Articles and Essays

THE RELIGIOUS AND ASSOCIATIONAL FREEDOMS OF BUSINESS OWNERS

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May private employers who are not exempted from Title VII[1] as religious employers but who nonetheless wish to pursue a niche market of catering to and advocating a narrow theological orientation employ only those with a shared religious practice or belief? Recent United States Supreme Court decisions have strengthened free exercise[2] hybrid rights[3] and, in particular, freedom of association,[4] which necessarily contracts the reach of antidiscrimination legislation.[5] The theoretical parameters of these decisions grant currently non-exempt religious employers, albeit perhaps unintentionally, the constitutionally protected right to promote religion and exert their associational freedoms through their employment decisions, in particular the decision to hire only those individuals who share and who are willing to promote the employer's religious beliefs and values.[6]

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1. 42 U.S.C. § 2000e (2000).

2. U.S. CONST. amend. I.

3. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 881 (1990) (linking free exercise rights with other constitutional protections that, conjoined, receive heightened scrutiny); *see* William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211 (1998) (discussing hybrid rights).

4. U.S. CONST. amend. I.

5. References to antidiscrimination legislation in employment are meant to reference Title VII and state statutes, many of which simply mirror the provisions of Title VII. This general reference also incorporates federal civil rights statutes prohibiting discrimination on other grounds and their state counterparts. *See, e.g.*, Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000) (prohibiting discrimination on the basis of disability, record of disability, or perceived disability); Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2000) (prohibiting discrimination on the basis of age involving employees over forty years of age); Equal Pay Act, 29 U.S.C. § 206(d) (2000) (prohibiting wage discrimination based on gender). Courts routinely interpret these statutes and their respective enforcement schemes consistently with Title VII.

6. *See infra* Part III.C.

That the employer devoted to employing co-religionists has emerged as the chief beneficiary of *Smith*'s[7] lowering the scrutiny of government intrusion in free exercise claims may be ironic, but it is a result following the emergence of expressive association as a trump to antidiscrimination legislation in *Dale*.[8] Thus, the end of the *Sherbert*[9] era did not necessarily bring about a wholesale defeat for the free exercise of religion but instead is marked by an expanding definition of religion and a resurgent commitment to less encumbered associational freedoms, which have created a super-hybrid protecting the employment decisions of those business owners with a devotion that is considered religious.

This super-hybrid right has important implications for the private employer who chooses co-religionist employees over otherwise qualified individuals to promote a religious message. While clearly not overwhelming in their representation in American business, such companies can and do enter the marketplace. In *EEOC v. Preferred Management Corp.*[10] the owners of a home health care agency were born again Christians who adhered to "The Great Commission," a religious directive to go into the world and share their faith.[11] "The world" includes their workplace.[12] Can these business owners hire only co-religionists who share their faith and who will promote their religious beliefs to their clients while at the same time functioning as home health care providers?[13] A second related, yet distinct, example of an employer whose behavior implicates the constitutional issues addressed in this Article is the business owner whose religious worship requires substantial time diverted from the typical workday. For this reason, the business is designed to accommodate the employment needs of co-religionists. Any positions filled by a non-adherent to this belief system results in one less employment opportunity for a co-religionist, who must then choose between worshiping according to the religion's beliefs and earning a livelihood. Therefore, the owner reserves all positions for co-religionists.

These scenarios are raised by the nexus of three strains of constitutional jurisprudence: free exercise, the Establishment Clause, and

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7. *Smith*, 494 U.S. at 883.

8. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

9. Sherbert v. Verner, 374 U.S. 398 (1963).

10. 216 F. Supp. 2d 763 (S.D. Ind. 2002).

11. *Id.* at 772–73; *see Matthew* 28:19-20 (King James) ("Go ye therefore, and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost. Teaching them to observe all things whatsoever I have commanded you. . . .").

12. *Preferred Mgmt. Corp.*, 216 F. Supp. 2d at 773.

13. The facts of *Preferred Management* do not raise this precise issue because the owners of the home health care agency knowingly hired both adherents and non-adherents to their belief system and then subsequently tried to convert the non-adherents. *Id.* ("Preferred employs an 'evangelism and discipleship' subcommittee whose members have prayed for the salvation of employees.").

freedom of association. We do not advocate for an expanded understanding of these constitutional protections. Instead, we present the recent Supreme Court rulings that have broadly interpreted an organization's expressive association rights. This Court's broader application of freedom of association has significant impact when considered with a free exercise of religion claim. This Article urges a consideration of the impact of the super-hybrid right on civil rights legislation before constitutional jurisprudence forces an unexamined conclusion.

At the very core of this issue is the question of constitutional tension between freedom and equality.[14] In particular, religious diversity is a constitutional strength and conundrum because tolerance for religious beliefs does not promote necessarily tolerant religious beliefs. *Dale* portends an important shift in the constitutional balance toward promoting associational freedom over equality.

This Article argues that deference toward both religious and associational freedoms need not eclipse equality protections. In light of the free exercise hybrid right created – even if inadvertently – by the Court's recent decisions, the context of Title VII antidiscrimination legislation must be considered.[15] Expanding the category of exempt religious employers to accommodate the employers who advocate and advance their religious beliefs through their occupational pursuits and employment decisions strikes the appropriate balance between over- and under-protectiveness.[16] Through this recommendation, business owners whose main purpose is a devotion that is religious will attain the right to employ co-religionists to carry out that purpose. In contrast, a business may not base employment decisions on religious belief if its owners are religious or have a religious niche but do not have a goal to advance or advocate a particular religious belief system or practice through the business. In formulating this response to the tension between broad associational freedoms and civil rights legislation, the Article contextualizes the current standard for religious exemptions under Title VII as impacted by the changed emphasis in religious and associational freedoms that now join to create a super-hybrid right.

Necessarily, the courts must treat religion under Title VII differently

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14. *See* Alan Brownstein, Symposium, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POLITICS 119, 119 (2002) ("The core of our legal and political culture has been pragmatism and experimentation, not a commitment to unchangeable absolutes and fixed principles.").

15. *See infra* Part II.B.

16. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 632 (1984) (O'Connor, J., concurring) (voicing concerns the Court's test for associational freedoms is both "overprotective of activities undeserving of constitutional shelter and underprotective of important First Amendment concerns.").

from other protected classes. Part I of this Article highlights the unique nature of religious freedom as evidenced by the religious employer exemption from Title VII.[17] Courts generally do not treat this exemption broadly,[18] but an interpretation that is too narrow implicates the Establishment Clause[19] and its parallel values of separation and neutrality.[20] Concurrently, the Free Exercise Clause is emerging as a challenge to federal and state antidiscrimination laws. Part II examines *Smith* as a shift away from traditional categories of religion toward an emphasis on any additional rights implicated with free exercise to form a hybrid right entitled to heightened scrutiny. Part III then recognizes *Dale* as providing broad associational freedoms with no consideration of the limiting parameters previously defining expressive association. Thus, the combination of religious exercise and association freedom forms a superior hybrid right with a broad emphasis on freedom over equality. Part IV offers a method by which this right may be contained within the established religious employer exemption to permit co-existence between well-recognized freedoms and a waning judicial interest in civil rights legislation.

I. THE RELIGIOUS EMPLOYER EXEMPTION OF TITLE VII

A. Religion Fails to Conform to Title VII Paradigm

Religion as a basis for protection from discrimination in employment has been different from other protected categories of Title VII of the Civil Rights Act of 1964[21] from its inception. Title VII represents the traditional antidiscrimination model,[22] what we refer to as the Title VII paradigm.

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17. 42 U.S.C. § 2000e-1(a) (2000).

18. *See infra* note 40 and accompanying text.

19. U.S. CONST. amend. I.

20. *See infra* Part I.C. *But see* Brownstein, *supra* note 14, at 120–21 (positing that formal neutrality and "the subsuming of religion under the rubric" of free speech are replacing the doctrine of separatism).

21. 42 U.S.C. § 2000e-2(a) (2000) of Title VII provides:

> (a) It shall be an unlawful employment practice for an employer –
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

22. For an excellent discussion of the paradigms of antidiscrimination and

This paradigm wholly rejects discrimination on the enumerated bases permitting only the very narrow bona fide occupational qualification (BFOQ) exception.[23] The Title VII paradigm proved problematic only for the protected category of religion.[24] As a result of the unique constitutional protection of religion, accommodation of employees' religious practices is included in legislation otherwise developed in an antidiscrimination paradigm.[25] The Free Exercise Clause and the Establishment Clause of the Constitution[26] require a delicate balance of permitting religious freedom, yet avoiding government endorsement. Part of this balancing includes the exemption for religious organizations from Title VII's prohibition of religious discrimination.[27]

Defining "religion" for purposes of Title VII calls into question these same constitutional protections.[28] The EEOC Guidelines[29] utilize the term itself in a circular definition derived from the *Welsh*[30] and *Seeger*[31] decisions. Thus, courts look to whether a belief is held as "religious" without defining the differentiation between values or priorities from religion.[32] Many commentators and courts favor avoiding differentiation

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accommodation, see Christine Jolls, *Antidiscrimination and Accommodation,* 115 HARV. L. REV. 642 (2001).

23. 42 U.S.C. § 2000e-2(e)(1) (2000); *see infra* Part IV.B.

24. However, the protected category of sex later proved problematic as applied to pregnancy. *See generally* Julie Manning Magid, *Pregnant with Possibility: Reexamining the Pregnancy Discrimination Act,* 38 AM. BUS. L.J. 819 (2001).

25. *Cf.* Erickson v. Bd. of Governors of State Colls. and Univs. for Northeastern Ill. Univ., 207 F.3d 945, 949 (7th Cir. 2000) ("Title I of the ADA, by contrast, requires employers to consider and to accommodate disabilities, and in the process extends beyond the anti-discrimination principle.").

26. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

27. 42 U.S.C. § 2000e-1(a) (2000); *see infra* Part I.B.

28. Obviously, this particular issue does not exist in a vacuum. Modern regulation of religious tax exemptions begs many of the same questions. Religious institutions organized and operated exclusively for a limited number of purposes are tax exempt (often referred to as "501(c)(3) organizations"). 26 U.S.C. § 501(c)(3) (2000). Nonetheless, the Internal Revenue Service considers "religion" broadly to avoid Establishment Clause violations. *See* Gen. Couns. Mem. 36,993 (Feb. 3, 1977) ("An attempt to define religion, even for purposes of statutory construction, violates the 'establishment' clause since it necessarily delineates and, therefore, limits what can and cannot be a religion.").

29. 29 C.F.R. § 1605.1 (2000). The EEOC Guidelines are interpretive regulations. Although they do not have the force of law, courts often rely upon them. The Supreme Court states, "while not controlling upon the courts by reason of their authority, [the Guidelines] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." General Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)) *superseded by* Pregnancy Discrimination Act, 42 U.S.C. 2000e(k).

30. Welsh v. United States, 398 U.S. 333 (1970).

31. United States v. Seeger, 380 U.S. 163 (1965).

32. 29 C.F.R. § 1605.1 (2000) ("[T]he Commission will define religious practices to

between religious and nonreligious belief systems by focusing on the broader interpretation of feelings of the conscience established by the Selective Service for conscientious objector purposes.[33]

Thus, feelings motivated by inner conscience, even if they comply with no known religious organization, may warrant protection under Title VII.[34] Despite the courts' use of morality and ethics for definitional purposes, there is resistance to rely on the normative force of social entities to define religion. A broad notion of commitment to justice that underlies other antidiscrimination legislation cannot be employed in the religious context because religion is constitutionally protected from being normalized by the majority.[35] A belief in white supremacy and intolerance toward minorities if sincerely held as religious is protected under the Constitution even if a supervisor may not make promotion decisions based upon these beliefs under Title VII.[36]

Religious beliefs, then, are those defined by the individual claiming the religious belief.[37] Although affiliation with or membership in an organization of a religious nature is not necessary for the individual to hold a belief as religious, if such an organization is referenced by the individual, the belief need not be one mandated by that organization.[38] An individualized understanding of the doctrines of an established religious organization is adequate to support the belief as religious.[39]

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include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."); *cf.* Gen. Couns. Mem. 36,993 (Feb. 3, 1977) ("[T]he primary rule as to religiousity is whether the organization's adherents are sincere in their beliefs.").

33. *Welsh*, 398 U.S. at 339–40 ("What is necessary under *Seeger* for a registrant's conscientious objection to all war to be 'religious' within the meaning of § 6(j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions."); *see* Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 384 (1996); William P. Marshall, *What is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 203 (2000); Lisa Schultz Bressman, *Accommodation and Equal Liberty*, 42 WM. & MARY L. REV. 1007, 1008–09 (2001). *But see* Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 GEO. WASH. L. REV. 685, 688–90 (1992).

34. 29 C.F.R. § 1605.1 (2000).

35. Sujit Choudhry, *Distribution vs. Recognition: The Case of Anti-Discrimination Laws*, 9 GEO. MASON L. REV. 145, 172 (2000).

36. Peterson v. Wilmur Communications, Inc., 205 F. Supp. 2d 1014, 1019 (E.D. Wis. 2002).

37. 29 CFR § 1605.1 (2000).

38. Geller v. Sec'y of Def., 423 F. Supp. 16, 18 (D.D.C. 1976) (noting that religious practice not required by religious organization may still constitute a religious belief).

39. Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 714 (1988) (noting that personal beliefs not mandated by a religious organization can constitute a religious belief).

B. The Parameters of the Religious Employer Exemption

Not only is religion unique in the Title VII framework from the standpoint of what characteristics or behaviors warrant protection, but also because Congress recognized the potential for constitutional concerns involved in forcing certain employers to ignore religion as a basis for making employment decisions.[40] Congress was concerned with the right of a religious organization to identify in employees the characteristics necessary to carry out the organization's mission. They were spurred, not in small part, by concerns about how Title VII's demands on employer conduct squared with the religion clauses of the First Amendment.[41] In particular, recognizing the potential Free Exercise Clause implications of regulating religious employers, Congress exempted such employers from the prohibition against religious discrimination.[42] The original version of Title VII provided exemption only in cases where the employee of a religious employer was involved in the religious activities of the organization.[43] A 1972 amendment to Title VII expanded the exemption, however, to exempt all activities of the religious employer – both religious and secular.[44]

Aside from the bare language of the religious employer exemption, Title VII does not specifically define or explicate what types of employers qualify as religious corporations, associations, educational institutions, or societies. While courts have recognized that the religious employer exemption is not limited on its face to houses of worship or churches, religious orders or denominations, and other institutions that are traditionally recognized as "religious," courts nevertheless have required an employer that qualifies for the exemption to have some sort of relationship or connection with that type of institution or organization.[45] Still, once that

40. A related issue is the parameters of religious harassment under Title VII. *See* Terry Morehead Dworkin & Ellen R. Peirce, *Is Religious Harassment "More Equal?"*, 26 SETON HALL L. REV. 44, 58 (1995) (discussing the "reasonable person" standard in religious harassment cases).

41. U.S. CONST. amend. I.

42. 42 U.S.C. § 2000e-1(a) (2000). ("[Title VII] shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities"). Throughout this Article, this section of Title VII is referred to as "the religious employer exemption."

43. H.R. CONF. REP. NO. 92-899, at 16 (1972).

44. *Id.*

45. *See, e.g.*, Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 624–25 (6th Cir. 2000); EEOC v. Kamehameha/Bishop Estate, 990 F.2d 458, 461 n.7 (9th Cir. 1993) (finding "no case holding the exemption [in Section 702(a)] to be applicable where the institution was not wholly or partially owned by a church"); Wirth v. Coll. of the Ozarks, 26 F. Supp.

relationship or affiliation has been shown, courts have found that a number of employers engaging in activities as diverse as social services, health care, publishing, and general education qualify for the exemption.[46]

Even when an employer qualifies for the religious employer exemption, it is not entirely excused from complying with Title VII. Instead, the exemption allows qualified employers to make decisions based on religion, by limiting consideration of and continued employment to individuals and employees "of a particular religion."[47] Nothing in the exemption excuses an employer from the Title VII prohibitions on race, sex, or national origin discrimination. Only discrimination on the basis of religion is exempted.[48] Nonetheless, an employee's failure to fulfill and to support the religious behavioral and moral mandates of the particular religion could constitute valid grounds for discharge.[49] The circuits are split regarding how broadly to apply that ideal when those mandates require or result in other forms of discrimination.[50]

2d 1185, 1187 (W.D. Mo. 1998).

46. *See, e.g.*, *Hall*, 215 F.3d at 620 (discussing college of health sciences and related healthcare entities); Killinger v. Samford Univ., 113 F.3d 196, 197 (11th Cir. 1997) (church-related liberal arts college); Anderson v. Loma Linda Cmty. Hosp., No. 91-56331, 1993 U.S. App. LEXIS 15249, at *1–*4 (9th Cir. June 16, 1993) (hospital affiliated with the Seventh-Day Adventist church); EEOC v. Pacific Press Pub. Assoc., 676 F.2d 1272, 1274 (9th Cir. 1982) (non-profit publishing house); EEOC v. Mississippi Coll., 626 F.2d 477, 478 (5th Cir. 1980) (four-year liberal arts college owned and operated by Mississippi Baptist Convention); EEOC v. Presbyterian Ministries, Inc., 788 F. Supp. 1154, 1155 (W.D. Wash. 1992) (retirement home operated by arm of Presbyterian denomination); Feldstein v. Christian Science Monitor, 555 F. Supp. 974, 975 (D. Mass. 1983) (newspaper).

47. 42 U.S.C. § 2000e-1(a).

48. *See Mississippi Coll.*, 626 F.2d at 484; Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church, 63 F. Supp. 2d 694, 701 (E.D.N.C. 1999) ("Although [the religious employer exemption] permits religious institutions to discriminate based on religion or religious preferences, Title VII does not permit religious organizations to discriminate on the basis of race, sex, or national origin."); Ganzy v. Allen Christian Sch., 995 F. Supp. 340, 348 (E.D.N.Y. 1997); *see also* Joanne C. Brant, *"Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275, 290–91 (1994) (citing *Psalms* 89:18). *But see* Treaver Hodson, Comment, *The Religious Employer Exemption Under Title VII: Should a Church Define Its Own Activities?* 1994 B.Y.U. L. REV. 571, 576 (arguing that courts should defer to religious organizations to define their own religious beliefs and to create communities consistent with those beliefs, even if the beliefs result in a disparate impact on members of other protected classes such as race, national origin, or sex).

49. *See* Robert J. Araujo, *"The Harvest is Plentiful But the Workers are Few": Hiring Practices and Religiously Affiliated Universities*, 30 U. RICH. L. REV. 713, 732 (1996) (citing Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991) and EEOC v. Presbyterian Ministries, 788 F. Supp. 1154 (W.D. Wash. 1992)).

50. *See* Vigars v. Valley Christian Ctr. of Dublin, 805 F. Supp. 802, 807 n.3 (N.D. Cal. 1992) (describing this developing split in the circuits); *see also* Hodson, *supra* note 48 (advocating that beliefs which result in disparate impacts on other protected classes are and should be covered by the religious employer exemption).

Finally, the religious employer exemption reads only "this subchapter shall not apply . . . with respect to the employment of individuals of a particular religion."[51] The section mentions nothing about compensation, terms, conditions, or privileges. Because the section does not track the language of Title VII's antidiscrimination mandate[52] it is reasonable to assume that not all employment decisions are exempted under the religious employer exemption. The most restrictive approach is to suggest that only the decision to hire or not to hire an individual would be included in the exemptions.[53] While courts may treat hiring and discharge decisions differently,[54] courts have applied the exemptions to decisions to discharge an employee as well as the decision to hire.[55] The EEOC admits that the religious employer exemption's use of "employment" encompasses both hiring and firing.[56] On the other hand, there is significant disagreement regarding the application of the religious employer exemption to terms, conditions, or privileges of employment, like compensation, benefits, and insurance.[57]

With courts finding that many less traditionally "religious" pursuits qualify for the religious employer exemption, there are many employees of those entities who will not be engaged in strictly religious activities. That certainly has spawned serious debate regarding the constitutionality of the 1972 amendment to the religious employer exemption, which broadened the exemption to include all activities of the religious employer.[58] Far from

51. 42 U.S.C. § 2000e-1(a).

52. 42 U.S.C. § 2000e-2(a)(1) (2000) (prohibiting an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

53. *See* Brant, *supra* note 48, at 285, for an article espousing this restrictive "hiring-only" approach.

54. *See* Ralph D. Mawdsley, *God and the State: Freedom of Religious Universities to Hire and Fire,* 36 EDUC. L. REP. 1093, 1106 (explaining that courts will probe discharge decisions more thoroughly than decisions not to hire).

55. *See, e.g.*, Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 624 (6th Cir. 2000) (citing Killinger v. Samford Univ., 113 F.3d 196 (11th Cir. 1997); Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991)).

56. Religious Organization Exemption, EEOC Compliance Manual (CCH) ¶ 2183, at 2364.

57. *See* EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1364 (9th Cir. 1986); *see also* Religious Organization Exemption, EEOC Compliance Manual (CCH) ¶ 2183, at 2364 (espousing the position that the religious employer exemption does not encompass decisions regarding terms, conditions, and privileges of employment).

While this controversy remains unresolved, its resolution is immaterial to this Article. This Article deals with the associational expression involved with religious employers making decisions about whom to hire and retain. Therefore, the hybrid right created in such situations would not be present in discriminatory decisions regarding terms, conditions, and privileges of employment. *See infra* Part III.

58. *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day

protecting freedom of religion, critics contended, it improperly benefited religious employers, burdening nonreligious employers in comparison.[59]

Settling some of this controversy, the Supreme Court determined in 1987 that the religious employer exemption was a permissible accommodation of religion and religious employers. A unanimous court declared in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*[60] that the religious employer exemption does not violate the Establishment Clause.[61] Working through the three-part *Lemon v. Kurtzman*[62] Establishment Clause test, the majority found that the Deseret Gymnasium, a nonprofit and nonreligious arm of the Mormon Church, could fire a janitor for failure to maintain a certificate of good standing with the church.[63] Several justices concurred with the judgment of the majority but qualified that agreement.[64] Nevertheless, the several concurring opinions share with the majority opinion the common understanding that the religious employer exemption is for the most part safe from constitutional challenge and abrogation.[65]

C. Government Approach to Religion: Separate or Neutral?

The role of the Establishment Clause in the issues of exemption is an important judicial strain to intersect with the free exercise and freedom of association jurisprudence.[66] Under this clause, the courts attempt a balance

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Saints v. Amos, 483 U.S. 327, 338 (1987) (rejecting plaintiff's claim relying on this argument).

59. *See id.* at 333.

60. *Id.* at 327.

61. *Id.*

62. 403 U.S. 602 (1971).

63. *Amos*, 483 U.S. at 330–39.

64. Notable among the qualifications found in the concurrences is the contention that the case leaves open the question of the constitutionality of the exemption as applied to for-profit activities of religious organizations. *Id.* at 344, 346, and 348 (Brennan, Blackmun, and O'Connor, JJ. concurring in the judgment). Still, the concurring opinions do not suggest that for-profit activities could never be exempted. Instead, Justice Brennan writes that such activities may require a case-by-case analysis to determine their role in the organization's religious mission. *Id.* at 345 n.6. This approach is consistent with this Article's recommendation and conclusion. *See infra* Parts IV.B.,V.

65. This is clearly true with regard to all activities except perhaps for those secular, for-profit activities of an otherwise qualified organization. For an argument that the religious employer exemption should apply to all activities of nonprofit religious organizations and only the religious activities of for-profit religious organizations, see Scott D. McClure, Note, *Religious Preferences in Employment Decisions: How Far May Religious Organization Go?*, 1990 DUKE L.J. 587, 606. Again, this approach is consistent with the recommendation of this Article. *See infra* Part IV.B.

66. Establishment Clause and free exercise discussions are inevitably intertwined. *See* Venters v. City of Delphi, 123 F.3d 956, 969 (7th Cir. 1997) ("Although [the Free Exercise and Establishment Clauses] constitute distinct protections, they also embody 'correlative

between separating religion from government and maintaining government neutrality with respect to religion as encapsulated by Justice Hugo Black in *Everson v. Board of Education of Ewing Township*.[67] In *Lemon*, the Court established a three-pronged test to determine whether a government action maintains the required separation by examining the purpose, effect and entanglements raised by the action.[68] As conceived and practiced,[69] separationism scrutinizes any relationship between government and religion to avoid involvement that in secular matters may be permissible.[70] The image of an impenetrable wall of separation, although dominating Establishment Clause jurisprudence for decades,[71] is not as easily practiced as it is endorsed.[72] Thus, the neutrality approach to the Establishment Clause was further developed.[73]

Rather than emphasizing an avoidance of religion in government action, neutrality advocates an even-handed approach to religious and secular institutions.[74] This change in emphasis[75] permits religious

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and coextensive ideas, representing only different facets of the single great and fundamental freedom [of religion]." (citing Everson v. Bd. of Educ. of Ewing Township, 330 U.S. 1, 40 (1947) (Rutledge, J., dissenting)).

67. 330 U.S. 1, 15–16 (1947) (government may not "prefer one religion over another" but must erect a "wall of separation" between Church and State).

68. 403 U.S. 602, 612 (1971).

69. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding prayer in public schools impermissible despite students' selection of speaker); Wolman v. Walter, 433 U.S. 229 (1977) (finding violation of separation of religion and government in government aid to religious schools); Sch. Dist. of Abington Townshipv. Schempp, 374 U.S. 203 (1963) (ruling state-sponsored school prayer unconstitutional).

70. *See* Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1073 (2002) ("Separationist doctrine thus subjects relationships between religion and government to special scrutiny, which may result in religion's being subjected to legal and regulatory burdens not imposed on secular activities, or relieved from burdens that are generally imposed on such activities.").

71. *See* Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 233 (1993).

72. For a discussion relating Establishment Clause jurisprudence to faith-based initiatives endorsed by President Bush and Congress, see Carl H. Esbeck, *A Constitutional Case for Government Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1 (1997); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997).

73. *But see* Locke v. Davey, 540 U.S. 712 (2004) (discussing the Supreme Court's most recent review of the parameters of Establishment Clause and free exercise in the context of permitting a state to deny scholarship money to students pursuing a theology degree emphasizes the separationist doctrine).

74. *See* Esbeck, *supra* note 72, at 26 (explaining that under neutrality, the Establishment Clause aims for "the minimization of the government's influence over personal choices concerning religious beliefs and practices.").

75. Professor Laycock argues that, despite some inconsistent Court decisions, there has been no change and separation remains the only necessary analysis of Establishment Clause. Laycock, *supra* note 72, at 47 ("In the Court's view, separation is and always has been a means of maximizing religious liberty, of minimizing government interference with

organizations to play a role in public welfare, whether that be in receiving or distributing such benefits, on par with secular organizations.[76]

Professor Gedicks considers both neutrality and separation approaches to the Establishment Clause issue of granting exemptions from federal antidiscrimination laws in hiring to religious social service providers.[77] In his neutrality analysis he notes that nonreligious social service providers are permitted to hire employees based on their adherence to the providers' ideological view of the world.[78] Permitting religious providers to hire only those employees who share the same religious beliefs that inform the providers' approach to welfare services is necessary in the neutrality context so that all social service providers have the same ideological freedom in formulating and advocating their social service agenda.[79] Such an exemption from federal antidiscrimination laws is much narrower under Professor Gedicks's separation analysis.[80]

These analyses are useful in considering the free exercise and expressive association claims of private employers who use their businesses as a means of expressing and propagating their religious beliefs. Specifically, can this neutral approach inform a means for delimiting the constitutional claims of private employers who pursue a religious interest while allowing those employers to, in the words of Professor Laycock, "maximize their religious liberty and minimize government interference?"[81]

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religion, and thus, of implementing neutrality among faiths and between faith and disbelief.").

76. Mitchell v. Helms, 530 U.S. 793 (2000) (finding that the government providing materials to qualifying schools, including sectarian schools does not violate the Establishment Clause).

77. Gedicks, *supra* note 70, at 1105–06.

78. *Id.* at 1105–1106.

> For example, it violates no law for a secular provider to refuse to hire an applicant who is categorically opposed to providing welfare services to the poor. A secular provider who believes that the poor are exploited by capitalists in a worldwide class conflict may discriminate in favor of Marxists, just as a secular provider who believes that the poor are responsible for their own situations may discriminate in favor of economic conservatives who believe that wealth is accumulated only by hard work.

Id.

79. *Id.* at 1106.

80. *Id.* (Separation analysis would permit an exemption from antidiscrimination laws only for those who "exercise leadership or doctrinal authority in the sponsoring church."). Professor Gedicks maintains the separation analysis is the core of the Establishment Clause protection. *Id.* at 1098.

81. Laycock, *supra* note 72, at 47.

D. Civil Rights vs. Civil Liberties

Eradicating discrimination in employment has enjoyed preeminence among competing constitutional rights in the decades following Title VII passage.[82] Thus free exercise and associational freedom claims have been subverted to the compelling government interest in civil rights. Cases such as *Bob Jones University v. United States*[83] provided an opportunity for courts to emphasize that antidiscrimination legislation can survive even strict scrutiny by the courts.[84] In that case, the Court determined that a racially discriminatory admissions policy based on a sincerely held religious belief did not excuse a religious institution from complying with the federal tax code's antidiscrimination provisions.

Prior to *Dale*, the major expressive association decision of the Court granted such deference to civil rights over associational freedoms. Justice Brennan, writing for the Court in *Roberts v. United States Jaycees*,[85] equated sex discrimination to discrimination on the basis of race and noted the "stigmatizing injury" resulting from both forms of private discrimination.[86] The fact that the Jaycees' right to expressive association was denied by forcing it to comply with a state antidiscrimination law was dismissed as inconsequential in light of the state's legitimate purpose in combating discrimination.[87]

Indeed, decades of judicial approval, enforcement and enlargement of Title VII have focused priority of equality over First Amendment freedoms.[88] This tradition of equal rights reining in the extremities of freedom no longer enjoys the robust support of the Supreme Court.[89] The

82. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984) ("[A]cts of invidious discrimination . . . cause unique evils that government has a compelling interest to prevent – wholly apart from the point of view such conduct may transmit.").

83. 461 U.S. 574 (1983).

84. *Id.* at 603–04 (finding government interest in eradicating racial discrimination was sufficiently compelling using strict scrutiny).

85. 468 U.S. 609, 625 (1984).

86. *Id.* ("That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.").

87. *Id.* at 626 ("Indeed, the Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association.").

88. Neal Troum, *Expressive Association and the Right to Exclude: Reading Between the Lines in Boy Scouts of America v. Dale*, 35 CREIGHTON L. REV. 641, 670 (2002) ("The Supreme Court has in the past used language suggesting that discrimination in general, and exclusion in particular, are not properly understood as forms of protected expression.") (citing Norwood v. Harrison, 413 U.S. 455 (1957); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)).

89. *See* David E. Bernstein, *Trends in First Amendment Jurisprudence: Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83, 139 (2001) ("*Dale* suggests that the *Roberts* era is thankfully over, and that the nine Justices of the Supreme

balance away from expansion of antidiscrimination legislation was not abrupt. Indeed, *Dale* was presaged by *Hurley*'s focus on government interference with free speech rights in a decision that gives meager weight to the goal of eradicating discrimination.[90] In what has been described as a "compelling picture of the civil libertarian approach"[91] Justice Souter's majority opinion in *Hurley* refuses to subvert the message of the organization to comply with government objectives.[92]

It is not necessary to end the Title VII regime in order to provide religious and associational freedoms to private businesses and organizations.[93] Nonetheless, striking a balance between the two is a difficult task that necessarily establishes some distinctions pertaining to the nature of religion and the extent of equality in employment.[94]

II. FREE EXERCISE CLAUSE NARROWED TO REQUIRE RELIGION PLUS

A. The Sherbert *Era Gives Way to* Smith *Hybrid*

That Congress may enact no law prohibiting the free exercise of religion is enshrined in the First Amendment of the Constitution.[95] Because government cannot restrict the beliefs of an individual, the constitutional protection undoubtedly includes the right of individuals to act upon their religious beliefs.[96] It is only when religiously-motivated

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Court, though retaining a level of disagreement on the scope of the right of expressive association, unanimously believe that antidiscrimination laws must be subject to the same constitutional scrutiny as other important laws with broad popular support."); Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 142 (2000) (*Dale* "calls for the constitutional invalidation of much of the Civil Rights Act, including Title VII insofar as it relates to employment.").

90. Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, 515 U.S. 557 (1995).

91. *See* Troum, *supra* note 88, at 667 (noting Justice Souter's opinion places "the line of permissible government intervention at a relatively low threshold").

92. *Hurley*, 515 U.S. at 559.

93. Rebecca L. Brown, *Liberty, The New Equality*, 77 N.Y.U. L. REV. 1491, 1557 (2002) (stating that "if courts would begin to protect even those values we all hold in common, unapologetically and thoughtfully, they would take a large step forward in the continuing evolution of ordered liberty").

94. *But see* David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. REV. 223, 228 (2003) (describing antidiscrimination legislation as a threat to civil liberties).

95. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1 at 785 (2d. ed. 1988) (characterizing the First Amendment as "the Constitution's most majestic guarantee").

96. *See* JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785) *reprinted in* 5 THE FOUNDERS' CONSTITUTION 82 (Philip B. Kurland & Ralph Lerner, eds., 1987) ("The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."); *see also* Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593

conduct infringes upon others' rights that government may curtail that conduct.[97]

In 1963, the Court's *Sherbert* decision defined the test for free exercise claims as whether a law is justified by a "compelling state interest" and, to demonstrate this, the government's showing must amount to more than a "rational relationship to some colorable state interest."[98] The Court further explicated this "compelling interest" test in *Yoder*[99] and, seemingly, relied on it for nearly two more decades of decisions.[100]

The landmark case of *Smith* abandoned the "compelling interest" test and set forth a rational basis review for neutral laws of general application that incidentally burden free exercise.[101] The *Smith* case arose from the attempt of two Native American employees to obtain unemployment benefits. The employees were denied benefits because they were fired "for cause" by their employer, a drug-rehabilitation facility, for violating a state controlled substances law when they ingested peyote while participating in religious rites. Justice Scalia's majority opinion found no exemption was necessary on free exercise grounds for this neutral law of general applicability.[102] The compelling interest test of *Sherbert* was not overruled, but limited to its facts.[103] *Yoder* and its progeny were distinguished from *Smith* by noting these decisions involved not free exercise alone, but in conjunction with some other constitutionally protected right.[104]

(1982) (noting the importance of the First Amendment as a tool for "individual self-realization.").

97. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1128 (1990) (arguing we should be "free to practice our religions so long as we do not injure others.").

98. Sherbert v. Verner, 374 U.S. 398, 406 (1963).

99. Wisconsin v. Yoder, 406 U.S. 205 (1972) (finding an exemption for Amish students from attending school through the age of sixteen did not undermine state's interest in education).

100. Jack S. Vaitayanonta, Note, *In State Legislatures We Trust?: The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 COLUM. L. REV. 886, 892 (2001) ("Between 1963 and 1990, the Court reaffirmed the principle that a neutral and generally applicable governmental regulation may nevertheless be unconstitutional if, in its application, it unduly and incidentally burdens the free exercise of religion by an individual or a group.").

101. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).

102. *Id.* ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'") (citing U.S. v. Lee, 455 U.S. 252, 263 n.3 (1982)).

103. *Id.* at 883 ("We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test unsatisfied.").

104. *Id.* at 881. The Court stated:

In effect, *Smith* returned the Court's free-exercise analysis to its pre-Sherbert jurisprudence.[105] An important heightened scrutiny exception to this erasing of the *Sherbert* era was preserved for hybrid rights: those involving free exercise and another First Amendment right – including free speech,[106] parental rights[107] and freedom of association.[108]

The importance of these hybrid rights was reaffirmed in *City of Boerne*[109] in which the Court struck down Congress's legislative attempt to return to the *Sherbert* standard by passing the Religious Freedom Restoration Act.[110] Although at least one circuit court has pronounced the scheme of affording heightened scrutiny to free exercise claims only when the claim is conjoined with some other constitutional right as "illogical,"[111]

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press. . .

Id. (citations omitted).

105. Critics of the *Smith* decision included renowned scholars. *See* Douglas Laycock, *New Directions in Religious Liberty: The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 221 ("In a nation that sometimes claims to have been founded for religious liberty, *Smith* means that Americans will suffer for conscience"); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 609 (1991) ("*Smith* is . . . profoundly wrong on both substantive and institutional grounds . . . ."); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1455 (1990) (arguing the Founders understood protection of religious liberty required specific measures); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) (considering *Smith* in view of the First Amendment).

106. *Smith*, 494 U.S. at 871.

107. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

108. Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984).

109. City of Boerne v. Flores, 521 U.S. 507 (1997).

110. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2000); *see* Ira C. Lupu, *Why Congress Was Wrong and the Court Was Right—Reflections on* City of Boerne v. Flores, 39 WM. & MARY L. REV. 793, 808 (1998) (remarking that *City of Bourne* was about federal power rather than religious liberty). *But see* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 183 (1997) ("[T]he Court's conclusion that judicial interpretations of the provisions of the Amendment are the exclusive touchstone for Congressional Enforcement power finds no support in the history of the Fourteenth Amendment"); *cf.* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 U.C.L.A. L. REV. 1465 (1999) (outlining an alternate approach to federal legislation with states fashioning exemptions in a common-law approach).

111. Kissinger v. Bd. of Trs. of the Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993) (stating that it is illogical to find that "a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the Free Exercise Clause if it did not implicate other constitutional rights").

there may, indeed, be some logic to the scheme.

The Court emphasized the religious tolerance aspect of free exercise in its post-*Smith* decision of *City of Hialeah*.[112] By emphasizing religious tolerance,[113] the Court has permitted a broad definition of religion but has granted such religious exercise little deference in light of government intrusion. That logic balances the relaxed, rational-basis review in defining "religion" with the stricter review for hybrid rights, protecting more traditional aspects of religion in the form of freedom of speech, association, and determining the religious upbringing of children with the stricter review hybrid rights provide.[114]

B. Free Exercise Challenges to Antidiscrimination Legislation

Prior to *Smith*, *Bob Jones* was among several cases in which the heightened scrutiny of the compelling interest test was used to challenge antidiscrimination legislation.[115] As noted earlier, the courts gave great deference to the interest in civil rights and eradicating discrimination during the *Sherbert* era. In particular, Title VII and state antidiscrimination legislation furthered a government aim for equal employment opportunity.[116] Therefore, although heightened scrutiny was utilized, free exercise challenges generally could not overcome the compelling government interest in equality in employment.[117]

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112. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("[A] law targeting religious beliefs as such is never permissible . . . .").

113. *Id.* at 547 ("The Free Exercise Clause commits government itself to religious tolerance . . . .").

114. Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872, 881 (1990) (holding that the only cases where the court has held the First Amendment to bar application of a neutral, generally applicable law has been where the Free Exercise Clause is acting in conjunction with other amendments).

115. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 603–04 (1983); Dayton Christian Sch., Inc. v. Ohio Civil Rights Comm'n, 766 F.2d 932, 961 (6th Cir. 1985) (holding that state civil rights commission's assertion of jurisdiction over a case involving a teacher who was discharged by a private school after she became pregnant violated the Free Exercise and Establishment Clauses), *rev'd on jurisdictional grounds*, 477 U.S. 619 (1986); EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1275 (9th Cir. 1982) (reviewing a case in which a religious publishing house dismissed employees in retaliation for bringing discrimination charges and claimed that it did so based on a religious doctrine that prohibited church members from bringing lawsuits against the church); Voluntary Ass'n of Religious Leaders, Churches, & Orgs. v. Waihee, 800 F. Supp. 882, 883 (D. Haw. 1992) (dismissing challenge to state statute prohibiting sexual orientation discrimination in employment); Madsen v. Erwin, 481 N.E.2d 1160, 1161, 1166 (Mass. 1985) (finding that a state law prohibiting sexual orientation discrimination in employment unnecessarily burdened a church-published newspaper's free exercise right).

116. Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984).

117. State *ex rel.* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 846–47 n.4 (Minn. 1985) (stating that health club owners who insisted on only hiring employees whose

Not surprisingly, the end of heightened scrutiny and return to a rational basis review of a free exercise claim under *Smith* along with the continued government emphasis on civil rights, particularly in employment opportunities, left little ground for religious freedom claims.[118] Any of the protected categories that equal employment legislation was designed to protect could prove to be rationally related to the government interest of equal employment opportunity.[119]

Despite *Smith*'s weakening of the free exercise right, the religious employer exemption to Title VII remained as a protective barrier between religious employers and discrimination claims.[120] In contrast, following *Smith* the parameters of the constitutionally-required ministerial exception to Title VII received renewed attention. First formulated during the *Sherbert* era in *McClure v. Salvation Army*,[121] the exception permitted courts to avoid entanglements prohibited by free exercise and establishment clauses by giving churches *carte blanche* in conducting their employment relationship with their ministers.[122] The *McClure* court determined Congress did not intend include the church/minister relationship under Title VII.[123] The decision, while claiming to be limited to the facts of the case, raises doctrinal issues of "church"[124] and its "ministers"[125] that continue to

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religious beliefs were consistent with their religious beliefs were required to comply with the state law prohibiting discrimination on the basis of sex, religion, and marital status).

118. *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1536 (M.D. Fla. 1991) ("freedom of association and free exercise of religion have bowed to narrowly tailored remedies designed to advance the compelling governmental interest in eradicating employment discrimination").

119. Vaitayanonta, *supra* note 100, at 901 ("Presumably, any one of the various types of civil rights laws designed to protect individuals on the basis of classifications such as race, gender, sexual orientation, age, or marital status could pass this low level of scrutiny simply owing to the legislature's judgment that such discrimination was undesirable.").

120. *See supra* Part I.B.

121. 460 F.2d 553 (5th Cir. 1972).

122. *See, e.g.*, Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1304 (11th Cir. 2000) ("[A]pplying Title VII to the employment relationship between a church and its clergy would involve excessive government entanglement with religion as prohibited by the Establishment Clause of the First Amendment") (internal quotation marks and citation omitted); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 (8th Cir. 1991) (holding that an inquiry into why a member of the clergy was dismissed is barred by the Fourteenth Amendment).

123. *McClure*, 460 F.2d at 560–61 ("We therefore hold that Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII to regulate the employment relationship between church and minister.").

124. *See, e.g.*, EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 283 (5th Cir. 1981) ("The local congregation that regularly meets in a house of worship is not the only entity covered by our use of the word 'church.'").

125. As an initial matter, the use of the term "minister" might seem to suggest it is only applicable to certain Protestant denominations and the other relatively few religious sects that use the term "minister" to describe their clergy. That, however, is certainly not the case. *See* Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church, 63

vex the ministerial exception.

While the Supreme Court has not addressed the ministerial exception, its *Smith* holding may fundamentally undermine the exception using rational basis review, but offer the exception a new basis of renewed support under the hybrid right analysis. In *EEOC v. Catholic University of America*, the court determined the ministerial exception survived *Smith* because it represented a "hybrid" of Free Exercise and Establishment Clause concerns.[126] Certainly, any such decisions of minister employment will involve both constitutional protections, but the hybrid rights to which Justice Scalia referred in *Smith* required more than bringing together any two constitutional claims.[127] Rather, the hybrid rights arose when free exercise is entwined with another distinct fundamental right.[128]

Hybrid rights of religious employers are raised in their employment decisions.[129] However, the strength of such a claim remained relatively weak *vis-a-vis* the deference to legislative judgment that ending invidious discrimination in private employment on the basis of narrowly tailored protected classes was necessary.[130] Hybrid rights have not played a major role in free exercise challenges since *Smith*.[131] However, because *Locke v. Davey*[132] has limited the holding in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*[133] as applying to laws showing animus to a particular religion,[134]

F. Supp. 2d 694, 704 n.7 (E.D.N.C. 1999) ("The court does not intend, by its adoption of the terminology "church-minister" exception, to suggest that this line of cases applies only to Protestant institutions and their clergy. The same principles are equally applicable to other religious entities and their clergy, including rabbis, priests, and imams").

126. EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996).

127. Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 567 (1993) (Souter, J. concurring in part) ("If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule . . . . "); *see also* Miller v. Reed, 176 F.3d 1202, 1208 (9th Cir. 1999) ("[A] plaintiff does not allege a hybrid-rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right"); Catholic Charities v. Superior Court, 85 P.3d 67, 89 n.15 (Cal. 2004) (rejecting a hybrid claim of free exercise and establishment clause).

128. *Smith*, 494 U.S. at 881–82.

129. Employment has associational aspects similar to membership in an organization. *See* Boy Scouts of Am. v. Till, 136 F. Supp. 2d 1295, 1308 (S.D. Fla. 2001) (adopting a broad reading post-*Dale* concerning whether the BSA has the right to exclude homosexuals from all membership or employment positions).

130. *See Catholic Charities*, 85 P.3d at 89 (expressing doubt about the validity of the hybrid-rights theory and noting the Supreme Court has not invoked it since formulating it in *Smith*).

131. *Id.* at 88 ("We are aware of no decision in which a federal court has relied solely on the hybrid rights theory to justify applying strict scrutiny to a free exercise claim.") *But see* Esser, *supra* note 3, at 242 (positing it is the strength of the attached right that determines the court's decision).

132. 540 U.S. 712 (2004).

133. *Lukumi Babalu Aye*, 508 U.S. at 520.

the focus undoubtedly now will be on hybrids in free exercise claims.

The Court has parsed the hybrid rights associated with child rearing and free speech in *Yoder* and *Sherbert* through its *Smith* decision.[135] In part, that explains the relative absence of hybrid claims in the lower courts. In contrast, there has been no case explicitly addressing freedom of association and free exercise; therefore, the hybrid of those two constitutional rights has not yet received examination by any court. This is particularly significant in a post-*Dale* era.[136] As the emphasis on civil rights and antidiscrimination legislation has given way to associational freedoms in *Dale*, the hybrid right of religious and association freedoms now has superior strength.[137]

III. THE STRENGTH OF EXPRESSIVE ASSOCIATION

A. Associational Freedoms Defined

Freedom of association constitutes two analytically distinct forms of association. Freedom of intimate association is protected by the substantive due process guarantee in the Fourteenth Amendment.[138] This freedom protects "choices to enter into and maintain certain intimate human relationships" free from government intrusion.[139] Freedom of expressive association is protected under the Freedom of Speech Clause of the First Amendment.[140]

Although the First Amendment is praised as the centerpiece of the Constitution, the praise for expressive association protection is not as universal.[141] In the first decision explicitly recognizing expressive association rights, *NAACP v. Alabama ex rel. Patterson*, Alabama required the NAACP to produce a list of members.[142] The NAACP refused to comply knowing its ability to organize in a hostile southern state would be

134. *Locke*, 540 U.S. at 720 ("In *Lukumi*, the city of Hialeah made it a crime to engage in certain kinds of animal slaughter. We found that the law sought to suppress ritualistic animal sacrifices of the Santeria religion. In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind.").

135. *Smith*, 494 U.S. at 881–82.

136. Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984).

137. *See Smith*, 494 U.S. at 882 (suggesting free exercise claims might survive if linked with freedom of association claims).

138. *Roberts*, 468 U.S. at 617–18.

139. *Id.* at 617.

140. *Id.* at 618.

141. Dale Carpenter, *Expressive Association and Anti-Discrimination Law After* Dale*: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1516 & n.5 (2001) ("Of the liberties guaranteed by the First Amendment, the freedom of association may be the most distrusted." Carpenter notes "'free exercise' of religion is a close second.").

142. 357 U.S. 449, 453 (1958).

compromised by such a disclosure. The Court found Alabama's action would curtail the formulation of ideas embraced by free speech guarantees, noting "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of [liberty] . . . ."[143]

Freedom of association became permanently intertwined with religious freedoms in *Roberts*. Justice Brennan noted that associational rights include the need to gather and form alliances to engage in other protected First Amendment activity – including the exercise of religion.[144] In *Roberts*, the Jaycees were unsuccessful in excluding women from membership in the organization in violation of a state public accommodations law. Although the organization engaged in expressive association it was unable to show admitting women would inhibit the activities engaged in or opinions expressed.[145]

In contrast, the activities and opinion of the organizers of a St. Patrick's Day parade were inhibited if a group of homosexual people, vocally expressing pride in their sexuality, participated in the parade.[146] This message of sexual pride was wholly different from the message that the organizers supported and the parade organizers were permitted to exclude it discriminatorily in order to shape their message.[147] Thus, in *Hurley* the expressive association rights of the parade organizers trumped the state public accommodations law.[148]

B. Dale *Strengthens Expressive Association*

Dale is most notable for its seeming disinterest in tailoring the holding to the unique situation presented in the case.[149] It is a broad statement of an organization's associational freedoms to defeat antidiscrimination legislation and it strengthens expressive association among fundamental rights.

The Court upheld the Boy Scouts of America's (BSA) right to exclude from its membership an openly homosexual man on the basis of his sexual orientation.[150] A state public accommodation law prevented such exclusion. However, the Court found public accommodation ubiquity

143. *Id.* at 460.

144. *Roberts*, 468 U.S. at 618.

145. *Id.* at 627.

146. Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group, 515 U.S. 557, 559 (1995).

147. *Id.* at 576 ("[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised.").

148. *Id.*

149. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); *see* Troum, *supra* note 88, at 680.

150. *Id.* at 642.

violated First Amendment rights and set to reconfigure the model to push associational freedoms back into the spotlight antidiscrimination legislation previously enjoyed.[151]

In formulating associational rights, the Court granted the organization control over its message, even absent specific evidence that this message had importance within the organization or was maintained strictly.[152] Thus, BSA claimed its objection to homosexuality was evidenced by goals to be "morally straight" and "clean."[153] Further, the Court granted to the organization the right to exclude individuals based on the organization's analysis of whom or what type of expression would impair their message.[154] Such deference to exclusion of members of a protected class based on expressive association directly conflicted with Court precedent elevating antidiscrimination goals over an association's exclusionary tendencies.[155] Previously, in *Norwood v. Harrison*, the Court held that freedom of expression resulting in private discrimination was not afforded constitutional protection.[156] Now, the BSA is allowed such deference.

In *Roberts*, Justice O'Connor's concurring opinion attempted to tailor the majority opinion to avoid those organizations who wanted to discriminate through an associational freedom claim. To do so she noted a distinction between commercial associations and expressive associations, the latter enjoying full constitutional protection.[157] Justice O'Connor required an association to "choose its market."[158] If the choice is one that is commercial "in any substantial degree" the association may not choose its members and is correspondingly limited in the message it can disseminate.[159]

Dale does not embrace the limitations developed in Justice O'Connor's *Roberts* concurrence. Rather, the majority opinion seems to

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151. *Id.* at 657 ("As the definition of 'public accommodation' has expanded . . . the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased.").

152. Carpenter, *supra* note 141, at 1538.

153. *Dale*, 530 U.S. at 650.

154. *Id.* at 653 ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."); *see also* Carpenter, *supra* note 141, at 1540 (calling impairment analysis in *Dale* a "sheep in wolf's clothing.").

155. *See* Stephen P. Hayford, Case Note, Boy Scouts of Am. v. Dale, *120 S.Ct. 2446 (2000)*, 11 SETON HALL CONST. L.J. 825, 854 (2001) ("While this holding is a victory for organizations' freedom of expressive association, it provides very little protection for individuals in minority groups seeking access to public accommodations, and represents a defeat for states that seek to end discrimination.").

156. 413 U.S. 455, 469 (1973).

157. Roberts v. United States Jaycees, 468 U.S. 609, 632 (1984) (O'Connor, J., concurring).

158. *Id.* at 636.

159. *Id.*

embrace the notion that associational freedoms necessarily result in diminished equality. Nonetheless, the message as formulated by the organization is protected.[160]

The dissent in *Dale* recognizes the impact of the majority opinion on civil rights jurisprudence. In particular, the grant of power to organizations in formulating and executing a message in the most exclusionary manner it deems necessary without requiring a balance is a significant departure for the Court.[161] The dissent would require a showing of a "clear and unequivocal" message to offset antidiscrimination protections.[162]

C. Expressive Association as a Hybrid

Commentators and courts debate the importance of *Dale* to antidiscrimination law. In particular, some commentators believe equal employment opportunity legislation is sacrosanct.[163] They claim that, while antidiscrimination legislation likely will not proliferate in public accommodation legislation post-*Dale*, the overall impact of the decision is minor and justified in terms of the organization or the protected class at issue.[164]

Such analysis fails to recognize two related issues. Firstly, to rely on Court precedent to narrow the implication of *Dale* disregards the change in jurisprudential priorities from civil rights and equality protection to the reinforcement of fundamental rights.[165] Certainly the scales may have been balanced toward usurping individual rights in favor of equality in the past but, regardless where one finds the balance is achieved, antidiscrimination legislation and court precedent must be viewed in light of this shift in priorities.

Secondly, Title VII and state employment antidiscrimination

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160. *Dale*, 530 U.S. at 653.

161. *Id.* at 676 (Stevens, J., dissenting).

162. *Id.*

163. Carpenter, *supra* note 141, at 1517–18 (arguing *Dale* will not have revolutionary consequences in areas where equality guarantees are "most critically needed" – particularly employment).

164. *Id.* at 1517. Some are more fearful of *Dale*'s consequences. *See, e.g.*, Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1591 (2001) ("[*Dale*] may portend a substantial rewriting of previous expressive association law . . . . At a minimum, it weakens the claim to open participation in our civic culture by lesbians and gay men."). *Dale* is also criticized for both contradicting and ignoring altogether the Court's holding in Runyon v. McCray. *Id.* at 1603.

165. *See* Laura B. Mutterperl, Note, *Employment at (God's) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation*, 37 HARV. C.R.-C.L. L. REV. 389, 416 (2002) ("Because some religious organizations may feel that hiring exclusively coreligionists is necessary to maintain their religious identity, the right of association suggests at least a limited entitlement to discriminate.").

legislation is not universally affected by the broad pronouncements in *Dale*, but a subset of employment antidiscrimination legislation is necessarily impacted – the religious employer. The religious employer invokes not just the strengthened associational freedoms but also advances a free exercise claim, thus producing a hybrid right pursuant to *Smith*.[166]

Although *Smith* grants hybrids heightened scrutiny, one noted commentator has found that that it is the strength of the fundamental right intertwined with free exercise that determines the court decision.[167] Accepting this conclusion, free exercise combines with a powerful expressive associational claim to create a claim that a religious employer can employ co-religionists as an exercise of expressive association despite antidiscrimination legislation in employment.

IV. STRIKING A BALANCE FOR RELIGIOUS BUSINESS OWNERS

A. *A Clash of Rights*

The Court's focus on associational freedoms in *Dale* and its accommodations of various "sincerely held" beliefs as free exercise establishes the potential rights of business owners to require employees to be co-religionists and to discriminate against those applicants that profess non-adherent religious beliefs.[168] As rights asserted in the First Amendment to the Constitution each alone, and all the more so as a hybrid, are touted as preeminent. Other rights are implicated in the employment of co-religionists, however.

Throughout this Article the importance of civil rights legislation largely is characterized as equality legislation with a normative force defining a commitment to justice. The Court consistently recognized sufficient government interest in establishing equality in employment as well as public accommodation as a means of advancing a societal value of justice both in terms of fairness to the individual and maintaining a meritocratic community norm.[169]

In addition to this equal justice paradigm,[170] however, is the essential

166. *But see* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 74 n.3 (Cal. 2004) (suggesting skepticism of hybrid right in a case concerning employment benefits).

167. Esser, *supra* note 3, at 242.

168. Business owners may bring religion in the workplace in a manner that does not evoke the same constitutional concerns. *See, e.g.*, Timothy L. Fort, *Religion in the Workplace: Mediating Religion's Good, Bad and Ugly Naturally*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 121, 126 (1998) (maintaining religious beliefs have a legitimate role in business ethics).

169. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 631 (1984).

170. *See supra* notes 18–19 and accompanying text.

constitutional right of equal protection underlying the formation of Title VII and other antidiscrimination legislation. The Fourteenth Amendment offers secure grounding for the ban on private discrimination motivated by race or sex.[171] But this grounding is far from absolute and courts consistently weigh even equal protection against competing rights. Therefore, the extent of this ban is necessarily limited to these enumerated categories,[172] while other legislatively protected categories, such as national origin, are less constitutionally secure but rather rest wholly on the commitment to equal justice.

Ultimately, there exists no inalienable right to employment. Free exercise and freedom of association claims of an employer who chooses to offer employment opportunities to individuals whose religious practice make them otherwise largely unemployable or to a home health care provider who seeks to carry a religious message as well as a service to its clients may rest their claims on constitutional principles which *Dale* raises to a higher constitutional priority than Title VII employment directives.[173] Title VII itself limits its protections to those employers with fifteen or more employees.[174] Even under state antidiscrimination legislation, the smallest employers are free to discriminate. No constitutional right is absolute and the clash of the rights between employees and employers is emblematic of an inherent compromise, the balancing point being critically debated.[175] The issues here involve two different legal relationships involving religion: Title VII endeavors to free individuals from a religiously-hostile work environment and from hiring exclusions based on religion while individuals, including private employers, are free from government interference in the free exercise of religion in operating their business.[176] A useful analogy explored by the courts is the regulation of speech in the context of workplace harassment.[177] Courts addressing this matter

171. U.S. CONST. amend. XIV.

172. Even defining the appropriate groups in terms of race and sex may challenge the courts. *See, e.g.*, General Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976) (rejecting sex discrimination claim for an otherwise comprehensive short-term disability policy that excluded pregnancy-related disabilities from coverage under an employer's benefit plan by explaining the exclusion was not based on sex but between those people who are pregnant and those who are not, the latter category including both men and women) *superceded by* Pregnancy Discrimination Act, 42 U.S.C. 2000e(k).

173. *See infra* Part I.B. concerning the religious employer exemption in light of First Amendment concerns.

174. 42 U.S.C. § 2000e(b) (2000).

175. We use the term "balance" not in the sense of finding equilibrium between these competing and contradictory rights but in the sense of constitutional co-existence, much like the "time, place and manner" restrictions limiting the absolute right of free speech. *See* Gedicks, *supra* note 70 (discussing free speech parallels to the Establishment Clause).

176. EEOC v. Preferred Mgmt. Corp., 216 F. Supp. 2d 763, 805 (S.D. Ind. 2002).

177. DeAngelis v. El Paso Mun. Police Officers Ass'n., 51 F.3d 591, 596 (5th Cir. 1995)

rationalize finding discriminatory speech as a "time, place, and manner regulation of speech" permitted under free speech jurisprudence.[178] Although the time, place, manner limitations may control harassing speech in the workplace somewhat tidily, the same formula is unworkable for free expression[179] because Title VII itself specifically permits religion in the workplace through its religious accommodation requirements.[180] Thus, if free exercise requires employers to permit religious considerations, can Title VII disallow private employers from free exercise and expressive association in its hiring? We think not given the renewed strength of this hybrid right.

B. Maintain Exemption under Title VII

The system of exemptions employed to carve out constitutional parameters often are placed squarely in the center of the debate about appropriate equilibrium. The literature concerning exemptions is plentiful and distinguished.[181] With respect to employer exemptions, much of the literature eschews such compromises.[182] However, constitutional jurisprudence has developed a strengthened freedom of association both alone and as a hybrid with free exercise.[183] The unique impact of this development on employment discrimination legislation requires consideration. Therefore, in the narrow context of the religious and association freedoms of business owners to employ co-religionists and the equal employment opportunity agenda encapsulated in Title VII, we advocate for invigorating the religious employer exemption under Title VII as defining regulation of competing priorities.

Having chosen an existing Title VII exception by which to accommodate and contain the religious associational rights of employers in relation to antidiscrimination legislation, one may wonder why we opted for the religious employer exemption rather than the exception that seems

("Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem . . . .").

178. Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1246 (10th Cir. 1999); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

179. *See* Gedicks, *supra* note 70 (Using the two-track theory of free speech jurisprudence to formulate a two-track theory for the Establishment Clause).

180. 42 U.S.C. § 2000e(j) (2000).

181. *See* Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565 (1999); Eugene Volokh, *Intermediate Questions of Religious Exemptions - A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595 (1999).

182. *See* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO WASH L. REV 915, 948 (1992) ("[A] constitutional right of religious exemption was not even an issue in serious contention among the vast majority of Americans.").

183. *See supra* Part III.C.

more applicable at first blush, the bona fide occupational qualification exception (BFOQ).[184] The answer is quite simple: it does not fit the scope of the constitutional issues implicated in this Article. This is evident by examining how the BFOQ would fail to address the example employers we have previously presented as likely beneficiaries of the newly-invigorated religious association hybrid.

The Supreme Court has emphasized that this BFOQ exception is applicable in only the most narrow circumstances.[185] The oft-quoted requirement for a BFOQ is that an employer must prove the "*essence* of the business operation would be undermined" if someone with non-conforming religious beliefs were hired for the position.[186] For the home health care business typified in *Preferred Management*, the employer could claim the essence of its business operations is to share its religious beliefs with its clients. However, the courts have not interpreted "essence of business operation" in terms of business goals but, rather, in terms of functionality.[187]

It is not necessary functionally for a home health care provider to have a religious background to care for clients' physical needs. Also, an employee may be willing to advance a religious message with clients whether or not the employee's religious beliefs conform to the message. However, this is not the free exercise of religion the employers seek. Rather, the business owners' religious beliefs may require that the message is lived by its employees and non-adherents could not proselytize to the clients of the business with any genuine conviction. A BFOQ exception

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184. 42 U.S.C. § 2000e-2(e)(1). This section provides:

> (e) [I]t shall not be an unlawful practice for an employer to hire and employ employees, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business enterprise.

Id.

185. *See* Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (applying the narrow BFOQ exception to the general prohibition against discrimination based on sex).

186. *Id.* at 333 (quoting Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir. 1971)).

187. *See Diaz*, 442 F.2d at 388 (calling BFOQ a "business necessity test, not a business convenience test"); *see also* Rasul v. District of Columbia, 680 F. Supp. 436 (D.D.C. 1988) (holding that denominational hiring of prison chaplains does not meet BFOQ test); Abrams v. Baylor Coll. of Med., 581 F. Supp. 1570 (S.D. Tex. 1984) (finding policy excluding Jews from Saudi Arabian hospital teams does not satisfy BFOQ); Kern v. Dynalectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983) (holding that requirement of Muslim pilots to fly into Mecca, Saudi Arabia on threat of beheading under local law is a BFOQ because business cannot operate if its pilots are beheaded); *cf.* Pime v. Loyola Univ., 803 F.2d 351 (7th Cir. 1986) (stating that BFOQ exception applies to Jesuit-affiliated university seeking to maintain a Jesuit influence in its philosophy department).

similarly would not address the free exercise claim of an employer who discriminates in hiring in order to promote the daily time demands of religious adherents who otherwise could not work regular hours and fully practice their religion.

To consider fully the free exercise and expressive association claim of private employers, courts must address the factors that produce the hybrid right. Free exercise alone would not impact the civil rights goals of Title VII.[188] Only when free exercise has the additional element of freedom of association, now more fully endorsed by the Court following *Dale*, is there an inescapable impact on antidiscrimination legislation.[189] Although private employers should assert their hybrid rights recently developed by the Court, the underlying considerations offer delimiting factors that promote the constitutional co-existence of rights.

Justice O'Connor's well-reasoned concurrence in *Roberts*,[190] wields less persuasive authority after *Dale* failed to recognize its commercial associations and expressive associations dichotomy. This is not the balance we strike. An association's profit motive is just one of several factors to consider in making the essential determination of whether a business owner may express religious beliefs in hiring practices. In the employment antidiscrimination context, *Dale's* deference to the organization's message, both in terms of formulation and dissemination,[191] also fails to enforce these important constitutional requirements. Rather, an organization with the central mission of promoting and advocating a religious belief must show objectively that its mission would be undermined by employing individuals who do not share this belief system.

Title VII suggests one way an employer who wishes to advocate theological orientation through business practices could hire discriminatorily without raising antidiscrimination concerns: limit the number of employees the business owner can hire. Although many state and local laws that likewise prohibit discrimination in the employment context reach much smaller numbers of employees, a cap on employees has the appeal to resolve this issue. Indeed, in all likelihood the employers who focus primarily on religious advocacy over profit motive of a business will be small businesses. This is an obvious compromise position.

Permitting a "small business" exemption for the purpose of free exercise and freedom of association, even if the number of employees permitted under the exemption is large enough to accommodate every

188. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881 (1990) (holding that generally the First Amendment does not bar "application of a neutral, generally applicable law to religiously motivated action").

189. *See supra* note 129.

190. Roberts v. U.S. Jaycees, 468 U.S. 609, 631 (1984) (O'Connor, J. concurring).

191. *See supra* notes 143–144 and accompanying text.

business owner who would want to take advantage of it, creates dangerous precedent and ultimately does not respect the constitutional provisions as fundamental rights. It would be under-inclusive.[192] Yet, a size limitation also would be grossly over-inclusive, as hardly every sufficiently small employer would use religious associational considerations as hiring criteria. In the end, the simplicity of a "small business" exemption would be overshadowed by its arbitrariness.

Each of these competing interests of civil rights and religious exercise play vital roles in our society so that we would avoid a compromise position and advocate, instead, for a position that recognizes the essential nature and goals of each and promotes each in a way that leads to co-existence rather than compromise.

The religious employer exemption Congress incorporated in Title VII[193] can achieve the appropriate constitutional nexus. Its parameters facilitate religious and association freedoms of business owners derived from the First Amendment while requiring equality in employment. The factors considered in granting such an exemption should be: whether the main pursuit of the employer is to express a devotion that is considered religious under current free exercise jurisprudence; whether, objectively, the formulation and dissemination of the religious message is undermined by the presence of non-conforming employees; whether the devotion represents a complete and exclusive belief system; and whether profit motivation in the end outweighs religious mission.

C. Factors for a Private Employer Religious Exemption Analyzed

1. Religious Exercise as a Primary Pursuit

The central aim in granting a religious employer exemption is to permit those employers who promote a religious message to engage in this constitutional right free of government interference in hiring. However, the main goal of the business owner must be that of religious exercise, rather than merely pursuing a niche market for profit. The focus here is not on alternatives to religious expression but on whether the exercise of religious ideals necessarily implicates associational freedoms.[194] If private

192. Despite the above generalization, religiously-motivated employers would not, by necessity, employ only a small number of workers. Consider, for instance, our example of the business owner whose purpose is to establish a place of employment that is tailor made for accommodating particularly onerous or non-traditional religious practices or worship. In a community with a large population of individuals who adhere to that religion, the employer could grow quite large.

193. *See supra* Part I.B.

194. For example, in *Preferred Management*, converting employees was part of the business owners' religious and business purposes. EEOC v. Preferred Mgmt. Corp., 216 F.

employers need not employ co-religionists as part of their religious beliefs and practices, the hybrid right is not created and the lower level of scrutiny of *Smith* represents the extent of the constitutional protections.

The recent *Catholic Charities* decision by the California Supreme Court offers an example of a religious employer exemption under California's Women's Contraceptive Equity Act (WCEA) that reaches many of the same employers advocated in our four factor analysis.[195] WCEA's exemption requires religious employers to have the inculcation of religious values as the purpose of the entity and the employer must primarily employ and serve persons who share the same religious tenets.[196] Catholic Charities did not qualify under this exemption because its primary purpose was to offer social services rather than the "inculcation of religious values," and many of its employees were not Catholic.[197] Likewise, Catholic Charities as an employer would not qualify under our proposed exemption because it is not organized to advocate for religious tenets and must not employ co-religionists to do so.

The difficulties associated with measuring the sincerity of any religious belief are present in determining whether private employers have a purpose of religious exercise.[198] Just as the definition of religion is painted in broad strokes by government entities in order to avoid Establishment Clause entanglements, so must the activities of religious groups be considered broadly. Exercise of religion through enterprise, however, may be required by religious organizations, as the religious employer exemption of WCEA suggests.[199]

2. Objective Evidence Must Exist Showing That Employees Promote Religious Belief

In addition, to consider the competing aims of civil liberties and civil rights, the religious tenet requiring co-religionist hiring must be one objectively documented. The employer's devotion and analysis of whom or what type of association would impair the message similarly must be determined objectively. This documentation requirement is addressed in *Dale*, but the majority does not require overtly objective indicators of

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Supp. 2d 763, 819 (S.D. Ind. 2002). Therefore, the owners were willing to associate with non-adherents as part of their religious expression.

195. Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 74 n.3 (Cal. 2004).

196. *Id.* at 74, n. 3.

197. *Id.* at 75.

198. *See id.* at 79 ("Congress and the state legislatures have drawn such distinctions for this purpose, and laws embodying such distinctions have passed constitutional muster.") (citing Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 334–40 (1978)).

199. *Id.* at 75.

purpose and mission.[200]

Certainly, Establishment Clause concerns are raised by requiring proof of religious exercise through private business.[201] However, a variety of laws require the government to distinguish between religious and secular activities, and it is upon objective indicators that this distinction must be made.[202]

For a private employer pursuing religious exercise through a business purpose and as a criterion for discriminatory hiring, the objective evidence must be obvious and available to entities and individuals who may evaluate this information before choosing to engage in business transactions.[203] The opportunities to document the religious exercise purpose of a business are numerous, ranging from business formation documents to employee handbooks. Interactions with clients or customers would provide further objective evidence to support an exemption under Title VII.

3. Religious Devotion Represents a Complete and Exclusive Belief System

An additional factor in qualifying for an exemption under Title VII is whether the message that the employer seeks to promote represents a complete and exclusive belief system.[204] For example, the Boy Scouts of America, as an employer, would not be exempted from antidiscrimination legislation under this formulation because, although the organization undoubtedly has a religious message in its promotion of spirituality and a higher power, it promotes that message in conjunction with various religious organizations that share this main tenet. As the religious message is one promoting religion generally rather than a complete belief system to the exclusion of embracing others, it does not rise to a constitutionally protected message over the civil rights goals in employment.[205]

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200. Boy Scouts of Am. v. Dale, 530 U.S. 640, 650 (2000) (demonstrating that through the Scout Oath, BSA showed evidence of goals for its members to be "morally straight" and "clean").

201. *See* Mitchell v. Helms, 530 U.S. 793, 828 (2000) (criticizing laws that invite government officials "trolling through a person's or institution's religious beliefs").

202. *See supra* note 28.

203. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring in part and concurring in the judgment) (suggesting an association entering the "marketplace of commerce" loses some control over its affairs it otherwise would retain if it remained in the "marketplace of ideas").

204. Such a belief system need not be consistent with an established religion. *See supra* Part I.A.

205. *Cf.* EEOC v. Kamehameha Sch./Bishop Estate, 990 F.2d 458, 465 (9th Cir. 1993) (finding that school does not qualify for curriculum-based religious educational institution exemption from Title VII, when "religion [was] more a part of the general tradition of the Schools than a part of their mission, and serv[ed] primarily as a means for advancing moral

If an entity embraces religion generally or a broad category of religions, the expressive association concerns that elevate free exercise are far more tenuous. *Dale* supported an organization's ability to tailor its message and granted broad freedom of association.[206] However, this latitude did not eliminate the Court's requirement in *Roberts* for a "proof of membership-message" connection.[207] The connection between a private employer's religious advocacy and those employees who can promote that message are particularly strong when the message is more narrowly tailored.[208]

Hiring focused on advocating a broad category of religion does not represent free exercise and associational rights so much as exclusion of individuals of nonconforming beliefs or practices.[209] It is this exclusion of the potential employee's religious beliefs that Title VII is focused on eliminating. Religious beliefs must be appropriately tailored so as not to violate the essential nature of civil rights goals.

4. Profit Motive Examined

Private employers with the goal of religious advocacy—including employing only individuals who share their religious tenets—should not be banned from that pursuit based solely on a profit element. Commercial enterprises are granted less protection under the First Amendment in many respects.[210] However, the definition of religion for constitutional purposes is sufficiently broad to accommodate an infinite number of belief systems, some of which may be exercised through for-profit transactions.[211] Profit element must be considered in making this determination but it is not, by necessity, mutually exclusive with the other factors such that it should presumptively disqualify the employer from exemption.

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values in the context of a general education").

206. Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000) (granting deference to an organization "regarding the nature of its expression").

207. *Roberts*, 468 U.S. at 627, 632.

208. *See id.* at 627–28 ("In claiming that women might have a different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations . . . the Jaycees relies solely on unsupported generalizations about the relative interests and perspectives of men and women.").

209. *See* Alvin C. Lin, Note, *Sexual Orientation Antidiscrimination Laws and the Religious Liberty Protection Act: The Pitfalls of the Compelling State Interest Inquiry*, 89 GEO. L.J. 719, 720 (2001) ("[A]lthough the Free Exercise Clause was intended to protect free exercise of religion, it was not intended to be used as a tool for individuals seeking to bypass generally applicable antidiscrimination laws.").

210. *See Roberts*, 468 U.S. at 634 (noting that states may regulate commercial transactions and that the "constitution does not guarantee a right to choose employees, customers, [or] suppliers. . . without restraint from the state").

211. *See supra* notes 25–28 and accompanying text.

Justice O'Connor's *Roberts* dissent offers a potential standard to determine associations subject to rationally related state regulation by characterizing as commercial those associations with activities "not predominantly of the type protected by the First Amendment."[212] Justice O'Connor recognizes that no "simple precision" can characterize associations as commercial or expressive.[213] Nonetheless, her formulation of the standard is an attempt to give protection to purely expressive association. The difficulty with this commercial/noncommercial standard is that the formulation of the standard assumes that activities which are commercial cannot be activities that are predominantly the type protected by the First Amendment. We believe our examples prove otherwise.

The business owners in *Preferred Management* undeniably had as their goal an effort to advocate religious values documented in "The Great Commission" directive.[214] Their business as home health care providers offered them an opportunity to go into people's homes and share their faith with them. These owners believed their faith as Born-Again Christians required them to express these tenets in every aspect of their lives, including the workplace.[215] Obviously, adequate home health care service is an important part of this business, but there seems no clear line that either religious advocacy or health care were predominantly the activities of the business. In fact, the business owners could point to "The Great Commission" and other documents guiding how their business must be established to comply with their faith as the major activity of the business.

The second example we have referred to throughout this Article is that of a business owner whose business purpose is establishing an accommodating employment atmosphere for co-religionists when their shared religious beliefs require worshipping in a way that is considered an "undue hardship" for other employers.[216] The commercial nature of the business is to allow free exercise of religion while employees earn a livelihood. Were it not for the religious requirement, there would be no need for the business.

Therefore, the commercial aspects and for-profit status of private employers cannot easily be separated to impose a bright line rule. Arguably, tax-paying entities should not be less qualified for an exemption under Title VII than religious entities that otherwise are exempted from

212. *Roberts*, 468 U.S. at 635.

213. *Id.* at 635.

214. EEOC v. Preferred Mgmt. Corp., 216 F. Supp. 2d 763, 773 (S.D. Ind. 2002).

215. *Id.* at 773.

216. 42 U.S.C. § 2000e(j) (2000); *see also* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84–85 (1977) (establishing the standard that an employer was not responsible to accommodate an employee's religious practices if it resulted in more than "de minimis" cost).

regulatory or tax burdens.[217] Nevertheless, evidence that the motivation for profit, financial or market growth, or the like appears to drive the employer's decisions is relevant to this inquiry. In fact, it may very well belie the objective evidence of the religious mission or purpose required by the second factor of our proposed exemption analysis. Yet, while business transactions and other displays of profit motivation may be indicators that the first three factors of the test are not sufficiently strong, profit motive cannot solely negate the existence of this super hybrid right.

These factors necessarily mean all but a very small number of religious business owners cannot discriminate in employment decisions. For that small number of business owners who wish to advocate a narrow theological orientation through their commercial pursuits, important constitutional rights are maintained. The factors represent the essential elements of a free exercise and associational hybrids, but one which permits the emerging civil liberties to exist alongside well-established civil rights.

V. CONCLUSION

When combined with *Dale* as an emblem of the reemergence of civil liberties, *Smith's* hybrid rights could prove problematic for the civil rights advances made over the past four decades. Therefore, we recognize the important values represented in this libertarian emphasis but additionally recognize the need to limit its effect on important civil rights and equality values.

Thus, we have advocated a position that recognizes and respects the core of the *Dale* associational expression as a super-hybrid constitutional free exercise right, while setting up a factor balancing approach that limits its use only to those employers who are truly using the employment process as a means of expressive association and religious exercise. By doing so, the employer's belief system will be laid bare for the market forces to judge whether or not such a business can and should survive. If there is a niche market for such businesses, they will survive and perhaps flourish. If not, they will not.

217. *See* Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334 (1987) (upholding Title VII exemption as "benevolent neutrality"); Walz v. Tax Comm'r, 397 U.S. 664, 680 (1970) (permitting property tax exemption for religious organizations that used the property for religious purposes exclusively).