

How Title VII Erodes the Mission of the Religious University

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Abstract. For decades, courts have held that Title VII of the Civil Rights Act of 1964 does not permit religious universities to consider a job applicant's religious beliefs when staffing most faculty and administrative positions. This article briefly reviews the law in this area and then applies the vast body of research on 'organizational culture' to argue that this judicial interpretation will, in the long-run, undermine the religious university's ability to perpetuate its mission.

Key words: religion, christian, college, university, discrimination, staffing, organizational culture, Title VII

1. Introduction

Religion is the centerpiece of many institutions of higher education in the United States. Currently, there are 707 U.S. colleges and universities that claim some religious affiliation (The College Board 1996). Although for many of these schools the affiliation may be a mere artifact, other religious institutions use religion to inform their academic, administrative, and personnel policies.¹ Moreover, some, as this article will detail, have sought to use religion as a litmus test for faculty hiring and other employment-related matters.

The rationale for such a hiring policy is basic: to propagate and to advance the religious mission of the institution, the institution must recruit and select individuals who genuinely support that mission, who will further that mission through their teaching, research, advising, and committee work, and who will serve as appropriate role models for the students. A policy that gives preferential treatment to applicants whose religious persuasion is aligned with that of the school arguably advances this objective. However, as many cases and scholarly articles have shown (e.g., Bagni, 1979; Laycock, 1981; Lupu, 1987; McClure, 1990; Brant, 1994), such a blanket limitation on the religious background of applicants contravenes the proscription of religious discrimination codified in Title VII of the Civil Rights Act of 1964. Those applying for a position with a college or university or with any other employer covered by the Act are protected from employment decisions that are based on their

religious beliefs. Thus, a fundamental tension exists between society's interest in protecting an individual from religious discrimination and a religious university's interest in maintaining its culture through the ideologies of its workforce. With the exception of critical positions within the university, as noted below, the courts have resolved this tension in favor of plaintiff job applicants. In essence, because courts have not recognized or accepted any relation between faculty and administrator ideology and the integrity of a religious mission, the individual's right has been found to outweigh that of the institution.

This article will describe the case law that is germane to such staffing policies and will then re-examine this tension in light of the wealth of literature that links employee religious beliefs to a religious institution's culture. It will argue that given the empirical evidence that organizations cannot maintain their culture without recruiting and selecting individuals who actively support the organization's mission and share its ideology, applying Title VII's religious discrimination prohibition to religious universities will have the long-run effect of eroding the religious character of the university.

2. Title VII cases involving faculty religious beliefs

The law regarding a religious institution's right to consider an applicant's religious beliefs in making a hiring decision has been detailed in several articles; therefore, it will be only briefly summarized here. Although Section 703 of Title VII proscribes religious discrimination in employment practices, religious institutions have defended religiously-motivated staffing decisions on two statutory grounds: exemption and bona fide occupational qualification (BFOQ). Exemption clauses are found in Sections 702(a) and 703(e)(2). Specifically, Section 702(a) states that Title VII:

'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.'

Section 703(e)(2) overlaps 702(a) stating that:

'it shall not be an unlawful employment practice for a school, college, or university or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled or managed by

a particular religion or by a particular religious corporation, association, or society. . . .’

Given this overlap, religious employers will often invoke both clauses to defend against allegations of religious discrimination.² Moreover, religious defendants typically advance a BFOQ defense as well, claiming that the employment of a religious individual is ‘reasonably necessary to the normal operation of the business.’³ A sample of cases that are representative and illustrative of these two defenses include:

- *Pime v. Loyola University of Chicago*:⁴ Loyola reserved three tenure-track positions in the philosophy department for Jesuits. When this policy was challenged by a Jewish individual who sought an appointment, Loyola defended on BFOQ grounds. The court agreed with the university, concluding that in the philosophy department, a ‘Jesuit “presence” is important to the successful operation of the university,’ and that ‘fixing the number (of Jesuits) as seven out of 31 is a reasonable determination.’
- *EEOC v. Kamahameha Schools*:⁵ Here, a school policy requiring all teachers to be Protestant was overturned. The court found that because the schools’ orientation was primarily secular rather than religious, no religious institution exemption applied. On the question of Protestantism being a BFOQ, the court concluded that instruction provided in ‘traditional secular subjects was done so in the traditional secular way;’ thus, being Protestant was not essential to the performance of the job.
- *Dolter v. Wahlert High School*:⁶ The issue here was whether a Catholic school could terminate a pregnant English teacher because she was unmarried. Because the school could not prove that adherence to Catholic doctrine was a BFOQ for Dolter’s job, the dismissal violated Title VII.
- *Scheiber v. St. John’s University*:⁷ A Jewish vice-president of student life at St. John’s, a Catholic university, alleged that he was fired because of his religion. The university denied engaging in any discrimination, insisting that the plaintiff was fired because of poor job performance. The court found, as a threshold matter, that St. John’s was indeed a ‘religious institution or organization’ under Title VII, but remanded the case for determination of whether preferential hiring would be permissible for this position.

It is clear that neither the 702/703 exemption nor the BFOQ defense has been interpreted as a license to discriminate against applicants on religious grounds or even a vehicle to operate a general preferential hiring policy in religious institutions. Rather, the law has developed to mean that the religious institution can reserve *only few* positions for individuals of a particular religion. That is, to exploit the available exemptions in Title VII, an organization not only

has to demonstrate religious ownership or control, it must also 'produce evidence that its employee is carrying out the organization's mission and that the employee is subject to institutional discipline if the employee fails to, or inaccurately, carries out the mission' (Mawdsley, 1994). Accordingly, a Jewish university may, for instance, reserve its president's position or its Jewish education positions for Jews, a Christian school may reserve vital policy-making positions for Christians, but no religious educational institution may adopt a general preferential hiring policy.⁸

3. Research on organizational culture and cultural change

Judicial interpretation of Title VII reveals that religious considerations in staffing the vast majority of university faculty or administrative positions will not be tolerated. In staffing their classrooms and administrative offices, then, religious colleges and universities must adhere to the same legal standards as other organizations covered by Title VII. On the face of it, this approach appears reasonable as it attempts to balance individual and institutional interests. There is no indication that courts have been hostile toward religious schools, nor have they shown any predisposition whatsoever in these cases. Employment law has been applied no differently in religious university cases from those cases involving secular universities or private corporations. However, in their haste to ensure this congruous application of Title VII, courts have neglected to fully consider the long-run implications of the law for the religious mission of the defendant institutions.

Although there is no need for a religious university to staff *every* position with like-minded religious individuals, absent the existence of some *critical mass* of faculty and policy-making administrators who share the institution's religious perspective, the religious character of the school, its curriculum, and its programs is at risk. Given the religious diversity of applicants for any faculty position, a hiring process that does not permit individuals to be selected by religion will produce some individuals who are indifferent to or unsupportive of the institution's mission. In fact, if an applicant's religious beliefs are relegated to complete irrelevance as prescribed by Title VII, such a hiring system should, over time, culminate in a faculty whose demographic and religious profile reflects the applicant pool.⁹ In the long-run, then, under the constraints of Title VII, it is probable that only a minority of faculty and administrators will be members of the religion with which their school is affiliated.

In and of itself, this is, of course, not evidence that the religious mission of the institution will be compromised. There is a significant void between the employment of a religiously pluralistic workforce and the secularization

of a religious school. That void is bridged, however, by an abundance of research that analyzes the processes and mechanics by which institutions change. Specifically, the voluminous ‘organizational culture’ literature offers empirical insight into how and why the mission of a religious university, when operating under Title VII’s hiring mandates, will inevitably be eroded.

3.1. *Organizational culture research*

Academics and business practitioners have researched organizational culture for decades (Trice and Beyer, 1993; Hatch, 1993). The seminal research began in the 1930s during the last phase of the Hawthorne studies¹⁰ at the Western Electric Company in Chicago. Researchers in fields ranging from business to sociology to anthropology began to conceptualize corporations as ‘cultures,’ and through the 1940s, 1950s and 1960s, investigated the dynamics of corporate culture to explain worker and firm behavior. The field emerged from relative obscurity around 1970 with the publication of works by Trice et al. (1969) in the United States and by Barry Turner (1971) in England, and later attained more widespread attention with popular publications of *Theory Z* (Ouchi, 1981) and *In Search of Excellence* (Peters and Waterman, 1982) that linked organizational culture to productivity. Throughout the 1980s and 1990s, organizational culture research has accelerated, clarifying its nexus with organizational performance (Hatch, 1993).

As contemporarily defined, organizational culture is:

‘A pattern of shared basic assumptions that [a] group learned as it solved its problems of external adaptation and internal integration, that has worked well enough to be considered valid and, therefore, to be taught to new members as the correct way to perceive, think, and feel in relation to those problems.’ (Schein, 1992).

In less formal terms, an organization’s culture can be conceived as the shared learning and experience of its members that gives rise to patterns of behavior among those members. It can remain continuous and stable over long periods of time, or it can evolve and change.

Many religious colleges and universities, it is presumed, use the myriad doctrines and tenets of their particular religion to build their organizational culture. Core assumptions about human nature manifest themselves as specific values, strategies and goals that underlie the visible elements of this culture – the mission statement, the curriculum and programs, the physical environment, the types of people the school employs, the budget priorities, the charitable works, etc.¹¹ For a university (or any organization) to perpetuate its culture and its mission, organizational research has demonstrated that

the school must actively and aggressively monitor the processes by which individuals enter the organization (recruitment and selection of faculty and administrators), the processes by which individuals are taught what is acceptable behavior (socialization of faculty and administrators), and the process by which individuals are rewarded (pay and benefits, tenure, and promotion). The effect of each of these processes on university culture is briefly explained next.

3.1.1. *Recruitment and selection of new faculty and administrators*

According to some of the best organizational culture research to date, 'one of the most subtle yet most potent ways through which cultural assumptions get embedded and perpetuated is the process of selecting new members' (Schein, 1992). It is imperative that a university employ faculty and policy-making administrators who support the religious mission of the school because '[i]f they select people, especially for management roles, with contrary or inconsistent views, the organization is likely to receive mixed ideological messages and may never form a single, coherent culture' (Trice and Beyer, 1993). Empirical support for this conclusion can most convincingly be found in a 1980 study of two British universities whose cultures tended to drift from their intended direction over several years (Lodahl and Mitchell, 1980). Both schools upon their foundation sought to embrace interdisciplinary study. Toward this end, the Vice-Chancellor of university A accorded significant weight to the ideology of applicants for deanships and only hired those who strongly supported the interdisciplinary ideal. By contrast, the president of university B hired deans primarily on the basis of their academic credentials without regard for the applicants' perspective on interdisciplinary study. Questionnaire data from the faculty who were hired by and who had exposure to these deans clearly indicated that university A faculty were much more likely to endorse interdisciplinary study than were the faculty at university B. Moreover, both universities found that support among faculty for interdisciplinary emphasis in study diminished over the seven year period of study, albeit more at university B. Accordingly, this study has been interpreted to suggest that 'the induction of newcomers can become a force diluting the original ideologies unless they are consciously recruited and selected for their compatibility with those ideologies' (Trice and Beyer, 1993; see also Lodahl and Mitchell, 1980).

3.1.2. *Socialization of new faculty and administrators*

Once new members are selected into a university, they soon learn the parameters of acceptable behavior. The rules of conduct may be defined formally in an orientation, but they are clarified and reinforced through daily inter-

action with other university members. Ideologies are inculcated through the ‘socialization’ of new members.

‘Organizational socialization consists of the social processes through which organizations transmit to members the expectations associated with their roles’ (Trice and Beyer, 1993). Members of the organization directly communicate to new members how they should behave and how they should think through discussion of the culture, through stories about important events and people, and through mentoring. Indirect communication of the culture is expressed through, for example, their dress, the type of language they use, the way they act, and their willingness to respect the organization’s rites and rituals (Schein, 1992). Among university faculty, much of this informal socialization comes from other faculty members. In fact, the above-referenced Lodahl and Mitchell study generated a list of faculty socializing mechanisms. In order of importance, they are:

1. Faculty meetings
2. Colleagues
3. Deans
4. Try changing something
5. Nonacademic administrators
6. Conversations with students
7. Vice-chancellor/pro-vice-chancellor
8. Faculty handbook
9. Formal orientation

Accordingly, although new members may be exposed to the school’s formal socializing mechanisms (e.g., an orientation or a handbook), they learn about the *de facto* culture through their friendships, through their work groups and departments, through the stronger political coalitions at meetings, and through their efforts to effect change. It is through this process that new faculty members come to understand – and later transmit – the cultural norms of the university environment.

3.1.3. *Rewarding faculty and administrators*¹²

Not only do new members of a university learn from formal and informal socialization, they determine for themselves what the university values and punishes by examining the established pay, promotion, and tenure systems. Priorities, values and assumptions are powerfully transmitted by such mechanisms because these systems are of critical importance to the individual. Here, what is *actually practiced* by the university (as opposed to that which might be stated in a handbook or by a colleague) is what sends the message. When members see others getting pay raises, getting important committee

assignments, getting a research, service or teaching award, or being excommunicated, they infer what behaviors precipitated those events. Having then learned what one should and should not do to reach desired ends, they will emulate or avoid those behaviors.

3.2. *What causes an organization's culture to change?*

Whereas the processes by which individuals are recruited, selected, socialized, rewarded, and punished can profoundly embed and advance a university's culture and mission, if these processes do not function to actively resist cultural change, then change, or 'organizational drift,' will inevitably occur (Lodahl and Mitchell, 1980). The most potent mechanism by which this change occurs is through the development and the promotion of 'subcultures.'

In organizations where many differences exist among members (e.g., functional differences, geographic differences, knowledge differences, demographic differences, ideological differences, etc.), subcultures – clusters of individuals with some commonality – will form (Trice and Beyer, 1993). These subcultures will exist in almost every organization and will be aligned with the central culture of the organization to greater or lesser degrees. In some organizations, subcultures are pervasive and potent, whereas in others they go almost unnoticed. University subcultures often develop as the school creates new programs, opens new markets (e.g., attracts a more diverse student body), or expands vertically (e.g., starts a graduate program) and tend to surface at critical decision points: the hiring process, tenure decisions, curriculum changes, and resource allocation. Thus, precisely when a university is undertaking some of the crucial functions that can perpetuate the central culture, it may be challenged by dissent from subcultures.

These subcultures vary in strength and in any organization become a cutting edge of organizational change. In fact, '[w]hether leaders are conscious of it or not, the way they develop . . . organizations culturally is by assessing the strengths and weaknesses of different subcultures and then biasing the total culture in favor of one of the subcultures' (Schein, 1993). The implication for the religious university is that unless it actively resists subcultures that are indifferent to the religious mission of the school, it is at risk of having such subcultures usurp essential personnel and academic functions.¹³ This is especially true in light of the tremendous governance power enjoyed by faculty at private universities.¹⁴ Accordingly, the religious university has an interest in controlling the growth of these subcultures to minimize this risk. Here again, the recruitment and selection of like-minded individuals, the socialization of these individuals to respect and honor the religious mission, and a reward/punishment system that reinforces these messages are imperative to meet this objective. Absent this consistent application and reinforcement

of the central university culture, the culture of the religious university will inevitably drift from its religious foundation.

4. A brief recommendation

In practical terms, the research summarized above implies that the administration of a religious university is a science: to safeguard the religious culture and mission of the institution, the school must actively resist forces that threaten it. Absent this vigilance and resistance, the culture of a religious university is expected to drift and ultimately to resemble the cultures of its secular counterparts.

Title VII of the Civil Rights Act has emerged as an impediment to the maintenance of religiosity at such schools. In proscribing the selection of faculty and policy-making administrators by religious belief, it prevents these organizations from taking the necessary steps to employ individuals whose religious ideologies are consistent with those of the school. As discussed above, such a staffing process will, in the long run, erode the religious culture of the school because these new members will soon be responsible for the socialization and hiring functions as well as for significant university governance.

From a legal perspective, there are only a few avenues available to arrest this erosion. One option for the religious university is to challenge the constitutionality of Title VII on Free Exercise grounds. That is, the religious institution could attempt to defend its religious-based hiring practices as a First Amendment right to pursue its mission. The school could plausibly support such a claim by relying on the above-cited organizational culture research, thereby demonstrating the effects of Title VII.

However, given the current legal climate, this option will likely be insufficient. Contemporary Supreme Court interpretation of the Free Exercise Clause of the First Amendment erects a virtually insurmountable barrier to religious organizations' challenges to generally applicable laws like Title VII.¹⁵ Consequently, such schools need look to Congress rather than to the courts to put some reigns on Title VII.

To remedy the perverse repercussions of Title VII's well-intentioned religious discrimination provision, Congress must expand the 702/703 exception to explicitly exempt religious institutions from coverage. Stated more plainly, Title VII need be amended to permit religious-based management decisions at religious educational institutions. As a practical matter, this merely amounts to clarifying sections 702(a) and 703(e)(2) of the Act in such a way that courts could no longer interpret this exception as applying to only a few university positions. Instead, the exception must apply to all faculty and administrative positions. By codifying this amendment, Congress would effectively remove

the judicially-imposed shackles that have for many years inhibited religious schools from preserving their culture and advancing their mission.

5. Conclusion

Some religiously-affiliated colleges and universities seek to facilitate a religious campus environment and to use religious doctrine to inform their academic and personnel policies. It is their goal to produce graduates whose faith is the center of their lives and who view the world from a religious context. To prevent a drift toward secularism, these institutions must actively safeguard their character by employing a critical mass of faculty and policy-making administrators who ardently support the institution's objectives and world-view.

Despite the plethora of empirical evidence that demonstrates the need for restrictive staffing policies to maintain a religious environment, Title VII and the courts will not tolerate religiously-motivated hiring except for a handful of positions within the school. In doing so, they promote the long-run erosion of these environments. Stated differently, *if the law operates as designed, these schools will ultimately employ a religiously pluralistic workforce who will, as policy-making managers, wield tremendous power to change the culture.* Organizational culture research predicts that the central religious culture of an institution facing such ideological diversity *will* change, drifting from its original direction.

To reverse this trend, religiously-affiliated schools must be exempted from the religious discrimination provision of Title VII. In light of the courts' narrow interpretation on the current 702/703 exceptions, it is incumbent upon Congress to intervene and to thereby safeguard the integrity of these schools. Failure to do so will perpetuate the erosion of the religious university mission and will promote the long-run secularization of these schools.

Notes

1. The terms 'religious institution' and 'religious university' are narrowly defined in this article to mean *colleges and universities whose mission is to maintain a religious environment on campus, to offer an education that is informed by religious doctrine, and to produce graduates whose faith is the center of their lives and who view the world from a religious context.* It is believed that the majority of the 707 schools that have a religious affiliation would not fit this definition. However, many schools, if their mission statements are an indicator, do aspire to this standard. A small cross-section (followed by an excerpt from their mission statement) would include: *Pacific Lutheran College* (offers 'an environment that is ecumenically Christian'), *Yeshiva University* (mission says its objective is to teach students that the 'heritage of contemporary civilization – the liberal arts and sciences –

is compatible with the ancient traditions of Jewish law and life,' and towards this end, undergraduates pursue a 'full program of Jewish Studies while taking college programs in the liberal arts and sciences. . . .'), *Seattle Pacific University* (mission statement refers to the 'university's clear Christian commitment' and notes that the school exists to 'encourage members of the university to make faith in Christ the authentic center of their lives'), *Olivet Nazarene College* (materials state that the school is 'clearly focused on education based on Christian values and an uncompromising commitment to Jesus Christ'), *Western Baptist College* (message from the president notes that the school is 'characterized by scholarship in a distinctly Christian environment and a distinctly Christian education with the Bible as the center of student life and all course study' and whose Vision Statement says that the school exists 'to produce servant leaders who are totally committed to the Lord Jesus Christ, who strive for godliness and excellence in all areas of life, with a burning desire to make a difference in the world'), *Bethel College* (a 'Christian learning community whose goal is to foster an effective academic program and to create a supportive environment for the development of growing Christian persons'), *Huntington College* (whose mission statement says that the school provides 'a high quality, Christ-centered educational program' and continues by noting that '[t]he college is committed to educating men and women to impact the world for Christ'), *Walla Walla College* (whose mission statement says '[t]hrough fellowship as well as instruction, the faculty seek to develop in students the capacity to . . . address issues from the perspective of Christian values . . . and to live for the service of God and the betterment of the world'), and *Cedarville College* (whose president's message says 'our faculty, staff, and administrators are here to teach you and serve you in many different roles, and also to encourage you to grow in Christ'). (Page numbers for all quotes in this note are not provided because the quotes come from college materials placed on the schools' internet home page.)

2. See, e.g., *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986).
3. This affirmative defense is located in Section 703(e)(1), applies to religious and secular employers, and permits sex, religion, and national origin to be BFOQs.
4. 803 F.2d 351 (7th Cir. 1986).
5. 990 F.2d 458 (9th Cir. 1992).
6. 483 F.Supp. 266 (N.D. Iowa 1980).
7. 638 N.E.2d 977 (NY 1994).
8. The United States Supreme Court has spoken to this issue only once, addressing whether the Section 702 exemption constitutes an establishment of religion. In *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), the court ruled that applying Title VII's religious exemption to employment in the secular, non-profit activities of a religious organization did not violate the Establishment Clause (at 339). However, it did not clarify whether Section 702 means that religious institutions are broadly exempted in all employment practices, or if, as the lower courts suggest, the exemption is to be applied narrowly.
9. For High Court articulations of this objective of Title VII, see *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), *Hazelwood School District v. United States*, 433 U.S. 299 (1977), *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), and *Connecticut v. Teal*, 457 U.S. 440 (1982).
10. The 'Hawthorne Studies' were conducted by a team of researchers lead by Elton Mayo of the Harvard Business School. They 'focused on improving productivity of individuals through group experimentation. (These experiments) included changing the group's composition and incentive schemes . . . (and) changing environmental conditions (of) lighting and physical arrangements.' This research is considered to be among the most important of the seminal studies in personnel management (Schuler, 1995, p. 19).
11. This is the fundamental framework within which organizational culture is typically understood: core assumptions leading to specific values leading to visible artifacts within the organization. See Schein (1992), p. 17.

12. This section is a synopsis of Schein (1992), pp. 242–243.
13. According to the Lodahl and Mitchell study, '[a]n innovative organization must try to instill an almost religious fervor into its members. A spiritual commitment to the ideology is called for. The danger of organizational drift is that a shift in the type of commitment will occur from one based on ideology to one based on techniques, departments, or self-interest. . . . For the innovative organization, . . . such a shift is deadly. The founders must do whatever they can to ensure that the ideology is realized in practice; in other words, they must strive to prevent organizational drift' (p. 187).
14. The broad parameters of these managerial and governance responsibilities of private university faculty were recognized by the U.S. Supreme Court in *NLRB v. Yeshiva University* (444 U.S. 672 (1980)). In deciding the question of whether Yeshiva's faculty were permitted to unionize under the National Labor Relations Act, the court surveyed the myriad management responsibilities of that faculty. The majority found that:
' . . . the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.' (at 686).
15. See, e.g., *Employment Division v. Smith*, 494 US 872 (1990), *City of Boerne v. Flores*, — US — (1997).

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