University of Richmond Law Review

Volume 30 | Issue 3 Article 3

1996

"The Harvest is Plentiful, But the Laborers are Few": Hiring Practices and Religiously Affiliated Universities

Robert John Araujo

"THE HARVEST IS PLENTIFUL, BUT THE LABORERS ARE FEW":* HIRING PRACTICES AND RELIGIOUSLY AFFILIATED UNIVERSITIES

*Robert John Araujo, S.J.***

Dominus Illuminatio Mea—the motto of Oxford University (The Lord Is My Light)***

In Lumine Tuo Videbimus Lumen—the motto of Columbia University (In Your Light We See Light Itself)****

I. GENESIS—THE BEGINNINGS AND ANCESTRAL HISTORY

This is a paper with a modest goal about an immodest topic: how mankind does God's work in this world. In particular, I address a small part of this rather large question: how do religiously affiliated schools make their modest contribution to this work? More particularly, who gets chosen to be a laborer in bringing in the plentiful harvest. The laborer is the teacher or administrator, the vineyard is the religiously affiliated university or college of the late twentieth century United States. Consequently, I address employment practices: who gets hired as a laborer and by what criteria is this special kind of laborer hired. A simple matter in some ways: whoever is the best quali-

---

* *Matthew* 9:37; *Luke* 10:2.

** Associate Professor of Law, Gonzaga University School of Law; A.B., J.D., Georgetown University; M. Div., S.T.L., Weston Jesuit School of Theology; LL.M., J.S.D., Columbia University; B.C.L., Oxford University. The author wishes to thank Professors John Garvey, Bruce Hafen, David DeWolf, and James Vaché for their helpful comments, and Fathers Joseph Appleyard, Gerald Cavanagh, Leo O'Donovan, Francis Nicholson, Patrick Ford, and Peter Ely (all of the Society of Jesus) for their insights. I would also like to thank Mr. Paul Matthews for his research assistance, and Dean John Clute for his kind support. The views expressed, and any errors are solely those of the author.

*** *Psalm* 27:1.

**** *Psalm* 36:9.

fied gets to be chosen as the laborer assigned to the bountiful harvest. Yet in other ways, hiring is an employment practice which is regulated by laws and public policy.

In the context of American law as it relates to the making of hiring decisions, employment practices are the concern of Title VII of the Civil Rights Act of 1964.[1] In choosing to hire or not hire, employers—the vineyard masters, if you will—generally cannot discriminate against would-be laborers on the grounds of race, color, religion, sex, or national origin.[2] The authoritative scrutiny provided by the anti-discrimination provisions of Title VII ensures that those who are chosen to be the laborers in a particular vineyard are selected on the basis of merit and substance, not on the basis of racial, ethnic, gender, or religious grounds which generally have no bearing on the talents of the laborer to perform the tasks for which that laborer is hired.[3]

Religiously affiliated schools are one type of vineyard where a group of employees—teachers and administrators in particular—come together as members of a community, as kindred intellects, who investigate the world from the perspective of a school, which holds the self-given task of seeking understanding from a background of religious belief. This enterprise, while having its own characteristics, nonetheless is a part of the larger community and therefore a component of public life. In short, the members of the community of scholars of the religiously affiliated school are not isolated from the public sphere. They are, to the contrary, very much a part of it.

In the late twentieth century, public life in the United States is often characterized as citizen involvement in the Public Square.[4] People from a wide variety of backgrounds (including

1. *See generally*, 42 U.S.C. § 2000e, Subchapter VII, Equal Employment Opportunities (1994).

2. 42 U.S.C. § 2000e-2(a)(1) (1994) is the principal anti-discrimination provision of Title VII which makes the failure to hire or discharge any individual on the basis of race, color, religion, sex, or national origin an unlawful employment practice. Subsection 2000e-2(a)(2) parallels this first provision by declaring the limitation, segregation, or classification of employees or applicants based on considerations of race, color, religion, sex, or national origin to be unlawful employment practices.

3. Title VII does provide in 42 U.S.C. § 2000e-2(e) (1994) for employers to take into consideration religion, sex, or national origin where such considerations constitute a "bona fide occupational qualification reasonably necessary to the normal operations" of the business or enterprise.

4. The term "public square" is one which appears throughout the discussion of

ethnic heritage, race, gender, regional identification, etc.) put aside some of these distinctions and search for common ground in which to engage in discourse about the great public issues of the day. In theory, the characteristics which separate individuals are momentarily relinquished in the common pursuit of a shared vocabulary which enables the participants in a heterogeneous culture to engage one another in conversation. Once the shared vocabulary is established and the conversation begins, the differences which emerge from the characteristics temporarily put aside are then introduced into the conversation to punctuate it with modifiers which reflect the interests of some but not all of the individual citizens engaged in any given public debate.

If the Public Square is, in theory, the place where members of a diversified citizenry engage one another in public discourse, the university may be seen as the place in which the ideas of the culture are investigated and discussed in the context of the university's educational mission. The notions of pluralism and diversity mold the fashion in which the academic conversation is conducted. In theory, all ideas, all perspectives have generally been accorded an enthusiastic welcome in the academy. Excepting perhaps the epithets fueled by hatred and bigotry,[5] virtually all perspectives are embraced in the academy's participation in public debate and dialogue.

---

participation in public life. In 1984, Richard John Neuhaus addressed the reluctance of Americans to mix discussions of politics and religion. He identified the "naked public square" as the exclusion of "religion and religiously grounded values from the conduct of public business." RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA vii, (1984). The "public square" would thus seem to be the arena in which public business is addressed. Neuhaus has himself identified the "public square" more recently as the forum where Americans "deliberate the order of our life together." Richard J. Neuhaus, *A New Order of Religious Freedom*, 60 GEO. WASH. L. REV. 620 (1992).

5. Recently, legal academia has reflected the interest of the rest of society concerning "hate speech" and the related issues of whether it is protected by the First Amendment freedom of speech clause or whether or not it can be regulated. *See, e.g.*, Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281; Richard Delgado, *Campus Antiracism Rules Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

Through western history, the evolution of universities has often been influenced by religious beliefs. The two mottos quoted from Columbia and Oxford Universities serve as evidence of this influence. The images of light and truth contained within these mottos identify divine inspiration as a catalyst for the academic inquiry conducted within the university.[6] These images also reflect the long standing human recognition of and quest for understanding and reason seeking faith and for faith seeking understanding and knowledge.[7] This recognition continues with more recently founded religiously affiliated schools such as Brigham Young University whose motto proclaims, "The Glory of God Is Intelligence."

But with the passage of time, the religious dimension and character of universities[8] has diminished. As George Marsden has recently noted, in the context of the United States many venerable institutions of higher education which previously claimed a Protestant establishment have become largely nonsectarian.[9] The reasons for secularization are diversified and reflect institution-specific as well as general societal ones. But what seems relevant to this inquiry is that secularization came about indirectly and unconsciously, rather than through a conscientious effort to impose a secular regime on the university.[10] This phenomenon, which I shall call secularization-by-default, has continued to appear throughout the history of the American

---

6. Within the context of a religiously affiliated university which claims a Christian foundation, John the Evangelist captures the essence of this seeking of truth:

> Then Jesus said to the Jews who had believed in him, "If you continue in my word, you are truly my disciples; and you will know the truth, and the truth will make you free.

John 8:31-32 (New Revised Standard Version).

7. For an examination into the tradition of *fides querens intellectum* (the tradition of faith seeking understanding, and understanding seeking faith having roots in the writings of Augustine and Anselm of Canterbury), *see* 1 FREDERICK COPLESTON, A HISTORY OF PHILOSOPHY 556 (1946).

8. From this point on, I shall use only the term *university* or *universities* to refer to any higher educational institution which is involved in the educational enterprise of offering instruction or supporting research which leads to the conferral of an associate, baccalaureate, graduate, or professional degree.

9. GEORGE MARSDEN, THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF 440 (1994).

10. *See generally* MARSDEN, *supra* note 9, at 5 (suggesting that the drift of schools from being religiously affiliated to largely secular did not occur by conscious design but rather by default).

academy of higher learning.[11] As George Marsden has noted about some of the more prestigious American schools, Duke is representative of those institutions which claim a religious heritage but have moved more and more in the direction of secularization. Marsden describes and explains the drift which has occurred in Duke's relationship with its religious foundation. While this university maintains limited appreciation of its "historic ties with the United Methodist Church and the religious faith of its founders," it has essentially become "*non-sectarian.*"[12]

The phenomenon of secularization-by-default has had its impact on a wide variety of religiously affiliated schools. Since I am more familiar with schools established by members of my own tradition (i.e., Roman Catholic), I shall concentrate on them. However, most of my investigation can apply to virtually any university which has historic and/or ongoing ties with other religious denominations.[13]

While taking note of the important work undertaken by Professor Marsden, I recall the exhortation offered by Georges Santayana: "Those who do not remember the past are condemned to repeat it."[14] In applying Santayana's insight to the subject at hand, then, our forgetfulness that formerly religiously affiliated institutions became secularized not through a conscious plan but through inattention can foreshadow the fate of those present institutions which do not intentionally discard

---

11. Another commentator has labeled this development as secularization by "religious atrophy." Michael J. Buckley, *The Catholic University and the Promise Inherent in Its Identity in* CATHOLIC UNIVERSITIES IN CHURCH AND SOCIETY: A DIALOGUE ON *EX CORDE ECCLESIAE* 75 (John Langan ed., 1993).

12. MARSDEN, *supra* note 9, at 421 (emphasis added) (quoting the 1988 Duke University self-study).

13. *E.g.*, Brigham Young—Mormon; Yeshiva—Jewish; Valparaiso—Lutheran; Pepperdine—United Church of Christ; Baylor, Mercer, Stetson, Wake Forest—Baptist; Southern Methodist, Boston University—Methodist; Boston College, Catholic University of America, Creighton, Dayton, DePaul, University of Detroit-Mercy, Duquesne, Fordham, Georgetown, Gonzaga, Loyola (of New Orleans, of Baltimore), Loyola-Marymount, Marquette, Notre Dame, Portland, St. John's, St. Mary's, Saint Louis, St. Thomas, San Diego, San Francisco, Seton Hall, and Villanova—Catholic.

14. As Georges Santayana suggested in his LIFE OF REASON, "Progress, far from consisting in change, depends on retentiveness. . . . Those who cannot remember the past are condemned to repeat it." *Quoted in* THE OXFORD DICTIONARY OF MODERN QUOTATIONS 190 (1991).

their religious affiliation by design but, rather, take it for granted. Within the realm of Catholic higher education, a diversity of commentators have offered evidence portraying the ongoing secularization of the religious academy. For example, two years ago, one commentator wrote about how a particular Catholic school affiliated with my religious order, the Society of Jesus, had over the course of two decades experienced a metamorphosis of remarkable progress. It was transformed from being a local and then a regional school to its present status as a university with national recognition. Although the school had encountered one success after another which reinforced its high academic credentials, the author suggested in the article's subtitle that this university had given up something important to its identity—it had sacrificed its "soul."[15] In order to determine for what this institution's soul has been exchanged, an examination of the research and insights of other investigators would be useful.

Although confining his remarks to professional education, another commentator has more than hinted at the incongruity between a university's efforts to maintain its religious affiliation and its quest for and maintenance of a national reputation. In the context of legal education, Mark Tushnet has argued that a university with a religious identity "will find it extremely difficult" to maintain this affiliation if it also seeks to attain or preserve a national reputation.[16] But why would it be difficult to maintain *both* a national reputation and religious identi-

---

15. *See* Chris Reidy, *Hitting the Heights*, BOSTON GLOBE, Mar. 28, 1993, at 69. Reidy addresses the evolution of Boston College from commuter school in 1965 to national university twenty years later. In his commentary, he states that "Boston College has seen enormous growth over the last few decades. But in going from a working-class commuter school to 'Chestnut Hill University,' has it lost its soul?" *Id.* Focusing the commentary is the author's reference to a statement of one non-Catholic undergraduate who, in commenting on the school's religious foundation, mentioned that "other than the crosses in the dining halls, you wouldn't know it's religious." *Id.* at 70. *See also* Buckley, *supra* note 11, at 74 (corroborating the previous quotation).

16. *See* Mark Tushnet, *Catholic Legal Education at a National Law School: Reflections on the Georgetown Experience*, *in* GEORGETOWN AT TWO HUNDRED: FACULTY REFLECTIONS ON THE UNIVERSITY'S FUTURE 322 (McFadden, ed., 1990); *but see* Sanford Levinson, *Some Reflections on Multiculturalism, "Equal Concern and Respect," and the Establishment Clause of the First Amendment*, 27 U. RICH. L. REV. 989, 996 (1993) (commenting on how the "elite legal academy" is "basically devoid" of the committed Christian and the clarion for "greater diversity of voices within the academy" rarely includes any "strong religious sensibility").

ty simultaneously? After all, would not both be compatible with and contribute to the diverse or pluralistic culture of the American melting pot as it exists in colleges and universities? Professor Tushnet's answer suggests otherwise. He argues that the national institution must concentrate on mainstream, i.e., secular, education. In his view, a national school which claims some connection with a religious foundation is most likely limited to integrating its religious dimension through outside lectures which are supplemental to, rather than constitutive of the school's normal fare of ongoing activities.[17] While he does point out that the university's leadership could be sensitive to the institution's religious connection by recruiting and hiring members of the religious teaching orders in the case of Catholic institutions of higher learning, he acknowledges that the school's orientation is "often derived from the desires and characteristics" of the school's faculty.[18] It would seem, then, that if the faculty does not consider attracting such individuals to its ranks, it will neither recruit nor hire them. Perhaps this is because, as Professor Tushnet notes, the *desires and characteristics* of potential faculty candidates who hold views sympathetic with the mission of the religiously affiliated school can be perceived by the faculty as impairing the "school's status as a national" one.[19]

But faculty are not the only individuals who might display antipathy towards the mission and the tradition of the religiously affiliated school. Students can also be sources of tension. Professor Stephen Carter of Yale Law School relates a telling experience he encountered at Notre Dame a few years ago when he gave an address there. As Carter explains, after his talk a reception was held in his honor. At the reception, two law students approached him and explained how "their classmates mocked them when, in class, they opposed abortion."[20] Carter further relates:

---

17. Tushnet, *supra* note 16, at 331.

18. *Id.* Michael J. Buckley has noted that the diversification of university faculties has certainly led to the progress of such institutions. The diversification has also led to the dilution of its religious identity, or as he says, leads to "the lowest common denominator" which "inhibits anything much beyond religious banalities." Buckley, *supra* note 11, at 78.

19. Tushnet, *supra* note 16, at 331.

20. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND

> The two students were Catholics and were told by classmates that because of their religion, their moral opinions on this matter were out of bounds—and this at a Catholic university. Had they but reached their moral positions with no reference to their religious beliefs, these students believed, they would have been welcomed in the classroom's version of the public square. But since they were accused of invoking, in effect, a forbidden epistemology, they were not.[21]

Nonetheless, a large number of religiously affiliated universities have taken the stance that they wish to preserve and enhance their religious affiliation. Several authors have expressed varying measures of optimism and hope that religiously affiliated schools can, on the one hand, compete with secular institutions in the fields of excellent teaching, scholarship, and research but, on the other hand, will contribute something in addition which is distinctive from their secular counterparts and which emerges from their religious tradition.[22] The religiously affiliated schools make, or are attempting to make, a stand that would preserve their religious identity while at the same time offering a curriculum that meets the rigor of intellectual investigation across most, if not all, academic disciplines. The conviction of many individuals concerned with preserving the religious affiliation of these schools is that knowledge and belief need not be mutually exclusive.[23] The academy is the arena in which reason and belief can, and do, come together in the search for answers to questions which humans have been addressing in the western universities for over eight hundred

---

POLITICS TRIVIALIZE RELIGIOUS DEVOTION 53 (1993).

21. *Id.*

22. *See, e.g.*, MARK SCHWEHN, EXILES FROM EDEN: RELIGION AND THE ACADEMIC VOCATION IN AMERICA viii (1993) (discussing the migration of one scholar from the University of Chicago (Eden) to Valparaiso (a Lutheran University in Indiana)); MARSDEN, *supra* note 9; THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY, (Theodore Hesburgh ed., 1994) (examining the nature of the Catholic university in both historical and contemporary contexts); UNIVERSITIES IN CHURCH AND SOCIETY, *supra* note 11, (addressing Pope John Paul II's apostolic constitution on Catholic higher education, *Ex Corde Ecclesiae*, and intellectual life in the contemporary Catholic University).

23. *See* Frederick M. Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 694-95 (1992) (persuasively developing both historical and philosophical responses to the secular claims which suggest the incompatibility of knowledge and belief).

years. The religiously affiliated academies have been the place where faith and reason have come together to pose these questions and to seek their answers.[24] As Robert Bolt has Thomas More suggesting in *A Man for All Seasons*, the human being was made by God "to serve him wittily, in the tangle of his mind!"[25]

If I may borrow from the world of environmental studies, the university has its particular ecology, which is largely determined by its mission, which is in turn molded by its administration, faculty, students, and alumni. Most human institutions have a mission of one sort or another. For example, military organizations have broad as well as specific strategic and tactical missions. Explorers like those of the television series *Star Trek* have missions to go where no one has gone before. Human beings have missions in life. Universities do, too. In the context of higher education, the mission of many schools is to provide an environment in which teaching, learning, and research are conducted. These activities—a conversation, a discourse amongst junior and senior scholars—often profess to search for truth—and, in the case of Harvard University, that is its mission as proclaimed by its motto, *Veritas*—Truth. The missions of the religiously affiliated universities can be characterized in similar ways. They too are communities of scholars in which the educational dialogue is directed at seeking truth—but a truth that is defined in terms of God's truth rather than man's.[26] Their mission, then, is different from that of their secular counterparts. The religiously affiliated schools' search for truth transcends the material because it seeks the eternal. In order to do this, the environment to support this quest differs again from that of its secular counterpart.

But, in the case of a religiously affiliated institution, this ecology faces threats caused by erosion, some of which is exter-

---

24. *See generally* HASTINGS RASDALL, THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES (Powicke and Emden eds., Oxford University Press 1936).

25. Robert Bolt, *A Man For All Seasons*, VINTAGE, 1962, at 73. Bolt has Thomas More telling his daughter Meg and her fiancé, Will Roper, that "God made the angels to show him splendor—as he made the animals for innocence and plants for their simplicity. But Man he made him to serve wittily, in the tangle of his mind!" *Id.*

26. A principal source of *truth* as being at the heart of the university enterprise is the biblical passage, "You will know the truth, and the truth will make you free." *John* 8:32 (New Revised Standard Version).

nal and some of which is internal.[27] As in the case of individuals and groups who care for the shorelines, forests, fields, and species of flora and fauna which are endangered by various kinds of erosion or extinction, the participants who make up the religiously affiliated university's environment must address the erosive forces which threaten the institution's ecology. But what are the forces of erosion which threaten the religious school and from where do they come? Ironically, the religious foundation of many of these schools is challenged both from within and from outside the institution. Some faculty and students hold a neutral view toward the religious identification; others may even hold a hostile one. These forces, in large part, are nurtured by a culture which is largely secular in its outlook. This secular atmosphere has displaced the religious as being characteristic of American higher education.[28] Professor Marsden has further noted that, regardless of academic credentials, religious individuals and groups have been moved to the periphery of the educational establishment.[29] He is not alone in voicing this kind of commentary.

In my own teaching experience, I have encountered students who have attended religiously affiliated universities who were not aware of the institution's religious heritage. While such incidents may be rare, they are a sad commentary on how the institution may not fully disclose its affiliation so that it attracts students and faculty who are not interested in attending or working at a religiously affiliated school. Far more tragic, however, are those instances where a student or faculty member or administrator applies for admission to or seeks employment at a school because this person believes that the school has a religious affiliation, only to discover however, that the religious tradition and affiliation are more myth than reality.

---

27. The theme of erosion of the religious affiliation and heritage of educational institutions has been discussed by others. *See, e.g.*, Fernand Dutile, *A Catholic University, Maybe; But a Catholic Law School?*, *in* THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY 75 (Theodore Hesburgh ed., 1994).

28. Over time, public religion has evolved into a non-sectarian civil religion. *See* Buckley, *supra* note 11, at 77. For general discussions about civil religion, see Michael Madigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CAL. L. REV. 293 (1993); Yehudah Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237 (1986).

29. MARSDEN, *supra* note 9, at 440.

When the disappointed student, faculty member, or administrator asks, "Why did this happen; who let this occur?," the questioner may receive a shrug of shoulders as the only response. But must this be the only response in the future? Can a religiously affiliated institution take steps that are both necessary and lawful both to retard the erosion of religious affiliation and to reinforce it in ways that enhance the academy's robust health? I believe that such an alternative exists.

The purpose of this article is to investigate several interrelated issues relevant to providing this alternative. The first focuses on the general legal history covering the ability of religiously affiliated schools to hire individuals under employment practices which do take account of preserving its religious affiliation. The second examines the legality of religiously affiliated institutions raising directly with prospective candidates for appointment to faculty or administrative positions questions concerning their understanding of the school's mission and their ability to support it.[30] The third area under investigation concentrates on whether such institutions may employ affirmative action or apostolic preference[31] schemes in the hiring of some faculty and administrators who would actively support the institution's mission as it is affected by the religious affiliation. This last investigation will offer a general proposal which may be helpful to the religiously affiliated school in developing a suitable plan consistent with Title VII norms.

---

30. *See generally* Joanne C. Brant, *"Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275 (1994); Treavor Hodson, *The Religious Employer Exemption Under Title VII: Should a Church Define Its Own Activities?*, 1994 B. Y. U. L. REV. 571; Ralph D. Mawdsley, *Limiting the Right of Religious Educational Institutions to Discriminate on the Basis of Religion*, 93 EDUC. LAW REPT. 1123 (1994); Ralph D. Mawdsley, *Religious Educational Institutions: Limitations and Liabilities Under ADEA and Title VII*, 89 EDUC. LAW REPT. 19 (1994); Scott McClure, *Religious Preferences in Employment Decisions: How Far May Religious Organizations Go?*, 1990 DUKE L.J. 587; John E. Sanchez, *Religious Affirmative Action in Employment: Fearful Symmetry*, 1991 DET. C.L. REV. 1019; Laura S. Underkuffler, *"Discrimination" on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment*, 30 WM. & MARY L. REV. 581 (1989).

31. Telephone Interview with R. Randall Rainey, Senior Fellow, Woodstock Institute, Georgetown University, Washington, D.C. (Sept. 30, 1994).

Since I do not wish to duplicate the work accomplished by other authors on this topic,[32] I shall briefly summarize in Part II the general statutory and constitutional legal issues facing the religiously affiliated educational institution when it attempts to hire candidates sensitive to and supportive of the school's religious affiliation and mission. In Part II, I present the general status of legal affairs prior to the Ninth Circuit's 1993 decision in *Kamehameha Schools/Bishop Estate*.[33] In Part III, I analyze the court's conclusion, and its claim that the Kamehameha Schools were not religiously affiliated and, therefore, could not require its teachers to be of the Protestant faith. Although its decision may be supportable on several narrow grounds, the Ninth Circuit's understanding of the Title VII religious exemptions to the non-discrimination provisions covering hiring practices is faulty. In Part IV, I offer my own analysis of the Title VII norms, exemptions, and legislative history, providing insight into what the norms and exemptions mean. In Part V, I take account of the concerns of those individuals and religious institutions which have acknowledged the need to recruit new faculty and administrators who share in the religiously-affiliated mission of the institution, i.e., those who sympathize with and support the synthesis of faith and reason. Consistent with the Title VII exemptions for religious institutions, I formulate a general approach which could assist religiously affiliated universities, as well as other religiously affiliated charitable institutions, in developing their future hiring practices. The structures I offer, while consistent with the non-discrimination norms of Title VII, should enable these institutions to exercise apostolic preference not only to co-religionists (they should certainly be covered) but to all others who are allied with, and supportive of, the institution's religiously inspired mission.

The focus of this article concentrates, then, on a program similar to those preferential hiring programs which rely on affirmative action employment practices. While such practices have been given much public attention recently,[34] and while

32. *See supra* note 30.

33. E.E.O.C. v. Kamehameha Schools/Bishop Estate, 990 F.2d 458 (9th Cir. 1993); *see also* Ralph D. Mawdsley, *Are Non-Church Controlled Educational Institutions Still Entitled to Title VII Religious Exemptions?*, 87 EDUC. LAW. REPT. 1 (1994).

34. *See, e.g.*, Nicholas Lehmann, *Taking Affirmative Action Apart*, N. Y. TIMES

they have been the focus of public debate[35] and, in the realm of publicly financed work projects subjected, to increased judicial scrutiny,[36] many individuals involved with private, religiously affiliated higher education have seen the need to comment on and suggest the use of such employment practices to ensure the continued existence of the university as religiously affiliated. Indeed, if the erosion of support of these institutions continues, preferential employment practices will be needed to restrain this erosion and to restore religiously affiliated higher education in the United States. These practices should be designed to respect the requirement not to discriminate unlawfully against others, while at the same time recognizing the need to ensure the continuance of these schools as religiously affiliated. Such preferential hiring practices could help promote and sustain the diversity that is important to American culture and education *vis-à-vis* race, ethnic heritage, color, sex, and even religion. Mission sensitive hiring practices can acknowledge that while some private and public institutions will and ought to remain secular, others need and should not. Diversity is enhanced, and pluralism is protected. If affirmative steps are not taken to address the erosion in religiously affiliated higher education, it is quite possible, perhaps even inevitable, that the religiously affiliated university will become extinct not because of voluntary decision but because critical employment appointments could not be made with mission-oriented goals in mind.

MAGAZINE, June 11, 1995, at 36; Shelby Steele, *Affirmative Action Must Go*, N. Y. TIMES, Mar. 1, 1995, at A19; *see also* Adarand Constructors, Inc. v. Federico Pena, 115 S. Ct. 2097 (1995) (finding that the legality of racial classifications used by Federal, state, or local governments in affirmative action set asides must withstand "strict scrutiny").

35. *See, e.g.*, *Affirmative Action's End? Now, It's Not That Simple*, N. Y. TIMES, July 23, 1995, at A1; Drummond Ayres, *California Board Ends Preferences In College System*, N. Y. TIMES, July 21, 1995, at A1; Drummond Ayres, *Efforts To End Affirmative Action Are Faltering*, N. Y. TIMES, Nov. 20, 1995, at A1; *California Governor Sues On Bias Plan*, N. Y. TIMES, Aug. 11, 1995, at A21; Steven Holmes, *G.O.P. Lawmakers Offer A Ban On Federal Affirmative Action*, N. Y. TIMES, July 28, 1995, at A17; Orlando Patterson, *Affirmative Action, On The Merit System*, N. Y. TIMES, Aug. 7, 1995, at A13.

36. *See Adarand Constructors*, 115 S. Ct. 2097.

II. EXODUS—A JOURNEY THROUGH THE EARLY LAW: BACKGROUND HISTORY

It is clear that religiously affiliated universities and other religiously affiliated institutions have already addressed the issue of how the institution's mission may play a role in employment practices. In some instances, these practices have allegedly violated the civil rights of individuals because they were either discharged or not employed on the grounds of religious considerations. These cases include the discharge of a teacher at a religiously affiliated primary school who became pregnant out of wedlock,[37] and the hiring of ordained ministers because of the requirement of ordination as a qualification to teach seminarians,[38] as well as the preferential hiring of members of a religious order to teach philosophy in a university founded by and affiliated with the same religious order.[39] It is also clear that under federal statutory law, religious organizations generally have grounds for some degree of exemption from the requirement for non-discriminatory employment practices of the Civil Rights Act of 1964. These provisions cover (1) religious corporations, associations, educational institutions, or societies which employ individuals of a particular religion to perform work connected with their religious activities;[40] (2) employment practices which admit or employ an individual on the basis of religion, sex or national origin where any of these characteristics are *bona fide* occupational qualifications reasonably necessary to the "normal operations" of the employer's business or enterprise;[41] or (3) employment practices of a school, college,

37. *See* Vigars v. Valley Christian Ctr., 805 F. Supp. 802, 804 (N.D. Cal. 1992) (termination of the employee's employment was based on the employee's becoming pregnant out of wedlock).

38. It would seem most reasonable under 42 U.S.C. § 2000e-2(e)(2) for the institution to hire only an ordained minister of a particular faith to teach seminarians who will be ordained into the same ministry because of the inextricable relation between the ordination qualification and the specific responsibilities of the position.

39. Pime v. Loyola Univ. of Chicago, 803 F.2d 351 (7th Cir. 1986) (concluding that the hiring preference given to members of the religious order over non-members was protected by the *bona fide* occupational qualification of 42 U.S.C. § 2000e-2(e)(1) because the preference was "reasonably necessary" to the normal operations of the university).

40. 42 U.S.C. § 2000e-1(a) (1994).

41. 42 U.S.C. § 2000e-2(e)(1) (1994).

university, or other educational institution to hire individuals of a particular religion where the educational institution 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 [institution] is directed toward the propagation of a particular religion."[42] Although this last section is the most relevant to this essay, I suggest, at this point, that the phrase "toward the propagation of a particular religion" should be read broadly rather than narrowly. I do so because determining what constitutes "the propagation of a particular religion" incorporates the holistic approach to life as well as the specific religious practices that occur within the lives of the members of each religious community. For example, within the Christian tradition, the propagation of the faith would include the relevance and application of Christian social thought within the daily lives of the members who are associated with educational, health care, and other institutions established and maintained by the worshiping community or its members.[43]

At this stage of my inquiry, I shall examine each of the three exemptions of the Civil Rights Act to ascertain some of the major questions they have addressed, and the answers courts have provided, regarding the ability of a religiously affiliated university to recruit individuals who would reinforce the identity and mission of the institution or to turn away individuals who would not.

A. *The Three Religious Exemptions of Title VII*

It should be kept in mind that section 2000e-2 identifies general employment practices which violate the non-discrimination provisions. Most notably, section 2000e-2(a)(1) notes that it is unlawful for an employer to refuse to hire or to discharge an individual or to discriminate against that individual in the context of wages, benefits, conditions or privileges of employment because of that individual's race, color, religion, sex, or

42. 42 U.S.C. § 2000e-2(e)(2) (1994).

43. The reasons for this arise from the definition of *religion* contained in Title VII and addressed below. *See infra* note 51. The definition of "religion" is an expansive rather than a narrow one.

national origin.[44] In addition, subsection (a)(2) expands employee protection by forbidding use of these characteristics when they limit, segregate, or classify the employees or applicants in any way that deprives or tends to deprive such individuals from employment opportunities, or otherwise adversely affects their employment status.[45] Congress provided three exemptions to religiously affiliated employers. Section 2000e-1 exempts certain types of employment practices pursued by religiously affiliated universities from the anti-discrimination provisions of Title VII. There are two additional provisions in section 2000e-2(e) which offer or imply certain protections to religious institutions from the provisions of Title VII. However, religiously affiliated employers are not the only ones who were granted certain exemptions from the general provisions of Title VII. Other employers are insulated from allegations of discrimination when they either favor certain individuals or would disfavor other individuals for reasons which follow.

For example, an employer who conducts business on or near an Indian reservation may extend preferential treatment to Indians so long as this practice is publicly announced.[46] An employer may also apply different standards of compensation or extend different terms of employment to specific individuals where these differences are based on recognized seniority and merit systems of employee classification or professionally developed tests designed to test abilities that are related to the tasks of the jobs to be performed by the employees.[47] Of course, the use of these criteria should not be allowed to mask the real intention of an employer who wishes to discriminate against individuals on the basis of race, color, religion, sex, or national origin.[48] Other provisions permit discriminatory employment practices based on national security reasons[49] and certain political affiliations of the individual (i.e., membership in the Communist Party)[50] which could compromise that person's ability to perform delicate or sensitive jobs that are a

44. 42 U.S.C. § 2000e-2(a)(1) (1994).
45. 42 U.S.C. § 2000e-2(a)(2) (1994).
46. 42 U.S.C. § 2000e-2(i) (1994).
47. 42 U.S.C. § 2000e-2(h) (1994).
48. *Id.*
49. 42 U.S.C. § 2000e-2(g) (1994).
50. 42 U.S.C. § 2000e-2(f) (1994).

part of or related to national security. But these are not the only circumstances in which employers can lawfully exercise employment practices that might otherwise violate Title VII. Congress also granted three exemptions to religiously affiliated institutions.

1. The First Exemption—Section 2000e-1(a)

Section 2000e-1(a) of Title 42 provides that the non-discrimination and other remedial provisions of the equal employment opportunity legislation do not apply to a "religious corporation, association, educational institution, or society [hereinafter *employer*]" concerning the employment of "individuals of a particular religion to perform work connected with the carrying on by such [employer] of its activities." At the outset, it is vital to understand the meaning of several important terms of this part of the statute to determine how the statute is to be construed. The terms *religious*, *religion*, and *activities* are primary candidates for examination. The terms *corporation*, *association*, *educational institution*, and *work* are terms that are also important for ascertaining the meaning of this first provision and applying it to specific cases.

The only specific term defined by the definitional section of this subchapter of the Civil Rights Act is *religion*.[51] The meaning of this relevant term covers "all aspects of religious observance and practice, as well as belief. . . ."[52] The phrase "all aspects" of religious observance, practice, and belief is broad and encompassing. But virtually all of the cases interpreting

---

51. 42 U.S.C. § 2000e(j) states in pertinent part that:

> *religion* includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The term *religion* also has a special significance in the context of the religion clauses of the First Amendment. I have suggested elsewhere that the term generally refers to belief in the transcendental. *See* Robert Araujo, S.J. *Contemporary Interpretation of the Religion Clauses: The Church and Caesar Engaged in Conversation*, 10 J. LAW & REL. 501 (1993-94). For the purposes of this article, I suggest that religion deals with an individual's belief in God—the God of the Abrahamic religions of Judaism, Christianity, and Islam.

52. 42 U.S.C. § 2000e(j).

subsection (j) concentrate on the issue of protecting the employee who might be discriminated against because of that individual's religious observance, practice, or belief rather than the employer's religious nature. Put within the context of a university which maintains some religious affiliation, a broader sense of the meaning of religion emerges when section 2000e-1(a) and section 2000e(j) are read together. Assuming that a religiously affiliated university is an "educational institution" under section 2000e-1(a), then it follows that the activities it pursues under the religion would include "*all* aspects of religious observance and practice, as well as belief."[53] Thus, the religiously affiliated educational institution should be able to develop policies, including employment practices, which reflect not only its religious practices and observances but also its views and their implementation, which reflects the group's beliefs. While there will be limits on what is reasonable, it would appear logical to argue that hiring practices which seek to employ individuals sympathetic with and supportive of these beliefs would be permissible.

By reading these two sections (sections 2000e-1(a) and 2000e(j)) *in pari materia*, the religious dimension covered by section 2000e-1(a) would seem to consider the employer's institutional observances, practices, and beliefs. Because this subsection specifically mentions "educational institutions" (thus including universities) it would be sensible to extend coverage of section 2000e-1(a) to a religiously affiliated university. Assuming that the religiously affiliated university's observances, beliefs, and practices that issue from a particular religious tradition do provide it some protection from the non-discriminatory equal employment opportunity provisions of the Civil Rights Act, the next question is how extensive is this protection or insulation from the non-discrimination provisions of Title VII?

It appears that not all of the employer's hiring decisions are immune from the equal employment opportunity provisions of the Civil Rights Act. It is more than likely that employment practices which consider race, national origin, color, and sex and which have little bearing on religion (including its practices, beliefs, and identification with an academic communi-

53. 42 U.S.C. § 2000e(j) (1994) (emphasis added).

ty) would not be exempt.[54] In the context of the religiously affiliated university, the coverage of section 2000e-1(a) may be limited to those situations in which the current or prospective employee's personal adherence to the religion in question is needed in order to "perform the work connected with the carrying on" of the university's various activities. For example, a religiously affiliated university would be protected from enforcement of the non-discrimination provisions if it only considered for hire an ordained minister to serve as university chaplain if the chaplain were to perform functions which only an ordained minister would be qualified and experienced to do.[55] While a religiously affiliated university would be free to discriminate on religious grounds (under the terms of Title VII) where there is a nexus between personal religious beliefs and the work required by the institution,[56] it is less clear if such a university could mandate that a candidate for a faculty or administrative position could only be selected if that individual subscribed to the religious tenets associated with the school. One federal district court has held that section 2000e-1 does not mean that the religious employer must hire only co-religionists (although it may should it see the necessity) when it desires to maintain the religious atmosphere consistent with its denomination's religious beliefs. However, the religiously affiliated employer

---

54. *See Vigars,* 805 F. Supp. at 807 (indicating that the legislative history of the religious statutory exemptions do not generally apply to sex-based employment practices exercised by religiously affiliated employers); *see also* Maguire v. Marquette Univ., 814 F.2d 1213 (7th Cir. 1987) (plaintiff unsuccessfully argued sex discrimination by a religiously affiliated school, which was countered by two defenses: (1) it was not plaintiff's gender which was used against her, but rather that the position she sought had to be filled by a Jesuit (and since only males can be Jesuits, only a male could fill the position); and, (2) the plaintiff's personal views on abortion were hostile to the teachings of the sponsoring religious group and contravened the goals and missions of the defendant university).

55. *See* Little v. Wuerl, 929 F.2d 944, 949 (3d Cir. 1991). *But see* Rasul v. District of Columbia, 680 F. Supp. 436 (D. D.C. 1988) (holding that prison authorities could not discriminate against a Muslim cleric since they had not demonstrated that the hiring of a Protestant cleric was a *bona fide* occupational qualification for the post of prison chaplain).

56. E.E.O.C. v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), *cert. denied,* 453 U.S. 912 (1980); *see also* Little v. St. Mary Magdalene Parish, 739 F. Supp. 1003 (W.D. Pa. 1990), *aff'd,* 929 F.2d 944 (3d Cir. 1991). The Third Circuit in *Little* read the exemption of the employer broadly; a religious school need not hire only co-religionists if it chooses, but it can hold all employees regardless of their personal religious beliefs to conduct themselves in ways consistent with its religious principles. *Id.* at 951.

can require its employees who do not share the institution's religious traditions and convictions to comply with employment practices which reflect the host religion's observances, practices, and beliefs. In *E.E.O.C. v. Presbyterian Ministries*[57] a Presbyterian retirement home knowingly hired a Muslim receptionist. The employer informed her that she was not to wear the head covering worn by some Muslim women because it was not consistent with the religious atmosphere of the home. Although the employer's position did not require that all employees had to be Presbyterian, the court agreed with the employer that Title VII did not prohibit its employees from being required to respect the religious traditions of the home.[58] In a similar vein, the Third Circuit in *Little v. Wuerl* has indicated that even when an employee charged the religiously affiliated employer with religious discrimination under Title VII, the religiously affiliated employer (in this case a primary school administered by the Roman Catholic diocese of Pittsburgh) is generally free from government intervention, a freedom which is to be read expansively.[59]

In another example, *E.E.O.C. v. Kamehameha Schools/Bishop Estate*, the schools were established under the will of a benefactor who specified that all teachers would have to be members of the "Protestant religion."[60] Although the district court agreed with the employer that it was entitled to rely on the Title VII religious exemptions,[61] the Ninth Circuit held that the responsibilities of the position sought by the non-Protestant candidate had a "primarily secular purpose and character" even though the schools conducted classes in comparative religious studies, scheduled prayer and other religious services, and had hired "nominally Protestant" faculty in the past.[62] The Ninth Circuit agreed with the E.E.O.C.'s finding that the school could not

57. 788 F. Supp. 1154 (W.D. Wash. 1992) (recognizing an implied right based on the Free Exercise Clause against the claim of religious discrimination covered by Title VII).

58. *Id.* at 1156.

59. 929 F.2d 944, 951 (3d Cir. 1991).

60. E.E.O.C. v. Kamehameha Schools, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993), *on remand*, 848 F. Supp. 899 (D. Haw. 1993).

61. *Kamehameha*, 780 F. Supp. 1317, 1323 (D. Haw. 1991), (agreeing with the school and estate that the Protestant-only hiring requirement was a *bona fide* occupational qualification).

62. *Kamehameha*, 990 F.2d at 466.

discriminate on the basis of religion against teachers who did not come from the Protestant tradition.[63] Since I argue that there are deficiencies with this court's legislative analysis of the meaning of the Title VII religious exemptions, I shall examine this more extensively in Parts III and IV.

At this point in the discussion, I suggest that a religiously affiliated school can refuse to hire a candidate or can discharge an employee whose personal conduct counters the religious tenets of the school.[64] While a religiously affiliated school does not waive its right to discriminate against other candidates when it hires someone not a member of its church,[65] it should be remembered that the relationship between a religiously affiliated school and its faculty is not always exempt from coverage of the equal employment opportunity protections of Title VII.[66]

2. The Second Exception: The Bona Fide Occupational Qualification—Section 2000e-2(e)(1)

Congress also extended protection to certain employers who engage in employment practices which take into account an individual's religion, sex, or national origin where such considerations constitute *bona fide* qualifications for employment and these three characteristics are occupational qualifications reasonably necessary to the normal operation of the business or enterprise.[67] Thus, an employer, including a religiously affiliated school, would be immune from enforcement of Title VII if it could show that considerations regarding the religion or reli-

---

63. *Id.* at 467.

64. *See, e.g.*, Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991) (upholding refusal of Catholic school to rehire teacher who was divorced and remarried). *But see* Vigars v. Valley Christian Center, 805 F. Supp. 802 (N.D. Cal. 1992), where the court held that parochial school was not automatically exempt from non-discrimination provisions of Title VII where it fired a school librarian who had a child out of wedlock. The District Court denied the employer's motion for summary judgment because of the dispute of material issues.

65. Little v. St. Mary Magdalene Parish, 739 F. Supp. 1003, 1005 (W.D. Pa. 1990); *see also* Little v. Wuerl, 929 F.2d at 951.

66. *Mississippi College*, 626 F.2d at 485. The court noted, however, that if the suspect employment practice is pursued in accordance with religious considerations in mind, then the Title VII exemptions for religious employers can insulate the practice from Title VII enforcement action.

67. 42 U.S.C. § 2000e-2(e) (1994).

gious views of an employee or a candidate for employment were integral to occupational qualifications that are reasonably necessary to the successful execution of the employer's enterprise.[68] While the Ninth Circuit found that education was largely a secular enterprise at the Kamehameha Protestant schools, the court also found that the consideration of the religion of the teachers who would offer religious instruction fell within the *bona fide* qualification protected by subsection (e)(1).[69] In accordance with these provisions, it has been held that a religiously affiliated university is exempt from Title VII when the school designated that seven of its thirty-one faculty positions in the philosophy department were to be restricted for members of the school's founding religious order.[70]

Interestingly, the religious *bona fide* occupational qualification exemption has been applied to employment practices of American firms conducting business overseas. An American contractor did not discriminate against non-Moslem pilots when it required the pilots ferrying religious pilgrims to Mecca be Moslem.[71]

3. The Third Exemption: Religiously Affiliated Schools, Colleges, or Universities Exemption—Section 2000e-2(e)(2)

Subsection (e)(2) arguably extends even more protection to a religiously affiliated school.[72] It states that any school, college, university, or other educational institution which 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" is permitted to employ individuals who are members of a particular religion. An educational institution is further protected by this same subsection if its hiring practic-

---

68. 42 U.S.C. § 2000e-2(e)(1) (1994).

69. *Kamehameha Schools*, 990 F.2d at 465-466.

70. *See Pime*, 803 F.2d at 354. The court found that reserving a certain number of positions within the philosophy faculty for members of the university's founding religious order constituted a *bona fide* occupational qualification. *Id.*

71. *See* Kern v. Dynalectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984). It is interesting to note that in the context of this case, it was also mandated by local law that any non-Moslem caught flying into Mecca would be beheaded.

72. 42 U.S.C. § 2000e-2(e)(2) (1994).

es are geared toward a curriculum which is "directed toward the propagation of a particular religion."[73] It is also a valid employment practice for a religiously affiliated university to provide free housing and other benefits to the faculty members of the religious order which operates the university, but not to provide such benefits to a lay member of the faculty who, unlike the order's teaching members, does receive a salary.[74]

B. *Reflection and Remaining Questions*

The cases under section 2000e-2(e)(1) are fairly straightforward in applying the *bona fide* occupational qualification. More problematic are those decisions covering section 2000e-2(e)(2), where the courts have concluded that either the record was insufficient to determine if the school was a religious institution covered by section 2000e-2(e)(2)[75] or the case could be decided on more narrow grounds.[76] As a member of the same religious order that was involved in *Pime*, i.e., the Jesuits, I question the direction in which the courts deciding that case were heading regarding the evidence needed to determine what constitutes a religious school, college, or university for purposes of section 2000e-2(e)(2). While there is a need to look at evidence that distinguishes schools which claim religious affiliation from secular schools, the fact that there is, for example, an active presence of the founding religious order serving as teachers and

---

73. *Id.*

74. *See* Tagatz v. Marquette Univ., 681 F. Supp. 1344, 1358-59 (E.D. Wis. 1988), *aff'd*, 861 F.2d 1040 (7th Cir. 1988). The Seventh Circuit noted that while Marquette is a Jesuit institution, the university "declined to plead the religious exemption as a defense" to the claim of religious discrimination. *Id.* at 1043.

75. In his concurrence in *Pime*, 803 F.2d at 354-58, Judge Posner questioned whether Loyola University is a religious employer for purposes of § 2000e-2(e)(2). *Id.* at 357. He further indicated that while "the degree of religious involvement in universities popularly considered to be religiously affiliated is highly variable [citation omitted], neither the statute nor the legislative history indicates where in the continuum Congress wanted to make the cut" for purposes of § 2000e-2(e)(2). *Id.* at 358. Because of the silence in the record concerning information detailing Loyola's governance and other material factors, Judge Posner was reluctant to address whether the religious employer exemption would apply. *Id.* It was sufficient to decide the case in favor of Loyola knowing that there was no "evidence of either discriminatory intention or discriminatory effect." *Id.*

76. *Id.* at 354, 357-58 (Posner, J., concurring); *Tagatz*, 861 F.2d at 1043 (Marquette University declining to rely on the religious exemption defense).

principal administrators and chaplains, and the mission of the school reflecting a religious ethos, philosophy, and *raison d'être,* seems far more significant and relevant than the number of the order's members who participate and the financial contribution the order makes to the institution.[77] The synthesis of such a mission statement with members of the church, order, or other religious group who participate in the teaching and administration of the school would certainly distinguish it from secular institutions which are state supported (e.g., land grant institutions, public grammar and high schools) or private schools which do not have a mission statement that reflects any religious affiliation. Certainly, many individuals who belong to the confession which is at the core of the religious affiliation might seek employment in the institutions because their own church affiliation is the same as that of the sponsoring school, college, or university. The presence of these individuals would supply a further reason for considering the school as either religious or having religious affiliation.

But the question remains: what happens where the employee or candidate for employment is not a member of the religious group which in some way sponsors the university? In other words, what happens when the religiously affiliated university seeks out candidates for employment who are not necessarily members of the church or religious group which is the source of its religious affiliation, but who are desirous of supporting the mission of the religiously affiliated university? No language in the three exemptions of Title VII discussed earlier addresses these situations. Does this mean that the institution violates Title VII when it prefers a candidate for employment who indicates a personal desire to support the mission of the religiously affiliated institution over a candidate who chooses to remain silent regarding his or her position *vis-à-vis* the religious identity and mission of the school?

This is a major problem which constitutes the focus of my investigation. Numerous commentators have recently expressed the shared view that recruitment of faculty interested in the mission of the university is vital to the university's continued existence and self-preservation as a religiously affiliated

77. *See Pime*, 803 F.2d at 357-58 (Posner, J., concurring).

school.[78] It is clear that a candidate for a faculty or important administrative position need not be a member of the church or religious group which sponsors the educational institution. What is also clear is the requirement that the candidate personally desire, regardless of his or her own personal religious beliefs, to engage in and support the mission of a particular religiously affiliated school. The exemptions of Title VII do not directly address this circumstance. Because they do not, it is less apparent if the educational institution would violate the non-discrimination provisions of Title VII by preferring a candidate who is willing to support the religious nature and mission of the school over one who does not offer such support or whose personal views are in conflict with the religious identity of the school. Nonetheless, there is some guidance available in helping the religiously affiliated school or institution through this thicket.

The Seventh Circuit[79] and the United States Supreme Court[80] have offered the greatest clarity in addressing these intricate employment issues pertaining to religious organizations and candidates for employment or employees who are refused employment on religious grounds, even though they are members of the church or religious organization which runs the school or institution. The Seventh Circuit responded to the allegations made by Dr. Marjorie Maguire, who applied for the position of associate professor of theology at Marquette University, a school founded by, and still affiliated with, the Society of Jesus, a Roman Catholic men's religious order.[81] She alleged that she was denied on at least six occasions the appointment she sought because of her gender and because of her controver-

78. While I shall discuss this subject later on in the context of hiring practices in religiously affiliated institutions, it should be noted here that the faculty recruitment and appointment process is inextricably linked to how an institution identifies itself and projects this image to the public. For example, if a university wishes to project an image which attracts minority students, it is important to have members of the faculty who are themselves members of minority groups. *See, e.g.*, Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 864 (1995) (commenting on the "important social roles" which faculty serve because they largely "set an institution's tone and agenda").

79. *Maguire*, 814 F.2d 1213.

80. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

81. Maguire v. Marquette University, 627 F. Supp. 1499 (E.D. Wis. 1986).

sial views on the moral theology of abortion.[82] The district court noted that the crucial issue was not the alleged sex discrimination but, rather, the plaintiff's unorthodox views on abortion which conflicted with the Roman Catholic Church's teachings and position.[83] Although she professed to be a member of the Catholic Church,[84] she asserted that the preferential hiring policy adopted by the defendant university to hire Jesuits sexually discriminated against her.[85] Ultimately the Seventh Circuit found that the principal issue was not the allegation of sex discrimination,[86] but focused on the plaintiff's personal views which were hostile to the goals and mission of Marquette as they reflect the teachings of the Catholic Church and the Jesuit order.[87] The circuit court agreed with the district court that the plaintiff did not have Title VII grounds for challenging the employment practices of Marquette because she was not discriminated against on the basis of either sex or religion.[88]

The Supreme Court in 1987 addressed similar issues in the *Amos* case. There the employer was the Church of Jesus Christ of Latter-Day Saints, which owned and operated a recreational facility and gymnasium at which Amos was employed.[89] The facility was run as a non-profit recreational facility open to the public.[90] Amos and other employees of the Church were dismissed because they had failed to obtain "temple recommends," certifications that they were members in good standing regarding particular Church practices.[91] The former employees alleged that if the Church, under Title VII, were able to discriminate on religious grounds by firing employees from non-religious jobs (such as the position of attendants in the gymnasium), the Establishment Clause of the First Amendment of the U.S. Constitution would be violated.[92] The fact that this case

82. *Id.* at 1502.
83. *Id.*
84. *Id.* at 1503.
85. *Id.*
86. 814 F.2d at 1218.
87. *Id.* at 1217.
88. *Id.*
89. *Amos*, 483 U.S. at 330.
90. *Id.*
91. *Id.* at n.4.
92. *Id.* at 331. The Establishment Clause reads: "Congress shall make no law re-

was largely decided on the constitutional issues does not restrict the insight it provides concerning the multiplicity of questions regarding employment discrimination allegations and religiously affiliated employers. The Court recognized that the non-profit activities of religious employers are entitled to protection from Title VII discrimination allegations when the work involved has been defined by the religious organization as being relevant to carrying out its religious mission.[93] The Court ultimately found that the statutory insulation from anti-discrimination enforcement given to religious organizations for employment practices involving non-religious positions did not violate the Establishment Clause.[94]

Justice Brennan's concurring opinion fleshed out the important issues inherent to the Court's decision. He was willing to investigate issues which the majority chose not to raise and which have come up in other cases involving employers with a religious nature, character, or tradition. Justice Brennan wrote separately to investigate Title VII's (section 702's) exemptions for non-profit organizations with religious affiliation.[95] He recognized that Title VII's exemptions address the non-profit activities of religious employers and are related to "the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[96] But Justice Brennan was not content with assuming what "religious missions and organizations" mean.

He understood "religious activity" to have a broad meaning. His definition of religious activity is encompassing. It emerges from the variety of human endeavors consisting of individual participation in a "larger religious community" which "represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals."[97] This definition avoids the legalistic and technical, but it embraces the realistic and practical. His insight acknowledged the signifi-

---

specting an establishment of religion. . . ." U.S. CONST. amend. I.

93. *Amos*, 483 U.S. at 339.

94. *Id.*

95. *Id.* at 340 (Brennan, J., concurring).

96. *Id.* at 339.

97. *Id.* at 342 (Brennan, J., concurring).

cance that those individuals who are committed to the mission of the religious organization are those persons qualified to determine which activities in fact further the organization's mission.[98]

Justice Brennan investigated an important point that might otherwise get obscured in a case involving important Constitutional and statutory issues concerning the rights and obligations of employers and employees. He used the concept of self-definition to investigate and explain this important point. He constructed a sensible sequence which began with an identification of the activities which further the religious mission of a group. But who is best able or most qualified to determine what tasks are essential to religious missions—legislators? Public administrators? Judges? Justice Brennan's sensible response to these questions was that those individuals who are members of the community and are "committed to [its] mission" are best able to determine what constitutes a "religious activity."[99] It is not public officials equipped with statute books and judicial opinions, legislative histories, and law dictionaries who can address this important issue, but rather it is those individuals who are in some way committed to the institution's beliefs, practices, and observances who are best qualified to provide answers.[100]

Justice Brennan refined his point by arguing that the self-definition of the religious mission by the members of the religious organization not only determines the mission but solidifies "individual religious freedom as well."[101] If some individual or group external to the members were to dictate the mission, this practical understanding of religion would be doomed, and the self-determination of the religious group and the people who comprise it and who identify with it would eventually face a form of persecution and perhaps even extinction.[102] Justice

98. *Id.*

99. *Id.*

100. *See supra* note 51, and the accompanying definition of religion found in § 2000e(j).

101. *Amos*, 483 U.S. at 342 (Brennan, J., concurring)

102. *See* Douglas Laycock, *The Rights of Religious Academic Communities*, 20 J. C. & U. L. 15, 33 (1993). The author develops the theme of self-determination raised by Justice Brennan and applies it to the academic community; as Laycock effectively argues:

Brennan expended considerable effort to warn that if a government body were to intrude in the process which defines the mission and the appropriate activities of the religious organization, then the individuals who comprise it as well as the group itself "may be chilled" in their Free Exercise activities which are protected by the First Amendment.[103] In his conclusion, Justice Brennan pointed out:

> Sensitivity to individual religious freedom dictates that religious discrimination be permitted only with respect to employment in religious activities. Concern for the autonomy of religious organizations demands that we avoid the entanglement and the chill on religious expression that a case-by-case determination would produce. We cannot escape the fact that these aims are in tension. Because of the nature of nonprofit activities, I believe that a categorical exemption for such enterprises appropriately balances these competing concerns. As a result, I concur in the Court's judgment that the nonprofit Deseret Gymnasium may avail itself of an automatic exemption from Title VII's proscription on religious discrimination.[104]

And, to ensure that no one may conclude that the Court was endorsing religion in conflict with the Establishment Clause, Justice O'Connor added a coda in her own concurring opinion. She pointed out that the Court's decision insulating the nonprofit activities of religious organizations is an accommodation rather than an establishment of religion.[105] She further elaborated her conclusion by indicating that the effect of the Court's decision would eliminate the need for religious organizations to

---

> For the state or academic associations to protect academic freedom at religious universities would require a secular intrusion into the central deliberative processes of a religious institution. To decide what innovations a religious tradition can and cannot tolerate is to decide the future content of the faith. It is of the essence of religious liberty that such decisions be made by the religious community, and never by secular authority. Religious limitations on academic freedom may be wise or foolish, and they may be administered well or badly. The questions raised by such limitations are the subject of serious debate within religious universities. That is where the debate should be conducted, and the Constitution should protect whatever answers emerge.

Id.

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

104. *Id.* at 345-46.

105. *Id.* at 349 (O'Connor, J., concurring).

justify their non-profit activities as both religious as well as non-discriminatory (i.e., in compliance with Title VII).[106]

It would then appear that with this corpus of Constitutional and statutory law as interpreted by the Supreme Court and other federal courts, religiously affiliated schools can claim both the right to determine what constitutes their religious activity along with the sovereign exercise of employment practices that favor certain types of individuals over others. However, this right to self-determination for religious organizations in non-profit activities has been clouded by the Ninth Circuit's decision in *E.E.O.C. v. Kamehameha Schools/Bishop Estate*.[107] Although the U.S. Supreme Court denied *certiorari*,[108] no federal court has followed, cited, criticized, or distinguished the Ninth Circuit's decision. Some of the ambiguity generated by the Ninth Circuit's opinion stems from what the court considered to be a religious organization (a school, in the context of this case) and from what it further concluded were *bona fide* occupational qualifications which would protect certain employment practices from the charge of religious or other discrimination. At this stage, a careful review of the Ninth Circuit's opinion and its legislative analysis is in order.

III. NUMBERS—THE LAW IS SUPPLEMENTED AND INTERPRETED

In *Kamehameha*, the Ninth Circuit addressed several Title VII issues concerning the primary and secondary educational system known as the Kamehameha schools which were established in 1884 under the will of Bernice Pauahi Bishop.[109] Princess Bernice, a wealthy member of the royal Hawaiian family and a deeply spiritual individual, directed the trustees of the trust established under her will to use its income to found and maintain schools which would provide "a good education"

106. *Id.* at 348-49.

107. 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993). *But see* Bob Jones University v. United States, 461 U.S. 574 (1983) (upholding the denial of tax exempt status under § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), to private schools which, although clearly providing education to students, practiced racial discrimination by prohibiting inter-racial dating amongst members of the university community).

108. 114 S. Ct. 439 (1993).

109. *Kamehameha*, 990 F.2d at 459.

as well as "instruction in morals and in such useful knowledge as may tend to make good and industrious men and women."[110] The Princess further instructed that "the teachers of said schools shall forever be persons of the Protestant religion, but I do not intend that the choice be restricted to persons of any particular sect of Protestants."[111] For about one hundred years, the Kamehameha schools established under Princess Bernice's trust were conducted according to her wishes. However, in 1985, Ms. Carole Edgerton, who was not a Protestant, applied for an advertised teaching position which became available in the Kamehameha schools.[112] Upon being notified that she could not be awarded the position because of the religious qualification, she filed a discrimination complaint with the Equal Employment Opportunity Commission in accordance with the provisions of Title VII.[113] After attempts at conciliation failed, the E.E.O.C. brought an action in district court alleging religious discrimination against Ms. Edgerton under the terms of 42 U.S.C. § 2000e-2(a)(1), and both the E.E.O.C. and the schools moved for summary judgment.[114] After accepting the defendant's arguments that the schools were exempt from Title VII under the provisions of 42 U.S.C. §§ 2000e-1, 2000e-2(e)(1), and 2000e-2(e)(2), the district court granted the school's motion for summary judgment and denied the E.E.O.C.'s countermotion.[115]

The district court concluded that: (1) since the schools were entitled to the religious organization exemption of section 2000e-1(a), the schools could hire only Protestant teachers because of the schools' religious history and their educational mission of providing a religious atmosphere for learning;[116] (2) the schools were entitled to rely on the *bona fide* occupational qualification of section 2000e-2(e)(1) because the need for "Protestant presence" was significantly related to the educational tradition and character of the school, and it would be reasonable to conclude that the educational experience would be dif-

110. *Id.* at 459 and n.1.
111. *Id.* at n.1.
112. *Kamehameha*, 780 F. Supp. at 1318.
113. *Id.*
114. *Id.*
115. *Id.* at 1328.
116. *Id.* at 1323.

ferent if this presence were not maintained;[117] and, (3) the Protestant-only hiring policy was directed at propagating a religion integral to the students' daily life and to the schools' curriculum, both of which would be protected by section 2000e-2(e)(2).[118] As a result of the district court's action, the E.E.O.C. appealed the denial of its motion to the Ninth Circuit Court of Appeals.

In considering the case, the Ninth Circuit stipulated that it would construe the three statutory exemptions narrowly, and that the burden of proving the exemptions was on the schools. It consequently concluded that the schools were not entitled to the benefit of any of these exemptions and reversed the district court.[119] The three-member panel began its investigation of the defenses available to the schools by examining section 2000e-1(a) which exempts religious corporations, associations, educational institutions, and societies from hiring individuals of "a particular religion" to perform the work connected with "its activities." The court relied on its earlier test laid down in *E.E.O.C. v. Townley Engineering & Manufacturing Co.*[120] The *Townley* majority stated that "[a]ll religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious."[121] The majority noted that the factual contexts of each case are vital to making a determination about whether the employer is secular or religious.[122] However, also vital to the *Townley* case are the specific facts concerning the nature of the enterprise. Townley Manufacturing Company was a closely held *for*-profit company principally involved with the manufacturing of mining equipment and had mandated that all of its employees had to

117. *Id.*

118. *Id.* at 1328.

119. *Kamehameha*, 990 F.2d at 460. Rex Lee (who successfully argued the *Amos* case before the Supreme Court, 483 U.S. at 328) has correctly pointed out that in asserting its "narrow construction" argument, the Ninth Circuit offered no support for this position, which Professor Lee suggests does not accurately reflect the law. *See* Rex Lee, *Today's Religious Law School: Challenges and Opportunities*, 78 MARQ. L. REV. 255, 263 (1995). I concur with Professor Lee and shall illustrate my reasons for this in Part IV when I investigate the applicable legislative history of Title VII.

120. 859 F.2d 610, 618-19 (9th Cir. 1988) (Noonan, J., dissenting).

121. *Id.* at 618.

122. *Id.*

attend periodic religious services on company time.[123] Unlike the Kamehameha schools which were *non*-profit, and unlike so many private universities which enjoy income tax exemption under section 501(c)(3) of the Internal Revenue Code, Townley Manufacturing, notwithstanding the deeply held religious commitments of its owners, was a for-profit commercial, not a non-profit educational, enterprise.

If, as the court suggested, facts are significant to determining whether an institution is religious or not, then facts are also vital to making crucial distinctions between money-making corporations like Townley and charitable educational institutions which have a religious component, like Kamehameha schools. The Ninth Circuit in *Kamehameha Schools* ignored this significant distinction. Moreover, while concluding that "[n]o religious organization has ever controlled or supported the schools," and that they are part of a "large and overwhelmingly secular business,"[124] it conceded in footnote discussion that while the schools are not directly affiliated with the United Church of Christ, they "maintain a cooperative relationship with the Bishop Memorial Church, which . . . is a member of the Hawaii Conference of the United Church of Christ."[125] For the Court to make so clear and neat a distinction between the secular and the religious for purposes of section 2000e-1 and so close a relationship between the Trust which funds the schools and the admittedly non-profit schools themselves, it forgets the interrelationship between the schools; its century of religious relationship with the United Church of Christ; and its mission in the "instruction of morals" which emerged from Princess Bernice's personal religious convictions. These facts are extremely relevant, as the court indicated, to a just disposition of whether the exemptions of Title VII apply or do not. But to suggest that the Kamehameha schools are more like for-profit business corporations and less like non-profit religiously affiliated educational institutions does injustice to the Kamehameha schools, their mission, and the great differences between secular-for-profit motivations and religiously inspired non-profit humanitarian educational ventures.

---

123. *Id.* at 611-12.
124. *Kamehameha*, 990 F.2d at 461.
125. *Id.* at n.7.

As has been noted earlier,[126] recruitment of faculty is important in identifying the most likely individuals who, by their personal religious belief and the moral outlook which extends from such belief, can establish and maintain the atmosphere for studying and developing the moral values which comprise a part of the schools' mission. Although the court implied that over the years the religious influence within the school had diminished, it also acknowledged that the Chaplain who also served as the pastor of the Bishop Memorial Church (United Church of Christ) exercised authority over the religious education at the schools.[127] To suggest that the presence of religion in the schools was negligible disregards such important facts which the court conceded were vital to resolving the legal conflict. The court also played down other significant facts. For example, it stated that as at other "public and private schools across the nation," the Kamehameha students could participate in Bible studies, or become members of the Fellowship of Christian Athletes and Young Life.[128] Yet, such comforting statements attempting to show that the Kamehameha schools are just like any other secular school fail to take account of the great difficulty which primary and secondary students in public schools have in even trying to have an innocuous non-denominational prayer once a year at the annual commencement exercises.[129] To suggest that students and teachers at public schools can engage in a variety of religious activities such as scripture reading and discussion or have a Fellowship of Christian Athletes ignores the proscriptions of numerous judicial precedents.[130] Noting that religious education is mandated at

126. *See supra* note 78, and accompanying text.

127. *Kamehameha*, 990 F.2d at 462.

128. *Id.*

129. Lee v. Weisman, 505 U.S. 577 (1992) (concluding that a non-denominational prayer at a public school graduation exercise violated the Establishment Clause of the First Amendment).

130. *See, e.g.*, Stone v. Graham, 449 U.S. 39 (1980) (prohibiting the display of the Ten Commandments in a public school); Engel v. Vitale, 370 U.S. 421 (1962) (prohibiting the recitation of prayers at the opening of the day in public schools); Roberts v. Madigan, 702 F. Supp. 1505 (D. Col. 1989), *aff'd.*, 921 F.2d 1047 (10th Cir. 1990) (declaring that while a public school did not violate the Establishment Clause by allowing a Bible in the school library, it could require removal of religiously oriented books from classrooms and could require a teacher to keep a personal Bible out of sight and refrain from silently reading it during classroom hours); *see also* Rena M. Bila, *The Establishment Clause: A Constitutional Permission Slip For Religion In*

the Kamehameha schools from kindergarten through the high school grades,[131] the court curiously insisted that the schools were "essentially secular" even though they operated within "an historical tradition" that "includes" Protestantism.[132] Any hope for continuous exposure to religious education in secular, public schools was eliminated in 1963 with the Supreme Court's decision in *Engel v. Vitale*.[133]

In addressing the *bona fide* occupational qualification of section 2000e-2(e)(1), the Ninth Circuit concluded that the district court defined the mission of the schools "too narrowly."[134] The court of appeals concluded that the central mission was education and, with the exception of religious instruction, "teachers at the schools provide instruction in traditional secular subjects in the traditional secular way."[135] If the district court defined the mission "too narrowly," the Ninth Circuit considered the *bona fide* occupational qualification too narrowly. The court was satisfied that there would always be a "Protestant presence" at the schools.[136] Yet with the precedent generated by its ruling, the ability of this "presence" would most certainly be threatened once the schools' ability to hire teachers from a particular religious background could no longer be assured. The result could eventually be a school with fine secular teachers who have no sympathy with or interest in the Protestant character, tradition, and atmosphere of the schools. Today's Protestant presence could well become tomorrow's memory.

Still, the Ninth Circuit asserted that, "there is no indication the educational experience at the Schools will be any different if some of the teachers are not Protestants."[137] To the contrary, once the Protestant atmosphere erodes, the educational experience would be different—it would be just like any secular private or public school where religion does not or cannot have

---

Public Education, 60 BROOK. L. REV. 1535 (1995) (arguing that since the Establishment Clause of the First Amendment promotes freedom *of* religion rather than freedom *from* religion, more instances of religion can be allowed in public education).

131. *Kamehameha*, 990 F.2d at 463.

132. *Id.* at 463-64.

133. Engel v. Vitale, 370 U.S. 421 (1962).

134. *Kamehameha*, 990 F.2d at 465.

135. *Id.* at 466.

136. *Id.*

137. *Id.* at 466.

a role in defining the nature and character of the institution. The normal operation of the schools was to conduct education in a reformed Christian tradition and not in a secular atmosphere. Yet, the Ninth Circuit glossed over this reality by suggesting that by providing instruction in "traditional secular subjects," the only approach is in the traditional secular way.[138] Understanding the stipulation which the schools and the E.E.O.C. entered,[139] the district court recognized that the "Protestant presence" or perspective was a valid *bona fide* occupational qualification—an interpretation in which Chief Judge Kay said the schools and the E.E.O.C. concurred.[140] The E.E.O.C. had argued that the "essence" of the schools' business was "education and not religion."[141] Yet, the E.E.O.C. was also guilty of understanding the reality of the situation too narrowly. The business of the schools was not simply education, it was education conducted in and surrounded by an environment of religious education, prayer, and other Christian activities.[142] The E.E.O.C. would be hard pressed to argue that this educational enterprise is analogous to public schools which cannot provide such a religious environment because they are forbidden to do so. Moreover, the educational environment at the Kamehameha Schools remained distinctive from private nonsectarian schools where the religious atmosphere, while not forbidden, simply does not exist.

The discussion about preservation of traditions and execution of missions raises questions about who does the preserving and who does the executing or implementing? Well, the employees of the institution do, of course. And this topic gets to the heart of the *bona fide* occupational qualification.[143] The Ninth Circuit concluded that the schools were not able to rely on this exemption because the Protestant-only requirement for teachers was simply a personal preference of the foundress rather than

138. *Id.* at 466.

139. *Kamehameha*, 780 F. Supp. at 1320 (providing that "the Kamehameha Schools/Bishop Estate contends the will of Mrs. Bishop by its language creates a [bona fide occupational qualification] for all teachers to be Protestant religion in order that there be a Protestant presence" at the schools).

140. *Id.*

141. *Id.* at 1322.

142. *Id.* at 1322-23.

143. 42 U.S.C. § 2000e-2(e)(1) (1994).

a *bona fide* occupational qualification.[144] The court relied on the majority opinion in *U.A.W. v. Johnson Controls, Inc.* which defined one kind of *bona fide* occupational qualification by invalidating the employer's fetal protection policy mandating that women of child-bearing ability but not potent men would be denied employment in those areas of battery production in which employees were exposed to lead.[145] In relying on its decision in *Dothard v. Rawlinson*,[146] the *Johnson Controls* Court noted that an employee's sex can be a *bona fide* occupational qualification (in the case of *Dothard*, the requirement of maintaining prison security in a maximum security male penitentiary). Under the *Dothard* standard, sex discrimination would be permitted where there is a "high correlation between sex and ability to perform job functions."[147] Essentially, in *Dothard* the Supreme Court found that this correlation existed between gender and job functions necessary to maintain security in a maximum-security male prison but that it did not exist in *Johnson Controls* in dealing with a noxious substance where both male and female employees were subject to medical dangers which could adversely affect their reproductive health and capabilities.

In addressing the *bona fide* occupational qualification claim in *Kamehameha*, the Ninth Circuit relied on the *Johnson Controls* standard that the discrimination "must 'affect an employee's ability to do the job,' and 'must relate to the essence or to the central mission of the employer's business.'"[148] The court then raised a series of questions addressing the correlation between the Protestant-only criterion and the variety of responsibilities entrusted to the faculty.[149] The Ninth Circuit presented a picture in which the schools did not take exhaustive steps to ensure some kind of religious orthodoxy. However, the court failed to consider that generally like-minded people who share a religious bond can approach all of their duties

144. *Kamehameha*, 990 F.2d 466-67.

145. U.A.W. v. Johnson Controls, Inc., 499 U.S. 187 (1991).

146. Dothard v. Rawlinson, 433 U.S. 321, 335 (1977) (holding that women prison guards could be excluded from certain positions in maximum security male prisons because of the "real risk" of safety to others in the event of prison violence).

147. *Johnson Controls*, 499 U.S. at 202.

148. *Kamehameha*, 990 F.2d at 465 (quoting *Johnson Controls*, 499 U.S. at 201).

149. *Id.* at 466.

with this common bond in mind. The court implied that anyone who holds the professional qualifications to teach particular subjects could teach the courses of studies offered in this or any other school. And in one technical sense, that may well be true. But the court failed to take account of the important reminder from *Johnson Controls* that discriminatory job qualifications not only affect an individual's ability to do a job (be it simply teaching, or teaching in a Protestant, Christian context) but also relate to the "essence" or "central mission" of the employer's enterprise.[150] The Ninth Circuit's analysis of the occupational qualifications for teaching at the Kamehameha schools only took into account the technical qualities needed to teach particular subjects. It did not also consider, as it should have, the "essence" and "central mission" of the schools. Had it done so, the court's conclusion about the *bona fide* occupational qualification exemption could have and should have been different. Was the "essence" of the school simply a school like any other? Or, was its "essence" inclusive of something beyond secular education? A fair review of all the activities supported, encouraged, and required by the Kamehameha schools suggests that their essence was considerably and qualitatively distinctive from their secular counterparts. Moreover, the "central mission" extended beyond the education that would be experienced in the secular institution. The schools' approach to education mandated religious education and moral training rarely found in most schools and certainly not in public schools.[151] The court did not recognize that what makes up the essence and central mission of educational institutions differs from one school to another.[152]

In justifying its position regarding the Kamehameha schools, the Ninth Circuit called attention to *Pime v. Loyola University of Chicago*[153] (upon which the Kamehameha schools relied in

150. *Id.* at 465 (referring to *Johnson Controls*, 499 U.S. at 203).

151. Abington School District v. Schempp, 374 U.S. 203, 280 (1963) (Brennan, J., concurring).

152. In commenting on the Ninth Circuit's "narrow construction" test for determining whether an institution is "primarily religious" or "primarily secular," Professor Lee wisely points out that this test raises a serious Constitutional question because it would "involve the courts in intrusive 'entangling' inquiries into religious matters." *See* Lee, *supra* note 119, at 264.

153. 803 F.2d 351 (7th Cir. 1986).

part) and argued that the "Protestant presence" of the Kamehameha schools would be maintained notwithstanding the decision to uphold the E.E.O.C.'s position that Ms. Edgerton was discriminated against. However, this reasoning failed to take account of the vital fact that in *Pime* Loyola University had determined for itself what was necessary to maintain a Jesuit presence in its philosophy faculty and that the Bishop Trust had determined what was essential to maintain a Protestant presence within its academic community.

The actions of both Loyola University and Kamehameha schools were exercises in self-determination inextricably related to defining their respective "essences" and "central missions." To have some external, secular institution such as the E.E.O.C. dictate what is the "essence" of a private school and what constitutes its "central mission" places the E.E.O.C. in a peculiar position for which its expertise can claim no competence. This is precisely the problem addressed by Justice Brennan in *Amos* when he stated that those individuals who are members of the community and are "committed to [its] mission" are best able to determine what constitutes a "religious activity."[154] Moreover, having a federal agency determine these important aspects of the Kamehameha schools' identity raises significant issues involving the free exercise of religion as well as establishment concerns under the First Amendment.[155]

With regard to the third exemption found at section 2000e-2(e)(2), the court referred to the important statutory text covering the employment of teachers of a particular religion if the curriculum of that school "is directed toward the propagation of a particular religion."[156] At first blush, there is a certain attraction to the Ninth Circuit's decision on this issue. Surely in one sense, when one considers and reflects upon the variety of individual subjects taught at the Kamehameha schools, it would be reasonable to conclude that each subject by itself (with the exception of religious instruction) is not directed toward the propagation of a particular religion—in this case, Protestantism. With the exception of the religion education classes, it would

154. *Amos*, 483 U.S. at 342-346 (Brennan, J., concurring).
155. *Id.* at 340-346.
156. 990 F.2d at 464 (quoting 42 U.S.C. § 2000e-2(e)(2) (1994)).

seem reasonable to see biology as primarily focusing on the secular study of biology, geography as primarily focusing on the secular study of geography, literature as primarily focusing on the secular study of literature, algebra as primarily focusing on the secular study of algebra, etc. In another sense, however, the phrase "directed toward the propagation of a particular religion" can be understood in a very different way, a way which escapes the analysis and discussion of the Ninth Circuit.

From a secular perspective, the notion that biology instruction focuses on biology; that literature focuses on literature; that algebra focuses on algebra makes sense. But the court fails to consider the distinct possibility that not all individuals concerned with education consider the teaching of these subjects from a purely or essentially or, to use a word favored by the court, "primarily" secular perspective. What if a person's world view is not secular but religious? What if the individual sees human involvement in the world, in the universe, as contemplating and probing God's creation from within the contexts of traditional disciplines of botany, paleontology, algebra, astronomy, philosophy, literature, etc.? What if one considers the human intellect pursuing these disciplines not as some secular Everyman scholar but as individuals such as Gregor Mendel, Teilhard de Chardin, Roger Bacon, Thomas Aquinas, Gerard Manley Hopkins, C. S. Lewis, G. K. Chesterton, Malcolm Muggeridge, T. S. Eliot, Thomas Merton, Flannery O'Connor, J. R. Tolkien, Alasdair MacIntyre, Jacques Maritain, John M. Finnis, A. P. d'Entrèves, Frederick Copleston, John Courtney Murray, Bernard F. Lonergan, Michael Perry, Elizabeth Anscombe, and Mary Ann Glendon, just to mention a few. These were, or are, real individuals and scholars who, across the centuries from the middle ages to the present, were or are people of faith as well as people of great intellect; individuals whose faith sought (seeks) understanding and whose understanding sought (seeks) faith. Can it be said that their perspective on education and teaching (most were teachers at one time in their careers) was, to use the Ninth Circuit's phrase, "primarily secular"? To bring these considerations closer to the facts of the Kamehameha schools: can it be said that Princess Bernice's intention, considering what her instructions were in the trust instrument, was primarily secular; can it be said that the century-long tradition of having Protestant teachers contrib-

ute to the particular mission not just of any school, but of the Kamehameha schools, was primarily secular? It apparently did not occur to the Ninth Circuit that the "propagation of a particular religion" can extend beyond the indoctrination of seminary training. Apparently, the Ninth Circuit was unwilling to grasp that through their contemplative and spiritual investigation, teachers and school administrators who hold religious beliefs and who teach subjects other than those of a specifically religious nature, can persuade young minds on how to contemplate the grandeur of God's creation in the study of the arts and sciences and professions.

The Ninth Circuit relied on several components of legislative history to reinforce its point that the section 2000e-2(e)(2) religious curriculum exemption is to be narrowly construed.[157] But the statute's language uses the generic terms "school," "college," or "university," and it does not use the term "seminary."[158] The court begins with a reasonable construction of the text that *propagation* refers to the "spreading or instilling of particular *religious values*."[159] It then goes on to indicate that *curriculum* is restricted to "course work and required school activities."[160] Clearly, "course work" at the Kamehameha schools mandated religious education, and the "required school activities" incorporated the religious views that emerge from the Protestant, Christian Tradition.[161] To suggest, as the court of appeals did, that the curriculum at Kamehameha was not directed to the propagation of a particular religion[162] is both problematic and incorrect. As the district court noted and found, the "Protestant tradition and its value system" permeated the "orientation of the schools" through the presence of the "on-campus church, mandatory devotion times, mandatory religious instruction, and daily prayer."[163]

---

157. *Id.*

158. 42 U.S.C. § 2000e-2(e)(2) (1994).

159. *Kamehameha*, 990 F.2d at 464.

160. *Id.*

161. *See, e.g., Kamehameha*, 780 F. Supp. at 1321, where the district court recognized that the "Protestant presence" contributes to the educational character of the Kamehameha schools. In order for students to advance and graduate, they had to pass their religious education classes.

162. *Kamehameha*, 990 F.2d at 463-464.

163. *Kamehameha*, 780 F. Supp. at 1323.

The Ninth Circuit went on to refer to three short passages taken from the legislative history to buttress its conclusion.[164] Asserting that these excerpts support its contentions,[165] the court went on to address the role of religion in the Kamehameha schools as presented by its publications which, in the court's view, made a distinction between "the general traditions of the Schools" and "their mission."[166] The court further noted that according to these publications, religion served "as a means for advancing moral values in education."[167] Of course, it is quite possible to argue that the mission of these schools is to preserve and continue to practice its "general traditions." After all, missions can be determined by traditions, and traditions can be determined by missions. The two are inextricably related, and the distinction made by the court between them[168] is artificial and mechanistic.

I raise these issues not because they have not been asked before, but in fact because they have already been raised. I also raise them because the legislative history which the Ninth Circuit claims to be "limited"[169] is in fact extensive and probes not only the exemption of section 2000e-2(e)(2) but also illuminates the meaning of the other two exemptions, i.e., sections 2000e-1(a) and 2000e-2(e)(1), as well. As mentioned earlier, the court referred to and quoted from statements made by Representatives Purcell, Roush, and Edmondson to reinforce its narrow view of the meaning of the section 2000e-2(e)(2) exemption.[170] Although the Ninth Circuit adopted a narrow view, a full analysis of the legislative history leads to a broader and more complete understanding of the intent and purpose of the legislation and the statutory exemptions to Title VII enforcement.

---

164. *Kamehameha*, 990 F.2d at 464.

165. *Id.*

166. *Id.* at 465.

167. *Id.*

168. As the district court noted, "the essence or central mission of [the schools] is to provide native Hawaiians with an education from the Protestant point of view." *Kamehameha*, 780 F. Supp. at 1323.

169. *Kamehameha*, 990 F.2d at 464.

170. *Id.*

IV. DEUTERONOMY—A FAITHFUL LEGISLATIVE ANALYSIS AND EXPLANATION

In the House of Representatives' deliberations, Congressman Purcell offered the amendment to the pending legislation which became section 2000e-2(e)(2).[171] While I shall not belabor the point here, legislative history must be used with care and caution.[172] Legislative history is not always the touchstone that will reveal the truest meaning of a statute whose definition is in dispute. If we rely on legislative history as being the source of all answers in difficult cases of statutory construction, we can often be disappointed. However, with careful and cautious use, it can prove to be beneficial in ascertaining the most accurate foundational meaning of the statute in specific cases.[173]

---

171. His amendment inserted the following:

> [A]nd (2) it shall not be an unlawful employment practice for a school, college, or university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

42 U.S.C. § 2000e-2(e)(2) (1994).

172. *See, e.g.*, Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380; Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371; Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983); Patricia M. Wald, *The Sizzling Sleeper: the Use of Legislative History in Construing Statutes in the 1988-1989 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990); *see also* Robert J. Araujo, *The Use of Legislative History in Statutory Interpretation: A Look at* Regents v. Bakke, 16 SETON HALL LEGIS. J. 57 (1992); *The Use of Legislative History in Statutory Interpretation: A Recurring Question—Clarification or Confusion?*, 16 SETON HALL LEGIS. J. 551 (1992).

173. Contrary to the position held by the Ninth Circuit that the legislative history is "limited," *Kamehameha*, 990 F.2d at 464, it is clear that the meaning of the statutory language and its history were ambiguous concerning the Title VII exemptions granted to religiously affiliated institutions. *See* 110 CONG. REC. 2589 (1964) (statement of Rep. Bromwell). Because of this ambiguity, Rep. Bromwell deemed it essential to clarify the meaning and eliminate the ambiguity by adopting the Purcell Amendment. Although the Ninth Circuit believed that the legislative history was limited, the almost eight pages of prolonged debate lead to determinate conclusion that religiously affiliated institutions, including schools, have the legally protected right "to carry out what *they* consider to be their moral responsibility to their faith." 110 CONG. REC. 2589 (1964) (Comments of Rep. Schadberg) (emphasis added).

When examined carefully and read fully in the context of the legislative process leading to the enactment of the law, legislative history can provide a most useful tool for resolving difficult interpretive issues. The *Kamehameha* case is such an instance.

The Ninth Circuit accurately quoted Rep. Purcell's initial, brief description of the meaning of his amendment which subsequently became the statute now known as section 2000e-2(e)(2).[174] As sponsor of this amendment, Rep. Purcell's understanding of his own amendment need not be the guiding force in determining the meaning of the specific and related legislation.[175] However, when it becomes evident that the author's opinion of the legislation's meaning becomes generally, if not universally shared by the debaters, then his opinion does count for a great deal when the legislation is being interpreted in subsequent litigation.[176]

As the analyst proceeds through the eight pages of the Congressional Record's reported debate and deliberation, it becomes clear that this was not a staged colloquy designed to put into legislative history that which could not be put into the statute.[177] Rather, it represents the penetrating legislative investigation about the meaning of this part of Title VII and the convincing resolution of this dispute. In the analysis that follows, I argue that the general as well as the specific conclusions made by the Ninth Circuit do not reflect what Congress intended and do not reflect the meaning of the statute, either in 1964 or in the present day. Even if the Ninth Circuit's explanations of the statute and its legislative history were to prevail in

---

174. *Kamehameha*, 990 F.2d at 464.

175. *See, e.g.*, Monterey Coal Co. v. Federal Mine Safety and Health Rev. Comm'n, 743 F.2d 589, 598 (7th Cir. 1984), where the court determined that the weight to be given remarks of the chairman of the principal House committee which oversaw the evolution of the legislation who was also a major sponsor of the bill which became the legislation had to be less weight because no other member of Congress voiced any opinion, favorable or unfavorable, concerning his remarks. Unlike that situation, the members of Congress who debated and agreed on the meaning of the religious exemptions to Title VII were considerable.

176. *See* Patricia Wald, *Some Observations on the Use of Legislative History*, *supra* note 172, at 201.

177. *See* William S. Moorhead, *A Congressman Looks at the Planned Colloquy and Its Effect in the Interpretation of Statutes*, 45 A.B.A. J. 1314, 1316 (1959) (arguing that planned colloquy can be employed to overcome political and parliamentary obstructions to inserting alternative language into the statute).

Kamehameha, I further argue that the analysis I am about to offer would provide many educational and other non-profit institutions (e.g., orphanages, hospitals, nursing homes) which claim a religious affiliation, heritage, or other connection which they determine is important to their existence, with the ability to rely on several of the religious exemptions to Title VII enforcement.

The Congressional debate began with Mr. Purcell offering his amendment. Rep. Gathings was quick to offer support for the Purcell amendment on the grounds that "religious institutions" (a broad term) should not be subject to "domination and control" by any government agency. Based on the need for the separation between church and state, he also argued that schools should be able to hire faculty members and "any employees" without having to have their decisions vetoed by the E.E.O.C. or some other government body.[178] However, the Purcell amendment was to undergo a quick challenge by Rep. Emmanuel Celler, the powerful chairman of the House Judiciary Committee. Chairman Celler, while generally sympathetic with the concept of offering exemptions for the hiring of faculty and administrators, did not want to see exemptions broadened beyond this.[179] In particular, he was opposed to extending the exemption to "non-administrative and non-teaching personnel" such as janitors and other support staff.[180] This was a view espoused by Rep. John Lindsay who later offered an amendment to counter and restrict the Purcell amendment.[181]

But the Celler-Lindsay understanding of what the religious exemptions were about precipitated an extended and vigorous discussion which the Ninth Circuit curiously and erroneously called "limited."[182] In the extensive congressional discussion that ensued, the Purcell amendment, as well as the Purcell understanding of the Purcell amendment, became the majority

178. 110 CONG. REC. 2586 (1964).
179. *Id.*
180. *Id.*
181. *Id.* at 2589-90. *See infra* note 221.
182. *Kamehameha*, 990 F.2d at 464 (concluding that the legislative history concerning the meaning of § 2000e-2(e)(2) was "limited"). As argued and illustrated above, the legislative history was not, as the court suggests, limited; rather, it was extensive and insightful about the meaning of the religious exemptions.

view, whereas the Celler-Lindsay understanding was essentially held by only a few members and subsequently abandoned by the proponents, i.e., Chairman Celler and Rep. Lindsay.[183]

The debate following the introduction of the Purcell amendment was punctuated with references to numerous experiences of members of Congress who had religiously affiliated institutions of various types in their respective districts, or who attended or were trustees of religiously affiliated schools. One such member was Rep. Harris, who questioned Chairman Celler with the example of a Baptist college having to hire an atheist who applied for a janitorial vacancy.[184] Chairman Celler began to withdraw from his earlier position by suggesting that facts and circumstances could be vital in making a decision in the case posed by Rep. Harris.[185] While Rep. Harris initially used the example of a janitor, he continued with other positions such as a football coach at another school affiliated with a different denomination.[186] While Chairman Celler opined that this type of position could conceivably be administrative and therefore covered by his understanding of the religious exemptions, he was pressed by Rep. Harris, who argued that the Chairman's views and the interpretive ambiguities to which they led rein-

183. While judges may not defer to the views of single legislators, *see supra* note 175-76, they should take account of and accord great weight to consensus regarding statutory meaning which is solidified by vigorous debate that is *also* accompanied by the clear withdrawal of opposing interpretations. In the debate on the meaning of the religious exemptions, both Chairman Celler and Rep. Lindsay withdrew their opposition to the broad interpretation of the religious exemptions as proposed by Rep. Purcell and others. *See* 110 CONG. REC. 2592 (1964) (Celler); 110 CONG. REC. 2593 (1964) (Lindsay).

184. Rep. McCulloch held the view that the bill, without the Purcell amendment, exempted many occupations. However, he did not think that candidates for janitorial positions should be discriminated against because of a preferential hiring practice which favored candidates of one religion. 110 CONG. REC. 2587 (1964).

185. *See* 110 CONG. REC. 2586 (1964):

Mr. CELLER. Religion is not, and should not be a qualification for the job of janitor. . . .

Mr. HARRIS. Then an atheist could be forced upon this particular college?

Mr. CELLER. Not necessarily. It would depend on all the circumstances.

Mr. HARRIS. But the Commission would have authority to determine whether it would come within the statute?

Mr. CELLER. That would be for the courts and the Commission. That example goes a little too far.

186. *Id.*

forced the need for the Purcell amendment.[187] To justify his position, Chairman Celler argued that the courts would have to be relied upon to determine the meaning and application of Title VII and its religious exemptions.[188] But Chairman Celler's efforts to pass these questions on to the courts did not sit well with other members of the House.

Rep. Poff of Virginia retorted by discussing the difficulties faced or that could be faced by religiously affiliated educational institutions, and which could and must be addressed by clear legislation. He posed the circumstance in which heads of religiously affiliated schools would be concerned with the religious views of employees with whom students would have daily contact. If an avowed atheist were hired because of the ambiguity of the statute, students could well be exposed to views that would unduly and negatively influence their young minds.[189] While the argument can be made that young inquiring minds ought to be exposed to many views on the human condition and its experiences as relayed by individual views, it is also legitimate for an educational institution and the administration which runs it to exercise their managerial function to provide the atmosphere in which the school's distinctive, religious character is not only tolerated but is encouraged to flourish.[190] Rep. Poff was committed to the proposition that government "should not tamper with the freedom of any religious body in the operation of any of its institutions . . . by meddling with the employment policies it pursues."[191]

But why should the government *not* tamper with these employment policies? Some answers to this question begin to emerge from the commentary made by the individuals responsible for crafting the language which became Title VII. A supporter of the more expansive view of granting exemptions to institutions with religious affiliations, Rep. Roush, who is quot-

187. *Id.*
188. *Id.*
189. *Id.*
190. In United Steelworkers v. Weber, 443 U.S. 193, 203-04 (1979), the majority of the Court, in relying on legislative history, recognized that government authorities, including the courts, should defer to the exercise of managerial discretion of private employers to comply with the remedial aspects of Title VII.
191. 110 CONG. REC. 2586 (1964).

ed by the Ninth Circuit,[192] began to frame the argument opening the broad horizon of activities of religiously affiliated institutions which need, because of the important issues of conscience and deep personal and community belief, some protection from blind application of Title VII. He noted that while so many religiously affiliated schools are non-profit corporations, there is no strong indication that they would be granted the status of a "religious corporation."[193] For him, the combination of being both religiously connected as well as not-for-profit was important. In his mind, such educational institutions "should have the right" to employ individuals whom the institution believes will be a part of and support the religious tradition and mission of the school as defined by its administration as well as its history.[194] In his words, the school

> should have the right to compel the individuals it employs to adhere to its beliefs, for that college exists to propagate and to extend to the people with whom it has influence its convictions and beliefs. To force such a college to hire an "outsider" would dilute if not destroy its effect and thus its very purpose for existence.[195]

Of course, the argument was made that granting religious institutions exemption from Title VII in a number of areas might suggest the conferral of a *carte-blanche* approval to disregard all of the civil rights legislation. In order to dispel such a thought, Rep. Chelf spoke up. He had supported another amendment which placed in the general provisions of Title VII the amendment including "sex" discrimination which was not contained in the original legislation.[196] He was sympathetic to the need to protect workers or applicants for employment from gender discrimination. But knowing that there were many religious communities within his congressional district (e.g, men's and women's Catholic religious orders, Catholic colleges, Presbyterian colleges, Baptist colleges, and Mormon wards), and being familiar with the problems they would all face if a narrow or

192. *Kamehameha*, 990 F.2d at 464.
193. 110 CONG. REC. 2587 (1964).
194. *Id.*
195. *Id.*
196. *Id.*

restrictive interpretation were given to the Title VII religious exemptions, Rep. Chelf supported the Purcell amendment.[197] As he said, "let us vote for the Purcell amendment. We absolutely cannot take any chances—there is far too much at stake."[198]

While this rhetoric may be inspiring and invigorating, it presents the essential question of, "What exactly is at stake?" Rep. Gill offered one answer: what is at stake is the relationship of the religious and the secular, i.e., how the religiously affiliated institution encounters the secular state, especially through the transfer of federal funds designated for educational purposes.[199] This relationship inevitably leads to questions about the Free Exercise and Establishment clauses of the First Amendment. Rep. Gill raised the circumstance in which religiously connected higher educational institutions receive "substantial amounts of Federal funds" and select employees based upon their religious affiliations and attitudes.[200] Rep. Harris raised another relevant question about whether there is a distinction between a "religious corporation" [a statutory term] and an educational institution that is in some concrete ways supported by a particular denomination.[201] Rep. Harris, a frequent participant in the February 8, 1964, debate on the religious exemptions to Title VII enforcement, began to supply some answers to these important issues.

As with roses, which by any other name would smell as sweet,[202] Rep. Harris explained that the making of strict, legalistic boundaries between religious corporations and educational institutions operated by religiously connected organizations was not what the Title VII religious exemptions were all about.[203] Both he and Rep. Roosevelt began to point to institutions of higher education, some of which are "wholly owned and operated for the purposes of a religious corporation" and "not

197. *Id.*
198. *Id.*
199. *Id.* at 2588.
200. *Id.*
201. *Id.*
202. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2. ("What's in a name? that which we call a rose, By any other name would smell as sweet. . . .").
203. 110 CONG. REC. 2588 (1964).

open to outside students" and many other institutions like the Catholic University of America located in Washington, D.C., which is religiously affiliated but which is also operated "for general purposes" of educating in a wide variety of subjects—some religious, but many secular.[204] Rep. Poage then commented on the "two different viewpoints" that had been presented concerning the religious exemptions and the institutions to which they applied.[205] He reminded the members of the House that "a great majority of the church-affiliated schools over the United States" provide multiple functions and serve multiple purposes. He cogently stated that such schools

> are established not simply to provide instruction in mathematics, science, or language, or even simply to promulgate a specific religious faith but in a great many cases it is also to provide a religious atmosphere in which they may help develop a better citizenship, and that religious atmosphere certainly cannot be maintained if these schools are required by some agency in Washington to employ any atheist that comes along and asks for employment when they have a vacancy[.][206]

Rep. Poage, after noting the important contribution that church affiliated schools have made to the progress of citizenship and society,[207] raised an important issue for the members of the House, especially those who might agree with Chairman Celler, to consider. This issue re-focused on the hybrid mission of religiously affiliated schools which provided education in secular as well as religious subjects. Rep. Poage disagreed with Chairman Celler's view that religious schools in the United States had the single mission of promoting "a particular theol-

---

204. *Id.*

205. *Id.*

206. *Id.*

207. Rep. Poage pointed out that

> these schools are rendering a wonderful service . . . to our civilization. I think, if they should be wiped out, and even if we should replace them with State-supported institutions which might well be able to give our young people every bit of education and cultural training which these church-affiliated institutions are now giving, . . . that the Nation would suffer an irreparable loss in the type of training for citizenship and Christian living which the church-affiliated institutions provide.

Id.

ogy."[208] Since Mr. Poage wanted this disagreement fully understood, he posed the Celler view as that in which any school concerned with teaching conventional subjects did not have to be concerned with the "moral or religious attitude of the students"; this is so because secular subjects can be taught just as effectively by non-religious teachers.[209] Rep. Poage, along with other members of the House, correctly acknowledged that the nice, clear cut dichotomy between religious schools as those focusing primarily on religious education, and other schools (including many church affiliated schools) that offered instruction in a wide range of subjects (including religious education) was more fiction than fact.[210]

In addition, Rep. Bromwell, while noting that the primary reason for enacting the civil rights legislation was to combat racial discrimination, argued the importance of considering the more subtle issues associated with religious questions.[211] Racial balance in public and employment sectors did not necessitate religious balance in all areas, and he argued that cases involving religious institutions called for exceptions.[212] Since there was initial disagreement on which institutions could rely on the religious exemptions of Title VII and which could not, Rep. Bromwell stated that the best way to eliminate the confusion about the meaning of the exemptions and the breadth of their application was to adopt the Purcell amendment.[213]

This observation prompted Rep. Gill to echo some of the sentiments of Chairman Celler. Rep. Gill believed that many institutions of higher learning in the United States, including Harvard, could make some claim to having a religious foundation. That being the case, he did not believe that it made sense to enable all of these schools, especially those receiving federal funds, to deny some candidate for a teaching position employment because that individual did not belong to some particular religious belief.[214] While noting that much of Rep. Gill's con-

208. 110 CONG. REC. 2588 (1964).
209. *Id.*
210. *Id.* at 2588-89.
211. *Id.* at 2589.
212. *Id.*
213. *Id.*
214. *Id.* at 2589-90.

cerns made sense, Rep. Edmondson pointed out the need to consider, as he put it, the other side of the coin.[215] The point that Rep. Edmondson made targeted the crisis that a religiously affiliated school faces when it is required to hire individuals who are opposed, openly or clandestinely, to the religious beliefs and convictions which the school desires to foster.[216] Rep. Quie, another supporter of the Purcell amendment, quickly followed by making the House members realize the danger of assuming that religiously affiliated schools always hire their co-religionists, for that is not the case,[217] and he pointed to the many instances where religiously affiliated schools do not always hire their co-religionists.[218] The particular insight he offered was two-pronged: the first was the realization that it is customary for religiously affiliated educational institutions to hire those they believe to be the best candidates for important positions; in other words, it is the responsibility and right of the institution to establish all the criteria by which hiring takes place.[219] The second aspect of his insight is that it is not the federal government's responsibility to make these decisions; as he stated:

> [I]n the case of an institution which is in whole or in part connected with a religious denomination or is directed toward the propagation of a particular religion, that decision ought to be made by them and in order to make it absolutely clear this amendment should be adopted.[220]

---

215. *Id.* at 2590.
216. *Id.*
217. *Id.* at 2590.
218. *Id.*
219. *Id.*
220. *Id.* Rep. Quie continued by saying that Congress "had better leave religious decisions to religious institutions themselves and not attempt to do it ourselves through Federal executive agencies." Id. This statement can be taken at its face level. But it can also be revealing on another one. This further level focuses on the need for the institution to make decisions about the religious aspects of the institution, regardless of whether the institution decides to place one of its co-religionists into a position or not. It is the institution's right and responsibility to make the determination on the religious issues, not the federal government's. In following Rep. Quie, Rep. Clausen, also a supporter of the Purcell amendment, added a further need for keeping decisions about the religious nature of religious institutions with the institutions themselves; this need focused on the right of religious liberty protected by the Free Exercise Clause of the First Amendment. 110 CONG. REC. at 2590.

At this stage in the debate, Rep. Lindsay offered an amendment to the Purcell amendment. The language of the Lindsay amendment would narrow the application of the religious exemptions to administrative and instructional employees of religious schools.[221] In offering his amendment, Rep. Lindsay stated that he did not think that religious exemptions should be extended to all positions including those of "the labor force, groundskeepers, and the like."[222] While Rep. Lindsay believed that the modifier "administrative" was broad and gave the religious school a good deal of flexibility, Rep. Whitten countered by arguing that religious institutions "should have full right to see that *all* employees fit into their own plan of operations and are cooperative with what their objective is."[223] Rep. Whitten implied that if this discretion were not retained by the institution, it might have to engage individuals it would prefer not to employ because the individual's religious views could conflict with the employer's views in a variety of important ways such as counter-conversion.[224] Rep. Bennett was of the same view. He agreed that a religiously affiliated school should be able to hire personnel—"regardless of the position" involved—to protect the right to have a community of their choosing.[225] Reps. Mahon, Waggonner, and Kornegay endorsed, in rapid succes-

---

221. The Lindsay amendment offered the following substitute which is underlined:

> [A]nd (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ *administrative or instructional* employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

110 CONG. REC. 2591 (1964).

222. *Id.*

223. *Id.* (emphasis added). Although Mr. Lindsay believed that the word "administrative" could be applied broadly, one wonders how broadly the Ninth Circuit would have interpreted it in view of the fact that it chose to apply a narrow construction to the religious exemptions of Title VII. *See Kamehameha*, 990 F.2d at 460 (stating that "[w]e construe the statutory exemptions narrowly").

224. 110 CONG. REC. 2591 (1964).

225. *Id.* at 2592.

sion, Rep. Bennett's views favoring the Purcell amendment and opposing the Lindsay amendment.[226]

Rep. Kornegay, moreover, offered additional remarks extending beyond endorsement of the Bennett view and the Purcell amendment. While observing that his Congressional district contained numerous church-related colleges, orphanages, and other charitable institutions, including those affiliated with Baptist, Methodist, Presbyterian, and Catholic Churches as well as the Quakers and the Masonic Order, he did not know what their hiring practices were because such matters were "none of [his] business and none of the business of the Federal Government."[227] It is important to note how broad in application Kornegay's understanding of the problem and the remedy was. He saw not only schools but many other kinds of charitable institutions affiliated with religious groups and organizations as needing the Title VII religious exemptions.[228]

Rep. Kornegay continued by offering his keen insight that

> the Government should never have the authority to dictate or meddle into the affairs of our religious and charitable institutions. . . . I stand here on the floor and earnestly beg this House not to take away from our dedicated historical and vital church-related schools and other charitable institutions the right to employ the teachers or the janitors of their choice. Gentlemen, this is a fundamental and constitutional right which must never be violated, and I urge with all my power that the chairman of the committee accept the [Purcell] amendment. . . .[229]

At this point in the debate a remarkable thing occurred. Chairman Celler asked if Mr. Kornegay would yield, and the latter consented.[230] Mr. Celler then stood and declared that "[i]n the light of the debate which has ensued" on the Purcell amendment and the Lindsay amendment offered in opposition, he (Chairman Celler) was now personally willing to accept the Purcell amendment and that the Lindsay amendment "would

226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*

not be acceptable."[231] Rep. Kornegay commended the Chairman for accepting the Purcell amendment which would "*permit our religious and church-related colleges and charitable institutions* the freedom to employ the *teachers and personnel* of their choice."[232] It is essential to recognize and appreciate the breadth of Rep. Kornegay's explanation of the exemptions which Chairman Celler ultimately accepted. They covered both religious and church-related schools *and* religious and church-related charitable institutions. In the light of this extensive discussion in the House, the exemptions were considered to be very broad and not narrow. In light of this congressional intent, the Ninth Circuit's wish to construe the statutory exemptions narrowly is counterintuitive. The construction of these exemptions consistent with legislative intent and purpose ought to be broad and not narrow.[233]

At this stage in the debate, Rep. Lindsay was recognized, and he requested that with unanimous consent his amendment be withdrawn.[234] And, without objection, the Lindsay amendment was withdrawn and its underlying sentiment of a more narrow set of Title VII exemptions for religious institutions died on the floor.[235] His withdrawal of the narrowing amendment in light of this extensive legislative debate is further proof that Congress saw need for a set of broad, not narrow, religious exemptions to Title VII.

The debate on these exemptions concluded, and the Purcell amendment went on to become a part of Title VII of the Civil Rights Act of 1964. In addition to the Lindsay Amendment, what also died on the floor of the House that day was the sentiment that these religious exemptions only applied to a narrow group of religious educational institutions. When the analyst carefully reviews the legislative debate on these provisions, it becomes clear that Congress acknowledged the need that reli-

---

231. *Id.* Rep. Chelf was recognized shortly after Chairman Celler's statement, and he (Mr. Chelf) analogized the "conversion" of the Chairman to that of Saul of Tarsus who, while on the way to Damascus, suddenly saw the "light" to stop persecuting Christians and to join their community of believers. 110 CONG. REC. at 2593; *see also Acts of the Apostles* 9:1-19; *Acts of the Apostles* 22:3-16.

232. 110 CONG. REC. 2593 (1964) (emphasis added).

233. *See Kamehameha*, 990 F.2d at 460.

234. 110 CONG. REC. 2593 (1964).

235. *Id.*

gious liberty extend to a very wide group of institutions claiming some kind of religious affiliation determined not by the Federal Government or the courts but by the institutions and the people who comprise them. It is this backdrop which underlies the Ninth Circuit opinion. To suggest, then, as the court did in *Kamehameha Schools,* that the religious exemptions to Title VII are to be narrowly construed would contradict the clear and powerful congressional intent and purposes which undergird the religious exemptions to Title VII.

V. THE PROPHETS—PROCLAMATION OF AUTHENTIC INTERPRETATION: A STRUCTURE FOR POSITIVE ACTION AND APOSTOLIC PREFERENCE

With the breadth of these exemptions in mind, I shall now begin to construct a suggestion for hiring practices which is consistent with the most accurate meaning of the Title VII exemptions and which would enable a wide variety of religiously affiliated institutions, but especially higher education institutions, to formulate an affirmative action, apostolicly preferential, and mission sensitive hiring policy. While candidates for employment may be co-religionists, they need not be. What is relevant to the preferential treatment is the hiring institution's identification of those candidates who would enthusiastically support and further the mission of the religiously affiliated school. I suggest that such preferential hiring practices would be consistent with the meaning of Title VII and its provisions for religious exemptions. In addition, these employment practices would enable these institutions to engage in hiring conversations that would help determine the candidates' sentiments regarding their understanding as well as their sympathies with the apostolic mission of these schools.

The ability and the opportunity of the religiously affiliated university to pursue affirmative action hiring would contribute to its survival in the secular world.[236] This claim for survival

236. An important issue, which the pragmatic administrator of a religiously affiliated university would focus on, is whether my proposal would jeopardize receipt of federal funding. A critic of my proposal might argue beyond the Title VII issues and claim that implementation of this proposal would produce a violation of the Establishment Clause of the First Amendment. While this question goes beyond the scope of

is an exercise of the right of self-determination which is ingrained in western democratic political theory.[237] The religiously affiliated school[238] of today—be it from the realm of primary, secondary, or higher education—retains the right as well as the legal protection to determine its own destiny and its own character.[239]

Part of my approach in proposing a structure for employment practices is rooted in the general sources of Constitutional and Title VII principles. One example is found in Justice Frankfurter's concurring opinion in *Sweezy v. New Hampshire*.[240] Justice Frankfurter identified "four essential free-

---

the Title VII issues examined in this article, it does raise an important point which deserves some attention here. In essence, this plan would not raise Establishment Clause concerns because, as the United States Supreme Court has held, federal funding of most educational functions at religiously affiliated universities is constitutionally permissible. Tilton v. Richardson, 403 U.S. 672, 676 (1971). In *Tilton*, the Court noted that not every form of financial aid to religiously sponsored activities violates the First Amendment. *Id.* at 679 (citing Bradfield v. Roberts, 175 U.S. 291 (1899) (upholding the legality of a federal construction grant to a religiously affiliated hospital)). The thrust of my proposal does not mandate that only co-religionists are hired to do specifically religious things; rather, it develops a responsible program for employing individuals from different religious backgrounds (including co-religionists) or even no religious background to teach or to administer at the university. The primary effect of this proposal is to hire individuals, regardless of their own religious persuasion, who demonstrate enthusiasm in supporting the mission of the school; the primary effect does not advance religion, it advances the broad educational purpose and mission of a religiously affiliated university. This is clearly permitted under the Constitution, for, as the Court noted in *Tilton*, the "crucial question is not whether some benefit accrues to a religious institution" but whether the benefit's "principal or primary effect advances religion." *Id.* at 679. It is Constitutionally permissible for religiously affiliated universities which receive or apply for Federal financial assistance that promotes broad educational goals to take steps to insure that those whom it employs are supportive of the school's distinctive educational mission.

237. *See* DAVID MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 69-74 (1994) (explaining Thomas Jefferson's notion of republican democracy as an exercise in self-determination and his familiarization with the political philosophies of the latter half of the eighteenth century); *see also* FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

238. Much of what I address in the context of schools can be applied to other religiously affiliated charitable institutions such as hospitals, orphanages, retirement homes, convalescent facilities, etc.

239. As a Roman Catholic priest who has dedicated his earthly life to the academic enterprises of my religious order, I have encountered instances in which both external and internal forces have pressured schools, perhaps without thinking about the consequences of their actions, to abandon their distinctive character which flows from their deep religious heritage and their rich religious nature.

240. 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

doms" associated with higher learning which include: (1) the determination of who may teach; (2) what is to be taught; (3) how such subject matters shall be taught; and, (4) who is to be taught.[241] These "four freedoms" had an influence on Justice Powell's crafting the majority opinion in *Regents of the University of California v. Bakke*,[242] which began to pave the way for positive action for minority student candidates within the medical school at the University of California at Davis. Each of Justice Frankfurter's essential freedoms has relevance to my argument and to the question of whether religiously affiliated universities in the United States will be able to retain the right to self-determination in the future. While religiously affiliated universities will offer tuition in many subjects also taught in secular schools, they also incorporate into the curriculum subjects respectful of the religious tradition that permeates the character of the school. Moreover, religiously affiliated schools have the freedom to direct how all subjects, including secular ones, are to be taught.[243]

The most relevant of these four freedoms identified and addressed by Justice Frankfurter is the first one: who may teach. As I have suggested earlier, the question of the selection of faculty and candidates for certain administrative posts is vital to determining how a school defines itself. If little regard is paid to the hiring process, then either deans or faculty hiring committees can have the greatest, and perhaps the only, say in who is hired and who is not. Concern should not be raised about this kind of hiring practice because it is a legitimate exercise of self-determination as Justice Brennan identified in *Amos*.[244] Protecting the ability of religiously affiliated schools to pursue their own self-determination is vital to maintaining diversity in the landscape of higher education in the United States.[245] The warnings given over the last several years by a

241. *Id.*

242. 438 U.S. 265, 312 (1978).

243. *See Sweezy*, 354 U.S. at 262-63. (Frankfurter, J., concurring).

244. *See supra* notes 96-104 and accompanying text.

245. Douglas Laycock has noted that the "secular side" of higher education controls approximately 97% of the institutions of higher learning in the United States. He raises the important question rhetorically about why the remaining three percent which are religiously affiliated have "some existence of their own?" As he frames the important issue, "is the secular model so absolutist that it cannot tolerate a three

wide variety of scholars has more than suggested that those responsible for the hiring process may have their own, rather than the institution's, welfare in mind, resulting in the perpetuation of views which conflict with the overarching mission of the institution.[246] If, for example, those who have been given hiring authority have decided that they would prefer to abandon any religious considerations in the hiring process, does the institution have any right to object and correct this unauthorized change of course in self-determination and destiny? Does or should this hiring practice take account of Justice Frankfurter's first essential freedom of determining "who may teach?" The answer I tender is, yes. Moreover, pursuing a lawful affirmative action scheme would serve as a responsible response to those individuals who do not wish to follow the self-definition which the larger university community (i.e., the administration, the alumni, the majority of the student body) have communally decided is the route it wishes to pursue. A more difficult question now begins to surface: what are the components of such a remedy or plan? The following ought to be considered in constructing a version of this remedy.[247]

From my perspective as a member of a religious order having a relatively long history of involvement in education,[248] it is apparent that institutional recruitment of teachers, administrators, and other employees supportive of the mission of religiously affiliated universities is crucial to the ability of these schools to maintain their nature, character, and religious affiliation in a viable and healthy fashion. Recruitment has also been identi-

---

percent minority with a different solution?" *See Laycock, supra* note 102, at 26.

246. The importance of the religiously affiliated institution being capable of hiring individuals who are supportive of, rather than opposed to, the mission of the institution as it is molded by particular religious views and beliefs cannot be overstated. As Michael McConnell has argued, educational institutions which identify or are affiliated with particular religions are communities "with mutual ties of loyalty and common purpose." Michael McConnell, *Academic Freedom In Religious Colleges And Universities*, 53 LAW & CONTEMP. PROBS. 303, 316 n.38 (1990).

247. With regard to the issue of religious affirmative action in general employment, see John Sanchez, *Religious Affirmative Action in Employment: Fearful Symmetry*, 1991 DET. C.L. REV. 1019, where the author analyzes overlapping concepts of non-discrimination and religious accommodation in the work place and develops a "prototype religious affirmative action scheme." *Id.* at 1022.

248. *See* CONSTITUTIONS OF THE SOCIETY OF JESUS, 171-205 (George E. Ganss trans. 1970); *see generally* GEORGE E. GANSS, ST. IGNATIUS' IDEA OF A JESUIT UNIVERSITY (1956).

fied by other individuals associated with religiously affiliated education in the United States as being a key element of the individual institution's self-determination.[249]

Of course, some faculty may have been hired during the expansion of religiously affiliated schools, when the school's quest for national prominence may have given little consideration to the candidate's personal views about the religious mission.[250] Indeed, such issues may never have been raised or explored during those recruitments. Today, these faculty members of religiously affiliated universities may feel or express concern about any moves toward making the school "more Baptist"[251] or "more Mormon"[252] or "more Catholic," etc. Understandably, such concerns may emerge from a sense of challenge to academic freedom and to a decrease in diversity. I suggest that legit-

---

249. *See, e.g.*, Harold Attridge, *Reflections on the Mission of a Catholic University*, *in* THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY, 24 (Theodore Hesburgh ed., 1994); Fernand Dutile, *A Catholic University, Maybe; But a Catholic Law School?*, *in* THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY 72 (Theodore Hesburgh ed., 1994); David Leege, *The Catholic University: Living with ND (Necessary Dissonances)*, *in* THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY 134-35 (Theodore Hesburgh ed., 1994).

250. As George Marsden has described and discussed this phenomenon, when church-related educational institutions simply hire the "best qualified candidates," "it is simply a matter of time until its faculty will have an ideological profile essentially like that of the faculty at every other mainstream university." *See* George Marsden, *What Can Catholic Universities Learn from Protestant Examples*, *in* THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY 193 (Theodore Hesburgh ed., 1994).

251. *See* RECRUITMENT PROFILE—DEAN OF THE CUMBERLAND LAW SCHOOL, SAMFORD UNIVERSITY (1995) [copy on file], in which Samford University, which "has been supported by the Baptists of Alabama since its inception" [in 1841], has specified that the new dean of its School of Law will "understand and support the religious foundation of the University and the mission of the Law School." Like many other religiously affiliated institutions of higher learning, Samford comfortably presents this relevant and important criterion for hiring, acknowledging that the University is also committed to employment of qualified individuals "regardless of race, color, sex, handicap, or national or ethnic origin." This language tracks that found in the areas protected by the Civil Rights Act of 1964 and the Americans With Disabilities Act. Interestingly, the statutory language regarding non-discrimination on the grounds of religion is not included in this list. Yet it would seem reasonable to argue, given the religion-based exemptions contained in Title VII, that Samford has concluded in its act of self-determination that religion could well be a *bona fide* occupational qualification or other exemption honored and protected by Title VII. In the RECRUITMENT PROFILE, Samford acknowledges its dedication to "academic excellence" while at the same time proclaiming that it is an institution "where matters of faith are taken seriously."

252. *See Statement On Academic Freedom At Brigham Young University*, 20 J.C. & U.L. 34 (1993).

imate concerns about such important issues which are vital to a healthy and vibrant academic community can be responsibly addressed and accommodated. For example, in my own order, I have seen a wide diversity of Jesuits from many races and many cultures (European, North American, South American, African, Middle-Eastern, Asian, Australian, and New Zealand) collectively working within one institution. Of course, a critic might argue that while these individuals come from different national and cultural backgrounds, they are all males who share a particular religious identity. My factual counter is that while this may be true, there are also many other teaching colleagues who provide another type of pluralism represented by different faiths, sexes, and cultures.[253] But many—though not all—of us are united in seeing that the underlying mission of the religiously affiliated school is important to its self-determination as a distinctive community of scholars—scholars who see that they labor in communion toward the goal of the university identified by Father Theodore Hesburgh. Fr. Hesburgh describes this goal as seeking further the gifts God has given to each human being to expand "these divine attributes [found in each person] to their fullness, for the glory of God and the enlargement of humanity everywhere."[254] The real question about the concerns of such faculty seems not, in the final analysis, directed at any loss of academic freedom or diversity but, rather, on their own antipathy or hostility to the religious influence. George Marsden, a "Protestant of the Reformed theological heritage,"[255] has commented on this phenomenon. As he argues:

---

253. For another description of this type of enterprise, see Marsden, *supra* note 245, at 192. *See also* Leege, *supra* note 244, at 135 (acknowledging that persons from a wide variety of religious faiths may seek out and may be sought by religious institutions established by other faiths because of "something that attracts [the candidates for employment] and in whose conversations they will join."). In the context of Catholic universities, Professor Leege suggests that they should be "a many-angled traffic circle, nay a plaza, where scholars the world over contribute to the flow of ideas." *Id.* *See also* Thomas Morris, *A Baptist View of the Catholic University*, *in* THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY 226 (Theodore Hesburgh ed., 1994) (discussing the importance of the "community of individuals" as it exists in catholic universities).

254. Theodore Hesburgh, *Afterword*, *in* THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY, 373 (Theodore Hesburgh ed., 1994).

255. *See* MARSDEN, *supra* note 9, at 7.

> Since departmental faculties typically have virtual autonomy in hiring, it becomes impossible to reverse the trend and the church tradition becomes vestigial. The Protestant experience thus suggests that once a school begins to move away from the religious heritage as a factor in hiring, the pressures become increasingly greater to continue to move in that direction. Such a conclusion becomes particularly perplexing if one weighs it against the good reasons that schools may have for increasing faculty diversity . . . Yet, despite the merits of these concerns, both the historical precedents and analysis of the forces that drive historical change suggest that opening the doors for such valuable and refreshing breezes soon lets in gale-force winds that drive out the religious heritage altogether.[256]

In essence, what may have been perceived as religious orthodoxy being intolerant of the secular has now been replaced in some religiously affiliated institutions with a secular orthodoxy intolerant of the religious. Sometimes this intolerance is not well disguised.

For example, several years ago, Mark Tushnet published a recent work on Constitutional law in which he addressed the role of religion in public life.[257] In noting that the liberal political tradition considers that religion "has no distinctive role to play in the shaping of public policy,"[258] Tushnet examines the role of religion in the "competing republican tradition" and the contributions religion makes to the political society which includes individuals who do live their public lives from a religious perspective.[259] In reviewing Tushnet's work, Suzanna Sherry offers what she considers to be the oddity of "a self-proclaimed leftist . . . giving religion a more prominent role in public policymaking" especially in an age when "the religious right has made unprecedented political gains" at the "expense of individual liberty and equality."[260] She argues that if Tushnet is making a place for the religious perspective in public life, she would advocate excluding such "nonrational modes of discourse" be-

256. Marsden, *supra* note 250, at 193.

257. MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 269-76 (1988).

258. *Id.* at 272.

259. *Id.* at 275-76.

260. Suzanna Sherry, *Outlaw Blues*, 87 MICH. L. REV. 1418, 1426 (1989).

cause "such things as divine revelation and biblical literalism are irrational superstitious nonsense."[261]

Ultimately, then, the faculty (those engaged in the forefront of the quest for faith seeking understanding and understanding seeking faith) is one of the most crucial elements of the contemporary American university. As Fr. Wilson Miscamble has suggested, faculty members are "located at the heart of a university," and because of this, "when a faculty is hostile to the mission of the institution, its attenuation is likely [, and when] a faculty is passive, the mission is likely to be anemic [, and when] a faculty is committed, there is every likelihood that the mission will be fulfilled."[262] Fr. Miscamble notes the further importance of the religiously affiliated university as a forum in which dedicated scholars from a wide variety of backgrounds can come together[263] [and I suggest in friendship] to address the serious moral, ethical, and religious issues of the day in a wide variety of academic disciplines.

But how does a religiously affiliated institution go about satisfying this need to attract and hire scholars sympathetic with this mission? This requires some kind of conscious employment practice. While affirmative action has come under siege in the late twentieth century United States,[264] it remains an appropriate and lawful exercise of the management function which can help ensure the continued vibrancy of religiously affiliated schools in the network of institutions of higher learning in the United States. By way of example, the argument for maintaining the historically black colleges advocates the need to preserve "the goals of equal educational opportunity, diversity, and effective education for African-Americans."[265] Similar arguments have been made for preserving single-sex educational institutions (particularly female) which are exempted from the sex discrimination provisions of Title IX.[266] These arguments

261. *Id.* at 1427.

262. Wilson Miscamble, *Meeting the Challenge and Fulfilling the Promise: Mission and Method in Constructing a Great Catholic University*, *in* THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY, 217 (Theodore Hesburgh ed., 1994).

263. *Id.* at 218.

264. *See supra* notes 34, 35 and accompanying text.

265. Wendy Brown-Scott, *Race Consciousness In Higher Education: Does "Sound Educational Policy" Support The Continued Existence Of Historically Black Colleges?*, 43 EMORY L.J. 1, 81 (1994).

266. *See* Kristin S. Caplice, *The Case for Public Single Sex Education*, 18 HARV.

can be extended to the need to maintain the tradition of the religiously affiliated university as well.

As has been seen in cases such as *Regents of the University of California v. Bakke*[267] and *United Steelworkers of America v. Weber*,[268] the American law of remedies provides solutions for addressing imbalances and exclusions which have occurred in the work place. I am not alone in expressing concern about the plight of religiously affiliated universities and the need to use affirmative action to address their drift toward secularization by attracting and hiring competent scholars and administrators who believe in and wish to participate in the mission of the religiously affiliated institution (even though many of them may not be followers of the sponsoring faith).[269] The kind of affirmative action plan which I propose does not seek only the co-religionists who participate in the same religious beliefs of the hiring institution. The action I propose is more inclusive and extensive. It seeks to identify, recruit, and hire those individuals who share in the vision for the future which accompanies the exercise of self-determination undertaken by the institution and its community of scholars, concluding that the school, besides having a secular mission to teach secular subjects, also has a mission to teach them in the context of faith.[270]

The core of this affirmative or positive action would be several fold. The first phase would take place within the university

---

J.L. & PUB. POL'Y 227 (1994) (arguing the case for public, single sex education by noting the benefits to society); Chai R. Feldblum et al., *Legal Challenges to All Female Organizations*, 21 HARV. C.R.-C.L. L. REV. 171 (1986) (arguing for the indefinite continuance of single sex educational institutions).

267. 438 U.S. 265 (1978).

268. 443 U.S. 193 (1979).

269. Dutile, *supra* note 249, at 80; Marsden, *supra* note 250, at 194; *see also* J. Bryan Hehir, *Comment*, *in* CATHOLIC UNIVERSITIES IN CHURCH AND SOCIETY: A DIALOGUE ON *EX CORDE ECCLESIAE* 30 (John Langan ed., 1993) (identifying the need for hiring not only co-religionists but also "a core group of persons who have shown explicit interest in addressing the Catholic identity of their institution"); David J. O'Brien, *Conversations On Jesuit (And Catholic?) Higher Education: Jesuit Sì, Catholic . . . Not So Sure*, *in* 1994 CONVERSATIONS ON JESUIT HIGHER EDUCATION 9 (arguing that deliberate action is needed "to influence faculty hiring to insure a critical mass of faculty in all disciplines committed to the mission of the school. . . .").

270. *See supra* note 251 for Samford University's law school dean recruitment profile as one example of this.

when it determines that an existing position in the ranks of the faculty or administration is to be filled or a new position is to be created. Here, the community should address the threshold question: is it important for the individual who is selected and hired to share in or support the mission of the institution insofar as it is defined by the religious affiliation? Assuming a positive response to this issue, the second phase of the plan would consider how the mission of the institution should be featured in the advertisement announcing that the vacancy exists. The content of the advertising would also be incorporated into the personal contacts members of the faculty and administration might make when they place personal telephone calls or make other personal contacts with prospective candidates whom they know directly or indirectly. The third phase would be executed in the interview process itself. Questions designed to ascertain the candidates' views on personal understanding of the history and mission are to be raised along with other questions seeking answers to how each candidate envisions his or her own personal and substantive contributions to this mission. While these questions should avoid what might appear to be some test of orthodoxy, they should also shun polite, diplomatic questions which avoid getting to the heart of the issue and the genuine beliefs of the candidate toward the institution's religious identity and mission regardless of that person's own religious affiliation.[271] These questions could also be raised prior to the in-person interview. If the university has a mission statement, the candidate could be requested to submit a written response detailing how he or she would help further the mission if an offer of employment were made. The

271. *See, e.g.*, Suzanne Matson, *Collegium, Catholic Identity, and the Non-Catholic*, *in* 1994 CONVERSATIONS ON JESUIT HIGHER EDUCATION 16-17, relaying the experiences of the author, who is a non-Catholic teaching at Boston College, in the interview and appointment process:

> The question of religion came up not at all during departmental interviews and only in the most diplomatic of ways in the Academic Vice President's office. I was asked, "How do you see yourself fitting in at a Jesuit university?" In its simplicity and openness, the question allowed the candidate wide scope. I said something about feeling myself to be in alignment with what I perceived to be the intellectual and humanitarian [but not religious] values of the Jesuits. It was a careful question, and a careful reply. Apparently it was enough. But was it enough? Should it have been?

Id.

candidate's written submission could then be used to facilitate the telephone or on-campus interview which might follow. The final stage of this plan would be ongoing. It would be the continuation of a substantive discussion by both the recently hired as well as the veteran employees of the university to ensure that their individual and communal understandings of the religious nature and mission of the school remain a part of their focus. Thus, if drift begins regarding the department's, the faculty's, or the institution's individual and collective missions *vis-à-vis* the religious foundation, the individuals as well as the community of scholars can address how to responsibly control this drift.[272]

---

272. My own school, Gonzaga University, has developed a program called the Partnership in Mission designed to monitor and guard against this drift. The Partnership in Mission statement provides as follows:

> Gonzaga's mission statement uses the terms humanistic, Catholic, and Jesuit to describe its character and distinction. The Council for Partnership in Mission (CPM) is a catalyst for assisting members of the Gonzaga Community to articulate and explore—in ways proper for a University—their visions of how truth and human value can be expressed at Gonzaga. The Council for Partnership in Mission has developed a number of activities for 1995-96 to aid this process of shaping our tradition. Each person in the community is invited to become involved in the CPM's sponsored activities. The CPM's activities are focused in five areas of University life and facilitated through the following committees: *Entrance*—The Entrance committee encourages those with responsibility for faculty and staff hiring and student recruitment to use the University mission effectively in their decision making. *Orientation*—The Orientation committee assists those responsible for the orientation of new faculty, staff, and students to more effectively introduce individuals to the traditions and dynamics of the University mission and invite them into a genuine partnership regarding its ongoing implementation. *Development*—The Development committee assists those with the responsibility for the ongoing development and training of the faculty, staff, and students to more effectively engage members of the University community in dialogue regarding the University mission. *Spirituality*—The Spirituality committee provides opportunities for the spiritual development of the faculty, staff, and students, especially regarding Ignatian spirituality. *Student*—The Student committee assists those responsible for the recruitment, orientation, development, and spirituality of students to increase awareness of and implementation of the university's mission. Ultimately, each person at Gonzaga University is a partner in mission by her or his participation in the life of the community.

VI. CONCLUSION—RENDER TO CAESAR THAT WHICH IS CAESAR'S AND TO GOD THAT WHICH IS GOD'S

At the beginning of this paper I mentioned my modest goal about an immodest topic: how mankind does God's work in this world. As a consequence, I addressed the contribution religiously affiliated schools make to this work. If these institutions are to succeed in this mission, the question of who gets chosen to be a laborer in this work which contributes to the rich heritage of higher education in the United States is of great importance. Of equal importance is the determination of the criteria by which this special kind of laborer is hired. While employers cannot, at one level, discriminate against would-be employees on the grounds of race, color, religion, sex, or national origin, religiously affiliated schools are nonetheless given statutory flexibility to select employees who share in such schools' missions to seek wisdom and understanding within a context of religious belief, belief which has often influenced the evolution of western universities.

With the passage of time, however, the religious dimension and character of many universities having a religious foundation has diminished. Increasing secularization in the world has made its claim on these institutions. The reasons for secularization are diversified, and reflect institution-specific as well as general societal causes. Still, a number of religiously affiliated universities have taken the stance that they wish to preserve and enhance their religious affiliation. The conviction of many individuals concerned with preserving the religious affiliation of these schools is that understanding and belief need not be mutually exclusive. The religiously affiliated academies have been the place where faith and reason have come together to pose these questions and to seek their answers for centuries. Their mission, then, is different from their secular counterparts. The religiously affiliated school's search for truth transcends the material because it seeks the eternal. In order to do this, the environment to support this quest differs, again, from that of its secular counterpart.

I have addressed the question of whether a religiously affiliated institution can take steps that are both necessary and

lawful to retard the erosion of religious affiliation and to reinforce it in ways that enhance the academy's robust health. I have attempted to illustrate the nature of the problem and how it can be addressed both responsibly and within the spirit of Title VII of the Civil Rights Act of 1964. Consequently, I have investigated several interrelated issues relevant to providing the legal framework for ensuring that these institutions remain vibrant and vital elements of higher education in the United States.

The first focused on the general legal history covering the ability of religiously affiliated schools to hire individuals under employment practices which take account of their religious affiliation. The second examined the legality of religiously affiliated institutions raising questions concerning the school's mission with prospective candidates, and their willingness and ability to support it. The third area concentrated on whether religiously affiliated institutions can employ affirmative action or apostolic preference schemes in the hiring of faculty and administrators who are eager to support the institution's mission as it is influenced by the religious affiliation. This last investigation offered a general proposal which could be helpful to the religiously affiliated school in developing employment practices consistent with Title VII norms, but which still affords the school the ability to preserve its important religious heritage. This proposal should enable these institutions to exercise apostolic preference not only to co-religionists but to all other employment candidates who are allied with and supportive of the institution's religiously inspired mission. Such preferential hiring practices could help promote and sustain the diversity that is important to American culture and education.

If affirmative steps are not taken to safeguard and preserve religiously affiliated schools, history reveals not only the possibility but even the inevitability that more and more religiously affiliated universities will become extinct. This extinction will come about not because of voluntary decisions but because critical employment appointments could not be made with mission-oriented goals in mind.

And this the American legal matrix does not mandate.