Religious Liberties

Ministers, Minimum Wages, And Church Autonomy

*By Thomas C. Berg**

When Judge Richard Posner expounds on an area of law in one of his opinions for the Seventh Circuit, the result is almost always thought-provoking and fun to read. So it is with his recent panel opinion in *Schleicher v. Salvation Army*,[1] which applied the "ministerial exception" to employment laws to dismiss a suit for minimum wages brought by two former Salvation Army ministers.

Steve and Lori Schleicher were captains in the Salvation Army, ordained by the group to act as clergy and serving as administrators of its Adult Rehabilitation Center in Indianapolis. Such centers operate as "self-contained religious communities," in Posner's words, for alcoholics, drug addicts, and others who reside there and "whom the Salvation Army is attempting to redeem."[2] The complex includes not only living and dining areas but a chapel where the Schleichers preached, led worship and singing, and taught classes in Bible study and Christian living. The Schleichers' duties also included administering five thrift shops, staffed by the center's residents, which sell donated goods to the public.

Salvation Army ministers receive no wages, only "an allowance... sufficient for basic needs."[3] The Schleichers each received $150 a week, which fell below the federal minimum wage, given the number of hours, including overtime, they each worked. They brought suit alleging violations of the minimum-wage and overtime provisions of the Fair Labor Standards Act (FLSA).[4] The Army expelled them for bringing suit. The district court dismissed the suit for lack of subject-matter jurisdiction on the basis of the so-called ministerial exception, and the Schleichers appealed.[5]

The Ministerial Exception

The ministerial exception is a cornerstone of constitutional protection for religious organizations. It was first recognized thirty-five years ago in another employment suit by a Salvation Army officer (minister).[6] Billie McClure brought a Title VII claim alleging discrimination in pay and benefits because of her sex, but the Fifth Circuit affirmed a dismissal for lack of jurisdiction. Recognizing the Army as a church and McClure as one of its ministers, the court held that applying Title VII to that relationship would "cause the State to intrude upon matters of church administration and government," areas "of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment."[7] Title VII contains no textual exception from race or sex discrimination claims, the court noted—in contrast to the provision allowing religious organizations to hire and fire based on religion[8]—but following the principle that a statute should be construed so as to avoid "'a serious doubt of [its] constitutionality,'" the court held that Congress in Title VII "did not inten[d] to regulate the employment relationship between church and minister" for any claims of discrimination.[9]

Since *McClure*, dozens of lower court decisions have dismissed claims by clergy against their religious employers alleging violations of Title VII's sex, race, or age discrimination provisions;[10] the Americans with Disabilities Act;[11] and various state statutes or common law doctrines governing the employment relationship.[12] The exception extends to non-Christian clergy and houses of worship; to clergy in other religious organizations such as hospitals;[13] and to non-ordained employees, such as music or education directors, whose primary duties involve teaching the faith, church governance, or supervising ritual or worship.[14] The exception has even grown since the Supreme Court held in *Employment Division v. Smith* (1990) that the Free Exercise Clause usually does not require any exemption for religious conduct from a "neutral law of general applicability."[15] Every circuit to consider the issue has held that the ministerial exception survives *Smith*'s shrinking of free exercise rights.[16]

The ministerial exception is also more absolute than even the most protective free exercise standards before *Smith*. Courts do not ask whether any compelling governmental interest justifies the burden on religious institutions from clergy suits; for example, race discrimination claims are dismissed even though the Supreme Court has found a compelling interest in eliminating race discrimination in other contexts.[17] Moreover, unlike most other free exercise exemptions, the ministerial exception is not limited to cases where discrimination is motivated by religious beliefs, such as the male-only rule for Catholic priests or Orthodox rabbis. A race or sex discrimination suit is barred even if the church's doctrine strongly condemns such discrimination and its agent acted on the basis of pure prejudice.[18]

The ministerial exception remains vigorous because it has deep and historic roots, not only in principles of religious freedom, but in the related doctrine of church-state separation. In *Schleicher*, before applying the exception to the minimum-wage case, Posner touches on these foundations:

> [T]hough [the exception] is derived from policies that animate the First Amendment, the relevant policies come from the establishment clause rather than from the free-exercise clause.... The assumption behind the rule—for it is an interpretive rule—is that Congress does not want courts to interfere in the internal management of churches, as they sometimes do in the management of prisons or school systems. In a religious nation that wants to maintain some degree of separation between church and state, legislators do not want the courts to tell a church whom to ordain (or retain as an ordained minister), how to allocate authority over the affairs of the church, or which rituals and observances are authentic.[19]

This passage recognizes, importantly, that the purposes for the exception are not limited to claims by ministers; indeed, Posner says, it "is better termed the 'internal affairs' doctrine."[20]

* *Thomas C. Berg is the St. Ives Professor of Law at the University of St. Thomas.*

The freedom of religious organizations to govern their internal affairs extends to a number of other situations, including at least the handling of members and congregants—the terms and conditions for their admission, discipline, or expulsion—and the promulgation of the organization's teaching to its members, employees, and volunteers. An influential judge's use of the umbrella term "internal affairs" should encourage courts to connect these other situations to the well-established ministerial exception. (The countervailing risk is that the term "internal" might incorrectly suggest to judges that church autonomy is wholly irrelevant whenever a church's conduct has any external effects—as a great many forms of conduct do.)

The precise constitutional source of the exception has been disputed. Posner locates it solely in the Establishment Clause and its principle of church-state separation. The non-establishment rationale certainly makes sense, and some judges, like Posner, have been drawn to it in order to sidestep *Smith*'s disapproval of mandated exemptions under the Free Exercise Clause.[21] A prime feature of the English established church was that the government decided clerical matters such as the appointment of bishops (technically it still does so today) and other ecclesiastical matters such as the content of the Book of Common Prayer. As a result, several decisions have rested the ministerial exception on the ground that lawsuits would create "excessive entanglement" between church and state in violation of the third prong of the *Lemon v. Kurtzman* test for establishment issues.[22]

More broadly, as several academic commentators have argued, the Establishment Clause reflects a model of "dual jurisdictions," state and church—in the words of Carl Esbeck, two "spheres of competence" covering temporal matters (the state) and spiritual matters (the churches).[23] Non-establishment of religion means that the state has no control over religious affairs. In Ira Lupu and Robert Tuttle's words, the state disclaims "jurisdiction over [the] ultimate truths" that are the subject of religion.[24] This jurisdictional separation makes the state a "penultimate" institution with a limited horizon," forswearing any "comprehensive claim to undivided loyalty."[25] Religious institutions and associations have sovereignty in the sphere of spiritual matters, and this "places a powerful limit" on the ambitions of the state."[26] Indeed, "at crucial points in Western history," Esbeck emphasizes, religious institutions have "had a 'pivotal role in guarding against political absolutism'"[27]—from the medieval conflict between pope and emperor over the power of appointing clergy to the twentieth century's religiously inspired resistance movements against Communism. Church autonomy is crucial in our constitutional order, therefore, for the sake not only of religious freedom but of limited government.

The line between state and church jurisdictions is not always clear, and they may overlap; but as the medieval conflict suggests, a crucial feature of an independent religious sector is the ability of religious organizations to choose their leaders according to their own standards. For the state to interfere in such decisions would wrongly make it the "coauthor" of faith; thus, the ministerial exemption is among "the entailments of the jurisdictional limitations that the Establishment Clause places on the state's role."[28]

This non-establishment ground runs deep, but Posner is mistaken to write off the Free Exercise Clause as an alternative ground for churches' right of control over their internal affairs. The Supreme Court has specifically based this right in free exercise. Holding more than fifty years ago that a state could not throw its weight on one side of a schism in the Russian Orthodox Church, the Court endorsed "a spirit of freedom for religious organizations, ... in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven, [has] federal constitutional protection as a part of the free exercise of religion."[29] *McClure* relied on this passage to hold that the ministerial exception was necessary to protect free exercise.[30] Indeed, it may be most natural to think of a secular intrusion on clergy selection, by a state with no established church, as violating free exercise rather than non-establishment.

Employment Division v. Smith does not dispose of the free exercise argument; on the contrary, *Smith*'s language preserves it. Before announcing its general rule against exemptions, the Court made clear that the Free Exercise Clause still forbids the government from, among other things, "lend[ing] its power to one or the other side in controversies over religious authority or dogma."[31] For that proposition, *Smith* cited the very same case, *Serbian Eastern Orthodox Diocese v. Milivojevich*,[32] that Posner cites as authority for the "internal affairs" exception.[33]

In fact, both Religion Clauses work together in this context; institutional free exercise coincides with institutional separation from government. Thus, in several cases affirming churches' autonomy, the Court has simply cited "the First Amendment" without differentiating the clauses.[34]

Posner is also on shaky ground when he calls the ministerial exception merely "a rule of interpretation, not a constitutional rule" (albeit a rule "derived from the policies that animate the First Amendment").[35] Most cases treat it as a constitutional mandate, not just a statutory construction designed to avoid constitutional questions.[36] Even *McClure*, which spoke in terms of avoiding "serious doubts" about constitutionality, made clear that a Title VII suit would draw the court into areas "it is forbidden to enter by... the First Amendment."[37] The distinction between interpretive rule and constitutional mandate matters, not because Title VII is likely to be amended to authorize ministers' suits, but because state statutes might be interpreted to authorize them. That is exactly what happened in the union context; after the Supreme Court construed the National Labor Relations Act's coverage to exclude teachers at parochial schools because of potential constitutional difficulties,[38] lower courts applied state labor laws and brushed aside the constitutional questions.[39] Posner himself has criticized the canon "that statutes should be construed not only to save them from being invalidated but to avoid even raising serious constitutional questions," on the ground, among others, that it leaves constitutional boundaries too vague.[40]

As we will see, treating the ministerial exception as a rule of narrow construction may make somewhat more sense for the FLSA than for Title VII and other antidiscrimination laws.[41] But for antidiscrimination suits, *Schleicher*'s dictum is best read to say that they fall outside Title VII because they are

unconstitutional, not because they merely raise constitutional questions.

Minimum-Wage Suits and the Exception's Scope

Most, although not all, ministerial exception cases have involved Title VII or other antidiscrimination claims. The Schleichers argued that their minimum wage suit was different, raising none of the evils that the exception aims to prevent. In most cases about clergy wages, this would be irrelevant, and the ministerial exception unnecessary: the FLSA applies only to "an enterprise engaged in commerce" (clarified by regulation to mean "ordinary commercial activities"), which most churches and religious organizations do not do.[42] But the Schleichers' case was complicated, and interesting, because part of their duties was to supervise the commercial thrift shops. The shops, as Posner pointed out, resembled those involved in the Supreme Court case of *Tony & Susan Alamo Foundation v. Secretary of Labor*[43]—commercial businesses used to finance a religious organization and staffed by the alcoholics and addicts whom the organization was trying to rehabilitate—and the Court had held the Alamo staffers covered by the FLSA. The question was whether the Schleichers as ministers were different. Did their claim implicate the evils the ministerial exception aims to avoid?

The narrowest evil from a minister's suit is that it may require the court to decide theological questions, a task plainly outside the power of civil authorities under the separate-jurisdictions, Establishment Clause framework described above.[44] As Posner noted in *Schleicher* (following several other decisions), a church will often answer a Title VII antidiscrimination suit by claiming that the plaintiff was fired or disfavored because she performed poorly as a minister, and "to evaluate such a defense—to determine, that is, whether it was sincere or pretextual—would require a court to weigh in on issues of [religious] doctrine and practice."[45] The court would inquire whether the minister did perform poorly or worse than others who were not fired. The impropriety of setting such standards is why courts have also uniformly rejected tort suits alleging so-called clergy malpractice in pastoral counseling relationships.[46]

But if inquiries into clergy performance and standards are the only wrong to avoid, a suit that required no such determination could proceed. That is what the Schleichers argued about their FLSA claim, since the duty to pay minimum wages does not depend on the employer's motive for withholding them. Indeed, even Title VII suits, the core of the ministerial exception, do not always or necessarily raise the issue of the minister's religious performance. The rationale for the exception must be broader.

Thus, *Schleicher* emphasizes, along with many other decisions, that the ministers' exception more expansively protects "a church's ability to determine who shall be its ministers."[47] The minister is (in *McClure*'s words) the church's "lifeblood," "the chief instrument by which [it] seeks to fulfill its purpose,"[48] and (in the Third Circuit's words) "the embodiment of [the church's] message," its "public representative, its ambassador, and its voice to the faithful."[49] As a result, as the Third Circuit puts it, the ministerial exception bars any claim "the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions," "'even when such actions are not based on issues of church doctrine or ecclesiastical law.'"[50] The protected choice of ministers is implicated obviously when a Title VII plaintiff seeks reinstatement, but also when he seeks to impose liability for the church's hiring or firing decision.

But the Schleichers argued that their suit did not implicate this concern either. Prima facie, it seems, the Salvation Army could retain its right to choose its ministers while paying them above-minimum wages (at least when they supervised commercial activities).

Posner nonetheless applied the ministerial exception, articulating two arguments. First, he analogized the case of Salvation Army ministers receiving subsistence wages and supervising thrift shops to the example of monks who "take a vow of poverty" and produce wine "in order to finance the operation of the[ir] monastery."[51] The monks would not fall within the FLSA as employees of an organization "engaged in ordinary commercial activities": "[t]he vow of poverty is a hallowed religious observance," and "an intent to destroy it cannot reasonably be attributed to the [FLSA's] draftsmen," for "[n]o one would think the curious precapitalist economy of a monastery an ordinary commercial activity."[52] Similarly, while the Salvation Army's thrift shops might be commercial and their sales staff subject to the FLSA per *Alamo*, the Schleichers were employed not by the shops but by the overall Adult Rehabilitation Center, which is a church—with its worship services and Bible studies—and for which the Schleichers' duties including preaching, teaching, and counseling as well as supervision of the shops. The Schleichers therefore were like the bishop of a cathedral with a profit-generating gift shop; the bishop remains fundamentally an ecclesiastical rather than commercial administrator, outside the FLSA. "The commercial tail," Posner concluded, "must not be allowed to wag the ecclesiastical body."[53]

This reasoning may seem simply an interpretation of the statute: clergy working for an overall religious organization are not employees of an enterprise "engaged in ordinary commercial activities" simply because the organization has a commercial component. But the interpretation plainly was motivated by considerations related to the ministerial exception. *Schleicher* ultimately adopts "a presumption that clerical employees are not covered by the [FLSA]."[54] The presumption can be defeated by a showing that the "minister's function is entirely rather than incidentally commercial," for example if "a church received by inheritance a steel plant, and it happened to have among its ministers a former steel executive whom it assigned to manage the plant full time."[55] But this appears to leave the ministerial exception applicable to another category: ministers whose primary duties involve a commercial enterprise with a religious motivation like the Salvation Army thrift shops or the Alamo Foundation businesses. Suppose, for example, the Schleichers had done all their work in the thrift shops, not just a small share.

Ultimately, in treating nearly all ministers as outside the FLSA, Posner offers reasons grounded in the ministerial exception. One, already mentioned, is that the vow of poverty

for clergy is a "hallowed religious observance." At least some minimum-wage cases, therefore, implicate a church's doctrinal belief in voluntary poverty for its leaders—just as a sex discrimination case against the Catholic Church would implicate the Church's doctrine of a male-only clergy. When such a doctrinal belief is involved, a ministerial exception need not rest on a broader right of church autonomy.

But Posner adds a second argument that does sound in church autonomy: that even minimum wage suits ultimately reduce to (impermissible) challenges to a church's ability to choose and evaluate its ministers. The Schleichers, for example, were dismissed from the Army when they filed suit, but they added no retaliation claim nor could they—because if the Army had answered that "their filing a suit seeking to enforce wage and overtime claims was inconsistent with their religious obligations as ministers and was thus an independent and adequate ground for firing them, the court would [improperly] have to explore the doctrines of the Salvation Army that define the role of its ministers."[56] Given that the Army had a policy against ministers filing suit, and given that its firing of ministers was unreviewable, "then however we rule no Salvation Army minister will ever receive the minimum wage. We are disinclined to take the first step on a path that leads so swiftly to so dead an end."[57]

Schleicher's Implications

By virtue of the church autonomy arguments in the preceding two paragraphs, *Schleicher* extends beyond a statutory interpretive rule that ministers normally fall outside the FLSA's coverage of "commercial" activities. The logic that a church can dismiss a minister for bringing a suit deemed inconsistent with the ministerial role, and that therefore it is pointless for a court to entertain the suit in the first place, creates a powerful constitutional shield covering a wide range of terms and conditions of clergy employment.[58] This coincides with the statement in *McClure*, the original ministerial-exception case, that the church's protected interests include not only the selection of a minister but "the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church."[59] It also coincides with the idea that the church-minister relationship is, at least in the vast majority of situations, outside the civil courts' jurisdiction. If other courts follow this aspect of *Schleicher*, it would strengthen the ministerial exception.

On the other hand, *Schleicher* does not speak directly to the situation where courts have been most uneven in shielding churches' decisions concerning clergy: third-party suits alleging that the church was negligent in hiring or supervising a minister who sexually abused a child or adult parishioner. Some courts have held that such suits do not affect church autonomy because negligence is a wholly secular standard and the church's interest in selecting its ministers is not implicated in suits by third parties as opposed to suits by ministers themselves. The Ninth Circuit went so far as to hold that even a minister's suit—a Jesuit trainee's claim against the order for negligently failing to stop alleged sexual harassment by his superior—could proceed because the Jesuits still favored the plaintiff's ordination and therefore the order's "freedom to choose its representatives" would be unaffected.[60] But this ignores the order's interest in freedom to act concerning the clergy who are potential or alleged wrongdoers. A religious organization's ability to select clergy according to its preferred model can be severely affected by liability, imposed in hindsight, for failure to predict that a minister would become a wrongdoer, or to intervene; and that determinations of what a "reasonable bishop" would have done in such circumstances can easily require courts to impose their own vision of a proper ecclesiastical structure.[61]

At the same time, third-party suits do involve the interests of people—especially children—who, unlike clergy plaintiffs, have not voluntarily entered into a church-minister relationship. A sensible balance of these competing interests would hold churches liable for failures to supervise that are reckless or intentional—that is, knowing of a substantial risk of a minister's abusive tendencies—as opposed to merely negligent.[62] Courts will only draw this balance if they recognize that even third-party suits can affect fundamental interests in clergy selection. But suits by ministers themselves, such as *Schleicher*, do not call attention to that fact.

The final point in *Schleicher* is the court's conclusion that the dismissal of the plaintiffs' suit, although proper, should have been on the merits, through judgment on the pleadings, not for lack of subject matter jurisdiction.[63] This too is questionable. If the separation-of-jurisdictions model is accurate, then suits over clergy matters really do exceed the civil court's jurisdiction.[64] Numerous ministerial-exception decisions, beginning with *McClure v. Salvation Army* itself, have dismissed suits for lack of subject matter jurisdiction.[65] Posner argues that "[a] federal court could not entertain a suit to restore the Latin mass or to declare Christian Science a heresy. But it does have jurisdiction to decide cases brought to enforce the Fair Labor Standards Act…. Jurisdiction is determined by what the plaintiff claims rather than by what may come into the litigation by way of defense."[66] But the defense of sovereign immunity is generally treated as jurisdictional, and it resembles the ministerial exception. Both place fundamental limits on the powers of civil courts in order to preserve the sovereignty of another actor, whether government or church.[67]

Endnotes

1 518 F.3d 472 (7th Cir. 2008).

2 *Id.* at 476.

3 *Id.* at 474 (quotation in original).

4 29 U.S.C. § 201 *et seq.*

5 Schleicher v. Salvation Army, 2007 WL 129041 (S.D. Ind. Jan. 12, 2007). Posner calls it the "ministers' exception" (*Schleicher*, 518 F.3d at 474), presumably because "ministerial" misleadingly connotes "administrative" or "non-discretionary." But I will use the more familiar term "ministerial exception."

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

7 *Id.* at 560.

8 42 U.S.C. § 2000e-1.

9 *McClure*, 460 F.2d at 560-61 (quoting Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)).

10 *See, e.g.,* Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008) (race discrimination); Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir.

2006) (Posner, J.) (age discrimination); Rayburn v. Gen'l Conf. of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985) (sex discrimination).

11 *See* Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007).

12 *See, e.g.,* Natal v. Christian and Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989) (state wrongful-termination claim).

13 *See, e.g.,* Shaliehsabou v. Hebrew Home of Greater Washington, Inc., 363 F.3d 299, 310 (4th Cir. 2004) (predominantly Jewish nursing home); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991) (hospital chaplain).

14 *See, e.g., Petruska*, 462 F.3d at 304 n.6 (quoting *Rayburn*, 772 F.2d at 1169); *Tomic*, 442 F.3d 1036 (choir director).

15 494 U.S. 872, 879 (1990).

16 *See, e.g.,* Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1303 (11th Cir. 2000); Combs v. Central Tex. Ann. Conf., United Methodist Church, 173 F.3d 343, 349 (5th Cir. 1999); EEOC v. Catholic University, 83 F.3d 455, 462 (D.C. Cir. 1996).

17 Bob Jones University v. United States, 461 U.S. 574, 604 (1983).

18 *See, e.g.,* Simpson v. Wells-Lamont Corp., 494 F.2d 490, 493-94 (5th Cir. 1974)).

19 518 F.3d at 475.

20 *Id.*

21 *Id.* ("In reading into statutes of general applicability an exception favorable to religious organizations, the courts may seem to be flouting [*Smith*].").

22 Lemon v. Kurtzman, 403 U.S. 602, 613 (1971). *See, e.g., Catholic University*, 83 F.3d at 465-67; *Rayburn*, 772 F.2d at 1169-71.

23 Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Government Power*, 84 Iowa L. Rev. 1, 28, 10 (1998).

24 Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 Vill. L. Rev. 37, 83-84 (2001).

25 *Id.*

26 Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject Matter Jurisdiction, and the Freedom of the Church*, 17 Wm. & Mary Bill Rts. J. (forthcoming 2008), at 27, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1108014.

27 Esbeck, *supra* note 23, at 67 (quotation omitted). *See also* Richard W. Garnett, *The Freedom of the Church*, 4 J. Cath. Soc. Thought 59 (2006).

28 Ira C. Lupu and Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 B.Y.U. L. Rev. 1789, 1815.

29 Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952). The classic exposition of free exercise church autonomy rights is Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981).

30 460 F.2d at 559-60.

31 494 U.S. at 877.

32 426 U.S. 696 (1976)

33 *See Smith*, 494 U.S. at 877 (citing *Milivojevich*, 426 U.S. at 708-25); *Schleicher*, 518 F.3d at 475 (citing *Milivojevich*, 426 U.S. at 708-15).

34 Presbyterian Church v. Hull Church, 393 U.S. 440, 449-51 (1969); *see also Milivojevich*, 426 U.S. at 708-10, 725 ("the First and Fourteenth Amendments"); NLRB v. Catholic Bishop, 440 U.S. 490, at 499-504 (1979) ("the First Amendment" and "the Religion Clauses").

35 *Schleicher*, 518 F.3d at 475.

36 *See, e.g., Rweyemamu*, 520 F.3d at 207 (exemption is "constitutionally required"); *Petruska*, 462 F.3d at 303 n.4 ("the plain text of Title VII and its legislative history foreclose the possibility of imposing a limiting construction upon the statute," but allowing ministers' Title VII suits would violate First Amendment); *Rayburn*, 772 F.2d at 1165-67 (same).

37 460 F.2d at 560.

38 *Catholic Bishop*, 440 U.S. 490 (1979).

39 South Jersey Catholic Sch. Teachers Ass'n v. St. Teresa of the Infant Jesus Ch. Elementary School, 150 N.J. 575, 696 A.2d 709 (1997) (New Jersey collective-bargaining law could apply to wages, certain benefits, and other secular terms of employment); Catholic High School Ass'n v. Culvert, 753 F.2d 1161 (2d Cir. 1985), *cert. denied*, 484 U.S. 830 (1987) (New York law).

40 Richard A. Posner, *Statutory Interpretation in the Courtroom and in the Classroom*, 50 U. Chi. L. Rev. 800, 815-16 (1983).

41 *See infra* notes 51-53 and accompanying text.

42 *See* 29 U.S.C. §§ 206(a), 207(a)(1)); 29 C.F.R. § 779.214 (cited in *Schleicher*, 518 F.3d at 476). In addition, in most cases coverage of ministers might be limited because they are "supervisors" or "administrators," an exception "mysteriously not invoked" by the Salvation Army. *Schleicher*, 518 F.3d at 478.

43 471 U.S. 290 (1985).

44 *See supra* notes 23-28 and accompanying text.

45 *Schleicher*, 518 F.3d at 475. *See also, e.g., Tomic*, 442 F.3d at 1037-38.

46 *See, e.g.,* Nally v. Grace Comm. Church, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), *cert. denied,* 490 U.S. 1007 (1989); William W. Bassett, Religious Institutions and the Law § 8:19 n.9 (collecting cases following *Nally*).

47 *Schleicher*, 518 F.3d at 475.

48 460 F.2d at 558-59.

49 *Petruska*, 462 F.3d at 306.

50 *Id.* at 307; *id.* at 304 n.7 (quoting *Gellington*, 299 F.3d at 1303; *Combs*, 173 F.3d at 350).

51 *Schleicher*, 518 F.3d at 476 (citing "Wine-Tasting and Retreats at California Monastery," May 23, 2006, www.ajc.com/travel/content/travel/otherdesti nations/us_ stories/052406monastery.html)).

52 518 F.3d at 476.

53 *Id.* at 476-77.

54 *Id.* at 478.

55 *Id.*

56 *Id.* at 474. The same would hold if an organization paid clergy above-minimum wages but required them to return a portion and fired one for failing to do so. *Id.* at 477.

57 *Id.*

58 *See, e.g.,* Malichi v. Archdiocese of Miami, 945 So.2d 526, 531-32 (Fla. App. 1 Dist. 2006) (holding that priest's workers' compensation suit would violate church autonomy doctrine because of, among other things, possibility of anti-retaliation claim if diocese dismissed priest for filing compensation suit), *review denied,* 965 So.2d 1277 (Fla. 2007). *But see, e.g.,* St. John's Lutheran Church v. State Compensation Ins. Fund, 252 Mont. 516, 525-26, 830 P.2d 1271, 1277-78 (1992) (holding that workers' compensation coverage for pastor did not interfere with church-pastor relationship).

59 460 F.2d at 559.

60 Bollard v. Cal. Province, Society of Jesus, 196 F.3d 940, 947 (9th Cir. 1999), *reh'g denied,* 211 F.3d 1331 (9th Cir. 2000) (en banc).

61 Lupu & Tuttle, *supra* note 24, at 1854-56.

62 *See, e.g., id.* at 1860-67; Gibson v. Brewer, 952 S.W.2d 239, 247 (Mo. 1997) (adopting "intentional failure to supervise clergy" standard).

63 518 F.3d at 478.

64 For elaboration of this argument, see Kalscheur, *supra* note 26.

65 *McClure*, 460 F.2d at 561; *see also* Hollins v. Methodist Healthcare, 474 F.3d 223; Kalscheur, *supra* note 26, at 13-14 n.47 (collecting cases). But see, in addition to *Schleicher*, *Petruska*, 462 F.3d at 302-03 (exception reflects failure to state a claim, not lack of jurisdiction).

66 *Schleicher*, 518 F.3d at 478.

67 *See* Kalscheur, *supra* note 26, at 53-56 (citing sources).