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RELIGIOUS DISCRIMINATION, PUBLIC FUNDING, AND CONSTITUTIONAL VALUES

by STEVEN K. GREEN*

The Salvation Army runs one of the larger private social service networks in the United States.¹ Operating in all fifty states and in every American city with a significant population, the Army runs homeless shelters and feeding programs, offers job training, and maintains day care and alcohol and drug rehabilitation programs for the millions of forgotten and faceless people living in poverty and despair.² Because of its long-standing commitment to assisting the needy, its effective network of agencies and its efficient organizational structure that runs like—well, an army—the Army has long received federal, state and local funds that pay for many of its human service programs.³

The Salvation Army is also a church.⁴ Founded in the 1870s by British evangelist William Booth, the Army is a Protestant evangelical denomination with roots in the Methodist sanctification movement.⁵ The Army has a body of doctrine, a recognized clergy

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1. See JOHN MCCARTHY & JIM CASTELLI, *RELIGION-SPONSORED SOCIAL SERVICE PROVIDERS: THE NOT-SO-INDEPENDENT SECTOR* 27 (1997) (indicating that in 1995 The Salvation Army provided services for more than 27 million people through 20 different program areas).

2. *Id.*; see also the Salvation Army's web page at <http://www.salvationarmyusa.org>.

3. CHARLES L. GLENN, *THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL AGENCIES* 212-40 (2000). For example, in 1999, the Salvation Army USA Western Territory received approximately \$266,292.00 from various government sources, amounting to 15.6% of its overall income of \$1.7 million. http://www.salvationarmy.usawest.org/about_stats.html.

4. GLENN, *supra* note 4, at 212-40; FRANK S. MEAD, *HANDBOOK OF DENOMINATIONS IN THE UNITED STATES* 230-32 (8th ed. 1987). See also *McClure v. The Salvation Army*, 460 F.2d 553, 556 (5th Cir. 1972).

5. See ROY HATTERSEY, *BLOOD AND FIRE: WILLIAM AND CATHERINE BOOTH*

(officers), and conducts worship services with an established liturgy.⁶ Like many evangelical bodies, the church espouses a post-millennial eschatology that expects the immediate return of Jesus who will judge the righteous and the unjust. Congregants believe in the sinfulness of humankind and the unique redemptive power of Jesus Christ. Salvation—and theoretically, sanctification—can occur only through a conversion experience in which one accepts Jesus as his or her Lord and Savior.⁷ Army members (soldiers) therefore believe that their first priority is to preach the Gospel to the unsaved. As one commentator has noted, for the Army, “its social services are merely a means of putting the socially disinherited—the needy in both the physical and spiritual realm—into a condition to be physically and spiritually uplifted.”⁸ Based on its status as a church, the Army enjoys the same legal benefits afforded other religious bodies, including being exempt from paying state and federal taxes or adhering to many of the regulations governing employment relationships.⁹

One of the more important regulations affecting employment relationships is Title VII of the 1964 Civil Rights Act and its equivalent state and local nondiscrimination laws.¹⁰ Title VII prohibits private employers with fifteen or more employees from discriminating in their employment practices on the bases of race, color, national origin, sex or religion.¹¹ As Congress intended, and as courts have universally found, Title VII applies to religious organizations in the same way it applies to secular private employers.¹² The law, however, exempts religious organizations from

AND THEIR SALVATION ARMY 7 (1999); MEAD, *supra* note 5, at 230-31.

6. See <http://www.salvationarmy.org/webmain.nsf/sub/whoweare>; MEAD, *supra* note 5, at 231-32.

7. MEAD, *supra* note 5, at 230-32.

8. *Id.*

9. For example, the Salvation Army, like other religious bodies, is exempt from paying social security taxes for its clergy or unemployment compensation for its employees. In addition, courts have held that charitable operations of the Salvation Army are exempt from the minimum wage and overtime compensation requirements of the Fair Labor Standards Act, 29 U.S.C. §§ 206(b), 207(b) (1966). See *Wagner v. Salvation Army*, 660 F. Supp. 466 (E.D. Tenn. 1986); see also discussion *infra* notes 224-240.

10. 42 U.S.C. § 2000e-2(a) (1994) (“It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because or such individual’s race, color, religion, sex, or national origin.”).

11. *Id.*

12. See 110 CONG. REC. 12818; *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986);

complying with the prohibition on *religious* discrimination “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.”¹³ In other words, this exemption, commonly known as section 702, entitles religious organizations to discriminate on religious grounds when hiring, promoting, or firing employees. The religious organization, though, remains subject to the prohibitions on discriminating on the basis of race, color, national origin and sex.¹⁴

The religious exemption to Title VII has not always been so broad. As addressed more fully below, Title VII originally exempted religious organizations from its non-discrimination requirement only with respect to positions that were connected with the organization’s *religious* activities, thus prohibiting employment decisions based on religion when the employee performed secular duties within the organization.¹⁵ In 1972, Congress amended section 702 to expand the zone of permissible religious discrimination to include all persons employed by a religious organization, regardless of whether their duties or functions contained a religious component.¹⁶ The Supreme Court upheld the constitutionality of that amendment in 1987.¹⁷

Therefore, under Title VII, the Salvation Army is allowed to hire co-religionists and discriminate on religious grounds in other employment practices for all positions, including those within its human service programs, regardless of whether the positions involve religious or secular duties. Despite the Supreme Court’s determination that this exemption is constitutionally permissible,¹⁸ the

E.E.O.C. v. Pac. Press Pub. Ass’n, 676 F.2d 1272, 1276 (9th Cir. 1982); E.E.O.C. v. Miss. Coll., 626 F.2d 477, 487 (5th Cir. 1980); McClure, 460 F.2d at 558.

13. 42 U.S.C. § 2000e-1(a).

14. See *McClure*, 460 F.2d at 558; *Rayburn*, 772 F.2d at 1166; *Pac. Press*, 676 F.2d at 1276. See also Section-by-Section Analysis to the Conference Report on H.R. 1746, “The Equal Employment Opportunity Act of 1972,” in THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 128 (1973) (“[Religious corporations, associations, educational institutions and societies] remain subject to the provisions of Title VII with regard to race, color, sex, or national origin.”).

15. See Pub. L. No. 88-352, § 702, 78 Stat. 255 (1964) (exempting religious organizations from Title VII only for persons employed to perform work “connected with the carrying on by such corporation, association, or society of its *religious* activities.” (emphasis added)).

16. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103-04 (1972).

17. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 339 (1987).

18. *Id.*

question remains whether it is constitutionally and politically defensible in all contexts. A second, and generally unanswered question is whether this license to discriminate on the basis of religion does or should extend to human service positions that are funded in whole or in part by public dollars, such as a registered dietician hired to run an Army soup kitchen. Are the reputed constitutional values that support the section 702 exemption—preservation of religious autonomy, identity, and control over religious mission, to name a few—present when the government initiates or defines the program goals and functions, or when the employment decisions involve positions that perform essentially secular functions and are funded by tax dollars? If so, is the national commitment to ending discrimination in the workplace sufficiently enhanced when government grants, contracts, or vouchers are at stake, such that this public interest should outweigh religious considerations, constitutional or otherwise?¹⁹ Additionally, does permitting religious discrimination in positions or programs that are funded by the government constitute state-sponsored discrimination in violation of the Equal Protection Clause? Does it similarly result in religious favoritism and the advancement of religion in violation of the Establishment Clause?

Despite a healthy body of case-law interpreting the application of Title VII and section 702 to religious organizations, these questions have generally gone unaddressed.²⁰ Most likely, the dearth of litigation on this issue is due to the commitment of most established religious agencies such as Catholic Charities, Lutheran Social Services and religiously run hospitals and nursing facilities not to engage in employment discrimination for most human service positions. No doubt, at a time of shortage of health care workers, a religious test for employment severely limits the available applicant pool. Also, until recently, accepted Establishment Clause interpretations had prohibited public funding of many religious endeavors, unless the

19. See *E.E.O.C. v. Pac. Press Pub. Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982) ("By enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination at a 'highest priority.'"); *E.E.O.C. v. Miss. Coll.*, 626 F.2d 477, 488 (5th Cir. 1980) ("[T]he government has a compelling interest in eradicating discrimination in all forms.").

20. In the only case directly on point, *Dodge v. Salvation Army*, No. S88-0353, 1989 WL 53857 (S.D. Miss. Jan. 9, 1989), a federal district court held section 702 violated the Establishment Clause in circumstances where the Salvation Army fired an employee in a government funded position for being a Wicca: "[T]he effect of the government substantially, if not exclusively, funding a position such as the Victims' Assistance Coordinator and then allowing the Salvation Army to choose the person to fill or maintain the position based on religious preference clearly has the effect of advancing religion and is unconstitutional." *Id.* at *3. The case is unreported.

religious and secular components could be severed.²¹ This practice of segregating profane from sacred functions—usually by establishing separate legal entities—ensured that the government funded secular services only. Opportunities for publicly funded indoctrination or discrimination were therefore rare.

Questions about public funding of entities engaged in religious discrimination have become more salient with the enactment of “Charitable Choice” provisions in recent federal social service legislation. First appearing in the Welfare Reform Act of 1996, Charitable Choice requires states to allow religious organizations to compete for government grants and contracts “on the same basis as any other nongovernmental provider without impairing the religious character of such [religious] organizations.”²² The purpose of the law is to ensure that religious organizations—both the more traditional “religiously affiliated” agencies like Catholic Charities USA and Lutheran Social Services and the more “faith infused” providers that heretofore had not received government grants based on the pervasively religious character of their polity or programs,²³ popularly called “faith-based organizations” (FBOs)—can receive public monies to run religiously infused social programs while retaining their religious identity and approach.

Charitable Choice, though, suffers from a degree of schizophrenia. On the one hand, the law has the overarching purpose of facilitating a religiously integrated alternative to funded human services while it exempts FBOs from some restrictions applied to non-religious providers.²⁴ On the other hand, it also prohibits public funds from being used for religious worship, instruction or proselytizing and

21. See *Bowen v. Kendrick*, 487 U.S. 589, 610-12 (1988) (reaffirming the prohibition on public funding of “pervasive sectarian” institutions and enterprises). *But see Mitchell v. Helms*, 530 U.S. 793, 825-29 (2000) (plurality opinion) (questioning the exclusion of pervasively sectarian institutions from neutral funding programs).

22. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 604a(b) (2001). Charitable Choice language currently appears in two other laws, the Community Services Block Grant Program, 42 U.S.C. § 9920 (2000), and in federal substance abuse and mental health programs, 42 U.S.C. § 300x-65 and 42 U.S.C. §§ 290kk-290kk-2 (2000).

23. See *Bowen*, 487 U.S. at 609-10.

24. See 42 U.S.C. § 604a(f) (allowing religious providers to discriminate in employment practices); *id.* at § 604a(d) (affirming that FBOs retain “control over the definition, development, practice and expression of [their] religious beliefs” and may continue to display “religious art, icons, scripture, and other symbols” in places where they deliver the funded services); *id.* at § 604a(h)(2) (allowing FBOs solely to limit government audits by segregating public funds into separate accounts).

prohibits religious organizations from refusing to serve eligible beneficiaries on the basis of their religion or their refusal to “actively participate in a religious practice.”²⁵ These latter restrictions would seem to undercut the effectiveness of a spiritually integrated approach to human services, requiring FBOs to work with one hand tied behind their backs. Yet, despite sending mixed signals about the importance and role of faith in addressing social problems, the law’s undeniable purpose is to facilitate participation in funded programs by organizations that offer religiously infused solutions to human problems.²⁶

This aspect of Charitable Choice should set off Establishment Clause warning alarms, as that clause has traditionally been viewed as prohibiting the funding of pervasively sectarian enterprises and religiously infused programs.²⁷ A slim Court majority still insists that government funding of religious worship or indoctrination is forbidden, even when it occurs pursuant to a religiously neutral program made available to religious and nonreligious entities alike.²⁸ But judicial perspectives are changing, as is evident by the recent decision upholding public vouchers for private religious schooling,²⁹ and a majority of the justices apparently have no problem with the government funding putative secular programs run by pervasively sectarian organizations—if that is not an oxymoron—provided *direct* funds do not pay for actual religious activity.³⁰ And, as noted, the Charitable Choice foreswears government funding of *religious worship, instruction or proselytizing*, as if those terms encompassed the entire universe of potential religious expression and activity.³¹

25. 42 U.S.C. § 604a(j).

26. See JULIE A. SEGAL, “‘Holy Mistaken Zeal’”: *The Legislative History and Future of Charitable Choice*,” in WELFARE REFORM AND FAITH BASED ORGANIZATIONS 9-27 (Derek Davis & Barry Hankins, eds, 1997).

27. See *Bowen*, 487 U.S. at 609-10. See also *Freedom From Religion Found. v. McCallum*, 179 F. Supp. 2d 950 (W.D. Wis. 2002) (holding unconstitutional direct state funding of a religiously infused alcohol treatment program).

28. See *Mitchell v. Helms*, 530 U.S. 790, 837-38 (2000) (O’Connor, J., concurring); 868-69 (Souter, J., dissenting).

29. *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002).

30. See *Zelman*, 122 S. Ct. at 2467; *Mitchell*, 530 U.S. at 809-10, 818-19 (plurality), 841-42 (O’Connor, J., concurring).

31. In an earlier holding, the Court declared that the First Amendment applies to “any religious activit[y] or institution[], whatever [it] may be called, or whatever form [it] may adopt to teach or practice religion.” *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947). Of course, even if the law’s terms are defined broadly to exclude funding of other forms of religious activity, religion clause concerns remain, particularly if a FBO integrates

Problem solved.³²

The most significant feature of Charitable Choice—at least for the purposes of this article—is the provision that expressly authorizes religious providers to discriminate in employment with respect to those positions funded under the law: “A religious organization’s exemption provided under section 2000e-1 of this title [section 702] regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (a)(2) of this section.”³³ As a result of this provision, religious organizations may accept public money to fund their social service programs but insist on hiring only co-religionists to work in those same putatively secular programs.

The religious discrimination issue has risen to the forefront of the Charitable Choice debate, spurred on by President George W. Bush’s “faith-based initiative” and recent attempts in Congress to apply Charitable Choice provisions to all federal social service programs.³⁴ While opponents of Charitable Choice initially emphasized the Establishment Clause considerations of funding pervasively sectarian organizations to provide a religiously oriented product, those concerns never caught on in Congress, likely because the law’s prohibition on funding overt religious activity satisfied the concerns of most legislators.³⁵ The notion of not simply allowing but *funding* discrimination is a different matter, and the issue has garnered more attention and elicited greater opposition. Revelations of back-room deals between the Bush Administration and Salvation Army lobbyists to guarantee religious providers the ability to discriminate against gay

privately funded religious activity into the requirements of a program that is partially funded by the government. FBOs may also encourage beneficiaries to participate “voluntarily” in religious activity, setting up the appearance of a quid pro quo in order to receive benefits. In related contexts, courts have held that the government may not coerce beneficiaries or probationers to attend religiously oriented substance abuse programs. *DeStefano v. Emergency Hous. Group*, 247 F.3d 397 (2d Cir. 2001); *Warner v. Orange County Dep’t of Prob.*, 115 F.3d 1068 (2d Cir. 1997); *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996).

32. Charitable Choice also requires that its “programs must be implemented consistent with the Establishment Clause of the United States Constitution.” 42 U.S.C. § 604a(c).

33. 42 U.S.C. § 604a(f)

34. See Laura B. Muttperl, “*Employment at (God’s) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation*,” 37 HARV. C.R.-C.L. L. REV. 389 (2002); Scott M. Michelman, “*Faith-Based Initiatives*,” 39 HARV. J. ON LEGIS. 475 (2002); Michelle Diabadj, “*The Legal and Social Consequences of Faith-Based Initiatives and Charitable Choice*,” 26 S. ILL. U. L.J. 529 (2002).

35. See SEGAL, *supra* note 26, at 16-20.

and lesbian job applicants only intensified public scrutiny on this issue.³⁶ The discrimination issue has so resonated that the coalition of church-state and civil liberties organizations that has fought Charitable Choice since 1995 renamed itself the Coalition to End Religious Discrimination.³⁷ Most legal scholars who have testified in Congress on this issue, however, have insisted that the Constitution permits, and may in fact support, religious organizations receiving public funding for social programing without losing their section 702 exemption.³⁸ The primary basis for such opinions of constitutionality is that religious organizations are not state actors subject to the strictures of the Equal Protection and Establishment clauses.³⁹

This Article offers a different approach to the issue of public funding of religious discrimination. First, it considers the purposes and goals of the religious exemption to Title VII's prohibition on religious discrimination and how those interests overlay with the constitutional values section 702 was designed to protect. Second, it briefly examines how courts have interpreted section 702, with an eye toward how such interpretations might apply in funding contexts. Third, this Article analyzes the holding in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,⁴⁰ the decision upholding the constitutionality of section 702, for consistency with the constitutional values and the expedience of extending that holding to publicly funded positions. The Article concludes by arguing that an expanded application of section 702 to government funded programs is inconsistent with general legislative purposes and constitutional values supporting the exemption, and that its availability for positions that are publicly funded violates the Equal Protection and Establishment clauses.

36. See Dana Milbank, "Charity Cites Bush Help in Fight Against Hiring Gays," WASH. POST, July 10, 2001, at A1; Mike Allen & Dana Milbank, "Rove Heard Charity Plea on Gay Bias," WASH. Post, July 12, 2001, at A1.

37. See web page of Americans United for Separation of Church and State, <http://www.au.org>.

38. See "Constitutional Role of Faith-Based Organizations in Competitions for Federal Social Service Funds," Hearing Before the House Subcom. on the Constitution, Comm. on the Judiciary, 107th Cong. (June 7, 2001) (statements of Douglas Laycock, Ira C. Lupu, and Carl H. Esbeck).

39. See *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); *N.L.R.B. v. Kemmerer Vill.*, 907 F.2d 661, 663 (7th Cir. 1990). See discussion *infra* note 286.

40. 483 U.S. 327 (1987).

The Religious Exemption to Title VII

Congress enacted Title VII in 1964 as a cornerstone of its efforts to eradicate suspect forms of discrimination in the public and private spheres.⁴¹ Expressly prohibiting discrimination in employment on the basis of race, color, national origin, sex or religion, it represents “an expression of Congress’ laudable intention to eliminate all forms of unjustified discrimination in employment.”⁴² Unlike Title VI, which prohibits discrimination in any program or activity funded by the government,⁴³ Title VII does not rely on Congress’ spending powers for its authority over private actions and is thus triggered in the absence of any public funding flowing to private employers.⁴⁴

To determine the purposes and scope of the 702 exemption, it is useful to consider its history, which is tortuous at best. From the beginning, Title VII included a limited exemption for religious employers. As originally proposed in 1964 by the House of Representatives, section 702 gave religious organizations a blanket exemption from all of Title VII’s provisions.⁴⁵ The Senate balked, however, at allowing religious organizations to discriminate on the basis of race, gender and national origin and, under the leadership of Senator Hubert Humphrey, substituted an amendment that limited the exemption for religious organizations to the “employment of individuals of a particular religion to perform work connected with the carrying [out] . . . of [that organization’s] *religious* activities.”⁴⁶ Thus as originally enacted, section 702 allowed religious organizations to engage in religious discrimination solely with respect to those positions that had religious functions or duties.

It would be a mistake, however, to assume from the language of either the original House proposal or the final version of section 702

41. See S. REP. NO. 872, “reprinted in 1964 U.S.C.C.A.N. 2355 (“The purpose of S. 1732 is to achieve a peaceful and voluntary settlement of the persistent problem of racial and religious discrimination or segregation by establishments doing business with the general public, and by labor unions and professional, business, and trade associations.”).

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

43. See 42 U.S.C. § 5309. The prohibition in Title VI applies to discrimination on the basis of race, color or national origin, and is thus ineffective against religious discrimination.

44. Rather, Title VII relies on Congress’ Article I commerce powers, applying to “employers engaged in an industry affecting commerce . . . with fifteen or more employees.” See 42 U.S.C. § 2000e(b).

45. See LEGISLATIVE HISTORY (Civil Rights Act of 1964), 1964 U.S.C.C.A.N. 2355, 2391, 2402 (hereinafter “Legislative History”); *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972); *E.E.O.C. v. Pac. Press*, 676 F.2d 1272, 1276 (9th Cir. 1982).

46. *McClure*, 460 F.2d at 556, n.4. See 110 CONG. REC. 12818 (emphasis supplied).

that Congress carefully considered the need of religious organizations to employ co-religionists. Congress' overarching purpose in enacting the 1964 Civil Rights Act was to end racial discrimination in accommodations and employment; the legislative history contains few statements about ending religious discrimination and no discussion about the need to accommodate religious autonomy interests by allowing religious entities to discriminate on the basis of religion.⁴⁷ A congressional rationale for section 702 simply is missing.

In 1971, Congress considered several amendments to Title VII, spurred on by concerns about the lack of EEOC enforcement powers and the exclusion of state and local government employers from the Act's coverage.⁴⁸ Most important for the purposes of this article, the final draft approved by the Senate Labor and Public Welfare Committee dropped a free-standing exemption for educational institutions while leaving the religious exemption unchanged.⁴⁹

The proposed expansion of Title VII was not without controversy, as several southern senators—in particular, Senators Sam Ervin of North Carolina and James Allen of Alabama—worked assiduously to defeat the measure. Altogether, Senators Ervin and Allen proposed thirteen amendments to the committee report, all of which would have narrowed the scope of Title VII or affected the EEOC's enforcement powers.⁵⁰ As part of this effort, Ervin proposed exempting religious educational institutions and organizations entirely from the coverage of Title VII, as had been proposed and ultimately rejected in the House in 1964.⁵¹ The Senate rebuffed

47. See, e.g., *Views of Reps. Carleton J. King, Arch A. Moore Jr., and William M. McCulloch, et al.*, in LEGISLATIVE HISTORY, 1964 U.S.C.C.A.N. at 2428-31; 2487. The extent of enforcement powers of the newly created E.E.O.C. also overshadowed other matters.

48. See THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, *supra* note 14, at 1.

49. The draft added religious educational institutions under section 702. See Senate Labor Committee Report, *id.* at 258-69. This Article focuses on the 1971-72 Senate bill because the House-passed version, H.R. 1746, left the original 702 exception with respect to religious institutions intact, deleting only the exemption for educational institutions. After the Senate amended section 702 to reflect its current language, the House acceded to the Senate version in conference committee. Report of House Committee on Education and Labor, *id.* at 155-224.

50. See 118 CONG. REC. at 1995; THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, *supra* note 15, at 410-12 (listing 13 proposed amendments by Ervin and Allen to Senate Labor Committee Report to S. 2515).

51. See 118 CONG. REC. at 1981-82 ("Mr. Ervin: I would allow the religious corporation to do what it pleased. . . . [The amendment] would take it out from under the control of the E.E.O.C. entirely."); *Feldstein v. Christian Sci. Monitor*, 555 F. Supp. 974, 976 (D.Mass. 1983).

Ervin's amendment and most of the amendments designed to weaken the Act.⁵² As a half-way measure, Senator Ervin then urged expanding the 702 exemption to include non-religious as well as religious activities of religious organizations and church-related colleges. The Senate approved the alternative after minimal debate, striking the modifier "religious" from the term "religious activities" used in the 1964 version. The House acceded to the Senate bill, resulting in an expansion of section 702 that allows religious societies, corporations, associations and educational institutions to discriminate "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities."⁵³

Divining a rationale for the 1972 expansion of section 702 is all but impossible. First and foremost, one is faced with a situation where the primary sponsor of the ultimate language was opposed to the overall bill,⁵⁴ as Ervin proposed his amendment chiefly to weaken Title VII. Successful "poison pen" amendments invariably are unreliable indicators of congressional intent. Even if one accepts Ervin's amendment at face value, the record indicates that his overriding concern was to exempt southern private colleges entirely from the Act. Debate focused chiefly on this issue.⁵⁵ As the debate progressed, Ervin seized on religious autonomy concerns by emphasizing the proposed law's impact on *religious* colleges, arguing that it would require church-related colleges to hire "an atheist, or a Mohammedan, or an agnostic . . . to teach chemistry, or economics or sociology."⁵⁶ Only later did Senators Ervin and Allen expand their points to include the law's impact on other religious institutions such as churches and religious hospitals. The bulk of the debate that gave birth to section 702, however, focused on this complete exemption for private colleges, not on a need to exempt religious institutions

52. See 118 CONG. REC. at 1995; THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, *supra* note 14, at 410-12.

53. 42 U.S.C. § 2000e-1(a).

54. See PAUL R. CLANCY, JUST A COUNTRY LAWYER: A BIOGRAPHY OF SENATOR SAM ERVIN 178, 195-97, (1974) (noting Ervin's general opposition to Title VII and court mandated desegregation, and how Ervin "became the intellectual darling of the segregationists.").

55. See 118 CONG. REC. at 946-49; 1975-95.

56. 118 CONG. REC. at 948. See also comments by Senator Allen, *id.* at 946 ("Under the provisions of the bill, there would be nothing to prevent an atheist being forced upon a religious school to teach some subject other than theology. A religious school would not like to have an atheist or people of a different faith teaching other subjects and confining its right to be selective in the choice of its faculty only to those phases of the work carrying out its religious activities").

generally.

Even when Ervin and Allen directed their remarks toward religious institutions, arguments supporting the need for expanding section 702 were few. Ervin provided no examples of overreaching by the EEOC nor elaborated on how adherence to the original, narrower exemption inhibited religious exercise or church autonomy. The closest he came to explaining the need for the amendment was the conclusory statement that “we are not securing religious liberty from invasion of civil authorities when we give the civil authorities power to regulate whom religious institutions, such as religious corporations, religious educational institutions, and religious societies can employ.”⁵⁷ Such statements, of course, only begged the question of what religious liberty interests were at stake and how government regulation impacted those interests. Yet time and again, Ervin fell back on the rhetorical claim that the exemption was needed “to take the political hands of Caesar off of the institutions of God, where they have no place to be.”⁵⁸ He simply never offered a First Amendment basis for expanding the exemption beyond making such pithy remarks.

Only one senator, Harrison A. Williams of New Jersey, the bill’s manager, challenged Ervin’s claim that the more limited exemption threatened free exercise interests. Although agreeing with Ervin that “the Government should not be involved in religious activities,” Williams insisted that the original exemption was already consistent with “the spirit of the first amendment,” and that Title VII’s prohibition would not apply in “an area where we have a first amendment situation, where we have religious activities.”⁵⁹ He pointed to the fact that religious corporations often provide “purely secular services” and jobs that are “identical to jobs in comparable secular institutions,” such as hospitals.⁶⁰ Significantly, Williams twice raised the issue of employees working in religiously affiliated social service agencies that serve the public, arguing that the exemption should not apply in those contexts.⁶¹ Unfortunately, Williams’ other remarks were as conclusory as those of Ervin: “[I]t is not clear to me

57. *Id.* at 1982.

58. *Id.* at 4503. Similar statements appear *id.* at 946, 1977, 1980, 1982.

59. *Id.* at 1982.

60. *Id.* at 1992.

61. *Id.* at 1992, 4813. Neither Ervin nor Allen responded to Williams’ concern, referring instead to the need of churches to hire secretaries and janitors of the same faith. *Id.* at 1979, 1982.

that the religious integrity of these institutions would be compromised by equal employment opportunities for employees in positions unrelated to religious activities of such institutions.”⁶² In the end, Williams never forced Ervin to explain the need for a broader exemption.⁶³ One is left with a record that lacks meaningful consideration of the free exercise interests at stake or how the amendment expressly furthered those interests in contexts involving employees not engaged in religious functions.

As mentioned, Ervin’s amendment for a total exemption failed. That result might suggest that a majority of the senators agreed with Senator Williams that there was no need to accommodate religious interests beyond what was contained in the original version of section 702. But the matter did not end there. Three weeks later, Ervin’s fall-back amendment that ultimately became section 702 passed with minimal debate, with Senator Williams again disputing that “the religious integrity of these institutions would be compromised by providing equal job opportunities for employees in positions unrelated to the religious activities of such institutions.”⁶⁴ Whether this means that a Senate majority now disagreed with Williams’ analysis or members were merely worn down by Ervin’s relentless attacks on Title VII such that they were willing to compromise, no one can say.

As a result, the legislative purpose behind section 702 is ambiguous at best.⁶⁵ Congress’ motive in expanding the exemption is obscured by the efforts of Senators Ervin and Allen chiefly to weaken Title VII. Concerns about religious discrimination and accommodation were three steps removed from the heart of the debate which focused on Ervin’s total exemption for private colleges. When those arguments did arise, they were typically in the form of fodder for and against the underlying goal of Ervin’s amendment. Considered in this light, it is most accurate to view the expansion of section 702 as a successful attempt to chip away at the scope and effectiveness of Title VII and the nation’s commitment to eradicating discrimination in the workplace.

62. *Id.* at 1991.

63. Ervin responded by declaring that he was “trying to take the political hands of Caesar off all religious corporations, off all religious associations, and off all religious societies.” *Id.*

64. *Id.* at 4813.

65. Accord Duane E. Okamoto, “*Religious Discrimination and the Title VII Exemption for Religious Organizations*,” 60 S. CAL. L. REV. 1375, 1377 (1987) (observing that the reasons for the 1972 amendment are “not entirely clear”).

This conclusion is understandably unsettling to supporters of section 702. One possible response is that, despite Ervin and Allen's questionable motives, the principles and goals underlying a religious exemption were already in place in the 1964 version, providing the exemption—and any subsequent expansion—with an independent legitimacy on which to build. Under this view, Ervin and Allen merely sought (successfully) to exploit that legitimacy, such that the independent validity of the exemption remains untarnished by the mixed motives of the amendment's sponsors, which cannot be attributed to Congress generally. This approach, however, takes us back to square one, as the 1964 debates contain no information as to the purpose of the exemption that can be grafted onto the 1972 expansion.

Even assuming more was at stake in 1972 than merely gutting Title VII, the bulk of the debate over section 702 took place in the context of Ervin's amendment to exempt religious educational institutions and organizations entirely from Title VII's proscriptions. Ervin's chief concern was to allow southern church-related colleges to continue to discriminate in their employment practices;⁶⁶ expanding section 702 to cover other religious institutions was of secondary concern, and the issue may have been raised as much for its rhetorical effect as out of a commitment to First Amendment principles.⁶⁷ Not surprisingly, considering the paltry debate, Congress did not consider whether the 702 exemption should apply to religious institutions or programs that received government funding. The record, therefore, is a bad indicator of the purposes and goals of the expanded 702 exemption or its application to funded situations.

Constitutional Values

The lack of a clear legislative rationale for the religious exemption to Title VII does not mean that one is unavailing. On the

66. Ervin was apparently motivated in part by his association with Davidson College, a North Carolina college affiliated with the Southern Presbyterian Church, on whose board of trustees Ervin served. Ervin referred to Davidson throughout his remarks. 118 Cong. Rec. at 948.

67. *Accord*, *Amos v. Corp. of the Presiding Bishop*, 594 F. Supp. 791, 807 (D.C. Utah 1984) ("Excerpts from the Congressional Record demonstrate that the proposes [Ervin] amendment was directed at religious educational institutions and not at religious organizations per se."). See also *King's Garden v. F.C.C.*, 498 F.2d 51, 54 (DC Cir. 1974), *cert. denied*, 419 U.S. 996 (1974) ("The sponsors of the 1972 exemption were chiefly concerned to preserve the statutory power of sectarian schools and colleges to discriminate on religious grounds in the hiring of all of their employees.").

contrary, the constitutional values supporting some form of exemption should stand independent of the legislative history. Three interrelated yet distinct constitutional values can be seen as supporting the ability of religious organizations to practice religious discrimination in their employment practices. These I shall define as observance, autonomy, and entanglement. Although all are derived from the First Amendment and are complementary, each serves a unique function.⁶⁸

The rights recognized under the Free Exercise Clause have arisen primarily through two types of cases. The most obvious type of claim involves the ability of individuals to believe and observe their faith as they feel they are called. This interest not only encompasses the ability to worship in private but also to proselytize and order one's life activities according to the dictates of one's faith.⁶⁹ Such cases have rarely involved government regulation of belief or internal worship practices; more frequently, they have involved allegations that an otherwise neutral government action or regulation has substantially burdened an individual's ability to practice or follow his or her sincerely held faith, such as when a compulsory educational attendance law conflicts with the theological beliefs of Amish parents to limit their children's formal education, or when a fair housing ordinance prohibits a landlord from refusing to rent to an unmarried couple because their apparent sexual lifestyle offends the landlord's religious sensibilities.⁷⁰

The notion that the Free Exercise Clause protects against undue government interference with religious observance has been extended to embrace the shared interests of a community of believers. The Court has recognized, and rightly so, that religious belief and observance are often expressed—and for some are only fully realized—in communal forms.⁷¹ In fact, one could argue that the

68. See Douglas Laycock, "Towards a General Theory of the Religion Clauses: The case of Church Labor Relations and the Right to Church Autonomy," 81 COLUM. L. REV. 1373 (1981) (distinguishing between burdens on religious practice and entanglement and church autonomy concerns).

69. *Id.* at 1389; see *Cantwell v. Connecticut*, 310 U.S. 296, 303-04, 307 (1940).

70. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Smith v. Fair Employment and Hous. Comm'n*, 913 P.2d 909 (Cal. 1996).

71. *Watson v. Jones*, 80 U.S. 679, 728-29 (1872) ("The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine . . . is unquestioned."). "The free exercise interest in being free from government intrusions into religious belief encompasses groups as well as individuals, in order to address the fact that much of religious life is inherently associational, interposing the religious community or organization between the state and the individual believer."

religious group or association is central to religious liberty generally.⁷² Consequently, a church may assert a free exercise claim based on government imposed burdens on its ability to form, observe, or disseminate its religious beliefs and to associate with like believers and govern its internal operations, and do so without relying on its members' individual interests.⁷³ Although a church may raise burden claims similar to those raised by an individual believer, the autonomy interest is unique to *bodies* of believers, and represents a separate strain of free exercise jurisprudence that protects the right of churches to organize and manage their institutions free of government interference.⁷⁴ As the Court affirmed in the early 1950s, the free exercise interest guarantees "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, the power to decide for themselves, free from state interference, matters of church governance as well as faith and doctrine."⁷⁵

The final related interest—entanglement—derives from the Establishment Clause and prevents government inhibition of religion by forbidding excessive oversight or surveillance of religious organizations.⁷⁶ Although entanglement is best known from public funding cases, the concern has found expression in other contexts involving government regulation of religious institutions.⁷⁷ Thus in the church polity line of cases, the Court foreswore civil authority over church tribunals not only because it encroaches on religious autonomy, but also because secular authorities will exercise excessive

LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 14-1 (Foundation Press, 1978). See also Frederick M. Gedicks, "Towards a Constitutional Jurisprudence of Group Religious Rights," 1989 WISC. L. REV. 99.

72. See Federalist No. 51 (James Madison) ("In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects."). See Bruce N. Bagni, "Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations," 79 COLUM. L. REV. 1514, 1540 (1979) (noting that the existence of a diverse number of religious groups serves to diffuse religious power).

73. See *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969).

74. See *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 107-08 (1952). See also *E.E.O.C. v. Catholic Univ.*, 83 F.3d 460, 462 (D.C. Cir. 1996) (identifying two strands of free exercise interests).

75. 344 U.S. at 116.

76. See *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

77. See *Tony & Susan Alamo Found. v. Sec' of Labor*, 471 U.S. 290, 305 (1985); *Jones v. Wolf*, 443 U.S. 595, 603 (1979).

oversight of religious matters.⁷⁸ The concern, the Court indicated, is that “the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs.”⁷⁹ Entanglement, therefore, represents the flip side of the autonomy coin, and is as concerned with the process and degree of government involvement in religious matters as it is with the potential consequences of such involvement.⁸⁰

The potentially burdening effect of a regulation prohibiting religious organizations from hiring co-religionists for religious functions is readily apparent. The ability to associate with co-believers by enforcing membership requirements and to restrict leadership to those who share the same beliefs is crucial for a body’s religious identity, expression, and self-survival.⁸¹ The burden on religious observance or practice lessens considerably, however, if an employee subject to the regulation is not engaging in religious activities or functions.⁸² A church janitor, for example, may be able to clean a sanctuary in a respectful manner without adhering to the tenets of that faith, and his handling of sacred relics would not take on the same religious significance as when a priest manipulates the relics during worship. Assuming that the line between religious and non-religious activity can be determined—which, admittedly, may not always be the case—a neutral regulation of the latter will not necessarily inhibit an organization’s ability to define or disseminate its doctrines or beliefs.⁸³ The relevant inquiry is not whether a religious entity is regulated but the impact of that regulation on a church’s ability to exercise its sincerely held beliefs.⁸⁴ Even then, the

78. See *Jones v. Wolf*, 443 U.S. 595, 603 (1979) (insisting that the “neutral principles” approach to reviewing inner-church disputes would “free civil courts completely from entanglement into questions of religious doctrine, polity, and practice.”); see *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976).

79. *Milivojevich*, 426 U.S. at 709.

80. *N.L.R.B. v. Catholic Bishop*, 440 U.S. 490, 502 (1979); *E.E.O.C. v. Pac. Press*, 676 F.2d 1272, 1282 (9th Cir. 1982).

81. *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir. 1985), cert. denied 478 U.S. 1020 (1986); see also *Bagni*, *supra* note 72, at 1540.

82. See *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999) (“[I]n the case of lay employees, the Free Exercise rationales supporting an exception to Title VII are missing.”).

83. *Bagni*, *supra* note 72, at 1544.

84. See *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 303 (1985) (“[T]he Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant’s

task of succeeding on such a claim became noticeably more difficult after the Court's 1990 decision in *Employment Division v. Smith*, which held that burdens arising through a neutral law did not violate the free exercise clause.⁸⁵ The implication from the *Employment Division* holding is that there is no constitutional entitlement to a religious accommodation from a generally neutral law like Title VII.

The more compelling justification for the 702 exception rests on autonomy and entanglement grounds.⁸⁶ The autonomy and entanglement interests serve to ensure that public officials do not intrude into decisions that arguably involve matters of church governance, faith, or doctrine, or make determinations whether religious beliefs are legitimate or asserted in good faith.⁸⁷ Employment decisions concerning employees engaged in religious functions are likely to turn on theological or doctrinal issues: does the ministerial candidate truly believe in the inerrancy of scripture; how closely does a priest agree with the Catholic Church's teachings on euthanasia; why the choir director prefers old-time gospel music over that by Monteverdi.⁸⁸ Interference with a religious body's ability to chose its own leaders or representatives affects the very ability of the body to organize and govern its operations, determine and disseminate its doctrine, and to carry out its religious mission.⁸⁹ Similarly, government scrutiny of church employment decisions might involve evaluations of motives of church administrators that are based on religious rationales.⁹⁰ The potential for intrusive review or ongoing supervision of religious decision-making is what triggers the entanglement concern.⁹¹

freedom to exercise religious rights."); see also *E.E.O.C. v. Miss. Coll.*, 626 F.2d 477, 488 (5th Cir. 1980).

85. 494 U.S. 872 (1990). See Mutterperl, *supra* note 34, at 413-15.

86. See *E.E.O.C. v. Catholic Univ.*, 83 F.3d 460, 462 (D.C. Cir. 1996) (distinguishing strands of free exercise interests and holding that the autonomy strand survived *Employment Division*); see also, *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1229, 1302-04 (11th Cir. 2000); *Combs v. Central Texas Ann. Conf. of United Methodist Church*, 173 F.3d 343, 349 (5th Cir. 1999).

87. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-14 (1976); *Kedroff*, 344 U.S. at 116; Laycock, *supra* note 68, at 1394-98.

88. See *Catholic Univ.*, 83 F.3d at 464 (holding that theology professor's position involved matters of church doctrine); *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999) (church choir director's duties involved selection of religious music).

89. *Kedroff*, 344 U.S. at 116; *Milivojevich*, 426 U.S. at 714; *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929). See also Laycock, *supra* note 68, at 1397-1402.

90. See *Catholic Bishop*, 440 U.S. at 502.

91. See *Hernandez*, 490 U.S. at 694 (opining that "pervasive monitoring for subtle or

Where the employee is engaged in arguably secular functions, however, autonomy and entanglement concerns lessen considerably, as regulation of such positions is less likely to intrude upon matters of church governance, faith, or doctrine.⁹² Also, more recent Court holdings indicate that ongoing oversight raises fewer entanglement concerns where the relationship is not religious in nature or, again, the regulated activities are secular.⁹³

Church autonomy interests are also stronger when the issues involve internal expressions of the church's operations: the determination of tenets, doctrine, and liturgy; the conducting of worship, catechism, and religious instruction; the selection of clergy and determining membership requirements.⁹⁴ Such spiritual activities and relationships represent integral facets of religious practice and can "be thought of as compromising the core or heart of a church."⁹⁵ Characteristic of such internal relationships and activities is that they often take place in private and almost always involve persons who have voluntarily assented to the religious activity, often as members.⁹⁶ In these contexts, the autonomy and entanglement concerns become paramount against the interest in government regulation.

Radiating out from such core activities and relationships, however, are layers of activities and relationships that are less inwardly directed, have more indicia of secularity, and frequently involve individuals who have not voluntarily assented to the spiritual authority of the church: church-run soup kitchens and food pantries serving local poor and homeless; interactions with vendors who supply both religious and nonreligious commodities; contracts with repairmen who make improvements on church structures.⁹⁷

overt presence of religious matter is a central danger against which we have declared the Establishment Clause guards against") (internal quotations omitted); *accord*, Pac. Press 676 F.2d at 1282.

92. *Tony & Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290, 302-03 (1985); *accord Hernandez*, 490 U.S. at 696-97 ("[R]outine regulatory interaction which involves no inquiries into religious doctrine . . . no delegation of state power to a religious body . . . and no detailed monitoring and close administrative contact between secular and religious bodies . . . does not of itself violated the nonentanglement command.") (citations and internal quotations omitted).

93. *See Agostini*, 521 U.S. at 232-33; *Bowen v. Kendrick*, 487 U.S. 589, 616 (1988).

94. *See Laycock*, *supra* note 68, at 1403; *Bagni*, *supra* note 72, at 1539; Shelley K. Wessels, "The Collision of Religious Exercise and Governmental Nondiscrimination Policies," 41 STAN. L. REV. 1201, 1219-20 (1989).

95. *Bagni*, *supra* note 72, at 1539.

96. *Laycock*, *supra* note 68, at 1405-06.

97. *See Bagni*, *supra* note 68, at 1539-49 (Discussing a model of concentric circles

Government regulation of such outward relationships, while indirectly impacting a church's operations, has less effect on its spiritual character.

To be sure, many activities that are public and outwardly directed may be central to the core religious functions of a church. Proselytizing or sharing of one's faith necessarily involves public contact with non-members,⁹⁸ and many outward functions of churches are integral to their defining religious mission: the operation of parochial schools, hospitals, orphanages and other charitable endeavors.⁹⁹ Churches commonly regard the provision of social services "as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster."¹⁰⁰ That is why some scholars have suggested that the level of spiritual intensity associated with the activity or relationship is also a crucial factor.¹⁰¹ Few would dispute that Mother Theresa's ministry to the poor of Calcutta was spiritually directed even though it took place in the streets.

At the same time, however, church officials realize that the more outwardly directed their activities, the more they must follow general rules and regulations imposed by civil authorities.¹⁰² Church busses that pick up children for Sunday School must observe the speed limits, even if that interferes with getting to services on time. So too, fire, building and health requirements, though ultimately affecting a church's operations, interfere less with the ability to define and express its religious identity than regulation of whom a church may select as its clergy. Thus, even though a church operated business may provide an environment for the spiritual growth of its employees and the income derived from the business may finance the church's spiritual ministries, involvement in the commercial market will expectantly involve greater governmental regulation of employment relationships, particularly where the church business competes with

representing various levels of religiosity and externality).

98. See *Murdock v. Pennsylvania*, 319 U.S. 105, 108-10 (1943).

99. *Lemon*, 403 U.S. at 413 (parochial school); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 362 (8th Cir. 1991) (hospital); *E.E.O.C. v. Presbyterian Ministries*, 708 F. Supp. 1154, 1156 (W.D. Wa. 1992) (retirement home).

100. *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 344 (1987) (Brennan, J., concurring).

101. Laycock, *supra* note 68, at 1409-10.

102. *Tony & Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290, 305 (1985); *Lemon*, 403 U.S. at 614.

secular counterparts.¹⁰³

As a result, autonomy and entanglement concerns diminish the more that an employment relationship involves duties that do not involve core religious functions, are less spiritually intense, and are directed outward into the profane world. The more that a particular position is removed from sacramental, pastoral or ecclesiastical duties and is engaged primarily with nonmembers in public contexts, the lesser chance that a regulation of that employment relationship will interfere with church autonomy interests or entangle government in religious controversies. Quite simply, it paints with too broad a brush to claim that all church employment relationships and duties trigger the same free exercise interests merely because they all involve matters of church administration or decision-making.

In fact, in the same church polity cases where the Court identified the autonomy interest, it commonly emphasized that the issues involved "purely ecclesiastical matters,"¹⁰⁴ or matters that were "strictly and purely ecclesiastical,"¹⁰⁵ suggesting a recognition that the autonomy interest is strongest when the proposed regulation concerns internal matters. This interpretation is also consistent with Title VII itself, which permits discrimination on the basis of religion but prohibits religious organizations discrimination on the basis of race, national origin, or sex.¹⁰⁶ Implicit in Title VII is the assumption that discrimination on the basis of race, sex or national origin would normally occur in nonspiritual contexts and involve more outward operations of religious organizations. And as discussed in the next section, courts have universally held that adhering to such regulation does not implicate exercise, autonomy or entanglement concerns.¹⁰⁷ Accordingly, Title VII recognizes a scale of relationships and intrusions, not all of which implicate free exercise values.

103. See *Alamo Found.*, 471 U.S. at 299.

104. *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 447 (1969).

105. *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 714 (1976).

106. See *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972); *Rayburn v. Gen. Conference of Seventh Day Adventists*, 772 F.2d 1164 1166 (4th Cir. 1985); *E.E.O.C. v. Pac. Press Pub. Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982). See also Section-by-Section Analysis to the Conference Report on H.R. 1746, "The Equal Employment Opportunity Act of 1972," in *THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972* (1973) at 128 ("[Religious corporations, associations, educational institutions and societies] remain subject to the provisions of Title VII with regard to race, color, sex, or national origin.").

107. See discussion *infra* at note 111.

The Legal Interpretation of Section 702

The absence of a clear legislative rationale for the 702 exemption has not deterred litigation on the scope of Title VII and section 702, which has been, in a word, robust. This should not be surprising considering that religious corporations and associations own and operate a kaleidoscope of for-profit and non-profit businesses and institutions, including major hospital centers, nursing and retirement homes, religious colleges and parochial schools, television and radio stations, publishing houses, hotels, and companies engaged in clothing production and food preparation.¹⁰⁸ Accurate figures for the number of employees of church-related enterprises are hard to come by, but estimates safely run in the millions. Like any employer, a religious business may face charges that its employment practices are unfair and discriminatory. Unlike other employers, religious organizations have been able to fall back on the protections provided under Title VII, and through the crucible of litigation have sought to direct judicial construction of the exemption.

Several interpretations of Title VII and section 702 are pertinent here. First, courts have universally rejected arguments based on statutory construction and the First Amendment that Title VII does not apply to religious institutions. In one early case, *McClure v. Salvation Army*, the Fifth Circuit held that the Salvation Army was an "employer" and an "industry affecting commerce" as defined under the Act, despite also finding that the Army was a church.¹⁰⁹ The court relied on clear intent by Congress to include religious organizations under the Act except as provided in the exemption.¹¹⁰ In line with this construction, courts have held that religious organizations remain subject to the other prohibitions on employment discrimination based

108. See *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330 (1987) (sports recreation center, clothing and food production); *Tony & Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290 292 (1985) (service stations, retail clothing, grocery stores, construction companies, motel, candy production and distribution); *N.L.R.B. v. Catholic Bishop*, 740 U.S. 490 (1979) (parochial schools); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991) (hospitals); *Tressler Lutheran Home*, 677 F.2d 302 (3rd Cir. 1982) (nursing homes); *E.E.O.C. v. Presbyterian Ministries*, 708 F. Supp. 1154 (W.D. Wa. 1992) (retirement homes); *Pac. Press*, 672 F.2d at 302 (publishing company); *King's Garden v. F.C.C.*, 498 F.2d 51, 52 (D.C. Cir. 1974) (radio station); *Feldstein v. The Christian Science Monitor*, 555 F. Supp. 974 (D. Mass. 1983) (newspaper).

109. *McClure*, 460 F.2d at 556-57 ("Organizations affecting commerce may not escape the coverage of social legislation by showing that they were created for fraternal or religious purposes.").

110. *Id.* at 558.

on race, color, sex and national origin.¹¹¹ Similarly, courts have uniformly turned away claims that the mere application of Title VII to religious institutions violates the Free Exercise and Establishment clauses. Even “wholly sectarian” institutions such as seminaries and church associations have lost such constitutional claims.¹¹² In most instances, courts have held that complying with Title VII and the accompanying reporting and enforcement powers of the EEOC place minimal burdens on the operations and functions of religious institutions and, even then, the government’s interest in eradicating discrimination is of the “highest order.”¹¹³ The relevant inquiry, according to one court, is not the impact of Title VII on the religious institution, but “the impact of the statute upon the institution’s exercise of its sincerely held religious beliefs.”¹¹⁴ Courts have also held that submission to EEOC jurisdiction and compliance with reporting requirements results in minimal government entanglement with religious matters.¹¹⁵

Religious organizations have not been on the losing end of all Title VII controversies. On the contrary, in several areas courts have interpreted Title VII permissibly in ways that have benefitted religious entities at the expense of claimants. First, even prior to the 1972 amendment, courts began to read a constitutionally compelled “ministerial exception” into Title VII that allows religious institutions to discriminate *on any basis*—race, gender, national origin—for employment decisions involving clergy.¹¹⁶ The exception, first

111. See *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 173 (2d Cir. 1993) (“[T]he legislative history of Title VII makes clear that Congress formulated the limited exemptions for religious institutions to discriminate based on religion with the understanding that provisions relating to nonreligious discrimination would apply to such institutions.”). See also *Boyd v. Harding Academy*, 88 F.3d 410, 413 (6th Cir. 1996); *Rayburn*, 772 F.2d at 1166; *Pac. Press*, 676 F.2d at 1276; *E.E.O.C. v. Miss. Coll.*, 626 F.2d 477, 484 (5th Cir. 1980); *McClure*, 460 F.2d at 558.

112. See *E.E.O.C. v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 281, 286-87 (5th Cir. 1981); *Rayburn*, 772 F.2d at 1167. *Accord Miss. Coll.*, 626 F.2d at 488 (Title VII applies even though college is pervasively sectarian).

113. *Rayburn*, 772 F.2d at 1169; *accord Pac. Press*, 676 F.2d at 1280 (“the elimination of all forms of discrimination [is] a ‘high priority.’”).

114. *Miss. Coll.*, 626 F.2d at 488.

115. *Pac. Press*, 676 F.2d at 1282; *Miss. Coll.*, 626 F.2d at 487-88.

116. See *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299 (11th Cir. 2000) (barring retaliation claim by clergy); *Combs v. Central Texas Ann. Conf. United Methodist Church*, 173 F.3d 343 (5th Cir. 1999) (barring sex discrimination claim of female clergy applicant); *E.E.O.C. v. Catholic Univ.*, 83 F.3d 455 (D.C. Cir. 1996) (barring sex discrimination claim of theology professor); *Young v. Northern Ill. Conf. of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994) (barring sex and race discrimination claim

recognized by the Fifth Circuit in *McClure*¹¹⁷ and later adopted by most of the circuits,¹¹⁸ removes entirely all aspects of the employment relationship between a church and its clergy from Title VII scrutiny.¹¹⁹ Recognizing that the church-pastor relationship lies at the core of religious autonomy concerns,¹²⁰ courts have disabled themselves from hearing discrimination claims brought by clergy, even when those claims allege the employment action was racially or gender motivated.¹²¹ As one court has stated, “[a] church’s selection of its own clergy is one such core matter of ecclesiastical self-governance with which the state may not constitutionally interfere.”¹²² In practice, this blanket exception relieves religious employers from having to articulate a religious reason for their action—or any reason for that matter. Courts have ruled that the free exercise interest at stake “protects the act of a decision, rather than the motivation behind it.”¹²³ Thus, pursuant to this exception recognized by a majority of the judicial circuits, religious organizations may engage in any form of employment discrimination involving its clergy without having to justify their actions in religious terms.¹²⁴

of female pastoral applicant); *Rayburn*, 772 F.2d at 1170-71 (same).

117. *McClure*, 460 F.2d at 560.

118. See cases cited *supra* note 116. See also *Bollard*, 196 F.3d at 949 (9th Cir.); *Sharon*, 929 F.2d 360 (8th Cir.); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989).

119. *Bollard*, 196 F.3d at 945; *Rayburn*, 772 F.2d at 1169.

120. *Bollard*, 196 F.3d at 949 (“The determination of whose voice speaks for the church is *per se* a religious matter We cannot imagine an area of inquiry less suited to a temporal court for decision.”) (internal quotation marks omitted).

121. See *Young*, 21 F.3d at 186 (barring action alleging sex and race discrimination); *Rayburn*, 772 F.2d at 1165 (same).

122. *Bollard*, 196 F.3d at 946 (“A church must retain unfettered freedom in its choice of ministers because ministers represent the church to the people Indeed, the ministerial relationship lies so close to the heart of the church that it would offend the Free Exercise Clause simply to require the church to articulate a religious justification for its personnel decisions.”); accord *Rayburn*, 772 F.2d at 1168 (“Any attempt by government to restrict a church’s free choice of its leaders thus constitutes a burden on the church’s free exercise rights.”)

123. See *Young*, 21 F.3d at 186 (“In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal decisions.”); accord *Rayburn*, 772 F.2d at 1169. According to one commentator, the ministerial exemption “is not an absolute constitutional entitlement; it derives from a tenuous combination of the employers’ free exercise right to noninterference in matters of internal governance (a right [*Employment Division v. Smith* affirmed), and their First Amendment right to expressive association.” Mutterperl, *supra* note 34, at 416.

124. Cf. *Bollard*, 196 F.3d at 947-48 (where the court refused to extend protection under the exemption against a claim of sexual harassment).

Despite some rhetoric to the contrary,¹²⁵ courts generally have read the ministerial exception broadly, deferring to the church's definition of a ministerial role. Ordination or seminary education is not determinative.¹²⁶ As one court stated:

[t]he ministerial exception has not been limited to members of the clergy. It has also been applied to lay employees of religious institutions whose 'primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship' . . . If their positions are 'important to the spiritual and pastoral mission of the church,' they should be considered 'clergy.'¹²⁷

On the one hand, the Free Exercise and Equal Protection clauses likely mandate an expanded interpretation of 'clergy;' otherwise, the availability of the exception would turn on whether a church's tenets require a professional clergy, thus disadvantaging those faiths without a clergy class or with a strong tradition of 'priesthood of the believer.' On the other hand, the exclusion of a large class of lay employees from Title VII's coverage—including its prohibitions on racial, gender, and ancestry discrimination—would undermine the effectiveness of Title VII.¹²⁸ Under this permissive view of clergy, the exception has been successfully applied to not only senior pastors but also associate ministers,¹²⁹ church choir directors,¹³⁰ hospital chaplains,¹³¹ members of religious orders,¹³² and theology professors

125. See *E.E.O.C. v. S.W. Baptist Theological Seminary*, 651 F.2d 277, 285 (5th Cir. 1981) (concluding that staff positions at seminary were not covered by the ministerial exception: "When churches expand their operations beyond the traditional functions essential to the propagation of their doctrine, those employed to perform tasks which are not traditionally ecclesiastical or religious are not 'ministers' of a 'church' entitled to McClure-type protection."); accord, *E.E.O.C. v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980) (rejecting claim that non-theological faculty at church-related college are entitled to ministerial exception: "That 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 purely of ecclesiastical concern.").

126. *Rayburn*, 772 F.2d at 1168 (noting that the ministerial exception "does not depend upon ordination but upon the function of the position.").

127. *E.E.O.C. v. Catholic Univ.*, 83 F.3d 454, 461 (D.C. Cir. 1996).

128. See *Southwestern Baptist*, 651 F.2d at 287.

129. *Rayburn*, 772 F.2d at 1165.

130. *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999); *Miller v. Bay View United Methodist Church*, 141 F. Supp. 2d 1174 (E.D. Wis. 2001).

131. *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991).

132. *Catholic Univ.*, 83 F.3d at 455.

and seminary administrators,¹³³ thus blocking any consideration of allegations that the employment actions were based on race, gender, ancestry, age or disability.¹³⁴

As is evident from this listing, the ministerial exception has not only been extended vertically but also horizontally. Although commonly thought of as applying to pastors in churches or houses of worship, the ministerial exception is available to all religious organizations that qualify for the religious exemptions under Title VII (see discussion below). Courts have held that the exception applies to clergy employed in non-church contexts such as religiously affiliated hospitals and non-profit organizations.¹³⁵

As with the definition of clergy, judicial interpretation of section 702 has expanded the scope of eligible exemptees. Other than defining 'religion' for the purposes of religious accommodation,¹³⁶ Title VII does not state what type of institution qualifies as a religious organization entitled to the exemption.¹³⁷ Although courts have imposed some limits on the types of organizations that are entitled to the exemption,¹³⁸ the trend has been to extend coverage beyond the paradigm of churches, mosques, synagogues, and other houses of worship and religious seminaries to include agencies and entities that have ties to religious bodies and denominations.¹³⁹ Whether a religiously affiliated institution is entitled to the exemption depends upon "[a]ll significant religious and secular characteristics" of the entity, with the ultimate inquiry being whether the entity's purpose

133. *Id.*; *Southwestern Baptist*, 651 F.2d 277.

134. *See Natal v. Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989); *E.E.O.C. v. Southwestern Baptist*, 651 F.2d 277, 283 ('ministers' may include non-ordained faculty).

135. *See Scharon*, 929 F.2d 360 (barring Title VII and ADEA claims by chaplain against church-affiliated hospitals); *Natal*, 878 F.2d 1575 (barring clergy claim against non-profit religious corporation).

136. *See* 42 U.S.C. § 2000e(j).

137. With respect to educational institutions, 42 U.S.C.S. § 2000e-2(e) (2003) defines eligible institutions as a "school, college, or other educational institution or institution of learning [that] 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, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion."

138. *E.E.O.C. v. Kamehameha Schs.*, 990 F.2d 458 (9th Cir. 1993); *United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990); *E.E.O.C. v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988); *Fike v. United Methodist Children's Home*, 547 F. Supp. 286 (E.D. Va. 1982), *aff'd on other grounds*, 709 F.2d 284 (4th Cir. 1983).

139. *Townley Eng'g*, 859 F.2d at 618.

and character are “primarily religious.”¹⁴⁰

Absent a few notable cases,¹⁴¹ most religiously affiliated entities have not had a difficult time meeting this standard. Thus courts have upheld extending section 702 to hospitals, nursing homes, retirement homes, publishing companies, newspapers, and colleges that have historic or financial ties to religious bodies or denominations.¹⁴² What is significant in this interpretation is that an institution need not be “pervasively sectarian” in order to qualify for the exemption;¹⁴³ neither have all courts required that the primary functions of the covered institutions—as distinguished from their purpose or character—be religious in order to qualify for the exemption. Liberal arts colleges and professional schools with little more than historic ties to church bodies have satisfied the test.¹⁴⁴ As one court declared, “[i]n order to constitute a ‘religious corporation’ or an ‘educational institution,’ as those terms are used in the Title VII exemption, it is not necessary that a narrow spectrum of Christian or of Baptist doctrine be espoused.”¹⁴⁵

Religious organizations have benefitted from other favorable interpretations of Title VII and the 702 exemption. At least one circuit has attempted to graft the ministerial “no explanation” rule onto employment claims raised by non-clergy. In *EEOC v. Mississippi College*, the Fifth Circuit, while determining that regular faculty of a church-related college did not qualify for the ministerial exception, held that a religious institution should be excused from responding to claims of race and sex discrimination if the institution presents “convincing evidence” that the challenged employment practice resulted from discrimination based on religion.¹⁴⁶ In essence,

140. *Id.*; accord *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624-25 (6th Cir. 2000); *Kamehameha Schs.*, 990 F.2d at 460.

141. Notable exceptions include *Kamehameha Schs.*, where the Ninth Circuit found that a private school operating within the historic tradition of Protestantism was essentially a secular institution, 990 F.2d at 463-64; and *Fike*, where the district court found that a children's home operated under the auspices of the United Methodist Church was a secular institution, 547 F. Supp. at 289-90.

142. See sources cited *infra* note 168.

143. *Killinger v. Samford Univ.*, 113 F.3d 196, 198-99 (11th Cir. 1997); accord *Hall*, 215 F.3d at 624-25 (Baptist affiliated medical school entitled to exemption); *Siegel v. Truett-McConnell Coll.*, 13 F. Supp. 2d 1335 (N.D. Ga. 1994) (church-related liberal arts college entitled to exemption).

144. See sources cited *supra* note 143.

145. *Killinger v. Samford Univ.*, 917 F. Supp. 773, 776 (N.D. Ala. 1996), *aff'd*, 113 F.3d 196 (11th Cir. 1997).

146. *E.E.O.C. v. Miss. Coll.*, 626 F.2d at 477, 485 (5th Cir. 1990) (“[I]f a religious

the Fifth Circuit seemed to say that religious discrimination that manifests itself as racial and gender discrimination would fall under the 702 exemption, which would relieve the religious institution from even responding to the non-religious claims. Apparently, no other circuit has interpreted the exemption so broadly, with the Fourth and Ninth circuits rejecting arguments that a religious organization's religious justification for a gender-based decision bars consideration of the non-religious claim.¹⁴⁷

This difference in approach has been less significant than might appear at first blush. Despite Congress' clear intention that religious organizations remain subject to Title VII's prohibitions on racial, gender and national discrimination, courts have permitted religious organizations to engage in effectively the same conduct under the aegis of permissible religious discrimination. The language of section 702 exempts religious organizations from the law's prohibitions "with respect to the employment of individuals of a particular religion."¹⁴⁸ Though not evident from the language, courts have interpreted this provision to apply not only to actions taken on the basis of an employee's religious affiliation or belief, but also to those decisions based on employee conduct that is inconsistent with the tenets and teachings of the religious institution. Stated differently, courts have held that it is a protected form of discrimination for a religious organization to dismiss an employee of the same (or different) faith if her lifestyle, sexual orientation or sexual practices (even when engaged in outside of the work place) are inconsistent with church doctrine.¹⁴⁹ In many instances, this has blurred the line between religious and nonreligious forms of discrimination. The following cases illustrate the point.

The vast majority of cases under the "tenets and teachings" approach have involved sex discrimination claims brought by women employees who were dismissed after their religious employer discovered they were pregnant outside of marriage. In *Boyd v. Harding Academy of Memphis*, the Sixth Circuit upheld the right of a

institution of the kind described in § 702 presents convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion, § 702 deprives the E.E.O.C. of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination.").

147. See *Rayburn v. Gen. Conference of Seventh Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985); *E.E.O.C. v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1277, 1280 (9th Cir. 1982).

148. 42 U.S.C. § 2000e-1(a) (2003).

149. See cases discussed *infra* notes 150-156.

religiously affiliated preschool to dismiss a pregnant teacher on the grounds she had violated its prohibition against premarital sex.¹⁵⁰ This was despite the teacher having otherwise satisfied the school's requirement of being an evangelical Christian.¹⁵¹ Other courts have similarly ruled that section 702 permits a religious employer "to employ only persons whose beliefs *and conduct* are consistent with the employer's religious precepts,"¹⁵² effectively barring consideration of many sex or pregnancy discrimination claims.¹⁵³

Similarly, in *Hall v. Baptist Memorial Healthcare Corporation*, the Sixth Circuit held that a religiously-affiliated nursing college's dismissal of employee based on her admission of lesbianism and her ordination in non-denominational gay church was permissible religious discrimination.¹⁵⁴ The college justified its action on the ground that the claimant's leadership position in a pro-gay organization clashed with the Southern Baptist Convention's "outspoken denunciation of homosexuality."¹⁵⁵ Agreeing with the college, the court held that the ability to employ "individuals of a particular religion" under section 702 includes decisions to terminate an employee "whose conduct or religious beliefs are inconsistent with those of its employer."¹⁵⁶

Also, the mere fact that a religious institution has previously declined to base its employment decisions on religious grounds does not constitute a waiver of its Title VII right. On the contrary, courts have held that the 702 exemption "cannot be waived" even when the institution has otherwise held itself out as an equal opportunity employer.¹⁵⁷ Thus a religious organization may fall back on its ability to discriminate on religious grounds at any time and, provided that justification is plausible, the organization may be protected from claims of pretext or selective application.

150. 88 F.3d 410 (6th Cir. 1996).

151. *Id.* at 411.

152. *Little v. Wuerl*, 929 F.2d 944, 951 (3rd Cir. 1991) (emphasis added).

153. *Cline v. Catholic Diocese of Toledo* 206 F.3d 651 (6th Cir. 2000); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340 (E.D.N.Y. 1998); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802 (N.D. Cal. 1992); *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266 (N.D. Iowa 1980).

154. 215 F.3d 618, 627 (6th Cir. 2000).

155. *Id.* at 627. Interestingly, the college declined to justify its dismissal on the ground that Hall—who was initially Presbyterian—was of a different faith. *Id.*

156. *Id.* at 624; *Pedreira v. Ky. Baptist Homes for Children*, 186 F. Supp. 2d 757 (W.D. Ky. 2001).

157. *Hall*, 215 F.3d at 625; *Little*, 929 F.3d at 951.

Only a handful of decisions have involved situations where a religious organization that qualified under section 702 also received some type of public financial support.¹⁵⁸ Absent one notable exception discussed below,¹⁵⁹ in no instance did the government aid directly fund the position in question; rather, the aid was typically in the form of grants to individuals who accessed services at the religious provider or paid for identifiably secular items.¹⁶⁰ As a result, courts have generally held that section 702 is not waived merely because the institution in question—most commonly, religiously affiliated hospitals and colleges—also receives some public funding.¹⁶¹ On its own, this holding is unremarkable, considering that religiously-affiliated hospitals commonly receive Hill-Burton construction grants and Medicare and Medicaid payments and many church-related colleges such as Notre Dame, Georgetown and Southern Methodist University receive government research and student grant monies while maintaining seminaries and religious studies departments.¹⁶² No doubt, all of the colleges involved in the Court's college funding decisions of the 1970s qualified for an exemption under sections 702 or 703.¹⁶³ However, the aid in those cases was restricted to secular uses, and the Court took pains to note that none of the institutions imposed religious requirements on faculty hiring, except for theological faculty and college chaplains who did not benefit from the aid.¹⁶⁴ As a result, the fact that a religious organization receives some form of public aid does not, on its own, disqualify it from accessing the protections of section 702. Conversely, the fact that a handful of section 702 cases have involved religious institutions that received public support does not answer the question of the permissibility of relying on section 702 for employment actions involving publicly funded employees.

How do these rulings impact FBOs participating in funded Charitable Choice programs? First, it is clear churches and

158. *Hall*, 215 F.3d at 625 (hospital grants); *Seigel v. McConnell Coll.*, 13 F. Supp. 2d 1335, 1344 (N.D. Ga. 1994) (Pell Grants); *Young v. Shawnee Mission Med. Ctr.*, No. 88-2321-S, 1988 U.S. Dist. Lexis 12248 (D. Kan. Oct. 21, 1988) (Medicare payments).

159. *See Dodge v. Salvation Army*, No. S88-0353, 1989 WL 53857 (S.D. Miss. Jan. 9, 1989).

160. *See* sources cited *supra* note 158.

161. *Hall*, 215 F.3d at 625; *Seigel*, 13 F. Supp. 2d at 1344.

162. *Hall*, 215 F.3d at 625 (hospital grants); *Seigel*, 13 F. Supp. 2d at 1344.

163. *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

164. *See Roemer*, 426 U.S. at 755, 757; *Hunt*, 413 U.S. at 743; *Tilton*, 403 U.S. at 686.

religiously-affiliated organizations will retain their section 702 eligibility for social service programming, provided that the FBO meets the initial requirement that its purpose and character are "primarily religious."¹⁶⁵ While a handful of cases have disqualified religious social service providers from relying on section 702, those holdings were anomalous and turned on facts particular to those cases.¹⁶⁶ The Church's involvement in charitable work is too longstanding and well documented for courts to question its religious foundations.¹⁶⁷ Second, it appears that an FBO does not waive its status under section 702 merely because it receives some form of public assistance. Religiously affiliated hospitals, colleges, parochial schools, nursing and children's homes, and charitable organizations can and do receive myriad forms of public financial and in-kind aid, provided the aid does not pay for religious activity, while remaining eligible under section 702.¹⁶⁸ General eligibility, however, begs the question of whether section 702 can be constitutionally applied to a position receiving government funding.

The final question about how the interpretations of section 702 apply to Charitable Choice concerns the 'ministerial exception.' As noted, courts generally have interpreted the ministerial exception broadly to include non-ordained employees whose duties are "important to the spiritual and pastoral mission of the church."¹⁶⁹ Arguably, this could encompass not only part-time associate ministers who are assigned to run a government funded program but also counselors and case-workers who perform many of the direct services. Supporters of Charitable Choice insist that the success of a faith-infused approach to social services turns on the ability of FBOs to employ people of like faith and character.¹⁷⁰ The question then

165. *Hall*, 215 F.3d at 624; *E.E.O.C. v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988).

166. *See Fike v. United Methodist Children's Home*, 547 F. Supp. 286, 289-90 (E.D. Va. 1982).

167. *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 344 (1987) (Brennan, J., concurring).

168. *Agostini v. Felton*, 521 U.S. 203 (1997) (parochial schools); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (religious charities); *Tilton*, 403 U.S. 672, (church-related colleges); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (religiously affiliated hospital).

169. *E.E.O.C. v. Catholic Univ.*, 83 F.3d 454, 461 (D.C. Cir. 1996) (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)).

170. *See STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY* 126 (1996) ("If the teachers or other staff of a nonprofit agency cannot be hired on the basis of their faith commitments, the religious character of that nonprofit would be destroyed.").

becomes whether an FBO could consider all of its employees to be “ministers” and thus not only discriminate on the basis of religion in its employment decisions but on the basis of race, national origin and gender as well. At least one Charitable Choice proponent argues that courts should treat social service workers in FBOs as the equivalent of clergy because they too interpret doctrine and represent the mission of the organization.¹⁷¹ The implications of applying current interpretations of section 702 and the ministerial exception to Charitable Choice programs are therefore quite significant.

The Constitutionality of Section 702

The expansive interpretations of section 702, while based in part on judicial assumptions of congressional goals in enacting the exemption, rely on a presumption of the exemption’s constitutionality. As discussed, federal circuits have generally agreed, although this has not been confirmed by the Supreme Court, that the ministerial exception is mandated by three interrelated constitutional interests: that government regulation of such “prime ecclesiastical” matters as selecting one’s clergy would burden religious practice and inhibit religious autonomy interests, both of which are protected by the Free Exercise Clause, and result in excessive government oversight of and entanglement in religious matters.¹⁷² Outside of this narrow area governing the employment relationships between churches and their clergy, the religious practice, autonomy and entanglement interests in allowing religious organizations to discriminate on religious grounds lessen considerably.¹⁷³

So long as section 702 was limited to employment decisions involving employees engaged in religious functions, few questioned the nexus between the exemption and the constitutional interests at stake. With the 1972 expansion of section 702, however, some observers claimed that allowing religious organizations to discriminate on religious grounds with respect to employees engaged in secular activities was not only not required under the Free Exercise Clause but also that it advantaged religion in a way that violated the

171. See GLENN, *AMBIGUOUS EMBRACE*, 197-98 (2000).

172. *McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972); see also *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 945-46 (9th Cir. 1999); *Catholic Univ.*, 83 F.3d at 461; *Rayburn*, 772 F.2d at 1167-69.

173. See *Bollard*, 196 F.3d at 947 (“[I]n the case of lay employees, the Free Exercise rationales supporting an exception to Title VII are missing.”).

Establishment Clause.¹⁷⁴

The first case to consider the constitutionality of the 1972 amendment to section 702 was *King's Garden v. FCC*, which involved an action by the Federal Communications Commission, pursuant to the Communications Act, to prevent a religious radio station from engaging in religious employment discrimination.¹⁷⁵ The radio station defended its employment practices by relying on the section 702 exemption. Although ultimately holding that section 702 did not override the Communications Act,¹⁷⁶ the D.C. Circuit disputed the constitutionality of the 1972 amendment.¹⁷⁷ Judge Skelly Wright acknowledged that the original exemption "was itself required by the First Amendment," but declared that the expanded exemption permitting religious discrimination against employees engaged in secular functions lacked a similar constitutional anchor.¹⁷⁸ On the contrary, the exemption provided religious employers with a distinct advantage over their secular counterparts. The exemption violated the Establishment Clause by:

invit[ing] 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 In creating this gross distinction between the rules facing religious and non-religious entrepreneurs, Congress placed itself on [a] collision course with the Establishment Clause.¹⁷⁹

Nine years later a second federal court also expressed "grave doubts" about the constitutionality of section 702, with the court stating that the exemption gave preferential treatment for the secular functions of religious enterprises over those of their secular counterparts.¹⁸⁰ As in *King's Garden*, however, the court was able to

174. See Bruce N. Bagni, "Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations," 79 COLUM. L. REV. 1514, 1548 (1979) ("[The] exemption runs afoul of the establishment clause, because it singles out religious organizations for preferential treatment and thus confers a benefit or withholds a burden on the basis of a purely religious classification.").

175. *King's Garden v. F.C.C.*, 498 F.2d 51, 52 (D.C. Cir. 1974).

176. *Id.* at 58 ("It does not necessarily follow that Congress intended to abrogate the F.C.C.'s own anti-bias rules [in enacting section 702].").

177. *Id.* at 53 ("The 1972 exemption is of very doubtful constitutionality.").

178. *Id.* at 56 ("[T]he 1972 exemption now shelters myriad 'activities' which have not the slightest claim to protection under the Free Exercise, Free Speech, or Free Press guarantees.").

179. *Id.* at 55.

180. *Feldstein v. The Christian Science Monitor*, 555 F. Supp. 974, 978 (D. Mass. 1983). As in *King's Garden*, the district court held that the resolution of section 702's constitutionality was ultimately unnecessary.

resolve the case without holding section 702 unconstitutional.

The constitutionality of section 702 was squarely put at issue in *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*.¹⁸¹ There, five employees of businesses owned or operated by the Church of Jesus Christ of Latter-day Saints (the "Mormon Church" or "Church") sued the Church for employment discrimination after they were fired from their jobs for failing to satisfy the Church's worthiness requirement of a temple recommend.¹⁸² All of the plaintiffs claimed they had performed non-religious functions in businesses that were only remotely connected to the religious ministry or mission of the Mormon Church, and that to exempt the Church's actions from Title VII's nondiscrimination provisions violated the Establishment Clause.¹⁸³ The district court found that one of the businesses, the Deseret Gymnasium, was not involved in the "spread[ing] or teach[ing] [of] the religious beliefs and doctrine and practices of sacred ritual of the Mormon Church," nor were the fired employee's duties as building engineer "even tangentially related to any conceivable religious belief or ritual of the Mormon Church."¹⁸⁴ That being the case, the court then determined that requiring the Mormon Church to follow Title VII with respect to nonreligious employees would not infringe on its free exercise rights or unnecessarily entangle the government in religious matters.¹⁸⁵

181. 483 U.S. 327 (1987).

182. See *Amos v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints*, 594 F. Supp. 791, 796 (D. Utah 1984). Four of the plaintiffs worked at the Church-owned Beehive Clothing Mills which manufactured religious garments and temple clothing, while the fifth plaintiff worked as building engineer for Deseret Gymnasium, a Church-owned gymnasium open to the general public. *Id.* at 799-803. Because the district court was initially unable to determine whether Beehive was engaged in religious activity, only the claim involving the Deseret Gymnasium was appealed to the Supreme Court. *Id.* at 803. See also *Amos v. Corp. of the Presiding Bishop of the Church of Latter-Day Saints*, 618 F. Supp. 1013 (D. Utah 1985).

183. *Amos*, 594 F. Supp. at 796.

184. *Id.* at 800, 802. The court found the primary function of the gymnasium was to provide facilities for physical exercise and athletic games and was open to the general public. *Id.* at 801. Despite finding that the gymnasium was not engaging in religious activity, the court found that section 702 otherwise applied. *Id.* at 804.

185. *Id.* at 814-20. ("The question is whether requiring the defendants to refrain from discriminating on the basis of religion in their secular, non-religious activities infringes the free exercise of their religious beliefs. The court does not believe that it does. Preventing religious discrimination in those instances can have no significant impact on the exercise of 'any sincerely held religious belief of the Mormon Church.'") *Id.* at 818. The district court also held that even if applying Title VII to the Church's non-religious employees burdened its free exercise rights, the government had a compelling interest in eradicating discrimination that overrode those rights. *Id.* at 819.

Finally, the district court agreed with the *King's Garden* court that the exemption lacked sufficient facial neutrality to withstand Establishment Clause scrutiny because it authorized religious organizations "to engage in conduct which can directly and immediately advance religious tenets and practices."¹⁸⁶

A surprisingly unanimous Supreme Court reversed, holding that the expanded section 702 did not violate the Establishment Clause. The apparent unanimity of that holding belied a Court conflicted over the basis for that conclusion. The five justice majority opinion, written by Justice Byron White—and surprisingly joined in by Justice John Paul Stevens—applied what can best be characterized as a less than rigorous Establishment Clause analysis. To survive the requirement of a secular legislative purpose,¹⁸⁷ the Court held that the government could take religion into account when fashioning legislative goals, provided it did not "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters."¹⁸⁸ The permissive goal here was to "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."¹⁸⁹ In so characterizing Congress' goal in expanding section 702 the Court did not rely on the legislative record for, as has already been discussed, no such references exist.¹⁹⁰ In fact, the majority acknowledged that the original version of section 702 was adequate to protect this free exercise interest, such that "the Free Exercise Clause required no more."¹⁹¹ Despite this admission, the majority expressed concern that

186. *Id.* at 824-25.

187. The Court applied the first two prongs of the *Lemon* test, which requires that a law have a "primary secular purpose" and a "principle or primary effect . . . that neither advances nor inhibits religion." *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335-38 (1987). See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

188. 483 U.S. at 335. It is highly surprising that Justice Stevens agreed with this characterization of the secular purpose requirement. First, Stevens has generally opposed both constitutional and legislative accommodations of religion. Second, Stevens has joined on several opinions that have declared that the Establishment Clause requires more than mere neutrality among religions (i.e., not promoting a *particular* point of view in religious matters), but prevents promotion of religion generally over non-religious values. See *Allegheny County v. ACLU*, 492 U.S. 573, 593-94 (1989).

189. 483 U.S. at 335.

190. Rather, the Court relied on the district court's generous characterization of Senator Ervin's statements in support of his original amendment that did not distinguish between various forms of discrimination or address the free exercise interest implicated under the original exemption. *Id.* at 336 (citing 594 F. Supp. at 812).

191. *Id.* at 336.

courts would second-guess churches' determinations of religious and secular activities, thus imposing a significant burden on the ability of religions to define and carry out their religious functions. Congress could permissibly seek to avoid such burdens through a broader exemption.¹⁹²

Whether section 702 advanced religion by affording churches the benefit of being able to discriminate in their employment practices—a benefit that was not available to non-religious entities—presented a more difficult issue for the Court. The majority acknowledged that by virtue of the exemption churches “are better able now to advance their purposes than they were prior to the 1972 amendment,” which in turn provided them with a financially advantageous practice denied to their nonreligious counterparts.¹⁹³ However, the Court resolved the conflict by constructing a syllogism that a law is not unconstitutional, “simply because it *allows* churches to advance religion, which is their very purpose,” but only if “the *government itself* had advanced religion through its own activities and influence.”¹⁹⁴ The syllogism, of course, begged the very question the Court was called upon to answer: whether *Congress* had advanced religion by permitting religious entities and religious entities solely to engage in otherwise impermissible business practices, particularly where such special treatment was not constitutionally mandated. This led the four concurring justices to take issue with the majority's characterization of exemption's effect, with Justice O'Connor observing that the distinction seemed “to obscure far more than to enlighten.”¹⁹⁵ The Mormon Church's discriminatory act was legal, and thus permissible, only because Congress had so declared through the exemption. As O'Connor noted, 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 section 702.”¹⁹⁶

Despite the potential implications of the syllogism, four aspects

192. *Id.* at 336 (“[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.”).

193. *Id.*

194. *Id.* at 337.

195. *See id.* at 347 (O'Connor, J., concurring). *See also id.* at 340 n.1 (Brennan & Marshall, JJ., concurring); *id.* at 346 (Blackmun, J., concurring).

196. *Id.* at 347 (O'Connor, J., concurring) (“Almost any government benefit to religion could be recharacterized as simply ‘allowing’ a religion to better advance itself . . .”).

of the majority's advancement analysis indicate its limited scope. First, in distinguishing between *government* advancements of religion and those passive actions authorizing *church* advancements, the majority pointed to "financial support" as an example of the former.¹⁹⁷ This oblique reference to financial support as crossing the line into unconstitutional advancement is more significant than appears at first blush. In arguing for the constitutionality of the exemption, the Justice Department distinguished the putative benefit afforded churches by section 702 from "direct money subsid[ies]" and expressly declared that "Section 702 does not result in government financial support of religious activities."¹⁹⁸ The distinction was again made in oral argument, with counsel for both the government and the Mormon Church emphasizing that "this is not a religious benefit[s] case" and that it involved "no endorsement of [or] financial support for . . . religious affairs by government."¹⁹⁹ It is impossible to know how crucial this factor was for the ultimate holding in *Amos*, but apparently some members of the Court viewed it as significant. Based on Justice Stevens' record in Establishment Clause funding cases,²⁰⁰ it is highly doubtful that his vote in *Amos* would have been secured in the absence of assurances that government funding was not in issue. The oblique reference to government funding thus understates the importance of that issue in the Court's decision-making. One could conclude that the absence of government funding was a determining factor in holding section 702 constitutional. At a minimum, it is safe to say that counsels' statements neutralized the funding issue as a factor in *Amos*, such that the Court reserved that question for another day. Either way, the Court's ruling on the constitutionality of section 702 cannot be said to cover situations where the government is funding the institution practicing the discrimination. More accurately, the *Amos* holding should be viewed as presupposing the *absence* of government funding.

Second, despite holding that the exemption only "allowed" the

197. *Id.* at 337.

198. Merits Brief of Appellant United States at 38, 34, in Kurland & Casper, *Landmark Briefs and Arguments*, vol. 173 (1988), at 211, 207. The brief of the Mormon Church made a similar, though less explicit, distinction between the indirect effect of the exemption and a financial grant or benefit. See Merits Brief of Appellant Corporation of Presiding Bishop, et al., at 40 n.41; *id.* at 159.

199. *Id.* at 554, 556 (Arguments of Rex Lee and William Bradford Reynolds).

200. See *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985); *Mueller v. Allen*, 463 U.S. 388 (1983).

Mormon Church to advance religion itself, "which is [its] very purpose," the majority indicated that the record revealed no evidence that section 702 increased the Church's ability "to propagate its religious doctrine," intimating that such proof might lead to an opposite conclusion.²⁰¹ In contrast to the funding issue, it is less likely that evidence the exemption enhanced the Church's proselytizing capacity would have changed the ultimate outcome in *Amos*. Still, the statement indicates a limit to the syllogism, such that a more direct causal relationship between the exemption and an FBO's ability to proselytize might be problematic. After all, Mr. Mayson was not employed in a program or function that was initiated or funded by the government. However, if a program is government initiated and funded, then any proselytizing that takes place may be viewed as being facilitated by the government.

A final limitation on the syllogism is found in the Court's prior and subsequent holdings. The *Amos* majority declared, without supporting authority, that singling out religious entities for a benefit has never been considered per se invalid, particularly when the government sought to accommodate a religious interest.²⁰² Until that time, however, the Court had upheld religion-only accommodations only where a significant free exercise based burden had existed.²⁰³ Here the only burden was interference with religious decision making regarding secular matters, an interest the Court indicated was not protected by the Free Exercise Clause.²⁰⁴ Although the Court has not repudiated its statement that religion-only accommodations are permissible, it cut back on the effectiveness of that statement in *Texas Monthly v. Bullock* by striking a religion-only tax exemption.²⁰⁵ A fractured Court indicated that legislative accommodations must either alleviate significant burdens on religious exercise or have a beneficiary class that includes "a large number of nonreligious groups

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

202. *Id.* at 338.

203. See *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Bowen v. Roy*, 476 U.S. 693 (1986); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987).

204. 483 U.S. at 336. The majority, however, characterized section 702 as lifting a burden on religious exercise: "Where, as here, government with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Id.* at 338. As indicated in part—*infra*, however, there is nothing in the legislative history to indicate that Congress amended Title VII on the belief that religious organizations were unnecessarily burdened.

205. *Texas Monthly v. Bullock*, 489 U.S. 1, 11 (1989) (plurality opinion).

as well.²⁰⁶ Four years later, the Court reemphasized that religion-only accommodations are problematic, unless the state is acting with the purpose of “alleviating special burdens” on religious practice.²⁰⁷

In addition, the *Amos* holding gave short shrift to the issue of whether the exemption allowed religious organizations to burden the religious interests of their employees. In a footnote that restated the syllogism, the Court declared that any burden on a third person’s religious beliefs came from the Church, and not from the government.²⁰⁸ The Court’s attempt to distinguish section 702 from the statute in *Thornton v. Caldor* requiring employers to accommodate an employee’s Sabbath request was transparent, as both accommodations (and the resulting burdens they imposed on third persons) were allowed only because they were authorized by law.²⁰⁹ While the statute in *Thornton* mandated an accommodation with resulting third person burdens, as opposed to making it merely permissible, that distinction obscures the fact that in both instances no burden on third persons could take place without government authorization.²¹⁰ Moreover, the syllogism has no bearing on the *effect* of the burden on third persons when it occurs, which the Court has indicated is the appropriate focus with permissive accommodations.²¹¹ In essence, where a legislative accommodation of religion is not mandated by the Free Exercise Clause, it should not result in imposing substantial burdens on third persons.²¹²

As addressed, the *Amos* majority’s free exercise analysis was subsumed in its discussion of the Establishment Clause. The only

206. *Id.* (noting that in prior accommodation cases that “benefits derived by religious organizations flowed to a large number of nonreligious groups as well); *id.* at 15, 18 n.8.

207. *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 704, 705 (1993) (noting that Court holdings have “relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges.”). See Michele Estrin Gilman, “‘Charitable Choice’ and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses,” 55 VAND. L. REV. 799, 883-84 (2002).

208. *Amos*, 483 U.S. at 337 n.15.

209. *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985).

210. Even if the *Amos* Court’s distinction is correct, it does not explain the holding in *United States v. Lee*, 455 U.S. 252, 261 (1982), where the Court declared that an exemption for a religious employer from paying Social Security taxes would burden employees, even though the option of taking the exemption would rest with the employer. *Accord* *Tony & Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290, 303 (1985).

211. *Texas Monthly*, 489 U.S. at 18 n.8; *Alamo Found.*, 471 U.S. at 303; *Lee*, 455 U.S. at 261.

212. *Id.*; *Thornton*, 472 U.S. at 709-10; *Lee*, 455 U.S. at 261.

interest identified as support for the expanded exemption was to minimize government interference with the decision making process of religions.²¹³ It fell to Justice Brennan in concurrence—possibly because of his scepticism with the majority's Establishment Clause analysis—to expand on the possible free exercise interest at stake. Justice Brennan indicated that the exemption did more than merely protect the decision-making processes by religions. It also promoted a strong religious autonomy interest by allowing religions to define and control their polity and religious missions.²¹⁴ According to Brennan, individual religious identity derives to a large degree from one's ability to participate in a larger community of like-minded believers. In turn, religious organizations define themselves through their members' shared beliefs and the ability to determine what activities are consistent with those beliefs.²¹⁵ Significantly, though, Brennan acknowledged that this rationale only supported the need for religious entities to discriminate on the basis of religion with respect to *religious* activities.²¹⁶ This is because the burden on religious self-definition is significantly less when dealing with secular activities. Brennan conceded that this lack of a burden on self-definition likely rendered the exemption unconstitutional under the Establishment Clause while it imposed burdens on the religious liberty interests of non-believing employees.²¹⁷ Like the majority, however, the need to balance the countervailing interests, and concerns about entanglement and chilling religious definition of religious activity, tipped the balance for Brennan.²¹⁸

What then does *Amos* tell us about the constitutional implications of section 702? First and foremost, the Court was unanimous in the belief that the free exercise interests at stake—whether defined narrowly as by Justice White or broadly as by Justice Brennan—were protected adequately under the pre-1972 exemption that limited discrimination to employment associated with religious

213. *Amos*, 483 U.S. at 336.

214. *Id.* at 342-43 (Brennan, J., concurring).

215. *Id.* at 343 ("Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself.")

216. "This rationale suggests that, ideally, religious organizations should be able to discriminate on the basis of religion *only* with respect to religious activities." *Id.* (emphasis in original).

217. *Id.*

218. *Id.* at 345.

activities.²¹⁹ There is no greater significant burden—at least one of a constitutional nature—on the ability of a religious group to define itself or associate with like-minded believers, or to design and carry out its religious mission, when it is restricted in discriminating in its secular employment practices than when the religious entity is required to adhere to other neutral fair labor practices.²²⁰ The mere fact that a religious organization is impacted by regulation of some secular function does not mean that its ability to exercise its religion has been similarly impacted.²²¹

The primary concern justifying extending section 702 into non-religious areas—the minimization of governmental interference with the “decision-making process in religions”²²²—cannot be taken to mean the full import of that statement. Decision-makers in religious entities, like their secular counterparts, make a host of decisions day in and day out that have nothing to do with religious faith, doctrine, or mission: whether to pave the parking lot; where to place a mailbox; when to order more toilet paper and cleaning supplies. Many important decisions that implicate a church’s financial choices and its relations to government regulators also frequently have little to do with religious matters: whether to install a city-required fire sprinkler system in a church fellowship hall; whether to comply with a municipal ordinance requiring facilities be wheel-chair accessible; or whether to pay minimum wage rates for church secretaries and janitors. To be sure, each situation involves religious officials making decisions having financial implications that ultimately impact the institution’s religious ministry. But the constitutional value in minimizing government interference with a religion’s decision-making process varies greatly depending on whether it concerns merely the “decision-making process in religions” or the *religious* decision-making process. The burden or “chilling effect” on religion that comes with having to predict a regulator’s view of a particular activity diminishes greatly when the religious entity is acting in response to government requirements that are in addition to the entity’s normal functions. And clearly, the more that a religious organization is implementing a government approved or financed program that by definition is to be secular—as is supposed to be the case with Charitable Choice—the less likely that government regulation is

219. *Id.* at 336, 343, 348.

220. *See Tony & Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290, 303-05 (1985).

221. *See Fremont Christian Sch.*, 781 F.2d at 1369; *Miss. Coll.*, 626 F.2d at 488.

222. *Amos*, 483 U.S. at 336.

interfering with a *religious* decision-making process.²²³

A point of reference is found in cases arising out of government enforcement of collective bargaining and wage and hour laws. In the 1979 decision of *NLRB v. Catholic Bishop*, the Court held that the National Labor Relations Act did not apply to parochial schools.²²⁴ While deciding on statutory grounds, the Court relied on arguments that subjecting the Catholic schools to N.L.R.B. authority would present a "significant risk" of government entanglement through review of employment decisions.²²⁵ Charges of unfair labor practices would "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission."²²⁶

An important factor in determining that N.L.R.B. jurisdiction would risk oversight of church decision-making was the fact that the schools were pervasively sectarian and that teachers played a "key role" in furthering the religious mission of the Catholic Church.²²⁷ Lower courts have emphasized that distinction in subsequent decisions. In the vast majority of N.L.R.B. cases involving religiously affiliated entities other than parochial schools, courts have upheld application of the Act, notwithstanding entanglement arguments.²²⁸ In applying the Act to religiously-run children's and nursing homes and religiously-affiliated social service agencies and hospitals, courts have relied extensively on the non-religious nature of many of the services performed by covered employees in order to find that Board review of employment practices would not intrude into religious decision-making.²²⁹ To be sure, several of the holdings reveal a

223. Alan Brownstein, "Constitutional Questions About Charitable Choice" in *WEFARE REFORM AND FAITH BASED ORGANIZATIONS* (1999) at 234.

224. 440 U.S. 490 (1979).

225. *Id.* at 502.

226. *Id.*

227. *Id.* at 501.

228. See *N.L.R.B. v. Kemmerer Village*, 907 F.2d 661 (7th Cir. 1990); *N.L.R.B. v. Salvation Army*, 763 F.2d 1 (1st Cir. 1985); *Volunteers of Am. v. N.L.R.B.*, 752 F.2d 345 (8th Cir. 1985); *Denver Post of Volunteers of Am. v. N.L.R.B.*, 732 F.2d 769 (10th Cir. 1984); *St. Elizabeth Comm. Hosp. v. N.L.R.B.*, 708 F.2d 1436 (9th Cir. 1983); *Tressler Lutheran Home v. N.L.R.B.*, 677 F.2d 302 (3d Cir. 1982); *N.L.R.B. v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981).

229. *Salvation Army*, 763 F.2d at 6; *Denver Post*, 732 F.2d at 772-73; *St. Elizabeth Comm. Hosp.*, 708 F.2d at 1441; *Tressler*, 677 F.2d at 305; *St. Louis Christian Home*, 663 F.2d at 64. In finding that the functions were primarily secular, courts also emphasized that the various homes, agencies and hospitals did not impose religious tests for covered employees and received public funds for their services. *Id.*

cramped view of how the service programs relate to the churches' religious mission.²³⁰ But the question of whether care of the sick or elderly is consistent with a denomination's religious ministry is different from whether the activities themselves are essentially secular. Even if specific functions could not be easily categorized, courts have held that Board review of employment decisions placed minimal burdens on religious practices.²³¹ Merely because a regulation imposes certain reporting and compliance requirements on a religious entity does not mean that it substantially burdens or inhibits religious practice.²³² Significantly, several N.L.R.B. cases involved religious social service agencies that received state placements or referrals and public monies to fund their welfare-related programs.²³³ In most instances, courts have upheld N.L.R.B. jurisdiction.

Courts have similarly held that enforcement of the Fair Labor Standards Act [hereinafter F.L.S.A.] places minimal burdens on the functioning of religious enterprises. In *Tony & Susan Alamo Foundation*, the Supreme Court rejected arguments that imposing wage and record keeping requirements on a religious business imposed a burden on religious practice or resulted in excessive entanglement with religion.²³⁴ Significantly, the Court interpreted the Act as applying only to the organization's commercial activities, such that it would not impact its evangelistic activities.²³⁵ Even though the Alamo Foundation insisted the two functions were intertwined,²³⁶ the Court still held that "routine and factual inquiries... bear no resemblance to the kind of government surveillance the Court has previously held to pose a intolerable risk of government entanglement with religion."²³⁷

230. See *St. Louis Christian Home*, 663 F.2d at 65 (declaring that "the Home's activities relate only tangentially to the religious mission of the Christian Church.").

231. *St. Elizabeth Comm. Hosp.*, 708 F.2d at 1442 (noting that Board jurisdiction will produce only incidental intrusion into church affairs and not require continuing government surveillance).

232. *Id.*

233. See *Kemmerer Vill.*, 907 F.2d at 662, 664 (70% of funding and a majority of placements from the state); *Denver Post*, 732 F.2d 769 at 772 (public funding); *St. Louis Christian Home*, 663 F.2d at 61 (public funds and placements).

234. *Tony & Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290, 305 (1985).

235. *Id.* at 305.

236. *Id.* at 299.

237. *Id.* at 305. The Court accepted the district court finding that the business activities were primarily commercial, but noted that a "admixture of religious motivations does not alter a business's effect on commerce." *Id.* at 299.

The Court's distinction between commercial and noncommercial activities was somewhat misleading, as the Act more broadly refers to "enterprises" which by definition include nonprofit activities and entities.²³⁸ Subsequent lower court decisions have clarified that the F.L.S.A. applies to nonprofit religious enterprises including religious schools.²³⁹ Even within the parochial school context, courts have held that enforcement of the Act's wage and reporting requirements places a limited burden on religious practice and results in minimal entanglement through potential surveillance and oversight.²⁴⁰

These contexts, if instructive, indicate that application of employment regulations to religious entities does not necessarily infringe on their religious decision-making in a way that threatens religious autonomy or invites excessive government entanglement. Unlike the *Amos* holding, which seemed to set aside a category of "the decision making process in religions" as sacrosanct, other decisions by the Court and lower courts have been willing to scrutinize the effect of regulations on free exercise interests. These decisions indicate that the more outward directed the activity and the more that an employee is engaged in secular functions or activities, the less that a regulation affecting employment relationships interferes with the core values of the Free Exercise Clause, even though the regulation impacts church decision making.

Section 702 and the Difference of Public Funding

This article has suggested that the constitutional justifications for expanding the zone of permissible discrimination under section 702 to include employees engaged in non-religious functions are not compelling. Congress failed to articulate a convincing rationale for the need of religious organizations to prefer coreligionists for non-religious positions, and the Court's rationale for the constitutionality of section 702—to avoid government interference with the decision making process of religions²⁴¹—is both overbroad and not convincing in the absence of a significant free exercise threat. While

238. See 29 U.S.C. § 203(r) and § 203(s)(5).

239. See *Dole v. Shenandoah Baptist Church*, 889 F.2d 1389, 1394-95 (4th Cir. 1990); *E.E.O.C. v. Freemont Christian Sch.*, 781 F.2d 1362, 1367 (9th Cir. 1986).

240. *Shenandoah Baptist Church*, 889 F.2d at 1398-99; *Freemont Christian Sch.*, 781 F.2d at 1368. Courts have distinguished Catholic Bishop on the ground that Congress expressly intended private religious schools to be covered under the FLISA. See *Shenandoah Baptist Church*, 889 F.2d at 1394 n.7.

241. *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987).

“alleviat[ing] significant governmental interference with the ability of religious organizations to define and carry out their religious missions” may constitute a sufficient rationale for a legislative accommodation of religion where the interference falls short of an actual free exercise violation, there were no legislative findings to support that such burdens existed under the pre-1972 exemption.

Even if one accepts the *Amos* rationale for section 702, there is nothing in the holding that suggests expanding that interpretation outside the confines of that decision: a privately funded operation of a non-profit religious entity that is engaging in its own programmatic activities. Section 702 should not be interpreted to cover discrimination of secular employees where the programs or activities are initiated or funded by the government. In light of the *Amos* petitioners’ distinction between funded and non-funded activities and the Court’s reference to financial support as crossing the line into active advancement, funded discriminatory activity cannot be seen as falling under the already shaky rationale supporting section 702.²⁴²

In addition, section 702 should not apply in the context of secular employees where the employment action places significant burdens on third persons. As mentioned, the *Amos* majority viewed the exemption as chiefly a passive benefit—analogueous to the tax exemption upheld in *Walz*—that did not enhance the ability of the religious entity to further its religious mission.²⁴³ This conclusion is dubious—churches are otherwise subject to Title VII’s prohibitions and the Mormon Church was able to impose its temple recommend requirement only because Congress had so authorized such action.²⁴⁴ Section 702 creates an express preference for religious employers, allowing them to engage in impermissible conduct (i.e., religious discrimination) that all other employers must forego. In that Congress has declared ending employment discrimination to be a national priority of the “highest order,”²⁴⁵ it is difficult to view the failure to exercise regulatory authority as having merely a “hands off” effect. The Church was able to dismiss Mr. Mayson only because that

242. As discussed, it does not follow that a religious organization loses its coverage from section 702 merely because it receives some public funding for its activities. However, section 702 should not apply with respect to those positions or programs directly funded in whole or in substantial part by the government.

243. *Amos*, 483 U.S. at 337.

244. *Id.* at 347 (O’Connor, J., concurring).

245. *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); *E.E.O.C. v. Pac. Press Pub.* 676 F.2d 1272, 1280 (9th Cir. 1982).

conduct was authorized by federal law.²⁴⁶

If one assumes that section 702 extends to programs, activities, or positions funded in substantial part by the government, then that interpretation likely violates the Equal Protection and Establishment Clauses. First, the ability to discriminate on the basis of religion in publicly funded programs amounts to government-funded discrimination of a fundamental interest as prohibited by the Equal Protection Clause. Second, section 702 violates the Establishment Clause by providing a distinct financial and psychological advantage to religious entities, while it advances their religious mission by allowing them to capture resources for their adherents and ensure that their religious message is communicated uninhibited.

Beyond peradventure, the Equal Protection Clause bars government funded discrimination of a fundamental right such as race or religion.²⁴⁷ In *Norwood v. Harrison*, the Court held that the state of Mississippi violated equal protection by providing state-paid textbooks to private schools that practiced racial discrimination.²⁴⁸ The rationale was simple. Because the Constitution prohibits the government from engaging in suspect discrimination, it also prohibits the government from funding the same discrimination by private entities: a state could not grant “tangible financial aid [to a private entity]. . . if that aid has a significant tendency to facilitate, reinforce, and support private discrimination.”²⁴⁹ In essence, it was as unconstitutional for the government to finance private discrimination as it was for the government to engage in the prohibited acts itself. It was “axiomatic,” the Court held, “that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.”²⁵⁰ The Court correctly noted that issue of whether the private schools were state actors was beside the point—here the government was financing the private discrimination and it was the government’s own action that was

246. *Amos*, 483 U.S. at 347 (O’Connor, J., concurring).

247. See generally the excellent discussion in Alex J. Luchenitser, “Casting Aside the Constitution: The Trend Toward Government Funding of Religious Social Service Providers,” *JOURNAL OF LAW AND POLICY*, 615-28 (2002).

248. 413 U.S. 455, 471 (1973).

249. *Id.* at 465-66. “[T]he Constitution does not permit the State to aid discrimination.” *Id.*

250. *Id.* at 465 (citing *Poindexter v. La. Fin. Assistance Comm’n*, 275 F. Supp. 833, 835 (E.D. La. 1968), *aff’d*, 389 U.S. 571 (1968) (“The United States Constitution does not permit the State to perform acts indirectly through private persons which it is forbidden to do directly.”)).

unconstitutional.²⁵¹ Neither did it matter that the aid in question, state textbooks, did not directly finance the discriminatory activity, such as with a private school using a state tuition grant to hire only white teachers. “[T]he Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid [and the private discrimination.]”²⁵²

Although *Norwood* dealt with racial discrimination, the Court did not cabin its holding, referring to racial or “other invidious discrimination.”²⁵³ Religious discrimination is as suspect as race for the purposes of the Equal Protection Clause,²⁵⁴ and government financed religious discrimination is similarly forbidden. There can be no dispute that the government cannot select its employees on the basis of religious affiliation or impose any religious test for public office-holding.²⁵⁵ Similarly, the government cannot facilitate or encourage prohibited discrimination through financial inducements.²⁵⁶ Part of the Court’s historic rationale for prohibiting government funding of religious schools is that many have discriminated on the basis of religion in either employment or admissions.²⁵⁷ Discriminatory practices have been considered indicia of a pervasively sectarian environment²⁵⁸ and have been sufficient in some instances to block educational institutions from receiving public

251. *Norwood*, 413 U.S. at 469.

252. *Id.* at 465-66. To be sure, subsequent doctrinal development—see, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976) (requiring a showing of purposeful discrimination to trigger the Equal Protection Clause)—may have weakened the broad pronouncements of *Norwood*. However, purposeful discrimination may be established through circumstantial evidence—see *Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 266 (1977)—and a state’s knowledge that a religious contractor engages in religious discrimination as authorized by Charitable Choice, 42 U.S.C. § 604a(f) (2001), should be sufficient to trigger the *Norwood* rule.

253. *Norwood*, 413 U.S. at 467.

254. See *Burlington N. R.R. v. Ford*, 504 U.S. 648, 651 (1992); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

255. See *Larson v. Valente*, 456 U.S. 228, 244-45 (1982); *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961); U.S. CONST. Art. VI, § 1, cl. 3 (the Religious Test Clause).

256. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (noting that government responsibility for actions of private parties exists in situations of “significant [government] encouragement”).

257. See *N.L.R.B. v. Catholic Bishop*, 440 U.S. 490, 501 (1979); *Lemon v. Kurtzman*, 403 U.S. 602, 636 (1971) (Douglas, J., concurring); *id.* at 651 (Brennan, J., concurring) (“[W]hen a sectarian institution accepts state financial aid it becomes obligated under the Equal Protection Clause of the Fourteenth Amendment not to discriminate in admissions policies and faculty selection.”).

258. *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 753 n.18, 757 (1976); *Hunt v. McNair*, 413 U.S. 734, 743-44 (1973).

financial aid.²⁵⁹ To finance such discriminatory actions would, on its own, violate the Establishment Clause.²⁶⁰ Here, the Equal Protection Clause and the Religion Clauses—the Establishment Clause, the Free Exercise Clause and the Religious Test Clause, Art. VI, cl. 3—“all speak with one voice . . . [a]bsent the most unusual circumstances, one’s religion ought not affect one’s legal rights or duties or benefits.”²⁶¹

The *Norwood* holding was no sport; the following year the Court reaffirmed that “any tangible state assistance . . . is constitutionally prohibited if it has ‘a significant tendency to facilitate, reinforce, or support private discrimination.’”²⁶² Members of the Court have continued to adhere to this principle, with the majority in *Richmond v. J.A. Croson* indicating that the government “has a compelling interest in assuring that public dollars . . . do not serve to finance the evil of private prejudice.”²⁶³

The funding of religious employment discrimination also violates the commands of the Establishment Clause in several respects. Recent Establishment Clause decisions have clarified that aid to religious institutions is unconstitutional if the aid program defines recipients by reference to religion.²⁶⁴ This most certainly takes place if the government authorizes private religious contractors to condition the receipt of a government benefit—here, government funded employment—on the basis of religious affiliation. On the one hand,

259. See *Minn. Fed. of Teachers v. Nelson*, 740 F. Supp. 694, 720 (D. Minn. 1990); *Am. United for Separation of Church and State v. Bubb*, 379 F. Supp. 872, 892 (D. Ka. 1974).

260. *Id.* The *Norwood* Court struggled with the fact that it had upheld some forms of public aid to parochial schools that in all likelihood engaged in religious hiring preferences. 413 U.S. at 465. The Court sought to distinguish those cases as involving either indirect aid or instances where the assistance was “properly confined to the secular functions of sectarian schools” and did not interfere with “the free exercise rights of others.” *Id.* at 464 n.7, 468. The Court’s decision in *Zelman v. Simmons-Harris*, upholding public vouchers for private religious schools, also does not affect this holding, as the Court emphasized the indirect nature of the benefit broke the circuit of government responsibility for how the funds were being spent. 122 S. Ct. 2460, 2467 (2002).

261. *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 715 (O’Connor, J., concurring); see also *id.* at 728 (Kennedy, J., concurring) (“[T]he Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion.”).

262. *Gilmore v. City of Montgomery*, 417 U.S. 556, 568-69 (1974) (quoting *Norwood*, 413 U.S. at 466).

263. *Richmond v. JA Crosson*, 488 U.S. 469, 492 (1989).

264. *Agostini v. Felton*, 521 U.S. 203, 234 (1997); *Mitchell v. Helms*, 530 U.S. 793, 813 (2000). *Accord Zelman*, 122 S. Ct. at 2472.

permitting a government benefit to be restricted on the basis of religious affiliation represents preference of one religion over others and is per se violative of the Establishment Clause.²⁶⁵ A “principle at the heart of the Establishment Clause” is that the government “should not prefer one religion to another, or religion to irreligion.”²⁶⁶ But under Charitable Choice, the government is providing a public benefit, the ability to discriminate, exclusively to religious providers while at the same time it is exempting them “from a general obligation of citizenship.”²⁶⁷ the mandate not to discriminate in employment. In defining recipients on the basis of religion, the exemption contravenes the rule that government benefits must be provided on a religion-neutral basis.²⁶⁸

On the other hand, allowing a religious contractor to condition the receipt of a job on the basis of religion leads to the other evil the Court has identified: that defining recipients by reference to religion “creat[es] a financial incentive to undertake religious indoctrination.”²⁶⁹ Here, section 702 creates incentives for religious organizations to discriminate on the basis of religion with the goal preserving the purity of their religious message. Allowing religious organizations to discriminate with public funds empowers those organizations to act in ways that would be unavailable in the absence of government funding, providing them with coercive economic power over their employees.²⁷⁰ Publicly funded jobs are a valuable benefit and, as the Court has noted, there are some occupations—such as social workers—where the government is the primary source of employment.²⁷¹ Authorizing FBOs to condition employment on the basis of religion aggrandizes their power by providing jobs for their adherents while it burdens prospective and actual employees against whom the exemption is applied.²⁷² Justice Brennan recognized

265. *Allegheny County v. UCL*A, 492 U.S. 573, 590-91 (1989); *Larson v. Valente*, 456 U.S. 228, 244 (1982).

266. *Kiryas Joel*, 512 U.S. at 703.

267. *Wisconsin v. Yoder*, 406 U.S. 205, 221-22 (1972).

268. *Kiryas Joel*, 512 U.S. at 703-05; *Texas Monthly v. Bullock*, 489 U.S. 1, 14-15 (1989); *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

269. *Agostini*, 521 U.S. at 231.

270. See *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring). See also Brownstein, “*Constitutional Questions*,” at 235.

271. See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77 (1990).

272. See Steven K. Green, “*Charitable Choice and Neutrality Theory*,” 57 NYU ANNUAL SURVEY OF AMERICAN LAW 33, 46-47 (2000); MUTTERPERL, *supra* note 34, at

this potential dilemma in his *Amos* concurrence when he wrote that the exemption “puts at the disposal of religion the added advantage[] of economic leverage in the secular realm.”²⁷³ It effectively presents prospective employees with:

the choice of either conforming to certain religious tenets or losing a job opportunity, a promotion, or . . . employment itself. The potential for coercion created by such a provision is in serious tension with our commitment to individual freedom of conscience in matters of religious belief . . .²⁷⁴

The government funded discrimination thus creates incentives for prospective employees to convert to the religion of the funded organization, enhancing its religious ministry. Whether this interest is characterized as a free exercise or establishment concern, it remains extant: the government is authorizing religious organizations to administer a public benefit while imposing a religious condition.²⁷⁵ Few results could be further from the principle of neutrality that prohibits government from affecting the religious choices of individuals.²⁷⁶

Allowing religious organizations to discriminate in publicly funded positions violates the Establishment Clause in more traditional ways. Publicly funding organizations that discriminate advances religion by allowing FBOs to expand their religious ministries through hiring of coreligionists and broadcast their religious messages unimpeded by government restraint. While the religious organization is prohibited from using public dollars on religious instruction, worship or indoctrination, the discrimination exemption ensures that the organization’s overall message will remain canonical and ungarbled.²⁷⁷ This in turn assists FBOs in propagating their faith and allows them to influence the religious choices and behavior of program beneficiaries, actions that again are inconsistent with government neutrality toward religion.²⁷⁸ In addition, the ability to discriminate in funded positions advances religion in other tangible

423-26.

273. *Amos*, 483 U.S. at 343 (Brennan, J., concurring).

274. *Id.* at 340-41.

275. See Martha Minow, “*Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*,” 80 B.U. L. REV. 1061, 1088 (2000) (“[I]ndividuals’ freedom of religious belief and practice need protection against government-backed preferences or interference.”).

276. See Douglas Laycock, “*The Underlying Unity of Separation and Neutrality*,” 46 Emory L.J. 43, 69-71 (1997).

277. See Green, “*Charitable Choice and Neutrality Theory*,” at 48.

278. See Green, “*Ambiguity of Neutrality*,” at 716.

ways:

It reduces costs, and increases their ability to exercise control over their members, attract new adherents, fulfill their normative mission and, perhaps most importantly, maintain their sense of continuous and distinct identity. The ability to engage in conduct that satisfies moral requirements and to perform rituals that demonstrate allegiance to a belief system or deity without state interference reinforces viewpoints and demonstrates their force and authority. These rights have substantial utility for speakers in competition with conflicting viewpoints.²⁷⁹

Finally, the fact that an organization discriminates on the basis of religion may be relevant evidence as to whether an organization is so pervasively sectarian that it should be constitutionally prohibited from participating in a government grant program.²⁸⁰ Courts have rightly surmised that such discriminatory practices are instructive of whether a religious organization expects its employees in funded positions to incorporate religious teaching and inculcation in their services. The inability to separate secular from religious services should render the FBO ineligible from receiving aid, notwithstanding arguments that the public funds are not paying for identifiable worship, instruction or proselytizing.²⁸¹

As a result, in the only case where the constitutionality of religious discrimination in a publicly funded program was squarely considered, the court found it unconstitutional. In *Dodge v. Salvation Army*, the Army fired an employee in a domestic violence shelter after discovering she was a Wiccan.²⁸² The Army defended the employee's suit for wrongful discharge based on section 702. The court disagreed. Because the position was "made possible by a grant from the Criminal Justice Department," and "was funded substantially, if not entirely," from public sources, allowing the Army to discriminate would violate the Establishment Clause.²⁸³ "the effect of the government substantially, if not exclusively, funding a position such as the Victims' Assistance Coordinator and then allowing the

279. Brownstein, "Interpreting the Religion Clauses," at 273-74.

280. *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 752 n.18, 757 (1976); *Hunt v. McNair*, 413 U.S. 734, 743-44 (1973) (internal citations omitted).

281. *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Freedom From Religion Found v. McCallum*, 179 F.Supp.2d 950 (W.D. Wisc. 2002).

282. *Dodge*, 1989 WL 53857.

283. *Id.* at *2.

Salvation Army to . . . maintain the position based on religious preference clearly has the effect of advancing religion and is unconstitutional.”²⁸⁴ Although short on analysis, the *Dodge* court reached the correct conclusion: allowing the Salvation Army to condition employment of publicly funded positions on the basis of religion provided a distinct spiritual advantage to the Army, ensuring that those beneficiaries who used its services received counseling and assistance that was consistent with its religious ministry. In addition, it gave the Army economic leverage in the hiring of future employees.²⁸⁵

To be sure, violations of the Equal Protection Clause—and, to lesser extent, the Establishment Clause as well—require a showing of state action.²⁸⁶ The “state action” for both clauses is the funding of the program in which the religious discrimination takes place.²⁸⁷ Of course, private entities do not become state actors themselves (and their discrimination is not automatically attributable to the government) merely because they receive public funds or perform

284. *Id.* at *3.

285. Charitable Choice proponents point to several cases where courts allowed religious organizations to rely on section 702 despite receiving public funding for their operations. See *Hall v. Baptist Mem. Health Care Corp.*, 215 F.3d 618, 625 (6th Cir. 2000); *Siegel v. Truett-McConnell College*, 13 F. Supp. 2d 1335, 1344 (N.D. Ga. 1994), *aff’d* 73 F.3d 1108 (11th Cir. 1995); *Young v. Shawnee Mission Medical Center*, 1988 U.S. Dist. LEXIS 12248 at *5; *Saucier v. Employment Sec. Dep’t*, 954 P.2d 285, 286 (Wash. App. 1998); *Arriaga v. Loma Linda Univ.*, 13 Cal. Rptr. 2d 619, 622 (Cal. App. 1992). All of these cases, however, were decided on statutory grounds and none considered whether the granting of an exemption violated the Establishment Clause. Moreover, in none of the cases was it clear that the public funds paid for the position in question.

286. See Michael W. McConnell, “*State Action and the Supreme Court’s Emerging Consensus on the Line between Establishment and Private Religious Expression*,” 28 PEPP. L. REV. 681, 682 (2001). However, the requirements for government action under the Equal Protection and Establishment clauses are not the same. In contrast to the equal protection requirement discussed in the text, the Court has found Establishment Clause violations in situations where an “appearance” of endorsement of private action exists. *Allegheny County v. ACLU*, 492 U.S. 573, 593-94 (1989) (“The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief . . .”). In *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995), a majority of the Justices rejected Justice Scalia’s assertion that the Establishment Clause “applies only to the words and acts of [the] government,” *id.* at 767, reaffirming that a violation occurs through the government’s endorsement of private religious actions. *Id.* at 777 (O’Connor, J., concurring) (emphasis in original).

287. *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973); see *United States v. Virginia*, 518 U.S. 515, 599 (1996) (Scalia, J., dissenting) (“The issue [is] not whether government assistance turns private colleges into state actors, but whether the government *itself* would be violating the Constitution by providing state support for single sex colleges.”) (emphasis in original).

some “public function.”²⁸⁸ On rare occasions the Court has found state action to be present where a private entity performs functions traditionally reserved to the state.²⁸⁹ But that standard is quite stringent,²⁹⁰ and charitable work performed by churches is not a function that has been the “exclusive prerogative” of the government or have been “traditionally associated with [the] sovereign[.]”²⁹¹ State action may be found, however, where the state “significantly encourages” the conduct of private individuals.²⁹² This rarely occurs in neutral programs; but Charitable Choice is not neutral in its allowance of discrimination by FBOs. Here, more than “mere [state] approval or acquiescence” of discrimination is at work.²⁹³ Congress has expressly exempted FBOs from usual prohibitions on discrimination in funded programs while it is funding the specific discriminatory activity.²⁹⁴ The focus, therefore, is not solely on the funding but also on government authorization, knowledge and facilitation of the religious discrimination²⁹⁵—that the government has created a financial incentive to engage in the discrimination, such that those actions are “fairly attributable to the state,” an inquiry that arises under both the Equal Protection and Establishment Clauses.²⁹⁶

Recent Establishment Clause cases have indicated that actions are not attributable to the state where they involve numerous private choices arising under a generally available benefits program.²⁹⁷ Thus where the state awards benefits to a broad class of individuals on the basis of objective criteria and without respect to their religious character, such general aid will rarely reflect government preference

288. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

289. *Marsh v. Alabama*, 326 U.S. 501, 509 (1946); *Evans v. Newton*, 382 U.S. 296, 302 (1966).

290. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974) (the inquiry being whether the function performed has been “traditionally the exclusive prerogative of the State”).

291. *Id.*

292. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 166 (1978); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

293. *Am. Mfrs. Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (citations omitted).

294. This makes the case stronger than in *Norwood v. Harrison*, where the funded activity was not itself discriminatory. 413 U.S. 455, 465-66 (1973)

295. Granted, mere knowledge by the state government is not sufficient for state action. *Am. Mfrs.*, 526 U.S. at 52.

296. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982); *Mitchell v. Helms*, 530 U.S. 793, 809-10 (2000); *Agostini v. Felton*, 521 U.S. 203, 226 (1997).

297. *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2467 (2002); *Mitchell*, 530 U.S. at 810; *Agostini*, 521 U.S. at 225.

for religion or for the actions taken by that private entity.²⁹⁸ But grants arising under Charitable Choice programs rarely are “generally available” to all interested providers; instead, they are typically awarded through a competitive process utilizing a subjective assessment of grant applicants’ qualifications and proposals and involving extensive contract negotiating. These contracts typically include ongoing review of methods and materials used by the private provider as well as accountability for how funds are used.²⁹⁹ The government’s discretionary and subjective action in selecting and funding a provider that in turn engages in religious discrimination in that same program makes those actions attributable to the government and creates the impression that the government endorses the discriminatory actions to which its funds are applied.³⁰⁰ Moreover, unlike the statutes in the private choice context, Charitable Choice is not neutral with respect to religion. It expressly authorizes religious discrimination by religious organizations alone.

Finally, barring religious organizations from applying section 702 to publicly funded positions—whether based on the Equal Protection or Establishment Clauses—would not implicate the core concerns that underlie *Amos*. The rationale in *Amos* for allowing the expanded exemption was to minimize government interference with the religious decision-making process by alleviating the burden on religious organizations of “predict[ing] which of its activities a secular court [might] consider religious.”³⁰¹ This potential chilling effect on religion is absent, however, with respect to funding of positions under Charitable Choice which, according to its language, are to engage in secular functions. Here, unlike the situation that confronted the Court in *Amos*, the line is a “bright one,” leaving little room for uncertainty.³⁰² Because public funds cannot statutorily or constitutionally pay for “religious worship, instruction or proselytizing,” there should be no ambiguity as in *Amos* about

298. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 840 (1995).

299. See generally Steven Rathgeb Smith & Michael Lipsky, *NONPROFITS FOR HIRE: THE WELFARE STATE IN THE AGE OF CONTRACTING* (1998) (describing the government contracting process with nonprofit agencies).

300. See *Decker v. O'Donnell*, 661 F.2d 598, 617 (7th Cir. 1980) (holding aid to a religious school unconstitutional based on the “wide degree of discretion” that the state had in selecting among “competitive “applicants” for the aid).

301. *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987).

302. *Id.*

whether the functions are religious or secular.³⁰³ Because FBOs are on notice that the funded positions are to engage in secular activities, there should be no chilling effect on the ability of a FBO to define its mission or distinguish its religious functions from those that are secular. The threats that loomed in *Amos* are thus minimized if non-existent.

Conclusion

The provision in Charitable Choice legislation permitting religious organizations to receive government grants and contracts but still access the safe harbor of section 702 should be stricken. There is no evidence that Congress intended section 702 to cover situations involving public funding, and nothing in the *Amos* decision indicates the Court viewed its holding as extending to publicly funded discrimination. On the contrary, the *Amos* decision was likely based on the presumption that section 702 did not extend to publicly funded employment relationships. If, however, section 702 does apply in instances where a position is substantially funded by the government, then its application violates both the Equal Protection and Establishment Clauses. Both provisions speak with the same voice: one's religious affiliation "ought not affect one's legal rights or duties or benefits."³⁰⁴

303. See Brownstein, "*Constitutional Questions*," *supra* note 223, at 234.

304. Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 715 (1993) (O'Connor, J., concurring).

