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I. INTRODUCTION

Section 703 of the Civil Rights Act of 1964 makes it unlawful for an employer to hire or discharge an individual "because of such individual's race, color, religion, sex, or national origin."[1] However, section 702 of the Act, as originally enacted, provided an exemption for religious institutions,[2] permitting them to make religion-based employment decisions for jobs involving "religious activities" of the institution.[3] The Equal Employment Opportunity Act of 1972 broadened the scope of section 702, permitting religious institutions to make religion-based employment decisions in *all* their activities, rather than just their religious ones.[4]

One issue raised by amended section 702 is whether it violates the Establishment Clause of the first amendment.[5] Permit-

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1. Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (1964) (codified at 42 U.S.C. § 2000e-2 (1982)). Section 703 reads, in pertinent part, as follows:

> (a) It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

2. Throughout this note, the phrase "religious institution" or "religious organization" will be used to mean any of the religious entities exempted by section 702; i.e., "a religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1 (1982).

3. Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (1964) (codified as amended at 42 U.S.C. § 2000e-1 (1982)). The original section provided: "This title shall not apply to . . . a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities . . . ."

4. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, 103-04 (codified at 42 U.S.C. § 2000e-1 (1982)). Amended § 702 now reads: "This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." *See also infra* notes 22-30 and accompanying text.

5. The Establishment Clause reads: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

ting religious institutions to discriminate on religious grounds, while prohibiting non-religious employers from doing so, arguably constitutes an "establishment of religion" in violation of the Constitution.[6] This issue was recently addressed by the United States Supreme Court in *Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos*.[7] Although sustaining the constitutionality of section 702 as applied to the facts of the *Amos* case, the Court left open the question whether section 702 would be constitutional if applied to a religious institution's profit-making activities.[8]

Part II of this note briefly reviews the majority and concurring opinions in the *Amos* case. Part III will examine the legislative history of amended section 702 and court opinions construing its scope in order to demonstrate that section 702 was intended to cover the for-profit activities of a religious organization. Part III concludes that section 702 is constitutional even when applied to a profit-making activity.

II. THE *AMOS* CASE

A. Background

Arthur Frank Mayson was employed as the building engineer for the Deseret Gymnasium ("Gymnasium"), a nonprofit health and fitness facility operated by the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints ("CPB") and the Corporation of the President of The Church of Jesus Christ of Latter-day Saints ("COP"). The CPB and the COP are religious entities wholly owned by The Church of Jesus Christ of Latter-day Saints. As building engineer, Mayson was responsible for maintaining the Gymnasium's physical

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6. Concerns are also raised about whether section 702 violates the fourteenth amendment's Equal Protection Clause. However, such concerns are beyond the scope of this note.

7. 107 S. Ct. 2862 (1987).

8. *See id.* at 2872 (Brennan, J., concurring), 2875 (O'Connor, J., concurring); *see also infra* notes 18-21 and accompanying text. The facts in *Amos* concerned a nonprofit gymnasium. For a definition of "nonprofit," see Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980):

> A nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees. . . . It should be noted that a nonprofit organization is not barred from earning a profit. . . . It is only the distribution of the profits that is prohibited.

facility, the equipment in the facility and the outside grounds.[9] He was discharged in 1981 because he failed to qualify for a temple recommend—a certificate indicating that he was a member of the Church in good standing and eligible to attend its temple services.[10]

Mayson and other employees who had been similarly discharged sued the CPB and COP, alleging discrimination on the basis of religion in violation of section 703. The defendants moved to dismiss the claim, contending that section 702 exempted them from the requirements of section 703. In response, the plaintiffs argued that section 702, as applied to employees performing nonreligious jobs, violated the Establishment Clause of the first amendment.[11]

The United States District Court for the District of Utah held that section 702 could constitutionally exempt the defendants from the requirements of section 703 only if section 702 satisfied the *Lemon* test.[12] Concluding that section 702 failed to satisfy the second prong of the test because it gave religious organizations "an exclusive authorization to engage in conduct which can directly and immediately advance religious tenets and practices,"[13] the court entered summary judgment in favor of Mayson and ordered the defendants to reinstate him with back pay.[14]

On direct appeal, the United States Supreme Court reversed the district court's decision and held that applying section 702 to the nonprofit activities of a religious organization did

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9. Amos v. Corporation of the Presiding Bishop, 594 F. Supp. 791, 802 (D. Utah 1984).

10. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 107 S. Ct. 2862, 2865 (1987).

11. 107 S. Ct. at 2865.

12. 594 F. Supp. at 804. In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Supreme Court formulated a three-prong test for determining the constitutionality of statutes allegedly conflicting with the Establishment Clause. Simply stated, *Lemon* holds that such a statute will be upheld only if (1) it has a secular purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not foster an excessive entanglement with religion. *Id.* at 612-13; *see also* Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970); Board of Educ. v. Allen, 392 U.S. 236, 243 (1968).

13. 594 F. Supp. at 825.

14. 107 S. Ct. at 2867. The district court based its decision as to the "effects" prong of the *Lemon* test on several factors that the Supreme Court had supposedly found determinative in earlier cases: that the exemption was limited to religious institutions and that the exemption was not supported by historical traditions. *See* 594 F. Supp. at 822-24.

not violate the Establishment Clause.[15] Although the CPB and COP argued that the *Lemon* test was inapplicable to exemption statutes,[16] the Court found that section 702 satisfied all three prongs of the test.[17]

B. Concurring Opinions

This note focuses on an issue raised in two concurring opinions by Justices Brennan and O'Connor. Joined by Justices Marshall and Blackmun,[18] Justices Brennan and O'Connor stated that their concurrences in the judgment rested on the fact that the Gymnasium was a *nonprofit* organization. Their opinions suggested that the outcome of *Amos* might have been different if the activity at issue had been for-profit. Because the Gymnasium was a nonprofit activity, the concurring Justices were willing to permit religious discrimination. Justice Brennan declared:

> The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation. . . . This makes plausible a church's contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose.[19]

Justice Brennan reasoned that because a *nonprofit* activity is more likely to be religious in nature than a *for-profit* activity,

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15. 107 S. Ct. at 2870. The case went on direct appeal to the Supreme Court because the United States had intervened in the matter. *Id.* at 2867. Direct appeals to the Supreme Court are permitted when a court has held a federal statute "unconstitutional in any civil action . . . to which the United States . . . is a party." 28 U.S.C. § 1252 (1982).

16. The Church argued that the *Lemon* test was inappropriate because "an exemption statute will always have the effect of advancing religion and hence be invalid under the second (effects) part of the *Lemon* test." 107 S. Ct. at 2867-68. The Church's argument was that under the Supreme Court's decisions in Gillette v. United States, 401 U.S. 437 (1971), and Walz v. Tax Comm'n, 397 U.S. 664 (1970), the appropriate test for determining the constitutionality of an exemption statute is a two-part inquiry: "[F]irst, whether the government acted with a legitimate, secular purpose and, second, whether the exemption at issue involves less governmental entanglement with religion than the alternatives to that exemption." Brief for Appellants at 14, Corporation of the Presiding Bishop v. Amos, 107 S. Ct. 2862 (1987) (No. 86-179).

17. 107 S. Ct. at 2868. The Court found "unpersuasive" the district court's analysis regarding the "effects" prong, indicating that there was "no reason to require that the exemption come packaged with benefits to secular entities," and stating that Congress' decision to expand the exemption was "entitled to deference, not suspicion." *Id.* at 2869.

18. Justice Blackmun wrote separately, stating that he concurred in the Court's judgment "[e]ssentially for the reasons set forth in Justice O'Connor's opinion . . . ." *Id.* at 2873.

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

inquiry into the nature of a nonprofit activity is more likely to result in impermissible entanglement of church and state. Thus, he concluded: "While every nonprofit activity may not be operated for religious purposes, the likelihood that many are makes a categorical rule [permitting religious discrimination in all nonprofit activities] a suitable means to avoid chilling the exercise of religion."[20]

Justice O'Connor expressed the same concern, stating:

> It is not clear . . . that activities conducted by religious organizations solely as profit-making enterprises will be as likely to be directly involved in the religious mission of the organization. While I express no opinion on the issue, I emphasize that under the holding of the Court, and under my view of the appropriate Establishment Clause analysis, the question of the constitutionality of the § 702 exemption as applied to for-profit activities of religious organizations remains open.[21]

Consequently, as made clear by the concurring opinions, the question of whether section 702 would be constitutional if applied to a profit-making activity is still unresolved. The rest of this note deals with how a case involving a profit-making activity should be decided, based on the intended scope of section 702 and on the analysis used by the *Amos* Court.

III. Constitutionality of Section 702 When Applied to For-Profit Activities

The discussion in this section will demonstrate that Congress intended section 702 to include a religious institution's for-profit activities and that courts have acknowledged this in their opinions. The section then demonstrates that, under the analysis used by the Supreme Court in *Amos*, section 702 is constitutional even in the context of a for-profit activity. Finally, this note concludes with a discussion of the policy arguments supporting the constitutionality of section 702 as applied to a religious organization's profit making activities.

A. The Intended Scope of Section 702

An examination of the legislative history and case law concerning section 702 reveals Congress's intent to permit religious

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20. *Id.* at 2873 (Brennan, J., concurring).
21. *Id.* at 2875 (O'Connor, J., concurring).

organizations to make religion-based employment decisions in *all* of their activities, including profit-making activities.

1. Legislative history

During the debates concerning the Equal Employment Opportunity Act of 1972, Senators Allen and Ervin co-sponsored two amendments intended to modify section 702 with regard to religious institutions.[22] The broadest of the two amendments, Amendment No. 815, would have exempted religious and educational institutions from all of the requirements of section 703, permitting them to discriminate on grounds of race, sex and national origin, as well as religion.[23] Although Amendment No. 815 was defeated,[24] statements made in support of it provide persuasive evidence of the intent for which Amendment No. 809, which

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22. Two years earlier, in 1970, Senator Ervin introduced an amendment that would have changed section 702 to read: "This title shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion." S. 2453, 91st Cong., 2d Sess., 116 CONG. REC. 34,573 (1970). In support of his amendment, Senator Ervin explained:

> [U]nder [the 1964 exemption], if a religious educational institution wanted to employ a professor of mathematics it could be compelled by the Commission to employ an infidel as professor of mathematics. In other words, the only exemptions are extended to those actually participating in the religious activities of the religious institution.
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> Justice Douglas has said, in connection with a school prayer case, that you could not separate secular and nonsecular activities of a religious institution. If that is true, this bill trespasses on the first amendment right to religious freedom.
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> Apart from that, as a matter of policy, I think people who establish a religious institution and people who establish a church should be allowed to select a janitor or a secretary who is a member of the church in preference to some infidel or nonmember. However, they could not do that under [the 1964 exemption]. My amendment would exempt religious organizations from the control of the State. If that is not in line with the letter of the law, it certainly is in line with the spirit of the law.
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> I hope all those who believe in religious freedom will support the amendment. We ought not to let Caesar undertake to control what belongs to God.

116 CONG. REC. 34,565 (daily ed. Oct. 1, 1970) (statement of Sen. Ervin). The amendment passed by a vote of 43 to 28, *id.* at 34,566, but the bill never became law.

23. Senator Williams, opposing the amendment, observed: "This amendment would allow religious organizations and educational institutions a complete exemption from title VII coverage." 118 CONG. REC. 1991 (daily ed. Feb. 1, 1972) (statement of Sen. Williams), *reprinted in* SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1249 [hereinafter LEGISLATIVE HISTORY].

24. 118 CONG. REC. 1995 (daily ed. Feb. 1, 1972), *reprinted in* LEGISLATIVE HISTORY, *supra* note 23, at 1259-60.

the Senate adopted, was proposed. For example, Senator Ervin, speaking about the unamended statute, remarked:

> [The 1964 Act] attempt[s] to do an impossible thing, that is, to separate the religious activities of a religious corporation, association, educational institution, or society, from those of its activities which can be said to be not religious, nonreligious, or unreligious. [I]t is impossible to separate the religious and nonreligious activities of a religious corporation or religious association or religious educational institution or religious society from its other activities. This is so because the whole religious organization is one body, and yet the bill would attempt to divorce the two kinds of activities each from the other . . . .[25]

The amendment that eventually was passed by the Senate, Amendment No. 809, deleted the word "religious" before the word "activities," thus permitting religious institutions to make religion-based hiring decisions in *all* of their activities, not just their religious ones.[26] As stated by Senator Ervin, the amendment would "remove religious institutions in all respects from subjugation to the EEOC."[27]

Senator Williams, an opponent of the amendment, recognized that "[t]his amendment would have the effect of exempting these institutions from the operation of title VII insofar as religion is concerned whether or not their activities are religious or secular."[28] Senator Williams summarized amended section 702 as follows:

> The exemption in this section for religious corporations, associations, educational institutions, or societies to allow such entities to employ individuals of a particular religion to perform work connected with the particular corporation, associa-

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25. 118 CONG. REC. 1973 (daily ed. Feb. 1, 1972) (Statement of Sen. Ervin), *reprinted in* LEGISLATIVE HISTORY, *supra* note 23, at 1211-12.

26. The amendment was agreed to by the Senate without a rollcall vote because of its similarity to the amendment that had been passed in 1970. 118 CONG. REC. 4813 (1972), *reprinted in* LEGISLATIVE HISTORY, *supra* note 23, at 1667. *See supra* note 22.

27. 118 CONG. REC. 948 (daily ed. Janb. 24, 1972) (Statement of Sen. Ervin), *reprinted in* LEGISLATIVE HISTORY, *supra* note 23, at 848.

28. *Id.* at 4813 (daily ed. Jan. 24, 1972) (Statement of Sen. Ervin), *reprinted in* LEGISLATIVE HISTORY, *supra* note 23, at 1665. Senator Williams also noted:

> Many of these religious corporations and associations often provide purely secular services to the general public without regard to religious affiliation, and most of the many thousands of persons employed by these institutions perform totally secular functions. In this regard, employees in these "religious" institutions perform jobs that are identical to jobs in comparable secular institutions.

Id. reprinted in LEGISLATIVE HISTORY, *supra* note 23, at 1665-66.

> tion, educational institution or society, has been broadened to allow such religious preference regardless of the particular job [for] which the individual is being considered.[29]

Congressman Erlenborn, who supported the amendment, observed:

> Religious institutions will be covered, but with a broad exemption for anyone employed by the religious institution rather than only those people who might be utilized in religious work per se. So that I think it was clearly the thought of the conference that if a religious institution is engaged in a profitmaking venture they still are not covered by the provisions of this act.[30]

Thus, it is clear that Congress intended that religious organizations be able to make employment decisions based on religious grounds in all activities, including profit-making activities.

2. *Judicial Interpretation of Section 702*

Courts examining the scope of section 702 have concluded that it was intended to apply to both nonprofit and for-profit activities of religious organizations. For example, in *King's Garden, Inc. v. F.C.C.*,[31] King's Garden, a nonprofit religious organization, operated two radio stations. Regulations promulgated by the F.C.C. under the "public interest" standard of the Communications Act[32] prohibited broadcast licensees from making employment decisions based on "race, color, religion, national ori-

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29. 118 CONG. REC. 4941 (daily ed. Feb. 22, 1972) (Statement of Sen. Williams), *reprinted in* LEGISLATIVE HISTORY, *supra* note 23, at 1770. In his section-by-section analysis of S.2515, the Senate proposal, Senator Williams explained the proposed amendment's effect on § 702 as follows: "The limited exemption from coverage in this section for religious corporations, associations, educational institutions or societies has been broadened to allow such entities to employ individuals of a particular religion in all their activities instead of the present limitation to religious activities." 118 CONG. REC. 7167 (daily ed. Mar. 6, 1972) (Statement of Sen. Williams), *reprinted in* LEGISLATIVE HISTORY, *supra* note 23, at 1845. The bill passed the Senate by a vote of 73-16. 118 CONG. REC. 4944 (1972), *reprinted in* LEGISLATIVE HISTORY, *supra* note 23, at 1779. A typographical error apparently exists in the Congressional Record's report of the Senate bill; it retains the adjective "religious" before the word "activities." *See* 118 CONG. REC. 4944 (daily ed. Feb. 22, 1972); *see also Amos*, 594 F. Supp. 791, 809 n.31 (D. Utah 1984).

30. 118 CONG. REC. 7567 (daily ed. Mar. 8, 1972) (Statement of Rep. Erlenborn), *reprinted in* LEGISLATIVE HISTORY, *supra* note 23, at 1858-59.

31. 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974).

32. The Communications Act of 1934, 47 U.S.C. §§ 151-610 (1982), requires the F.C.C. to impose regulations on broadcast licensees "as public convenience, interest, or necessity requires." 47 U.S.C. §§ 303, 307, 309(a) (1982).

gin or sex."[33] A person who had applied for a job at one of the radio stations filed a complaint with the F.C.C., alleging that he had been questioned regarding his religious beliefs. Relying on section 702, *King's Garden* claimed it had the right "to discriminate on religious grounds with respect to all positions of employment at its radio stations."[34] The F.C.C. disagreed, ruling that "only 'those persons hired to espouse a particular religious philosophy over the air should be exempt from the non-discrimination rules.' "[35]

On appeal, the Court of Appeals for the D.C. Circuit affirmed the F.C.C.'s ruling, declaring that section 702 "does not control [the F.C.C.'s] 'public interest' mandate under the Communications Act."[36] Although finding that section 702 was inapplicable to the case, the court proceeded to analyze its legislative history and to question its constitutionality.[37] Commenting on the scope of section 702, the court noted:

> In covering all of the "activities" of any "religious corporation, association, educational institution, or society," the exemption immunizes virtually every endeavor undertaken by a religious organization. If a religious sect should own and operate a trucking firm, a chain of motels, a race track, a telephone company, a railroad, a fried chicken franchise, or a professional football team, the enterprise could limit employment to members of the sect without infringing the Civil Rights Act.[38]

The court recognized that "[t]o effect a substantive narrowing of the exemption the courts would have to attempt to divide a sect's various undertakings into 'secular' and 'religious' categories, but it is precisely this categorization which Congress repudiated in 1972."[39]

In *Larsen v. Kirkham*,[40] an English teacher who was em-

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33. The regulations in force at the time King's Garden was decided, 47 C.F.R. §§ 73.125, 73.301, 73.599, 73.680 and 73.793, were consolidated into a single section, § 73.2080, in 1979. 44 Fed. Reg. 6722, 6727 (1979). Section 73.2080 commands that "no person shall be discriminated against in employment because of race, color, religion, national origin or sex."

34. 498 F.2d at 52 n.1.

35. *Id.* (quoting *In re* Complaint by Anderson, 34 F.C.C.2d 937, 938 (1972)).

36. *Id.* at 53-54.

37. *Id.* at 54-57.

38. *Id.* at 54. The court concluded its discussion of § 702 by stating: "[T]he exemption's benefits clearly extend to the non-religious, commercial enterprises of sectarian organizations." *Id.* at 57.

39. *Id.* at 54 n.7.

40. 499 F. Supp. 960 (D. Utah 1980).

ployed by the L.D.S. Business College alleged that her teaching contract was not renewed because she was "insufficiently involved in ecclesiastical activities" of the Mormon Church, which owned and operated the College.[41] In dismissing the complaint, the court noted that under the Equal Employment Opportunity Act of 1972, "Section 702 . . . was extended so as to exclude from Title VII coverage *all* acts of religious discrimination in employment, regardless of the type of activity involved."[42] The court never addressed the constitutionality of section 702, however, choosing instead to focus on section 703(e), which expressly permits religious schools to hire teachers based on their religious beliefs.[43]

Although the issue of whether section 702 is constitutionally applicable to for-profit activities was never directly before these courts, dicta in both opinions strongly indicate that the courts believed that the section 702 exemption would extend to the profit-making activities of a religious institution.[44] The district court in *Amos* reached the same conclusion, stating that it was "compelled to conclude that the legislative intent of [amended section 702] is that all religious organizations, associations, educational institutions and societies may discriminate, on religious grounds, *in all their activities* against all their employees."[45]

B. Analysis of Section 702 Under Lemon

The traditional test used to determine whether a particular statute violates the Establishment Clause is the three-prong test

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41. *Id.* at 961.

42. *Id.* at 964-65 (emphasis added).

43. *Id.* at 965-67. Section 703(e) (codified at 42 U.S.C. § 2000e-2(e) (1982)) provides:

> Notwithstanding any other provision of this subchapter . . . (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution . . . to hire and employ employees of a particular religion if such school, college, university, or other educational institution . . . is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion . . . .

44. *See also* E.E.O.C. v. Southwestern Baptist Theological Seminary, 485 F. Supp. 255, 260 (N.D. Texas 1980), *aff'd in part, rev'd in part,* 651 F.2d 277 (5th Cir. 1981), *cert. denied,* 456 U.S. 905 (1982):

> [The section 702 exemption] is a remarkably clumsy accommodation of religious freedom with the compelling interests of the state, providing on the one hand far too broad a shield for the secular activities of religiously affiliated entities with not the remotest claim to first amendment protection while on the other hand permitting intrusions into wholly religious functions.

45. Amos v. Corporation of the Presiding Bishop, 594 F. Supp. 791, 804 (D. Utah 1984) (emphasis added).

first enunciated in *Lemon v. Kurtzman*.[46] In order for a statute challenged on Establishment Clause grounds to pass constitutional muster three requirements must be met: First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and finally, the statute must not foster "an excessive government entanglement with religion."[47]

As the Supreme Court indicated in *Amos*, the *Lemon* test is the appropriate analysis to use in determining the constitutionality of section 702.[48] Thus, although the Court analyzed section 702 in the context of a religious institution's employment decisions for a nonprofit activity, the same analysis should be used in the case of a religious institution's employment decisions in a profit-making activity.

1. *Legislative Purpose*

As stated, the first prong of the *Lemon* test requires the challenged statute to have a secular legislative purpose.[49] As the *Amos* Court noted, "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[50] Both the district court and the Supreme Court agreed that the purpose of section 702 "was to minimize governmental 'interfer[ence] with the decision-making process in religions.' "[51]

The Supreme Court concluded in *Amos* that section 702 was enacted by Congress for a secular purpose. Obviously, the purpose for which a statute was passed does not change just because it is applied in another context. Once a statute has been enacted, the purpose for which it was passed is set, even though the con-

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46. 403 U.S. 602 (1971); *see supra* note 12.

47. *Lemon*, 403 U.S. at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

48. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 107 S. Ct. 2862, 2867-68 (1987). The Court declined to examine whether application of *Lemon* was inappropriate to exemption statutes in general, *see supra* note 16, finding that "the exemption involved here is in no way questionable under the *Lemon* analysis." *Id.* at 2868.

49. *Lemon*, 403 U.S. at 612. The aim of this prong is not to ensure that the law's purpose is wholly unrelated to religion, but rather to prevent Congress "from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Amos*, 107 S. Ct. at 2868.

50. *Amos*, 107 S. Ct. at 2868.

51. *Id.* (quoting *Amos*, 594 F. Supp. 791, 812 (D. Utah 1984)) (alteration in original).

texts in which it is subsequently *applied* may greatly vary. The Supreme Court's conclusion that section 702 was passed for a secular legislative purpose, although made in the context of a nonprofit activity, applies to for-profit activities as well. Therefore, because the first prong of the *Lemon* test is met for a nonprofit activity, that prong is also met for a for-profit activity.

2. *Effect*

The second prong of the *Lemon* test, that the statute's "principal or primary effect . . . be one that neither advances nor inhibits religion,"[52] was expanded somewhat by the Supreme Court in *Amos*. The Court stated: "For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence."[53]

The Court's emphasis was on whether the government, as contrasted with the Church, could be said to be advancing religion. The Court observed: " '[F]or the men who wrote the Religion Clauses of the First Amendment the "establishment" of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.' "[54] The Court seemed persuaded by the fact that section 702 did nothing more than restore religious employers to the position they occupied prior to the passage of the Civil Rights Act of 1964. "In such circumstances," the Court stated, "we do not see how any advancement of religion achieved by the Gymnasium can be fairly attributed to the Government, as opposed to the Church."[55]

Disagreeing with this expansion, Justice O'Connor remarked that the Court's opinion apparently "suggest[s] that the 'effects' prong of the *Lemon* test is not at all implicated as long as the government action can be characterized as 'allowing' religious organizations to advance religion, in contrast to government ac-

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52. *Lemon*, 403 U.S. at 612.

53. *Amos*, 107 S. Ct. at 2869 (emphasis in original). It will be interesting to see if the Court maintains this interpretation in future Establishment Clause cases. Taken literally, this interpretation of the "effects" prong of the *Lemon* test may make it difficult for any statute to fail the *Lemon* test unless, as Justice O'Connor hypothesized, the statute in question "involved actual proselytization by government agents." *Id.* at 2874 (O'Connor, J., concurring).

54. *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)) (alteration in original).

55. *Id.* at 2869.

tion directly advancing religion."[56] In her concurring opinion, Justice O'Connor reiterated the position she had first asserted in *Wallace v. Jaffree*.[57] In that case she argued that strict adherence to the *Lemon* test should be replaced with the inquiry of "whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement."[58] Even under her proposed analysis, however, section 702 would still be constitutionally applicable to profit-making activities. As found by both the Supreme Court and district court in *Amos,* Congress' purpose in amending section 702 was to avoid excessive church-state entanglement; the amendment was not intended as an endorsement of religion.[59]

The second inquiry in Justice O'Connor's analysis, "whether the statute conveys a message of endorsement," can also be answered in the negative. Although one could certainly interpret section 702 as an endorsement of religion by the government, the better interpretation—the one that is consistent with Congress' purpose in enacting it—is that section 702 conveys a message that is consistent with the goals of the First Amendment; i.e., that religions shall neither be inhibited nor promoted through government action. Indeed, the argument that section 702 constitutes an endorsement of religion was apparently raised by the appellees in *Amos,* but was rejected by the Court, which stated: "We find no merit in appellees' contention that § 702 'impermissibly delegates governmental power to religious employees [sic] and conveys a message of governmental endorsement of religious discrimination.' " [60] As the Court stated in *Lemon,* "total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable."[61]

Justice Brennan's concurrence seemed to be concerned with whether the activity in question was secular or religious, rather than whether it was a nonprofit or for-profit one. For example, he commented that "ideally, religious organizations should be able to discriminate on the basis of religion *only* with respect to

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

57. 472 U.S. 38, 67 (1985) (O'Connor, J., concurring).

58. *Id.* at 69 (O'Connor, J., concurring).

59. *See supra* notes 22-30, 49-51 and accompanying text.

60. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 107 S. Ct. 2862, 2869 n.15 (1987) (quoting Brief for Appellees at 31).

61. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

religious activities,"[62] but conceded that the "character of an activity is not self-evident" and that the "searching case-by-case analysis" required to determine whether a particular activity was religious or secular would "result[] in considerable ongoing government entanglement in religious affairs."[63] He thus suggested a middle ground of sorts, permitting religious institutions to discriminate in nonprofit activities only, because nonprofit activities are usually religious in nature.[64]

Although Justice Brennan's argument is perhaps constitutionally sound in that only religious activities should be afforded first amendment protection, it still fails to handle adequately the problem of what to do about a profit-making activity that is arguably religious in nature.[65] His analysis would apparently require courts to inquire concerning whether a profit-making activity was religious or secular. This would lead to a court's intrusion into matters of church autonomy, thus violating the Free Exercise Clause as well as the prohibition against "excessive government entanglement" found in *Lemon*. Only a complete exemption covering all of the activities of a religious organization will ensure that first amendment values are protected.[66]

Applying the *Amos* Court's analysis to a for-profit activity, the section 702 exemption would satisfy the "effects" prong of the *Lemon* test. Even though the exemption may constitute, as one court declared, "a sure formula for concentrating and vastly extending the worldly influences of those religious sects having the wealth and inclination to buy up pieces of the secular economy,"[67] any advancement of religion will result from the religion itself, not from direct aid given by the government. This is consistent with an earlier observation made by Justice Brennan in *McDaniel v. Paty*:

> [An] understanding of the interrelationship of the Religion Clauses has permitted government to take religion into account . . . to exempt, when possible, from generally applicable gov-

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62. *Amos*, 107 S. Ct. at 2872 (Brennan, J., concurring).

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

64. *See supra* text accompanying notes 19-20.

65. Justice Brennan noted: "It is also conceivable that some for-profit activities could have a religious character, so that religious discrimination with respect to these activities would be justified in some cases." *Amos*, 107 S. Ct. at 2873 n.6 (Brennan, J., concurring).

66. *See infra* notes 74-84 and accompanying text.

67. Kings Garden, Inc. v. F.C.C., 498 F.2d 51, 55 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974).

> ernmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish.[68]

Thus, application of section 702 to a religious institution's profit-making activities is constitutional under both the analysis used by the majority of the *Amos* court and that proposed by Justice O'Connor.

3. *Excessive entanglement*

The final prong of the *Lemon* test requires that the challenged statute "not foster 'an excessive government entanglement with religion.' "[69] In *Amos*, both the district court and the Supreme Court found that section 702 easily met this requirement in the context of nonprofit activities. The Supreme Court stated:

> It cannot be seriously contended that § 702 impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in this case. The statute easily passes muster under the third part of the *Lemon* test.[70]

This third prong is also satisfied if the exemption is applied to a religious institution's profit-making activities. If the exemption were held to be inapplicable to such activities, it would involve the government in attempting to determine whether or not a particular profit-making activity could be characterized as religious.[71] As the district court in *Amos* held, the exemption provided by section 702 "was designed . . . to ensure that the government and courts do not go through the rigors of inspecting and analyzing whether the activities in which a religious entity is engaging are religious or secular, thus avoiding an intimate and continuing relationship between church and state."[72]

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68. McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring). *See also* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("[T]he Constitution . . . affirmatively mandates accommodation, not merely tolerance, of all religions.").

69. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

70. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 107 S. Ct. 2862, 2870 (1987).

71. *See infra* notes 80-84 and accompanying text.

72. Amos v. Corporation of the Presiding Bishop, 594 F. Supp. 791, 828 (D. Utah

Thus, the exemption provided by section 702 would satisfy the *Lemon* test even in the context of a profit-making activity. The exemption was passed with a secular purpose; the exemption merely accommodates religions, and does not constitute an advancement of religion by government; and the exemption clearly prevents excessive government entanglement with religion. As one commentator has noted, "[t]he state does not support or establish religion by leaving it alone."[73]

C. Policy Arguments

Sound constitutional arguments support the application of section 702 to a religious organization's profit-making activities. Exempting both nonprofit and for-profit activities of a religious organization (1) promotes Free Exercise Clause values of religious autonomy and (2) avoids Establishment Clause problems of excessive government entanglement with religion.

1. Religious autonomy

A religious institution should have the right to decide what activities are consistent with its religious tenets. Permitting a court or Congress to decide that a for-profit activity is not consistent with the institution's religious beliefs violates the first amendment's guarantee of the free exercise of religion.[74] The Court in *Amos* commented: "[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. . . . Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission."[75]

1984).

73. Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1416 (1981). Professor Laycock also observed:

> If the church were allowed to pay wages so low that its employees became public charges, the subsidy would be obvious. But in the absence of such a subsidy, the mere fact that the state does not impose on a church all the costs and burdens it imposes on secular organizations is not an establishment. And the fact that church employees may not earn as much or be as well treated as they would if the church were regulated is not a forced subsidy.

Id.

74. The Free Exercise Clause reads: "Congress shall make no law . . . prohibiting the free exercise [of religion]. . . ." U.S. CONST. amend. I.

75. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day

Justice Brennan agreed, noting in his concurring opinion in *Amos* that

> religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to:
>
> > select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] [C]lause
> >
> > . . . .
>
> Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself.[76]

Congress realized that Free Exercise Clause values would be infringed by the original limitation to "religious activities" contained in section 702 and so it extended the exemption to all activities.[77] Interpreting the exemption to apply only to nonprofit activities would once again require courts to involve themselves in issues of church autonomy. Ensuring that religious employers complied with Title VII would require the same "comprehensive, discriminating, and continuing state surveillance" that was forbidden by the *Lemon* Court.[78] As Justice Brennan noted, "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."[79]

2. *Excessive government entanglement*

Permitting religious employers to make religion-based employment decisions in all of their activities is consistent with the Establishment Clause of the first amendment because government entanglement with religion would be minimized. Of course, merely holding that only nonprofit activities are exempt by sec-

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Saints v. Amos, 107 S. Ct. 2862, 2868 (1987).

76. *Id.* at 2871 (Brennan, J., concurring) (quoting Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981) (alteration by Justice Brennan).

77. *See supra* notes 22-30 and accompanying text.

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

79. *Amos*, 107 S. Ct. at 2873 (Brennan, J., concurring).

tion 702 would not involve any government intrusion into religion. The for-profit/nonprofit line may be easy to draw in most cases.[80] However, the rationale for such line drawing is that for-profit activities are typically nonreligious and therefore unprotected by the first amendment. To ensure that free exercise values are not infringed by such a broad generalization would require an intrusive court inquiry into the practices and beliefs of the organization similar to that carried out by the *Amos* district court. Such an inquiry would very likely constitute excessive governmental entanglement with religion, thus violating the Establishment Clause.[81] Permitting government to determine the religious nature of an activity is precisely the type of entanglement problem that the *Lemon* Court sought to avoid.[82]

Practically speaking, the issue of whether a religious institution may make religion-based employment decisions in its for-profit activities will not arise. In a profit-making venture, the goal is to have the most qualified people so that the enterprise will be profitable. Religious discrimination is inconsistent with the goal of profit-making.[83] However, even if the issue does arise, and the religious organization asserts that the activity in question serves a legitimate religious purpose, permitting a court or Congress to inquire as to whether such a purpose is in fact legitimate constitutes a direct infringement on religious autonomy and would result in impermissible government entanglement with religion.

Justice Brennan appropriately summed up the problems that result when government undertakes to determine whether a particular activity is religious or not:

> [The] prospect of government intrusion raises concern that a religious organization may be chilled in its Free Exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to

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80. *See supra* note 8.

81. *See also supra* notes 69-72 and accompanying text.

82. *See Lemon*, 403 U.S. 602, 621-22 (1971): "[T]he government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state."

83. *See* H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 1, 28-30, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2515-17 (describing employment discrimination as "an economic waste" and stating that "[t]hrough toleration of discriminatory practices, American industry is not obtaining the quantity of skilled workers it needs.").

> characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation. A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity.[84]

Thus, a court should refuse to question an employment decision made on religious grounds by a religious entity, regardless of the nature of the employment, in order to protect first amendment values of religious autonomy and to prevent excessive government entanglement with religion.

IV. Conclusion

Analysis of the legislative history surrounding the amended version of section 702 and of case law dealing with the scope of the exemption reveals that the exemption was intended to apply, and has been construed as applying, to *all* of the activities of a religious institution—both nonprofit *and* for-profit. Such application is not only consistent with, but indeed *required by*, the first amendment's Free Exercise and Establishment Clauses. Thus, section 702 is constitutional whether the activity in question is nonprofit or for-profit.

Scott Klundt

84. *Amos*, 107 S. Ct. at 2872 (Brennan, J., concurring).