘religion’ they want to use”).

52. *Rayburn*, 772 F.2d at 1169.

53. *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003) (quoting *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 801 (4th Cir. 2000)).

54. 198 F.3d 173, 176 (5th Cir. 1999). The three factors are as follows: (1) whether the employment decision was based largely on religious criteria; (2) whether the employee was qualified and authorized to perform the ceremonies of the church; and (3) whether the employee

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fact, qualify as a minister, it promptly affirmed the district court's decision to grant summary judgment to the religious employer.⁵⁵

Similarly, the Seventh Circuit reaffirmed the widespread view that minimal judicial analysis is required for Title VII claims brought by employees of religious institutions.⁵⁶ In *Alicea-Hernandez v. Catholic Bishop of Chicago*, Gloria Alicea-Hernandez, a Hispanic woman, was employed as the Hispanic Communications Manager for the Archdiocese of Chicago.⁵⁷ During her nine-month tenure, Alicea-Hernandez filed several complaints with the Equal Employment Opportunity Commission (EEOC), alleging that she was continuously humiliated and excluded in the workplace and was eventually replaced "by a male Hispanic with less competence and experience in Hispanic communication."⁵⁸ However, the district and appellate courts refused to address the discriminatory treatment she experienced and, instead, focused solely on her position.⁵⁹ The court rejected Alicea-Hernandez's suggestion that it consider "the nature of her claims and whether the discrimination in question was exclusively secular."⁶⁰ Rather, relying on *Rayburn's* broad deference to religious organizations, the Seventh Circuit concluded that any individual who serves as a "liaison" between the church and the community is precluded from bringing a Title VII claim.⁶¹ Because the court refused to consider the church's doctrine, it effectively characterized the plaintiff as a "minister," even though it is equally possible that the church's religious beliefs would not define her as such.⁶² Her role as the press secretary to the Hispanic community was enough for the court to arrive at that conclusion.⁶³

As the *Starkman* and *Alicea-Hernandez* decisions demonstrate, the ministerial exception precludes courts from considering the merits of plaintiffs' claims.⁶⁴ Moreover, nothing prevents a church or other re-

engaged in activities traditionally considered ecclesiastical or religious, including whether the plaintiff attends to the religious needs of the faithful. *Id.*

55. *Id.* at 177.

56. *Alicea-Hernandez*, 320 F.3d at 703. According to the court, the sole issue on appeal was "whether Alicea-Hernandez's position as Hispanic Communications Manager can functionally be classified as ministerial." *Id.*

57. *Id.* at 700.

58. *Id.* at 702.

59. *Id.*

60. *Id.* at 703.

61. *Id.* at 704.

62. *Alicea-Hernandez*, 320 F.3d at 703.

63. *Id.* at 703-04.

64. *Id.* at 702, 704 (affirming that a dismissal for lack of subject matter jurisdiction, by its very nature, bars the court from reaching the merits of the case).

religious institution from asserting the ministerial exception as a pretext for impermissible discrimination. *Miller v. Bay View United Methodist Church, Inc.*, a recent case in the Eastern District of Wisconsin, illustrates this troubling fact.⁶⁵ The plaintiff in *Miller* was an African American woman who, after an extensive interviewing process, was hired as the church's Choir and Music Director.⁶⁶ Among other duties, she was responsible for "preparing the music for the Sunday worship service, practicing with the choirs in the weeks before the worship services, and leading the choirs and congregation in song during the Sunday worship services."⁶⁷ During her interview, the church asked her about her religious denomination.⁶⁸ She responded that she was a member of a different Methodist church and a "self-proclaimed 'religious' and 'spiritual' person."⁶⁹ The selection committee found the plaintiff to be well qualified for the position and hired her.⁷⁰ Six months later, she was fired.⁷¹

Although the plaintiff in *Miller* was qualified for the position and fit the church's religious criteria,⁷² the actual reasons behind her termination remain unknown. The limited facts of the case reveal that the plaintiff successfully fulfilled her job duties.⁷³ Other than that, the district court's opinion is completely devoid of any information regarding the circumstances surrounding her termination. Instead, the court concentrated on applying the *Starkman* three-factor test to evaluate the plaintiff's role as a "minister."⁷⁴ After finding the first two factors to be satisfied, the court quickly determined that, because she was "engaged in traditionally ecclesiastical or religious activities," the ministerial exception applied.⁷⁵ This case is another example of how a court's emphasis on the plaintiff's role within the church allows it to make snap decisions based on what it accepts as traditionally ecclesiastical or religious activities.⁷⁶

65. 141 F. Supp. 2d 1174, 1184 (E.D. Wis. 2001).

66. *Id.* at 1177.

67. *Id.* at 1178.

68. *Id.* at 1182.

69. *Id.* at 1177.

70. *Id.* at 1178.

71. *Miller*, 141 F. Supp. 2d at 1179.

72. *Id.* Title VII exempts religious organizations from religious discrimination claims. Thus, if the church administrators opposed the plaintiff's religious denomination or practices, they likely would not have hired her in the first place. However, they apparently found her religious denomination to be acceptable, because they employed her for six months. *Id.*

73. *Id.* The facts are "limited," because the ministerial exception precludes the court from inquiring about the reasons behind the plaintiff's termination.

74. *Id.* at 1181-83.

75. *Id.* at 1183.

76. *Id.*

D. *The Religion Clauses*

The First Amendment to the U.S. Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁷⁷ Courts have used both the Free Exercise and Establishment Clauses of the First Amendment to justify the ministerial exception to Title VII.⁷⁸ As one court phrased it, the ministerial exception “saves Title VII from unconstitutionality under the First Amendment by requiring that Title VII suits be dismissed when they would impermissibly encroach upon the free exercise rights of churches or excessively entangle government or religion.”⁷⁹

However, one U.S. Supreme Court case has cast doubts on lower courts’ use of the Free Exercise Clause to justify applying the ministerial exception.⁸⁰ In *Employment Division, Department of Human Resources v. Smith*, the Court upheld Oregon’s right to deny unemployment compensation to two members of the Native American Church after they were terminated from their jobs for ingesting the hallucinogenic drug peyote.⁸¹ While peyote is considered a “controlled substance” under Oregon state law, it is also used for sacramental purposes by the Native American Church.⁸² In an opinion written by Justice Scalia, the Court rejected the plaintiffs’ contention that “their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice” and found that “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability.”⁸³ Notably, this decision also emphasized the importance of having legislatures, rather than courts, “decide whether to create exceptions to a neutral, generally applicable law.”⁸⁴

77. U.S. CONST. amend. I.

78. See, e.g., *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006).

79. *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 953 (9th Cir. 2004).

80. *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990); see also Corbin, *supra* note 17, at 1982. However, *Smith* has been widely criticized. See, e.g., John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of Oregon v. Smith*, 25 IND. L. REV. 71 (1991); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1124 (1990); James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1412 (1992) (referring to the decision as a “regrettable departure from a doctrine that at least purported to value and protect religious liberty”).

81. 494 U.S. at 890.

82. *Id.* at 874.

83. *Id.* at 878–79.

84. MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 126 (2005).

Courts have varied in their response to *Smith*. As one scholar noted, most lower courts “have read the decision as a bright-line prohibition on exemptions from facially neutral laws that ‘only incidentally’ burden religion.”⁸⁵ Still, other courts have interpreted *Smith* as only eliminating the first of two types of protection offered by the Free Exercise Clause.⁸⁶ According to these courts, “[t]he second type of government infringement—interference with a church’s ability to select and manage its own clergy—was not at issue in *Smith*” and, therefore, while “*Smith* limited free exercise protection of religious individuals, [it] left intact the free exercise autonomy of religious institutions.”⁸⁷ Thus, while commentators continue to debate which approach most appropriately interprets *Smith*,⁸⁸ lower courts’ inconsistent decisions illustrate that one thing is clear: *Smith* has created ambiguity in free exercise jurisprudence.⁸⁹

Since *Smith*, many courts and commentators have drawn support for the ministerial exception from the Establishment Clause.⁹⁰ In *Lemon v. Kurtzman*, the U.S. Supreme Court articulated a three-prong test for determining whether a statute creates excessive entanglement in violation of the Establishment Clause.⁹¹ The first two factors require that the statute have a secular, legislative purpose and a primary effect that neither advances nor inhibits religion.⁹² Third, the statute must not foster an excessive government entanglement with religion.⁹³ It is this third prong, and its prohibition on entanglement, that is typically at issue in Title VII cases involving ministerial employees.⁹⁴ For instance, in *Miller*, the court addressed the two ways gov-

85. Brant, *supra* note 6, at 301. Brant also correctly observed that, “[s]ince the employment discrimination laws are not directed at religious institutions, *Smith* requires a reconsideration of the continuing validity of [the ministerial exemption].” *Id.* at 277.

86. Corbin, *supra* note 17, at 1983–84 (citing *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1303–04 (11th Cir. 2000); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 656–57 (10th Cir. 2002)).

87. *Id.* For a general critique of this position, see generally *id.* at 1981–2002 (discussing at length three key weaknesses of courts’ attempts to distinguish *Smith* from ministerial exception cases).

88. See, e.g., John L. Tuttle, Note, *Adding Color: An Argument for the Colorable Showing Approach to Hybrid Rights Claims Under Employment Division v. Smith*, 3 AVE MARIA L. REV. 741 (2005).

89. See Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith*, 75 N.Y.U. L. REV. 1045, 1046 (2000) (stating that, “[i]n the wake of *Smith*, confusion abounds in the lower courts, which interpret the Court’s new test in significantly divergent ways”).

90. Corbin, *supra* note 17, at 2004.

91. 403 U.S. 602, 612–13 (1971).

92. *Id.* at 612.

93. *Id.* at 613.

94. Corbin, *supra* note 17, at 2005.

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ernment entanglement can occur: procedurally and substantively.⁹⁵ First, the *Miller* court concluded that applying Title VII on its face would “allow[] the commencement of a potentially protracted legal process” and result in excessive procedural entanglement.⁹⁶ Specifically, the court found that, if it were to apply Title VII, the defendant’s “personnel and records would inevitably become subject to subpoena, discovery, cross examination, [and] the full panoply of legal process designed to probe the mind of the church in the selection of its ministers.”⁹⁷ Second, the court determined that inquiring into whether the church’s religious justification was merely pretextual would lead to excessive substantive entanglement.⁹⁸ According to the court, reviewing the plaintiff’s job performance unquestionably offends the First Amendment.⁹⁹

Clearly, the ministerial exception ensures that courts will not violate the Religion Clauses of the First Amendment, sparing them the difficult task of conducting a more substantive investigation into what actually happened regarding the plaintiff’s employment. Yet, as scholars have pointed out, many of these inquiries would not be sufficiently difficult or intrusive as to unlawfully entangle the government with religious matters.¹⁰⁰ In the case of a choir director, for example, there are often documented statements and criteria that a church specifically looks to when hiring such an individual.¹⁰¹ In these cases, it

95. 141 F. Supp. 2d 1174, 1183 (E.D. Wis. 2001) (“Procedural entanglement arises in situations where a protracted legal process pits church and state as adversaries, while substantive entanglement arises where the Government is placed in a position of choosing among competing religious visions.” (internal quotation marks omitted)).

96. *Id.* at 1184. In the end, the *Miller* court granted the defendant’s motion to dismiss for lack of subject matter jurisdiction. *Id.* However, the court’s language indicates that this premature dismissal was based largely on the court’s assumptions regarding the course that this legal action could potentially take. As Corbin pointed out, “no one has closely examined actual Title VII litigation to determine how likely” it is that courts would be forced to evaluate issues concerning religious doctrine. Corbin, *supra* note 17, at 2006.

97. *Miller*, 141 F. Supp. 2d at 1183 (alteration in original) (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (1985)). The court was again making assumptions regarding the future of the lawsuit, which, at this early stage, was simply unknown.

98. *Id.* at 1184.

99. *Id.*

100. See, e.g., HAMILTON, *supra* note 84.

101. For example, the plaintiff in *Miller* was subjected to a vigorous interviewing process by a special selection committee, during which she was given a printed copy of the choir director’s job description. 141 F. Supp. 2d at 1177–78 (“[P]laintiff’s responsibilities . . . were described as leading the Chancel Choir and the Contemporary Christian Choir.”). After determining that Miller met these requirements, the selection committee prepared a written recommendation that she be hired. *Id.* Miller also interviewed with three additional people who reiterated her job responsibilities and concluded that she was entirely qualified. *Id.* at 1178. It is noteworthy that the Church specifically questioned Miller about her religious beliefs before hiring her. See *id.* at 1177.

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would not be overly intrusive for a court to conduct some investigation into the merits of a former employee’s discrimination claim.¹⁰² The following discussion of the *Petruska* decision demonstrates that the inherent conflict between the First and Fourteenth Amendments can be avoided, or at least minimized, to a point where courts can still allow plaintiffs’ discrimination claims to proceed.¹⁰³

III. SUBJECT OPINION: *PETRUSKA V. GANNON UNIVERSITY*

The Third Circuit’s original *Petruska* decision was a step forward for women and minorities throughout the United States. For the first time, a circuit court delved into a more searching and meaningful analysis of the ministerial exception. Judge Becker’s well-reasoned opinion recognizes many of the concerns feminists and legal scholars had previously voiced regarding the ministerial exception.¹⁰⁴

First, this Part explains the essential facts surrounding Lynette Petruska’s ultimate resignation from her well-regarded position as chaplain at Gannon University.¹⁰⁵ After laying out the facts in Section A, Section B analyzes the Third Circuit’s treatment of Petruska’s constitutional claims and the majority’s decision to allow her Title VII case to go forward.¹⁰⁶ Section C discusses the dissent’s perspective.¹⁰⁷ Section D concludes with the holding of the original *Petruska* decision.¹⁰⁸

A. *The Facts Demonstrate that Petruska Experienced Gender Discrimination*

In July 1997, Gannon University hired Lynette Petruska to serve as its Director of Social Concerns.¹⁰⁹ Two years later, when the position

102. Corbin discussed this notion in her article. *See* Corbin, *supra* note 17, at 2017. To illustrate, Corbin used the example of a divorced teacher at a religious school who helps a colleague with a sexual harassment suit against the school and is subsequently fired. Should the school claim that it terminated the teacher for violating its religious proscription against divorce, Corbin pointed out that a court would still be able to determine “whether, assuming the school’s religion condemns divorce, this condemnation motivated the termination, or whether it was motivated by illegal retaliation for protected conduct, or both.” *Id.* at 2017 & n.350 (discussing alternative arguments the teacher could make “without putting into issue the validity, truthfulness, or substance of Catholic religious teaching”).

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103. *See infra* notes 150–174 and accompanying text.

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104. *See, e.g.*, Coon, *supra* note 25, at 487–88; Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1116 (1996).

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105. *See infra* notes 109–149 and accompanying text.

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106. *See infra* notes 150–174 and accompanying text.

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107. *See infra* notes 175–183 and accompanying text.

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108. *See infra* notes 184–187 and accompanying text.

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109. *Petruska v. Gannon Univ. (Petruska I)*, No. 05-1222, 2006 U.S. App. LEXIS 13135, at *5 (3d Cir. May 24, 2006), *reh’g granted*, 2006 U.S. App. LEXIS 15088 (3d Cir. June 20, 2006).

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of permanent chaplain of the university became available, the President of Gannon University, David Rubino, chose to appoint Petruska.¹¹⁰ However, as her complaint indicated, Petruska was initially hesitant about accepting the promotion for several reasons.¹¹¹ First, she was aware that Gannon University engaged in gender discrimination practices and followed discriminatory policies.¹¹² Specifically, Petruska was concerned about working under Bishop Donald Trautman, who then served as the chair of Gannon's Board of Directors.¹¹³ He was known "for being unable to work with women and for removing women from leadership positions" within the university.¹¹⁴ Petruska also worried that she would be replaced once a suitable male became available to serve as chaplain.¹¹⁵ A former Gannon University chaplain, Reverend Nicholas Rouch, was due to return from Rome, and Petruska felt that, if given the option, Gannon would prefer to retain a man in this powerful position.¹¹⁶

On the other hand, accepting the chaplain position would have been a step forward for Petruska's career. At Gannon, the role of chaplain was equivalent to being vice president of a company.¹¹⁷ As chaplain, Petruska would have served in a cabinet-level position on Rubino's staff and would have had the opportunity to co-chair Gannon's Catholic Identity Task Force.¹¹⁸ The chaplain was not solely a secular position but was also responsible for a few religious duties.¹¹⁹ In Petruska's case, she would have been responsible for holding prayer services and planning liturgies.¹²⁰ Moreover, at this time, Petruska was very close to taking her final vows and becoming a nun in the Catholic Church.¹²¹ Accepting the chaplain position would have made her the first female to serve in this position at Gannon University.¹²² Thus, before accepting the appointment, Petruska requested and received assurance from Rubino that she would not be replaced by Rouch when he returned from his study in Rome.¹²³ Rubino also

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Petruska I*, 2006 U.S. App. LEXIS 13135, at *5.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at *6.

120. *Id.*

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

122. *Id.*

123. *Petruska I*, 2006 U.S. App. LEXIS 13135, at *5.

assured her that she would not be replaced by any other male, so long as her job performance was up to par.¹²⁴ In fact, “her tenure as chaplain would be based solely on her performance, and not her gender.”¹²⁵ This promise was upheld for several months before things started to change at Gannon.¹²⁶

In March 2000, Rubino “was accused of having a sexual affair with a female subordinate” at the university.¹²⁷ As a result, he was forced to take a leave of absence while Gannon investigated the matter.¹²⁸ It was not difficult for the university to get to the bottom of the scandal, because Rubino admitted the truth of the allegations to several university officials.¹²⁹ Soon after the first accusation, another female employee came forward and alleged that Rubino was guilty of sexually harassing her as well.¹³⁰ A few months later, Rubino resigned.¹³¹ Provost Thomas Ostrowski was selected as Rubino’s replacement and immediately took over as acting president.¹³²

During this tumultuous time, Petruska took the responsibilities of her position on the President’s staff seriously. Petruska was heavily involved in addressing the sexual improprieties taking place at Gannon.¹³³ In addition to serving on Gannon’s Sexual Harassment Committee, Petruska aided Rubino’s second harassment victim in coming forward with her story.¹³⁴ When Bishop Trautman “began a campaign to conceal Rubino’s misconduct,” Petruska opposed him and, instead, advocated openly dealing with the former president’s embarrassing

124. *Id.*

125. *Id.*

126. *Id.* at *6.

127. *Id.*

128. *Id.*

129. *Petruska I*, 2006 U.S. App. LEXIS 13135, at *6.

130. *Id.* The university was ultimately forced to settle this claim. *Id.* at *22.

131. *Id.* at *6.

132. *Id.*

133. *Id.*

134. *Id.* While the sexual harassment was not directed toward Petruska or another clergy member, commentators have noted that discrimination cases can be intertwined with cases in which a clergy member alleges that she was harassed by another clergy member. See Eikenberry, *supra* note 18, at 291–92. Eikenberry highlighted one case where the Minnesota Court of Appeals separated a clergywoman’s claims of discrimination and sexual harassment and treated the latter differently under the Establishment Clause. See *Black v. Snyder*, 471 N.W.2d 715, 717 (Minn. Ct. App. 1991). The court found that the Establishment Clause did not prevent it from hearing the plaintiff’s sexual harassment charge and “that excessive entanglement is a question of degree, and the degree of intrusion necessary in resolving [her] sexual harassment claims presented no greater conflict with the church’s disciplinary authority than that presented in cases enforcing child abuse laws.” Eikenberry, *supra* note 18, at 291–92 (internal quotation marks omitted); see also *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 959 (9th Cir. 2004) (ordained female minister’s “attempt to show that she was sexually harassed . . . would, after all, involve a purely secular inquiry”).

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transgressions.¹³⁵ When several university lawyers encouraged Gannon to limit “the time period in which [sexual harassment] grievances could be filed,” Petruska lobbied against such limitations.¹³⁶ The record indicates that she was not alone in her approach, for her view on the limitations issue “ultimately prevailed.”¹³⁷ Overall, Petruska was not afraid to shed light on some of the university’s questionable discrimination and harassment practices and policies, even though some of the powerful men at the university opposed her.¹³⁸

By July 2000, it was evident that Petruska had supporters and was not the only person who disagreed with the way the university was covering up the sexual harassment scandal. In response, Bishop Trautman decided to take action. He instructed Ostrowski, Gannon’s acting president, to “place the Chaplain’s Division under the control of Rouch [who had returned from Rome], thereby making Petruska Rouch’s subordinate.”¹³⁹ Ostrowski refused to do so and informed Petruska about Trautman’s request.¹⁴⁰ “According to Petruska, Ostrowski conceded that the proposed action was being taken *solely* on the basis of Petruska’s gender. Later, Ostrowski ‘made it clear to [Petruska] that Trautman and Rouch would never let her remain Chaplain at Gannon because of her gender.’”¹⁴¹ In January 2001, Ostrowski learned that Trautman had fashioned an alternative plan.¹⁴² Once Trautman was able to replace Ostrowski with a new President, he planned to “‘clean house’ by removing three high-ranking university officials, all of whom were female”: Petruska, who was still serving as the permanent chaplain, the Executive Director of Admissions, and the acting provost.¹⁴³

Little by little, Trautman’s design began to unfold. A new male president, Antoine Garibaldi, was appointed in May 2001.¹⁴⁴ Garibaldi immediately eliminated a great deal of Petruska’s decision-making power by requiring “Rouch’s approval of all important decisions

135. *Petruska I*, 2006 U.S. App. LEXIS 13135, at *6.

136. *Id.*

137. *Id.*

138. *Id.* at *6–7. Petruska helped prepare a report that “criticized Gannon’s discrimination and harassment policies. Despite a request from Gannon’s President, the committee that prepared the report refused to modify portions criticizing the university.” *Id.* Petruska also opposed allowing a former Gannon priest, who was required to leave after engaging in sexual misconduct with students, from returning to campus. *Id.* at *7 n.4.

139. *Id.* at *7.

140. *Id.*

141. *Petruska I*, 2006 U.S. App. LEXIS 13135, at *7 (emphasis in original).

142. *Id.* at *7–8.

143. *Id.* at *8.

144. *Id.*

that Petruska, as chaplain, ordinarily made.”¹⁴⁵ About a year passed before Garibaldi made it clear that it would not be long before Rouch would officially become Petruska’s superior.¹⁴⁶ In August 2002, Garibaldi informed Petruska “that he had decided to restructure the university, that she would be removed from the President’s Staff, and that the Chaplain’s Division would report to Rouch. The effect of the restructuring was to make Rouch Petruska’s boss.”¹⁴⁷ Stripped of her authority and on the verge of being fired, Petruska resigned in October 2002.¹⁴⁸ Rouch made certain that the student body and staff did not get any ideas about having another woman occupy Petruska’s position by repeatedly telling them “that a woman would not be considered to replace Petruska as chaplain.”¹⁴⁹

B. Applying the U.S. Constitution to Petruska

The Third Circuit, in an opinion by the late Judge Becker, began its analysis of Petruska’s claims by identifying “three explanations of why the Constitution may require the ministerial exception.”¹⁵⁰ In the past, other circuits had employed these three rationales to similar Title VII cases. Thus, choosing to follow precedent created by other appellate courts, the court considered whether any of these rationales applied in Petruska’s case.¹⁵¹ While the Third Circuit considered the other circuits’ analyses, it ultimately found that “neither Supreme Court precedent nor the arguments advanced by [its] sister circuits supports a ministerial exception that applies without regard to the reason for an employment decision.”¹⁵² However, before analyzing the ways the Third Circuit applied the three rationales in the *Petruska* decision, it is important to define each rationale and understand how they differ.

First, the “government scrutiny” rationale “holds that the ministerial exception is necessary to avoid government probing or examina-

145. *Id.* The court noted that “Gannon has cited no explanation grounded in religious belief, religious doctrine, or internal regulation for the decision to give to Rouch what had, in effect, been Petruska’s job.” *Id.* at *23 n.19. The importance of Gannon’s failure to provide a religious reason will be discussed more extensively later in this Note. See *infra* notes 158–160, 171, 199–202.

146. *Petruska I*, 2006 U.S. App. LEXIS 13135, at *8.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at *13.

151. *Id.*

152. *Petruska I*, 2006 U.S. App. LEXIS 13135, at *14.

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tion of a church's affairs."¹⁵³ This rationale stems from the First Amendment's Establishment Clause, "which commands the government to avoid entanglement in religious matters."¹⁵⁴ The pertinent question under this mode of examination is as follows: Would allowing Petruska to go forward with her Title VII claim result in "excessive judicial scrutiny" of Gannon University?¹⁵⁵ In answering this question, the court turned to a well-established U.S. Supreme Court principle: "A secular court must not resolve issues of religious belief, religious doctrine, or internal church regulation."¹⁵⁶ Supreme Court precedent clearly places such matters "beyond judicial scrutiny."¹⁵⁷ However, in this case, Gannon never asserted that it had a religious reason for demoting Petruska.¹⁵⁸ Thus, a court could consider the adverse employment action without delving into religious analysis.¹⁵⁹ Gannon's failure to offer a religious justification for Petruska's demotion made it impossible to determine at that point in the lawsuit whether its personnel and records would be subject to intrusive "subpoena, discovery, [or] cross-examination."¹⁶⁰ Alternatively, if Gannon were to offer a religious justification for its employment decision, the court found that this would not automatically mean that Petruska's claim should be dismissed under the ministerial exception.¹⁶¹ There are several facts that lend themselves to a gender discrimination claim.¹⁶² Again, allowing a court to investigate these allegations to determine if, in fact, impermissible discriminatory conduct took place

153. *Id.* Here, the court cited one of the main concerns voiced by the Fourth Circuit in *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985): "Church personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers."

154. *Petruska I*, 2006 U.S. App. LEXIS 13135, at *14.

155. *Id.* at *39.

156. *Id.* The Court articulated and used this principle in past church autonomy and church property lawsuits. *See id.* It has been argued that one of the most influential of these church property cases, *Jones v. Wolf*, 443 U.S. 595 (1979), "sharply undermines any claim that the Free Exercise Clause confers a wide-ranging right of autonomy upon religious organizations." Brant, *supra* note 6, at 294.

157. *Petruska I*, 2006 U.S. App. LEXIS 13135, at *39.

158. *Id.*

159. *Id.*

160. *Id.* at *14 n.10. For other cases where the defendant religious institution did not offer a religious justification for its alleged discriminatory actions and the court still chose to apply the ministerial exception, see Eikenberry, *supra* note 18, at 269–70 (arguing that "the Constitution may not necessitate an exception to Title VII and other anti-discrimination laws in cases in which the religious organization offers no religious justification for discriminatory employment action").

161. *Petruska I*, 2006 U.S. App. LEXIS 13135, at *39–40.

162. *See supra* notes 109–149.

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would not require it “to delve into religious questions,” causing no infringement on the Establishment Clause.¹⁶³

Second, “the ‘selection of the clergy’ rationale aims to prevent the government from controlling actual employment *decisions*.”¹⁶⁴ After considering other circuits’ decisions employing this rationale, the court found that this explanation seems to be grounded in the Free Exercise Clause, rather than the Establishment Clause.¹⁶⁵ Some courts have chosen to apply this rationale very broadly, finding that the government should refrain from any involvement with religious organizations’ decisions regarding the hiring and firing of ministers.¹⁶⁶ While the Third Circuit generally agreed with this viewpoint, it placed logical limitations on its position.¹⁶⁷ The court made an important distinction that set its position apart from its sister circuits. It stated, “where an employment decision is devoid of religious or doctrinal content, and is based solely on sexism, we fail to see how the decision relates to the free exercise of religion.”¹⁶⁸

Finally, the “inquiry into religious doctrine” rationale justifies a court’s use of the ministerial exception through the idea that the exception is “necessary to prevent [it] from resolving religious questions,

163. *Petruska I*, 2006 U.S. App. LEXIS 13135, at *39–40. The court concluded this portion of its analysis with another citation to its decision in *Geary v. Visitation of the Blessed Virgin Mary Parish School*, 7 F.3d 324, 330 (3d Cir. 1993). It reaffirmed that “[a] conclusion that the religious reason did not in fact motivate dismissal would not implicate entanglement since that conclusion implies nothing about the validity of the religious doctrine or practice.” *Petruska I*, 2006 U.S. App. LEXIS 13135, at *39–40 (alterations in original).

164. *Petruska I*, 2006 U.S. App. LEXIS 13135, at *15 (emphasis in original).

165. *Id.* Circuits have used both Religion Clauses to support this rationale. The Third Circuit chose to focus on the Free Exercise Clause for its analysis, “because [the ‘selection of clergy’ rationale] focuses on the right of a church to put its beliefs into practice through its choice of ministers.” *Id.*

166. *See, e.g., Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985) (“Any attempt by government to restrict a church’s free choice of its leaders . . . constitutes a burden on the church’s free exercise rights.” (emphasis added)).

167. *Petruska I*, 2006 U.S. App. LEXIS 13135, at *47. For instance, “if a religious employer fired a ministerial employee for reasons related to faith, doctrine, or internal regulation, a judgment against the church would punish the church for expressing its beliefs.” *Id.* In this situation, the Third Circuit had no qualms about aligning itself with other courts, because involving itself in such a manner would indeed infringe on the First Amendment.

168. *Id.* The court also provided an illustration to further its point:

Let us assume that a male applicant and a female applicant for a ministerial position have identical religious views, that they are equally qualified, and that there is no religious reason to choose one over the other. Let us further assume that the decisionmaker chooses the male candidate due to sexism that is utterly unconnected to his religious beliefs. In such a case, we do not think that allowing the female candidate to bring suit under Title VII would infringe on the religious autonomy of the church.

Id.

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which lie beyond judicial competence and authority.”¹⁶⁹ Some courts have found that reviewing a ministerial employment decision would require it to “determine the meaning of religious doctrine and canonical law.”¹⁷⁰ The court quickly disposed of this rationale, finding that, as with the “government scrutiny” rationale, it was too early in the case to decide whether “Petruska’s claims will raise questions of a religious nature, requiring secular courts” to engage in an examination of Gannon’s religious doctrine.¹⁷¹

In short, the Third Circuit was not persuaded that any one of these three rationales justified dismissing Petruska’s claim. While each of the rationales presents reasons why the government should refrain from becoming too involved in religious matters, and the ministerial exception is one means of retaining separation of church and state, the court found that there are ways to approach these rationales with more “bite” and still remain true to the constitutionally mandated separation.¹⁷² Likewise, the court found that broadly applying the three rationales would result in “compulsory deference”¹⁷³ to religious institutions, and it was unwilling to practice such deference, especially because there was “nothing in the complaint suggest[ing] that Petruska’s demotion was based on religious belief, religious doctrine, or internal church regulation.”¹⁷⁴

C. *The Dissent’s Perspective*

In the original *Petruska* decision discussed above, Judge Smith entered a strong dissent, finding that, in tailoring the ministerial excep-

169. *Id.* at *16.

170. *Id.* (quoting *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991)). The plaintiff in *Scharon*, an ordained Episcopal priest employed by the defendant hospital as a chaplain in the Department of Pastoral Care, argued that “the defendants’ claims that religious issues were the basis of her termination [were] merely a pretext for the actual motive behind her dismissal”—the actual motive, she alleged, was age and sex discrimination. 929 F.2d at 363. She urged the court to consider her claims and, like Petruska, alleged “government involvement with religion can be avoided by focusing solely on the issues of age and sex discrimination.” *Id.* However, the court flat-out rejected this possibility, finding that a religious inquiry was, in fact, unavoidable. “To allow *Scharon*’s case to continue would necessarily lead to the kind of inquiry into religious matters that the First Amendment forbids.” *Id.*

171. *Petruska I*, 2006 U.S. App. LEXIS 13135, at *49.

172. *Id.*

173. The phrase “compulsory deference” was used by Supreme Court in *Jones v. Wolf*, 443 U.S. 595 (1979), a case involving a church property dispute. While the specifics of the case are quite different from the Title VII issue presented in *Petruska I*, the Third Circuit found Jones’s underlying reasoning to be applicable. Specifically, in *Jones*, the Court reinforced the principle “that religious organizations are bound by secular laws, so long as those laws do not require inquiry into religious doctrine.” *Id.* at *36. Thus, because Petruska’s claims did not require the inquiry discussed in *Jones*, the Third Circuit correctly decided to hear her case.

174. *Id.* at *37.

tion, the majority “effectively refuses to recognize any ministerial exception, placing [it] at odds with every other federal court of appeals to consider the issue.”¹⁷⁵ In Judge Smith’s view, a church’s right to select and terminate ministers is absolute.¹⁷⁶ He found that placing any limitations on this right egregiously violates a religious institution’s First Amendment protections.¹⁷⁷

Addressing the Free Exercise Clause first, Judge Smith found that the court should focus on the plaintiff’s functions as an employee, regardless of whether Gannon University asserted a religious justification for its treatment of Petruska.¹⁷⁸ Petruska qualifies as a “minister.”¹⁷⁹ Once that had been established, Title VII, “a neutral law of general applicability,” did not apply—where a religious institution is concerned, it will only apply to “lay employment decisions.”¹⁸⁰

Turning to the Establishment Clause issues raised by the majority,¹⁸¹ Smith reached a similar conclusion: “Because, as discussed above, a church’s choice regarding who will perform its spiritual functions is inherently a religious decision, any inquiry into that decision

175. *Id.* at *57–58 (Smith, J., dissenting).

176. *Id.* at *58 (“I disagree with the majority’s fundamental premise that a church’s choice regarding who performs particular spiritual functions is not necessarily a religious decision. . . . [S]uch a decision is, by its very nature, a religious one.”).

177. *Petruska I*, 2006 U.S. App. LEXIS 13135, at *58 (Smith, J., dissenting) (“[G]overnment interference with [a church’s ministerial employment decisions] necessarily infringes on [its] free exercise of religion and entangles the courts in religious matters.”).

178. *Id.* at *65–66. “[M]atters of governance and internal organization” are still at issue even though “Gannon has not identified an internal regulation or religious doctrine that required it . . . to hire Father Rouch to fill [the] position” above Petruska at the behest of Bishop Trautman. *Id.* at *65.

179. *Id.* at *66. Some of Petruska’s duties as chaplain were spiritual in nature: “she served as co-chair for the Catholic Identity Task Force, held prayer services, and was traditionally involved in planning liturgies.” *Id.* at *66 n.50.

180. *Id.* at *67–68 (emphasis in original). However, it has been argued that the court’s determination regarding a plaintiff’s ministerial status requires them to directly decide “questions of religious doctrine in a way they never do when deciding whether discrimination occurred.” Corbin, *supra* note 17, at 2026. According to Corbin, courts entangle themselves in religious doctrine by taking “a functional approach to determining who counts as a minister” and could actually characterize all of a religious entity’s employees as ministers. *Id.* at 2026–27 (“In order to decide whether [a] position is ministerial, the court must determine whether a plaintiff’s job ‘is important to the spiritual and pastoral mission of the church.’” (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)); accord *Dunlap, supra* note 16, at 2032 (“[G]ranted the judiciary the authority to define who performs ‘enough’ spiritual functions to qualify as a minister gives the government much the same power as it would possess if the ministerial exemption did not exist.”).

181. Judge Smith did not necessarily find it important to address the Establishment Clause, because, in his view, “the Free Exercise Clause bars any claim which limits a church’s right to choose who will fulfill particular spiritual functions” and made consideration of the Establishment Clause unnecessary in this case. *Petruska I*, 2006 U.S. App. LEXIS 13135, at *69 (Smith, J., dissenting). Nonetheless, he decided to respond “to the majority’s treatment of that issue.” *Id.*

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would traverse such questions” and, consequently, is beyond a secular court’s jurisdiction.¹⁸² In fact, Judge Smith found that, “[e]ven though the decision here involves an individual act rather than general practice, the necessary inquiry—asking whether the church can justify its employment decision with reference to church doctrine—excessively entangles the court.”¹⁸³

D. Petruska’s Outcome

After authoring the Third Circuit’s breakthrough Title VII opinion, Judge Becker passed away.¹⁸⁴ Shortly after his death, Gannon University petitioned the court for a rehearing by a reconstituted panel, and its request was granted.¹⁸⁵ It is unnecessary to dedicate much time to *Petruska II*, because the Third Circuit vacated its prior decision straight away.¹⁸⁶ Judge Smith applied the same line of reasoning used in his *Petruska* dissent to author *Petruska II*,¹⁸⁷ and, just like that, Lynette Petruska was back where she started: in a federal district court that applied the ministerial exception in a way that precluded her sex discrimination claim from being heard.

IV. ANALYSIS

The original *Petruska* decision was well reasoned and correctly decided.¹⁸⁸ While moving in an entirely new direction, it did not stray

182. *Id.* at *70.

183. *Id.* at *70–71. For a more detailed discussion of this assertion, see Part IV and accompanying text. For now, it is enough to realize that Judge Smith’s entanglement argument is illogical. How does simply asking Gannon University to assert religious doctrine in support of its alleged discriminatory act *excessively* entangle the court? Was Petruska’s performance at work less than satisfactory? Did she violate a religious belief in her pursuit of nunhood? Or was she performing her job well by advocating on behalf of the university students who had been violated by its President? All of these questions can be answered fairly easily, given that there are many witnesses who could testify in front of the District Court. However, the only way this testimony could come to light is if a court agreed to hear it—and this is a possibility completely barred by Judge Smith’s acceptance of the blanket ministerial exception.

184. *Petruska v. Gannon Univ. (Petruska II)*, 462 F.3d 294 (3d Cir. 2006). The opinion was issued several days after Judge Becker’s death in May 2006. See Henriques, *supra* note 121. R

185. *Petruska II*, 462 F.3d at 294. Judge Nygaard, who served as the third judge on the panel in the original decision (in addition to Judges Becker and Smith), recused himself from the reconstituted panel. *Id.* The circuit randomly selected Judges Cowen and Greenberg to join Judge Smith in hearing the case for the second time. *Id.*

186. *Id.* at 299.

187. See *id.* at 303–12.

188. Several commentaries on the ministerial exception have called for precisely the decision the Third Circuit authored in *Petruska*. See, e.g., Coon, *supra* note 25, at 484–85 (arguing that “instead of focusing on whether an employment dispute implicates a ministerial relationship . . . justiciability should be based on whether adjudication of the dispute would actually implicate religious doctrine or practice”); Hodson, *supra* note 7, at 573 (arguing that “the obligations of a R

from the binding principles handed down by the U.S. Supreme Court since Title VII's enactment in 1964.¹⁸⁹ Moreover, the Third Circuit's thorough analysis of how and why other circuits have applied the exception demonstrated its willingness to consider other circuits' approaches before determining that the exception is, in fact, being wrongly applied. By dedicating a large portion of its decision to examining, and ultimately rejecting, each of the three commonly used rationales for applying the ministerial exception,¹⁹⁰ the Third Circuit strengthened its position and clearly reasoned why the exception, as applied, is not in accordance with Congress's intentions when it enacted the section 702 exemption to Title VII.¹⁹¹ Thus, even more important than correctly examining and applying existing precedent regarding the exception, the Third Circuit interpreted section 702 according to its plain language and, as a result, *Petruska* is the most accurate and least judicially active decision, making it the one that should be followed by district courts throughout the United States.¹⁹²

The issues addressed in *Petruska I* and *Petruska II* are complex. These decisions, as well as several of the cases discussed in this Note, exhibit the inherent conflict between First Amendment liberties and the protection that the Fourteenth Amendment provides for members of a protected class.¹⁹³ The threshold question becomes the following:

religious employer under Title VII should be based on whether the employment practice is religiously based rather than on whether the employment practice discriminates on a nonreligious basis or whether the activities of the employee in question are central to the religion's mission").

189. See *supra* notes 77–103 and accompanying text.

190. *Petruska v. Gannon Univ. (Petruska I)*, No. 05-1222, 2006 U.S. App. LEXIS 13135, at *37–50 (3d Cir. May 24, 2006), *reh'g granted*, 2006 U.S. App. LEXIS 15088 (3d Cir. June 20, 2006); see also *supra* notes 109–149.

191. *Petruska I*, 2006 U.S. App. LEXIS 13135, at *25.

192. See the Third Circuit's discussion of the language of the section 702 exemption:

[T]he exemption is restricted to the decision to employ "individuals of a particular religion" to perform work connected with the organization's activities. Thus, Congress gave churches the explicit right to discriminate on the basis of religion, but declined to create a right to discriminate on the basis of sex or to retaliate against an employee for complaining of sex discrimination.

Id. (citations omitted). Interpreting a statute by looking at what Congress purposely left out of the law is a form of classic statutory interpretation.

193. See *supra* notes 77–103 and accompanying text. See also Duane E. Okamoto, *Religious Discrimination and the Title VII Exemption for Religious Organizations: A Basic Values Analysis for the Proper Allocation of Conflicting Rights*, 60 S. CAL. L. REV. 1375, 1375–77 (1987) (framing the "inherent conflict" in a very similar manner as portrayed in this Note: "On the one hand, allowing a religious group to practice religious discrimination in employment matters advances first amendment goals by allowing religious groups to keep their beliefs intact. On the other hand, allowing a religious group to discriminate may seriously infringe upon the individual employee's right to be free from discrimination . . ."); Rutherford, *supra* note 104, at 1059 (referring to the First Amendment as a "shield" used by religious institutions in order to "protect themselves against claims of illegal discrimination"; Kristen Colletta & Darya Kapulina, Note,

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When does the burden on free exercise override another compelling state interest, such as equal protection?¹⁹⁴ Second, how does the Establishment Clause fit into this picture?¹⁹⁵ This Note argues that the expansion of the ministerial exception warrants tipping the balance between these two competing amendments in favor of the Fourteenth Amendment. While selecting a minister, understood as a church leader or other individual whose job involves religious doctrine, should be protected by the First Amendment, the expanding definition of “minister” is overinclusive and allows religious institutions to enjoy more protection than necessary at the expense of the Fourteenth Amendment.¹⁹⁶ As many cases have demonstrated,¹⁹⁷ the ministerial exception has been applied to employment positions that are more secular than religious in nature and, therefore, should not be exempt from “generally applicable legal obligations.”¹⁹⁸

As the Third Circuit noted, Gannon University never asserted a religious justification for the adverse employment action it took against Petruska, which ultimately forced her out of her job.¹⁹⁹ Thus, in its original decision, the court was able to avoid any serious conflict with the First Amendment Religion Clauses and still seriously consider Pe-

Employment Discrimination and the First Amendment: Case Analysis of Catholic Charities, 23 HOFSTRA LAB. & EMP. L.J. 189, 189 (2005).

194. *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985). This is not a new question. In one of the most famous cases dealing with the conflict between First Amendment liberties and other legitimate, if not necessary, state laws, the Court stated that “[t]he values underlying [the Free Exercise and Establishment Clauses] have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance.” *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). The Court explained that “interests of admittedly high social importance” must, in fact, be those of the “highest order.” *Id.* at 214–15.

195. The Court has pointed out that, while this First Amendment Religion Clause is the “less explicit” of the two clauses, it is still “an equally firm . . . prohibition against the establishment of any religion by government.” *Yoder*, 406 U.S. at 214.

196. As Corbin noted, “the ministerial exception leaves more than ordained clergy without a remedy.” Corbin, *supra* note 17, at 1976. In fact, religious organizations’ “expanded role, spurred by [President George W. Bush’s] Faith-Based Initiatives and changes in religion clause jurisprudence, multiplies the number of positions that are potentially subject to the ministerial exemption.” *Id.* at 1969.

197. See *supra* notes 54–76 and accompanying text.

198. Lupu, *supra* note 21, at 391. The Court’s discussion in *Yoder* of the relationship between state-mandated education and religion supports this contention: “A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; *to have the protection of the Religion Clauses, the claims must be rooted in religious belief.*” *Yoder*, 406 U.S. at 215 (emphasis added). For more information about Title VII’s status as a “neutral law of general application,” see Brant, *supra* note 6, at 303–11.

199. *Petruska v. Gannon Univ. (Petruska I)*, No. 05-1222, 2006 U.S. App. LEXIS 13135, at *39 (3d Cir. May 24, 2006), *reh’g granted*, 2006 U.S. App. LEXIS 15088 (3d Cir. June 20, 2006).

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truska's sexual discrimination claim.²⁰⁰ In contrast, the blanket exemption employed by the reconstituted Third Circuit panel in *Petruska II* runs contrary to well-established notions of liberty and permits Gannon University, by virtue of its religious association, to engage in gender discrimination for reasons unfounded in religious doctrine.²⁰¹ Surely, it can be difficult to sort out what is and what is not religious doctrine for purposes of the ministerial exception; however, any such complexity should not preclude courts from engaging in such a searching analysis. The U.S. Supreme Court has recognized that, in some cases, a fine line exists between a religious person or entity's "way of life" and what actually constitutes "religious belief or practice."²⁰² It is unfair to assume that every employment decision made by a religious institution is somehow fundamental to that institution's religious doctrine. Instead, evaluating each Title VII discrimination claim on a case-by-case basis is, for several reasons, the better approach.²⁰³

First, facts are critical to deciding individual Title VII cases.²⁰⁴ Rather than endorsing other circuits' policy of promptly dismissing Title VII cases once a defendant religious institution asserts the ministe-

200. *Id.* at *37–50.

201. *See Yoder*, 406 U.S. at 215–16 ("Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.") This powerful statement demonstrates the importance of maintaining a balance between First Amendment liberties and other important societal rights. The ministerial exception, as applied in *Petruska II*, allows religious institutions to avoid dealing with the "delicate question" of what really constitutes religious doctrine and, in fact, avoids asking any questions at all.

202. *Id.* at 215. The Court included a helpful illustration in its *Yoder* opinion. The Court responded to the defendant Amish family's argument that their "religious faith and their mode of life are . . . inseparable and interdependent":

[I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such a belief does not rise to the demands of the Religion Clauses.

Id. at 215–16.

203. Some commentators perceive the judiciary's refusal to hear these cases according to their individual merits as granting too much preference to religious organizations. *See, e.g.,* Lupu & Tuttle, *supra* note 24, at 34. "Courts routinely refuse to entertain claims of unlawful discrimination by clergy or other religious leaders against religious entities. . . . No other type of organization gets the benefit of rules of deference and nonintervention that these decisions routinely apply." *Id.* at 33–34.

204. *See Parker v. Califano*, 561 F.2d 320, 333 (D.C. Cir. 1977) (discussing how important it is for an attorney to "gain the familiarity with the facts of the [Title VII] case that is so important in the fact-intensive area of employment discrimination").

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rial exception,²⁰⁵ the Third Circuit correctly emphasized that premature dismissal of a valid claim is just as dangerous as a potential First Amendment infringement.²⁰⁶ There are ways in which district courts can avoid deciding religious questions while still allowing the complainant to present her evidence.²⁰⁷ Capable factfinders²⁰⁸ can assess the evidence without engaging in serious inquiries regarding the religious doctrine of the institution involved in the lawsuit.²⁰⁹ In short, it is possible for a court to tailor its examination of a Title VII claim in a way that prevents entanglement with religion but allows it to remain fair to the plaintiff by seriously considering her allegations of discrimination.²¹⁰

205. See, e.g., *Young v. N. Ill. Conference of United Methodist Church*, 818 F. Supp. 1206 (N.D. Ill. 1993), *aff'd*, 21 F.3d 184 (7th Cir. 1994).

206. *Petruska v. Gannon Univ. (Petruska I)*, No. 05-1222, 2006 U.S. App. LEXIS 13135, at *42-43 (3d Cir. May 24, 2006), *reh'g granted*, 2006 U.S. App. LEXIS 15088 (3d Cir. June 20, 2006). In this portion of its opinion, the court included an excerpt from a D.C. Circuit decision that it found to be instructive. The following quote is taken from *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990), which dealt with a minister's contract claim:

It could turn out that in attempting to prove his case, appellant will be forced to inquire into matters of ecclesiastical policy Of course, in that situation, a court may grant summary judgment on the ground that appellant has not proved his case and pursuing the matter further would create an excessive entanglement with religion. On the other hand, it may turn out that the potentially mischievous aspects of [appellant's] claim are not contested by the Church or are subject to entirely neutral methods of proof. The speculative nature of our discussion here demonstrates why it is premature to foreclose appellant's . . . claim. Once evidence is offered, the district court will be in a position to control the case so as to protect against any impermissible entanglements.

Petruska I, 2006 U.S. App. LEXIS 13135, at *43-44 (quoting *Minker*, 894 F.2d at 1360).

207. For instance, in *Petruska's* case, the Third Circuit found that she "could cite evidence that she was demoted due to discrimination without any religious basis. . . . [S]he might present evidence that the decisionmakers *said* that they had not religious reason to discriminate against her." *Petruska I*, 2006 U.S. App. LEXIS 13135, at *42 (emphasis in original). To support her position, *Petruska* could also raise the point that Gannon University hired her as chaplain knowing that she was a woman. If Gannon's religious doctrine bars women from serving in this position, why appoint *Petruska* in the first place?

208. The original Third Circuit panel articulated its confidence in the "excellent district courts in [its] circuit" and found that they were "up to the task" of examining "whether a piece of evidence calls religious doctrine into question." *Id.* at *44.

209. For instance, the Third Circuit explained that, while a district court "may be constitutionally required to limit discovery or exclude evidence designed to call into question the validity, existence, or plausibility of the religious doctrine," such measures *can* be taken in our country's legal system. *Id.* at *43.

210. Such an approach "would risk foreclosing perfectly valid claims, thereby ignoring the will of Congress without a justification rooted in the Constitution." *Id.* at *46. The Court also reinforced the importance of the Fourteenth Amendment: "We will not, until we have a constitutional reason to do so, enfeeble 'a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long.'" *Id.* (quoting *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 204 (1979)).

Second, the spectrum of ministerial positions is vast and varies depending on the religious organization involved. Since the *Rayburn* decision, courts have largely focused on the employment position occupied by the plaintiff,²¹¹ further warranting a case-by-case analysis of Title VII claims involving religious institutions. In *Rayburn*, the Fourth Circuit used the balancing test the Court fashioned in *Wisconsin v. Yoder*²¹² to determine which was more important: free exercise of religion or equal employment opportunities.²¹³ After entertaining this broad question, the *Rayburn* court found that the “balance weigh[ed] in favor of free exercise of religion” and then inquired about the ministerial status of the employment decision.²¹⁴ Finding that the employment position that the plaintiff had wished to occupy was indeed that of a “minister,” the Fourth Circuit promptly ended its inquiry.²¹⁵ This is the major point of contention between *Rayburn* and *Petruska*.²¹⁶ In emphasizing the importance of the First Amendment concerns, courts like *Rayburn* effectively minimize the harm that the subsequent Fourteenth Amendment violations cause protected individuals. The Seventh Circuit is one of many courts that has adopted the *Rayburn* court’s view: “‘While an unfettered church choice may create minimal infidelity to the objectives of Title VII, it provides maximum protection of the First Amendment right to free exercise of religious beliefs.’”²¹⁷ However, as demonstrated in *Petruska*, the ministerial exception creates much more than “minimal infidelity” to Title

211. See *supra* notes 56–78 and accompanying text.

212. 406 U.S. 205, 221 (1972) (balancing the burden on free exercise against the “impediment to [the state’s] objectives that would flow from recognizing the claimed . . . exemption”).

213. *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1165, 1168 (4th Cir. 1985) (dismissing plaintiff’s sexual and racial discrimination claims under Title VII, because “state scrutiny of the church’s choice would infringe substantially on the church’s free exercise of religion and would constitute impermissible government entanglement with church authority”); see also Lupu, *supra* note 21, at 392 (“Cases such as *Rayburn* pit our social concern for equal employment opportunity against our constitutional commitment to governmental respect for religious freedom of choice.”).

214. *Rayburn*, 772 F.2d at 1168. The plaintiff in *Rayburn* was challenging the church’s decision not to hire her as an associate pastor. *Id.* at 1164–65. This role included several spiritual duties, such as introducing children to the church, leading Bible study sessions, counseling a singles group, preaching from the pulpit, and leading the congregation during church services. *Id.* at 1168.

215. Having fulfilled its duty of determining whether “the position of associate in pastoral care is important to the spiritual mission” of the defendant church, the court neglected to go further and did not “inquire whether the reason for [plaintiff’s] rejection had some explicit grounding in theological belief.” *Id.* at 1169.

216. *Petruska v. Gannon Univ. (Petruska I)*, No. 05-1222, 2006 U.S. App. LEXIS 13135, at *28 (3d Cir. May 24, 2006), *reh’g granted*, 2006 U.S. App. LEXIS 15088 (3d Cir. June 20, 2006).

217. *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003) (quoting *Rayburn*, 772 F.2d at 1169).

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VII and, in some cases, actually results in invidious discrimination and the dismissal of potentially valid claims.²¹⁸ Thus, while the outcome in *Rayburn* was arguably the correct one in that case, the bright-line rule that the Fourth Circuit constructed has resulted in full immunity for religious organizations and has turned “the Free Exercise Clause into a license for the free exercise of discrimination unmoored from religious principle.”²¹⁹

Meanwhile, other courts have been more reluctant to balance the interests and, instead, have found that religious freedom overrides all other constitutional concerns. According to some courts, the ministerial exception is necessary, because “some religious interests are ‘so strong that no compelling state interest justifies government intrusion into the ecclesiastical sphere.’”²²⁰ The *Alicea-Hernandez* and *Miller* courts relied on this reasoning and, in doing so, characterized the specific positions of press secretary to the Hispanic community and choir director—positions that have a very limited influence on the church’s central functions—as “so strong” that there can be absolutely no inquiry in cases where plaintiffs allege discrimination. It is evident that this judicially created exception for “ministers” reaches too far.²²¹ Applying the ministerial exception in such a broad manner grants religious employers “carte blanche to engage in discrimination, whether it is gender, or marital status, or sexual orientation, so long as the discriminatory decision can be explained at least tangentially by some religious belief.”²²²

218. In *Alicea-Hernandez*, for example, the Seventh Circuit affirmed the dismissal of the communications manager’s discrimination claims without considering the merits. *Id.* at 704. Rather, the court held that the First Amendment precluded it from examining her discrimination claims. *Id.*

219. *Petruska I*, 2006 U.S. App. LEXIS 13135, at *28. Instead, the Third Circuit opted to consider the employer’s reasons for making the employment decision, for “these reasons make all the difference.” *Id.* At this time, the Third Circuit made sure to note that its “version of the ministerial exception also comports with the Establishment Clause because courts will not be forced to consider religious questions, a process that could entangle the government in religious affairs.” *Id.* (emphasis omitted).

220. *Miller v. Bay View United Methodist Church, Inc.*, 141 F. Supp. 2d 1174, 1180 (E.D. Wis. 2001) (quoting *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 946 (9th Cir. 1999)).

221. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court “made it clear that religious entities may ask for legislative exemptions narrowly tailored to their religious practices.” Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1214–15 (arguing that, “[i]f a religious entity can persuade a legislature that exempting it from the law will not harm the public good, then an exemption is consistent with ordered democracy”).

222. HAMILTON, *supra* note 84, at 192.

V. IMPACT

Among all of the classes that Title VII protects, the ministerial exception has had the greatest impact on women.²²³ This is not surprising considering the history of discrimination and exclusion women have experienced in religious communities.²²⁴ Many of the early prohibitions on women's religious involvement were grounded in the fear that women would gain too much influence in these powerful institutions.²²⁵ Gender stereotypes allowed men to reinforce religious rules that called for women's subordination²²⁶ and, consequently, maintain their control among religious clergies and their followers.

Moreover, discrimination within religious institutions has a profound effect upon society as a whole.²²⁷ Allowing sexual discrimination in religious organizations permits these employers to take advantage of women's labor and simultaneously reinforces the notion

223. "In the past fifteen years, and with increasing frequency of late, religious institutions have claimed constitutionally based rights to engage in otherwise prohibited forms of discrimination. Virtually all of the cases in the employment context have involved matters of gender discrimination." Lupu, *supra* note 21, at 395-96; accord Corbin, *supra* note 17, at 1969 n.15 ("[S]ex discrimination . . . is both the harder and more common case.") R

224. As early as colonial times, women faced persecution for preaching religion. Rutherford, *supra* note 104, at 1052. R

225. See *id.* at 1054. Jane Rutherford analogized this early treatment of women to the exclusion of African Americans from important positions in churches and other religious bodies:

Just as a woman might be more attracted to a faith that believed that grace was conferred on all genders, African-Americans might be more likely to read the Bible to condemn rather than support slavery. Therefore, prohibitions against African-American preachers were meant both to circumvent certain religious views and to reinforce the subordination of African-Americans.

Id.

226. See *id.* Unfortunately, many of the stereotypes that existed centuries ago continue to permeate modern American society. Stereotypes that were used to exclude women from preaching during colonial times are still common reasons why some men prefer to keep women out of positions of leadership in corporate America. For example, it was thought that "women were supposed to be emotional rather than rational, and therefore less able to preach." *Id.* Rutherford pointed out that, while "we no longer whip African-American preachers nor exile women who dare interpret scriptures, we do lend the power of the state to exclude women and minorities from religious offices." *Id.* at 1055-56. Much of this exclusion is the result of overinclusive application of the judicially created ministerial exception.

227. Eikenberry, *supra* note 18, at 271; see Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women's Equality*, 10 WM. & MARY J. WOMEN & L. 459, 459 (2004) (arguing that, "from the perspective of women's rights, relegating religion to the private sphere does not effectively solve the inherent conflict between patriarchal religions and women's rights or ensure women's right to equality in the liberal state"). "Excluding disfavored groups from religions also circumscribes their role in the larger community." Rutherford, *supra* note 104, at 1092 (emphasizing the "important communal role" religion plays by "provid[ing] a community of shared values, concerns, and culture that, for many, serves as an anchor in a fragmented society"). R

that women are somehow inferior to men.²²⁸ Limiting women’s access to leadership roles within their religious communities also “exclude[s] them from an important avenue of political access,” as religion plays a huge role in shaping people’s political opinions.²²⁹ The line between the “private sphere” and the “public sphere” is blurred.²³⁰ Categorizing religion as an issue falling squarely within the private sphere ignores the great influence religious beliefs and organizations have on the secular world.²³¹

Ideally, religious organizations could resolve instances of sexual discrimination internally, thus making government intervention unnecessary. However, *Petruska II* and other cases demonstrate that this is unlikely.²³² Petruska, a woman who actually occupied a powerful position, had all of her powers stripped from her for doing her job. It was easy for the men at Gannon to exclude her from the decision-making process; consider how much easier it would be for a secretary or choir director’s allegations of sexual discrimination to be ignored. The law should not leave the task of dealing with Title VII discrimina-

228. For instance, “[w]hen a religious institution claims a constitutional right to pay women lower wages for performing the same work as men, that institution is not only communicating its religious beliefs; it is also sending a powerful social message about the value of women’s labor.” Brant, *supra* note 6, at 277.

229. Eikenberry, *supra* note 18, at 271. Rutherford stated the following:

Religions are key political players. They have long been influential on the most important political concerns from abolition, to desegregation, to abortion. Religious organizations not only take stands on important issues, they also become involved in politics directly. Clergy members have run for and held political office, and conservative Christian groups have taken control of several state Republican Party organizations. Consequently, religious groups are sources of political power and influence.

Rutherford, *supra* note 104, at 1093.

230. See Brant, *supra* note 6, at 277 (“Because churches have long enjoyed a role of moral and ethical leadership, the resistance of religious organizations to equal employment laws can undermine the effectiveness of those laws in the public sphere.”).

231. See, e.g., Corbin, *supra* note 17, at 1968–69 (emphasizing that “[t]he need to challenge the constitutional underpinnings of the ministerial exception is more important than ever due to the increasing role of religious entities in distributing social services”); Stopler, *supra* note 227, at 459.

232. For instance, consider an analogous situation: “It is painfully apparent that self-policing has not worked to protect thousands of children from severe childhood sexual abuse. . . . Indeed, but for the law, the abuse may have stayed out of the public’s awareness forever.” Hamilton, *supra* note 221, at 1206–07. For total church autonomy to be feasible, Hamilton argued, “the churches would have to take it upon themselves to ensure that their actions served the public good, or at least did not harm it.” *Id.* at 1208–09. However, in the child sexual abuse cases, “[n]either the public good nor the best interest of children was an overriding concern of the Church; rather, perpetuation of the institution, avoidance of public scandal, and preservation of power were far more potent motivators.” *Id.* at 1209.

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tion claims up to religious institutions.²³³ Rather, it is time for the judicial system to engage in a more searching analysis and end its absolute deference to all religious employers.²³⁴

Some commentators have found that the legal system may not be the correct route for dealing with employment discrimination against women.²³⁵ Pointing to the overall advancement of women in society, these commentators have taken the optimistic stance “that employment practices and policies [of religious congregations] will come to reflect, even model, those aspired to in society at large.”²³⁶ Again, while this would be ideal, it is unlikely to happen in the near future. This Note does not argue that the government should require the Catholic Church to hire female priests, but rather that the Church be prevented from discriminating against women in positions that they *are* allowed to occupy under Church doctrine. Aside from the fact that this form of discrimination has been ongoing for centuries, there is no logical or religious justification for it.²³⁷ Requiring women to wait for change from within not only prevents them from retaining their jobs, but also excludes them from initiating any changes that may lead to greater equality.

V. CONCLUSION

We must be mindful that, when courts choose to create their own exceptions to an important and widely litigated statute such as Title VII, they end up harming those that Title VII was intended to protect: those who experience discrimination due to their “race, color, religion, sex, or national origin.”²³⁸ When Congress drafted the section 702 exemption, it expressly stated that the only permissible discrimination in which religious employers could engage was based on relig-

233. Some have argued that discrimination against an employee in a religious organization “may even be more harmful to the individual than discrimination in the secular world.” Eikenberry, *supra* note 18, at 271.

234. *See* Corbin, *supra* note 17, at 2022. Corbin aptly demonstrated that courts are well suited to “ferret out discrimination” and can analyze religious employment decisions by utilizing the same techniques they apply in secular cases. *Id.* Even where the defendant proffers a religious justification for the adverse employment action, it is not outside the courts’ jurisdiction to determine whether the stated reason is pretextual: “Since an employee’s claims may be resolved by relying on neutral methods of proof, religious organizations should not be shielded from having their reasons scrutinized just because they proffer a subjective religious reason.” *Id.*

235. *See, e.g.*, Elisabeth S. Wendorff, *Employment Discrimination and Clergywomen: Where the Law Has Feared to Tread*, 3 S. CAL. REV. L. & WOMEN’S STUD. 135, 136 (1993).

236. *Id.* at 161.

237. As one commentator has stated, “[t]here is an absolute right to believe, but at the same time there can be no constitutional right to harm others in the name of religion.” Hamilton, *supra* note 221, at 1109.

238. 42 U.S.C. § 2000e-2(a)(1)–(2) (2000).

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ion. Adding First Amendment protections to this limited exception should not result in the expansive and overinclusive ministerial exception that is currently utilized by all U.S. appellate courts that have addressed the issue. Rather, it is imperative that courts and lawyers across the nation are aware of the vacated *Petruska v. Gannon University* decision, for it contains exceptional arguments calling for the narrow application of the ministerial exception.

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