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# RELIGIOUS DISCRIMINATION AND HIGHER EDUCATION: A CONTINUING DILEMMA

## I. Introduction

As expressed in Title VII of the Civil Rights Act of 1964, the United States Congress has granted religiously affiliated institutions of higher learning the freedom to introduce considerations of religion into their employment practices. Title VII, amended by the Equal Employment Opportunity Act of 1972, exempts church-related colleges and universities from the Act's general prohibition against religious discrimination: religious schools may prefer persons of their own faith when hiring any personnel. In an effort to implement the overall policies of the Civil Rights Act, the executive branch created the Office of Federal Contract Compliance (OFCC) within the Department of Labor. Towards this end, the OFCC forbids all discrimination by organizations which are federal contractors; only a very limited exemption for certain religious schools is provided. Colleges and universities that wish to claim the Title VII exemption with respect to employment practices must label themselves "religious organizations." Similar labeling must be adopted to qualify for the OFCC's limited exemption for certain religious groups.

The Supreme Court has yet to rule on the constitutionality of those provisions of the Civil Rights Act or OFCC regulations which exempt or except religious organizations from the general ban on religious discrimination. However, the Court has had occasion to deal with a related issue: the constitutionality of federal and state funding programs to religious institutions under the establishment clause of the first amendment. Briefly stated, the Court has held that church-related schools may qualify for government aid provided they are not characterized as "pervasively sectarian." The institution's "character" has become the crucial determining factor in recent decisions considering the constitutionality of funding to church-related schools.

Consequently, the question for consideration is whether by labeling themselves "religious" for Title VII and OFCC purposes church-related colleges and universities are destined to be marked "pervasively sectarian" and therefore ineligible for government aid. In an attempt to answer this problem, the following discussion will examine, individually, the treatment given the church-state issue by the legislative, executive and judicial branches of the federal government. From this analysis it should become clear that a Title VII exemption, as well as an OFCC exemption, is compatible with basic establishment clause principles. Thus, a religious educational institution should be free not only to discriminate in employment on religious grounds, but to continue to receive governmental aid and support without constitutional violation.

## II. Title VII of the Civil Rights Act of 1964: A Legislative History of § 702 and § 703

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employ-

ment Opportunity Act of 1972,<sup>1</sup> prohibits discrimination in employment practices by employers, employment agencies and labor organizations on grounds of race, color, religion, sex or national origin.<sup>2</sup> However, it provides for three instances in which religious colleges and universities are not subject to the full impact of the law.

§ 702 This title 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.<sup>3</sup>

§ 703(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of religion, sex or national origin in those instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it 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 the 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.<sup>4</sup>

Section 702 provides an exemption for all religious educational institutions from the prohibitions against religious discrimination. Section 703(e)(1) provides an exception for enterprises in which the profession of a certain faith is a bona fide occupational qualification. Section 703(e)(2) further excepts from the general prohibition certain qualifying religious educational institutions. For a correct understanding of the congressional intent in singling out religious institutions of higher learning in both § 702 and § 703(e), one must briefly study the legislative history of the title.

In addition to the exceptions allowing the use of religion as a bona fide occupational qualification (BFOQ),<sup>5</sup> the original legislation proposed in the House in 1964 contained an exemption for religious entities which applied to all their activities:

This title shall not apply . . . to a religious corporation, association or society.<sup>6</sup>

Fear was expressed, however, that many religious schools might not be free from

<sup>1</sup> 42 U.S.C. § 2000e *et seq.*, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at § 2000e-1.

<sup>4</sup> *Id.* at §§ 2000(e)-2(e).

<sup>5</sup> UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMM., LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, 2010 (1968). HOUSE COMM. ON EDUC. AND LABOR, H.R. Rep. No. 1370, 87th Cong. 2d Sess. (1962).

<sup>6</sup> *Id.*

the federal restrictions under the general exemption for "religious corporations, associations of societies" since "most church-related schools are chartered under the general corporation statutes [of the states] as non-profit institutions for the purpose of education."<sup>7</sup> The concern was that such institutions might therefore be considered "state" corporations rather than "religious" corporations. Section 703(e)(2), as it currently reads, was proposed to remedy this possible difficulty.<sup>8</sup>

The legislators also discussed the permissible scope of the exemption for religious institutions. Proponents of the exemption argued that religious schools ought to be free to discriminate in the hiring of librarians and dormitory personnel as well as in the hiring of deans and professors.<sup>9</sup> Debate centered on whether considerations of religion should be permitted when the hiring involved non-administrative, non-teaching personnel; the BFOQ clause was thought by some to be adequate protection of the legitimate interests of religious schools.<sup>10</sup> Those who urged that schools should be free from all government intervention in their hiring policies were successful in the House.<sup>11</sup>

Section 702, the general exemption clause, underwent substantial change in the Senate. The Dirksen-Mansfield amendment limited the exemption enjoyed by religious corporations, associations, and societies to the employment of individuals to perform work connected with their religious activities only. The amendment further proposed an exemption for educational institutions with respect to the employment of individuals to perform any work connected with the educational activities of the institutions:

This title shall not apply to . . . a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its *religious* activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.<sup>12</sup>

Educational institutions were thereby allowed to discriminate on any ground in the hiring of personnel whose duties were part of the educational mission of the school. Religious organizations could use religion as a hiring criterion only with respect to potential employees whose duties would be religious in nature. This version of the bill was eventually adopted and signed into law as the Civil Rights Act of 1964.

In 1972, Title VII of the Civil Rights Act was amended by the Equal Employment Opportunity Act. Section 703(e) was not altered, thereby leaving intact the bona fide occupational qualification clause and the exemption for religiously affiliated schools. However, the provision in Section 702 allowing discrimination by educational institutions was abolished; sex and minority dis-

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7 *Id.* at 3197, 110 CONG. REC. 2585 (1964).

8 *Id.*

9 *Id.* at 3197-98.

10 *Id.* at 3200, 110 CONG. REC. 2586 (1964).

11 *Id.* at 3051, 110 CONG. REC. 12812 (1964).

12 *Id.* at 3050 (emphasis added).

crimination in the field of higher education were cited as the cause for the amendment.<sup>13</sup>

The basic thrust of the amendment was to substantially enlarge the scope of the exemption.<sup>14</sup> Section 702 was altered by striking the word "religious"<sup>15</sup>; the removal of this limitation allowed religious organizations to discriminate on religious grounds in all their activities. The debate surrounding this amendment was in large part a revival of the same issue which was debated in the House eight years before: should all employees of a religious educational institution be exempted or only those who perform a religious task? Again, as in 1964, the final decision favored the broader exemption. As it stands today, Title VII allows religious organizations to consider religion when choosing employees. Of course the exemption only applies to religious discrimination; religious organizations "remain subject to the provisions of Title VII with regard to race, color, sex and national origin."<sup>16</sup> The intent of Congress, witnessed by lengthy discussion in 1964 and 1972, is beyond dispute. Legislators expressly intended that the law not interfere in any way with a religious educational institution's policy of considering religion as a qualification for employment.

Section 702 of the Civil Rights Act provided a most critical freedom to religious colleges and universities. The language is more inclusive than that of § 703(e). In addition to being broader than the BFOQ exception (§ 703(e)(1)), it does not require a showing of intimate relationship of governance with an ecclesiastical authority. Many colleges do not fall within the narrow confines of § 703(e)(2) because they are not "owned, supported, controlled or managed by a particular religion," nor is their curriculum "directed toward the propagation of a particular faith." It is to § 702 and not § 703(e) that most religious colleges and universities must look when they desire to qualify for the Title VII exemption.

### III. Executive Order No. 11246 and OFCC

Title VII witnesses Congress' intent to exempt church-related colleges and universities from the general prohibition against utilizing religion as a hiring criterion. Following Congress' enactment of the Civil Rights Act, President Johnson issued Executive Order No. 11246 to implement the policies of that Act in the area of federal contracts.<sup>17</sup> As amended, this order prohibits discrimination on the basis of race, color, religion, sex or national origin by agencies

13 SUBCOMMITTEE OF SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 79, 86 (1972).

14 *Id.* at 1770, 118 CONG. REC. 4940 (1972).

15 *Id.* at 789.

16 *Id.* at 1845, 118 CONG. REC. 7167 (1972).

17 The interpretation placed by HEW on the term "contract" for purposes of inclusion under Executive Order 11246 is a strict one. Institutional coverage under the executive order is to be determined only by those contracts under which the institution furnishes to a government agency supplies or services. Many smaller colleges would be exempt from Executive Order 11246 since the kinds of contracts which determine inclusion under the order are typically made with university research branches. The order does not apply where the government performs services or provides supplies.

holding federal contracts.<sup>18</sup> This executive action, however, does not grant church-related colleges and universities the same exempt status Congress saw fit to provide in Title VII. Thus, different standards and obligations attach when these institutions accept funding via the federal contract route.

The executive order authorized the establishment of the Office of Federal Contract Compliance (OFCC) within the Labor Department. The OFCC, responsible for implementing Executive Order No. 11246 and supervising federal agency enforcement programs under the order, has issued various regulations and guidelines applicable to all federal contractors, including church-related educational institutions which accept federal contracts. All aspects of an institution's activities are included within the ban on discrimination unless the activity is specifically exempted as being unrelated to those activities which are federally funded.<sup>19</sup> Failure to comply with OFCC regulations can result in immediate withdrawal of funds and future "blacklisting" of the non-complying institutions.<sup>20</sup>

To the extent that Executive Order 11246 and OFCC regulations do not provide the same exemption for church-related institutions that Congress incorporated into the Civil Rights Act, there is inconsistency between the executive and legislative treatment of the problem. Noting this, the Association of American Colleges petitioned the Secretary of Labor to amend the Executive Order and to reconcile it with the religious exemption provisions of Title VII. New regulations were proposed by the Secretary and published in the Federal Register on March 29, 1974.<sup>21</sup> The proposed regulations exempted religious organizations from the requirement of the OFCC Equal Opportunity clause "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities."<sup>22</sup> By using this language, the Secretary attempted to establish consistency between religious exemption provisions of § 702 and OFCC rules and regulations.

Comments on the proposed change were submitted by educational institutions and religious associations. While supporting the concept contained in the Civil Rights Act, these groups feared that § 702 language would entangle them in federal funding problems. In particular, they expressed concern that if they took advantage of the exemption as proposed, they might be subjected to the full force of *Tilton v. Richardson*<sup>23</sup> and those establishment clause cases<sup>24</sup> which deny federal funds to "pervasively religious" institutions. Other groups believed that the BFOQ exemption contained in the regulations gave adequate protection to the church-related schools. Yet another group urged that the language of § 703(e)(2) rather than that of § 702 be used; such language would prevent discrimination by government contractors while at the same time protecting the legitimate interests of religious entities.

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18 Executive Order No. 11246, 30 Fed. Reg. 12319 (1965) as amended by Executive Order 11375, 32 Fed. Reg. 14303 (1967).

19 41 C.F.R. § 60-1.5 (1975).

20 *Id.*, see also 42 U.S.C. § 209(a) *et seq.* (1970).

21 39 Fed. Reg. 11555 (1974).

22 *Id.*

23 403 U.S. 672 (1971).

24 See *Meek v. Pittinger*, 421 U.S. 349 (1975); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzmann*, 403 U.S. 602 (1971).

After consideration of these comments, the Department of Labor concluded that the best approach would be to adopt the language of § 703(e)(2). Consequently, certain colleges and universities whose religious affiliations are such that they are largely owned and managed by religious groups, or whose curriculum is "directed toward propagation of a particular religion,"<sup>25</sup> are excepted from the OFCC regulations.

This selection of language, however, did not avoid the problem. While church-related colleges and universities considered these new guidelines to be an improvement of Executive Order 11246, the new law fell short of the desired exemption provided by § 702 of the Civil Rights Act. As noted in the earlier discussion of Title VII, the bona fide occupational qualification exemption and the limited scope of § 703(e)(2) do not afford adequate protection for many religious organizations, particularly colleges and universities. For this reason these institutions unsuccessfully sought and encouraged the incorporation of language similar to § 702 into the OFCC guidelines. Today schools are left with much the same inconsistency as was present before the amendment: a large number of institutions exercising their exemption under § 702 may be denied federal contracts pursuant to the Executive Order because of their failure to meet the requirements of § 703(e)(2).

#### IV. The Supreme Court and the Establishment Clause

Closely linked to the executive and legislative concern for civil rights has been the judicial treatment of the religion question and its interpretation of the establishment clause. Although the exact issue of religious discrimination under § 702 and § 703(e) has never been decided by the Supreme Court, the constitutionality of federal funding to church-related institutions has received considerable attention. Colleges and universities with a religious affiliation have fared well when challenged for receiving federal aid. A brief overview of the Court's decisions is necessary to understand the Court's interpretations of the establishment clause and to identify possible areas of concern with respect to the constitutionality of § 702.

The first amendment of the Constitution prohibits Congress from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>26</sup> The question of what these words mean in a given situation has been the subject of frequent Supreme Court review.

In *Board of Education v. Allen*,<sup>27</sup> the Court upheld New York's grant of secular textbooks to children attending parochial schools. The Court recognized that "religious schools pursue two goals, religious instruction and secular education,"<sup>28</sup> that portion of the school's program which is secular may be aided by the government without establishment clause difficulties. Bus transportation,<sup>29</sup> released time programs,<sup>30</sup> and construction grants<sup>31</sup> have similarly been approved,

25 41 C.F.R. § 60-1.5 (1975).

26 U.S. CONST. amend. I.

27 392 U.S. 236 (1968).

28 *Id.* at 245.

29 *Everson v. Board of Educ.* 330 U.S. 1 (1947).

30 *Zorach v. Clauson* 343 U.S. 306 (1952).

31 *Tilton v. Richardson*, 403 U.S. 672 (1971).

the Court recognizing that secular education was thereby advanced and a public purpose served.

The constitutionality of federal construction grants to private colleges and universities was analyzed at length in *Tilton v. Richardson*.<sup>32</sup> The Court applied a three-part test: does the legislation have a secular purpose; is its primary effect the advancement or inhibition of religion; does it result in excessive government entanglement? The Court approved a federal funding program<sup>33</sup> which gave construction grants to institutions of higher learning to build facilities used exclusively for secular purposes. The legislation met the secular purpose requirement<sup>34</sup> and also had a primary effect which was not the advancement of religion:

The crucial question is not whether some benefit accrues to a religious institution as a consequence of a legislative program, but whether its principal or primary effect advances religion.<sup>35</sup>

The Court next considered the issue of entanglement: would the program require excessive government supervision to insure that federal funds were not used for sectarian purposes? If the program did demand that federal enforcement agencies "entangle" themselves too closely in the affairs of a religious school, it would be unconstitutional.

Three indicia were relevant to the Courts with respect to entanglement: the nature and character of the aided institutions, the form of the aid, and the resulting relationship between secular and religious authorities. The Courts concluded that religious indoctrination was not the goal of the colleges involved in the dispute. Rather, they were institutions of higher learning "characterized by a high degree of academic freedom."<sup>36</sup> Government's need to come on to the campuses for purposes of secular supervision was lessened because college students were considered "less susceptible to religious indoctrination."<sup>37</sup> Additionally, the type of aid provided, construction grants, was "non-ideological" and posed few entanglement problems.<sup>38</sup> Finally, the aid was a "one-time, single purpose grant," involving no continuing relationship between the school and the federal government in terms of audits or inspection.<sup>39</sup> The *Tilton* grant survived the establishment clause challenge by successfully complying with the three-part test.

In *Hunt v. McNair*<sup>40</sup> the Court upheld a South Carolina higher education construction grant program which benefited the Baptist College at Charleston. Since the authorizing act contained a secular use restriction,<sup>41</sup> and was available to all institutions of higher learning, it was held to have a secular legislative

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32 *Id.*, at 677-89.

33 *Id.* at 675.

34 *Id.* at 678-79.

35 *Id.*, at 679.

36 *Id.* at 686.

37 *Id.*

38 *Id.* at 687.

39 *Id.* at 688.

40 413 U.S. 734 (1973).

41 *Id.* at 735.



purpose.<sup>42</sup> The Court found that religion was not so pervasive at the college as to necessitate entangling governmental supervision.<sup>43</sup> "Primary effect" was interpreted in *Hunt* in an enlightening manner:

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its function is subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.<sup>44</sup>

Integral to the *Hunt* decision is a realistic recognition that religious schools, particularly colleges and universities, are able to and do in fact separate secular academics from sectarian indoctrination.

The state funding issue was again raised for the Court's consideration in *Roemer v. Board of Public Works of Maryland*.<sup>45</sup> Maryland had for some time furnished aid to private institutions of higher learning provided they met certain minimum criteria. In particular, the legislation contains a secular use requirement. The Maryland Council for Higher Education, which administers the Act and determines institutional eligibility, insures that the funds are not used for sectarian purposes. Consequently, seminaries and theological schools are ineligible to participate in the program. Furthermore, since the aid given consists of an annual fiscal year subsidy based on the number of students enrolled, seminarians and theological students at other institutions are necessarily excluded. The Act additionally requires each college to make an annual report, separately identifying the aided, non-sectarian expenditures. Annual audits to verify the report are allowed, if needed.

The Supreme Court decided in favor of the legislation and the private schools. Despite affiliation with the Catholic Church, the colleges involved were "characterized by a high degree of institutional autonomy."<sup>46</sup> "Religious indoctrination is not a substantial purpose or activity"<sup>47</sup> of the colleges, even though Roman Catholic chaplains perform religious services on campus. Mandatory religion classes were viewed by the Court as a supplement to a liberal arts program;<sup>48</sup> academic freedom was not felt to be lessened by classroom prayer or religious garb.<sup>49</sup> Students and faculty were chosen without regard to religion.<sup>50</sup> Thus the requirements of the primary effect test, articulated in *Hunt*,<sup>51</sup> were met

<sup>42</sup> *Id.* at 741.

<sup>43</sup> *Id.* at 746. Note that the college undergoing challenge in *Hunt* had considerably more affiliation with the Baptist church than did the colleges in *Tilton* with their respective churches. This can be taken as a broadening of the *Tilton* principles and an emphasis on the permissibility of aid to institutions of higher education as long as they are characterized by academic freedom and absence of indoctrination as their sole purpose.

<sup>44</sup> *Id.* at 743.

<sup>45</sup> 96 S. Ct. 2337 (1976).

<sup>46</sup> *Id.* at 2349, quoting from district court opinion found at 387 F. Supp. 1282, 1293 (D. Md. 1974).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 2349-50.

<sup>49</sup> *Id.* at 2350.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 2349.

in *Roemer*.<sup>52</sup>

The Court then looked to the three indicia described in *Tilton* to determine whether the Maryland program called for excessive government entanglement. Because a large number of the colleges' functions were non-sectarian in nature, said the Court, "the need for close surveillance . . . is correspondingly reduced."<sup>53</sup> The "form of the aid" test was not applied because plaintiffs were challenging the funding program itself and not a particular use of funds.<sup>54</sup> As to the third index of entanglement, the resulting relationship between secular and religious authorities, the Court found that the annual nature of the subsidy would not necessarily result in excessive interference.<sup>55</sup> The *Tilton* and *Hunt* programs had also called for an ongoing contact between the government and the schools because continued inspection and regulation of subsidized buildings were contemplated.<sup>56</sup> Thus the *Roemer* Court similarly held that, "the annual nature of the subsidy [is] not fatal,"<sup>57</sup> and is no more likely to be entangling than are, "the inspections and audit incident to the normal process of the colleges' accreditations by the State."<sup>58</sup>

Mr. Justice Blackmun, writing for the Court, emphasized the first criterion of the entanglement test, noting that the character of the aided institutions determines the constitutionality of funding programs. If it is given to schools which have adequately separated their secular and sectarian functions, the form which the aid takes is irrelevant. However, aid will be lost should schools be characterized by a pervasively sectarian atmosphere. Thus, since the institution's character has become the crucial factor in determining the validity of state aid, church-related schools face a critical issue after *Roemer*: to what extent will religious involvement be tolerated and not considered so excessive as to preclude government aid?

It is impossible to glean a list of permissible religious practices from dicta in *Tilton* and subsequent cases. The Court has looked at such factors as mandatory theology courses, required church attendance, and the number of students and faculty of other faiths on the campus. Will an institution be disqualified from receiving aid if only one of these factors is found, or is a greater showing of religious character necessary?

What remains to be considered is the interaction of these various approaches to the church-state problem. As noted, Congress and the executive branch have clearly indicated their belief that under certain circumstances religious discrimination is permissible. Indeed, they have expressly sanctioned such discrimination. The judiciary's acquaintance with this church-state problem has been confined to establishment clause considerations. The Supreme Court has found that the

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52 The first part of the three-part test—secular legislative purpose—was not at issue, the district court having found that the program's purpose was the "secular one of supporting private higher education generally, as an economic alternative to a wholly public system." *Id.*

53 *Id.* at 2352.

54 *Id.*

55 *Id.* at 2353.

56 *Id.*

57 *Id.* at 2352.

58 *Id.* at 2353.

government aid to "pervasively religious" organizations is violative of the constitution. The issue, then, is whether financial support by the government of institutions claiming the exemptions contained in § 702 and OFCC regulations constitutes aid to organizations which are "pervasively sectarian," and is therefore unconstitutional. This question is yet unanswered by the Supreme Court.

V. *King's Garden, Inc. v. FCC*: Judicial Response to § 702

The constitutionality of § 702 of the Civil Rights Act has yet to be decided by the Supreme Court. The issue has arisen, however, in *King's Garden, Inc. v. FCC*<sup>59</sup> in the Court of Appeals for the District of Columbia Circuit. Petitioner, sectarian licensee of a radio station, sought review of an order of the Federal Communications Commission (FCC) which found that it was discriminating on religious grounds in its employment practices and directed it to submit to the FCC a statement of its future hiring practices. The station relied upon the 1972 exemption amending the 1964 Civil Rights Act, Title VII, claiming that, as a sectarian licensee, it should be allowed to discriminate on religious grounds in all its activities.<sup>60</sup>

The court affirmed the FCC's ruling. It noted that the limited exception from FCC antibias rules "already exempted employment connected with the espousal of the licensee's religious views"<sup>61</sup> and that this was sufficient to protect the sectarian licensee's rights. Stating that a religious group may buy and operate a licensed radio or television station, the Court contended that "like any other group, a religious sect takes its franchise burdened by enforceable public obligations."<sup>62</sup>

A plurality of the Court commented *obiter* that the 1972 Title VII exemption appeared to be undefined, without limit, and in collision with the establishment clause of the Constitution. Essentially, the court opined that § 702, by exempting "all" activities of a religious corporation, association, educational institution or society from the Act's prohibitions, might violate 1) the establishment clause of the first amendment and 2) guarantees of equal protection under the due process clause of the fifth amendment. The court expressed concern that religious sects owning and operating purely profit-making enterprises—fried chicken franchises, railroads, athletic teams—would be able to limit employment to members of the sect under color of the Civil Rights Act. The result would be an inequality between the rules facing religious and non-religious entrepreneurs, creating establishment clause<sup>63</sup> difficulties as well as equal protection concerns.<sup>64</sup>

Although *King's Garden* did not involve educational institutions, attempts

59 498 F.2d 51 (D.C. Cir. 1974).

60 *Id.* at 52-53.

61 *Id.* at 53, quoting from *In re Complaint* by Anderson 34 F.C.C.2d 937, 938 (D.C. Cir. 1972).

62 *Id.* at 60, quoting from *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1964).

63 *Id.* at 54-55. The Court dealt with the establishment clause challenge by applying the three-part test. No secular purpose was found in Section 702. As for primary effect, the Act was viewed as a form of sponsorship of religion. The entanglement issue was not treated.

64 *Id.* at 57.

to expand its holding are quite probable. However, should opponents of § 702 try to apply the *King's Garden* reasoning to church schools, there is strong argument against its relevance. The Civil Rights Act was not novel in its exemption of religious groups from federal or state legislation. The United States Supreme Court in *Walz v. Tax Commission*<sup>65</sup> upheld the constitutionality of granting tax exempt status to religious organizations for properties used solely for religious worship. The Court noted the complexity of church-state interplay:

. . . short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.<sup>66</sup>

The Court held that New York's property tax exemption neither advanced nor inhibited religion.<sup>67</sup> Far from establishing religion, the statute simply spares "the exercise of religion from the burden of property taxation levied on private profit institutions" and allows them to operate as "beneficial and stabilizing influences in community life . . . and in the public interest."<sup>68</sup>

The Court's treatment of the entanglement question is instructive. Government interference under the statute was minimal. If government were to tax church property, the resulting degree of involvement would be much greater. In effect, it would equal government intrusion.<sup>69</sup> Direct money grants to churches are markedly different from tax exempt status, said the Court. Subsidies result in relationships which are "pregnant with involvement and . . . could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . ." <sup>70</sup> Exemptions have the opposite effect.

The Court in *Walz* was correct in distinguishing between money grants to church-related organizations and giving such groups various types of exemptions. Exemption laws easily meet *Tilton's* three-part test. Firstly, public policy dictates that church-related organizations, including colleges and universities, be permitted to operate independently of government because of the unique services which they provide to the public. Secondly, the primary effect of exemption, whether it be from New York's tax law or Title VII of the Civil Rights Act, is not to advance or inhibit religion but to maintain the necessary neutrality between the state and church. Finally, to allow government and its various administrative enforcement agencies to supervise church-related colleges and universities invites excessive government entanglement. For these reasons, exemption legislation has resisted and must continue to survive challenge on establishment clause grounds.

#### A. Three Types of Religious Organizations: The Need to Distinguish

The court in *King's Garden* correctly identified potential constitutional

65 397 U.S. 664 (1970).

66 *Id.* at 669.

67 *Id.* at 672.

68 *Id.* at 673.

69 *Id.* at 675.

70 *Id.*

difficulties raised by § 702. The court did not need to decide the constitutionality of § 702 because the situation was governed by antibias rules of the FCC. However, the issue may arise again, presenting the same establishment clause problems, but without the availability of such administrative rules.

In order to be sustained in the face of future constitutional challenge, it is important to recognize at the outset the crucial difference existing between basic church organizations; non-religious, commercial enterprises and subsidiaries of religious entities; and church-related institutions. Basic church organizations are clearly characterized by a direct control link to church authority and governance. Religious orders, dioceses, seminaries, and parochial schools are examples. For these organizations, the propagation, practice or teaching of religion constitutes the major reason for their existence.

In contrast, there exists at the opposite end of the spectrum a category of non-religious, commercial subsidiaries of religious entities such as radio and television stations and other profit-making enterprises.

Occupying the middle of the spectrum are the multitude of church-related institutions, including hospitals, colleges and universities. The characteristic feature of these institutions is that, while they possess religious motivation and vision, their secular functions are not subservient to their religious purposes. *Tilton* and other cases have recognized that these organizations are able to balance their secular and sectarian functions in such a way as to qualify for direct federal aid.<sup>71</sup>

The Civil Rights Act defined a category of basic church organizations when § 703(e)(2) was added. Its language requires direct church control or a definite propagational mission; the eligibility of such groups to obtain federal funding or contracts raises serious constitutional questions.

In contrast, profit-making organizations under the auspices of a church are "public" businesses, so loosely tied to a religious entity that they should have no claim to free exercise protections or to religious exemptions. The Court in *Walz* was aware of this difference and upheld the tax exempt status of churches because of their private, non-profit nature and the contribution which they make to the public interest.<sup>72</sup>

The concern voiced in *King's Garden* that any religious corporation, even one which is profit-making, would be able to utilize § 702 to discriminate on religious grounds is lessened when seen in light of the Supreme Court's treatment of *Walz*. An argument can be advanced that profit-making subsidiaries of churches, such as *King's Garden, Inc.*, were not within the legislators' intent when § 702 was adopted, leaving the constitutionality of the section unchallenged. In any case, colleges and universities ought not be penalized by applying the inappropriate rationale of *King's Garden* to an entirely distinct type of church organization.

### B. Title VII and the Courts: Reaching a Benevolent Neutrality

The final question in this analysis is now posed; it involves the crossroads

<sup>71</sup> See text accompanying notes 27 to 53 *supra*.

<sup>72</sup> 397 U.S. at 674.

between the legislative treatment of religious discrimination by church-related colleges and the Court's interpretation of the establishment clause vis-à-vis these schools. Title VII exempted religious organizations from the prohibition against using religion as a criterion in hiring their personnel. But it is also clear that by labeling itself "religious" for purposes of § 702 of the Civil Rights Act (and somewhat "more religious" to qualify for exemption under OFCC guidelines), an educational institution runs the risk of being adjudged "pervasively sectarian" and unable to receive federal or state funding.

The dilemma is not irresoluble. The Court has affirmed that church-related institutions of higher learning can and do separate their secular and religious functions. They are different from strictly religious societies which have only a sectarian mission, yet their secular nature is not so great as to classify them as businesses or public associations. They are what they are: colleges and universities pursuing the legitimate and vital goal of providing education within the private sector. The public-private way of providing service is unique in this country. The public sector, unable to provide every needed service, should encourage privately sponsored programs and institutions.

Private programs and institutions, because of their close involvement with the public sector, are required to uphold the fundamental freedoms guaranteed by the Constitution, particularly the first amendment. Lawmakers and judges, however, ought not lose sight of the fact that church-related colleges and universities have an educational mission which is not overshadowed by political, religious, or economic pursuits. For their part, if colleges and universities regard their primary goal to be the providing of service to the government, the economy, or even the church, the educational function of these institutions may be endangered. The balance struck between excessive church involvement and excessive government entanglement should be based upon the respect which both church and state have for education and the pursuit of truth which it fosters.

In *Tilton*, Chief Justice Burger concluded that the colleges were "institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education."<sup>73</sup> Focusing on the character of church-related higher education, he legitimized the concept that a church-related college or university may retain a religious dimension and simultaneously qualify for direct federal aid to finance its secular educational objectives. A balance is thus reached between the first amendment dictates of free exercise and establishment. One must point out, however, that any excessive interference, regulation, or surveillance affecting the religious dimension of church-related colleges and universities could upset this balance. Any governmental activity de-emphasizing or ultimately minimizing the religious aspects of such schools would endanger the neutrality ordained between church and state.

Mr. Justice Stevens, dissenting in *Roemer*, objected to giving direct subsidies to schools, but added:

However, I would add emphasis to the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission

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73 403 U.S. 672 (1971).

without wholly abandoning it. The disease of entanglement may infect a law discouraging wholesome religious activity as well as a law encouraging the propagation of a given faith.<sup>74</sup>

Stevens' concern is well-founded. Private schools at the post-secondary level cannot exist today without financial support from the government. Church-related schools will be faced with two options if denied aid: they will abandon their religious character to qualify for funds, or they will refuse to submit to government demands and be forced to close their doors. It has been the tradition of this country that pluralism be encouraged. Private education is a vital segment of American life, a fact which the Court expounded in the *Roemer* decision.<sup>75</sup> Justice Stevens' remarks witness to the "pernicious" consequences which follow from forcing church-related schools to choose between unhappy options. Wiser alternatives are available.

## VI. Conclusion

If church-related institutions are not permitted to receive government aid because they also claim the Title VII exemptions, there will be serious consequences for church-related higher education. It is in the public interest to support private education yet not to become its master. If church-related schools choose to employ persons of a particular religion, a privilege granted them by Congress, they must be able to do so without fear that government will entangle itself in their affairs. The purpose of § 702 is not to give religious organizations a *carte blanche* to discriminate; it is rather a recognition of the legitimacy of the particular goals pursued by church-related institutions of higher education, and that it is not salutary for federal enforcement agencies to establish themselves on private college campuses.<sup>76</sup>

Church-related schools have proven their secular validity in the courts and have been granted exempt status in a limited way by Congress. When these schools are seen as the successful, private educational institutions which they are, there is every reason to accept both Congress and the courts' vision with regard to church-related higher education.

*Mary Mullaney*

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74 96 S. Ct. 2337, 2358 (1976).

75 *Id.* at 2349.

76 For a discussion of the role of private service agencies, including colleges and universities, and their relationship to government, see a statement made by Rev. James T. Burtchaell, C.S.C. at Public Hearings held by the United States Dept. of Labor, Washington, D.C., October 1, 1975.

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