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CORPORATION OF PRESIDING BISHOP v. AMOS: THE SUPREME COURT AND RELIGIOUS DISCRIMINATION BY RELIGIOUS EDUCATIONAL INSTITUTIONS

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INTRODUCTION

The right of an individual to be free from discrimination is explicitly recognized in the Civil Rights Act of 1964[1] and its 1972 amendments.[2] Of equal concern to Congress is an individual's first amendment right[3] to worship or not as he or she sees fit and to practice his or her beliefs without governmental interference. This first amendment right extends to religious institutions and gives them the right to appoint their own clergy, manage their own internal affairs, and control the advancement and explanation of their own belief systems. In so doing, religious organizations have often claimed the right to make employment decisions based on religious belief, a right denied to secular employers. This claim is especially pertinent to religiously-affiliated educational institutions. The question of religious discrimination by religious employers has been addressed both by Congress and by the courts.

Congress addressed this issue in the Civil Rights Act of 1964.[4] This act prohibited discrimination generally, but provided an exemption in section 702 for religious organizations in their religious activities. In 1972, Congress amended the act,[5] broadening the section 702 exemption for religious institutions by including their secular activities as well. The 1972 amendment also expressly added religious educational

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1. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.).

2. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e (1982)).

3. U.S. CONST. amend. I provides, in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

4. Pub. L. No. 88-352, 78 Stat. 241 (1964).

5. 42 U.S.C. § 2000e (1982).

institutions to the list of religious organizations that could benefit from the section 702 exemption.

The Supreme Court in *Corporation of Presiding Bishop v. Amos*[6] held this exemption constitutional when applied to the secular, non-profit activities of a religious group. In so doing, the Court broke with prior federal court decisions concerning the scope and constitutionality of the exemption. Previously, courts had extended the exemption only to the religious activities of religious organizations,[7] for fear that a further extension would result in state sponsorship of religion in the form of special preference, in violation of the neutrality principles the Court requires under its present interpretation of the establishment clause of the first amendment.[8]

In *Amos*, the Court held that a broader application of the exemption did not violate first amendment principles. Justice White, writing for the Court, stated that the exemption furthered government neutrality in religious affairs by preventing government interference with the decisions of religious organizations. Also, the statute did not constitute state sponsorship of religion, as the lower courts feared, since the statute merely allowed religions themselves to further their own cause.[9] Concurring, Justice O'Connor recognized that the exemption advanced religion; nevertheless, the exemption was constitutional because an objective observer would view such an exemption as legitimate accommodation of religion rather than illegitimate sponsorship.[10]

This note argues that the decision of the Court in *Amos* is

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6. 107 S. Ct. 2862 (1987).

7. *E.g.*, EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. Unit A July 1981), *cert. denied*, 456 U.S. 905 (1982); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974); Feldstein v. Christian Science Monitor, 555 F. Supp. 974 (D. Mass. 1983); Whitney v. Greater New York Corp. of Seventh-Day Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975). These cases will be examined, *infra*, at text accompanying notes 35-51.

8. The Court provided a definition of neutrality in School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963). Justice Goldberg wrote, "The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." *Id.* at 305 (Goldberg, J., concurring).

9. 107 S. Ct. 2862 (1987).

10. *Id.* at 2874 (O'Connor, J., concurring).

sound. Part I of this note examines the legislative history of section 702 and the lower federal court interpretations of it. Part II examines the district court opinions in *Amos* I and II and the Supreme Court's decision in *Amos*.

Part III examines the Supreme Court's construction of the establishment clause and its developing notion of acceptable accommodation. This part argues that, as Justice O'Connor suggested, government action may sometimes result in a benefit to religion. In such cases, a distinction must be made between acceptable accommodation and state sponsorship of religion. While courts have consistently struck down legislation providing direct state aid to religion, they have generally upheld legislation providing indirect benefits to religion, such as tax exemptions. This note argues that this is legitimate, for, while the former at least appears to be direct financial involvement in religion, the latter provides only an indirect benefit. This symbolic aspect is important, since even the appearance of establishment of religion may well create resentment, harmful to both government and religion. Part III argues that the section 702 exemption provided by Congress for religious organizations falls within the first category of acceptable accommodation, since it allows such organizations to conduct their affairs without the fear of courts deciding whether or not an activity is religious.

Finally, Part IV of this note examines the effect of *Amos* on religiously-affiliated educational institutions. Although the Court upheld the exemption in *Amos*, the precise effect of this decision on religiously-affiliated educational institutions is as yet unclear. While courts will likely extend the exemption to religious primary and secondary schools, courts may be more reluctant to extend it to religiously-affiliated colleges and universities. Part IV argues that the exemption should be extended to these post-secondary schools to avoid inconsistency. Furthermore, there are constitutional difficulties in allowing courts to judge whether a given position at such a school is religious or secular.

I. Background of Section 702

A. *Legislative History*

1. Civil Rights Act of 1964

Congress passed the Civil Rights Act of 1964[11] in re-

11. Pub. L. No. 88-352, 78 Stat. 241 (1964).

sponse to a growing concern about discrimination in society, including the area of employment. Title VII of the Act forbids discrimination in hiring, firing, compensation, or terms and conditions of employment on the basis of an individual's "race, color, religion, sex, or national origin."[12] In order to avoid conflicts with the first amendment rights of religious institutions, Congress provided in section 702 an exception for religious institutions. The section 702 provision exempted such institutions from Title VII "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its religious activities."[13]

This exemption was seen as the best way to balance the right of individuals to be free from discrimination with the first amendment right of religious institutions to conduct their religious activities free from governmental interference. For this reason, Congress extended the exemption only to the religious activities of a religious organization.[14] A synagogue thus would be permitted to hire only Jews to lead services, or a Christian-run radio station would be permitted to

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12. 42 U.S.C. § 2000e-2(a)(1) (1982).

13. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (1964) (codified as amended in scattered sections of 42 U.S.C.).

> Title VII of the Civil Rights Act of 1964 was originally passed as an expression of Congress' laudable intention to eliminate all forms of unjustified discrimination in employment, whether such discrimination be based on race, color, religion, sex, or national origin. This posed a sharp question under the Establishment Clause of the First Amendment to the United States Constitution as to whether Congress could properly regulate the employment practices, and specifically the preference for co-religionists, of religious organizations in matters related to their religious activities. As a result, the original Title VII contained an exemption from the operation of Title VII's proscriptions with respect to the employment of co-religionists to perform work related to the employer's religious activity.

Feldstein v. Christian Science Monitor, 555 F. Supp. 974, 976 (D. Mass. 1983).

14. The original House version of § 702, H.R. 7152, granted to religious organizations a blanket exemption from Title VII. The original version read, "This title shall not apply to an employer with respect to the employment of aliens outside any State or to a religious corporation, association, or society." This version was limited by Substitute Senate Amendment No. 656, sponsored by then-Senate Majority Leader Hubert Humphrey. Senator Humphrey's amendment later became law. *See* 110 CONG. REC. 12, 818 (1964); *see also* McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir.) (discussing the legislative history of the 1964 version of § 702), *cert. denied*, 409 U.S. 896 (1972).

hire only Christians to broadcast its religious message, without governmental intrusion. In order to protect individuals from discrimination in other areas, Congress did not allow a religious organization to discriminate on religious ground in hiring for a non-religious position, such as a secretary or a janitor. Nor could such an organization discriminate on other than religious grounds; for example, racial or sexual discrimination not based on a religious belief would not come under the exemption. Moreover, a religiously-affiliated business whose primary purpose was deemed religious in nature was permitted to hire only members of its own sect, while a religiously-affiliated business whose purpose was considered secular would not have the benefit of the exemption.

Further, private and religiously-affiliated schools were provided a separate exemption under section 703.[15] Under this section, these schools were permitted to consider the religious background of any of their employees when making personnel decisions.[16]

2. Equal Employment Opportunity Act of 1972

In 1972, Congress amended the Civil Rights Act of 1964, recodifying section 702 under the Equal Employment Opportunity Act of 1972.[17] Concerned that the section 702 exemption was unnecessarily narrow, Senators Samuel J. Ervin and James B. Allen introduced an amendment to section 702 which would broaden the exemption afforded to religious organizations by expanding it to include all activities of a religious organization, not only those activities deemed religious. Senators Ervin and Allen were concerned that any government interference with religious institutions in the form

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15. 42 U.S.C. § 2000e-2(e) (1982).

16. Section 703 provides, in pertinent part,

> [I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(e)(2), 78 Stat. 241, 256 (1964).

17. 42 U.S.C. § 2000e (1982).

of regulation would implicate first amendment interests of such institutions in their freedom to conduct themselves as they see fit. Said Senator Ervin, "When the Federal Government begins to grasp the power of things of the Lord, it is reaching a state of government interference which is alien to the first amendment. The first amendment was designed to build a wall of separation between church and state."[18] Congress adopted the Ervin-Allen amendment; section 702 now reads, in pertinent part:

> This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.[19]

Section 703 remained unchanged by the 1972 amendments.[20] However, the inclusion in section 702 of education institutions in the list of religious organizations arguably broadened the exemption for such institutions. Not only are they entitled to discriminate on the basis of religious preference, but they are also now entitled to the exemption provided in section 702. The precise effect of this depends to a large extent on the interpretation given to section 702.

B. *Difficulties in Interpretation of Section 702*

The language of section 702 is open to a number of interpretations, and the federal courts have struggled with it since the adoption of the 1972 amendments. Courts were faced with defining religious discrimination and which activities of religious organizations were constitutionally entitled to the exemption.

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18. 118 CONG. REC. 1977 (1972).

19. 42 U.S.C. § 2000e-1 (1982).

20. 42 U.S.C. § 2000e-2(e) (1982). "The sponsors of the 1972 amendment were chiefly concerned to preserve the statutory power of sectarian schools and colleges to discriminate on religious grounds in the hiring of all their employees." King's Garden, Inc. v. FCC, 498 F.2d 51, 54 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974). The court, citing the legislative history of the 1972 amendment, stated that Senators Ervin and Allen, when discussing the effects of the amendment, "invariably adverted to its effect on religious educational institutions." *King's Garden*, 498 F.2d at 54 n.6 (citing LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITIES ACT OF 1972, at 844, 846, 848-52 (1972)). For this reason, § 702 is especially pertinent to religiously-affiliated schools.

1. Religious Discrimination

First, section 702 allows religious institutions to discriminate in hiring and firing "individuals of a particular religion."[21] If interpreted narrowly, this allows a religious organization to prefer members of a particular sect over members of other sects or over those not affiliated with any sect. For example, a Catholic school would be allowed to hire a Catholic over a non-Catholic. But no other form of discrimination, such as sexual discrimination, would be allowed. Thus, a Catholic school would not be allowed to prefer a Catholic man over a Catholic woman in hiring. While this narrow interpretation would advance the state's interest in preventing other forms of discrimination, a religious institution may have a religious interest in hiring only men or only women for certain positions[22] and thus may see such an interpretation as undue government interference.

A broader interpretation of section 702 would allow such institutions to discriminate on any grounds, including gender, if such grounds had a religious basis. Thus, a Catholic school that wished to hire only men for certain positions would be permitted to do so, if such a preference were based on Catholic belief. Although this broader view would provide individuals applying for such positions less protection from discrimination in the market place, religious organizations may see this as a grant of more freedom to perform their activities.

2. Religious Activities

Second, the 1972 amendment to section 702 extended the exemption to the carrying on by a religious organization "of its activities."[23] The question then becomes to which activities this exemption extends. It is established that a religious institution may choose its own leaders under section 702,[24] but it is not clear whether a religiously-affiliated business may discriminate in hiring what are usually considered "secular" employees. A narrow interpretation would extend section 702 only to those activities deemed to be religious. For instance, a Jewish school could discriminate in hiring reli-

21. 42 U.S.C. § 2000e-1 (1982).

22. For example, a religious organization which restricts ordination to men may want to hire only men to teach theology or act as spiritual counselors.

23. 42 U.S.C. § 2000e-1 (1982).

24. McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).

gion teachers, but a Christian-run clothing store could not refuse to hire a non-Christian janitor. This interpretation avoids giving an unfair advantage to religious organizations in the market place and thus escapes the perception of government favoritism toward religion. However, an activity may have both religious and secular components. Confusion over this point could involve courts in a determination of whether an activity was part of a religious belief or not, a determination which a religious institution may resist. More importantly, such a determination would amount to a court making religious decisions for religious groups, a serious implication of first amendment entanglement[25] and free exercise concerns.

The legislative history of the 1972 amendments to section 702 indicates that the sponsors intended the broadest interpretation of that section. Senator Ervin asserted that the purpose of the amendment was to "take the political hands of Caesar off of the institutions of God, where they have no place to be."[26] Under this broad interpretation, a religious organization may discriminate in any of its activities, whether religious or secular in nature. Thus, a religiously-affiliated restaurant would be permitted to hire on a preferential basis, even in hiring for obviously secular positions, such as busboys. This interpretation affords religious institutions the greatest margin of freedom in conducting their affairs as they wish. If interpreted too broadly, however, the exemption may amount to an improper benefit to religion in commercial areas where secular competitors do not have the same advantage. Further, a religious organization has much less of a claim to first amendment protection in the commercial area than it does in the areas of education or worship.[27]

C. *Lower Federal Court Interpretations of Section 702*

1. Religious Discrimination

Despite the call in the legislative history for a broad interpretation, lower federal courts nonetheless have construed the section 702 exemption narrowly. For example, courts had

25. The Supreme Court expressed concern over excessive government entanglement with religion in Lemon v. Kurtzman, 403 U.S. 602, 613 (1971). For further discussion of *Lemon*, see *infra* notes 73-78 and accompanying text.

26. 118 CONG. REC. 4503 (1972).

27. *See, e.g.*, Marshall & Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L.J. 293, 324 (1986).

generally limited the section 702 exemption to those situations in which an organization discriminates on the basis of religious preference; they had been reluctant to extend the exemption to sexual discrimination. In *EEOC v. Pacific Press Publishing Association*,[28] the Ninth Circuit upheld the district court's ruling that a publishing house, affiliated with the Seventh-Day Adventist Church, had violated Title VII when it denied female employees monetary allowances given to similarly situated male employees. The court held that, while the section 702 exemption permits religious institutions to prefer members of their own faith, "religious employers are not immune from liability for discrimination based on race, sex, national origin . . . ."[29]

Similarly, in *Rayburn v. General Conference of Seventh-Day Adventists*,[30] the Fourth Circuit stated that the "statutory exemption applies to one particular reason for employment decision—that based on religious preference. It was open to Congress to exempt from Title VII the religious employer, not simply one basis of employment, and Congress plainly did not."[31]

In construing section 702, then, lower courts had limited religious institutions to hiring decisions based on religious preference; sexual discrimination by such employers is subject to Title VII scrutiny. Therefore, religiously-affiliated

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28. 676 F.2d 1272 (9th Cir. 1982).

29. *Id.* at 1276. Pacific Press had argued that Title VII exempted its employment practices from coverage. The court rejected this argument, stating that the legislative history of the 1972 amendment to § 702 indicated that Congress intended to broaden the exemption to include all activities of a religious organization, but not discrimination on any basis other than religion. *Id.*

30. 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 3333 (1986).

31. *Id.* at 1166-67. The plaintiff in *Rayburn* had been denied a pastoral position in the Seventh-Day Adventist Church. She charged the church with sexual discrimination under Title VII of the Civil Rights Act of 1964. Although the court rejected the church's argument that § 702 granted the church an exemption for sexual discrimination, the court held that the "role of an associate in pastoral care is so significant in the expression and realization of Seventh-day Adventist beliefs that state intervention in the appointment process would excessively inhibit religious liberty." *Id.* at 1168. For other cases construing § 702 as limiting religious organizations to discrimination based on religious preference, see EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. Unit A July 1981), *cert. denied*, 456 U.S. 905 (1982); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).

schools may discriminate on the basis of religious preference under both section 702 and section 703, but their inclusion in section 702 does not allow them to discriminate on the other grounds.

2. Religious Activities

Courts have consistently applied the exemption to religious activities. In *McClure v. Salvation Army*,[32] the Fifth Circuit upheld the district court's dismissal of a complaint by a Salvation Army minister, who sued the Salvation Army alleging sexual discrimination in violation of Title VII. The court held that Title VII does not apply to the relationship between a church and its ministers: "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."[33] Government regulation of the choosing of ministers would directly involve the state in the internal affairs of religion, a clear free exercise violation. Thus, the court concluded that Title VII was not intended to apply to the church-minister relationship.[34]

Notwithstanding the breadth of the legislative history, courts were hesitant to apply section 702 to the secular activities of religious organizations. For example, in *Whitney v. Greater New York Corp. of Seventh-Day Adventists*,[35] the district court refused to extend the *McClure* exemption to the relationship between a church and its clerical help. The court emphasized that the employment of a typist does not touch

32. 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972). The court in *McClure* dealt with the § 702 exemption before the 1972 amendments. The court also limited its decision to the church-minister relationship and expressly refrained from discussing any other relationship. *Id.* at 555. However, its definition of the church-minister relationship is pertinent here and has been relied upon by other courts in construing § 702 since the 1972 amendments. *See, e.g.*, Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 3333 (1986); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. Unit A July 1981), *cert. denied*, 456 U.S. 905 (1982); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); Whitney v. Greater New York Corp. of Seventh-Day Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975).

33. *McClure*, 460 F.2d at 559.

34. *See also Rayburn*, 772 F.2d 1164 (4th Cir. 1985) (holding that government interference with a church's choice of its leaders would constitute a burden on the church's free exercise of religion), *cert. denied*, 106 S. Ct. 3333 (1986).

35. 401 F. Supp. 1363 (S.D.N.Y. 1975).

"so close to the heart of church administration as to be protected by the First Amendment from the commands of Title VII."[36] Nor would the Fifth Circuit extend its *McClure* holding to the relationship between a seminary and its support personnel in *EEOC v. Southwestern Baptist Theological Seminary*.[37] The court there asserted that the state has an interest in preventing discrimination among non-religious employees: "Neither the Supreme Court nor this court has held that the employment relationship between a church and all of its employees is a matter of purely ecclesiastical concern."[38] Because the support staff of the seminary are not ministers in the *McClure* sense, the court held that section 702 did not exempt the seminary from EEOC filing requirements.[39]

The Fifth Circuit similarly held that the relationship between a religious educational institution and its faculty is not exempt from Title VII in *EEOC v. Mississippi College*.[40] In this case, the EEOC sought enforcement of a subpoena issued in connection with its investigation of the college on a sexual discrimination charge.[41] The college refused to comply on first amendment grounds. Although the college has a written policy of preference to Baptists in hiring, in order to create an atmosphere of piety, the court found "[t]hat the faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus

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36. *Id.* at 1368. The court stated that the facts in this case did not fall within *McClure*, since a typist is not a minister.

37. 651 F.2d 277 (5th Cir. Unit A July 1981), *cert. denied*, 456 U.S. 905 (1982).

38. *Southwestern Baptist Theological Seminary*, 651 F.2d at 287.

39. *Id.* at 286. Section 709(c) of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000e-8(c), requires employers to keep records relevant to determining whether the employer has committed unlawful employment practices. Pursuant to § 709(c), the EEOC requires both public and private institutions of higher education to file biennially the Higher Education Staff Information Report EEOC-6. 29 C.F.R. § 1602.50 (1980). The EEOC-6 requires employment information regarding every employee, including race and gender. The court here held that, because the EEOC was simply gathering statistical information, the burden on the seminary was "largely hypothetical." 651 F.2d at 286. Because the "resulting relationship between the Seminary and the government is . . . minimal," the court held that the filing requirement did not violate the establishment clause. *Id.*

40. 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

41. Dr. Patricia Summers, a part-time psychology professor, had been denied a full-time position. The college had hired a man to fill the position instead. 626 F.2d at 479.

of purely ecclesiastical concern."[42] The court thus applied section 702 narrowly.

Two courts which considered section 702 as applied to the secular activities of religious organizations expressed doubts as to the constitutionality of the exemption when so extended. In *King's Garden, Inc. v. FCC*,[43] the District of Columbia Circuit affirmed an FCC order to King's Garden, an inter-denominational radio station licensee. The FCC had found that King's Garden had been discriminating on religious grounds in its employment decisions, including those not related to the broadcasting of its religious message. The FCC ordered it to submit a statement of future hiring practices, and King's Garden refused to comply, invoking section 702.[44] In dicta, the court stated that the 1972 amendment to section 702, when applied to the activities of a religious organization, including those traditionally defined as secular, constitutes state sponsorship of religion, in that it "invites religious groups, and them alone, to impress a test of faith on job categories, and indeed whole enterprises, having nothing to do with the exercise of religion."[45] This can only be construed, declared the court, as special preference.[46] The court indicated its reservations in extending section 702 to secular activities since, under section 702, religious organizations receive favoritism, even when they choose to enter the secular, corporate economy.[47]

The district court of Massachusetts expressed similar reservations in *Feldstein v. Christian Science Monitor*.[48] Here, the court dismissed the complaint of a man claiming religious discrimination by the newspaper.[49] The court held that the newspaper was a religious activity of a religious organization

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42. *Id.* at 485. The court held that, because the application of Title VII could have "only a minimal impact on the College's religion based practices," it did not violate the establishment clause. *Id.* at 487.

43. 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974).

44. 498 F.2d at 52. The court found that Congress, in enacting the 1972 amendments to § 702, did not intend for § 702 to apply to rulings by the FCC under the Communications Act. This was because § 702 applies only to purely private industries, and broadcasting is not wholly private; "licensed broadcasters must meet FCC-imposed obligations inapplicable to the private sector generally." *Id.* at 58-59.

45. *Id.* at 55.

46. *Id.*

47. *Id.* at 57.

48. 555 F. Supp. 974 (D. Mass. 1983).

49. *Id.* at 975.

and therefore the exemption applied.[50] However, the court in dicta asserted that section 702, if applied to the secular activities of a religious organization, may well constitute favoritism of religion over non-religion, in violation of the first amendment.[51]

Courts have been reluctant to allow religious educational institutions to rely solely on the exemption provided in section 703, which allows them to inquire into the religious background of prospective employees. Instead, courts have brought section 702 into the inquiry. Section 702, construed so narrowly, would exempt a religious educational institution only in the hiring and firing of personnel engaged in religious activities. A Methodist high school, for example, would be able to hire only Methodists to lead school services or teach religion. Whether the same school would be able to so discriminate in hiring an English teacher or a secretary would depend on whether such positions were considered religious or secular. It was this sort of confusion that led to the Supreme Court's decision in *Amos*.[52]

II. CORPORATION OF PRESIDING BISHOP V. AMOS

In *Amos*, the Court held that the section 702 exemption is constitutional when applied to the secular, non-profit activities of a religious organization. This section examines the facts of *Amos*, the district court's opinions in *Amos* I and II,[53] and the decision of the Supreme Court.

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50. *Id.* at 978. The plaintiff argued that the newspaper was not a religious activity because it carried articles of a secular nature. The court rejected this argument, citing the "close and significant relationship existing between the Christian Science Church, the Publishing Society and the Monitor; or the declared purpose . . . of the Monitor to promulgate and advance the tenets of Christian Science." *Id.* For this reason, the court found that the Monitor was a religious activity.

51. *Id.* at 978-79. The court stated:

> It is not mandated under the Constitution that Congress prohibit discrimination on grounds of religion in private sector employment. However, having elected to do so in the Civil Rights Act of 1964, the Congress *is* under a constitutional obligation to do so in a way that neither favors nor disfavors secular, private sector enterprises that may be conducted by religious organizations. . . . It is well established that the expression of a preference for all religion is as constitutionally infirm as a preference for, or a discrimination against, a particular religion.

Id. (emphasis in original).

52. 107 S. Ct. 2862 (1987).

53. After *Amos* I, the plaintiffs filed a second amended complaint, adding an additional named plaintiff by stipulation of the parties. 618 F. Supp. 1013, 1016 (D. Utah 1985).

A. *The Facts*

The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints (CPB) and the Corporation of the President of the Church of Jesus Christ of Latter-day Saints (COP) are Utah corporations owned by the Church of Jesus Christ of Latter-day Saints (Mormon Church). The COP operated both the Beehive Clothing Mills and the Deseret Gymnasium. The Beehive Clothing Mills manufactured and distributed clothing and temple garments; the Deseret Gymnasium was a gymnasium open to the public. Deseret Industries was a division of the Mormon Church's Welfare Services Department and ran several thrift stores which refurbished goods and sold used clothing to the public. Also, Deseret Industries provided jobs and training to handicapped and mentally retarded persons and others who could not find work.[54]

Christine J. Amos was employed in the personnel department of Beehive. Others were employed as seamstresses at Beehive. Arthur Frank Mayson was employed at Deseret Gymnasium as a building engineer. Ralph L. Whitaker was employed by Deseret Industries as a truck driver.[55] These individuals were fired from their jobs because they either failed or refused to satisfy the Mormon Church's requirements for a temple recommend.[56] Amos and others filed a complaint against the CPB and the COP alleging that the defendants discriminated against them on religious grounds in violation of Title VII of the Civil Rights Act of 1964 and that the section 702 exemption from anti-discrimination laws violates the establishment clause of the first amendment. The defendants moved to dismiss the action or, in the alternative, for summary judgment, on the grounds that section 702 of the Act relieves them of liability.[57]

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54. Amos v. Corporation of Presiding Bishop, 594 F. Supp. 791, 796 (D. Utah 1984).

55. *Id.* at 796; 618 F. Supp. at 1016.

56. *Amos*, 594 F. Supp. at 796. A temple recommend is a certificate which states that one is a member of the Mormon Church and eligible to attend its temples. It is issued only to those who observe the Church's standards of conduct. *Id.*

57. *Id.*

B. Amos *I*

The district court in *Amos* I[58] denied the defendants' motions. The court considered whether section 702 is constitutional when applied to the secular activities of a religious organization. In doing so, the court applied the three part test set out in *Lemon v. Kurtzman*,[59] which provides that (1) the challenged statute must have a secular purpose, (2) its principle or primary effect must neither inhibit nor advance religion, and (3) must not foster excessive entanglement of government with religion.[60] After examining the legislative history of section 702, the court concluded that it had the legitimate secular purpose of assuring government neutrality in religious affairs, in that it prevented government interference with the decision-making process of religious organizations.[61] However, the court found that section 702 had the primary effect of advancing religion.[62] The court stated that the exemption had no historical tradition and, more importantly, singled out religious organizations and only granted them permission to engage in activities which advance religious beliefs and practices.[63] Thus, the court concluded that section 702, when applied to the secular activities of a religious institution, fails the second prong of the *Lemon* test and violates the establishment clause.

The court then had to determine whether the activity in question was religious. If it was, the section 702 exemption would permit the discrimination. To make this determination, the court developed a three-pronged test. In doing so, the court focused on the exemption required by the constitution, namely, that the government may not interfere with matters of church administration or with the decision as to

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58. 594 F. Supp. 791 (D. Utah 1984).

59. 403 U.S. 602 (1971). For further discussion of the *Lemon* test, see *infra* notes 73-78 and accompanying text.

60. 403 U.S. at 612-13.

61. *Amos*, 594 F. Supp. at 812. The court stated that the "legislative goal of assuring that the government remains neutral and does not meddle in religious affairs by interfering with the decision-making process in religions is a valid secular purpose."

62. In examining whether § 702 violates the second prong of the *Lemon* test, the court stated that the proper inquiry was not whether the statute had the "primary" effect of advancing religion, but whether "the law in question has the direct and immediate, or substantial, effect of advancing or inhibiting religion." *Id.* at 820.

63. *Id.* at 825.

who will profess the group's beliefs.[64] First, the court must examine the nexus between the activity in question and the religious organization, especially in its financial matters, management, and day-to-day operations. Second, the court must look at the relationship between the primary function of the activity and matters of church administration or church beliefs or rituals. If the relationship in both cases is substantial, the court need look no further and may declare that the activity is religious. If the second relationship is tenuous, the court must look at a third relationship: that between the nature of the employee's job and matters of church administration, tenets, or rituals. Where this relationship is substantial, the court must declare the activity religious and thus exempt under section 702.[65]

Under this three-prong analysis, the court held that Deseret Gymnasium was not a religious activity for purposes of section 702. Applying the first prong, the court found that a tie did exist between the Mormon Church and the every day functions of Deseret Gymnasium. However, under the second prong, the court found that the relationship between the primary function of Deseret Gymnasium and matters of Mormon church administration and beliefs was tenuous. The primary function of Deseret Gymnasium was to serve as an athletic facility, open to the general public, not as a teacher of the Mormon faith. The Mormon Church does not require religious discrimination in employment, nor does it require its members to perform any kind of physical exercise. Therefore, no relationship exists between the rituals or tenets of the Mormon Church and the primary function of Deseret Gymnasium. Under the third prong, the court looked at the relationship between the nature of Mayson's job and matters of Mormon church administration or beliefs. It found that none of Mayson's duties as building engineer were tied to the administration or beliefs of the Mormon faith. The court therefore held that Deseret Gymnasium was not a religious activity and was not exempt from Title VII under section 702.[66] The court entered summary judgment for Mayson.[67]

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64. The court cited King's Garden, Inc. v. FCC, 498 F.2d 51, 56 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974), explaining the constitutional requirement that the "Free Exercise Clause precludes governmental interference with ecclesiastical hierarchies, church administration, and appointment of clergy." *Amos*, 594 F. Supp. at 799 n.7.

65. *Amos*, 594 F. Supp. at 799.

66. *Id.* at 802.

67. *Id.* at 831.

A closer question was posed by the claims of the Beehive employees. Because the facts in the record were limited, the court reserved judgment as to whether Beehive was a religious activity.[68]

C. Amos *II*

In *Amos* II,[69] the plaintiffs moved for summary judgment on the Beehive and the Deseret Industries claims. As to the Beehive claim, the court concluded that summary judgment was inappropriate, since genuine issues of material fact remained.[70]

The court then applied the three-prong test set out in *Amos* I to determine whether the activities of Deseret Industries were religious in nature. Deseret Industries was founded by the Mormon Church to provide employment for Church members and charity for its members in need; the very reason for its founding was to fulfill the Mormon Church's belief in helping its needy members. Applying the first prong, the court found that a substantial tie existed between the Mormon Church and Deseret Industries. Applying the second prong, the court found a substantial tie between the charitable function of Deseret Industries and the beliefs of the Mormon Church. Therefore, Deseret Industries fell under the exemption of section 702 and was entitled to discriminate on the basis of religion. The court granted summary judgment for the defendants.[71]

D. *The Supreme Court*

The defendants appealed the district court's judgment in *Amos* I. The Supreme Court addressed the issue of whether the exemption provided in section 703 is constitutional when applied to the secular acts of non-profit religious organizations.[72] The Court held that the exemption did apply to such secular activity, revising the lower court decision.

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68. *Id.* at 802-03. The court held that the plaintiffs were entitled to discovery on the manufacture and distribution of garments by Beehive, the tax-exempt status of Beehive, employees of Beehive who were or were not Mormons, Beehive's contracts with private enterprises, and the hiring practices of Beehive's plants in Mexico and England.

69. 618 F. Supp. 1013 (D. Utah 1985).

70. *Id.* at 1016.

71. *Id.* at 1030.

72. Corporation of Presiding Bishop v. Amos, 107 S. Ct. 2862, 2867 (1987).

The Supreme Court held that section 702 when applied to secular activities, satisfies the requirements of the *Lemon* test. *Lemon*'s first requirement, that the statute in question have a legitimate secular purpose, serves to prevent the government from advocating a particular viewpoint in matters of religion. It does not require that a statute be unrelated to religion. Thus, a statute may legitimately prevent the government from interfering with the decisions of religious organizations concerning their religious missions. The Court pointed out that a religious institution may well feel threatened by the possibility of a judge deciding which of its activities is religious, and this fear may affect its actions.[73] For this reason, the Court agreed with the district court's judgment that section 702 satisfies the first requirement under *Lemon*.[74]

Second, the *Lemon* test requires that a statute have a primary effect that neither inhibits nor advances religion. In order to have forbidden effects under *Lemon*, the government itself must be advancing religion by its own activities. It is not enough to say, as did the district court, that a statute allows churches to advance religion, since that is their reason for existing.[75] Establishment of religion, according to the founders, consists of government sponsorship of religion,[76] not merely allowing religions to advance their own cause. No evi-

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73. The Court noted that the *Amos* case itself presented a good example of this threat. The distinction between Deseret Industries, which the district court found to be a religious activity, and the Gymnasium, which the district court found to be secular, is "rather fine," and both the CPB and the COP view the two as an expression of their religious values. *Id.* at 2868 n.14 (citing Brief for Appellants at 6-8, 19 (No. 86-179)).

74. *Id.* at 2868.

75. The Court here stated that religious organizations have benefitted from a number of laws which allow them to advance their own cause. The Court cited Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding a property tax exemption for properties used by religious organizations for worship), and Board of Educ. v. Allen, 392 U.S. 236 (1968) (upholding loans of books to school children, including parochial school children). The fact that a statute gives special consideration to religious groups has never rendered a statute *per se* invalid. This would "run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause." *Id.* at 2868-69.

76. The Court cites Walz v. Tax Comm'n, 397 U.S. 664 (1970), which states that "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Amos*, 107 S. Ct. at 2869 (citing *Walz*, 397 U.S. at 668). For further discussion of this issue, see *infra* note 90.

dence existed here which would imply that section 702 constitutes government sponsorship of Deseret Gymnasium, since it was the Mormon Church, not the government, who was seeking to advance religion. Thus, the Supreme Court rejected the argument of the district court that section 702 failed the second requirement of *Lemon*.[77]

The Court pointed out that the government may accommodate religious institutions without violating the establishment clause, so long as such accommodation does not amount to sponsorship and does not interfere with religion. A statute having the legitimate secular purpose of alleviating government interference with religion satisfies the third *Lemon* requirement. The section 702 exemption avoids the intrusion of courts into religious matters by preventing courts from deciding which of an institution's activities are religious and which are not, as did the district court. The statute thus encourages a separation between church and state.[78] For this reason, the Court found the exemption constitutional as applied to the secular, non-profit activities of religious organizations.

In his concurrence, Justice Brennan emphasized two important first amendment values: the right of religious institutions and the right of individuals.[79] Religious organizations have a first amendment right to run their own internal affairs, free from government control. These organizations provide their members with a community which fosters value and meaning for them. Thus, extending the exemption to religious organizations advances the religious freedom of individuals.[80] On the other hand, section 702 allows religious institutions to confront an individual such as Mayson with a choice between employment and religious belief. This possi-

77. *Amos*, 107 S. Ct. at 2869. The Court also rejected the district court's argument that § 702 was unsupported by a long historical tradition. The Court stated that "the fact that Congress concluded after eight years that the original exemption was unnecessarily narrow is a decision entitled to deference, not suspicion." *Id.*

78. *Id.* at 2870.

79. *Id.* at 2870 (Brennan, J., concurring).

80. *Id.* at 2871-72 (Brennan, J., concurring). Brennan emphasized that "for many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals." *Id.* at 2871 (Brennan, J., concurring).

bility of coercion is in direct conflict with the individual freedom guaranteed by the first amendment.[81]

Brennan argued that the ideal situation would be to restrict the section 702 exemption to the religious activities of religious organizations. But an activity is almost never clearly religious or secular. The result would be further government entanglement in religion and the concern that a religious organization would let the possibility of a lawsuit affect its operations.[82] A categorical exemption for non-profit activities provides a balance between these concerns. That an organization is non-profit is an indication that it operates with a religious purpose not to make money. These same considerations do not arise with respect to for-profit institutions engaged in commerce.[83]

Justice O'Connor, in her concurring opinion, also stressed the differences between profit and non-profit organizations when determining the constitutionality of section 702.[84] She criticized the Court's application of the second prong of the *Lemon* test, in particular the distinction drawn between allowing religions to further their cause and the government directly advancing religion. Any government benefit, short of actual preaching by government officials, may be characterized as allowing religious organizations to advance religion. The first step a court should take, she suggested, is to recognize that such a statute will have the effect of advancing religion.[85] Second, a court must distinguish between ille-

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81. *Id.* at 2872 (Brennan, J., concurring).

82.

> A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would be shaped in part by the process of litigation.

Id. (Brennan, J., concurring).

83.

> In contrast to a for-profit corporation, a non-profit organization must utilize its earnings to finance the continued provision of the goods or services it furnishes, and may not distribute any surplus to the owners. . . . This makes plausible a church's contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose . . . . Non-profit activities therefore are most likely to present cases in which characterization of the activities as religious or secular will be a close question.

Id. at 2872-73 (Brennan, J., concurring).

84. *Id.* at 2874 (O'Connor, J. concurring).

85. In Wallace v. Jaffree, 472 U.S. 38 (1985), Justice O'Connor criti-

gitimate rewards to religion and legitimate accommodation of religion. The test of a statute should be whether an objective observer would understand it as government endorsement of religion. Only in that event would the statute be unconstitutional.[86] For these reasons, Justice O'Connor agreed with the difference drawn by Justice Brennan between a non-profit and a for-profit institution when applying section 702 as an endorsement of religion. Thus, she concludes that section 702 is constitutional when applied to a non-profit organization of a religious institution.[87]

III. SECTION 702 AS ACCEPTABLE ACCOMMODATION

A. *Strict Separation v. Acceptable Accommodation*

The first amendment of the constitution provides that the government "[s]hall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[88] Thus, Congress is prohibited from establishing an official religion and inhibiting the rights of the people to worship or not as they see fit. Beyond this, the Supreme Court has developed a notion of what constitutes an establishment of religion

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cized the Court's application of the *Lemon* test. There she stated that the *Lemon* test would invalidate legislation relieving religious observers from government imposed duties, since such legislation would have the religious purpose of advancing religion. At the same time, any legislation which benefits religion can be said to accommodate religion, thus vitiating the establishment clause. Corporation of Presiding Bishop v. Amos, 107 S. Ct. 2862, 2874 (1987) (citing *Wallace*, 472 U.S. at 82 (O'Connor, J., concurring)). O'Connor stated that the majority's application of the second *Lemon* prong came close to the second option:

> The Court seems to suggest that the "effects" prong of the *Lemon* test is not at all implicated as long as the government action can be characterized as "allowing" religious organizations to advance religion . . . . This distinction seems to me to obscure far more than to enlighten . . . . The Church had the power to put Mayson to a choice of qualifying for a temple recommend or losing his job because *the government* had lifted from religious organizations the general regulatory burden imposed by § 702.

Id. (O'Connor, J., concurring) (emphasis in original).

86. *Id.* at 2874-75 (O'Connor, J., concurring). Citing Lynch v. Donnelly, 465 U.S. 668, 693-94 (1984)(O'Connor, J., concurring), O'Connor stated that the question of whether an objective observer would view the endorsement of religion "is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is . . . in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Amos*, 107 S. Ct. at 2875.

87. *Amos*, 107 S. Ct. at 2874.

88. U.S. CONST. amend. I.

and government interference with free exercise. The Court has moved away from its earlier interpretation of the first amendment—that it erected a strict "wall of separation" between church and state—and has held more recently that the government may accommodate religion without violating the first amendment.

1. Strict Separation

In *Everson v. Board of Education*,[89] the Supreme Court articulated its notion of strict separation between government and religion required by the first amendment. After tracing the evils of state-sponsored religion through the history of Europe and of the early United States, Justice Black concluded that the first amendment "erected a wall between church and state. That wall must be kept high and impregnable."[90] For this reason, the state may no more inhibit religion than it may sponsor it. The Court upheld a New Jersey statute which authorized the board of education to reimburse parents of public and private school children for bus fare for the children to and from school. Justice Black wrote that, without this program, some children might be prevented from going to church-related schools; for him, this would be an impermissible inhibition of the free exercise of their religion.[91]

In spite of agreement among the Justices on the strict separation theory, four Justices disagreed with the result. Justice Jackson, joined by Justice Frankfurter, argued that the

89. 330 U.S. 1 (1946).

90. *Id.* at 18. According to Laurence H. Tribe, the views of the founders fell into three categories: (1) the evangelical view of Roger Williams, under which separation between church and state meant that the state must foster a climate favorable to all religion by giving aid but not exercising control; (2) the Jeffersonian view, under which separation of church and state would be complete so as to protect the state from religion; and (3) the Madisonian view, under which both religion and government should be separate so that each could achieve its highest goal. The Supreme Court, especially Justice Black, has relied on the history of the first amendment in interpreting it and has considered the ideas of Jefferson and Madison especially relevant. Thus, the Court construed the intent of the founders to be a strict separation between church and state. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3, at 817-18 (1978). However, Tribe points out that "the actual history of the establishment clause may belie this interpretation. At least some evidence exists that, for the Framers, the establishment clause was intended largely to protect state religious establishments from national displacement." *Id.* at 819.

91. *Everson*, 330 U.S. at 16-18.

New Jersey statute violated the strict separation of church and state by spending tax funds to aid religious education.[92] Similarly, Justice Rutledge, joined by Justices Frankfurter, Jackson, and Burton, argued that the first amendment was written to "create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[93] The New Jersey law violated this principle by aiding religious schools.

This separationist view was echoed in *McCollum v. Board of Education*.[94] There the Court struck down an Illinois program under which children in public school could receive religious instruction on public school premises.[95] Relying on *Everson*, the Court stated that the program violated the separation between church and state required by the first amendment: "For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[96]

Justice Reed, however, in his dissent, planted the seed for the Court's later interpretation of the religion clauses. After stating the history of the religion clauses and listing past practices involving both the state and religion, Justice Reed argued that the religion clauses "do not bar every friendly gesture between church and state. It is not an absolute prohibition against every conceivable situation where the two may work together, any more than the other provisions of the

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92. Justice Jackson wrote that the first amendment was

> [s]et forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse. Those great ends I cannot but think are immeasurably compromised by today's decision.

Id. at 26-27 (Jackson, J., dissenting).

93. *Id.* at 31-32 (Rutledge, J., dissenting).

94. 333 U.S. 203 (1948).

95. Under the Illinois program, religion teachers, employed by religious groups, were allowed once a week to come into public school and teach 30-minute religion classes on the basis of a request card signed by the parents of the child. Children who did not attend religion classes were required to remain at the school to pursue their secular studies. The teachers were not paid by the state, but were subject to the approval and supervision of the superintendent of schools. *Id.* at 207-09.

96. *Id.* at 212.

First Amendment . . . are absolutes."[97] For this reason, Justice Reed would have upheld the Illinois program.

2. Acceptable Accommodation

The strict separation theory became increasingly difficult to apply because of the difficulty of determining what precisely constitutes aid to religion in violation of the free exercise clause. For this reason, the Court has more recently held that the state may accommodate religion, so long as it retains "benevolent neutrality" toward religion.[98]

This notion of accommodation was first expressed in *Zorach v. Clauson*.[99] The Court upheld a New York program under which public school students could, at the written request of their parents, be released during the school day to attend religious institutions for religious instruction.[100] Justice Douglas wrote that, while the first amendment "reflects the philosophy that Church and State should be separated. . . . [it] does not say that in every and all respects there shall be a separation of Church and State."[101] This absolute separation would constitute hostility toward religion. For this reason, the state may accommodate religion.[102]

In accommodating religion, the state must remain neutral. The Court defined this notion of "benevolent neutrality" in *School Dist. of Abington Township v. Schempp*,[103] in which the Court struck down a Pennsylvania statute requiring public school students to read from the Bible and recite the

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97. *Id.* at 255-56 (Reed, J., dissenting).

98. L. TRIBE, *supra* note 89, § 14-4, at 820.

99. 343 U.S. 306 (1952).

100. Under the program, students not released would remain in the public school classroom. The churches made reports to the schools of which students who had been released had not attended religious instruction. The religious organizations paid all of the costs. *Id.* at 308-09. The Court distinguished *McCollum* by stating that this program, unlike that in *McCollum*, did not involve religious instruction on public school grounds. *Id.* at 309.

101. *Id.* at 312.

102. Justice Douglas wrote,

> We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.

Id. at 313.

103. 374 U.S. 203 (1963).

Lord's Prayer at the beginning of each school day.[104] Justice Clark, writing for the majority, stated that history has taught us that the government should be neutral in its dealings with religion, for this neutrality protects all by neither favoring one religion over another nor religion over non-religion.[105] Thus, the test of the validity of a statute affecting religion is: "[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."[106]

Furthermore, in *Sherbert v. Verner*,[107] the Court held that not only are religious classifications permissible, in some circumstances they are mandated by the first amendment. The Court struck down a South Carolina statute under which the plaintiff had been denied unemployment benefits because she would not accept employment that required her to work on Saturday, the sabbath day of her church, the Seventh-Day Adventists.[108] Justice Brennan stated that the statute forced the plaintiff "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[109] Only a compelling state interest could justify the infringement on her first amendment right. The Court found none[110] and thus held that the statute unconstitutionally burdened the plaintiff's free exercise right.

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104. A child could be excused from the exercise by the written request of his or her parent. *Id.* at 205.

105.

> We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality.

Id. at 226.

106. *Id.* at 222.

107. 374 U.S. 398 (1963).

108. The South Carolina statute denied benefits to those workers who, without good cause, refused to accept suitable work. *Id.* at 401. Significantly, those who would not work on Sunday for religious reasons were not similarly denied benefits. *Id.* at 406.

109. *Id.* at 404.

110. The state had argued that accepting the plaintiff's claim would invite fraudulent claims, depleting the unemployment fund and hindering employers who needed Saturday workers. The Court held that, even if this were not so speculative, it would not be enough to "warrant a substantial infringement of religious liberties." *Id.* at 407. *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

The Supreme Court has thus developed the interpretation that state action may affect religion so long as such action merely accommodates religion.[111] This action must be benevolently neutral; that is, it may neither favor religion nor inhibit religion.[112] The question then becomes what constitutes an acceptable accommodation of religion.

B. *What Constitutes Accommodation—Direct Financial Assistance v. Indirect Aid*

The question of what constitutes acceptable accommodation of religion often arises in the context of state aid to religious educational institutions. Courts have generally struck down direct aid but have usually upheld indirect benefits such as tax exemptions. This section argues that, while seemingly artificial, this distinction is sound.

1. Direct Financial Assistance

While the Court has held that the state may indirectly benefit religion,[113] the Court has held some benefits to be unconstitutional sponsorship of religion. For example, the Court in *Lemon v. Kurtzman*[114] declared unconstitutional two state statutes which authorized salary supplements to public school teachers teaching secular subjects in non-public schools. Because both statutes led to state supervision of non-public school teachers, the Court held that they created an entanglement between government and religion.[115] Therefore, the statutes were unconstitutional.

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111. This accommodation, however, has its limits. For example, in Bob Jones Univ. v. United States, 461 U.S. 574 (1983), the Court upheld an IRS finding that Bob Jones University did not qualify as a tax-exempt organization. Bob Jones University practiced a form of racial discrimination in the admission of students, based on religious belief. The Court held that the purpose of an institution benefitted by tax-exempt status must not contravene fundamental public policy. Because racial discrimination violates accepted views of what constitutes justice, the Court held that the government's interest in eradicating racial discrimination in education overrode the university's first amendment claim. *Id.* at 592-96, 602-04. *See also* Norwood v. Harrison, 413 U.S. 455 (1973).

112. For further cases discussing this notion, see, *e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Wisconsin v. Yoder, 406 U.S. 205 (1972); Walz v. Tax Comm'n, 397 U.S. 664 (1970); Engel v. Vitale, 370 U.S. 421 (1962).

113. *See supra*, notes 99-112 and accompanying text.

114. 403 U.S. 602 (1971).

115. The Court set out the three part *Lemon* test (discussed *supra* text accompanying note 59) and applied the test to the statutes in question. The Court held that the statutes had a valid secular purpose, in that the

Similarly, the Court in *Aguilar v. Felton*[116] declared unconstitutional a New York program under which the city of New York used federal funds to pay the salaries of public school teachers who taught in parochial schools to assist educationally deprived children. As in *Lemon*, the Court found that the program resulted in state supervision of religious schools. This supervision created too great a risk of government entanglement in the administration of religious schools. This program thus led to the impermissible conferring of a direct benefit upon religion, violating the Constitution.[117]

2. Indirect Aid

In contrast, when a program has led to indirect aid from the state to a religious educational institution, the Court has generally upheld it. In *Meek v. Pittenger*,[118] the Court stated that the financial benefit of the program went to the parents and the children, not to the religious schools themselves. Further, the state loaned only secular books which had been approved by the board of education. The Court found that this program had a secular effect and therefore was constitutional.[119]

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legislature intended to enhance minimal educational standards. *Lemon*, 403 U.S. at 612-13. However, the statutes fostered excessive entanglement between government and religion in that both led to state supervision of nonpublic school teachers and the resulting danger of government control of religious schools. *Id.* at 612, 621. The Court did not consider whether the statutes either advanced or inhibited religion. *Id.* at 613.

116. 473 U.S. 402 (1985).

117. *Id.* at 414. In both *Lemon* and *Aguilar*, the programs struck down involved primary or secondary schools. The Court has been more lenient in upholding state statutes which grant direct financial assistance to religiously-affiliated colleges and universities, on the theory that college students are more mature and less likely to be influenced by the sectarian nature of a school. For example, the Court has upheld statutes which authorized payments to religious colleges and universities for the construction of buildings to be used for secular purposes only. *See, e.g.*, Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).

118. 421 U.S. 349 (1975).

119. *Id.* at 362. The Court struck down the part of the program which authorized lending instructional material and equipment to non-public schools. The Court held that this constituted "direct and substantial advancement of religious activity," in that such aid to the educational function of religious schools resulted in aid to the sectarian mission of the schools as well. *Id.* at 366.

Similarly, in *Wolman v. Walker*,[120] the Court upheld an Ohio textbook program like the one in *Meek*. The Court also has upheld programs supplying to non-public schools standardized testing and scoring services as well as diagnostic and therapeutic services. The Court held that the testing and scoring services involved no entanglement, since the state was not supervising non-public school teachers; the diagnostic services involved a relationship between the diagnostician and the child in which there was little risk of sectarian views intruding; and, the therapeutic services did not advance religion or involve excess entanglement because they were conducted on neutral premises. For these reasons, these programs did not violate the first amendment.[121]

In addition to indirect aid to religious schools, tax exemptions for religious organizations have been upheld. For example, in *Walz v. Tax Commission*,[122] the Court upheld a New York statute granting a property tax exemption to religious organizations for properties used for worship only. Justice Burger wrote that, while the tax exemption provides a benefit to religion, this alone does not render the statute unconstitutional. Within the boundaries of benevolent neutrality, the state may provide benefits to religious organizations.[123] Short of the Founders' fears of sponsorship, the government may accommodate religion in a "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[124]

The Court has thus upheld those programs which have been seen as giving indirect aid to religious educational institutions or religion generally. Such programs, unlike those granting direct aid, have been seen as acceptable accommodation of religion, within the bounds of benevolent neutrality required by the first amendment. Some have argued that this

120. 433 U.S. 229 (1977).

121. *Id.* at 238-48. The Court declared unconstitutional a part of the program which authorized the loan of instructional materials and equipment to non-public schools, for reasons set out in *Meek*, 421 U.S. at 366. *Wolman*, 433 U.S. at 250. The Court also struck down a part of the program which authorized school districts to provide transportation for non-public school children for field trips. The Court stated that, because the school controls the field trip, the school itself receives the benefit rather than the children. Further, excessive entanglement would be created because use of the funds would involve state supervision of non-public teachers to ensure that the purpose of the field trips was secular. *Id.* at 253-54.

122. 397 U.S. 664 (1970).

123. *Id.* at 674-75.

124. *Id.* at 669.

distinction is artificial. They argue that there is little difference between giving money directly to a religious school and excusing it from paying a tax. In the end, the economic result is the same. However, there are two important differences between the two which impinge on the constitutional distinction: the danger of entanglement between government and religion and the symbolic importance of state neutrality in religious affairs.[125]

Unlike indirect aid to religion, direct aid in the form of subsidies poses a threat of state entanglement with religion. Direct aid involves a direct transfer of public funds to religion, while indirect aid is passive.[126] For this reason, direct government subsidies are often granted on the basis of some qualifications and carry with them more stringent government regulations.[127] Because of these regulations, states must administer the funds closely. This administration creates a relationship between church and state "pregnant with involvement,"[128] for it involves the state directly in the affairs of a religious educational institution and therefore directly in religion itself. Tax exemptions, on the other hand, do not involve the state so intimately in religion and religious affairs since they are a passive form of assistance. Beyond the danger of state involvement with religion is the danger of such involvement leading to the politicizing of religion. Subsidies must be handed out on a regular basis and thus entail more political controversy.[129] Further, religious organizations often espouse a particular political viewpoint. Direct government involvement with religion may thus lead to political fragmentation along religious lines, a danger both to government and

125. This section asserts that the direct/indirect aid distinction, on a theoretical level, is sound. This section does not argue that the Court has been consistent in deciding which programs constitute direct aid and which do not. Both the Court itself and commentators have recognized the inconsistency. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 106-07 (1985) (Rehnquist, J., dissenting); Committee for Pub. Educ. v. Regan, 444 U.S. 646, 662 (1980); *see also* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Jones, *Accommodationist and Separationist Ideals in Supreme Court Establishment Clause Decisions*, 28 J. CHURCH & STATE 193 (1986); Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409 (1986); Marshall, *"We Know It When We See It" The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986).

126. Walz v. Tax Comm'n, 397 U.S. 664, 690 (1970) (Brennan, J., concurring).

127. *Id.* at 699 (Harlan, J., concurring).

128. *Id.* at 675 (Brennan, J., concurring).

129. *Id.* at 699 (Harlan, J., concurring).

religion against which the first amendment protects.[130]

Moreover, direct aid to religious educational institutions poses a symbolic threat to the neutrality demanded by the first amendment. As Robert Cushman points out, aid of any kind is extended not to individuals but to groups.[131] An institution therefore receives aid not individually, but as a member of a group. Receipt of aid, then, depends on the group in which the institution is classified rather than on the institution itself. Thus, religious schools receive direct subsidies *as* religious schools;[132] therefore, the religious nature of the school is pertinent in the granting of the aid. This violates the neutrality demanded by the first amendment, which requires that the state neither favor one religion over another or religion over non-religion. But religious educational institutions receive tax exemptions *as* non-profit organizations,[133] as do other organizations formed for the cultural or moral improvement of others. This is important, since the religious nature of the school is irrelevant to the grant of the benefit. Further, it demonstrates that the state does not support religion, and religion does not support the state.[134]

C. *Section 702 as Acceptable Accommodation*

In *Amos*,[135] the Supreme Court upheld the constitutionality of the section 702 exemption from federal anti-discrimination laws. This exemption, as Justice O'Connor suggested,[136] seems to be a benefit to religion. It allows only religious employers to make personnel decisions based on religious preference, a benefit not allowed secular employers. Yet this benefit falls into the category of acceptable state accommodation of religion. The benefit is indirect, in that it does not lead to state involvement in religion; rather, it leads to less involvement of the state with religion. The exemption allows religious organizations to conduct their religious and their secu-

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130. *Id.* at 695 (Harlan, J., concurring). *See, e.g.*, Board of Educ. v. Allen, 392 U.S. 236, 249 (1968) (Harlan, J., concurring); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 305-08 (1963) (Goldberg, J., concurring); *see also* Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969).

131. Cushman, *Public Support of Religious Education in American Constitutional Law*, 45 ILL. L. REV. 333, 348 (1950).

132. *Walz*, 397 U.S. at 689 (Brennan, J., concurring).

133. *Id.* (Brennan, J., concurring).

134. *See* Freund, *supra* note 130, at 1687 n. 16.

135. 107 S. Ct. 2862 (1987).

136. *Id.* at 2874 (O'Connor, J., concurring).

lar non-profit activities free from government regulation concerning employment. Indeed, a religious organization may see all of its activities as religious. The fear that a court might not agree may well lead such organizations to mold their activities according to what the court might want rather than to its own religious purpose. One commentator points out,

> If a church or other religious organization is unduly involved with the agencies of government, it may become subverted and redirect its programs to meet ends chosen by government. Accordingly, the church becomes compromised in its efforts to act in accord with its higher calling.[137]

This chill on the activities of a religious organization runs afoul of the first amendment, especially the entanglement concerns of the Supreme Court in *Lemon*.[138]

Further, the non-profit/for-profit activities distinction of the Court in *Amos* is sound. The distinction at first seems artificial, since not all non-profit activities of an organization are religious in nature. Yet the Supreme Court, like the lower courts, was concerned with extending section 702 too far. While the religious institution has important rights in the hiring and firing of personnel in religious and non-profit activities that override the state's interest in preventing discrimination, the same cannot be said for an institution's for-profit activities. When religious institutions enter the secular market, they are placing themselves in an area having little if anything to do with their religious missions. For this reason, the state's interest in preventing discrimination overrides whatever interest the religious group may have. In the same way, giving an exemption to a religiously-affiliated organization in the area of for-profit activities gives them an advantage secular employers do not have. Two commentators assert, "To exempt religious institutions from strictures governing these activities is to place those enterprises not excluded at a competitive disadvantage."[139] This advantage can only amount to special favoritism to religion, an issue that raises serious constitutional questions.

Thus, while the for-profit activities of a religious institu-

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137. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 374 (1984) (footnote omitted).

138. 403 U.S. 602, 613 (1971).

139. Marshall & Blomgren, *supra* note 27, at 324.

tion do not merit constitutional protection, the non-profit activities of such an institution are far more likely to be concerned with the religious mission of the organization. While not perfect, as no bright line test can be, this distinction seems best to balance the competing interests of the state in preventing discrimination with the first amendment concerns of religious organizations. The distinction also enables the Court to avoid first amendment difficulties of determining on a case by case basis which activities are religious and which are not.

IV. THE IMPACT OF *Amos* ON RELIGIOUS EDUCATION INSTITUTIONS

The Court's decision in *Amos* has special significance for religious educational institutions. *Amos* held constitutional the section 702 exemption from federal anti-discrimination laws when applied to the secular, non-profit activities of a religious organization. Thus, a religious educational institution should benefit from the exemption in any of its hiring decisions, as long as it qualifies as a non-profit, religiously-affiliated institution. However, courts may also see more of a state interest in regulating religious schools since the state has more of an interest in the education of its citizens than it does in a privately-run gymnasium or clothing mill.

At the least, under *Amos*, the section 702 exemption should be extended to primary and secondary religious schools. Traditionally, state supervision of these schools has been minimal: such supervision has been limited to ensuring that minimum educational standards are met, that teachers are competent, that the school is accredited, and that the school observes a minimum number of hours of work and credit.[140] This state supervision satisfies the state's legitimate interest in the education of its young citizens. Beyond this, however, a religious organization may well see education as an integral part of its religious mission. Parents send their children to religious schools for a special reason, so that they may add a religious dimension to their education.[141] It is in the classroom that children are instilled with the beliefs and way of life of their religion. For this reason, the religious mission of a school pervades the entire atmosphere, from reli-

140. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 631 (1971) (Douglas, J., concurring).

141. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510 (1925).

gion class to spelling lessons, for this atmosphere is a vehicle for transmitting faith to the next generation.[142] For this reason, what may seem secular to the outsider may well be intensely religious to the religious school. A court determination otherwise would seriously implicate the entanglement concerns set out by the Court in *Lemon*.[143] A religious organization, then, has a significant interest in its educational mission. Because of this interest, the section 702 exemption should be extended to both the religious and the secular activities of religious organizations, without violating the religion clauses.

However, religious organizations do not have the same interest in a college or university that they do in a primary or secondary school. The students are more mature and therefore less likely to be influenced by a sectarian atmosphere than are school children.[144] Thus, the college or university will have less of an opportunity to instill in its students a belief system or way of life. In fact, many religiously-affiliated colleges and universities see their primary purpose as providing a secular education, unlike primary and secondary schools. Many do not require participation in religious exercises or attendance in religion classes. Many also have a policy of academic freedom.[145] For this reason, the courts may see the state's interest in preventing discrimination as overriding the college's or university's religious interest. While a religious college or university has an obvious interest in hiring whomever they choose to teach theology,[146] courts may be less willing to extend section 702 to the secular aspects of such institutions.

Yet there are dangers in limiting this exemption to the religious activities of religious colleges and universities. While a ruling that a religious college may discriminate in the hiring of theology teachers may raise few problems, it is more problematic to say that such a college may discriminate in hiring an English teacher or a mathematics teacher. None-

142. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 616 (1971); *see also* Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development: The Nonestablishment Principle* (pt. 2), 81 HARV. L. REV. 513, 574 (1968).

143. 403 U.S. 602, 613 (1971).

144. *See, e.g.*, Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).

145. *Tilton*, 403 U.S. at 686-87.

146. *See, e.g.*, Maguire v. Marquette Univ., 627 F. Supp. 1499 (E.D. Wisc. 1986).

theless, allowing courts to decide whether a given position is religious or secular may well lead to the confusion which preceded the Court's decision in *Amos*. Inconsistency in results may leave such institutions unsure of whether they are violating the law or not when they discriminate; thus, they may alter their actions to avoid litigation rather than follow their own missions. This chill on the activities of religious colleges and universities was feared by the sponsors of the 1972 amendments to section 702[147] and was feared by Justice Brennan in his concurring opinion in *Amos*.[148] Most importantly, leaving such a decision to courts leads to the serious danger of judicial entanglement with religion, afoul of the first amendment. The exemption, then, should be extended to the secular activities of primary and secondary religious schools as well as religiously-affiliated colleges and universities.

CONCLUSION

In *Amos*, the Supreme Court held constitutional the section 702 exemption from federal anti-discrimination laws as applied to the secular, non-profit activities of religious organizations. Breaking from earlier lower court decisions interpreting section 702, the Court held that the exemption did not amount to state sponsorship of religion. This is consistent with the Court's line of cases striking down direct financial aid to religion as impermissible state sponsorship, while upholding indirect aid as permissible accommodation. This decision is especially pertinent to religious educational institutions, for it recognizes their interest in engaging in religious discrimination in hiring faculty and other personnel. Courts should extend this decision to religious primary and secondary schools and should extend it to religious colleges and universities. This extension would avoid the inconsistencies present in lower courts before the *Amos* decision and the constitutional danger of entanglement of courts deciding for such schools which of their activities are religious and which are not.

147. 118 CONG. REC. 1993-94 (1972).

148. Corporation of Presiding Bishop v. Amos, 107 S. Ct. 2862, 2872 (1987) (Brennan, J., concurring).