KING'S GARDEN INC. v. FCC: LOOSENING THE POLITICAL HANDS OF CAESAR

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Introduction

Only a decade ago, the Warren Court handed down two decisions, known collectively as the "prayer and Bible reading cases."[1] Their announcement was greeted with clamorous public hostility[2] culminating in the introduction of a number of constitutional amendments to reverse the "lockout of God" by the congressional guardians of the public weal.[3] The proposed amendments were finally defeated by a coalition of liberal religious and lay organizations intent upon preserving the First Amendment guarantee of religious liberty, but not without a massive counteroffensive directed at the Congress and its national constituency.[4]

So it is not without irony that a scant ten years later a case which sought to test the constitutionality of the controversial amendment to Title VII of the Civil Rights Act of 1964,[5] which exempts all religious corporations from the national policy of nondiscrimination in employment, went unnoticed in the public press.[6] Even more alarming is the fact that the denial of certiorari in this case by the Supreme Court evoked not even an indifferent protest among the groups traditionally

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* Member, second year class.

1. School District v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

2. *See* Pollack, *Forward: Public Prayers in Public Schools, The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 63 (1963).

3. Twenty-two senators and fifty-three representatives introduced amendments in response to *Engel* alone. Beaney & Beiser, *Prayer and Politics: The Impact of Engel and Schempp on the Political Process*, in THE IMPACT OF SUPREME COURT DECISIONS 20, 23 (T. Becker ed. 1969).

4. Note, *Religion and the Public Schools*, 20 VAND. L. REV. 1078, 1087-88 (1967).

5. Equal Employment Opportunity Act § 3 (1972), *amending* 42 U.S.C. § 2000 e-1 (1964).

6. King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 95 S. Ct. 309 (1974).

devoted to the preservation of the wall of separation between church and state.[7]

While the vagaries of public opinion and the political winds of change are beyond the scope of this article, the purpose of the note is first, to examine the instant case in detail; secondly to analyze the peculiar events which led to the litigation in the Court of Appeals of the District of Columbia; thirdly, to assess the state of the law for religious discrimination in other jurisdictions; and finally to point out that by refusing to hear the appeal, the Supreme Court has left the lower courts in a quandary and the ambiguities of Title VII unresolved.

Background

On April 24, 1967, the Office of Communication, the Board of Homeland Ministries and the Committee for Racial Justice Now of the United Church of Christ[8] filed a petition with the Federal Communications Commission seeking the adoption of the following broadcast rule:

> No license shall be granted any station which engages in discrimination in employment practices on the basis of race, color, religion, or national origin. Evidence of compliance with this section shall be furnished with each application for a license and annually during the term of each license upon prescribed forms.[9]

Because the petition suggested significant changes in its policy, the Federal Communications Commission not only provided for the customary filing of statements of support and opposition to the proposed rulemaking,[10] but also consulted with the Equal Employment Opportunity Commission and the Department of Justice. At the request of the FCC's general counsel, Assistant Attorney General Stephen J.

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7. Only the ACLU filed an amicus brief, *see* note 63 *infra*, while groups such as the Anti-Defamation League of the B'nai Brith, the General Conference of Seventh-Day Adventists, and the American Jewish Congress were strangely silent.

8. The Office of Communication is an instrumentality of the United Church of Christ, a Protestant denomination of two million members, authorized to conduct a ministry in mass media and provide technical and legal assistance to citizen's groups throughout the nation in matters pertaining to access to the broadcast media. *See, e.g.*, Office of Communication v. FCC, 465 F.2d 519 (D.C. Cir. 1972); Office of Communication v. FCC, 425 F.2d 543 (D.C. Cir. 1969).

9. Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 13 F.C.C.2d 766 (1968).

10. The FCC received some thirty-five statements from individuals and groups and all but one supported the United Church's petition. The sole objection came from the National Association of Broadcasters which professed sympathy for the proposal, but took the position that Congress had delegated this function to the Equal Employment Opportunity Commission under Title VII.

Pollak of the Civil Rights Division of the Justice Department responded with an advisory opinion to the effect that the proposed rulemaking was well within the authority of the Commission and that ending discrimination in employment was a "[n]ational policy of high priority".[11] Further, wrote Pollak, since 80 percent of television and 10 to 12 percent of the radio licensees were (or soon would be) subject to the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964 both the EEOC and the Civil Rights Division of the Justice Department would welcome the FCC's proposed rule as an "added incentive toward compliance by broadcast licensees with existing provisions of law."[12]

Armed with the United Church of Christ's petition and the assurances of the Justice Department, in June of 1969 the FCC adopted nondiscriminatory hiring regulations[13] modeled after those prepared by the Civil Service Commission for federal agencies.[14] The provisions were particularly adapted to the broadcasting industry and issued under the authority of the FCC's own enabling statute,[15] rather than the Civil Rights Act of 1964.

In May of the following year, after a series of revisions, the Commission's equal employment opportunity rules took final form with provisions extending nondiscriminatory hiring policies to women and those with Spanish surnames. All stations having more than five full time employees were within the statute's jurisdiction.[16]

At the same time the Commission amended its own rules to insure a "positive continuing program."[17] To prevent a lapse in equal employment opportunities once a new license had been granted or an existing license renewed, all broadcasters were required to submit annual

11. Letter from Stephen J. Pollak to Hon. Rosel H. Hyde, Chairman of the Federal Communications Commission, May 21, 1968, in 13 F.C.C.2d 766, app. A [hereinafter cited as Pollak letter].

12. Pollak letter, *supra* note 11, at 777. At the time the Equal Employment Opportunity Commission had no enforcement powers. Not until 1972 did Congress pass the Equal Employment Opportunity Act. Under Title VII, as thus amended, the EEOC now has the power to issue judicially enforceable cease and desist orders. 42 U.S.C. § 2000e-5(g) (Supp. II, 1972).

13. *In re* Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 18 F.C.C.2d 240 (1969).

14. Equal Employment Opportunity Agency Program, 5 C.F.R. 713.201 to .301 (1974).

15. The Communications Act of 1934, 47 U.S.C. §§ 154, 307-10 (1970).

16. *In re* Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 23 F.C.C.2d 430 (1970); as codified at 47 C.F.R. §§ 73.125(a), 73.301(a), 73.559(a), 73.680(a), 73.793(a) (1973).

17. Petition for Rulemaking to Require Licensees to Show Nondiscrimination in Their Employment Practices, 23 F.C.C.2d 430, 435 (1970).

employment reports as evidence of good faith.[18] The regulations in the FCC's order were stringent, exceeding those set forth in the Civil Rights Act of 1964 in scope and detail.[19] Once again, the source of legitimacy for the new employment policies was the Communications Act of 1934[20] and the justification was the "compelling need for extensive reform of media employment practices to help reduce racial discrimination and bring about progress in race relations."[21] Although the FCC did not intend the action to conflict with the efforts of agencies specially created to enforce these policies, it nevertheless had an authority of its own to follow and separate sanctions to employ in the event of noncompliance:

> It is also clear that we have an independent responsibility to effectuate such a strong national policy in broadcasting, and that we need not await a judgment of discrimination by some other forum or tribunal . . . .
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> . . . The command of the Communications Act is to the contrary, whatever the nature of the particular unresolved public interest question. Therefore, while not every complaint of an isolated action, even if substantial, will warrant deferring a renewal or designating a renewal application for hearing, *renewal will not be appropriate where there is a pattern of substantial failure to accord equal employment opportunities.*[22]

Regulation Through Licensing—The Fairness Doctrine

A unique combination of legislative grace and judicial approval over the last half century has equipped the FCC with expansive powers to regulate the broadcast industry.[23] Regulation, of course, is accomplished through licensing. Both the Communications Act of 1934[24] and its predecessor, the Radio Act of 1927,[25] delegated to the Commission

18. *Id.* at 436.

19. For example, section 1.612(c) was added to the FCC Rules to provide that licensees place employment advertisements in the media which have "significant circulation among minority-group people," cooperate with unions to develop minority representation, and ban intelligence tests or other selection techniques which discriminate against minority groups. *Id.*

20. 47 U.S.C. §§ 151-609 (1970).

21. 23 F.C.C.2d at 430.

22. Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 18 F.C.C.2d 240, 241-242 (1969) (emphasis added).

23. Section 303(r) of the Communications Act, 47 U.S.C. (1970), gives the Commission the broad authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter . . . ."

24. § 303(*l*)(1) (Supp. 1975).

25. Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162.

exclusive control over broadcast licensing because: "It quickly became apparent that broadcast frequencies constituted a scarce source whose use could be regulated and rationalized only by the Government."[26] The broad latitude of the Commission to grant, continue, and renew broadcast licenses is primarily circumscribed by a determination of what serves the "public interest, convenience and necessity."[27] From its own plenary powers, Congress has not only provided the Commission with ample statutory means to regulate the broadcasting industry, but has levied few restrictions on implementation.[28]

To guide the FCC's administration of licensing, Congress has ordained the "fairness doctrine." First codified in 1959,[29] this doctrine has been expanded by the Commission on a case by case basis and now includes not only equal airtime for opposing political candidates, but also opportunities for reply to personal attacks, as well as rules relating to political editorializing.[30] As noted by the Supreme Court in *Red Lion Broadcasting Co. v. FCC*,[31] the fairness doctrine is an outgrowth of the same premise which motivates government regulation of broadcasting in the first place: the inherent physical limitations of the system. Because not all those who apply for licenses will receive them, it is incumbent upon those who do to operate as "trustees" of the public's airwaves. Licensees are thus burdened with an enforceable obligation to provide diverse political, economic and social views for their listeners. In the event the broadcaster fails to meet fairness doctrine

26. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 (1969).

27. 47 U.S.C. § 309(a). This section states: "Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it . . . whether the public interest, convenience, and necessity will be served by the granting of such application, and if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

28. For example, the FCC may not choose among license applicants in the basis of political, economic or social views, *see* National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943); or take censorship action in the form of prior restraints on specific program content, 47 U.S.C. § 326 (1970).

29. Act of Sept. 14, 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557, *amending* 47 U.S.C. § 315. The amendment requires a broadcasting station to afford equal air time to all legally qualified candidates for any public office. It provides further that there shall be no exceptions from the obligation to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

30. This note deals only with the fairness doctrine insofar as it pertains to the instant case. For an excellent survey of the current status of the fairness doctrine and its first amendment ramifications, *see* Barrow, *The Fairness Doctrine: A Double Standard For Electronic and Print Media*, 26 HAST. L. J. 659 (1975) [hereinafter cited as Barrow].

31. 395 U.S. 367 (1969).

standards, the FCC under its congressional mandate may refuse to renew its license.[32]

The First Amendment and Broadcast Licensees

In the federal courts, the fairness doctrine also legitimates the imposition of restrictions on the free speech of broadcasters.[33] For both the FCC and the courts, application of the fairness doctrine entails the balancing of the First Amendment interests of the broadcast media with what best serves the public interest:

> A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.[34]

In sum, while the First Amendment allows the broadcaster "significant journalistic discretion,"[35] the right of the people to be fairly informed is paramount.[36] Within a legislatively imposed structure, the FCC functions as the government's "overseer" of the nation's airwaves[37] which broadcasters use as a "matter of privilege rather than of right."[38] For example, the Commission may revoke the broadcasting privilege by denying a station's license for racial and religious discrimi-

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32. *Id.* at 389-390. *See also* Brandywine-Mainline Radio, Inc. v. FCC, 473 F.2d 16 (D.C. Cir. 1972).

33. Television Corp. v. FCC, 294 F.2d 730, 733-34 (D.C. Cir. 1961); McIntire v. Wm. Penn Broadcasting Co., 151 F.2d 597, 599 (3rd Cir. 1945).

34. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969).

35. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 111 (1973).

36. *Id.* at 102. There are indications that the federal courts are beginning to reconsider the fairness doctrine as a means of insuring First Amendment goals in broadcasting. Judge Bazelon has pointed out that the fairness doctrine may also operate to suppress the discussion of controversial issues: "[W]e are told today, by highly respected members of the newspaper and broadcasting corps, that governmental regulation of broadcasting has been more pernicious than any group of private censors." Brandywine-Mainline Broadcasting Inc. v. FCC, 473 F.2d 16, 77 (D.C. Cir. 1972) (Bazelon, J., dissenting). *But see* Barrow, *supra* note 30, at 682. Professor Barrow argues convincingly that the fairness doctrine (with improvements) should be retained because: "In our representative democracy, the need of the people to know should continue to be a right to know."

37. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973).

38. Television Corp. v. FCC, 294 F.2d 730, 733-34 (D.C. Cir. 1961).

nation in programming,[39] or refuse to issue a license at all when the applicant is attempting to monopolize and control the singularly available sources of news dissemination in a geographic area.[40] For all practical purposes, the commissioners of the FCC are the ultimate arbiters of who shall operate radio frequencies and television channels and how airtime shall be allocated, subject only to congressional legislation and judicial review.[41]

The Controversy

Soon after the announcement of its new hiring policies for the broadcasting industry, the Commission received its first allegation of religious discrimination on the part of King's Garden, Inc., owner of radio stations KGDN-AM and KBIQ-FM in Edmonds, Washington.[42] In his letter of July 19, 1971, Mr. Trygve Anderson contended that when he applied for a job at the station as an announcer or newsman, he was asked discriminatory questions which had no bearing on ability to handle a job in broadcasting. He asked the FCC to order the stations belonging to King's Garden to delete requests for religious preferences and beliefs from their employment applications.[43]

39. Several months ago, the FCC denied the renewal applications of eight existing educational television stations and declined to issue a construction permit for a ninth station in Alabama because of a past history of racial discrimination in overall programming practices. This action was taken despite a recent effort on the part of the stations to recruit and hire minority applicants. The FCC stated: "A history of disservice during the license term of the magnitude disclosed by the evidence of record in this proceeding makes it impossible for us to find that renewal would serve the public interest, convenience and necessity." *In re* Application of Alabama Educ. Television Comm'n, 32 P&F Radio Reg. 2d 539, 560 (1975).

40. Mansfield Journal Co. v. FCC, 180 F.2d 28, 34-35 (D.C. Cir. 1950). The FCC, however, must hold hearings if the applicant so requests, before suspending an operator's license. 47 U.S.C. § 303(m)(2) (1937). It is also possible for responsible representatives of the listening public to contest the renewal of a broadcast license as intervenors or as petitioners in FCC proceedings. Office of Communication v. FCC, 425 F.2d 543, 546 (D.C. Cir. 1969); *accord, In re* Application of Storer Broadcasting Co., 27 P&F Radio Reg. 2d 1469 (1973).

41. *See, e.g.*, Office of Communication v. FCC, 425 F.2d 543 (D.C. Cir. 1969). The FCC suffered one of its few reversals at the hands of the same organization which instigated the enactment of the FCC's nondiscriminatory hiring policies. *See* text accompanying note 8, *supra*.

42. King's Garden described itself as a "nonprofit, interdenominational religious and charitable organization located in Seattle, Washington." Its basic goal is to "share Christ world wide" through a series of ministries aimed primarily at youth. Among its undertakings are King's Teen Clubs, King's Teen Miracle Ranch, King's Teen Valentine Banquet, King's Elementary School and King's High School. It also operates a Senior Citizen Community, supplies medicines to Christian missionaries around the world, and publishes Christian literature. Brief for petitioner at 3, King's Garden Inc. v. FCC, 498 F.2d 51 (D.C. Cir. 1974).

43. Anderson stated he was asked, "Are you a Christian?", "Is your spouse a

In accordance with its practice, the Commission's Complaints and Compliance Division forwarded a copy of Anderson's letter to King's Garden and asked for an explanation.[44] King's Garden replied with a statement that 78 percent of Station KDGN's programming was inspirational" and that its format was primarily "good music" punctuated by hourly airings of brief essays on moral and spiritual values. As a christian religious organization with a "mission," it was necessary to inquire of prospective employees whether or not they shared the same religious objectives.[45] Furthermore, King's Garden denied that these inquiries violated the Commission's rules and supported its position with reference to (1) a provision in Title VII of the Civil Rights Act of 1964 which stated that the act did not apply to religious organizations with respect to employment of persons to carry out their "religious activities,"[46] and (2) a provision exempting jobs for which religion was a "bonafide occupational qualification."[47]

Finding the explanation unacceptable, the FCC informed King's Garden that as a licensee of the Commission it did not exist solely to espouse a particular religious philosophy, but was required to make time available for the presentation of other, including non-christian, religious views.[48] Following these guidelines, the FCC concluded that all work performed by employees of station KGDN and KBIQ-FM would not be "connected with the carrying on of their religious activities" as described in the statute. Therefore, jobs in nonregilious categories could be filled by qualified persons no matter what their religious affiliation.[49] However, since it was a case of first impression, no sanctions were imposed. Instead, the station was to submit within 20 days a statement of its future hiring practices and policies in accordance with the Commission's rules.[50]

Before the twenty day grace period for King's Garden had expired, the Equal Employment Opportunity Act of 1972 was signed into law. Among the amendments of Title VII of the act was one of the very exemptions on which King's Garden had relied. But the effect

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Christian?" and "Give a testimony." *In re* Complaint by Trygve J. Anderson, 34 F.C.C. 2d 937 (1972).

44. *Id.* at 937.

45. *Id.*

46. 42 U.S.C. § 2000e-1 (1970).

47. 42 U.S.C. § 2000e-2(e) (1970).

48. 34 F.C.C.2d at 938. *See also In re* Young People's Association for the Propagation of the Gospel, 6 F.C.C. 178, 185 (1938). A religious organization was not granted a license when it proposed to make time available only to other religious groups which espoused the same views. Held: "The granting of this application will not serve public interest, convenience and necessity."

49. 34 F.C.C.2d at 938.

50. *Id.* at 938-39.

of the new section 702 was to broaden the religious organization exemption to cover all its pursuits by deleting the word "religious" before the word "activities."[51] The exemption was now tantamount to total immunity from nondiscrimination in hiring for any and all groups who could claim religious affiliation.

Pointing to the new amendment, the attorneys for King's Garden dropped their claim under the "bonafide occupational qualification" and asked the Commission to change its ruling to conform with section 702 of Title VII. Simultaneously, King's Garden joined the National Religious Broadcasters in filing a petition for rulemaking with the FCC demanding an amendment to sections 73.125 and 73.301 to exempt all employees of religious radio stations to reflect the changes in the Civil Rights Act of 1972.[52] In its decision, the FCC declined to make such amendments, giving as its reasons:

> The Civil Rights Act and amendments to it are not part of our enabling statute, and the former does not encompass the whole of the public interest standard imposed on us by the latter. This is obvious from the fact that our rules differ from the requirements of the Civil Rights Act . . . . In addition, when the rules were adopted, we pointed out that the rules were based on the policy set out in the Civil Rights Act *and* our requirement that broadcast stations operate in the public interest. Our concept of the public interest includes the duty of a broadcast station to serve the entire community. "A refusal to hire Negroes or persons of any race or religion clearly raises a question of whether the licensee is making a good faith effort to serve his entire public." *Nondiscrimination in Employment Practices*, 13 F.C.C. 2nd 766, 770 (1968).[53]

There remained for consideration King's Garden's second contention that the existing Commission's rules as applied to it violated the First Amendment.[54] It was argued that by assuming the responsibility for delineating religious activities and defining religious philosophy, the

51. 42 U.S.C. § 2000e-1 (Supp. II, 1972), *amending* 42 U.S.C. § 2000e-1 (1970). Prior to amendment the statute read: "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 or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution." The statute 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."

52. *In re* Request of Nat'l Religious Broadcasters, Inc., 43 F.C.C.2d 451 (1973).

53. *In re* King's Garden, Inc., 38 F.C.C.2d 339, 340 (1972).

54. *Id.* at 341. (King's Garden had cited two "conscientious objector" cases, Welch v. United States, 398 U.S. 333 (1970), and United States v. Seeger, 380 U.S. 163 (1965), for the principle that religion must not be limited to traditional or parochial concepts.)

FCC's restrictions interfered with its free exercise of religion. King's Garden urged that the Commission recognize that all its broadcasting operations were religious activities and therefore its hiring practices were wholly permissible.[55]

The Commission's Reply to the First Amendment Claims

To show interference with the free exercise clause, countered the FCC, it was necessary for one to show a "coercive effect" of a statute against him in the practice of his religion.[56] "We note first," said the FCC, "that King's Garden can practice its religion without holding a broadcast license," and secondly, "we did not compel King's Garden to become a licensee."[57] The Commission stated further that it had never recognized the right of religious organizations holding broadcast authorizations to use a station only for the propagation of its own religious views. If King's Garden was unwilling to devote a portion of its broadcast time to meet community needs through the presentation of other religious views, it could relinquish its license. Having exhausted all its administrative remedies, King's Garden filed an appeal from the FCC ruling in the United States Court of Appeals for the Ninth Circuit.[58]

Issues Raised on Appeal

In its petition for review, King's Garden raised no new issues, but simply restated the same two arguments it had presented in the FCC hearings: (1) that in view of the Civil Rights Act of 1964 as amended, the FCC did not have authority to require religious radio stations to employ persons who did not share the organization's religious beliefs and (2) the FCC's requirements as applied to licensees contravened the religious guarantees of the First Amendment.[59]

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55. 38 F.C.C.2d at 341. In a subsequent ruling, the FCC stated that it would exempt all employees hired for the preparation of programs espousing the licensee's religious views and those hired to answer religious questions on the air, but announcers, as a general category, would not be exempt from the nondiscriminatory hiring rules, because there was no reason why an announcer had to be of a specific faith to introduce a program, read the news or make a commercial announcement. *In re* Request of Nat'l Religious Broadcasters, Inc., 43 F.C.C.2d 451, 452 (1973).

56. 38 F.C.C.2d at 341, *citing* School District v. Schempp, 374 U.S. 203, 223 (1963). The establishment clause on the other hand does not depend upon a showing of compulsion, but is violated by laws which establish an official religion. Engel v. Vitale, 370 U.S. 421, 430 (1962).

57. 38 F.C.C.2d at 341.

58. Transferred on motion of the FCC to the United States Court of Appeals for the District of Columbia Circuit which has exclusive jurisdiction under section 402(b) of 47 U.S.C. (1970).

59. Brief for Petitioner at 2, King's Garden Inc. v. FCC, 498 F.2d 51 (1974).

Since there was no dispute over the facts, the Commission's brief answered the charges by reiterating that its nondiscrimination rules were reasonable exercise of its authority under the Communications Act, and that it had not interferred with King's Garden's free exercise of religion because the "question of hiring . . . is more a matter of conduct than belief," and, as such, had less "constitutional protection."[60] In explanation the FCC declared:

> The Commission's Order does not make it unlawful to hold a religious belief or opinion, nor does it require King's Garden to embrace a belief or to say anything in conflict with its own religious tenets. Since the prohibition of employment discrimination imposes an important social duty on broadcast licenses and affects conduct rather than beliefs, we believe it may be enforced against King's Garden without breaching First Amendment rights.[61]

Amicus Curaie Brief of the American Civil Liberties Union

Together with the First Amendment sentinel of the broadcast industry, the United Church of Christ,[62] the ACLU filed an *amicus curiae* brief in behalf of the respondents. The ACLU spoke to the issue of invidious discrimination on the basis of religion made possible by this amendment of Title VII,[63] but counseled judicial restraint. Rather than view the amendments to Title VII as preemptive, as urged by petitioner, the ACLU suggested that the FCC's order and the Title VII exemption be read together so as to compliment each other. The proposed test was a practical one: "whether compliance with one precludes compliance with the other?"[64] Applying this test to the present case, the ACLU argued that the FCC regulations did not require a practice outlawed by Title VII but merely went beyond it. Secondly, the ACLU pointed out, "the religious exemption of Title VII was not expanded to include licensees" already under the FCC's jurisdiction.[65]

60. Brief for Respondent at 24. *See also* Braunfeld v. Brown, 366 U.S. 599, 603-04 (1961): "[L]egislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties . . . even when the actions are demanded by one's religion."

61. Brief for Respondent at 24.

62. *See* note 8, *supra.*

63. The ACLU argued that King's Garden's interest in the free exercise of religion did not include "the right to have a staff that functions like a congregation . . . [a result that] would be outrageous in the context of race or sex discrimination." Brief for ACLU as *Amicus Curiae* at 4, King's Garden, Inc. v. FCC, 498 F.2d 51 (1974).

64. *Id.* at 15.

65. *Id. See also* Powell v. United States Cartridge, 339 U.S. 497 (1950) *and* Potlatch Forests, Inc. v. Hays, 465 F.2d 1081 (8th Cir. 1972) (State statute upheld since compliance with it does not prevent employer from complying with Title VII by extending overtime to both sexes instead of only women).

The ACLU concluded that since the legislative purpose of the Title VII exemption as applied to religious radio stations was unclear and judicial construction was lacking, the court of appeals should permit the FCC's ruling to stand.

Decision in the Court of Appeals

Early in January of 1974, the case finally reached the court and in May a decision came down affirming the Commission's ruling. Writing for the majority, Circuit Judge Skelly Wright upheld the FCC's regulatory scheme as "facially sound" while recognizing that its future application would "require continuing judicial scrutiny."[66]

Basic to the court's decision was its finding that "[t]he 1972 exemption [section 702] is of very doubtful constitutionality."[67] Moreover, Congress had given no indication whatever that it wished to impose the exemption upon the FCC. Indeed, a review of the legislative history of section 702 had convinced the court that its Senate sponsors, Allen and Ervin, were primarily concerned with exempting religious educational institutions.[68] Senator Ervin in particular feared for the protestant sponsored colleges of his native North Carolina, when he stated that unless his amendment was adopted, the EEOC in possession of new "cease and desist" powers might require such a privately endowed school to hire a "Mohammedan, agnostic, or atheist."[69] He added for emphasis:

> I am not exaggerating when I say that this bill authorizes the Federal government to lay the political hands of Caesar upon the things that belong to God.[70]

While the senators' primary intention was to bar the infidel from the christian temples of learning, their amendment was framed in terms so broad that under a literal interpretation any endeavor of a re-

66. 498 F.2d at 54.

67. *Id.* at 53.

68. Senator Allen observed:

> Under the provisions of the bill, there would be nothing to prevent an atheist being forced upon a religious school to teach some subject other than theology.

Legislative History of the Equal Employment Opportunity Act of 1972, 844 (Nov. 1972)." *Id.* at 54 n.6.

69. *Hearings on S-2515, Equal Employment Opportunity Act of 1972, Before the Subcomm. on Labor and Public Welfare*, 92nd Cong., 2nd Sess. at 848 (remarks of Senator Ervin). Ervin referred in particular to Davidson College which was affiliated with the Southern Presbyterian Church and privately endowed. The College had a rule that a full professor had to be a member of an Evangelical Christian Church, and as a former member of Davidson's Board of Directors, Ervin saw nothing "immoral or illegal about that." *Id.*

70. *Id.* at 849, *cited in* King's Garden, Inc. v. FCC, 498 F.2d at 54 n.6 (1974).

ligious group would be exempt from nondiscriminatory hiring policies.[71] As the court of appeals pointed out:

> 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.[72]

Colliding with the Establishment Clause

It was clear to the District of Columbia circuit court that in enacting the 1972 exemption under the aegis of the free exercise clause permitting religious entrepreneurs to hire only their coreligionists, Congress had placed itself on a "collision course with the Establishment Clause."[73] The First Amendment pledge of absolute neutrality in religious affairs had been compromised.[74]

To reach this conclusion, the court of appeals invoked the cumulative criteria first compiled by Chief Justice Burger in *Lemon v. Kurtzman:*

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster "an excessive government entanglement with religion."[75]

Applying the above standards, the majority found no secular purpose to be served by the "unbounded exemption." As for the primary effect, the exemption invited religious groups alone to "impress a test of faith on job categories, and indeed whole enterprises, having nothing to do with the exercise of religion.[76] Moreover, they could uncover a few precedents for a preferential exemption which in its administra-

71. 498 F.2d at 54.

72. 498 F.2d at 54. The court discussed the possibility that the exemption might be read narrowly thus exempting commercial enterprises of a religious sect from discriminatory hiring policies, but dismissed the idea, since it was "precisely this categorization which Congress [had] repudiated . . . ." *Id.* n.7.

73. *Id.* at 55-56. The issue is not a novel one. The Supreme Court has long recognized the need to steer the treacherous course between the strictures of the establishment clause and the "accommodations" of the free exercise clause. *See, e.g.*, School District v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962). In fact, the two religious clauses may actually conflict. Wisconsin v. Yoder, 406 U.S. 205, 220-221 (1972). *See also* Sherbert v. Verner, 374 U.S. 398 (1963).

74. "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." Everson v. Board of Education, 330 U.S. 1, 15 (1947).

75. 403 U.S. 602, 612-13 (1971). *See also* Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 771-72 (1973).

76. 498 F.2d at 55.

tion would accomplish "a sure formula for concentrating and vastly extending the worldly influence of those religious sects having the wealth and inclination to buy up pieces of the secular economy."[77]

The third prohibition of *Lemon* against "an excessive government entanglement with religion," had also been breached by the wholesale exemption on a sectarian basis alone. It amounted to a "religious gerrymander"[78] on the part of the legislature, since its consequence would be "to shelter myriad activities which have not the slightest claim to protection under the Free Exercise, Free Speech or Free Press guarantees."[79]

A Fifth Amendment Challenge

Although it was not raised in the pleadings, Judge Wright alluded to a possible challenge on equal protection grounds under the Fifth Amendment.[80] To the extent that the nonreligious commercial enterprises of religious organizations competed with those of nonreligious organizations, the federal government was forced to discriminate inversely between business rivals. Following the two-tier test employed by the Supreme Court in reviewing legislative classifications under the equal protection clause,[81] it was Judge Wright's opinion that the exemption could not meet either measure:

> The criterion of discrimination . . . not only lacks a rational connection with any permissible legislative purpose, but is also inherently suspect. Such invidious discrimination violates the equal protection of the laws guaranteed by the Due Process Clause.[82]

Scope of the Decision

In view of the broad constitutional issues canvassed by the majority, their decision case as something of an anticlimax. They chose to construe the statute "so as to avoid, rather than aggravate, constitutional difficulties."[83] While it would be dangerous to inflate a con-

77. *Id.* at 55. In a footnote the court cited A. BALK, THE RELIGION BUSINESS 8-11 (1968); F. ROBERTSON, SHOULD CHURCHES BE TAXED? 139-70 (1968); and M. LARSON & C. LOWELL, PRAISE THE LORD FOR TAX EXEMPTION, 193-246 (1969) as authority for this dicta. Justice Douglas is also critical of laws which subsidize a number of churches and church sponsored businesses. *See generally* Walz v. Tax Comm'n, 397 U.S. 664, 700 (1970) (Douglas, J., dissenting).

78. A description first used by Mr. Justice Harlan. Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

79. 498 F.2d at 56.

80. *Id.* at 57.

81. *See* Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

82. 498 F.2d at 57.

83. *Id.* at 57. *See also* United States v. Thirty Seven Photographs, 402 U.S. 363,

stitutionally doubtful statute into a "national policy" as urged by King's Garden, a definitive resolution of the constitutionality of the religious exemption of Title VII would have to await a case in which it was "squarely raised."[84]

Instead, the court read the 1972 amendment as not intended by Congress to abrogate the FCC's extensive antibias rules. To begin with, the Commission's regulations were in full force at the time Congress was debating the exemption for "all religious activities," and yet the legislative history disclosed no reference to sectarian radio stations as within the proposed coverage of the statute. Secondly, the FCC had followed the public interest command of the Communications Act, and therefore was justified in finding the 1972 amendment to Title VII irrelevant to its regulation of broadcast licensees.[85]

Notwithstanding their reluctance to brand the statute unconstitutional, Judges Wright and Wyzanski gave short shrift to the petitioner's claim that the Commission's fair employment rules interfered with the sect's hierarchy, membership policy and administration.[86] Disagreements among church members as to policy and interdenominational disputes over dogma are immune from governmental interference under the free exercise clause,[87] but a religious sect has no constitutional right to "convert a licensed communications franchise into a church."[88] Its religious convictions will not absolve King's Garden from taking its radio franchise burdened with the same enforceable obligations that non-

368 (1971); Crowell v. Benson, 285 U.S. 22, 62 (1932); Schneider v. Smith, 390 U.S. 17, 27 (1968); United States v. Rumely, 345 U.S. 41, 45 (1953).

84. King's Garden has raised a constitutional issue. "Does this Federal Communications Commission requirement as applied to licensees who are religious organizations, contravene the religious freedom guarantees of the First Amendment?" Brief for Petitioner, at 2, King's Garden, Inc. v. FCC, 498 F.2d 51 (1974).

85. 498 F.2d at 58.

86. Brief for Petitioner at 9-10, King's Garden v. FCC, 498 F.2d 51 (1974).

87. *See* McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972). In an action brought by an ordained minister of the Salvation Army for its failure to promote her and pay her the same salary as that received by male officers of the corps, the court refused to interfere. Held: the applicable provisions of Title VII (as amended) forbid regulation of the employment relationship between church and minister, at 560-61. Prior to McClure, there was ample precedent under the free exercise and establishment clauses to prevent legislative and judicial intervention in the ecclesiastical arguments among churches and their parishioners. *See* Kreshick v. St. Nicholas Cathedral, 363 U.S. 190 (1960); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) (courts will not decide between competing churches). *See also* Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969).

88. 498 F.2d at 60. King's Garden claimed a religiously motivated desire to engage in activities in conjunction with other persons of similar religious beliefs, even though these activities are not all strictly "religious" in a narrow sense. (Included were regularly scheduled prayer meetings). Brief for Petitioner at 25.

religious broadcasters must observe.[89]

The court found *Wisconsin v. Yoder*,[90] on which King's Garden had relied so heavily in its brief, to be inapposite. As distinguished from the Amish in *Yoder*, King's Garden did not face an unhappy choice of abandoning its traditional religious beliefs or risking criminal prosecution.[91] At most, its license would not be renewed if it continued to defy the FCC's ruling. Undoubtedly, there were First Amendment limitations on the conditions which the FCC might impose,[92] but whatever the restrictions, they did not require the FCC to relinquish its mandate so that religious sects "may merge their licensed franchises completely into their ecclesiastical structures."[93]

There was more merit to the petitioner's complaint that the FCC's exemption was too narrow to guarantee the denomination's right to broadcast its choice of religious views. Despite the fact that broadcasters' rights have never been clearly delineated, Judge Wright saw a recent tendency of the Supreme Court to emphasize the same liberties of expression for broadcasters as those enjoyed by private journalists.[94] As a consequence, if King's Garden would be willing to meet its obligations under the fairness doctrine by producing some programs of general community interest, then it might well be able to give a "sectarian tone or perspective to all of its other programming."[95] So far the fears

89. *Accord*, Hartford Communications Comm. v. FCC, 467 F.2d 408 (D.C. Cir. 1972). For a discussion of the fairness doctrine, *see* text accompanying notes 24-40, *supra*.

90. 406 U.S. 205 (1972).

91. In *Wisconsin v. Yoder*, the Court recognized a free exercise of right of the Amish to withdraw their children from the public schools at the secondary level because, "the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218.

92. *See* New Jersey Lottery Comm'n v. United States, 491 F.2d 219 (3rd Cir. 1974). "We think it clear from 47 U.S.C. § 326 that in enacting the Communications Act of 1934 Congress, while exercising its plenary power to license use of broadcast frequencies, did not claim, directly or by implication, any power to impose conditions on the grant of such licenses which would violate the first amendment." *Id.* at 224.

93. 498 F.2d at 60.

94. 47 U.S.C. § 326 (1970) provides: "[n]othing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated . . . which shall interfere with the right of free speech by means of radio communication." In *Columbia Broadcasting Sys. Inc. v. Democratic Nat'l Comm.*, the Supreme Court interpreted the statute to mean that "Congress intended to permit private broadcasting to develop with the widest journalistic freedoms consistent with its public obligations." 412 U.S. 94, 110 (1973). *See also* the concurring opinion of Justice Stewart: "The First Amendment prohibits the Government from imposing controls upon the press. Private broadcasters are surely part of the press." *Id.* at 133.

95. 498 F.2d at 60.

of King's Garden were premature, however, since the Commission had given no indication that it intended to monitor all programs emanating from stations KBIQ-FM and KDGN in an effort to censor any religious content.[96] On the contrary, the Commission had ruled only that where a job category at the station had no substantial connection with the espousal of the licensee's religious views, it should not be exempt from the FCC's nondiscriminatory hiring policies.[97] Under these circumstances, the FCC's directive would not compromise the licensee's freedom of religious expression and should stand.[98] The majority closed its opinion with an admonition to the FCC that it had set for itself the difficult task of drawing lines between the secular and sectarian broadcasting operations of religious licensees. Nonetheless, it was one which the "First Amendment thrusts upon every public body which has dealings with religious organizations."[99]

Concurring Opinion

Unlike the majority, Chief Judge Bazelon frankly answered the constitutional issue raised by the religious exemption of section 702. He could not agree with his colleagues that the Commission's mandate to act in the public interest empowered it to contravene an explicit congressional policy.[100] However, the reasoning of the majority had convinced him that in exempting "all 'activities' of any 'religious corporation, association, educational institution or society,"[101] Title VII violated the establishment clause of the first amendment. In his view, the exemption was unconditional and not binding on the FCC.

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96. To do so would contravene section 397 of the Radio-Communications Act, 47 U.S.C. §§ 301-97 (1970).

97. *In re* Request of Nat'l Religious Broadcasters, Inc., 43 F.C.C.2d 451, 452 (1973).

98. 498 F.2d at 61.

99. *Id.* at 61. The court relied upon Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 775 (1973); Tilton v. Richardson, 403 U.S. 672, 681 (1971); and Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) to reach this conclusion.

100. 498 F.2d at 61. The sole precedent cited by Judge Bazelon was *Southern Steamship Co. v. Labor Board*, 316 U.S. 31 (1942). In a five to four decision, the majority held that the National Labor Relations Board had acted beyond its authority when it intervened on behalf of merchant seamen, because their strike activities on board a merchant ship in a Houston dock was mutiny, a criminal offense within the admiralty jurisdiction of the United States. *See also* City of Pittsburg v. Federal Power Comm'n, 237 F.2d 741 (D.C. Cir. 1956), in which Judge Bazelon delivered the court's opinion that the Federal Power Commission could not determine illegalities under the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1970), because Congress had given that power to the Interstate Commerce Commission.

101. 498 F.2d at 61.

Discrimination by Other Ecclesiastical Employers

King's Garden is not the first case in which an ecclesiastical employer has used the free exercise clause as a shield for questionable employment practices. But such advocates usually present a simplistic argument which ignores the long recognized principle that although government may not interfere with religious beliefs and opinions, it may interfere with religious practices.[102] In *Cantwell v. Connecticut*,[103] Mr. Justice Roberts drew a careful distinction when he wrote that conduct dictated by religious belief "remains subject to regulation for the protection of society."[104]

This principle was applied again a decade later in *Mitchell v. Pilgrim Holiness Church Corp.*[105] The Seventh Circuit court upheld the Fair Labor Standards Act[106] as taking precedence over the right of the defendant religious corporation to practice its beliefs in a manner which denied its employees the benefits of minimum wage laws and healthful working conditions. Pilgrims Holiness Church maintained that its printing plant, mail order office and bookstore was dedicated to spreading the gospel and therefore involved religious worship rather than commerce to be regulated by Congress. The court held to the contrary, reasoning that the act was designed to protect the welfare of all employees and that doing the "work of the Lord" was not of itself a sufficient reward. Pilgrim Holiness Church would have to abide by the Fair Labor Standards Act because the free exercise of religion was never intended as a guarantee of immunity for the violation of the law.[107]

An even more novel free exercise claim was made in 1970 by the new owners and operators of a convalescent home in *Cap Santa Vue, Inc. v. National Labor Relations Board.*[108] As employers, they refused to bargain collectively with their employees, despite an NLRB order, on the grounds that their religious convictions prevented them from doing so in good faith as required by the Board. The employers claimed that they did not believe in the commands of the National Labor Relations Act or any other secular authority. In a unanimous decision, the judges concluded that although the employers might believe as they chose, this was an incidence of religious practice which the court might

102. *See* Reynolds v. United States, 98 U.S. 145, 166 (1878).
103. 310 U.S. 296 (1940).
104. *Id.* at 304. *Accord*, United States v. Kuch, 288 F. Supp. 439, 443-44 (D.D.C. 1968).
105. 210 F.2d 879 (7th Cir. 1954).
106. 29 U.S.C. §§ 201-19 (1970).
107. 210 F.2d at 884.
108. 424 F.2d 883 (D.C. Cir. 1970).

regulate, in view of the "compelling state interest" in the right of employees to self-organization.[109]

So far the courts have been unwilling to extend the proposition that religious conduct may be regulated in the interests of society to the intrinsic concerns of the churches themselves, unless their religious customs are contrary to the "criminal laws of the land."[110] In *McClure v. The Salvation Army*,[111] a consideration of section 702 of the Civil Rights Act of 1964 compelled a conclusion that Congress did not intend a religious organization to be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin. However, the court rejected the claim that the provisions of Title VII were applicable to the relationship between the church and its minister. To intrude in matters of strictly ecclesiastical interest would deprive churches of the power to decide these questions free from state interference, and would represent an encroachment into the area of religious freedom forbidden by the free exercise clause.[112]

Religious Discrimination in Secular Employment

Although it receives less attention than racial prejudice, religious discrimination in secular industries has long been a commonplace. The cases most frequently litigated have involved petitioners whose religious persuasions teach the observance of a sabbath other than the traditionally recognized Sunday.

Following the compelling state interest test which the First Amendment demands whenever the exercise of religious freedom conflicts with state laws,[113] Supreme Court precedents have been mixed. For example, in *Braunfeld v. Brown*,[114] the Court upheld the constitutionality of "Sunday closing laws" in Philadelphia, even though Jewish merchants would be forced to keep their stores closed for two days in order to observe their own Sabbath which fell on Saturday. Offered as the justification was the state's legitimate interest in a uniform day of rest for the protection of society.[115] Yet in *Sherbert v. Verner*,[116] the Court ruled that the South Carolina statute requiring all recipients of unemployment compensation to be "available for work" on Saturdays

109. *Id.* at 887.

110. United States v. Kuch, 288 F. Supp. 439, 445 (D.D.C. 1968). *See also* note 87, *supra.*

111. 460 F.2d 553 (1972).

112. 460 F.2d at 561.

113. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972). *See also* Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969).

114. 366 U.S. 599 (1961).

115. *Id.* at 603-14.

116. 374 U.S. 398 (1963).

was an unconstitutional disqualification of a Sabbatarian, since it discriminated among religious convictions in a pluralistic society. The Court found the petitioner's interest in the free exercise of her religion to outweigh to any state interest in a standard work week.[117] *Sherbert* advances the proposition that a state may, and in some instances should, act to accommodate its activity to further the religious interest protected by the free exercise clause.[118]

Reconciling these conflicting decisions has proven difficult for the lower courts called upon to decide the issue of accommodation of religious beliefs in the private sector beyond the reach of the First and Fourteenth Amendments. A case in point is *Dewey v. Reynolds Metals Co.*[119] Therein, plaintiff Dewey, a new convert to the Faith Reformed Church, averred that his religion not only forbade him to perform compulsory Sunday overtime work but also to find a suitable replacement, since all work on the Sabbath was sinful. When he was discharged for his failure to abide by the union-management contract, Dewey embarked on a monumental course of litigation to vindicate his rights.[120]

In a series of three decisions, the lower court ordered Dewey's reinstatement.[121] In its second decision, the district court held that in failing to make reasonable efforts to accomodate the religious beliefs of its employees, Reynolds Metals had unlawfully discriminated against Dewey by forcing him to choose between continued employment and the tenets of his faith.[122]

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117. *Id.* at 406-07.

118. *See* Note, *Religion and the Public Schools*, 20 VAND. L. REV. 1078 (1967). *See also* Kauper, *The Warren Court: Religious Liberty and Church-State Relations*, 67 MICH. L. REV. 269, 284-85 (1968-69).

119. 300 F. Supp. 709 (W.D. Mich. 1969), *rev'd*, 429 F.2d 324 (6th Cir.), *rehearing denied*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971).

120. Dewey filed a grievance protesting his discharge under the labor management contract where his discharge was upheld. He enlisted the aid of the Michigan Civil Rights Commission which refused to file a complaint for lack of probable cause. The United States Office of Federal Contract Compliance denied a hearing. *See generally* Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration under Title VII*, 69 MICH. L. REV. 599 (1971) [hereinafter cited as Edwards & Kaplan]. Finally, on the basis of an investigation the EEOC found probable cause and Dewey brought suit in the United States District Court for the Western District of Michigan. Dewey v. Reynolds Metals Co., 291 F. Supp. 786 (W.D. Mich. 1968).

121. Dewey v. Reynolds Metals Co., 291 F. Supp. 786 (W.D. Mich. 1968); Dewey v. Reynolds Metals Co., 300 F. Supp. 709 (W.D. Mich. 1969); Dewey v. Reynolds Metals Co., 304 F. Supp. 1116 (W.D. Mich. 1969).

122. 300 F. Supp. at 712. The district court relied on Sherbert v. Verner, 374 U.S. 398 (1963) along with the 1967 EEOC guidelines although they were not in effect at the time Dewey was discharged. The 1966 EEOC guidelines called for "an obligation on the part of the employer to accommodate to the reasonable religious needs of employees." The 1967 guidelines provided for "an obligation on the part of the employer to

The circuit court of appeals reversed the decision, finding *Sherbert*, on which the lower court had based its decision, inapplicable because no state action was involved.[123] Further, the majority decreed that 1966 EEOC guidelines were in effect when Dewey was discharged, and therefore were controlling. Contrary to the district court's holding, the Sixth Circuit court absolved Reynolds of religious discrimination, ruling that Dewey had been discharged for violation of his union's collective bargaining agreement rather than for his unorthodox religious practices.

On rehearing, the court of appeals stated that Title VII prohibits only discrimination by design, not discrimination in effect, the compulsory overtime provision in the union contract discriminated "against no one," as it was not intended to deny employment opportunities to any religious sect.[124] Lastly, the majority refused to reverse its decision in the previous *Dewey* hearing wherein it held that when the parties agree to arbitration, the decision of the arbitrator should be final.[125]

The New EEOC Criteria for Accommodation

With the advent of the Equal Employment Opportunity Act of 1972,[126] the federal courts received a more definite statute to interpret

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make *reasonable accommodations* to the religious needs of employees . . . where such accommodations can be made without *undue hardship* on the conduct of the employer's business." EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (1970) (emphasis added). *See also* Edwards & Kaplan, *supra* note 118, at 608-09 nn.43 & 44.

123. In dismissing *Sherbert* as involving state action and therefore inapposite to the case at bar, the Sixth Circuit Court failed to point out that the Civil Rights Act of 1964 was enacted under Congress' power "[t]o regulate Commerce . . . among the several states . . . ." At the time of the *Dewey* decision, section 701(b) of Title VII defined the term employer as "a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks" so that it might have been possible to make a correlation between the "compelling state interest of *Sherbert* and the EEOC's "undue hardship" standard. *Cf.* Edwards & Kaplan, *supra* note 118, at 631-32.

124. 429 F.2d at 336.

125. *Id.* at 331. In his dissent, Judge Combs reasoned that Dewey's rights under the contract and under Title VII were separate and distinct. The dissent anticipated the Supreme Court's holding in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), in which the Court ruled that an employee has a statutory right to trial *de novo* under Title VII and is not foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement. *Accord,* Hardison v. TWA, 375 F. Supp. 877 (1974).

126. 42 U.S.C. § 2000e(j) (Supp. II, 1972) reads: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." It codifies the 1967 EEOC guidelines.

in cases of religious discrimination in employment. The new EEOC standards for the reasonable accommodation by an employer of his employee's religious beliefs and practices were tested and affirmed by the Fifth Circuit in *Riley v. Bendix Corp.*[127] Riley, a seventh day adventist, was reinstated even though he was unwilling to work a Saturday shift, and the company was warned to accommodate pluralistic religious beliefs in the future.[128]

In another seventh day adventist case, *Reid v. Memphis Publishing Co.*[129] the Sixth Circuit reconsidered the stand that it had taken several years before in *Dewey v. Reynolds Metal Co.*[130] Once again the decision of the district court was reversed, but this time with an order to Reid's prospective employer, the Memphis Press Scimitar, to take reasonable efforts to accommodate the religious beliefs of a sabbatarian, if it could be done without undue hardship.[131]

The *Reid* case was distinguished from *Dewey* on three grounds: (1) in *Dewey*, the employer had made an accommodation to Dewey's Faith Reformed Church beliefs by allowing him to find a replacement. (2) the new EEOC regulations were not in effect at the time of Dewey's discharge, but were in effect when petitioner, Reid, applied for a position as a copy reader with the Memphis Publishing Company;[132] (3) the decision in *Dewey* was largely influenced by the final award of the grievance arbitrator, but no arbitration factor was presently involved.[133]

To reach their decision, the three judge panel adopted Chief Justice Burger's "business necessity" test articulated in *Griggs v. Duke Power Co.*:

> The Act [The 1964 civil rights Act] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. . . . The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[134]

Although *Griggs* referred to racial discrimination and the court's current concern was with religious discrimination, the Equal Employment Opportunity Act treated them similarly. It was clear to the court of appeals that the *Griggs* decision extended to other prohibited forms of discrimination. Moreover, the Burger opinion had laid to rest any

127. 464 F.2d 1113 (5th Cir. 1972).
128. *Id.* at 1115.
129. 468 F.2d 346 (6th Cir. 1972).
130. 429 F.2d 324 (6th Cir. 1970).
131. 468 F.2d 346, 351 (6th Cir. 1972).
132. The EEOC guidelines were codified on March 24, 1972.
133. 468 F.2d at 349.
134. 401 U.S. 424, 431 (1971).

doubts of the *Dewey* majority as to the constitutionality of the EEOC guidelines or their consistency with statute. Thus, when the EEOC criteria[135] and the holding in *Griggs* were taken together, the court of appeals found a duty on the part of the publisher to accommodate the religious needs of present as well as prospective employees.[136]

In the summer of 1974, the Ninth Circuit Court of Appeals was called upon to resolve a clash between a collective bargaining agreement requiring all employees to pay union dues, and the religious scruples of Yott, a valued employee of North American Rockwell Corporation for twenty-two years prior to the union shop agreement.[137] In denying the appellant's contention that his discharge for failure to join the union was an infringement on his rights under the free exercise clause, the court cited cases from the First[138] and Fifth Circuits[139] as precedent. The court found that on balance the government's interests in "industrial peace and the free flow of commerce," which a union shop insures, outweighed a minor impairment of religious freedom.[140] If Yott could not in good conscience join the union, his alternative was not destitution, but merely employment in a nonunion shop.[141]

On the issue of "accommodation" as set forth in Title VII, the case was remanded to the trial court for determination with the following caveat:

> We note, however, that it is not a "refusal to work" case in which a reasonable accommodation is easily provided. We are not certain that any accommodation is available. If appellees are able to demonstrate that any suggested accommodation would impose undue hardship on the Union or on the employer's business then Yott's discrimination claim should fail.[142]

The Ninth Circuit's repudiation of Yott's free exercise claim may be distinguished from the previous cases involving religious holidays on

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135. In amplification of § 701(j), EEOC Regulation § 1605.1 defines undue hardship to the employer's business as a situation in which "the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence from the Sabbath observer." 29 C.F.R. § 1605.1 (1974).

136. 468 F.2d at 351.

137. Yott v. North Am. Rockwell Corp., 501 F.2d 398 (9th Cir. 1974).

138. Linscott v. Millers Falls Co., 440 F.2d 14 (1st Cir. 1971), *cert. denied*, 404 U.S. 872 (1971).

139. Gray v. Gulf, Mobile and Ohio R.R., 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971).

140. 501 F.2d at 403-04.

141. *See id.* at 399. Upon his discharge by North American Rockwell, Yott had secured employment with a calculator company that serviced North American Equipment.

142. *Id.* at 403. (Currently on remand to Dist. Court for Central Dist. Cal. No. 71-1418 (Carr, J.,)).

the basis that the duty to accommodate the varying religious beliefs of employees should not put an end to collective bargaining agreements. This is particularly true when the resulting discrimination is insignificant in comparison to a strong governmental interest in a union shop.[143]

The Current Status of Religious Discrimination In Employment

From the foregoing survey of the status of religious discrimination cases both within and without church sponsored industries, it seems safe to say that for secular employers at least, discrimination on the basis of religion is no longer permissible. Under the "business necessity" principle first announced in *Griggs*, the controlling factor in employment must be the applicant's qualifications for a particular job, so that "race, religion, nationality and sex become irrelevant."[144]

As for the variety of religious discrimination practiced by sectarian denominations who insist on hiring their own devout to perform work of a nonreligious nature, there is still no effective deterrent. What is lacking is a decision of the stature of *Griggs v. Duke Power Co.* to define the parameters of section 702 of the Equal Employment Opportunity Act. Unfortunately, the decision in *King's Garden* falls short of the mark.

Conclusion

Any significance which might attach to the holding in *King's Garden, Inc. v. FCC*[145] is obviously blunted by the majority's failure to settle the constitutional issue raised by section 702 of Title VII.[146] When stripped of dicta, the decision is little more than an affirmation of the FCC's own ruling that it would disregard the suspect amendment of 1972, because it was not a part of its enabling statute.

In upholding the Commission's regulatory scheme as facially

143. *Id.* *See also* Hardison v. Transworld Airlines, 375 F. Supp. 877 (W.D. Miss. 1974). The district judge found that a union always has a duty to protect its members from unlawful discrimination. Nevertheless, its seniority system (which provided for choice of days off for religious holidays on the basis of length of employment) did not discriminate against its membership because "[i]t was *coincidental* that in the plaintiff's case the seniority system acted to compound his problems in exercising his religion. He did not have sufficient seniority in the building to which he was transferred to be able to impose his choice of days off over those of other employees who had more seniority." *Id.* at 883 (emphasis added).

144. 401 U.S. at 431.

145. 498 F.2d 51 (1974), *cert. denied*, 95 S. Ct. 309 (1974).

146. The majority characterized the religious exemption of Title VII as a "poor candidate" for salvage by judicial construction because it was reasonably clear to them that it violated the establishment clause. However, since it was far less clear to the judges how much or in what way the exemption should be narrowed to avoid First Amendment objections among permissible alternatives. The choice should be left to Congress. *Id.* at 54-55.

sound, the D.C. Circuit has left the FCC with no yardstick by which to measure the religious and nonreligious dimensions of King's Garden's programming without becoming embroiled in questions of the validity of religious dogma, already established as beyond the competency of any court.[147] And yet, if the FCC does not attempt a determination of what is religiously inspired activity and what is not, King's Garden can continue to staff its enterprises from among its faithful despite the decision against it in the D.C. Circuit.

More importantly, in permitting the lower court's decision to stand, the Supreme Court has failed to answer once and for all Judge Bazelon's contention that in exempting all the activities of any religious association, educational institution, or society," Title VII as presently written violates the establishment clause of the First Amendment.

The debate continues as to the amount of accommodation the free exercise clause may permit before running afoul of the establishment clause.[148] But if the tension between the two clauses remains a dialetic in search of synthesis, the Supreme Court has never overruled Justice Black's interpretation of the First Amendment in *Everson v. Board of Education*[149] that the government may not prefer religion over the lack of it. Yet as the *King's Garden* court has made quite clear in dicta, the religious organization exemption of Title VII does exactly that. To compound the irony, the baptist and presbyterian separationists who triumphed over the anglican theocrats in the struggle over establishment first in Virginia and later at the Constitutional Convention of 1787, are now among the most ardent lobbyists for congressional dispensations to religious institutions.[150] In securing the Title VII exemption which permits religious discrimination, the separationists have come full circle, abandoning the religious equality ethic for which they had struggled since colonial days. As a result, religion, or the lack of it has become a political question once again.

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147. *See, e.g.*, Gillette v. United States, 401 U.S. 437 (1971); United States v. Ballard, 322 U.S. 78 (1944); Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969).

148. *See* note 74 *supra*. *See also* Torcaso v. Watkins, 367 U.S. 488 (1961). "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Id.* at 495.

149. 330 U.S. 1 (1947). For a variety of scholarly interpretation of the religious clauses of the First Amendment, *see* Gianella, *Religious Liberty, Nonestablishment and Doctrinal Development, Part II, the Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968); Katz, *Radiations from Church Tax Exemption*, 1970 SUP. CT. REV. 93; Kauper, *The Supreme Court and the Establishment Clause: Back to Everson*, 25 CASE WEST. RES. L. REV. 107 (1974); P. KURLAND, RELIGION AND THE LAW (1962).

150. *See* note 7 *supra* and accompanying text.

Professor Freund would remind the partisans of state-sanctioned aid to churches and their manifold commercial enterprises that political division on religious lines is one of the principal evils that the first amendment sought to forestall."[151]

It has been argued that the religious exemption of Title VII makes only another small chip in the "blurred, indistinct and variable barrier" which the wall of separation between church and state has become in the 1970's.[152] Nevertheless, proponents of this permissive point of view would do well to recall Mr. Justice Clark's response to an earlier remonstrance to the effect that school prayers were relatively minor encroachments on the First Amendment: "What is today a trickling stream may all too soon become a raging torrent."[153] In the ensuing flood, the last vestiges of the once proud wall of separation are in danger of being swept away with the current.

151. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969).
152. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).
153. School District v. Schempp, 374 U.S. 203, 225 (1963).