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Serving God Or Ceasar: Constitutional Limits on the Regulation of Religious Employers

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NOTES

SERVING GOD OR CEASAR: CONSTITUTIONAL LIMITS ON THE REGULATION OF RELIGIOUS EMPLOYERS

Ohio Civil Rights Commission v. Dayton Christian Schools[1]

The First Amendment of the United States Constitution guarantees that religion will be free from governmental restraints and encroachments.[2] This guarantee of religious freedom has created an abundance of caselaw in modern times. The Free Exercise Clause and the Establishment Clause raise important issues concerning the propriety of discovery of documents and records held by sectarian groups as well as the application of employment discrimination statutes to religious organizations. The United States Supreme Court had the opportunity to address these issues in *Ohio Civil Rights Commission v. Dayton Christian Schools*.[3] Unfortunately, the former issue was addressed vaguely and in general terms, while resolution of the latter issue was avoided completely by utilization of the *Younger v. Harris*[4] abstention doctrine. The balance of this Note will examine the Court's treatment of the discovery issue and consider the constitutionality of employment discrimination laws as applied to religious employers.

In *Dayton Christian Schools*, Linda Hoskinson was a teacher at Dayton Christian Schools. In January of 1979, she informed the Dayton Christian Schools principal that she was pregnant. After the principal discussed this matter with the Dayton Christian Schools superintendent, they decided that Hoskinson's contract would not be extended to the following school year. The school informed Hoskinson of the decision, stating in a letter that they desired that mothers be home with pre-school age children.[5]

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1. 106 S. Ct. 2718 (1986).

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. 1.

3. 106 S. Ct. 2718.

4. 401 U.S. 37 (1971). The *Younger* Doctrine is premised upon the idea that federal courts should refrain from exercising jurisdiction which would improperly infringe on a state's right to enforce its own laws. C. WRIGHT, LAW OF FEDERAL COURTS § 52A (1983); *see infra* note 21 and accompanying text.

5. 106 S. Ct. at 2721. Hoskinson was not an unwed mother. The letter of explanation written to her stressed the importance of the mother in the early years of child development. It went on to state that this was a factor considered in the

Hoskinson threatened legal action based upon state and federal employment discrimination statutes if she was not rehired.[6] In response, the Dayton Christian Schools Board rescinded their letter refusing to rehire Hoskinson and immediately discharged her for her failure to follow the "Biblical Chain of Command."[7]

Following her dismissal, Hoskinson contacted the Ohio Civil Rights Commission (OCRC) and filed charges of sex discrimination against Dayton Christian Schools.[8] Both Hoskinson and the OCRC claimed the dismissal was inextricably tied to the school's view of the maternal role in child care, a form of sex discrimination. The OCRC began their investigation of the matter, requesting extensive data, handbooks, rules, forms, and other material from Dayton Christian Schools. The OCRC found they had jurisdiction over the matter and issued a complaint against Dayton Christian Schools.[9] Dayton Christian Schools' answer asserted lack of jurisdiction as a defense in that the discharge was on religious grounds.[10]

Once the OCRC notified Dayton Christian Schools that hearings would be held, Dayton Christian Schools[11] filed this action in federal district court. They sought a declaratory judgment denying OCRC jurisdiction and an injunction to prevent the OCRC from interfering with plaintiffs' free exercise

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hiring process. Dayton Christian Schools v. Ohio Civil Rights Comm'n, 766 F.2d 932, 934 n.2 (6th Cir. 1985), *vacated*, 106 S. Ct. at 2718 (1986).

6. 106 S. Ct. at 2721. Ohio law provides that: "It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, national origin, handicap, age or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." OHIO REV. CODE ANN. § 4112.02(A) (Anderson Supp. 1985).

7. 106 S. Ct. at 2721. There seems to be little difference in refusing to rehire Hoskinson versus firing her. The facts of the case are not clear, but apparently she would be eligible for later employment in the former scenario.

It is important to note here that the subsequent litigation deals both with Dayton Christian Schools' (DCS) opinions as to the mother's role in pre-school child care and also with DCS' dismissal on Biblical Chain of Command grounds. Biblical Chain of Command is an authority structure which promotes the internal, peaceful resolution of disputes within the church. *Matthew* 18:15-17.

8. 106 S. Ct. at 2721; *see supra* note 5 and accompanying text.

9. *Dayton Christian Schools*, 766 F.2d at 935. The OCRC determined that the dismissal was a result of DCS' belief that "a mother's place is in the home." They found no religious basis for the act and characterized it as unlawful discrimination. *Id.*

10. 106 S. Ct. at 2721.

11. *Id.* at 2721-22. Stephen and Camillia House and Paul Pyle also joined DCS as plaintiffs. The Houses were parents of students who attended DCS and they alleged their constitutional right to oversee the religious education of their children was infringed. Pyle was a teacher at DCS, and claimed OCRC's exercise of jurisdiction interfered with his ability "to carry out [his] religious vocation in the Christian formation and education of young people." *Dayton Christian Schools*, 766 F.2d at 935.

of their religious beliefs. Furthermore, OCRC's exercise of jurisdiction was characterized by Dayton Christian Schools as violative of the Establishment Clause. The district court dismissed the case and denied relief, allowing the OCRC to proceed with their investigation.[12]

The district court made several important findings of fact. First, the district court found that Dayton Christian Schools had "a dominant religious purpose which permeates both the administrative and substantive aspects of the school."[13] School policy required all employees to adhere to Dayton Christian Schools' statement of faith.[14] Moreover, the Dayton Christian Schools superintendent testified that before teachers are hired, "we must be in total harmony about that teacher's commitment to Christ and her life style and her ability to teach in our system."[15]

Second, the district court found OCRC's complaint challenged two religious beliefs of Dayton Christian Schools.[16] One was that a mother should give full time care for young children. Although Hoskinson was not aware of this belief when hired,[17] the Dayton Christian School Board had a policy of rejecting applications of mothers with pre-school age children. The district court found that "[t]hough the belief may not be documented or as well known or accepted as other precepts . . . the evidence clearly establishes that [the dismissal] was based upon religiously founded principles."[18]

It was also found that the Biblical Chain of Command was a legitimate religious belief of Dayton Christian Schools. Furthermore, Hoskinson had agreed to subscribe to this philosophy in both her employment contract and her application for employment.[19]

On appeal, the Court of Appeals for the Sixth Circuit reversed.[20] The appellate court held that the OCRC's assertion of jurisdiction over Hoskinson's employment discrimination complaint violated both the Free Exercise and Establishment Clauses.

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12. 106 S. Ct. at 2722.

13. Ohio Civil Rights Comm'n v. Dayton Christian Schools, 578 F. Supp. 1004, 1008-09 (S.D. Ohio 1984), *rev'd*, 766 F.2d 932 (6th Cir. 1985), *vacated*, 106 S. Ct. 2718 (1986). The school's purpose was to educate students on how to lead a Christian life by understanding the guidance and direction provided by the Bible.

14. *Dayton Christian Schools*, 766 F.2d at 936-37. This involved professing to be a Christian and following the teachings of the Bible.

15. *Id.* at 937.

16. The issue of whether a policy constitutes a religious belief that is constitutionally protected is a question of fact. Brown v. Dade Christian Schools, 566 F.2d 310, 314 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978).

17. *Dayton Christian Schools*, 578 F. Supp. at 1012.

18. *Id.* at 1031. The OCRC contended that this belief was not a religious tenet, but merely a personal philosophy of the superintendent. This was an important finding, for if the initial decision not to rehire was based on personal beliefs, then OCRC review of that decision would not raise First Amendment concerns.

19. *Dayton Christian Schools*, 766 F.2d at 939-40.

20. *Id.* at 962.

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The Supreme Court of the United States reversed the court of appeals, holding that the district court should have abstained under *Younger v. Harris*.[21] The procedural nature of the disposition is deceptive. For the first time, the Court has voiced an opinion regarding discovery of documents and data held by religious organizations. The majority stated that "the Commission violates no constitutional rights by merely investigating the circumstances of Hoskinson's discharge in this case, if only to ascertain whether the ascribed religous-based reason was in fact the reason for the discharge."[22] The concurring opinion reiterated this view and said that "neither the investigation of certain charges nor the conduct of a hearing on those charges is prohibited by the First Amendment . . . ."[23]

These statements in *Dayton Christian Schools* answer an important First Amendment question, a question commonly present in religious organiztion litigation.[24] It is clear that initial discovery pursuant to an investigation violates no constitutionally protected right.[25] Though stated in vague and general language, devoid of any First Amendment analysis, the Court said this initial investigative discovery should be limited to determinations of the existence of legitimate religious beliefs.[26] This approach is similar to the district

21. 106 S. Ct. at 2720. Justice Rehnquist authored the majority opinion and was joined by Chief Justice Burger and three other Justices. Three Justices joined in Justice Stevens' concurring opinion.

This Note will not discuss the Court's analysis under the *Younger* Doctrine for it will have little, if any, impact on that doctrine. Rather, the real impact of the Court's decision will be felt in the area of employment discrimination statute application to religious organizations. It should be noted, however, that resolution of the constitutional issues before the Court was not absolutely precluded by *Younger*. Initially the OCRC did advocate *Younger* abstention in the district court, but later agreed that "[t]he jurisdiction of the court is not disputed." 106 S. Ct. at 2718 (quoting the district court's final pretrial order dated December 1, 1980). The OCRC similarly did not contest federal court jurisdiction at the appellate court level. Given OCRC's consent, it is clear that the Supreme Court used *Younger* to avoid the religious freedom issues before it. Review was appropriate under Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977) (state found to have consented to jurisdiction). In *Dayton Christian Schools* the Court summarily dismissed these contentions. 106 S. Ct. at 2722-23.

22. 106 S. Ct. at 2724.

23. *Id.* at 2725 (Stevens, J., concurring).

24. *See* Roman Catholic Church, Diocese of Tucson v. Superior Court of Arizona, No. Civ. 83-578-Tuc-Mar (D. Ariz. Nov. 17, 1983) (summarized in 4 RELIGIOUS FREEDOM REP. 82 (1984)) (discovery of diocese personnel records in defamation action); Gipson v. Brown, 288 Ark. 422, 706 S.W.2d 369 (1986) (church members sought discovery of financial data held by elders); Sinai Temple v. Superior Court of California, 2 RELIGIOUS FREEDOM REP. 322 (Cal. Ct. App.), *cert. denied*, 459 U.S. 861 (1982) (interrogatories and requests for admissions regarding rabbi's job performance and dismissal).

25. 106 S. Ct. at 2724-25.

26. *Id.* at 2724.

court truism that such courts always have jurisdiction to determine if they do in fact have jurisdiction.[27] By analogy, the OCRC here had jurisdiction to determine whether Dayton Christian Schools was indeed a religious organization and whether Hoskinson's dismissal was religious in nature.[28] Lower courts will undoubtedly utilize this language when religious organizations contest initial investigations or discovery on constitutional grounds.[29] However, future use of this approach to compel discovery must not lose sight of established First Amendment protections of religious freedom.

First, application of *Dayton Christian Schools* in the field of discovery must be done in light of the United States Supreme Court's decision in *Serbian Eastern Orthodox Diocese v. Milivojevich*.[30] In *Serbian Eastern Orthodox*, a defrocked bishop brought suit against the diocese, claiming his dismissal was contrary to church doctrine. The court held that "religious controversies [such as these] are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them."[31] Thus disclosure of church records and documents cannot be premised upon resolution of ecclesiastical questions.

Furthermore, the Supreme Court's opinion in *NLRB v. Catholic Bishop of Chicago*[32] may bar disclosure of materials held by religious organizations. *Catholic Bishop* dealt with the applicability of the National Labor Relations Act (NLRA) to a pervasively religious employer. In finding the NLRA inapplicable, the Court stated that the "very process of inquiry" may lead to

27. *See generally* United States v. United Mine Workers, 330 U.S. 258 (1947).

28. These determinations are constitutionally required prior to any governmental involvement in the dispute. Otherwise violations of the Free Exercise Clause may occur. *See* Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

29. Indeed, the *Dayton Christian Schools* opinion has already been seized upon by a district court in Seattle Pac. Univ. v. Haas, No. C84-1787 (W.D. Wash. July 14, 1986) (summarized 6 RELIGIOUS FREEDOM REP. 363 (1986)). A Catholic was denied employment as a warehouseman with Seattle Pacific University (SPU) because of their policy of hiring only evangelical Christians. The Washington State Human Rights Commission (WSHRC) began an initial investigation of SPU to determine if unlawful discrimination had occurred. SPU filed suit under 42 U.S.C. § 1983 (1982), claiming its free exercise rights were violated. That action was voluntarily dismissed by SPU once the WSHRC found it had no jurisdiction over the matter. The instant action arose when SPU sought recovery of attorney fees pursuant to 42 U.S.C. § 1988 (1982) (available to successful section 1983 plaintiffs). The district court, relying on *Dayton Christian Schools*, dismissed the case finding that no violation of SPU's constitutional rights took place. The Supreme Court's decision was interpreted to hold "that a state commission authorized to enforce a state law against employment discrimination does not violate the consitutional rights of a religious school by assertion of jurisdiction over a discrimination complaint against the school and investigation of the underlying facts." *Id.*

30. 426 U.S. 696 (1976).

31. *Id.* at 713.

32. 440 U.S. 490 (1979).

infringement of First Amendment rights of religious freedom.[33] Such infringement would arguably be present, according to *Catholic Bishop*, when the religious organization's doctrine or mission is called into question.[34]

Thus *Dayton Christian Schools*, despite its procedural disposition, will have an impact on preliminary discovery and investigations in religious freedom litigation. Unfortunately, the Supreme Court's utilization of the *Younger* Doctrine permitted it to side-step the broader constitutional issue of employment discrimination statute application to religious organizations. The following examination of the constitutional problems inherent in the application of statutes like the Ohio Civil Rights Act to groups such as Dayton Christian Schools makes it clear that the Supreme Court should have adjudicated this case on the merits.[35]

The Ohio Civil Rights Act provides that discrimination in employment based on race, sex, religion, national origin, age, or handicap is unlawful.[36] The Act creates the OCRC and empowers it to hold hearings, subpoena witnesses, and require the production of documents.[37] The Act is similar to provisions in the federal Civil Rights Act of 1964,[38] but there is an important distinction. The Civil Rights Act of 1964 contains a provision exempting religious organizations from compliance with respect to employment of individuals who perform religious work.[39] There is no analagous exemption in the Ohio Civil Rights Act.

One constitutional problem present in the application of employment discrimination statutes to religious organizations surfaces during an examination of the *Dayton Christian Schools* facts relevant to the Free Exercise Clause. The test for a violation of this clause requires that the burden placed on Dayton Christian Schools' religious beliefs be weighed against the state's interest in the action.[40]

In ascertaining the extent of the burden imposed on Dayton Christian Schools, attention should be focused on several factors. One such factor is the right of parents to choose the manner in which their children will be educated. This right was firmly established in *Pierce v. Society of Sisters* where the Supreme Court held that a "child is not the mere creature of the

33. *Id.* at 502; *see infra* note 81 and accompanying text.
34. *Id.*
35. *See supra* note 21.
36. OHIO REV. CODE ANN. § 4112.02(A) (Anderson 1980 & Supp. 1985).
37. *Id.* § 4112.04(B)(3).
38. 42 U.S.C. §§ 2000e to 2000e-17 (1982).
39. *Id.* § 2000e-1. The absence of a similar provision in the Ohio Civil Rights Act is a means of distinguishing the present case from Equal Employment Opportunity Commission cases. Several of these cases will be discussed *infra* text accompanying notes 57-78.
40. *See generally* Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

state, [parents] have the right, coupled with the high duty, to recognize and prepare [the child] for additional obligations."[41] The Supreme Court has interpreted these "obligations" as encompassing the teaching of religious beliefs.[42] In *Dayton Christian Schools*, the OCRC was attempting to compel the school into retaining or hiring teachers whose beliefs conflicted with those held by the plaintiffs. The formative ages of the students must also be considered with this parental right.[43]

Another factor in evaluating the burden placed on Dayton Christian Schools' free exercise of religion was the highly coercive nature of the state interference imposed by OCRC jurisdiction.[44] In addition to the extensive discovery requested by OCRC, the Commission attempted to compel Dayton Christian Schools into signing a Consent Order. This order would have required the rehiring of Hoskinson and that Dayton Christian Schools agree to implement its policies while not basing employment decisions on employees' religious beliefs.[45] Dayton Christian Schools was faced with the dilemma of abandoning the mandates of their consciences or exposing themselves to criminal sanction,[46] truly a substantial burden on their free exercise of religion.

A state may burden the free exercise of religion only when pursuing a compelling interest.[47] The state's interest promoted by the Act and the OCRC was that of eliminating discrimination. A state interest also exists in prohibiting Dayton Christian Schools from interfering with the right of an employee to petition the government for redress of grievances. Although both these goals are worthy, it should be remembered that there is no constitutional

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41. 268 U.S. 510, 534-35 (1925) (Oregon statute requiring all children to attend public school found violative of the Fourteenth Amendment).

42. *See* Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (The Court found "*Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children.").

43. The Court in *Yoder* said "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." 406 U.S. at 213-14.

44. *Dayton Christian Schools*, 766 F.2d at 949. OCRC measures are always coercive, but the religious context of this case creates problems with their use. The Supreme Court has noted that "it is necessary in a free exercise case for one to show the *coercive* effect of the enactment as it operates against him in the practice of his religion." School Dist. of Abington v. Schempp, 374 U.S. 203, 223 (1963) (emphasis added).

45. *Dayton Christian Schools*, 766 F.2d at 951. Dayton Christian Schools did not contend that OCRC's efforts were any more intrusive or coercive than those normally implemented. But this distinction is irrelevant given the Free Exercise, and not Equal Protection, issue being considered.

46. The Ohio Civil Rights Act provides that a violation of its provisions is a misdemeanor. OHIO REV. CODE ANN. § 4112.99 (Anderson 1980).

47. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the higher order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

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prohibition against *private* sex discrimination or *private* abridgment of the First Amendment right to petition.

The necessity of regulating Dayton Christian Schools' actions must be analyzed in light of the notion of "accommodation" mandated by the Free Exercise Clause.[48] In the instant case, accomodation of Dayton Christian Schools' religious beliefs would not seriously hamper the state's eradication of employment discrimination. Regulation of non-religious institutions would not be affected, nor would regulation of religious institutions in the absence of an asserted religious belief. Moreover, regulation of religious entities such as Dayton Christian Schools might be permissible if carried out through less burdensome and noncoercive means. Possibilities include the denial of public bus transportation, textbooks, health and diagnostic services, and tax credits.[49]

Application of employment discrimination statutes to religious schools such as Dayton Christian Schools may also run afoul of the Establishment Clause. Guidelines for implementation of the clause have been framed in terms of line drawing between permissible and impermissible church-state relations. In *Lemon v. Kurtzman*, the Supreme Court said it is useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an "excessive government entanglement with religion."[50] The Ohio Civil Rights Act clearly has a secular purpose and is primarily neutral towards religion, hence the crucial focus is on the issue of entanglement. Factors relevant to determining whether there was excessive entanglement include the character of the institution affected, the nature of the burden encountered, and the resulting church-state relationship.[51]

As previously discussed, Dayton Christian Schools is pervasively religious in nature.[52] The Supreme Court has stated that the likelihood of entanglement is tied to the extent of this pervasion.[53] Moreover, the nature of

48. *See* Lynch v. Donnelly, 465 U.S. 668 (1984). In its analysis of Free Exercise claims, the Court said the Constitution "mandates accomodation, not merely tolerance." *Id.* at 673.

49. Compliance with the Ohio Civil Rights Act could be a precondition for receipt of these benefits. However, although these means are less coercive, the result might still be the same. That is, the state arguably would be burdening the free exercise of religion in possible violation of the Establishment Clause. *See generally* Capps & Esbeck, *The Use of Government Funding and Taxing Power to Regulate Religious Schools*, 14 J. LAW & EDUC. 553 (1985).

50. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (quoting Walz v.Tax Comm'n., 397 U.S. 664, 674 (1970)).

51. *Id.* at 615.

52. *See supra* text accompanying notes 13-15.

53. Hunt v. McNair, 413 U.S. 734, 746 (1973). There the court stated that "'*Lemon* . . . [was] grounded on the proposition that the degree of entanglement . . . varies in large measure with the extent to which religion permeates the institution." *Id.*

the burden also indicates unnecessary entanglement in that the OCRC attempted to involve itself in the hiring policies of religious instructors. Entanglement is likely when the state involves itself with teacher hiring practices. In *Catholic Bishop*, the Court noted that "[t]he key role played by teachers in such a school system has been the predicate for our conclusions that governmental [involvement with] teachers creates an impermissible risk of excessive governmental entanglement in the affairs of . . . church operated schools."[54]

The church-state relationship resulting from such state involvement would be ripe with unacceptable entanglement. Allowing OCRC to exercise jurisdiction would create an on-going church-state relationship, calling for continued investigation into and assessment of religious decisions. As long as Dayton Christian Schools exists, the potential would exist for OCRC to exert jurisdiction over employment disputes, thus leading to the continuing relationship. The OCRC would be evaluating questions of intent, motive, and causation behind religious practices. Such involvement is "fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches."[55] It is apparent that church-state entanglement problems would be created by allowing the OCRC to intervene here.

As the *Dayton Christian Schools* facts point out, there exists today a conflict between the competing goals of religious freedom and the eradication of employment discrimination. The Supreme Court in *Dayton Christian Schools* left unresolved the issue of employment discrimination statute applicability to religious organizations. This issue may be better understood by examining the current judicial status of the religious freedom-employment discrimination conflict. This examination consists largely of cases involving religious institutions and application of Title VII of the Civil Rights Act of 1964.[56]

The Ninth Circuit ruled in favor of Title VII application in *EEOC v. Pacific Press Publishing Association*.[57] There a female employee in an ad-

54. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979).

55. Lemon v. Kurtzman, 403 U.S. 602, 620 (1972).

56. Title VII was intended to prohibit employment discrimination. Section 709 of Title VII, 42 U.S.C. § 2000e-2 (1976) provides in part:

> (a) 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; . . . .

Id. However, Section 702 of Title VII, 42 U.S.C. § 2000e-1 (1976) provides that: "This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with . . . its activities." *Id.*

57. 676 F.2d 1272 (9th Cir. 1982).

ministrative position brought charges of sex discrimination in regard to gender biased pay scales.[58] Pacific Press was a religious publisher, and required all employees to adhere to Biblical teachings and church authority.[59] A Biblical Chain of Command issue, similar to the one in *Dayton Christian Schools* was raised, but the court found that enforcement of Title VII against Pacific Press did not infringe its religious freedom rights.[60] Although Pacific Press published only religious materials and alleged that all duties involved religious activity, the court refused to apply the religious exception to Title VII.[61]

Dolter v. Walhert High School[62] is another case indicative of Title VII application to a religious institution. A teacher at a parochial school brought a sex discrimination suit after she was dismissed for being single and pregnant. The dismissal was based upon moral and religious standards of the Roman Catholic Church. The school, in its motion for summary judgment, argued that it was exempt as a religious employer under the statutory scheme of Title VII and that application would create an excessive entanglement between church and state.[63] The court rejected these arguments and denied the motion, finding that the school's policy could be discriminatory on the basis of sex.[64]

McClure v. Salvation Army[65] also dealt with the application of Title VII to religious institutions. McClure, a female ordained minister, claimed sex discrimination by her employer, the Salvation Army. The court interpreted Title VII's religious exemption as applicable solely to religious discrimination.[66] The court recognized, however, that "[t]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."[67] Because application of Title VII created state intervention into

58. *Id.* at 1275.
59. *Id.*
60. *Id.* at 1281.
61. *Id.* at 1282.
62. 483 F. Supp. 266 (N.D. Iowa 1980).
63. *Id.* at 269-71. Although the plaintiff was a Catholic lay teacher of English, she was involved with the religious pedagogical ministry of the church. One might wonder why a Free Exercise claim was not emphasized more by the school. The court's discussion focused solely on the issues of exemption and entanglement. *Id.* at 270.
64. *Id.* at 271. The court found that the moral code was not equally enforced. The *Dolter* court noted in dictum that had men and women teachers been treated the same, the dismissal would have been upheld. *Id.* at 270 n.5. This case exemplifies the difficulties involved in the application of Title VII to instructors in religious schools.
65. 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).
66. The court noted that the applicability of social legislation may not be escaped merely "by showing [the organization was] created for fraternal or religious purposes." *Id.* at 557.
67. *Id.* at 558-59.

ecclesiastical matters, the church-minister relationship was found not within the scope of Title VII.[68]

The Fifth Circuit declined to extend its *McClure* church-minister exemption to a college and its faculty in *EEOC v. Mississippi College*.[69] A part-time faculty member claimed she was denied a permanent position on the basis of sex discrimination. The college maintained the discrimination was religious.[70] The court ruled in favor of the EEOC, finding that a religiously affiliated college was not a church, and that the faculty did not minister to the religious needs of the students.[71] Though not present here, the court adhered to its *McClure* rationale that the church-minister relationship is exempted from Title VII coverage.[72]

The Fifth Circuit again confronted Title VII's applicability in a religious context in *EEOC v. Southwestern Baptist Theological Seminary*.[73] The Seminary had refused to file a form[74] required by the EEOC, claiming Congress did not intend it to apply in this situation. The court distinguished *Mississippi College* and reaffirmed *McClure*.[75] The *McClure* church-minister relationship was found to be present here. The Seminary offered exclusively religious courses and its purpose was to train ministers, thus the court found it to be a "church" within the *McClure* test.[76] Furthermore, most of the faculty members were ordained, taught religious courses, and attended to the religious needs of the students.[77] Hence, they were ministers for *McClure* purposes. However, this classification was not extended to other staff who, although ordained, did not perform traditionally religious functions.[78]

The Supreme Court has never addressed the extent of Title VII application to religious organizations. As the above cases indicate, there are im-

68. *Id.* at 560-61. The court expressly limited its holding as to other church employees. *Id.* at 555. Secondly, the court was construing the statute so as to avoid a constitutional question. *Id.* at 560.

69. 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

70. *Id.* at 484. The college was affiliated with the Baptists. The man hired in the claimant's stead was a Baptist, the claimant was a Presbyterian.

71. *Id.* at 489.

72. *Id.* at 485.

73. 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982).

74. The document in question was Form EEO-6. It required the submission of information regarding job description, length of employment contract, salary, gender, and race or national origin of every employee. *Id.* at 280.

75. The court found that the Seminary was totally sectarian, as opposed to the pervasively sectarian nature of Mississippi College. *Id.* at 281. Also, the court reiterated that the religious exemption in Title VII applied solely to religious discrimination. *Id.* at 282.

76. *Id.* at 283.

77. *Id.* at 283-84 & n.4.

78. *Id.* at 285. The forms had to be filled out for support staff who, although performing bona fide religious functions, did not qualify as "ministers" in the *McClure* sense. *Id.* at 287.

portant questions still unresolved in the area of employment discrimination and religious organizations.[79]

One such question involves the constitutionality of judicial inquiries into ministerial positions. Under the *McClure*[80] approach, only those positions which qualify as "church-minister" relationships are exempt from Title VII's provisions. This approach requires courts to make substantive value judgments regarding employee roles in the inculcation process. Such state assessment is indicative of impermissible government involvement,[81] and hence compliance with the *McClure* test would lead to excessive church-state entanglement.

The question of what constitutes religious discrimination also gives rise to constitutional problems. Under Title VII religious organizations are only exempted from religious based discrimination.[82] *Dayton Christian Schools* exemplifies the problems inherent in this assessment. Recall that Hoskinson was dismissed pursuant to religious beliefs and that the OCRC inferred a non-exempt form of discrimination (sex). In these situations the statutory framework forces the court to assess church doctrine and determine its validity as a reason for the conduct. The Supreme Court in *Catholic Bishop* frowned on such assessments finding that:

> The resolution of such charges . . . in many instances will necessarily involve inquiry into the good faith of the position asserted by the clergy-administractors and its relationship to the school's religious mission. It is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.[83]

Thus the very framework of Title VII itself may be unconstitutional when applied to religious employers.

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79. For example, did Congress even intend to confer jurisdiction over religious institutions? *Compare* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979) (Held: the NLRB did not have jurisdiction over a church operated school because of "the absence of a clear expression of Congress' intent" to confer such jurisdiction.) *with* McClure v. Salvation Army, 460 F.2d 553, 557 (5th Cir. 1972) (such jurisdiction was conferred in the employment discrimination context).

80. *See supra* text accompanying notes 65-68.

81. *See supra* text accompanying note 55; *see also* Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, n.380 (1984).

82. 42 U.S.C. § 2000e-1 (1982). The Ninth Circuit in EEOC v. Pacific Press Publishing Ass'n found that "[t]he legislative history of this exemption shows that although Congress permitted religious organizations to discriminate in favor of members of their faith, religious employers are not immune from liability for discrimination based on race, sex, [or] national origin . . . ." 676 F.2d 1272, 1276 (9th Cir. 1982).

83. 440 U.S. at 502.

The most important question yet unresolved concerns the appropriate standard of review due religious freedom in the employment discrimination context. Discriminating on a religious basis in matters of staff employment goes to the very essence of propogation of a particular faith. Yet, cases such as *Dolter* and *Pacific Press* make it clear that religious freedom can be suppressed under the guise of employment discrimination statutes. One might wonder why these freedoms are not given the same rigorous protection as other First Amendment guarantees. For example, civil libertarians vehemently defend free speech regardless of its social value (or lack thereof). They are quick to point out that allowing even minute government regulation or censorship could lead to impermissible suppression of First Amendment rights.[84] These same civil libertarians, however, are oblivious to the compromise of religious freedom that occurs under current employment discrimination statutes. This "second rate" treatment is a wholly unjustified intrusion upon the First Amendment guarantee of religious freedom.

It is in the context of these questions that the significance of *Dayton Christian Schools* is apparent. First of all, the opinion is significant for its comments regarding preliminary discovery and investigation of religious organizations. The Court stated that no constitutional violation is created by use of these procedures. Their use, however, must be tempered by the First Amendment protections of *Serbian Eastern Orthodox* and *Catholic Bishop*. Unfortunately, *Dayton Christian Schools* is also significant for the Court's reluctance to address the pressing issue of employment discrimination statute application to religious organizations.

When the Supreme Court eventually addresses these unresolved questions, it should give deference to claims of religious liberty.[85] The eradication of employment discrimination is undoubtedly a worthy governmental concern. Moreover, the Religion Clauses of the First Amendment should not be treated as a shield to invidiously discriminate against employees. The dilemma, however, faced by religious organizations such as Dayton Christian Schools involves fundamental, guaranteed rights to be free to exercise one's religious beliefs and free from unnecessary governmental intervention in religious matters. The attempted exercise of jurisdiction in teacher hiring practices clearly infringes upon these rights and this infringement necessitates that the First Amendment guarantee of religious freedom prevail.

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84. Consider the First Amendment protection afforded pornography. When cases involving suppression or censorship arise, courts do not attempt to balance its value against its harmful effects to the community; nor do they weigh it against competing societal goals. Pornography is protected as a form of speech because we are fearful of where such suppression might lead. There exists no principled argument why the First Amendment's grant of religious freedom should not receive the same protection, for the dangers are the same.

85. Rules of construction would tend to support this interpretation. Present is a conflict between a Constitutional right and a Congressional enactment.