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PETRUSKA V. GANNON UNIVERSITY: A CRACK IN THE STAINED GLASS CEILING

ABSTRACT

An examination of the protections afforded to religious institutions in their hiring decisions. Both § 702 of the Civil Rights Act and the judicially created ministerial exception allow churches to use criteria that other employers are not permitted to use under the law when making hiring decisions. Beginning with *McClure v. Salvation Army*, courts have slowly expanded the scope of these protections, leading up to the recent case of *Petruska v. Gannon University*. *Petruska* provides an example of the extent to which a broad reading of § 702 and the ministerial exception can harm religious workers. The opinion of Judge Becker, who wrote the first appeals court decision, presented an alternative view of § 702 and the ministerial exception, as he believed that the courts have a duty to protect the rights of religious workers and that the protections of § 702 and the ministerial exception should only be imposed when necessary. Due to his death during circulation of his opinion, Judge Becker's decision was reversed in a rehearing of the case. In denying certiorari of Petruska's case, the Supreme Court of the United States failed to take advantage of an opportunity to protect the rights of women in the religious workplace.

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*The Constitution protects religious exercise, and we decline to turn the Free Exercise Clause into a license for the free exercise of discrimination unmoored from religious principle.*¹

INTRODUCTION

For generations, women everywhere have banged their heads on the proverbial glass ceiling in the professional marketplace. Women in the clergy face similar frustrations when pursuing positions in their chosen religion, where tradition, prejudice, and governmental protections make it difficult to serve in even a non-ministerial capacity.² The plight of women clergy is "exacerbated by long-standing religious norms about appropriate gender roles."³ Hiring decisions regarding ministers and clergy usually take place at the local level, where local feelings and traditions can come into conflict with denominational goals.⁴ The ability of religious institutions to limit or exclude women from clergy positions is enabled by congregational self-regulation,⁵ First Amendment protection under the Free Exercise and Establishment Clauses,⁶ and judicial interpretation of Title VII of the Civil Rights Act of 1964.⁷ Title VII enables

1. *Petruska v. Gannon Univ.*, No. 05-1222, 2006 U.S. App. LEXIS 13135, at *28 (3d Cir. May 24, 2006) (opinion withdrawn by the court). The opinion was vacated and reheard due to Judge Becker's death shortly after the signing of the original Court of Appeals opinion. Gannon University filed a sur petition for rehearing, and a panel in the Third Circuit approved the petition. *Petruska v. Gannon Univ.*, No. 05-1222, 2006 U.S. App. LEXIS 15088, at *2-3 (3d Cir. June 30, 2006).

2. Laura R. Olson et al., *Changing Issue Agendas of Women Clergy*, 39 J. SCI. STUDY RELIGION 140, 142 (2000).

3. *Id.*

4. Patricia M. Y. Chang, *Female Clergy in the Contemporary Protestant Church: A Current Assessment*, 36 J. SCI. STUDY RELIGION 565, 569 (1997) [hereinafter *Female Clergy in the Contemporary Protestant Church*]:

Ethically, Christian churches identify themselves with values of justice and equality. Socially, the issue of women's rights has been affirmed by secular society and women's ability to perform well in a number of traditionally male occupations stands as a visible affirmation of these rights. At the same time, theological interpretations within the Christian tradition are often actively mobilized to support resistance to a female clergy. In addition to this, historical patterns within Christianity have been dominated by male imagery, which makes it difficult on a cultural and cognitive level for some laity to accept female pastors.

5. Edward C. Lehman, Jr., *Clergy Women's World: Musings of a Fox*, 43 REV. RELIGIOUS RES. 5, 10-11 (2001).

6. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

7. Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a) (2000):

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment

religious institutions, among other organizations, to use broad discretion in their employment decisions and structure.⁸ First, Title VII protects religious institutions from employment discrimination claims when the claim alleges discrimination based on religion.⁹ Second, as a result of the amendments to Title VII and judicial interpretations, courts have carved out a constitutional ministerial exception to analyze a plaintiff's Title VII claim when the sought after employment position involves primarily religious functions.¹⁰ In some circuits, the ministerial exception has successfully blocked even preliminary judicial analysis of legitimate claims against religious organizations¹¹ because of fear of entanglement between church and state.¹² Over half of the federal circuit courts apply a ministerial exception to cases involving employment with religious institutions.¹³

The governmental protection afforded religious entities through the ministerial exception results in deficient equal opportunity protection for the employees who work there.¹⁴ While the exception has never been scrutinized by the Supreme Court,¹⁵ many circuits uphold the ministerial exception's applicability.¹⁶ Recently, a small crack formed in the employment protection that religious institutions enjoy. Lynette Petruska, an attorney and a former nun,¹⁷ attempted

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.

8. 42 U.S.C § 2000e-1(a).

9. Laura L. Coon, Note, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481, 486 (2001).

10. *Id.*

11. *See, e.g.*, EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 801 (4th Cir. 2000) ("The exception precludes 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 . . .").

12. Coon, *supra* note 9, at 483-84.

13. *Petruska v. Gannon Univ.*, No. 05-1222, 2006 U.S. App. LEXIS 13135, at *10 (3d Cir. May 24, 2006).

14. Telephone Interview with Lynette Petruska, Plaintiff, *Petruska v. Gannon Univ.* (Jan. 5, 2007).

15. *Petruska*, 2006 U.S. App. LEXIS 13135, at *29.

16. *Id.* at *10 (citing as examples *Werft v. Desert Sw. Annual Conference of the United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996)) ; *Young v. N. Illinois Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972)).

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

to take the ministerial exception to the Supreme Court¹⁸ in order to battle her gender-based dismissal from her position as University Chaplain at Gannon University.¹⁹ During the writing of this Note, the Supreme Court denied certiorari in Petruska's case.²⁰ By doing this, the Court has allowed confusion to continue among the circuits and has effectively denied civil liberties to some religious workers.

Part I of this Note will trace the history and development of the ministerial exception, from its constitutional and judicial origins to Title VII. Part II will analyze how the judiciary has extended the ministerial exception beyond the plain language of Title VII and how some courts have created a safe haven for religious institutions with respect to employment decisions. Part III will evaluate the current status of the exception in light of Petruska's case against Gannon University and its unconventional procedural history and argument. Part IV will assess the historical and existing experience for female clergy members and the void that Petruska's case could have filled if analyzed by the Supreme Court.

The ministerial exception provides an important buffer between the interests of the state to enforce equal opportunity objectives,²¹ and the interest of religious entities to practice and observe their faith freely.²² Analysis of the late Judge Becker's opinion in *Petruska* provides an alternative view of the ability of courts to analyze employees' discrimination claims against religious institutions when the claim is not based on religion.²³ Application of this view could be the glimmer of light that shines through the stained glass ceiling.

I. THE HISTORY AND THE DEVELOPMENT OF THE MINISTERIAL EXCEPTION

The balance between Church and State has always been precarious. The First Amendment to the United States Constitution carves out protections for the freedom of religion based on the Free

18. *Id.*

19. *Petruska v. Gannon Univ.*, 350 F. Supp. 2d 666, 671 (W.D. Pa. 2004).

20. *Petruska v. Gannon Univ.*, 127 S. Ct. 2098 (2007).

21. Civil Rights Act of 1964, Pub. L. No. 88-352, Preamble, 78 Stat. 241 (1964) (stating its goal is "to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity. . .").

22. *Little v. Wuerl*, 929 F.2d 944, 947 (3d Cir. 1991) ("[Free exercise] is guaranteed not only to individuals but also to churches in their collective capacities." (quoting *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952))).

23. *Petruska v. Gannon Univ.*, No. 05-1222, 2006 U.S. App. LEXIS 13135, at *43-44 (3d Cir. May 24, 2006) ("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." (quoting *Minker v. Baltimore Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1360 (D.C. Cir. 1990))).

Exercise and the Establishment Clauses,²⁴ and it is from the interpretation of these clauses that the ministerial exception is based.²⁵ During the Civil Rights movement in the 1960s, the United States government enacted Title VII of the Civil Rights Act of 1964 to grant basic liberties to all citizens.²⁶ The Civil Rights Act, however, included § 702 (now 42 U.S.C. 2000e-1), which allows the equal opportunity employment mandates to apply less stringently to religious institutions.²⁷ The intention of this statute was to apply the “proscriptions” and protections of the First Amendment to the judiciary’s governance of disputes and violations of Title VII.²⁸ Under a plain reading, the statute only exempted religious organizations “to the extent they discriminated against employees involved in strictly religious activities.”²⁹ Courts, thus, would not have jurisdiction over cases involving employees of religious institutions where the claims of employment discrimination were based on religion. The legislature expanded the scope of Title VII in 1972, extending the “religious institution exemption to include *all* activities of religious institutions, instead of merely their *religious* activities.”³⁰ This increase in the scope of Title VII protection has been considered vague and far-reaching because it includes all employment decisions, even those touted as profit ventures of the church,³¹ such as schools.³²

A. McClure v. Salvation Army

*McClure v. Salvation Army*³³ was one of the seminal cases on the ministerial exception as applied to religious institutions.³⁴ *McClure* involved a pay and gender discrimination claim by a female Salvation

24. U.S. CONST. amend. I.

25. *Petruska v. Gannon Univ.*, 350 F. Supp. 2d 666, 672 (W.D. Pa. 2004).

26. Civil Rights Act of 1964, Pub. L. No. 88-352, Preamble, 78 Stat. 241 (1964). Protections described in the Preamble include the enforcement of the constitutional right to vote and relief from discrimination.

27. Coon, *supra* note 9, at 486-87.

28. *Petruska*, 350 F. Supp. 2d at 672 (citing *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 191 (1960)).

29. Coon, *supra* note 9, at 487.

30. *Id.*

31. *Id.*

32. See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 336-39 (1987) (upholding the constitutionality of Title VII of the Civil Rights Act of 1964 and holding that Title VII does not unfairly advance religion); see also Coon, *supra* note 9, at 489-96, for a discussion on the court battles regarding Title VII.

33. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

34. *Petruska v. Gannon Univ.*, No. 05-1222, 2006 U.S. App. LEXIS 13135, at *10 (3d Cir. May 24, 2006).

Army employee.³⁵ McClure argued that because the discrimination was not based on religion, the Title VII exception should not apply.³⁶ In response to McClure's argument, the court articulated an exception to a Title VII claim based on the denial of equal employment, known as the ministerial exception.³⁷ Describing the minister-church relationship as the "lifeblood" of the church,³⁸ the court held that "[t]he minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."³⁹

The Fifth Circuit hesitated in *McClure* to apply Title VII's equal employment demands to the ministerial employment relationship.⁴⁰ Jurisdiction over such claims would impermissibly call for judicial analysis of religious decisions.⁴¹ After *McClure*, religious institutions enjoyed what amounted to two protections, the exemption under § 702 of Title VII, protecting any employment discrimination based on religion, and the *McClure* judicially created ministerial exception, protecting any employment discrimination in the minister-church relationship.⁴²

B. Title VII and the Ministerial Exception After EEOC v. Mississippi College

Eight years after first articulating the ministerial exception in *McClure*, the judiciary clarified the scope of the exception in *EEOC v. Mississippi College*.⁴³ The court in *Mississippi College* analyzed Title VII to determine if it violated the Free Exercise Clause⁴⁴ when there was a charge of racial discrimination raised against a private religious

35. *McClure*, 460 F.2d at 555.

36. *Id.* at 556; see also Coon, *supra* note 9, at 497.

37. *McClure*, 460 F.2d at 558-60.

38. *Id.* at 558.

39. *Id.* at 559.

40. *Id.* at 560.

41. *Id.* Application of Title VII would "cause the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern." *Id.*

42. Coon, *supra* note 9, at 503.

43. *EEOC v. Miss. Coll.*, 626 F.2d 477, 488 (5th Cir. 1980).

44. *Id.*

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

Id.

school.⁴⁵ The court held that Title VII's statutory exception, found in § 702, is limited to discrimination on the basis of religion⁴⁶ even if the religious discrimination is simply pretextual to a racial bias.⁴⁷ The EEOC argued that Title VII would not require excessive government involvement⁴⁸ and that the statute did not enable religious institutions to disregard equal employment mandates.⁴⁹ The court ruled that if the religious organization presented sufficient evidence that the challenged employment practice was a result of discrimination on the basis of religion, the EEOC was not permitted to further investigate the challenged practice.⁵⁰

The court in *Mississippi College* also extended Title VII to religious organizations' employment practices in their non-religious ventures.⁵¹ Thus, a religious organization had full discretion in its employment decisions, as long as any discrimination displayed had a basis in religious belief, despite a possible foundation in sexual or racial bias.⁵²

The case of *Rayburn v. Seventh-Day Adventists*⁵³ presented another broad caveat to the religious employment exemptions under Title VII and the First Amendment. Additionally, the court in *Rayburn* articulated a test to evaluate the application of the ministerial exception when raised as a defense by religious institutions.⁵⁴ In *Rayburn*, the Fourth Circuit employed the protections of the First Amendment to hold that a church organization was "immune" from a gender discrimination claim under Title VII stemming from the organization's refusal to hire a female for a clergy position.⁵⁵ The court recognized that the language of § 702 does not grant the freedom to make hiring decisions based on race, sex, or national origin and that the legislative intent of the statutory exemption was limited to religious predilections.⁵⁶ Despite the Fourth Circuit's recognition of the narrowness of the exception, the court barred the gender-based discrimination claim.⁵⁷ In arriving at this decision, the *Rayburn* court developed a test, known as the "primary duties of the plaintiff

45. *Id.* at 481.

46. *Id.* at 485-86.

47. *Id.* at 489.

48. *Id.* at 486.

49. *Id.* at 484.

50. *Id.* at 485.

51. Coon, *supra* note 9, at 497.

52. *Id.* at 499.

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

54. Coon, *supra* note 9, at 503.

55. *Rayburn*, 772 F.2d at 1169-70.

56. *Id.* at 1166.

57. *Id.* at 1172.

test," that has since been relied upon to determine the application of the ministerial exception.⁵⁸

To define to whom the ministerial exception should apply, the court first "looked to the function of the plaintiff's current or desired employment position."⁵⁹ The court found that a person should be considered a member of the clergy, and the ministerial exception should apply, "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in a ritual and worship."⁶⁰ Thus, the court must find the employee's position "sufficiently spiritual" to find the exception.⁶¹ Arguably, this extends the ministerial exception far beyond the person standing at the pulpit on Sunday, to include aid workers in religious community outreach programs, Sunday school teachers, and teachers at religious institutions, among others.⁶²

C. Rationales Behind the Constitutional Reliance of the Courts on the Ministerial Exception

The courts rely on various rationales to support their reluctance to delve into the minister-church employment relationship. One, the "government scrutiny rationale," based on the Establishment Clause, holds that the exception is necessary to avoid government entanglement between church and state and to prevent government questioning of church administrative dealings.⁶³ Under the second rationale, the "selection of clergy" rationale, courts rely on the idea that churches should be free to choose their own religious leaders.⁶⁴ Specifically, the Court of Appeals for the Eleventh Circuit, applying the "selection of clergy" rationale, reasoned that "the minister is the chief instrument by which the church seeks to fulfill its purpose,"⁶⁵ and as such, the minister should remain separate from the state.⁶⁶ A third rationale,

58. Coon, *supra* note 9, at 503.

59. *Id.* at 504.

60. Rayburn, 772 F.2d 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)).

61. Coon, *supra* note 9, at 505.

62. Steven K. Green, *The Ambiguity of Neutrality*, 86 CORNELL L. REV. 692, 722-23 (2000) (reviewing CHARLES L. GLENN, *THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL AGENCIES* (2000)).

63. Petruska v. Gannon Univ., No. 05-1222, 2006 U.S. App. LEXIS 13135, at *13-14 (3d Cir. May 24, 2006).

64. *Id.* at *15.

65. Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1304 (11th Cir. 2000) (quoting McClure v. Salvation Army, 460 F.2d 553, 558-59 (5th Cir. 1972)).

66. *Id.* ("An attempt by the government to regulate the relationship between a church and its clergy would infringe upon the church's right to be the sole governing body of its

the "inquiry into religious doctrine" rationale, is based on the fear of a secular government making faith determinations.⁶⁷ Implementation of judicial standards would burden the free exercise of religion and the state's interest would not be strong enough to overcome the detriment to the Constitution.⁶⁸

II. EXPANSION OF THE MINISTERIAL EXCEPTION BEYOND RELIGION-BASED DISCRIMINATION CLAIMS

Following the holdings in *McClure*,⁶⁹ *Mississippi College*,⁷⁰ and *Rayburn*,⁷¹ courts have taken it upon themselves to adapt the religious exemptions under Title VII and the ministerial exception.⁷² Though the language of Title VII appears narrow, there has been new judicial expansion of its protections from its original scope.⁷³ This expansion has occurred through case law, as courts are given the option to quickly raise jurisdictional concerns under the ministerial exception.

One of the most important cases with respect to the expansion of Title VII protection is that of *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.⁷⁴ The appellee, Mayson, an assistant building engineer for a church-run gymnasium, was fired for failing to acquire a certificate showing his membership in the Mormon church.⁷⁵ Mayson argued that if "construed to allow religious employers to discriminate on religious grounds in hiring for nonreligious jobs, § 702 [would violate] the

ecclesiastical rules and religious doctrine.").

67. *Petruska*, 2006 U.S. App. 13135 LEXIS, at *16.

68. Theresa J. Fuentes, *Title VII, Religious Freedom, and the Case of the Nontenured Nun*, in *Constitutional Law*, 65 GEO. WASH. L. REV. 727, 745 (1997) (quoting *EEOC v. Catholic Univ.*, 83 F.3d 455, 467 (1996)).

69. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

70. *EEOC v. Miss. Coll.*, 626 F.2d 477 (5th Cir. 1980).

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

72. Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1193-96 (2004). "The ministerial exception . . . is a judicial invention that has been used at times to extend Congress's exemption for discrimination on the basis of religious belief to other types of discrimination." *Id.* at 1195; see also Angela C. Carmella, *The Protection of Children and Young People: Catholic and Constitutional Visions of Responsible Freedom*, 44 B.C. L. REV. 1031, 1039 (2003) (discussing the inability of women to make sexual harassment claims against their clergy employers).

73. Michael Kavey, Note, *Private Voucher Schools and the First Amendment Right to Discriminate*, 113 YALE L.J. 743, 781 (2003) (citing *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)).

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

75. *Id.* at 330.

Establishment Clause.”⁷⁶ The Supreme Court, however, rejected this argument, overruling the district court, and found that § 702 of Title VII was constitutional⁷⁷ under the Establishment Clause.⁷⁸ Concerned with church autonomy, Justice Brennan, in his concurring opinion, reasoned that the judiciary should “avoid the entanglement and the chill on religious expression that a case-by-case determination would produce.”⁷⁹ In spite of the fact that the duties did not involve spreading and proclaiming the faith, the Court in *Amos* found that § 702 permitted a religious entity to discriminate in any activity associated with church employment.⁸⁰ Justice Brennan, in his concurrence, went so far as to advocate a “categorical rule” for employees of religious non-profit ventures, to protect religious institutions’ employment discretion rights.⁸¹

The ministerial exception faced its first major Supreme Court challenge in *Employment Division v. Smith*.⁸² In *Smith*, the respondents, members of the Native American Church, were fired from their jobs with a private drug rehabilitation organization for their use of peyote, a natural hallucinogenic drug used for sacrament in the

76. *Id.* at 331.

77. *Id.* at 330. The test applied by the district court was as follows:

First, the court must look at the tie between the religious organization and the activity at issue with regard to such areas as financial affairs, day-to-day operations and management. Second, whether or not there is a close and substantial tie between the two, the court next must examine the nexus between the primary function of the activity in question and the religious rituals or tenets of the religious organization or matters of church administration. . . . [W]here the tie between the religious entity and activity in question is either close or remote under the first prong of the test and the nexus between the primary function of the activity in question and the religious tenets or rituals of the religious organization or matters of church administration is tenuous or non-existent, the court must engage in a third inquiry. It must consider the relationship between the nature of the job the employee is performing and the religious rituals or tenets of the religious organization or matters of church administration. If there is a substantial relationship between the employee’s job and church administration or the religious organization’s rituals or tenets, the court must find that the activity in question is religious. If the relationship is not substantial, the activity is not religious.

Id. at 332 n.6. The district court then applied the *Lemon* test. *Id.* at 332-334. The *Lemon* test requires: (1) the statute must have a secular legislative purpose; (2) its primary effect must be one that neither advances nor inhibits religion; (3) the statute must not foster an excessive government entanglement with religion. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

78. *Amos*, 483 U.S. at 339.

79. *Id.* at 345 (Brennan, J., concurring).

80. Coon, *supra* note 9, at 496.

81. *Amos*, 483 U.S. at 345-46 (Brennan, J., concurring).

82. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

Native American Church.⁸³ As a result of the respondents' alleged misconduct, the respondents were denied unemployment benefits because Oregon had outlawed the use of peyote.⁸⁴ The respondents argued that "prohibiting the free exercise [of religion]' includes requiring an individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)."⁸⁵ Justice Scalia, writing for the Court, determined that the Free Exercise Clause was not violated by the state's regulation of peyote.⁸⁶ In so holding, the Court reasoned that the law was not a directive aimed at religious beliefs⁸⁷ and that an individual cannot raise the Free Exercise Clause as a defense against a neutral law.⁸⁸ According to the Court, while there are many religious values, beliefs, and practices that should be protected, they should be protected through the political process, rather than the judicial process.⁸⁹ Thus, *Smith* stands for the proposition that a blanket "nondiscriminatory religious-practice exemption" is not "permitted" or "desirable."⁹⁰

The dissent viewed the Court's opinion as a departure from existing methods of protecting the free exercise of religion from infringement by the state.⁹¹ Justice Blackmun believed that "Oregon's interest in enforcing its drug laws against religious use of peyote [was] not sufficiently compelling to outweigh respondents' free exercise of their religion."⁹² In so finding, the dissent articulated the position of religious institutions that there should be broad protection of religious practices under the Free Exercise clause.⁹³

A. Survival of the Ministerial Exception After the Holding in Employment Division v. Smith

The majority in *Smith* recognized that the Free Exercise Clause is limited in its ability to exempt religious practices and decisions

83. *Id.* at 874.

84. *Id.*

85. *Id.* at 878.

86. *Id.* at 890.

87. *Id.* at 885.

88. *Id.* at 878-79. "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'" *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

89. *Id.* at 890

90. *Id.*

91. *Id.* at 907-08 (Blackmun, J., dissenting).

92. *Id.* at 921 (Blackmun, J., dissenting).

93. *Id.* at 909-21 (Blackmun, J., dissenting).

from state regulations.⁹⁴ Following *Smith*, Title VII could be interpreted to apply equally to civil servants despite the spiritual or secular nature of their work.⁹⁵ The requirement that the statute supported a compelling state interest was no longer necessary when a law was neutral in its application.⁹⁶

Smith dispelled the idea of a judicially-crafted exception from a neutral statute.⁹⁷ Many religious institutions condemned the application of these statutes and fought for federal legislation.⁹⁸ The Religious Freedom Restoration Act (RFRA) was a result of their efforts.⁹⁹ Though RFRA was limited in *Boerne v. Flores* as applicable to state law only,¹⁰⁰ *Boerne* still enabled courts to accommodate religious institutions through other legislative protections, such as the federally enacted § 702.¹⁰¹ The decision in *Smith* was criticized and circumvented by subsequent cases.¹⁰²

Judicially, the ministerial exception continues to be applied despite the holding in *Smith*.¹⁰³ Circuit courts have maneuvered around the holding in many ways. For example, the D.C. Circuit Court held that although the right of free exercise does not excuse an *individual* from complying with a valid and neutral law, it does not follow from the holding in *Smith* "that a *church* may never be relieved of the obligation."¹⁰⁴ It has also been argued that the ministerial exception rests not on a compelling interest of the state, but on the basic idea of protection of church doctrine and religious

94. William B. Turner, Note, *Putting the Contract into Contractions: Reproductive Rights and the Founding of the Republic*, 2005 WIS. L. REV. 1535, 1600 (2005) ("The implicit point of the *Smith* decision . . . is a thoroughly Lockean one: institutions and organizations that accept the benefits of government must also accept certain limitations.").

95. 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, 1071 (2000).

96. *Smith*, 494 U.S. at 892-94 (O'Connor, J., concurring).

97. Hamilton, *supra* note 72, at 1195 ("[C]ourts are not competent to carve out individual exemptions from generally applicable laws; that is the province of the legislature. That is the explicit holding in *Smith*.").

98. *Id.* at 1108.

99. *Id.*

100. *Boerne v. Flores*, 521 U.S. 507 (1997).

101. Coon, *supra* note 9, at 489 n.26 (discussing *City of Boerne's* finding that there is a sphere of constitutional "accommodation" for different aspects of religion even when that protection is not specifically outlined in the Free Exercise Clause (citing *Boerne*, 521 U.S. at 516-20)).

102. See Michael E. Lechlitter, Note, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 MICH. L. REV. 2209, 2222-28 (2005) for a discussion of cases criticizing and circumventing the decision in *Smith*.

103. Kavey, *supra* note 73, at 780. Several appellate courts have held that the ministerial exception has not been overruled and the selection of clergy is protected by the Free Exercise Clause and the Establishment Clause.

104. *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996).

practices.¹⁰⁵ Circuit courts continue to apply the ministerial exception to religion-neutral laws, and *Smith* has effectively been disregarded.¹⁰⁶

The *Smith* backlash highlights the heightened decision-making role of the judiciary in ministerial exception cases. It would appear that the ministerial exception is a judicial extension of Title VII's protections of religious beliefs. Judicial failure to heed *Smith* exemplifies the judiciary's perceived "authority to ensure that . . . civil rights laws include exemptions for core religious liberty interests."¹⁰⁷

B. The Current Status of the Ministerial Exception Within the Circuits

Many of the circuits continue to apply the ministerial exception.¹⁰⁸ Its proponents demand that the judiciary defend the First Amendment free exercise activity of religious institutions and they argue that religious institutions' employment decisions should be immune from State governance.¹⁰⁹ Under this logic, the interests of groups such as churches "should be absolutely protected when the interest is directly linked to internal matters of the religious community."¹¹⁰ Fears pervade among the different circuits about the entanglement of judicial determinations of fact and religious doctrine.¹¹¹ The fundamental need for separation of church and state is clear, though the degree of application of the ministerial exception has varied.¹¹² The ease in which it can be applied in some circuits can leave civil servants without recourse for a termination unrelated to church dogma. *Petruska v. Gannon University*¹¹³ provided an opportunity for the Supreme Court to clarify the ministerial exception. On April 27, 2007, however, certiorari was denied.¹¹⁴ In refusing to hear the case, the Court has allowed for the continued twisting of *Smith*'s holding by the lower courts. Petruska's case presented a classic

105. *Id.* at 462-63.

106. Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699, 734 (2005) ("Ministerial exemptions . . . inexplicably persist after *Smith* even though the civil rights statutes are not aimed at religion.").

107. Jack S. Vaitayanonta, Note, *In State Legislatures We Trust?: The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 COLUM. L. REV. 886, 924 (2001).

108. *Petruska v. Gannon Univ.*, No. 05-1222, 2006 U.S. App. LEXIS 13135, at *1 (3d Cir. May 24, 2006).

109. *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972).

110. Vaitayanonta, *supra* note 107, at 923.

111. Fuentes, *supra* note 68, at 744.

112. Hamilton, *supra* note 72, at 1193.

113. *Petruska v. Gannon Univ.*, 350 F. Supp. 2d 666 (W.D. Pa. 2004).

114. *Petruska v. Gannon Univ.*, 127 S. Ct. 2098 (2007).

situation in which a religious employee's civil rights were subverted to the fears of mingling church and state.

III. PETRUSKA'S CASE AND WHAT IT MEANS FOR THE MINISTERIAL EXCEPTION

Lynette Petruska was hired by Gannon University in 1997 as director of the University's Center for Social Concerns.¹¹⁵ Petruska, who was then a nun as well as an attorney,¹¹⁶ was told by the University that the workplace was an equal opportunity environment, especially with respect to gender.¹¹⁷ Shortly after Petruska was hired, she was asked to serve as the University Chaplain while Chaplain Rouch was out of the country on a period of study.¹¹⁸ Although this position was not necessarily a high-powered position, it did place Petruska on the president's staff.¹¹⁹ Petruska accepted the position as Chaplain for the University with assurances from the University President, David Rubino, that she would not "be replaced when a male became available to fill the position, or . . . when Rouch returned from Rome."¹²⁰ Petruska sought these assurances because she had observed women being removed from leadership positions in the past.¹²¹ Petruska's appointment as Chaplain for the University demonstrated that Gannon University did not have any doctrinal objection to a woman serving as Chaplain.¹²²

A contentious environment developed after President Rubino took a leave of absence when a sexual affair came to light.¹²³ Chaplain Petruska helped uncover further allegations of sexual harassment against Rubino resulting in Rubino's resignation.¹²⁴ According to Petruska, a cover-up then ensued to hide the wrong-doings and sexual misconduct from the public and members of the University.¹²⁵ Petruska was "vocal in opposing this and other of the Administration's policies and procedures which she viewed as discriminatory toward females."¹²⁶

115. *Petruska*, 350 F. Supp. 2d at 670.

116. Henriques, *supra* note 17.

117. *Petruska*, 350 F. Supp. 2d at 670.

118. *Id.*

119. Telephone Interview with Lynette Petruska, *supra* note 14.

120. First Amended Complaint at 6, *Petruska v. Gannon Univ.*, 350 F. Supp. 2d 666 (W.D. Pa. 2004) (No. 1:04:cv-0080-SJM).

121. *Id.* at 7-9.

122. E-mail from Lynette Petruska, Plaintiff, *Petruska v. Gannon Univ.* (Oct. 25, 2007, 22:18 EST) (on file with author).

123. First Amended Complaint, *supra* note 120, at 7.

124. *Petruska*, 350 F. Supp. 2d at 670-71.

125. *Id.* at 670.

126. *Id.*

Petruska was pressured to remove items from a report she assisted in submitting that documented the gender inequality at the University.¹²⁷ She refused, and in retaliation for this action,¹²⁸ Petruska alleged that a meeting took place where Bishop Trautman instructed the newly appointed President Ostrowski to remove Petruska as chaplain or restructure her position to put her under Rouch.¹²⁹ Ostrowski refused to comply.¹³⁰ Though the University argued that these changes were just in title and not in status, the change would have removed Petruska from the President's staff.¹³¹ Ostrowski conceded that the restructuring was because of Petruska's gender.¹³² Soon after, Bishop Trautman decided to "clean house" by removing the Executive Director of Admissions, the acting Provost, and the University Chaplain, all of whom were females.¹³³

Despite these threats, Petruska continued to call the Bishop's attention to actions by priests that she thought were inappropriate.¹³⁴ Petruska's duties were reigned in¹³⁵ and she believed that she was "demoted not only because she [was] a woman, but because she [was] a woman who dared to challenge the propriety of the Board."¹³⁶ Based on communications with Antoine Garibaldi, the new president of Gannon University, Petruska believed that she would be fired for raising her concerns about discrimination, and as a result of this belief, Petruska resigned from her position.¹³⁷ Despite submitting two weeks' notice, Petruska was told to leave the premises immediately.¹³⁸

Following her resignation, Petruska alleged that she was treated differently than other male employees of the University, namely priests, who were forced to resign in the past.¹³⁹ Specifically, Petruska alleged that she was banned from the campus whereas priests who had been accused of sexual misconduct were not.¹⁴⁰ Additionally, statements were made to students and faculty that a woman would not be

127. *Id.* at 670-71.

128. *Id.* at 671.

129. First Amended Complaint, *supra* note 120, at 8.

130. *Id.*

131. Telephone Interview with Lynette Petruska, *supra* note 14.

132. *Petruska*, 350 F. Supp. 2d at 671; *see also* First Amended Complaint, *supra* note 120, at 9.

133. First Amended Complaint, *supra* note 120, at 10.

134. *Id.* at 12.

135. *Id.* at 11.

136. *Id.* at 12.

137. *Petruska*, 350 F. Supp. 2d at 671.

138. *Id.*

139. First Amended Complaint, *supra* note 120, at 18.

140. *Id.* at 18-19.

considered for Petruska's replacement,¹⁴¹ highlighting the fact, according to Petruska, that her original demotion was based on gender.¹⁴²

Petruska's complaint against the University raised both state law claims as well as claims of retaliatory and gender-based discrimination in violation of Title VII.¹⁴³ Specifically, Petruska asserted six theories for recovery including: (1) Title VII Gender Discrimination Against All Defendants, (2) Title VII Retaliatory Discrimination Against All Defendants, (3) Fraudulent Misrepresentation, (4) Civil Conspiracy, (5) Breach of Contract, and (6) Negligent Supervision and Retention of Various Employees.¹⁴⁴ Gannon University and the other named defendants (including the Board of Trustees, Bishop Trautman, former President Rubino, current President Garibaldi, and Vice President Rouch) moved to dismiss all of these claims on the ground that the court lacked subject-matter jurisdiction under the ministerial exception.¹⁴⁵

The motion to dismiss Petruska's First Amended Complaint was argued before the District Court for the Western District of Pennsylvania.¹⁴⁶ Judge McLaughlin, writing for the court, first noted that the defendants' motion presented a facial challenge to the court's subject matter jurisdiction and, as such, the court was required to consider the allegations in Petruska's complaint as true.¹⁴⁷ Judge McLaughlin, however, recognized that it was ultimately Petruska's burden to establish that the court had jurisdiction.¹⁴⁸ Applying these principals, Judge McLaughlin then analyzed the impact and extent of the ministerial exception and, thus, the lynchpin issue of whether the court had jurisdiction to hear the plaintiff's claims.¹⁴⁹

Judge McLaughlin traced the ministerial exception from its roots in the Free Exercise Clause and the Establishment Clause to the present day interpretation.¹⁵⁰ After surveying and analyzing a number of court decisions regarding employment discrimination claims against churches by ministers,¹⁵¹ Judge McLaughlin found that the guard against judicial involvement in the ministerial relationship, protected by the ministerial exception, extended to "*any matters* 'touching this relationship.'" ¹⁵² While first noting that the controlling Third

141. *Petruska*, 350 F. Supp. 2d at 672.

142. First Amended Complaint, *supra* note 120, at 9.

143. *Petruska*, 350 F. Supp. 2d at 668.

144. *Id.* at 672.

145. *Id.*

146. *Id.* at 668.

147. *Id.* at 669.

148. *Id.*

149. *Id.* at 672-85.

150. *Id.* at 672-73.

151. *Id.* at 673-75.

152. *Id.* at 674.

Circuit had not adopted the ministerial exception, the district court determined that under "appropriate circumstances" the exception would apply to keep civil rights claims out of the court system.¹⁵³

After recognizing the ministerial exception as valid, Judge McLaughlin then analyzed whether the ministerial exception was applicable to Petruska's claims. Judge McLaughlin first found that Petruska's duties were ministerial in nature,¹⁵⁴ despite the fact that Petruska would not have been deemed a minister in her own church, the Catholic church, where the role is reserved for males.¹⁵⁵ The court found that Petruska's role on the Catholic Identity Task Force and her holding of prayer services were sufficiently ministerial.¹⁵⁶ Judge McLaughlin did not find it significant that the reason for Petruska's dismissal was unrelated to religious doctrine, as the focus of the ministerial exception is on the action taken and not the motives.¹⁵⁷ Thus, the ministerial exception would halt any investigation into employment motivations by the court.¹⁵⁸

The district court then analyzed the impact of *Employment Division v. Smith*¹⁵⁹ upon the invocation of the ministerial exception by Gannon University.¹⁶⁰ Relying upon the decisions of other federal district courts, Judge McLaughlin found that the *Smith* decision did not "undermine the viability of the ministerial exception."¹⁶¹

Finally, the district court refused to waive the ministerial exception in Petruska's case, despite Gannon's self-promotion as an equal opportunity employer.¹⁶² Petruska claimed that these representations and the receipt of public funding constituted a waiver of Gannon's First Amendment protections.¹⁶³ The district court declined to find a waiver of First Amendment protections through the acceptance of federal funds, as a waiver needs to be knowing and intelligent.¹⁶⁴

Welter v. Seton Hall University,¹⁶⁵ cited by the Plaintiff, discussed the importance of the ministerial exception. The court in *Welter* stated

153. *Id.* at 674-75.

154. *Id.* at 677.

155. *Id.* at 675.

156. *Id.* at 676-77.

157. *Id.* at 677.

158. *Id.*

159. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

160. *Petruska*, 350 F. Supp. 2d at 678.

161. *Id.* at 678 (relying upon the fact that a different aspect of the free exercise of religion was at issue in *Smith* and that the ministerial exception does not address the same concerns).

162. *Id.* at 679.

163. *Id.*

164. *Id.* at 679-80.

165. *Welter v. Seton Hall Univ.*, 608 A.2d 206, 212-15 (N.J. 1992).

that "[i]n appropriate circumstances a court may apply neutral principles of law to determine disputed questions that do not implicate religious doctrine."¹⁶⁶ The Supreme Court of New Jersey noted that the rights of a religious institution to free exercise in employment decisions under religious doctrine could be "bargained away."¹⁶⁷ While the district court held that the ministerial exception may be waived because it is judicially-made law, the high standard for waivers of constitutional rights was not met by Gannon University.¹⁶⁸

As no issue of waiver existed, the court held that it did not have jurisdiction to hear Petruska's claims.¹⁶⁹ Thus, the court was not permitted to question whether Gannon University's motives were related to Petruska's gender or were retaliatory in nature.¹⁷⁰ It would appear from the court's reasoning that an association between the motives and the doctrine of the Catholic church was not needed.¹⁷¹ Judge McLaughlin found that unfortunately for Petruska, and other religious servants in the district, whether Gannon University's motives were misguided did not matter with respect to equal employment under Title VII.¹⁷²

Though the court acknowledged that there was "potential for abuse,"¹⁷³ there were safeguards in place for people and actions that fell outside of the ministerial exception, namely sexual harassment claims under Title VII.¹⁷⁴ In finding that sexual harassment fell outside the scope of the ministerial exception, the court relied upon the case of *Bollard v. California Province of the Society of Jesus*.¹⁷⁵ Subsequent case law, however, casts doubt on the ability of the judiciary to maintain these distinctions in the context of the ministerial exception.¹⁷⁶ Petruska's claim was denied as the court failed to address her complaint because of an alleged lack of jurisdiction.¹⁷⁷

166. *Id.* at 212.

167. *Id.* at 214.

168. Petruska, 350 F. Supp. 2d at 680-82.

169. *Id.* at 683.

170. *Id.*

171. Petruska herself had served as chaplain.

172. Petruska, 350 F. Supp. 2d at 683.

173. *Id.* at 684.

174. *Id.* at 684-85.

175. *Id.* at 685; *Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999).

176. See *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1303-04 (11th Cir. 2000) (affirming the dismissal of a minister's Title VII retaliation and constructive discharge claims); see also First Amended Complaint, *supra* note 120, at 7 (though Petruska herself was not sexually harassed, she was "instrumental" in bringing sexual harassment claims to the attention of her superiors).

177. Petruska, 350 F. Supp. 2d at 685.

Petruska appealed her case to the United States Court of Appeals for the Third Circuit, where it was argued on October 20, 2005.¹⁷⁸ In a surprising opinion by the late Honorable Judge Edward R. Becker, the Third Circuit reversed the lower court's decision concerning jurisdiction over the case.¹⁷⁹

The court held that the scope of the ministerial exception in the Third Circuit should be "carefully tailored" and found that "[w]here otherwise illegal discrimination is based on religious belief, religious doctrine, or the internal regulations of a church, the *First Amendment* exempts religious institutions from Title VII."¹⁸⁰ The court further held that discrimination unrelated to religion was not protected under the ministerial exception and did not foreclose Title VII suits.¹⁸¹ Judge Becker recognized that although six of his sister circuits apply the ministerial exception when the discrimination is not based in religion,¹⁸² application in the Third Circuit must take into account the government's interest in fair employment.¹⁸³

In a rather frank opinion, Judge Becker recognized the reasons the Constitution requires the ministerial exception to protect the First Amendment rights of religious institutions.¹⁸⁴ In addition, Judge Becker explained why the circumstances presented in this case were different from the cases in which the ministerial exception applied.¹⁸⁵ The court noted that the ministerial exception is necessary to avoid 'government scrutiny' into the operations of religious institutions, that churches should be free in the selection of their clergy, and that courts should not be put in the position of resolving questions of religious doctrine.¹⁸⁶

The issue in *Petruska* was "whether a ministerial employee may bring suit under Title VII where the religious institution lacks a rationale for the employment action that is grounded in faith, doctrine, or internal regulation."¹⁸⁷ The court found that the legislature did not give religious institutions the blanket right to discriminate based on gender.¹⁸⁸ Despite the fact that decisions in different circuits held

178. *Petruska v. Gannon Univ.*, No. 05-1222, 2006 U.S. App. LEXIS 13135 (3d Cir. May 24, 2006).

179. *Id.* at *56-57.

180. *Id.* at *2.

181. *Id.*

182. *Id.* at *10.

183. *Id.* at *2-3.

184. *Id.* at *9-16.

185. *Id.* at *27-28.

186. *Id.* at *13-16.

187. *Id.* at *22-23.

188. *Id.* at *25.

that "employer's reasons are irrelevant to the ministerial exception,"¹⁸⁹ Judge Becker forced the Third Circuit to delineate based on that distinction.¹⁹⁰ In support of Petruska, and other religious civil servants within the jurisdiction of the Third Circuit, the court "decline[d] to turn the *Free Exercise Clause* into a license for the free exercise of discrimination unmoored from religious principle."¹⁹¹ Thus, in order to apply the ministerial exception in the Third Circuit, the employment decision must be motivated by religious belief, religious doctrine, or church regulation.¹⁹² If the law does not reach into their doctrine, religious organizations should adhere to neutral laws.¹⁹³

The Third Circuit held that based on Petruska's complaint, analysis of her claim would not *necessarily* involve examination of religious doctrine.¹⁹⁴ The district court could refrain from determining religious questions if church doctrine and practice were not implicated.¹⁹⁵ It would appear that the court did not view this as a circumstance in which the Catholic religion barred women from chaplain positions, as Gannon University had appointed Petruska as University Chaplain.¹⁹⁶ When religious doctrine is not implicated, the court held that the exception should be construed narrowly so that the court is "cut[ting] with a scalpel, not a butcher's knife."¹⁹⁷ Fear or "mere speculation" that some religious worker's claims may present First Amendment problems in the future should not bar the court from asserting jurisdiction.¹⁹⁸ Judicial analysis of non-doctrinal decisions does not impact a religious institution's free exercise rights,¹⁹⁹ and at that early stage of litigation, there is no entanglement between church and state.²⁰⁰ Judge Becker, thus, concluded that the district courts of the Third Circuit could determine whether a piece of evidence invoked a religious doctrine.²⁰¹ Therefore, no reason existed to prematurely deny jurisdiction in cases seeking to protect civil liberties.²⁰²

The civil rights of employees in religious institutions, through this opinion, can still be argued in the judicial system when the

189. *Id.* at *28.

190. *Id.*

191. *Id.* at *28.

192. *Id.*

193. *Id.* at *35.

194. *Id.* at *37.

195. *Id.* at *41.

196. *Id.* at *5.

197. *Id.* at *45.

198. *Id.*

199. *Id.* at *47.

200. *Id.* at *50.

201. *Id.* at *44.

202. *Id.*

question is not one of religious canon. This parallels Petruska's belief that "before we should impose the First Amendment exceptions we should look to see if dogma is implicated, or otherwise it is just discrimination masquerading as religion."²⁰³

The internal operating rules of the Third Circuit require that an opinion be in circulation for eight days.²⁰⁴ Judge Becker's opinion was circulated to the full court for five days when he passed away.²⁰⁵ Due to the failure to satisfy the eight-day minimum, a sur petition by the Respondent, Gannon University and other named defendants, for rehearing was granted,²⁰⁶ and Judge Becker's opinion was vacated on June 20, 2006.²⁰⁷

In the rehearing, the Honorable Judge Smith, who dissented in the original hearing, wrote the opinion for the court.²⁰⁸ Relying on his analysis in his previous dissent, Judge Smith upheld the decision of the district court, finding the ministerial exception applicable and concluding the exception "is akin to a government official's defense of qualified immunity."²⁰⁹ Judge Smith, unlike the late Judge Becker, was deeply influenced by actions taken by other circuits who feared even the slightest risk that Title VII would violate the First Amendment rights of religious institutions.²¹⁰

Judge Smith found that the history of the ministerial exception did not allow religious institutions free reign to discriminate on the basis of gender.²¹¹ Despite this, the court held that the First Amendment protected "the act of a decision rather than a motivation behind it."²¹² Judge Smith did not see how the state could remain separate from the church when analyzing motivations behind religious employment decisions.²¹³

203. Telephone Interview with Lynette Petruska, *supra* note 14.

204. 3RD CIR. R. 5.5.2, *available at* <http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf>.

205. Telephone Interview with Lynette Petruska, *supra* note 14.

206. *Petruska v. Gannon Univ.*, No. 05-1222, 2006 U.S. App. LEXIS 15088 (3d Cir. June 30, 2006). Another opinion of Judge Becker's was in circulation for less than eight days, but the decision was not vacated because the issue was not raised. Petruska argued that if you need to have a live judge to validate the opinion, then the rule should apply to all affected opinions. She petitioned that the judge need only be alive when sitting on the bench. Telephone Interview with Lynette Petruska, *supra* note 14.

207. *Petruska*, 2006 U.S. App. LEXIS 15088.

208. *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 (3d Cir. 2006).

209. *Id.* at 302.

210. *Id.* at 303-04.

211. *Id.* at 303-04 n.4 (citing *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167 (4th Cir. 1985)).

212. *Id.* at 304 n.7 (citing *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)).

213. *Id.* (citing other circuit court opinions that feared that any examination by the judiciary violates the Free Exercise Clause and the Establishment Clause rights of

Judge Smith agreed that the exception to Title VII for religious institutions should be narrow,²¹⁴ but saw the narrowness as satisfied through the exclusive application to ministers.²¹⁵ The appellate court saw the protection of a religious institution's right to hire and fire its ministers as paramount to that religious institution's free speech, thus trumping an individual's rights to equal employment.²¹⁶ Gannon's choice to change Petruska's position and restructure the department "constituted a decision about who would perform spiritual functions and about how those functions would be divided."²¹⁷ As Petruska was a "ministerial" employee, the court concluded that it was precluded from any investigation into Gannon's possibly inappropriate motives.²¹⁸

The loss of the second battle in the appellate court did not surprise Petruska.²¹⁹ If Gannon had lost, however, the Catholic church could have pressured the University not to appeal the decision to the Supreme Court.²²⁰ A loss in the Supreme Court would hurt the liberty of the Church's employment decisions in every circuit, not just in the Third Circuit.²²¹ Petruska and her attorneys then decided to take her plight for civil liberties to the Supreme Court.²²²

In bringing her case to the Supreme Court, Petruska had two motives. First, it was Petruska's firm belief that churches should operate as other employers do.²²³ To Petruska, Title VII is a neutral law and an exception should not keep thousands of church workers separated from their civil rights.²²⁴ Second, Petruska wished to draw national focus to the problems that she saw with institutionalized religions that have protection from the law, particularly the Catholic faith.²²⁵ Her experience as a nun in the Catholic church exposed her

religious organizations). The court quoted the Eleventh Circuit for the proposition that "the constitutional protection of religious freedom afforded to churches in employment actions involving clergy exists even when such actions are not based on issues of church doctrine or ecclesiastical law." *Id.* at 305 n.7 (quoting *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1303 (11th Cir. 2000)).

214. *Petruska*, 462 F.3d at 305.

215. *Id.* at 312.

216. *Id.* at 306-307.

217. *Id.* at 307-308. The court remanded Petruska's breach of contract and fraud claims, as the ministerial exception would not apply and disposition of the claims would not require the court to delve into religious dogma. *Id.* at 312.

218. *Id.* at 312.

219. Telephone Interview with Lynette Petruska, *supra* note 14.

220. *Id.*

221. *Id.*

222. *Id.* Ms. Petruska planned to file her petition on January 16, 2007.

223. *Id.*

224. *Id.*

225. *Id.*

to an “ongoing cover-up of priest sexual misconduct,” where the ministerial exception was just one more enabling safeguard.²²⁶ From Petruska’s perspective, if she was given a chance to tell the truth about the priest misconduct as she experienced it, she would win.²²⁷ According to Petruska, the blatant cover-ups by the Catholic church served to disillusion her both as a nun and as a Catholic.²²⁸

These goals could have been accomplished through Petruska’s day in the Supreme Court. Though the chances of any case being granted certiorari are very slim, the issue presented in Petruska’s case is one of great importance. There have been particular circuit splits, and the Supreme Court has not addressed the overall idea of an exception in over thirty years.²²⁹ Now that the Supreme Court has denied certiorari to hear Petruska’s case, the ministerial exception may not be addressed for many more years to come. This issue “has developed, and now it has developed into a muddle and [*Petruska*] is a good case that illustrates the confusion.”²³⁰ The lower courts have clearly shown their need for guidance, as the ministerial exception has percolated for a long period of time.²³¹ Additionally, the Supreme Court has historically shown a great deal of respect for Judge Becker’s opinions.²³²

Critics of the ministerial exception saw *Petruska* not only as a chance for clarification, but also as an opportunity to bring to light the follies of the ministerial exception.²³³ When the exception goes too far, it “wrongly puts courts in the shoes of the legislature.”²³⁴ Congress did not provide an exception from equal employment requirements for non-doctrinally motivated employment discrimination.²³⁵ If the Supreme Court ruled in favor of Petruska, religious institutions

226. *Id.*

227. *Id.*

228. *Id.* Petruska is no longer a nun or a practicing Catholic. She is now a full-time lawyer, working in St. Louis, Missouri. Her frustration stems from the fact that she “can’t get the laws of this country enforced for [herself], but [priests] can violate the rules of their diocese and nothing happens.”

229. Telephone Interview with Marci Hamilton, Professor of Law, Cardozo School of Law (Jan. 17, 2007). Ms. Hamilton also assisted in Petruska’s case and represented her in front of the Supreme Court.

230. *Id.*

231. *Id.*

232. *Id.*; see also Tim Weiner, *Edward R. Becker, 73, Judge on Federal Court of Appeals*, N.Y. TIMES, May 20, 2006, at D8.

233. E-mail from Lynette Petruska, *supra* note 122.

234. Marci Hamilton, *A Federal Trial Court Dismisses a Nun-Priest Sexual Harassment Claim: A Dubious Case for Invocation of the ‘Ministerial Exception,’* FIND LAW, Jan. 27, 2005, available at <http://writ.news.findlaw.com/hamilton/20050127.html>.

235. *Id.*

demanding exceptions to anti-discrimination laws would have been forced to return to Congress for broader statutory protections.²³⁶

Additionally, some critics saw *Petruska* as yet another example of the high level of deference given to religious institutions, despite private, and sometimes public, indiscretions.²³⁷ Clergy sexual abuse scandals concern the public, particularly when cover-ups are brought to light.²³⁸ Fear that these transgressions continue, and go unpunished, has brought scrutiny upon religious institutions.²³⁹ Feelings of resentment also surround the protections that religious institutions have from investigation.²⁴⁰ America is an ordered democracy with laws upheld by the government, and some believe that strong religious institutions operate in contrast to that political ideal of fairness.²⁴¹

The mentality of those who criticize the ministerial exception is one that advocates the Court's decision in *Bob Jones University v. United States*.²⁴² In *Bob Jones University*, the Supreme Court held that Bob Jones University was not permitted to discriminate on the basis of race while receiving federal funds.²⁴³ In addition to finding that racial discrimination was against public policy,²⁴⁴ the case also exemplifies the balancing of liberty interests between religious interest and public policy.²⁴⁵

Petruska's case and claim against the Catholic institution of Gannon University was just one example of the plight of many religious civil servants around the country. When the courts interpret the ministerial exception broadly, the judicially-created law can serve to disassociate church employees from their civil rights. This can affect those serving even minimally ministerial functions. The exception, though valid in many cases, can be misconstrued in favor of protecting sexist, racist, and bigotry-driven motives of religious leaders. In some cases, the secular legal issue is so entangled in the religious dogma that the court cannot be trusted to decipher it.²⁴⁶ Lynette Petruska's experience represents the plight of women who

236. *Id.*

237. Telephone interview with Marci Hamilton, *supra* note 229.

238. See, e.g., Peter Schworm, *Protestors Demand Priest's Apology: Accused of Aiding Sex Abuse Cover-up*, BOSTON GLOBE, Sept. 10, 2007, at B2; see also William Bunch & Dana DiFilippo, *But No Justice for Victims as Grand Jury's Powerless to Act*, PHILA. DAILY NEWS, Sept. 22, 2005, at 3.

239. *Id.*

240. Telephone Interview with Marci Hamilton, *supra* note 229.

241. *Id.*

242. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

243. *Id.* at 605.

244. *Id.* at 593.

245. Telephone Interview with Marci Hamilton, *supra* note 229.

246. *Id.*

wish to become religious professionals and the lack of protection afforded their civil liberties once they arrive there. Unfortunately, the advancement of Petruska's cause has been halted, for the time being, by the Supreme Court.

IV. THE MINISTERIAL EXCEPTION'S IMPACT ON WOMEN IN CLERGY POSITIONS AND HOW *PETRUSKA* CAN HELP

The glass ceiling is just as thick, if not more so, for women like Petruska who wish to make their careers in the church. If women are even permitted to enter into leadership roles within a religious institution, they do so at lower numbers²⁴⁷ and at a slower rate than their male counterparts.²⁴⁸ A late 1990s study found that "women . . . constitute about 10 percent of all American religious leaders."²⁴⁹ Another study found that "it takes women twice as long to reach the 50% employment mark than it does for men."²⁵⁰ An exception to this is the United Methodist Church, where the Church mandates that there be a guarantee of employment for all ordained clergy.²⁵¹ In general, however, men are employed far more quickly than women after graduating from seminary.²⁵² As time has gone on, the disparities between males and females in mid-level and high-level positions within the church have continued.²⁵³

It has been suggested that one reason for the discrepancy in placement and advancement speed between men and women is that women are being guided to lower-level service positions within their religious institutions based on their gender.²⁵⁴ Beginning in seminary, women are tracked to lower positions of clerical employment.²⁵⁵ A female entering seminary is more likely to be placed in "secular work, interim positions, specialized ministries, chaplaincies in secular

247. Olson et al., *supra* note 2, at 141 ("Many American religious traditions, most notably the Catholic Church and most of evangelical Protestantism, do not ordain women at all.").

248. Patricia M. Y. Chang, *In Search of a Pulpit: Sex Differences in the Transition from Seminary Training to the First Parish Job*, 36 J. SCI. STUDY RELIGION 614, 617 (1997) [hereinafter *In Search of a Pulpit*].

249. Olson et al., *supra* note 2, at 140.

250. *In Search of a Pulpit*, *supra* note 248, at 617.

251. *Id.*

252. *Id.* at 618-19 (analyzing studies that found that more than fifty percent of men versus forty percent of women found employment after ninety days, and eighty-five percent of men have jobs within two years of graduation from seminary, compared to seventy percent of women).

253. Paula D. Nesbitt, *Clergy Feminization: Controlled Labor or Transformative Change?*, 36 J. SCI. STUDY RELIGION 585, 585 (1997).

254. *Female Clergy in the Contemporary Protestant Church*, *supra* note 4, at 566.

255. *Id.* at 567.

institutions, and non-parish ministries.”²⁵⁶ Their superiors, a lack of institutional support, and the difficulties associated with getting parish positions push females into these positions.²⁵⁷ Females are discouraged from becoming ordained by their religious leaders and ordained advisors.²⁵⁸ Even in clergy positions, women are earning less than their male counterparts.²⁵⁹ There are concerns that the presence of women serving as professionals is superficial, as these women are not given the opportunity for substantial authority.²⁶⁰ Studies have found that it takes women longer to find jobs in religious institutions because local congregations are resistant and women are less likely to receive aid in placement.²⁶¹

The feminization movement of religious institutions has been slow because there is fear over community disdain for female leaders.²⁶² Religious leaders worry that women will “take over the church” and drive away other religious workers and worshippers, that the clergy market will be over saturated, and that rifts will occur within churches.²⁶³ Feminine presence in the religious workplace has also been discouraged for its alleged negative effect on male clergy.²⁶⁴ Simply put, women in the church, like Petruska, face inherent discrimination that can at times be wrongly condoned by the government.

CONCLUSION

The future of religious employees like Petruska has been left unprotected, or at least unexamined by the Supreme Court. If the Court had chosen to examine the issue, there are a number of factors that would have influenced the Supreme Court’s resolution of the issues presented by Petruska’s claims. A number of the Supreme Court Justices are of the Catholic faith.²⁶⁵ If nothing else, it would

256. *Id.* at 568.

257. *Id.* at 568-69.

258. Lehman, Jr., *supra* note 5, at 7-8.

259. *Female Clergy in the Contemporary Protestant Church*, *supra* note 4, at 568.

260. Nesbitt, *supra* note 253, at 585.

261. *In Search of a Pulpit*, *supra* note 248, at 615.

262. *Female Clergy in the Contemporary Protestant Church*, *supra* note 4, at 565 (“Some thought that the presence of women in the pulpit would cause large numbers of members to leave the church.”).

263. Nesbitt, *supra* note 253, at 586.

264. *Id.* “Presumed adverse effects of feminization . . . have included sexual temptation . . . , male impotency . . . , men shirking religious responsibility . . . , lower male morale, and loss of socially legitimated privilege to vestments as well as other pastoral or sacramental activities traditionally associated with women’s domestic roles.”

265. Religious Affiliation of the U.S. Supreme Court, http://www.adherents.com/adh_sc.html (last visited Nov. 11, 2007).

have been interesting to see the Court's internal battle between the Justices' religious tendencies and their textualism. On the other hand, recent decisions concerning the Free Exercise Clause are in contrast to the present interpretation of the ministerial exception.²⁶⁶

The ministerial exception is a reminder of the freedom from religious persecution that our forefathers fought and died for.²⁶⁷ The protection of the freedom of religion relies upon the ability of churches and other bodies of worship to practice their faith freely. History clearly views aspects of faith and religious practice as privileged in the eyes of the law.²⁶⁸ When a religious institution seeks exclusion from Title VII's equal opportunity mandates, the scope of § 702 and of the ministerial exception will completely dictate the future of the matter. If the scope of § 702 and the ministerial exception are too broad, a religious employee may be wrongly denied her day in court. In contrast, if the scope is read too narrowly, the line between church and state can become blurry. Judge Becker believed in protecting religious employees when the nature of the discrimination was neither religious in nature nor a part of church doctrine.²⁶⁹ If the exception is narrowly tailored, the rights of the individual, as well as the rights of the institution, can be protected. In respecting the principle behind § 702 and the ministerial exception, the courts can halt the "free exercise of discrimination,"²⁷⁰ and help women break through the stained glass ceiling.

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266. Hamilton, *supra* note 72, at 1194-95.

267. *Employment Div. v. Smith*, 494 U.S. 872, 909 (1990).

268. Laura B. Mutterperl, Note, *Employment at (God's) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation*, 37 HARV. C.R.-C.L. L. REV. 389, 408 (2002).

269. *Petruska v. Gannon Univ.*, No. 05-1222, 2006 U.S. App. LEXIS 13135, at *2 (3d Cir. May 24, 2006).

270. *Id.* at *28.

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