Church-Related Schools and the Section 504 Mandate of Nondiscrimination in Employment on the Basis of Handicap

Carla A. Grosch

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Section 504 of the Rehabilitation Act of 1973 broadly declares a principle...
ple of nondiscrimination on the basis of handicap under federal grants. In fashioning section 504, Congress did not consider the uniqueness of the discrimination the handicapped faced. Unlike racial or gender-based discrimination, the remedying of handicap discrimination might necessitate the expenditure of considerable sums of money to render work facilities accessible or to otherwise accommodate a handicapped individual. Despite the possibility of requiring large expenditures, Congress did not expressly define or delimit the scope of section 504, nor did it consider the potentially far-reaching effects that provision would have on recipients of federal financial assistance. One set of recipients that receives a small amount of federal aid, and for which application of section 504 poses serious first amendment questions, is church-related schools. This article discusses the application of the section 504 mandate of nondiscrimination in employment to church-related schools and how statutory construction and the first amendment may limit that application.

I. SECTION 504 AND EMPLOYMENT DISCRIMINATION: A PROBLEM OF DEFINITION AND SCOPE

The Statute and Legislative History

Section 504 of the Rehabilitation Act of 1973 provides, in pertinent part:


4. Section 504 was intended to prohibit recipients of federal assistance from discriminating on the basis of handicap not only in employment, but also in housing, transportation, educational services, and health services. S. Rep. No. 1297, 93d Cong., 2d Sess. 38, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6388.
No otherwise qualified handicapped individual in the United States... shall, solely by reason of his [or her] handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency. . . .

The language of the provision does not specify that discrimination on the basis of handicap in employment is prohibited. Rather, the mandate, in simply outlawing discrimination on the basis of handicap, is broad and appears to be all-inclusive. The congressional statement of purpose, as well as contemporaneous and subsequent legislative history, demonstrate that Congress intended "discrimination" to include employment discrimination.

The declaration of congressional purpose provides that the Rehabilitation Act of 1973 is to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment." An examination of the legislative history of section 504 prior to the passage of the Rehabilitation Act of 1973 further demonstrates that Congress, or at least some of its members, intended "discrimination" to include employment discrimination. In 1971, Representative Charles A. Vanik introduced a bill to amend the Civil Rights Act of 1964 to prohibit discrimination on the basis of physical or mental handicap in programs receiving federal financial assistance. Senators Hubert H. Humphrey and Charles A. Percy introduced companion bills to the Vanik Amendment in the Senate in 1972. The Humphrey-Percy bills sought to amend Title VI and Title VII of the Civil Rights Act of 1964 to include prohibitions of discrimination against the handicapped. The bills were


6. 29 U.S.C. § 701(8) (1976). The congressional declaration of purpose in § 701(8) may be considered as directed specifically to §§ 791(b) and 793, the affirmative action provisions of the Act, see note 1 supra and note 14 infra. However, when construed with Senator Humphrey's statement, see text accompanying note 16 infra, and the finding of S. REP. No. 318, 93d Cong., 1st Sess. 4-5, reprinted in [1973] U.S. CODE CONG. & AD. NEWS 2076, see note 17 and accompanying text infra, the § 701(8) declaration of purpose lends support to the interpretation of § 504 as a ban on employment discrimination on the basis of handicap under federally assisted programs and activities.


10. 42 U.S.C. § 2000e (1976 & Supp. III 1979). Title VII includes a broad ban on discrimination in employment on the basis of race, color, religion, sex, and national origin. Title VII is applicable to employers of a certain size in an industry affecting commerce, regardless of whether the employer receives federal assistance.
not reported out of the House or Senate Judiciary Committees. Rather, a provision similar to the proposed amendments to the Civil Rights Act was included in the proposed Rehabilitation Act of 1972 when the Senate Committee on Labor and Public Welfare considered the bill. This provision became section 504 of the Rehabilitation Act of 1973, which became law after presidential vetoes of two previous bills containing the same provision.

In the course of the passage of the Rehabilitation Act of 1973, there was very little discussion of section 504 of that Act. The limited discussion, however, suggests that section 504 was intended to prohibit employment discrimination under federally assisted programs. In a statement in support of the Senate version of the proposed Rehabilitation Act of 1972, Senator Humphrey applauded the Senate Committee on Labor and Public Welfare for including sections 503 and 504 in the proposed Act. Senator Humphrey stated that these provisions carry through the intent of the original 1972 bills that he had introduced to "guarantee the right of persons with a mental or physical handicap to participate in programs receiving Federal financial assistance, and to make discrimination in employment because of these handicaps, in the absence of a bona fide occupational qualification, an unlawful employment practice." To the same effect, the Senate Report accompanying the Senate version of what became the Rehabilitation Act of 1973 stated that the hearings on the Rehabilitation Act revealed that employment discrimination was an area characterized by a lack of action, and that this bill would fill the void. Thus, the legislative history preceding the passage of section 504 indicates a congressional intent to in-

15. See note 8 supra.
clude employment discrimination in its general prohibition of discrimination against the handicapped under federally assisted programs.

Subsequent legislative history also demonstrates this intent. The Senate Report accompanying the final bill amending the Rehabilitation Act stated: ""[S]ection 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs.""

The Department of Health, Education and Welfare—since renamed the Department of Health and Human Services—also has interpreted section 504 and its sparse legislation as prohibiting discrimination against the handicapped in employment. HEW promulgated regulations implementing section 504 in 1977, nearly two and one-half years after section 504 became law. When asked to explain the delay in the promulgation of implementing regulations, representatives of HEW cited the sparse and unilluminating legislative history surrounding section 504 and the uniqueness of the problem of discrimination against the handicapped, in comparison to discrimination on the basis of sex or race.

18. In discussing § 504 and congressional intent, courts have resorted to consulting subsequent legislative history to fill the void left by sparse statutory language and unilluminating prior legislative history. Several courts have cited Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969), for the proposition that subsequent legislative history has cogent significance in construing a statute. See, e.g., Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977); NAACP v. Wilmington Medical Center, Inc., 453 F. Supp. 280 (D. Del. 1978). Indeed, it was on the basis of the legislative history surrounding the 1974 amendments that one federal district court ordered HEW to promulgate § 504 regulations. Cherry v. Mathews, 419 F. Supp. 922 (D.D.C. 1976).


21. In response to inquiry into the delay in promulgating regulations, HEW printed the following explanation:

The process of preparing the proposed regulation for Section 504 has been time consuming for a number of reasons. The issues inherent in discrimination on the basis of handicap are new and complex. . . . The problem of determining the scope and nature of what constitutes discrimination against handicapped persons has been made more difficult by the sparseness of legislative history for Section 504.

Rehabilitation of the Handicapped Programs, 1976: Hearings on the Implementation of the Rehabilitation Act of 1973 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. 347 (1976). In a statement made at hearings on the implementation of § 504, the Director of the HEW Office for Civil Rights stated that: ""[T]he development of the regulations was difficult because of the absence of substantive
handicap discrimination in employment under programs and activities receiving federal financial assistance.\footnote{22}

Although the discussion above establishes that section 504 prohibits discrimination on the basis of handicap in employment under programs and activities receiving federal financial assistance,\footnote{23} a question remains unanswered. Specifically, what did Congress mean by "program or activity" in its prohibition of discrimination under any program or activity receiving federal financial assistance under section 504? No clear definition of "program" or "activity" is evident from the language of section 504 or from the Act's legislative history. As noted by one commentator, "[C]ongress seems to have glossed over the problem of defining 'program' in their haste to read [sic] the crucial issue of discrimination."\footnote{24}

Although the discussion above establishes that section 504 prohibits discrimination on the basis of handicap in employment under programs and activities receiving federal financial assistance,\footnote{23} a question remains unanswered. Specifically, what did Congress mean by "program or activity" in its prohibition of discrimination under any program or activity receiving federal financial assistance under section 504? No clear definition of "program" or "activity" is evident from the language of section 504 or from the Act's legislative history. As noted by one commentator, "[C]ongress seems to have glossed over the problem of defining 'program' in their haste to read [sic] the crucial issue of discrimination."\footnote{24}

legislative history; Section 504 was enacted without congressional hearings and with virtually no floor debate in either body of Congress. Furthermore . . . many forms of discrimination are unique to the handicapped." Implementation of § 504, Rehabilitation Act of 1973: Hearings before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor, 95th Cong., 1st Sess. 291 (1977) (statement of David Tatel).

The confusion over congressional intent and implementation of § 504 was so great that HEW Secretary Mathews refused to sign the proposed regulations before leaving office. The next Secretary of HEW, Joseph Califano, ordered more extensive consideration of the regulations before issuing them. Each Secretary, at some point in his tenure of office, wrote a letter to Congress expressing his frustration at the lack of clear congressional intention. Letter from Secretary Mathews to Congress (Jan. 18, 1977) and letter from Secretary Califano to Congress (April 18, 1977), reprinted in Implementation of § 504, Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor, 95th Cong., 1st Sess. 73, 76 (1977).

\footnote{22} 45 C.F.R. §§ 84.11-.14 (1981). Section 84.11(a)(1) provides: "No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies." The regulations apply to institutions receiving or benefiting from federal financial assistance. Id. § 84.2.

\footnote{23} Other federal laws and regulations restrict or prohibit discrimination in employment. Under the Education Amendments of 1972, HEW promulgated regulations which included a ban on discrimination in employment in education programs or activities. 45 C.F.R. §§ 86.51-.61 (1980). The Supreme Court recently upheld the promulgation of these regulations and concluded that HEW did not act beyond the scope of its authority in banning employment discrimination under Title IX. North Haven Bd. of Educ. v. Bell, 50 U.S.L.W. 4501 (May 17, 1982).

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, prohibits employment discrimination on the basis of race, color, or national origin in federally assisted programs or activities where the primary objective of the assistance is to provide employment. 42 U.S.C. § 2000d-3. See text accompanying notes 61-65 infra.

The limited scope of Title VI, relating only to federally assisted employment, is sensible in light of the existence of Title VII, which broadly bans employment discrimination regardless of receipt of federal assistance. Civil Rights Act of 1964, §§ 708-718, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979). Title VI, in essence, provides an additional remedy for disallowance of federal assistance where the employer discriminates in its federally assisted employment program or activity. Title VII governs employment decisions made by employers of a certain size in an industry affecting commerce, employment agencies, and labor organizations. Id. §§ 2000e, 2000e-2. It should be noted that Title VII does not prohibit employment discrimination on the basis of handicap.

\footnote{24} Friedman, Administrative Cutoff of Federal Funding Under Title VI: A Proposed Interpretation of "Program," 52 Ind. L.J. 651, 656 (1977).
Three possible definitions of "program or activity" under section 504 are discernible from the statute, the regulations, and relevant case law. Under the first definition, section 504 mandates that recipients of federal assistance not discriminate on the basis of handicap in employment generally. "Program or activity" under this definition broadly refers to all of a recipient's programs and activities. The second definition strictly limits the section 504 prohibition of discrimination to those specific programs and activities actually receiving federal financial assistance. Under the third possible definition, section 504 would prohibit discrimination only when the primary objective of the federally assisted program or activity is to provide employment. The last definition interprets "program or activity" most narrowly. Each definition concerning the scope of the section 504 ban on employment discrimination would have a different impact on the extent to which church-related schools, and other employers, would need to alter their employment practices. These definitions are discussed and evaluated in the following paragraphs, and their impact is explored in Part Two of this Article.

The Scope of the Section 504 Ban on Employment Discrimination

Definition One: A Broad Ban of Discrimination on the Basis of Handicap in Employment

Since the enactment of section 504 in 1973, individuals have brought a number of cases claiming discrimination on the basis of handicap in employment.

25. A private right of action under § 504 for handicapped persons who claim to have been discriminated against has been recognized in a number of cases. The seminal case in this line is Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977) (private right of action for mobility disabled). See United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977) (private right of action for mobility disabled); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977) (private right of action for student with vision in only one eye); Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978) (private right of action for individual with past history of drug abuse who was in a methadone program); Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977) (private right of action for deaf teacher in need of interpreter for a refresher course); Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976) (private right of action for blind teacher), aff'd, 556 F.2d 184 (3d Cir. 1977), cert. denied, 450 U.S. 923 (1981).

Some courts have required that a plaintiff claiming a § 504 violation must first exhaust administrative remedies. See, e.g., Sherer v. Waier, 457 F. Supp. 1039 (W.D. Mo. 1978) (complaint dismissed without prejudice); Doe v. New York Univ., 442 F. Supp. 522 (S.D.N.Y. 1978) (plaintiff must resort to administrative remedies before seeking temporary restraining order and preliminary injunction); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977) (proceedings stayed pending administrative review). Other courts, however, have maintained § 504 claims without requiring prior resort to administrative hearings when "time is of the essence," e.g., New York State Ass'n for Retarded Children, Inc. v. Carey, 466 F. Supp. 478 (E.D.N.Y. 1978) (when time is of the essence in ensuring that mentally retarded children are provided adequate education programs, it is unnecessary to defer to administrative enforcement of the statute as otherwise might be required), and when there has been no meaningful enforcement of § 504, e.g., Whitaker v. Board of Higher Educ., 461 F. Supp. 99 (E.D.N.Y. 1978).
employment in violation of section 504.26 A number of courts appear to apply the section 504 mandate to the employment practices of the recipient without limitation.27 Such application, in essence, equates "program" with "recipient." These cases lend support to the view that section 504 regulates all of a recipient's employment decisions, and that "program" under section 504 includes all of a recipient's programs and activities.28 In only two of these cases, however, did the majority opinion even cursorily discuss the problem of defining the scope of section 504.29 The remainder of the courts did not address the issue.

An examination of the nature of the recipients of federal financial assistance in these cases may provide an explanation for the absence of discussion regarding which programs and activities are subject to the section 504 nondiscrimination mandate. Almost all of these cases30 concerned a recipient that was heavily, if not entirely, publicly financed, such as a

26. See, e.g., Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir. 1980) (former employee of federal contractor brought suit alleging handicapped based discrimination); Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978) (nurse sought reinstatement after being discharged because of deteriorating eyesight), cert. denied, 442 U.S. 947 (1979); Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977) (blind teacher brought action against officials of school district alleging that she had been discriminated against because she was blind), cert. denied, 450 U.S. 923 (1981); Simon v. St. Louis County, 497 F. Supp. 141 (E.D. Mo. 1980) (paraplegic police officer who was discharged alleged that police department's failure to rehire him violated his rights under Rehabilitation Act of 1973); Duran v. City of Tampa, 451 F. Supp. 954 (M.D. Fla. 1978) (applicant who was denied employment because of childhood history of epilepsy brought action alleging violation of rights under Rehabilitation Act of 1973); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977) (epileptic brought an action alleging she was denied position at hospital solely because of her epilepsy).

27. See, e.g., Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948 (D.N.J. 1980); Hart v. County of Alameda, 485 F. Supp. 66 (N.D. Cal. 1979). But see cases discussed in notes 57-74 and accompanying text infra. See also cases discussed in notes 36-56 and accompanying text infra.


29. The court in Hart v. County of Alameda, 485 F. Supp. 66 (N.D. Cal. 1979), specifically rejected the defendant's argument that § 504 applied only to those programs and activities that receive federal funds with the primary objective to provide employment. Similarly, the court in Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948 (D.N.J. 1980), refused to limit § 504's mandate to the specific program or activities that receive aid. Cf. Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672, 676 (8th Cir. 1980) (McMillian, J., concurring) (although appellant in the instant case not covered under the Act, § 504 imposes general requirement upon recipients of federal grants not to discriminate against employees).

public school or school district, a city or other municipal body, or a city hospital. Presumably, these publicly financed institutions received large amounts of federal financial assistance that generally was not earmarked for specific programs or activities. In fact, it would have been nearly impossible to distinguish those programs and activities that were federally assisted from those that were not. Therefore, the courts in these cases were not called upon to address the question of whether the section 504 mandate is applicable to programs and activities not federally assisted. Hence, the absence of language limiting the applicability of section 504 to programs or activities receiving federal financial assistance in the cases cited above simply may be a result of the nature of the recipients and the nature of the federal assistance involved rather than a judicial affirmation of the broader definition of "program or activity.

Definition Two: The Prohibition of Discrimination on the Basis of Handicap in Employment as Limited to Programs or Activities Actually Receiving Federal Financial Assistance

When a recipient is an institution that receives a limited amount of federal assistance earmarked for a particular purpose or program, it no longer is reasonable, in light of the language of section 504 and the implementing regulations, to apply the section 504 mandate to all of the employment decisions within that institution. Rather, the statutory language prohibiting "discrimination under any program or activity receiving federal financial assistance" compels the conclusion that when the federal aid specifically is directed to an identifiable program or activity, the section 504 nondiscrimination mandate extends only to that program or activity.

The court in Proffitt v. Consolidation Coal Co. recognized this limitation on the application of section 504 to a recipient's employment practices.


In Proffitt, a trained coal mine electrician with sight in only one eye claimed that a coal mining operation refused to hire him because of his blind eye. The coal company participated in the Job Employer-Employee Program of West Virginia (JEEP), an on-the-job training program under the Comprehensive Employment and Training Act of 1973 (CETA). As a participant in JEEP, the company received federal funds. The court, in considering the plaintiff's claim, addressed the issue of the scope of section 504's mandate of nondiscrimination. The court held that the mandate did not cover all of a recipient's employment practices, but rather related only to those programs and activities actually receiving federal financial assistance. The Proffitt court granted summary judgment for the coal company on the plaintiff's section 504 claim because the plaintiff was not seeking employment in the company's federally assisted program.

Similarly, the federal district court in Simon v. St. Louis City Police Department held that a paraplegic former police officer "must allege that the particular job category in which he was allegedly discriminated was a program or activity receiving federal financial assistance" to support his claim that the police department violated section 504 by refusing to hire him. Because of this failure to state a claim for which relief could be granted, the court dismissed the complaint with leave to amend.

More recently, the Seventh Circuit, considering the Simon decision, held that there must be a nexus between the federal aid and the alleged discriminatory act or omission for a plaintiff to prevail. In Simpson v. Reynolds Metals Co., the court stated that "to be actionable, the discrimination must come in the operation of the program or manifest itself in a handicapped individual's exclusion from the program or a diminution of the benefits he [or she] would otherwise receive from the program." Although the court concluded that private recovery under section 504 is restricted to intended beneficiaries, the court warned that the definition of program and the corresponding identification of beneficiaries was not to be narrowly determined.

The narrower construction of section 504 that Proffitt, Simon, and Simpson endorsed appears to have been adopted by the former Department of

38. 21 Fair Empl. Prac. Cas. at 385.
39. Id.
41. Id. at 1364.
42. Id. The plaintiff's amended complaint was reviewed in Simon v. St. Louis City County, 497 F. Supp. 141 (E.D. Mo. 1980), in which the court held that plaintiff failed to establish, within the meaning of § 504, that he was an "otherwise qualified" individual who had been discriminated against solely by reason of his handicap.
43. 629 F.2d 1226 (7th Cir. 1980).
44. Id. at 1232.
45. Id. at 1235.
Health, Education and Welfare in its regulations implementing section 504. The language of the regulations limits the applicability of the section 504 nondiscrimination in employment mandate to employment practices under programs or activities receiving federal financial assistance. This construction comports with the clear language of the statute, and with the courts' reading of section 504 in Proffitt, Simon, and Simpson.

Alternatively, it could be argued that Senator Humphrey's statement—that the provisions that ultimately became sections 503 and 504 of the Rehabilitation Act of 1973 carried through the intent of the original bills he had introduced to amend Titles VI and VII of the Civil Rights Act of 1964—supports a broad interpretation of section 504 as covering all of a recipient's programs and activities. Under this argument, the Senator's statement would be indicative of a congressional intent to ban all employment discrimination on the basis of handicap, much like Title VII bans employment discrimination on the basis of race, color, national origin, gender, or religion. This reasoning, however, negates the express language of section 504, which limits the nondiscrimination mandate to programs or activities receiving federal financial assistance. Had Congress wished to impose a broad ban on employment discrimination on the basis of handicap,
it could have amended Title VII rather than patterning section 504 on the
closer inclusive Title VI.  

Furthermore, under the 1978 amendments to the Rehabilitation Act of
1973, remedies, procedures, and rights available under Title VII were
granted to federal employees complaining of handicap discrimination in
employment in violation of section 501  
of the Act, while the remedies,
procedures, and rights available under Title VI were made available to com-
plainants under section 504. These amendments indicate that Congress did
not intend, in enacting section 504, to impose a general ban on handicap
discrimination in employment. Rather, similar to Title VI, the section 504
mandate is limited to prohibiting discrimination in relation to federal finan-
cial assistance.

In sum, a limitation of the section 504 mandate to "discrimination under
any program or activity receiving federal financial assistance" may result
in the scope of section 504 being dependent upon the nature of the federal
assistance the recipient received. When a recipient receives large amounts of
federal monies that are not earmarked for specific programs or activities,
section 504 may be applicable to many or all of the recipient's employment
decisions. Such a result is unavoidable when federally assisted programs
and activities cannot be separated from unassisted programs and activities.
When a recipient receives federal funding that is limited to a specific pro-
gram or activity, however, a more limited application of section 504 would
be required under the language of the statute. This limitation on the ap-
planation of the section 504 nondiscrimination mandate to federally assisted
programs and activities has been endorsed by the courts in Proffitt, Simon,
and Simpson, and by the former Department of Health, Education and
Welfare in its section 504 regulations.

Definition Three: Section 504 as Prohibiting Discrimination on the Basis
of Handicap in Employment Only in Programs of which
the Primary Objective of the Federal Aid is the Provi-

The Fourth Circuit, in Trageser v. Libbie Rehabilitation Center, Inc.,

50. See notes 9, 10 & 23 supra.
51. Rehabilitation, Comprehensive Services and Development Disabilities Amendments of
(Supp. III 1979)).
52. 29 U.S.C. § 791 (Supp. III 1979). Section 501 requires that federal agencies adopt affirma-
tive action plans designed to employ and advance in employment qualified handicapped in-

53. Id. § 794(a)(1).
54. Id. § 794(a)(2).
55. Id. § 794.
56. See notes 30-34 and accompanying text supra.
57. 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979).
found "program," in the context of a section 504 employment discrimination claim, to mean a federally assisted program of which the primary objective is to provide employment. This definition of "program" is significantly narrower than either of the two definitions discussed above.

In Trageser, the plaintiff, a registered nurse, filed suit claiming that she was constructively discharged in violation of section 504 because of her deteriorating vision. Her employer, Libbie Rehabilitation Center, Inc., was a private nursing home that received substantial federal assistance in the form of Medicare, Medicaid, Veterans Administration, and welfare payments. The court analyzed Ms. Trageser's claim in light of the 1978 amendments to the Rehabilitation Act. These amendments include section 505(a)(2) which provides:

The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under Section 794 [Section 504] of this title.19

In availing section 504 complainants of the remedies, procedures, and rights set forth in Title VI, Congress further implemented its intent, expressed in the 1974 legislative history, that section 504 be "patterned after, and . . almost identical to," Title VI.60

The key provision of Title VI is section 601.61 Section 601 prohibits discrimination on the basis of race, color, or national origin under any federally-assisted program or activity. Section 60462 and the HEW regulations63 restrict the Title VI mandate of nondiscrimination on the basis of

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60. S. REP. NO. 1270, 93d Cong., 2d Sess. 27, reprinted in 120 CONG. REC. 35003, 35010 (1974). Section 504 was patterned after § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976), and § 901 of the Education Amendments of 1972, 42 U.S.C. § 1683 (1976) (pertaining to gender). Despite the similarity in the statutory language of these three provisions, the applicability of each provision to employment practices is different.
62. Id. § 2000d-3.
63. 45 C.F.R. § 80.3(c)(3) (1980). The text provides:
Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) [regulating employment practices] shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

Id. Section 80.3(c) of the regulations extends the nondiscrimination mandate to instances where employment discrimination on the basis of race, color, or national origin tends to cause discrimination against the primary beneficiaries (e.g., students) of the federal aid. See, e.g.,
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race, color, or national origin in employment to federally aided programs of which the primary objective of the assistance is the provision of employment, and to situations when employment discrimination by the recipient tends to cause or "necessarily causes discrimination against the primary beneficiaries of the aid."

The *Trageser* court reasoned that, in the absence of contrary legislative history, the extension of Title VI remedies, procedures, and rights to section 504 complainants would require the incorporation of the section 604 limitation into the section 504 scheme. Based on this reasoning, the court concluded that the section 504 nondiscrimination in employment mandate is limited to federally aided programs of which the primary objective of the aid is to provide employment, and to situations when employment discrimination tends to cause or necessarily causes discrimination against the primary beneficiaries of the federal aid. The court affirmed the lower court's dismissal of *Trageser*'s claim, concluding that the primary objective of federal aid to the nursing home was to provide medical and supervisory care, not to provide employment.

Several courts have adopted the *Trageser* interpretation of the 1978 Amendments to the Rehabilitation Act. The Seventh Circuit, in *Simpson*

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66. The legislative history of the 1978 Amendments gives no guidance as to why the remedies, procedures, and rights under Title VI were made available to § 504 complainants. Also, through the 1978 amendments to the Rehabilitation Act, Congress made the remedies, procedures, and rights under Title VII available to § 501 complainants. 42 U.S.C. § 794(a)(2) (Supp. III 1979). Section 501 requires federal agencies to adopt affirmative action plans to employ and advance in employment handicapped persons. *Id.* § 791(b). There is legislative history that suggests that Congress made the Title VII rights and remedies available to § 501 complainants because it believed that § 501 established the federal government as an "equal opportunity employer." Thus Title VII—which broadly bans employment discrimination—was the logical source of remedies, procedures, and rights. *See* 124 CONG. REC. 15591 (1978). Section 504, however, regulated recipients of federal assistance and was patterned after Title VI. *See* note 23 *supra*. Thus the logical source of remedies, procedures, and rights under § 504 was Title VI. *Cf.* *Hart v. County of Alameda*, 485 F. Supp. 66 (N.D. Cal. 1979) (since § 504 was modeled after Title VI, it should be construed as creating a private cause of action for handicapped job seekers). For a discussion of *Hart*, *see* notes 75-83 and accompanying text infra.

67. *See*, e.g., United States v. Cabrini Medical Center, 639 F.2d 908 (2d Cir. 1981) (hospital's receipt of Medicare and Medicaid funds does not constitute receipt of federal financial assistance under § 504); *Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672 (8th Cir. 1980) (relief denied where plaintiff was not an intended beneficiary of EPA construction and engineering grants to sewer district); *Brinkley v. Department of Pub. Safety*, 22 Fair Empl. Prac. Cas. 164 (N.D. Ga. 1980) (clerk dispatcher failed to show that primary purpose of
v. Reynolds Metals Co., expanded the Trageser interpretation, and noted that, under certain circumstances, an "infection theory" justified application of section 504 to all employment practices of a recipient institution. The "infection theory" applies when employment discrimination by a recipient of federal aid against nonbeneficiaries also affects intended beneficiaries of the aid. The "infection theory" is codified in the Health and Human Services regulations and has been followed by some courts in actions brought under Title VI. In Simpson, the court found the theory inapplicable because alleged discrimination against a handicapped person in an isolated segment of Reynolds Metals did not "infect" the company in a manner that would affect participants in the federally funded work training program. The court stated, however, that the "holding should not be in-


68. 629 F.2d 1226 (7th Cir. 1980).
69. Id. at 1235 n.16.
70. Id.
71. See 45 C.F.R. § 80.3(c)(3) (1980). See note 63 supra, for the text of this regulation.
72. See United States v. El Camino Community College, 454 F. Supp. 825, 831 (C.D. Cal. 1978), aff'd, 600 F.2d 1258 (9th Cir. 1979), cert. denied, 444 U.S. 1013 (1980). In El Camino, for example, the Office for Civil Rights (OCR), under authority of Title VI, sought to investigate all of the College's employment practices for possible discrimination against Spanish-surnamed individuals. The College refused to accede to the part of the investigation that bore on employment practices unrelated to the program receiving federal funds. The El Camino court held that the OCR maintained authority to investigate all employment practices to determine whether discrimination, if it existed, in programs not federally assisted caused discrimination against intended beneficiaries of federally assisted programs. 454 F. Supp. at 831. The court recognized that § 604 of Title VI generally restricts administrative action with respect to employment practices when the primary objective of the federal financial assistance is to provide employment. Id. The court concluded, however, that 45 C.F.R. § 80.3(c)(3), see note 63 supra, provides an exception to the provisions of § 604 when discrimination in unassisted programs causes discrimination in federally assisted programs. 454 F. Supp. at 831. See also Caulfield v. Board of Educ., 583 F.2d 605, 610-11 & n.11 (2d Cir. 1978); United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 883 (5th Cir. 1966), aff'd on rehearing, 380 F.2d 385 (5th Cir.), cert. denied, 389 U.S. 840 (1967).
73. 629 F.2d at 1235 n.16. The plaintiff, in Simpson, alleged that the company had discharged him because of his alcoholism, a disability that he claimed qualified him as an "otherwise handicapped person" under § 504. Id. at 1231 n.8. The plaintiff further alleged that the company received federal assistance in an on-the-job training program for veterans, thereby causing the § 504 mandate to apply to the company. Id. at 1231-32. In accord with the Trageser interpretation of § 504, however, the court rejected his claim because he was not a participant in the federally assisted program. Id. at 1235-36. See notes 57-66 and accompanying text supra.
terpreted as foreclosing the possibility that in the future a handicapped individual, not himself [or herself] involved in a federally funded program, may be able to recover if he [or she] can show that the discrimination against him somehow affected the intended beneficiaries of the assistance."

One post-Trageser court explicitly has refused to adopt the Trageser rationale that a section 504 claim is actionable only when a primary objective of federal aid is to provide employment. In Hart v. County,\(^73\) which concerned the refusal of the County Probation Department to employ a "controlled epileptic," the court expressly rejected the Trageser incorporation of section 604 of Title VI into the scheme of section 504 of the 1973 Rehabilitation Act.\(^66\) The court declared that it could not accept the two significant assumptions the Trageser court made.\(^67\) Specifically, the Trageser court had assumed that although the language of section 604 is directed only to enforcement actions by any governmental department or agency, section 604 also restricts private suits under Title VI.\(^68\) The Hart court rejected that assumption, stating that no authority suggests that Congress intended the section 604 restrictions to apply to private actions.\(^69\)

The Hart court also rejected the second Trageser assumption that in enacting the 1978 amendments to the Rehabilitation Act, Congress intended to restrict the scope of section 504 by incorporating the section 604 limitation. The court observed that the legislative history surrounding the 1978 amendments did not manifest a restrictive intent.\(^60\) Indeed, the Hart court cited legislative history supporting its interpretation that the 1978 amendments were meant to expand the remedies section 504 provided.\(^61\) The court ex-

\(^{74}\) 629 F.2d at 1235 n.16.

\(^{75}\) 485 F. Supp. 66 (N.D. Cal. 1979).

\(^{76}\) Id. at 71-72. Although the probation department received federal assistance through revenue sharing funds, none of the assistance was intended to provide employment. Id. at 67, 71. Consequently, under the narrow Trageser holding that § 504 allows a private remedy only when a primary objective of the federal assistance is to provide employment, the plaintiff in Hart would have been denied a remedy. See text accompanying notes 57-66 supra.

\(^{77}\) 485 F. Supp. at 72.

\(^{78}\) Id.

\(^{79}\) Id. The Hart court noted that § 604, which limits HEW enforcement of § 601, see notes 61-65 and accompanying text supra, has been ignored by several courts in adjudicating private employment discrimination actions under Title VI. Id. (citing Afro Am. Patrolmen League v. Duck, 503 F.2d 294 (6th Cir. 1974). Ortiz v. Bach, 14 Fair Empl. Prac. Cas. 1019 (D. Colo. 1977)).

\(^{80}\) 485 F. Supp. at 72-73. See note 66 supra.

\(^{81}\) In support of its argument that the 1978 amendments were intended to expand the remedies available under § 504, the Hart court cited the following statement by Senator Cranston:

"Mr. President, I believe this amendment is much needed. To date, we have permit-
ted certain private enforcement of Title V [including § 504] and, yet, we have not
provided the means by which such private rights of action are meaningful. This
amendment—providing attorney's fees on the same basis as attorney's fees are pro-
vided under Public Law 94-559—will go a long way toward assisting long-neglected
explained that section 505(a)(2) of the Rehabilitation Act, as amended, makes Title VI remedies, procedures, and rights available to section 504 complainants, and was merely modeled after Title VI provisions rather than restricted by them.82 Declining to adhere to the narrow Trageser approach, the Hart court held that the handicapped plaintiff could sustain a right of action under section 504.83

The lack of any cogent legislative history giving meaning to section 505(a)(2) makes it difficult to predict how other appellate courts, or ultimately the Supreme Court, would resolve the issue presented in Trageser and Hart. The language of section 505(a)(2)—"the remedies, procedures, and rights set forth in Title VI . . . shall be available"84—could be interpreted to have made available to section 504 claimants only the mechanics of Title VI. In other words, the procedural framework of Title VI is to be available under section 504, as are the remedies and rights inherent in that framework. This reading of section 505(a)(2) does not incorporate the limitations of section 604 of Title VI into the Rehabilitation Act. This interpretation is reasonable in that the section 604 limitation on programs designed to provide employment functions to prevent conflict or overlap with Title VII remedies for employment discrimination on the basis of race or national origin. As Title VII does not embrace employment discrimination on the basis of handicap, there is no conflict or overlap between section 504 and Title VII. Yet the legislative history and statutory language are such that a court could, and the Trageser court did, interpret section 505(a)(2) as making the substantive provisions of Title VI applicable to actions brought under section 504.

Finding little guidance in the statute or legislative history, the policies supporting the respective treatments of section 505(a)(2) in Trageser and Hart must be examined. The Trageser restriction protects a private, indirect recipient of federal assistance from being compelled to expend potentially large sums of money to comply with section 504.85 The nursing home defendant in Trageser, a private institution, received federal assistance only in-
directly through primary beneficiaries' choices of where to spend their Medicaid, Medicare, and welfare monies.\textsuperscript{86} Private institutions such as these are unable to tap tax revenues to meet the financial burden of complying with section 504. As one court remarked, applying section 504 to private institutions inequitably forces "substantial expenditures of private monies to accommodate the federal government's generosity."\textsuperscript{87} The Trageser approach thus avoids burdening private, indirect recipients by restricting the "programs" to which section 504 is applicable.

This policy, however, suffers a major shortcoming. By limiting private actions under section 504 to situations where a primary objective of federal assistance is to provide employment, the Trageser restriction insulates not only indirect recipients from the section 504 mandate, but insulates many direct recipients as well. A better approach than the restriction the Trageser court imposed would be to redefine "recipient" in a way that would exclude indirect recipients from the sweep of section 504. Regardless, no movement to do so is afoot in Congress, and courts have expressly refused to interpret "recipient" so narrowly.\textsuperscript{88} In sum, the Trageser restriction, narrowly defining "program," is an insufficient means of achieving an otherwise just objective. If the policy justification behind Trageser is the avoidance of inequities resulting from the application of section 504 to indirect recipients, the Trageser approach is overinclusive.

Alternatively, the primary support for the broader Hart interpretation of "program" is the undesirability of using any federal funds to support discriminatory hiring practices. Unjustified discrimination against handicapped job-seekers in any federally aided program constitutes federally assisted job discrimination.\textsuperscript{89} Furthermore, a limitation on section 504's applicability to programs in which the primary objective of the federal aid is to provide

\textsuperscript{86} Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87, 88 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979). See United States v. Cabrini Medical Center, 639 F.2d 908 (2d Cir. 1981) (a hospital's receipt of Medicare and Medicaid funds did not subject it to § 504's mandate of nondiscrimination in employment).

\textsuperscript{87} Barnes v. Converse College, 436 F. Supp. 635, 638 (D.S.C. 1977). The court concluded, however, that "[d]espite the obvious inequities inherent in the enforcement of this regulation with respect to private institutions, there has been no challenge to its validity and this court is bound by law to give it effect." \textit{Id.} at 639.


\textsuperscript{89} As noted in the Supreme Court's opinion in Brown v. Board of Educ., 347 U.S. 483 (1954), discrimination has a greater detrimental impact when it is government assisted. The Court, speaking of segregation in public schools, approvingly quoted the lower court, which had reasoned: "The impact [of discrimination] is greater when it has the sanction of law; for the policy [of discrimination] . . . is usually interpreted as denoting the inferiority of the [affected] group." \textit{Id.} at 494.
employment appears contrary to the express goal of section 504\textsuperscript{90} to prohibit discrimination against the handicapped. Thus, the Hart approach, forbidding discrimination against handicapped job-seekers in all federally funded programs, better comports with the express section 504 goal than the Trageser approach. The Hart reading of "program" also is mandated by the generally accepted rule that civil rights statutes should be liberally construed to realize the objectives of the legislation.\textsuperscript{91} A liberal construction of "program" under section 504 is especially necessary because Title VII, which broadly bans employment discrimination in other areas, does not reach discrimination against the handicapped. Accordingly, section 504 is the only general statutory protection available to handicapped job-seekers.\textsuperscript{92}

In sum, the policies underlying section 504 support the result in Hart rather than that reached in Trageser. The Trageser holding, which permits private actions only when the primary objective of the federal aid is to provide employment, contravenes the broad section 504 goal of avoiding the involvement of federal funds in programs that are administered in a discriminatory fashion. Absent meaningful legislative direction, the broader Hart approach should be adopted because it furthers this goal.

II. SECTION 504 AND CHURCH-RELATED SCHOOLS: NLRB v. CATHOLIC BISHOP OF CHICAGO AND FIRST AMENDMENT CONCERNS

Under each definition of "program" examined in Part I, it can be argued that the employment decisions made in church-related schools that receive or benefit from federal financial assistance are subject to the section 504 mandate of nondiscrimination on the basis of handicap.\textsuperscript{93} If the first, broad definition of "program"\textsuperscript{94} is applied, it may be argued that all of the

\textsuperscript{90} See notes 1-5 and accompanying text supra.


\textsuperscript{92} In addition to the provisions of § 504, which prohibit discrimination against the handicapped in federally funded programs in general, the Rehabilitation Act contains two prohibitions against such discrimination in specific situations. Section 501 forbids employment discrimination against the handicapped by the government itself. Section 503 provides a similar prohibition that applies to employers accepting government contracts exceeding a certain sum. See 29 U.S.C. §§ 791, 793 (1976). See generally Bayh, Foreword to the Symposium Issue On Employment Rights of the Handicapped, 27 DEPAUL L. REV. 943 (1978) (delineating differences between the provisions of the Rehabilitation Act).

\textsuperscript{93} Indeed, the only court to consider whether a religious organization is subject to § 504's mandate indirectly ruled affirmatively. In Cain v. Archdiocese of Kansas City, 508 F. Supp. 1021 (D. Kan. 1981), the court denied the Archdiocese's motion to dismiss, holding that there was a factual dispute as to whether the primary objective of federal aid received was to provide employment. The court did not consider the constitutionality of the application of § 504 to the Archdiocese.

\textsuperscript{94} This definition holds that, under § 504, "programs" encompasses all of a recipient's
Employment decisions of church-related schools are under the aegis of section 504. If the second definition of "program" is adopted, it may be argued that employment decisions of church-related schools that pertain to the administration of federally assisted programs and activities are subject to section 504 regulation. Finally, if the Trageser definition of "program" is upheld, employment decisions in church-related schools that pertain to the administration of work-study programs and employment decisions under other programs that "infect" the school in such a way as to result in discrimination against handicapped students arguably could be subject to section 504. Thus, regardless of what the scope of the mandate of section 504 may be, the issues of whether church-related schools were intended to be subject to section 504, and whether such schools may be so subject in light of the first amendment, survive.

The Statute and Legislative History

The question of whether the legislature intended to subject church-related schools to section 504 may be answered by an examination of the statute's broad language. The language of section 504 does not limit its coverage to public organizations or agencies, nor does it distinguish between direct and indirect recipients of federal assistance. Rather, section 504 apparently anticipates broad coverage of all recipients of federal financial assistance. Thus, although a specific intent to include church-related schools is not evidenced in the legislative history, inclusion is inferable from the statute's sweeping language.

As direct and indirect recipients of federal aid through participation in the school lunch program, and in the aid that provides grants to children programs and activities, even those that are unsupported by federal aid. See text accompanying notes 27-28 supra.

95. Under the second definition, "program" refers only to federally assisted programs, thereby insulating employers' unassisted activities from the aegis of § 504. See text accompanying note 35 supra.

96. Trageser narrowly defined "program" under § 504 to include only those federal programs designed to provide employment. See text accompanying note 66 supra.

97. For a discussion of the infection theory see notes 67-73 and accompanying text supra.

98. See notes 1-5 and accompanying text supra.

99. See note 5 and accompanying text supra.

100. See notes 27-28 and accompanying text supra.

101. See note 5 and accompanying text supra. Prior and subsequent legislative history surrounding § 504 fails to mention church-related schools. In hearings before a House Subcommittee, David Tatel, the director of the Office for Civil Rights of HEW, stated: "The enactment of Section 504 and issuance of the implementing regulations represent a new era of civil rights in our nation, and will have an impact on virtually every public school system, university, social service agency and provider of health care in the United States." Implementation of Section 504, Rehabilitation Act of 1973: Hearings before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor, 95th Cong., 1st Sess. 311 (1977) (emphasis added).

of low income families for their special educational needs, church-related elementary and secondary schools appear to be subject to the mandate of section 504. A church-related institution of higher education may be subject to section 504 through its participation in federal tuition assistance programs such as basic educational opportunity grants, federally insured student loans, college work-study programs, and veterans' assistance.

The NLRB v. Catholic Bishop of Chicago Decision

In contrast to the legislative intent issue, the constitutionality of the application of section 504 to church-related schools is an issue that is not so easily resolved. The Supreme Court, in NLRB v. Catholic Bishop of Chicago, considered whether legislation regulating employment may be applied to church-related schools. In Catholic Bishop, the Court was confronted with the question of whether lay faculty members teaching both religious and secular subjects at minor seminaries and Catholic high schools were within the jurisdiction of the National Labor Relations Board (NLRB). The NLRB had found that the Catholic schools had violated the National Labor Relations Act by refusing to recognize or bargain with unions that were properly certified as representatives of the schools' lay faculties. The NLRB ordered the schools to cease the unfair labor practices and to bargain collectively with the unions. On appeal, the Seventh Circuit denied enforcement of the NLRB's orders, holding that the NLRB's distinction between "completely religious" and "merely religiously associated" was unworkable as a standard by which to decide whether to exercise jurisdiction over church-related institutions. The court of appeals


105. Minor seminaries are preparatory secondary schools in the Catholic seminary system. Id. at 492.

106. The National Labor Relations Board had been asserting jurisdiction over nonprofit, private secondary schools since 1971, after concluding such institutions had a sufficient and growing involvement in interstate commerce so as to be subject to the Act. See, e.g., Shattuck School, 189 NLRB 886 (1971). For a discussion of the history of the Board's treatment of private schools, see Catholic Bishop of Chicago, 440 U.S. at 497.


108. Catholic Bishop of Chicago, 224 NLRB 1221 (1976); Diocese of Fort Wayne-South Bend, Inc., 224 NLRB 1226 (1976). The separate cases were consolidated on appeal. See Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112 (7th Cir. 1977).

109. 224 NLRB 1221, 1224; 224 NLRB 1226, 1229.

110. 559 F.2d at 1118. In rejecting the standard that distinguished between "completely religious" and "merely religiously associated" institutions, the Seventh Circuit reasoned:

We find the standard itself to be a simplistic black or white, purported rule containing no borderline demarcation of where "completely religious" takes over or, on the other hand, ceases. In our opinion the dichotomous "completely religiously associated" standard provides no workable guide to the exercise of discretion.

Id.
further held that the application of the National Labor Relations Act to the Catholic schools violated the first amendment. The Supreme Court granted certiorari to consider two questions: (1) whether teachers in church-operated schools that teach religious and secular subjects are under the jurisdiction of the NLRB; and (2) if the National Labor Relations Act grants such jurisdiction to the NLRB, whether the exercise of jurisdiction violates the guarantees of the religion clauses of the first amendment.

In addressing these issues, the Court declared that it must “determine whether the Board’s exercise of its jurisdiction here would give rise to serious constitutional questions.” "If so," the Court continued, "we must first identify ‘the affirmative intention of the Congress clearly expressed’ before concluding that the [National Labor Relations] Act grants jurisdiction.” Applying this analysis, the Court first discussed whether the NLRB’s exercise of jurisdiction over a teacher who performs a “critical and unique role . . . in fulfilling the mission of a church-operated school” would possibly create a conflict with the first amendment religion clauses. Concluding that serious first amendment questions would arise out of NLRB jurisdiction, the Court turned to the National Labor Relations Act to determine whether such jurisdiction had been specifically conferred.

The Board had been following a policy of denying jurisdiction, as a matter of discretion, over church-related institutions that were “completely religious” as opposed to “merely religiously associated.” Under this policy, the NLRB restrained from exercising jurisdiction when schools were devoted exclusively to teaching religion or religious subjects. See, e.g., Association of Hebrew Teachers, 210 NLRB 1053 (1974); Board of Jewish Educ., 210 NLRB 1037 (1974). The Board asserted jurisdiction over church-related schools that provided a general education based on religious principles as well as religious instruction. See, e.g., Cardinal Timothy Manning, 223 NLRB 1218 (1976); Roman Catholic Archdiocese, 216 NLRB 249 (1975).

111. 559 F.2d at 1123, 1130. The court reasoned that because the religion clauses require that parochial schools finance without governmental aid, the clauses must require that the schools “be equally freed of the obviously inhibiting effect and impact of the restrictions of the National Labor Relations Act.” Id. at 1130.


114. Id. at 500, 501.

115. Id. at 501 (quoting Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957)). By using this mode of analysis, the Court implemented the prudential policy of avoiding a constitutional question, when possible, through statutory construction. See, e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963); Machinists v. Street, 367 U.S. 740 (1961).

116. 440 U.S. at 501. The Court anticipated serious first amendment questions primarily concerning excessive entanglement of government with religion. Id. at 502. For a discussion of entanglement, see notes 122-89 and accompanying text infra.

117. 440 U.S. at 504.

118. Id.
teachers in church-related schools, and it therefore was unnecessary to resolve the "difficult and sensitive" first amendment questions that would arise from a grant of jurisdiction.

The Applicability of Section 504 to Church-Related Schools After NLRB v. Catholic Bishop of Chicago

The mode of analysis the Supreme Court used in Catholic Bishop is particularly cogent as an approach to the problem of section 504 regulation of employment in church-related schools. Both the problem the Court faced in Catholic Bishop and the problem addressed in this Article concern the application of laws regulating employment relationships within church-related schools.

Utilizing the analysis set forth in Catholic Bishop to resolve the present questions, it first must be determined whether the application of section 504's mandate to church-related schools would raise serious first amendment questions. If constitutional questions would arise, the affirmative intention of Congress would have to be clearly expressed in order to conclude that section 504 was applicable to church-related schools.

Step One: First Amendment Problems Arising Out of the Application of Section 504 to Church-Related Schools

Entanglement

The constitutional question that arises out of the application of Section 504's nondiscrimination in employment mandate that will be discussed first is that of entanglement—the intrusion of government into the province of

119. Id. at 507.
120. Id. Justice Brennan, joined by Justices White, Marshall, and Blackmun, dissented from Chief Justice Burger's majority opinion on the ground that the majority's interpretation of the National Labor Relations Act was not "fairly possible." Id. at 511 (Brennan, J., dissenting). The dissenter reasoned that Congress expressly deemed the Act applicable to all employers, listing only eight exceptions to its otherwise all-inclusive language; church-operated schools were not among the exceptions. Id. Moreover, the dissent noted that Congress had unequivocally rejected a proposal to exclude religious organizations from the Act's coverage. Id. at 513. According to the dissenters, therefore, the majority's requirement of a "clear expression of an affirmative intention of Congress" before extending the Act to religious schools amounted to a "cavalier exercise in statutory interpretation which succeeds only in defying congressional intent." Id. at 518. Although the four dissenters concluded that the Act covered religious schools, they did not speculate as to whether the actions of the NLRB in the case violated the first amendment religion clauses' guarantees. Id.
121. At least one appellate court has followed the Supreme Court's mode of analysis. In EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981), the court considered the application of Title VII law to a seminary. The court acknowledged the Supreme Court's Catholic Bishop analysis and held that the Constitution compels the conclusion that the Equal Employment Opportunity Commission has no jurisdiction over the seminary's relationship with its faculty. Id. at 284-87.
religion. Before discussing the entanglement that arises out of the application of section 504, however, the concept of entanglement must be explored.

A. Origins of Entanglement: The Establishment Clause Applied to Parochial School Aid

The first amendment of the United States Constitution reads, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The two religion clauses of the first amendment—the establishment clause and the free exercise clause—have given rise to two distinct doctrines, both of which were developed to guarantee the implicit promises, in the first amendment, of voluntarism and of separation of church and state. The free exercise clause forbids government interference with an individual's religious beliefs. When the

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122. U.S. CONST. amend. I.

123. The principle of voluntarism operates through the free exercise clause by requiring that religious practices be voluntary, not forced or coerced, or burdened by government interference. "[T]he Free Exercise Clause . . . recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees." Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963) (prohibiting prayer and Bible-reading in public schools). Professor Tribe argues that the establishment clause also might be seen as an expression of voluntarism through the notion that advancement of a church should come only from the voluntary support of its followers, and not from governmental support. L. Tribe, American Constitutional Law 818-19 (1978).

124. See Reynolds v. United States, 98 U.S. 145, 164 (1879). The establishment clause, in the spirit of this concern for the separation of church and state, prohibits state-established religion. The Supreme Court, in Everson v. Board of Educ., 330 U.S. 1 (1946), discussed the purpose of the establishment clause:

The "establishment of religion" clause 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. Neither can force or influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or nonattendance. . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state." Id. at 15-16 (citation omitted).

Separatism also operates through the free exercise clause. As Thomas Jefferson stated, "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." Braunfeld v. Brown, 366 U.S. 599, 604 (1960) (quoting 8 Writings of Thomas Jefferson 113 (H.A. Washington, ed. 1854)).

125. A free exercise violation is premised on coercion or compulsion. Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963). "It is necessary . . . for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." Id.

126. Sherbert v. Verner, 374 U.S. 398, 402-03 (1963). In Sherbert, the Court distinguished
government restrains or interferes with conduct that is coupled with religious belief, courts employ a balancing test to determine whether the government regulation unconstitutionally burdens the free exercise of religion. The balancing test consists of weighing the burdens imposed on the individual's exercise of religion against the compelling interest of the state in enforcing the legislative scheme. The government must demonstrate not only a compelling state interest, but also that no alter-

between "religious belief" and "religious conduct." The Court emphasized that "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs." Id. at 402 (emphasis in original). The belief-conduct distinction stems from Cantwell v. Connecticut, 310 U.S. 296 (1940), where the Court stated that although the freedom to believe is absolute, the freedom to act is not. Id. at 303-04. However, because of the heightened constitutional protection afforded religious conduct, evidenced by Sherbert and Wisconsin v. Yoder, 406 U.S. 205 (1972), two cases in which the Court protected religious conduct such as not attending high school or working on the Sabbath, one scholar maintains that the belief-conduct distinction has been obscured. See Marcus, The Forum of Conscience: Applying Standards Under the Free Exercise Clause, 1973 DUKE L.J. 1217, 1234 [hereinafter cited as Marcus]. Marcus maintains that the belief-conduct distinction is referred to in opinions but largely unheeded.

127. See Sherbert v. Verner, 374 U.S. 398, 403-04 (1963) (establishing the modern free exercise balancing test). If the circumstances warrant, before balancing the Court first may make a threshold inquiry to ascertain the sincerity of the individual's religious beliefs. See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972). In Yoder, the Court held that the state could not compel Amish children to comply with compulsory school attendance laws against their parents' wishes. Id. at 234-35. The Court's decision hinged on the sincerity and depth of the Amish belief that sending their children to high school would endanger their salvation and that of their children. The Court stated:

It cannot be overemphasized that we are not dealing with . . . a group claiming to have recently discovered some "progressive" or more enlightened process for rearing children for modern life. Aided by a history of three centuries as an identifiable religious sect . . . the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs . . . and the hazards presented by the State's enforcement of a statute generally valid as to others. Id. at 235. See also Marcus, supra note 126, at 1242. Cf. cases discussed at note 148 infra (extent to which religion pervades a parochial school affects constitutionality of aid to the school).

128. See, e.g., Sherbert v. Verner, 374 U.S. 398 (1963). In Sherbert, the plaintiff, a Seventh-Day Adventist, was discharged by her employer for refusing to work on Saturday, her Sabbath day. Id. at 399. When the state denied her unemployment compensation under those circumstances, she claimed that her religious freedom had been abridged. In determining the constitutional issue, the Court balanced the plaintiff's interest in adhering to her religious scruples by declining to work on Saturday against the state's interest in protecting itself against fraudulent unemployment compensation claims. Id. at 403-07. The Court concluded that the state's asserted interest proved insufficient to justify the burden on the plaintiff's exercise of her religion. Id. at 409. For further elaboration on the free exercise balancing test, see Gianella, Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee, 80 HARV. L. REV. 1381, 1390 (1967).

First amendment scholars have criticized the Supreme Court's balancing test as formless, thus setting no rule of law to define the scope of first amendment protection of religious conduct. See Clark, Guidelines for the Free Exercise Clause, 83 HARV. L. REV. 327, 330 (1969); Marcus, supra note 126, at 1240-43.
native forms of regulation would infringe less on religious practices.\textsuperscript{129}

Under the establishment clause analysis, challenged legislation\textsuperscript{130} must meet the following three tests: (1) the legislation must have a secular legislative purpose; (2) the primary effect of the legislation must neither inhibit nor advance religion; and (3) the legislation must not foster an excessive government entanglement with religion.\textsuperscript{131} This tripartite test is designed to guarantee an effective "wall of separation" between church and state.\textsuperscript{132}

The entanglement test, as noted above, has its origin in the establishment clause. Indeed, one commentator has noted that the entanglement test has become an integral part of establishment clause analysis and has been applied by the Supreme Court as "a distinct third test,"\textsuperscript{133} an "independent measure of constitutionality."\textsuperscript{134} The Supreme Court opinions, however, fall far short of clearly illuminating what constitutes excessive entanglement.

In \textit{Walz v. Tax Commission},\textsuperscript{135} the Supreme Court introduced the concept of entanglement to help draw the line separating church and state in a society with pervasive government regulation.\textsuperscript{136} In discussing the entanglement issue in the context of tax exemptions for churches, the Court stated that the entanglement test was concerned with whether government involvement with churches is excessive and whether the involvement required "of-
ficial and continuing surveillance.” The Walz Court upheld tax exemptions for churches, as the exemptions met all three of the aforementioned establishment clause tests, including the entanglement test.

In Lemon v. Kurtzman, which involved a challenge to state statutes that aided secular elements of instruction in elementary and secondary religious schools, the Court further developed the entanglement concept. In analyzing the entanglement issue, the Court conceded that absolute separation of church and state would be impossible; some contacts between the two entities, such as through zoning regulations and compulsory school attendance laws, are necessary and permissible. Thus, while some contact between government and religion is inevitable, the role of the establishment clause “is to prevent, as far as possible, the intrusion of either [government or religion] into the precincts of the other.” Therefore, courts must ultimately determine whether the entanglement is excessive by examining “the character and purpose of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority.”

In Lemon, the Court found that the state’s determination of whether religious content was impermissibly interjected into state-aided secular instruction in church-related schools would require constant state surveillance. The Court held that this surveillance, in addition to the state inspection of schools’ expenditure records, would create such “an intimate and continuing relationship between church and state” that the statutes conferring the aid were unconstitutional.

Following its reasoning in Lemon, the Supreme Court reached a similar result in Meek v. Pittenger. In Meek, the Court held that aid to church-related schools in the form of auxiliary services and loans for instructional materials violated the establishment clause. Again, the Court emphasized

137. Id. at 674-75. The Walz Court emphasized that tax exemption did not constitute direct support for religion: “Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory and administrative standards, but that is not this case.” Id. at 675.

138. The Court reasoned that the relationship between tax exemption and establishment of religion was too remote to constitute an establishment clause violation. Id. at 675-76. In analyzing the entanglement issue the Court noted that “[t]he hazards of churches supporting government [if taxed] are hardly less in their potential than the hazards of government supporting churches. . . .” Id. at 675.

139. 403 U.S. 602 (1971).

140. Id. at 614-15.

141. Id. at 614.

142. Id. at 615.

143. Id. at 620.

144. Id. at 621.


146. Id. at 372. Auxiliary services under the challenged legislation included counseling, testing, psychological services, speech and hearing therapy, services for exceptional and educa-
the entangling consequences flowing from state attempts to ensure that aided services were free from religious content.\textsuperscript{147}

\textit{Walz, Lemon, and Meek} assess administrative entanglement in the context of aid to churches and church-related schools.\textsuperscript{148} Excessive entangle-

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    \item the entangling consequences flowing from state attempts to ensure that aided services were free from religious content.\textsuperscript{147}
    \item \textit{Walz, Lemon, and Meek} assess administrative entanglement in the context of aid to churches and church-related schools.\textsuperscript{148} Excessive entangle-
\end{itemize}
ment in these contexts manifests itself as a continuing surveillance and evaluation of religious content by government authorities.  

B. Entanglement as a Free Exercise Theory

The Supreme Court's concern about entanglement in *NLRB v. Catholic Bishop of Chicago* stemmed from circumstances similar to those in the school aid cases. In *Catholic Bishop*, the Court expressed the concern that the "very process of inquiry leading to findings and conclusions" in unfair labor practice hearings, as well as the conclusions the NLRB ultimately reached, might impinge on the first amendment religious guarantees. The Court stated that "[g]ood intentions by government [i.e., the NLRB]—or third parties—can surely no more avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining than in the well-motivated legislative efforts consented to by the church-operated schools which we found unacceptable in *Lemon, Meek, and Wolman [v. Walter]*." As in the school aid cases, the Court in *Catholic Bishop* was U.S. 736 (1976) (upholding constitutionality of noncategorized grants to sectarian colleges); *Hunt v. McNair*, 413 U.S. 734 (1973) (state issuance of revenue bonds for a Baptist-controlled college does not violate the establishment clause); *Tilton v. Richardson*, 403 U.S. 672 (1971) (sustaining constitutionality of construction grants to sectarian colleges). Entanglement concerns are minimized because the religious element is substantially less pervasive in church-related colleges than in religious secondary and elementary schools. *Roemer v. Board of Pub. Works*, 426 U.S. at 750-52, 762. *Cf. Schotten*, supra note 146, at 244 (the religious character of parochial schools is less substantial than the Court assumes). The Court in *Roemer* thus explains that the school aid cases "are better reconciled in terms of the character of the aided institution." 426 U.S. at 762 (emphasis added). *But see* note 146 *supra*. Hence, government scrutiny under § 504 of the employment practices of church-related colleges may give rise to fewer entanglement concerns than those expressed in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (minor seminaries and high schools). See notes 122-23 and accompanying text *supra*, and notes 161-77 and accompanying text *infra*.

149. The excessive entanglement test is not without its disapproving critics. Professor Giannella asserts: 

[I]f the concept of "excessive entanglement" is to be taken seriously, it raises more questions than it answers. Its broad and amorphous nature makes predictability an impossibility unless the Court refines and reduces it to more precise guidelines. The Court is not likely to do this. . . . There is the likelihood that entanglement will turn into a convenient label to help the Court announce decisions arrived at on other grounds more difficult to articulate in terms of consistent legal theory. *Giannella, Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 *SUP. CT. REV.* 147, 148. Professor Giannella seems to be almost prescient in light of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Another author has remarked that the Court has applied the entanglement test so inconsistently that the test has provided a rationalization, rather than a rationale, for Court decisions. *Schotten*, supra note 146, at 215.

150. 440 U.S. 490 (1979). In *Catholic Bishop*, the Court avoided deciding the constitutional issue of entanglement by narrowly construing the National Labor Relations Act. See note 120 and text accompanying notes 117-20 *supra*.


152. *Id.* In *Wolman v. Walter*, 433 U.S. 229 (1977), the Court held that the provision of instructional materials, equipment and field trip services to nonpublic schools was unconstitutional.
concerned with government evaluation of religious content. Specifically, the Court questioned the constitutionality of the NLRB's scrutiny of reasons for the discharge or discipline of a teacher-union member coupled with continuing surveillance of school operations.153

The implicit application of the entanglement theory in NLRB v. Catholic Bishop demonstrates that entanglement theory is relevant not only in evaluating establishment clause problems, but also in evaluating free exercise clause problems.154 The problem in Catholic Bishop arose because of the special church-teacher relationship in church-operated schools, where the teacher plays "a critical and unique role . . . in fulfilling the mission" of the school.155 The potential entanglement involved in this kind of situation, as opposed to that in the provision of aid to a parochial school, concerns encroachment on the right of church-operated schools to direct their teachers. Thus, implicit in the reasoning and holding of the Supreme Court is a recognition that entanglement theory is useful in guaranteeing free exercise of religion under the first amendment.

The Fifth Circuit has adopted this entanglement reasoning in its review of free exercise challenges to government regulation of the employment practices of religious institutions. In McClure v. Salvation Army,156 the Fifth Circuit declared that the application of Title VII to the employment practices of the Salvation Army regarding its "officers" [ministers]157 in the Army's Public Relations Department violated the first amendment free exercise guarantee. The court was concerned that, under Title VII, regulation of the employment relationship between a church and its ministers would result in excessive government entanglement with religion. Such regulation would entail government intervention into substantive ecclesiastical matters and matters of church administration that lie at the "heart of any religious organization." The coercive effect implicit in such government involvement,
the *McClure* court concluded, could only produce "the very opposite of that separation of church and state contemplated by the First Amendment." Since application of Title VII to the employment relationship between the Salvation Army and its officers would violate the free exercise guarantee, the court held that Congress could not have intended to regulate that employment relationship, and dismissed the complaint for want of jurisdiction. In essence, the *McClure* court applied the same analysis that the United States Supreme Court later promulgated in *NLRB v. Catholic Bishop of Chicago*—that government regulation of the employment practices of religious institutions will be permitted only when Congressional legislation clearly expresses this affirmative intention.

In *EEOC v. Mississippi College*, a Mississippi district court denied enforcement of a subpoena the EEOC issued in connection with a charge of discrimination that a female assistant professor had filed against a Baptist college. In so ruling, the district court implied that conferring jurisdiction on the EEOC to investigate the college's employment decision regarding the female professor would result in excessive entanglement of the government with religion.

On appeal, the Fifth Circuit held that application of Title VII to the college violated neither the establishment clause nor the free exercise clause of the first amendment. The court found the *McClure* construction of Title VII—that excessive entanglement would result from the application of Title VII to the employment relationship between a seminary and its ministers—uncontrolling with regard to the employment relationship between the college and its faculty and staff. The court noted that, unlike the employment of ministers in *McClure*, the employment decisions of the college regarding its faculty members were not "matters of church administration and government . . . purely of ecclesiastical cognizance." The

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158. *Id.* at 560.

159. *Id.* at 560-61. *See also* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500-02 (1979) (because of the lack of express intention by Congress to confer on the NLRB jurisdiction over parochial schools, the Court would not infer intent due to the risk of infringement of the religion clauses); *EEOC v. Mississippi College*, 626 F.2d 477, 485 (5th Cir. 1980) (the purpose of § 702 of Title VII is to deprive the EEOC of jurisdiction when its exercise would infringe the religion clauses), *cert. denied*, 453 U.S. 912 (1981).

160. For a discussion of the *Catholic Bishop* case, see notes 104-21 and accompanying text *supra*.


164. 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972). *See notes* 156-60 and accompanying text *supra*.

165. 626 F.2d at 485.

166. *Id.* (quoting McClure v. Salvation Army, 460 F.2d 553, 555 (5th Cir. 1972)).
faculty members did not perform a religious function other than as “exemplars of practicing Christians.” The court accordingly held that Title VII could be applied to the employment relations of the college regarding its faculty without unconstitutionally entangling the government with religion.

A recent Fifth Circuit decision clarifies that court's interpretation of the constitutional problems attendant to the application of employment laws to religious institutions. In EEOC v. Southwestern Baptist Theological Seminary, the court addressed the question of whether Title VII conferred jurisdiction on the Equal Employment Opportunity Commission to regulate and review a Baptist seminary's employment practices. The district court considered the case to constitute “a pure question of entanglement” and held that application of Title VII to the employment relationships between the Seminary and its faculty and support personnel infringed upon its right of free exercise under the first amendment. The district court had noted that the Seminary's employment decisions were “steeped in a perception of divine will,” making them “inseparable from its mission.” In light of this, the district court reasoned that enforcement of Title VII claims against the Seminary would lead to excessive government entanglement with religion “in the process of dissecting [the Seminary's] employment functions into religious and secular components. . . .”

The Fifth Circuit affirmed the district court's conclusion regarding the Seminary's relationship with its faculty and reversed the district court as to support personnel. The court discussed McClure and Mississippi College at length, and concluded that the pervasively sectarian nature of the Southwestern Baptist seminary and the important religious functions of the faculty required exemption from Title VII for those employees. The

167. 626 F.2d at 485. The court's distinction of McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972), is unsatisfactory. The plaintiff in McClure, although titled "minister," was a secretary in the Salvation Army's Territorial Headquarter's Public Relations Department. Id. at 555. The lesson of Mississippi College and McClure, therefore, is that a religious organization can exempt itself from Title VII by awarding religious titles to its employees.

168. 626 F.2d at 485.


170. See note 10 supra.

171. 485 F. Supp. at 259. The court identified that question as "whether the religious exemption contained in Title VII of the Civil Rights Act [42 U.S.C. § 2000e-1 (1976)] is adequate when applied to a seminary to assure the degree of separation between church and state required by the free exercise clause of the first amendment." 485 F. Supp. at 259. The court stated that as a pure question of entanglement, the issue could not be "obviated by statutory construction in the manner of NLRB v. Catholic Bishop of Chicago." Id.

172. Id. at 260.

173. Id. at 261.

174. Id.

175. 651 F.2d at 284-87.

176. Id.
Seminary's relationship with support and certain administrative staff was held to be subject to the jurisdiction of the EEOC. Thus, in the Fifth Circuit, it is the religiosity of the institution and the role the employee plays in the sectarian function of the institution that determines whether the application of Title VII to the employment relationship is constitutionally permissible.

Not all federal courts addressing the employment-entanglement question have agreed that the application of Title VII to teachers in religious institutions would unconstitutionally entangle government with religion, as did the courts in *Southwestern Baptist Theological Seminary* and *McClure*. A district court had declared that the application of Title VII to a religious high school's employment practices relating to its teachers did *not* excessively entangle government with religion and denied the school's motions to dismiss and for summary judgment. In *Dolter v. Wahlert High School*, a Catholic high school teacher had been discharged because she was single and pregnant, apparently having violated the religion's prohibition of premarital sex. The District Court for the Northern District of Iowa, applying the analysis set forth in *Catholic Bishop of Chicago*, first found the affirmative intention of Congress to include church-related schools in its ban on discrimination on the basis of race, color, sex, or national origin. The court then rejected the school's claim that application of Title VII to this employment practice resulted in excessive entanglement in violation of the first amendment free exercise clause. The court noted that application of Title VII would not necessitate review of the Catholic Church's doctrine or moral code, but only a determination of whether its employment criteria were imposed equally on men and women.

C. Entanglement Theory as Applied to Section 504

Regulation of employment relationships under section 504 is similar to that under Title VII, although the enforcement schemes differ. Under sec-

177. *Id.*
178. 483 F. Supp. 266 (N.D. Iowa 1980).
179. *Id.* at 269.
180. *Id.*
181. Governmental regulation of employment relationships in religious institutions under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. III 1979), has been found to be constitutionally permissible. See, e.g., Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879 (7th Cir.), *cert. denied*, 347 U.S. 1013 (1954); Marshall v. Pacific Union Conf. of Seventh-Day Adventists, 14 Empl. Prac. Dec. 5956 (C.D. Cal. 1977). However, government regulation under § 504 is more similar to that under Title VII than that under the Fair Labor Standards Act (FLSA), as Title VII and § 504 require a more pervasive investigation into and evaluation of employment decisions that may be related to the schools' religious mission. Although some inquiry into employment decisions is made under the FLSA, it is far less intrusive into the schools' religious functions. This is because the FLSA seeks merely to ensure that all employees are paid the minimum wage and overtime compensation without further inquiry into the employer's decisions. See also Comment, *Are Churches Above the Law? The Application of the Fair Labor Standards Act and the Equal Pay Provisions of Title VII to Religious
tion 504, an official of the Department of Health and Human Services conducts a periodic review of recipients to ensure compliance with the mandates of section 504. If an individual files a written complaint alleging discrimination, a Department official conducts an investigation of the charge and attempts to resolve the matter informally through conciliation and voluntary compliance. If the recipient still refuses to comply, after an opportunity for a hearing, federal assistance will be terminated upon an express finding of discrimination on the record. Thus, an inquiry into an alleged unlawful employment practice under section 504 is similar to an inquiry into an alleged unlawful employment practice under Title VII, which is in turn similar to an inquiry into unfair labor practice allegations under the National Labor Relations Act.

The inquiry into employment practices under either Title VII or section 504 can be seen as most potentially damaging to the first amendment free exercise guarantee when the motive behind an employment decision is at issue. A first amendment problem develops when a church-related school teacher alleges that discrimination on the basis of handicap motivated his or her discharge or discipline, but the church-related school maintains that the reason for the school's decision was that the teacher was not capable of fulfilling his or her role in the religious mission of the school. In such cases, the government may be called upon to inquire into and evaluate the validity of the church-related school's motivation. This type of inquiry and evaluation may constitute an entangling breach of the "wall of separation" constructed by the first amendment.

In light of the significant risk of a first amendment violation, section 504 should not be construed as encompassing the employment relationship between a church-related school and its teachers. Whether section 504 should be construed as encompassing the employment relationships between church-related schools and their nonteaching employees would depend on the function of the employee in relation to the church's mission.

Organizations, 40 U. Pitt. L. Rev. 465 (1979) (both the FLSA and Title VII are reconcilable with the first amendment).

182. 45 C.F.R. § 80.7(a) (1980).
183. Id. § 80.7(b).
184. Id. § 80.7(d).
185. Id. § 80.8(c).
186. Title VII provides for an EEOC investigation into charges and an attempted conciliation between parties. If no conciliation is reached, the grievant is allowed to bring suit against the employer. 42 U.S.C. §§ 2000e-5(b) (1976).
187. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979), for a discussion of the inquiry into and resolution of unfair labor practices as potentially impinging on first amendment rights.
188. See notes 181-87 and accompanying text supra.
189. See, e.g., King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir. 1974) (upholding an FCC antibias regulation as applied to job positions having no substantial connection with program content and positions under programs having no religious dimension); EEOC v. Pacific Press Publishing Ass'n, 21 Empl. Prac. Dec. ¶ 30, 522 (N.D. Cal. 1979) (a religious publishing
Conditioning a Benefit on a Burden to Free Exercise

Another first amendment problem that would arise should section 504 be held applicable to church-related schools concerns the constitutionality of conditioning a benefit on a burden to free exercise rights. In this situation, federal financial assistance in the form of school lunches and tuition assistance is conditioned on the requirement of incurring substantial expenditures to retrofit buildings or to otherwise accommodate handicapped employees. The requirement of enduring the potentially entangling regulation of employment relationships places a further burden on the receipt of financial assistance.

The United States Supreme Court addressed the constitutionality of conditioning a benefit on a burden to free exercise rights in *Sherbert v. Verner*. The appellant, Sherbert, was a Seventh-Day Adventist discharged by her employer because she would not work on Saturday, the Sabbath day of her religion. Because of her inability to work on Saturday, she was unable to find new employment after her termination. She then filed a claim for unemployment compensation benefits, which the South Carolina Employment Security Commission rejected. The County Court of Common Pleas and the South Carolina Supreme Court affirmed the Commission’s finding that she was ineligible for unemployment compensation benefits because she failed to accept available and suitable work.

By declaring Sherbert ineligible for benefits, the state courts that reviewed the Commission’s decision rejected Sherbert’s constitutional claim that the determination of ineligibility infringed on her freedom to observe her religious beliefs. The United States Supreme Court reversed, holding that the disqualification for benefits burdened, albeit indirectly, the appellant’s free exercise of her religion. Furthermore, South Carolina could advance no compelling state interest in the present enforcement of the Act’s eligibility provision sufficient to justify the substantial infringement of Sherbert’s first amendment rights. In its discussion of the burden on free exercise rights,
the Court declared: "It is too late in the day to doubt that the liberties of religion and expression may [not] be infringed by the denial of or placing of conditions upon a benefit or privilege." The Court stated further that conditioning the availability of benefits on the appellant's willingness to violate a central principle of her religious faith effectively penalized the free exercise of her constitutional freedoms.

The burden on the free exercise rights of church-related schools that compliance with section 504 imposes is not as clear-cut and obvious as the burden on free exercise Sherbert faced in her quest for unemployment compensation. The burden in the church-related school context results from the need for church-related schools to retrofit buildings or to otherwise accommodate handicapped employees. This retrofit of school facilities or provision of services typically calls for substantial expenditures drawn from

196. Id. at 404. The Court cited a long line of cases invalidating conditions and qualifications upon governmental privileges and benefits because of their tendency to inhibit constitutionally protected activity. Id. at 404-05 n.6. One of the cases cited by the Sherbert Court was American Communication Ass'n v. Douds, 339 U.S. 382 (1952). In Douds, the Court rejected the NLRB's argument that the noncommunist affidavit requirement of the Taft-Hartley Act did not raise a problem under the first amendment because the Board's sole sanction against the noncomplying union was withdrawal of the privilege of using its facilities. Justice Frankfurter wrote, "Congress may withhold all sorts of facilities for a better life but if it affords them it cannot make them available in an obviously arbitrary way or exact surrender of freedoms unrelated to the purpose of the facilities." Id. at 417 (Frankfurter, J., concurring except as to Part VII). See also Wilcox, Invasions of the First Amendment Through Conditioned Public Spending, 41 CORNELL L.Q. 12, 39 (1955) (discussion of Douds). Cf. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (residency requirement as a condition to an indigent's receipt of non-emergency hospitalization or medical care burdens the right to travel); Shapiro v. Thompson, 394 U.S. 618 (1969) (denial of welfare assistance to individuals with less than one year residency held unconstitutional). See generally Note, Unconstitutional Conditions, 73 HARV. L. REV. 1595 (1960) (discussion of the traditional bases used to justify the imposition of conditions on governmental benefits).

197. 374 U.S. at 406. The Sherbert Court declared:

This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."

198. See note 85 supra for a discussion of estimates of the cost of complying with § 504 for the public school system.

199. The burden on an employer under § 504 is to "reasonably accommodate" handicapped employees. The notion of "reasonable accommodation" includes a consideration of the burden
coffers that depend on the pockets of the parents of attending children and on the church that supports the school for replenishment. Money spent on such accommodation is necessarily directed away from the schools' raison d'être—the furthering of the school's religious mission. Unlike public schools, church-related schools do not have the privilege of tapping tax revenues to meet the costs of complying with section 504. In fact, many kinds of general aid to those schools that could lighten the burden of complying with section 504 by assisting secular instruction have been held to be impermissible due to the school's religious nature. Thus, because of the funding scheme of church-related schools, the condition placed on federal financial assistance by section 504 burdens the church-related schools' ability to carry out their religious missions.

Compliance with section 504 burdens free exercise in another way. As discussed above, there is the potential for entangling governmental regulation of employment decisions if section 504 is held applicable to church-related schools. Requiring church-related schools to endure such potentially entangling regulation as a condition of the acceptance of federal financial assistance would require the schools to sacrifice those free exercise rights that protect the employment relationships between the schools and their teachers, and possibly between the schools and their other employees.

Although the burdens on free exercise rights of church-related schools discussed above may be more indirect than the burden on free exercise in Sherbert v. Verner, there is a similarity between Sherbert and the application of section 504 to church-related schools that favors exempting church-related schools from the purview of section 504. The plaintiff, in Sherbert, was the direct beneficiary of the unemployment compensation benefits that she sought to receive without having to sacrifice her religious freedom. In the church-related school context, the students are the direct beneficiaries of

on the employer. 45 C.F.R. § 84.12 (1981). Unfortunately, a meaningful determination as to undue burden is precluded by the absence of statutory guidelines to assist the Department of Health and Human Services (HHS) in assessing the burden on a school.

200. Church-related schools often operate at a deficit. For example, each of the five Indiana Catholic high schools involved in Catholic Bishop operated at a substantial deficit, which was met by direct contributions from the parishes in the Diocese. Brief for Respondent at 10 & n.9, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).


203. See note 146 supra.

204. See notes 181-89 and accompanying text supra.

205. See notes 156-89 and accompanying text supra.

206. But see note 189 supra.
federal assistance in the form of school lunches and remedial reading and tuition assistance that the church-related schools seek to provide without a compromise of their religious mission. Therefore, to prohibit such federal assistance to church-related schools arguably would burden the students' first amendment free exercise rights to choose a sectarian school. In sum, the essence of the "conditioning a benefit on a burden" problem is that the government cannot make the receipt of federal benefits contingent upon the school's compliance with regulations that require the sacrifice of constitutional freedoms.207

The potential for infringement of first amendment rights arises most readily with the section 504 ban on discrimination on the basis of handicap because, unlike the race or sex discrimination proscriptions, compliance with section 504 may require a substantial outlay of funds. Requiring a church-related school to expend large sums constitutes a sacrifice of religious freedom in that the limited funds of the school must be directed away from the fulfillment of its religious mission if the school hopes to provide its students with the benefits from what little federal aid is permissible. In light of this heavy burden attendant on the acceptance of federal benefits, the application of section 504 to church-related schools may be deemed unconstitutional.208 To avoid these serious constitutional questions, a court should adopt the reasoning of NLRB v. Catholic Bishop of Chicago209 and narrowly interpret section 504 as inapplicable to church-related schools.

**Step Two: Examining Section 504 and Its Legislative History for the "Affirmative Intention of the Congress Clearly Expressed"**

Under Step One, the first amendment problems arising from the application of section 504 to church-related schools were discussed. The discussion of the problems of excessive entanglement and conditioning a benefit on a burden revealed that the application of section 504 to church-related schools would give rise to serious constitutional questions. Under NLRB v. Catholic Bishop of Chicago, this risk of encountering constitutional problems requires the court to identify "the affirmative intention of the Congress clearly expressed" to include church-related schools within the proscription of section 504.

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207. The court in EEOC v. Southwestern Baptist Theological Seminary, 485 F. Supp. 255 (N.D. Tex. 1980), aff'd and rev'd on other grounds, 651 F.2d 277 (5th Cir. 1981), held that a seminary did not waive first amendment objections by seeking and accepting veterans who were receiving veteran's assistance. See notes 169-77 and accompanying text supra. Similarly, by accepting federal assistance, church-related schools do not consent to infringement of their religious liberty.

208. See generally Wilcox, Invasions of the First Amendment Through Conditioned Public Spending, 41 CORNELL L. REV. 12 (1955) (examination of conditions that are so far removed from benefits or employment that they could be unconstitutional).

As discussed above, section 504 was drafted in broad terms lacking any specific definition of the meaning of "program" or "recipient" as used therein.\(^{210}\) Furthermore, there is no discussion of the application of section 504 to church-related schools in the sparse legislative history of that section.\(^{211}\) Therefore, it cannot be maintained that the "affirmative intention of the Congress clearly expressed" in drafting section 504 was to include church-related schools within the scope of section 504.\(^{212}\) Absent such a congressional intent, the reasoning of \textit{NLRB v. Catholic Bishop of Chicago}\(^{213}\) supports a narrow construction of section 504 as inapplicable to church-related schools, and thus avoids any potential constitutional infrac-

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If narrowly construed, section 504 would be inapplicable to church-related schools and first amendment free exercise problems can be avoided. Exempting church-related schools from section 504, however, gives rise to another constitutional problem. Specifically, such an exemption arguably operates in favor of religion in violation of the establishment clause.\(^{214}\)

Justice Stewart, in his opinion concurring in the result in \textit{Sherbert v. Verner},\(^{215}\) noted that "there are many situations where legitimate claims under the Free Exercise Clause will run into a head-on collision with . . . the Establishment Clause."\(^{216}\) Justice Stewart further noted that "[t]he ob-

\[210.\] See notes 5-24 and accompanying text \textit{supra} for a discussion of § 504 and its legislative history.
\[211.\] See note 101 \textit{supra}.
\[212.\] Contrast § 504 with Title VII, where there was some intention expressed as to the coverage of religious institutions. \textit{See} 42 U.S.C. § 2000e-1.
\[213.\] See notes 104-20 and accompanying text \textit{supra}.
\[214.\] For a discussion of the establishment clause see notes 130-49 and accompanying text \textit{supra}.
\[216.\] 347 U.S. at 414.
\[217.\] \textit{Id.} at 414 n.2.
Since Justice Stewart observed in *Sherbert* that the Court had ignored the tension between the free exercise and establishment clauses of the first amendment, the Court has attempted to address the potential for conflict in a principled manner. In *Walz v. Tax Commission*, the Court considered a constitutional challenge to the exemption from property tax of real or personal property used exclusively for religious purposes. In determining the validity of the challenge that the tax exemption advanced religion in violation of the establishment clause, the Court considered the purpose of and the relationship between the free exercise and establishment clauses. The basic purpose of these provisions, the Court noted, is "to insure that no religion be sponsored or favored, none commanded, and none inhibited." Short of these constitutionally proscribed governmental acts, there would appear to be some range of neutral activity in which the government could constitutionally engage. The notorious internal inconsistency of the Court's first amendment opinions has resulted from what the Court viewed in retrospect as "too sweeping utterances" made in previous cases regarding the scope of the two religion clauses. The *Walz* Court attempted to establish a zone of "benevolent neutrality that will permit religious exercise to exist without sponsorship and without interference" through a formulation of the "accommodation theory."


220. Chief Justice Burger delivered the opinion of the Court. Justice Brennan wrote a concurring opinion; Justice Harlan a separate opinion; and Justice Douglas a dissenting opinion.

221. The property tax exemption also applied to property used for charitable, philanthropic, educational, hospital, and other purposes. 397 U.S. at 667, n.1.

222. *Walz* reasoned that, by granting a tax exemption to church property, the New York Tax Commission indirectly compelled him to contribute to religious bodies in violation of the first and fourteenth amendments. *Id.* at 667.

223. *Id.* at 669.

224. *Id.*

225. *Id.* See Note, Government Neutrality and Separation of Church and State: Tuition Tax Credits, 92 HARV. L. REV. 696 (1979). The author of this Note characterized the Court's opinion in *Walz* as a "paradigm of balancing" between separation and neutrality. *Id.* at 710.

226. 397 U.S. at 669. See P. KAUPER, RELIGION AND THE CONSTITUTION 67-79 (1964) [hereinafter cited as KAUPER]. Professor Kauper defines accommodation theory as:

The theory that any limitations derived from the establishment limitation cannot be rigidly applied so as to preclude all aid to religion or to require absolute neutrality, that questions arising under the establishment limitation cannot be viewed in isolation from the free exercise guarantee, and that in some situations government *must*, in other situations *may*, accommodate its policies and laws in the furtherance of religious freedom.

*Id.* at 59 (emphasis in original). Professor Kauper marks Zorach v. Clauson, 343 U.S. 306 (1952), as the first expression of the accommodation theory. KAUPER, supra, at 67. Zorach involved the practice in New York City public schools of permitting students, at the request of their parents, to leave school buildings and grounds to attend religious instruction at religious centers, while compelling all other students to remain in their classrooms. In upholding this practice against free exercise and establishment clause attacks, the Court noted that the practice involved neither religious instruction in public schools, nor an expenditure of public funds,
The Walz Court, however, provided little guidance as to exactly how the accommodation theory should be applied. Thus, it is necessary to look to the comments of observers and other United States Supreme Court opinions to develop further the concepts of "benevolent neutrality" and "accommodation" as means of resolving first amendment conflicts.

The principle of benevolent neutrality has been characterized by one commentator as a "judicially-created concept [that] . . . balances free exercise against establishment and is weighted in favor of free exercise." Another commentator describes the accommodation principle as "the judicial vehicle for harmonizing the two clauses in the interests of this larger and benevolent neutrality which in an overall sense is directed to the end of protecting and advancing religious liberty." Both commentators would limit the application of the principle of benevolent neutrality at the point of state "involvement" or "entanglement" with religion.

Benevolent neutrality, as a principle of decision, can be seen operating in the case of Sherbert v. Verner, although the Court did not name the principle until several years after Sherbert. The claimant in Sherbert was but merely an adjustment of the schedules of these schools. 343 U.S. at 315. The Court pointed out that to hold that the state may not accommodate the spiritual needs of its people would be to "find in the Constitution a requirement that the government show a callous indifference to religious groups." Id. at 314.

Professor Katz suggests that neutrality, as guaranteed by the first amendment, means that in some instances, government must aid religion to avoid placing religion at a disadvantage and thereby limiting the full enjoyment of religious liberty. See Katz, Freedom of Religion and State Neutrality, 20 U. Chi. L. Rev. 426 (1953). Professor Kauper noted that accommodation principles recognize the "larger neutrality" posited by Professor Katz. Kauper, supra, at 71. See also Kauper, Schenck and Sherbert: Studies in Neutrality and Accommodation, in Religion and the Public Order 3, 27-28 (D. Giannella ed. 1963) (discussing the concept of a "larger and benevolent neutrality") [hereinafter cited as Studies in Neutrality].

227. Excessive Entanglement, supra note 218, at 373. See also Studies in Neutrality, supra note 226, at 16.


229. See Studies in Neutrality, supra note 226, at 28, where Professor Kauper states that "accommodation of laws and programs in furtherance of religious liberty cannot be carried to the point where it swallows up the establishment limitation. The accommodation theory is limited by the involvement principle."

230. See Excessive Entanglement, supra note 218, at 374. The author notes:

The acceptance of benevolent neutrality indicate[s] the Court's intention to allow the greatest possible area in which free exercise could flourish; at the same time, the development of the entanglement test indicate[s] the Court's concern that the involvement allowed under benevolent neutrality would not constitute a violation under the establishment clause.


granted a special exemption so as to protect her religious liberty.\textsuperscript{233} In rejecting the establishment clause claims raised by the granting of a special exemption, the Court reasoned that the "extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation to neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."\textsuperscript{234} One commentator interpreted the \textit{Sherbert} holding as implying that "in some instances, in spite of the prohibition against establishment, the free exercise clause requires the legislature to grant a special religious exemption to accommodate the free exercise rights of the individual..."\textsuperscript{235}

The establishment clause problem caused by granting a special exemption from section 504 to church-related schools—an exemption purportedly compelled by the free exercise clause—gives rise to a conflict between the apparent demands of the religion clauses which may be resolved under the principle of benevolent neutrality. As illustrated in \textit{Sherbert},\textsuperscript{236} the concept of benevolent neutrality requires that, in evaluating the exemption of church-related schools from the section 504 mandate of nondiscrimination in employment under federally assisted programs, the conflicting establishment and free exercise concerns be weighed and balanced against each other, with the balance favoring the protection of free exercise. The free exercise concerns, which purportedly would require an exemption from section 504 for church-related schools, are the excessive entanglement and interference of government with the relationship between the church-related schools and their teachers and other sectarian employees,\textsuperscript{237} and the impermissible conditioning of a benefit on a burden to free exercise rights.\textsuperscript{238} The granting of an exemption creates establishment clause problems because this privilege permits church-related schools to receive federal benefits such as school lunches and tuition assistance for students without incurring the substantial expenditures that compliance with section 504 might require. Weighing the free exercise concerns against the establishment concern requires making a subjective judgment as to the importance and seriousness of each concern. The free exercise concerns appear substantial in light of

\begin{itemize}
\item \textsuperscript{233} 374 U.S. at 409-10. For a discussion of \textit{Sherbert} see notes 190-97 and accompanying text \textit{supra}.
\item \textsuperscript{234} 374 U.S. at 409.
\item \textsuperscript{235} \textit{Excessive Entanglement, supra} note 218, at 372-73 (footnotes omitted) (emphasis in original).
\item \textsuperscript{236} 374 U.S. 398 (1963). \textit{See also} Thomas v. Review Bd., 450 U.S. 707 (1981); Widmar v. Vincent, 102 S. Ct. 269 (1981). The \textit{Widmar} Court held that religious groups should have access to open forum facilities at a state university. The Court analyzed the problem as one of content-based regulation of speech. The Court also noted that religious groups possibly will benefit from access to the university's facilities, implicitly applying the principles of benevolent neutrality. 102 S. Ct. at 274.
\item \textsuperscript{237} \textit{See} notes 181-89 and accompanying text \textit{supra}.
\item \textsuperscript{238} \textit{See} notes 190-207 and accompanying text \textit{supra}.
\end{itemize}
the religious mission of church-related schools and the importance to that mission of sectarian control over the choice of who will inculcate religious values in students of church-related schools. The free exercise concerns gain further weight in view of the pressure that would be placed on church-related schools to compromise their religious mission to provide their students with federal tuition assistance and school lunches. In contrast, the establishment clause concern is made substantially less significant by the constitutionally mandated limitation on the amount and nature of federal aid that church-related schools may receive. The establishment concern is further weakened because, in most instances, federal aid directly benefits the students and only indirectly benefits the schools. Thus, the balance appears to be best achieved by granting the exemption.

Although the principle of benevolent neutrality arguably would require that church-related schools be granted an exemption from the section 504 mandate of nondiscrimination in employment under federally assisted programs, such an exemption results in inequitable treatment of nonreligious private schools. To minimize this inequity, it is suggested that Congress and agencies implementing section 504 should redefine "recipient" to exclude institutions that benefit only indirectly from federal assistance, and courts and implementing agencies should adopt a definition of "program" that requires that the mandate of section 504 apply only to those programs and activities that are federally assisted.

239. See note 201 supra.

240. Justice Stevens, in his dissent in Roemer v. Board of Pub. Works, 426 U.S. 736 (1976), emphasized "the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it. The disease of entanglement may infect a law discouraging wholesome religious activity as well as a law encouraging the propagation of a given faith." Id. at 775.

241. See notes 130-49 and accompanying text supra.

242. See notes 102-03 and accompanying text supra.

243. See text accompanying note 88 supra. The Department of Health, Education and Welfare (now, Health and Human Resources) has shown some willingness to restrict the definition of "recipient," but appears to take away with one hand what it gives with the other. In its Analysis of Final Regulation, HEW states:

One other comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's regulations implementing Title VI and Title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of § 84.4(b)(iv), which prohibits recipients from assisting [sic] agencies that discriminate on the basis of handicap in providing services to the beneficiaries of the recipients' programs.


244. See notes 35-56 and accompanying text supra.
Section 504 mandates nondiscrimination on the basis of handicap in employment "under programs or activities receiving Federal financial assistance."245 The scope of this mandate was not made clear by the legislature and is in dispute. The preferred definition of the scope of section 504 is one that would apply section 504 only to those programs or activities specifically receiving federal assistance. Where an institution or organization receives this type of federal assistance, but in such large amounts that it would not be possible to segregate the assisted from the unassisted programs and activities, all of the employment practices of the recipient should be subject to section 504.

However, the application of the section 504 nondiscrimination in employment mandate to church-related schools raises serious constitutional questions of entanglement and of the conditioning of a benefit on a burden. Therefore, under the NLRB v. Catholic Bishop of Chicago free exercise analysis, the Act should be examined to determine whether "the affirmative intention of the Congress clearly expressed"246 was to include church-related schools. Such an examination reveals no affirmative congressional intent to include church-related schools within the purview of section 504. Therefore, section 504 should be narrowly interpreted to exclude church-related schools from its mandate.

The granting of an exemption from section 504 to church-related schools to avoid free exercise problems gives rise to an establishment clause problem. The conflict between the two religion clauses of the first amendment may be resolved by applying the accommodation principle of benevolent neutrality. The application of the principle of accommodation to this conflict would justify the exemption of church-related schools from the section 504 mandate.
