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**THE SUPREME COURT’S MISSTEP: REVISITING THE HOLDING OF *CORPORATION OF PRESIDING BISHOP OF CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS V. AMOS* TO FORMULATE AN APPROPRIATE DEFINITION OF “NONPROFIT” ACTIVITY**

By  
Emma Haas

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## INTRODUCTION

Antidiscrimination laws have resonated in American life in profound ways, but few areas of our society have been affected as much as the workplace. Title VII of the Civil Rights Act of 1964 was a sweeping measure of reform and change that prohibited employment decisions based on an employee's race, color, sex, national origin, and religion.<sup>1</sup> This statute applies to all public sector employers *and* to most private sector employers.<sup>2</sup> Title VII, however, also concerns the First Amendment Free Exercise rights<sup>3</sup> of religious organizations, and the tension between the rights of religious employers and their employees' own religious beliefs sets the stage for the statutory exemption for religious organizations.

In 1987, the United States Supreme Court issued its decision in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*,<sup>4</sup> which resulted in a dramatic interpretation of the § 702 exemption<sup>5</sup> for religious organizations from the requirements of the Civil Rights Act. Congress, in enacting § 702, gave "traditional religious organizations such as churches, synagogues, and religious educational institutions"<sup>6</sup> the ability to hire and fire based on the employee's religion. In 1972, the exemption was amended to exclude *all* of a religious organization's activities from the reach of Title VII, not just its religious activities.<sup>7</sup> In *Amos*, the Court was presented with the question of whether applying the § 702 exemption to the "secular nonprofit activities of religious organizations violates the Establishment Clause of the First

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<sup>1</sup> 42 U.S.C. §§ 2000e (1964); *see also* MARGARET C. JASPER, EMPLOYMENT DISCRIMINATION LAW UNDER TITLE VII, at 1 (1999); Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 730 (1996).

<sup>2</sup> MICHAEL WOLF ET AL., RELIGION IN THE WORKPLACE 2 (1998).

<sup>3</sup> U.S. CONST. amend. I, cl. 1.

<sup>4</sup> 483 U.S. 327 (1987).

<sup>5</sup> 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e-1).

<sup>6</sup> Thomas M. Messner, *Can Parachurch Organizations Hire and Fire on the Basis of Religion Without Violating Title VII?*, 17 U. FLA. J.L. & PUB. POL'Y 63 (2006).

<sup>7</sup> This exemption, 42 U.S.C. § 2000e-1, provides, in part: "This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." *Id.*

Amendment.”<sup>8</sup> The Court, in a divided opinion, ultimately upheld the constitutionality of the § 702 exemption as applied to all secular (not just religious) nonprofit activities conducted by religious organizations.<sup>9</sup> This decision sparked a wave of debate over whether the Court’s holding, in effect, granted more freedom to discriminate on religious grounds than was necessary to allow religious groups to maintain their autonomy and belief systems.

One question that was raised by Justice Brennan and Justice Marshall in concurrence, and which the Court has not since revisited, was the issue of nonprofit activities. The majority held that it would allow the *nonprofit* secular activities of religious organizations to come in under § 702 without requiring courts to engage in case-by-case analysis of which activities are religious and which are secular.<sup>10</sup> The Court did not, however, address or dwell on a specific definition of “nonprofit,” but rather merely used the word. Justice Brennan, however, in concurrence, wrote, “I believe that the particular character of nonprofit activity makes inappropriate a case-by-case determination whether its nature is religious or secular.”<sup>11</sup> Justice Brennan agreed that courts should not engage in case-by-case inquiries, but he based this decision on the nature of nonprofit activities. Thus, a precise definition of “nonprofit” would support the Court’s decision to exempt the religious *and* secular activities of religious organizations because only a specific class of nonprofit activities—whatever the Court would include in its definition—would receive such a broad exemption. A narrower definition, however, will also eventually require case-specific determinations of whether an organization’s activities are “nonprofit.”

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<sup>8</sup> 483 U.S. at 329-30.

<sup>9</sup> *Id.* at 339 (“It cannot be seriously contended that § 702 impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case.”).

<sup>10</sup> *Id.* at 329-30 (holding that applying the § 702 exemption to the secular nonprofit activities of religious organizations did not violate the Establishment Clause of the First Amendment).

<sup>11</sup> *Id.* at 340 (Brennan, J., and Marshall, J., concurring in judgment).

This paper will explore the issue of what constitutes a “nonprofit” activity for purposes of the § 702 exemption for religious organizations under *Amos*. Part I explores the history of exemptions for religious organizations from federal statutes of general applicability, looking at the arguments for and against freedom from governmental interference for these organizations. Part II examines the Civil Rights Act, its legislative history, and the exemption under § 702 for religious organizations. Part III provides an overview of the Supreme Court’s decision in *Amos*, focusing in particular on the concurrences of Justices Brennan and O’Connor, and the justices’ arguments regarding nonprofit activities of religious organizations. Part IV explores the meanings and definitions of nonprofit activity that have arisen in various contexts, in order to provide a framework by which to analyze nonprofit activities that are exempt from Title VII’s requirements. Part V shows why the Supreme Court must clarify its holding in *Amos* by explaining the types of “nonprofit activity” that would qualify for the § 702 exemption. This part also provides some possible definitions or interpretations, based on the available sources. Because the Supreme Court’s holding in *Amos* is only supposed to extend to the nonprofit activities of a church, synagogue, or educational institution, it is troubling that the definition of “nonprofit” has not been visited. In order to ensure that the § 702 exemption for religious organizations does not go further than is necessary to protect their Free Exercise rights, thus protecting the aims of the 1964 Civil Rights Act, it will eventually be necessary for courts to engage in case-by-case inquiries of whether the religious organizations in question are nonprofit.

## **I. THE DEBATE OVER RELIGIOUS AUTONOMY AND FREEDOM FROM FEDERAL MANDATES**

Religious communities are central to many people’s religious identities and beliefs.<sup>12</sup>

Although individuals often have personal or solitary religious experiences, many still perpetuate

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<sup>12</sup> BETTE NOVIT EVANS, INTERPRETING THE FREE EXERCISE OF RELIGION: THE CONSTITUTION AND AMERICAN PLURALISM 121-22 (1997).

their religious experiences through “collective activities.” Therefore, courts have developed a “Free Exercise jurisprudence that goes beyond protecting individual beliefs and posits that religious institutions may have First Amendment rights not reducible to the rights of individual members.”<sup>13</sup> Professor Evans notes that because the activities of religious organizations encompass not only the ceremonial, but also “education[], healing, broadcasting, and social service ministries, in addition to the financial arrangements supporting them,” the protection of religious practices under the Free Exercise Clause has necessarily come to mean protection of all of these activities.<sup>14</sup> The protection has also extended to the “*decisions regarding the ordinary housekeeping details of institutional existence.*”<sup>15</sup> These rationales have led to statutory exemptions for religious institutions in multiple contexts.

#### **A. History and Rationale for Early Statutory Religious Exemptions**

David Steinberg explains that early statutory religious exemptions took three different forms: (1) legislatures exempted religious pacifists from mandatory military service; (2) early state constitutional provisions exempted religious believers from testimonial oaths if taking them conflicted with religious beliefs; and (3) during the eighteenth and early nineteenth centuries, states and colonies maintained state-endorsed churches and collected taxes to support the churches; “assessment statutes” often exempted religious dissenters.<sup>16</sup> This institutional

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<sup>13</sup> *Id.* at 122-23. Evans write, “Many thinkers now argue that institutions, in their own right, merit constitutional protection even when individual conscience claims are not involved, and perhaps even when doing so compromises the rights of individual members (citation omitted). The focus on groups and institutions implicates the broader questions of pluralism and the role of autonomous associations in the American polity.” *Id.* at 123.

<sup>14</sup> EVANS, *supra* note 12, at 123; *but see* Employment Div. v. Smith 494 U.S. 872, 878-79 (1990) (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”).

<sup>15</sup> EVANS, *supra* note 12, at 123 (emphasis added). These “ordinary housekeeping details” have caused some of the most contentious debate surrounding the free exercise rights of religious institutions and their ability to discriminate on the basis of religion in, for example, the hiring of building engineers, janitors, or secretaries who had no involvement in the propagation of the institution’s religious mission. *See* discussion *infra* Part III.

<sup>16</sup> David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241 (1995) (citing Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1466-73 (1990)).

autonomy for religious organizations extended to protection from “excessive entanglement” by the government, a doctrine recognized in the Supreme Court decisions of *Waltz v. Tax Commission*<sup>17</sup> and *Lemon v. Kurtzman*.<sup>18</sup>

In *Waltz*, the Supreme Court upheld the New York City Tax Commission’s property tax exemptions granted to religious organizations for properties used solely for religious purposes. The Court held that this was not an unconstitutional attempt to establish or sponsor religion, or to interfere with free exercise rights, noting that, “Separation [of church and state] in this context cannot mean absence of all contact; the complexities of modern life inevitably produce some contact . . . .”<sup>19</sup> Thus, the government may not impermissibly or excessively entangle itself in religious affairs, but some contact, even in the form of exemptions, is acceptable. On the other hand, in *Lemon*, the Supreme Court held that a Rhode Island statute, consisting of salary supplements for teachers of secular subjects in nonpublic schools and operating to the benefit of parochial schools, and also involving comprehensive state oversight, was unconstitutional because the government was excessively entangled with religion. The court also held that a Pennsylvania statute, entailing reimbursement of nonpublic schools of teachers’ salaries, textbooks, and instructional materials used in the teaching of secular subjects, and involving direct aid to church schools and comprehensive oversight over operations, was unconstitutional because the government was excessively entangled with religion.<sup>20</sup>

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<sup>17</sup> 397 U.S. 664 (1970).

<sup>18</sup> 403 U.S. 602 (1971). Professor Evans explains that, “[N]umerous Free Exercise claims are predicated upon the resistance of religious institutions to state scrutiny, certification, record keeping, and the like, and the state’s hesitation to become involved in such entanglement. Not surprisingly, the arguments for religious institutional autonomy frequently overlap between these two religion clauses.” EVANS, *supra* note 12, at 125.

<sup>19</sup> *Waltz*, 397 U.S. at 676 (“Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.”).

<sup>20</sup> 403 U.S. at 618-22. *Lemon* is still good law, but it is widely criticized. See, e.g., *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 346-49 (1987) (O’Connor, J.,

Other reasons have been offered for why religion should be afforded special protection from government interference. Alan Brownstein suggests that religion furthers several “social purposes.” First, it serves as an independent source of values, which are “structurally divorced from government,” thus promoting democracy because religion develops values that can counterbalance government decisions.<sup>21</sup> This arguably justifies enforcement of the Free Exercise Clause for religious organizations because they help to reinforce these values. Religion also often has a communal element, allowing people, who are increasingly individualized in our society, to congregate together and interact in society, especially in houses of worship.<sup>22</sup> Finally, many established religions are “grounded in tradition” or “institutions that operate over the long term and are less likely to be swayed by the passions of the moment.”<sup>23</sup> Of course, even long-lasting religious institutions can suddenly change positions on certain issues, and many other religious institutions or organizations might *not* be grounded in tradition. Brownstein illustrates, however, why religious organizations have received high governmental deference.<sup>24</sup>

The rights of religious organizations often come at the expense of individual Free Exercise rights. In *Wisconsin v. Yoder*, for example, the Supreme Court allowed Old Amish Order religious authorities the Free Exercise right to take Amish children out of school after the eighth grade; this “gave the broader religious community the right to perpetuate its faith by imposing significant disadvantages upon those who might consider rejecting the faith.”<sup>25</sup> Steven

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concurring in judgment) (claiming that the majority appeared to think that the “effects” prong of *Lemon* would not be implicated as long as the government action is characterized as “allowing” religious organizations to advance religion (as opposed to directly advancing it)). *Id.* at 347.

<sup>21</sup> Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 92 (2006).

<sup>22</sup> *Id.* at 95.

<sup>23</sup> *Id.* at 96 (citing BENJAMIN BEIT-HALLAHMI & MICHAEL ARGYLE, *THE PSYCHOLOGY OF RELIGIOUS BEHAVIOR, BELIEF & EXPERIENCE* 98-112 (“[c]ontinuity in religious identity between generations is the rule rather than the exception”).

<sup>24</sup> *Id.* at 97.

<sup>25</sup> Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment*, 52 U PITT. L. REV. 75, 89 (1990).



Gey explains that the “religious imperatives perceived by the authorities of a particular faith will always include the need to inculcate sacred values and reject the profane,” which is “always an assault on freedom of conscience.”<sup>26</sup>

## **B. Arguments Against Absolute Freedom for Religious Organizations**

Brownstein also acknowledges that the rights of religious institutions are not absolute, and that balancing is always required when weighing government interests against the free exercise of religion. He notes that one of the commonly expressed concerns with extending extra protection to Free Exercise rights is that exemptions will induce people to “practice religion or espouse a particular faith,” and that “exempting religious institutions such as schools, day care center, and recreational programs from the regulatory burden[s] . . . will allow them to provide less costly, more efficient, and more cohesive services than their secular competitors.”<sup>27</sup>

Others argue that autonomy for religious institutions is not as sacrosanct as many would believe. Professor Evans cites Ira Lupu, who argues that the right to freedom of religious worship has traditionally been considered an individual, not collective, right. Evans explains:

Institutions do not have group rights beyond that which individuals would have. Thus, individuals may have associational rights to form ‘members only’ groups that may imply a right to hire church members only. But since individuals have no right to discriminate on the basis of race or sex, neither do religious institutions, religious doctrine notwithstanding. Lupu concludes that the Free Exercise Clause does not require exemptions for religious organizations and that, moreover, the Establishment Clause forbids them. To grant such exemptions would enable dominant groups to gain rights unavailable to others, thus threatening the principle of *equal* religious liberty.<sup>28</sup>

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<sup>26</sup> *Id.* at 90. Gey argues that courts will still uphold the dictates of the religious organization under the “accommodation principle,” which allows religious participants to receive considerations that are not given to the nonreligious, i.e., where governments grants a statutory accommodation of religion (the accommodation could also be mandatory). *Id.* at 80-81. He does acknowledge that the principle is “not absolute.” *Cf.* *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990).

<sup>27</sup> *Id.* at 131 (noting that an exemption having “force as an inducement does not necessarily require that a court reject it [because] the power of an exemption to induce religious belief and practice should be part of the balancing analysis a court undertakes in adjudicating a free exercise claim,” *id.* at 132).

<sup>28</sup> *Id.* at 126 (citing Ira Lupu, *Free Exercise Exemptions and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 422 (1987)).

Likewise, Steven Gey suggests that the Supreme Court has transformed the principle of religious accommodation from protection for minority or dissenting individuals into a “way of enforcing the norms of the religious community.”<sup>29</sup>

Courts have also upheld enforcement of statutes of general applicability against religious organizations, even when the organizations call for an exemption. In a recent case, *Catholic Charities v. Superior Court*,<sup>30</sup> the California Supreme Court held that California did not impermissibly interfere with internal church governance matters in enforcing a statute that “implicate[d] the relationship between a nonprofit public benefit corporation and its employees, most of whom do not belong to the Catholic Church. Only those who join a church impliedly consent to its religious governance on matters of faith and discipline.”<sup>31</sup> Thus, courts will not always defer to the institutional autonomy of religious organizations, at least in the context of a church-affiliated entity), and when the employees’ own beliefs might be compromised.

Some go so far as to suggest that exemptions for religious institutions from statutes of general applicability should be categorically rejected because the difficulties outweigh the advantages of allowing for exemptions. These difficulties include the idea that exemptions “require courts to engage in difficult and intrusive inquiries into the sincerity and religiosity of beliefs,”<sup>32</sup> and “unfairly favor certain religious beliefs over other religious and nonreligious

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<sup>29</sup> *Id.* at 135 (quoting Gey, *supra* note 25, at 94-95).

<sup>30</sup> 85 P.3d 67 (Cal. 2004). Catholic Charities sought an exemption from a California state law, WCEA, which required employers to provide employees health insurance plans that covered medically prescribed contraceptives; this law would force Catholic Charities to violate the tenets of Catholicism, which forbids the use of contraceptives. California refused to grant an exemption, primarily because doing so would privilege a religious organization by relieving it of the costs that other employers had to incur; however, the state also refused to grant the exemption because then Catholic Charities employees would be denied insurance coverage guaranteed by statute, or the state would have to assume the cost. *Id.* at 75-76. *See also* Brownstein, *supra* note 21, at 101-02.

<sup>31</sup> 85 P.3d at 77.

<sup>32</sup> Steinberg, *supra* note 16, at 268 (citations omitted).

beliefs.”<sup>33</sup> Additionally, Steinberg explains the argument that the courts lack the “institutional authority” to mandate exemptions. Under the “originalist” argument, a legislature’s power to enact religious exemptions derives from its general power to promote the welfare of its citizens; the Free Exercise Clause does not give courts such authority.<sup>34</sup> The institutionalist argument states that that elected officials are better equipped to create exemptions. If a claimant is relying on a legislative exemption, a court does not have to balance the religious interests served by the exemption against the state interests; but this balancing *is* necessary with court-mandated exemptions because courts often favor familiar, orthodox religions over minority faiths.<sup>35</sup>

Individuals or organizations might also assert “sham claims” that a law imposes burdens on their religious beliefs and practices; these might be “constitutional tools that can be used all too easily by unscrupulous persons or institutions to avoid unpleasant regulatory obligations.”<sup>36</sup> However, Brownstein suggests that this problem is exaggerated, since an organization that invokes a Free Exercise exemption might therefore also become ineligible for government subsidies, or conditions might be attached to the exemption that make it too much trouble to exert a “sham” Free Exercise claim. Ultimately, however, Brownstein acknowledges that fraudulent claims cannot be avoided entirely, and courts should not overlook the possibility that they will be brought.<sup>37</sup>

## II. THE § 702 EXEMPTION: AN OVERVIEW OF ITS MERITS AND COMPLICATIONS

The First Amendment states, in part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”<sup>38</sup> Unlike race, gender,

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<sup>33</sup> Steinberg, *supra* note 16, at 268 (citations omitted).

<sup>34</sup> *Id.* at 269.

<sup>35</sup> *Id.* at 271-72.

<sup>36</sup> Brownstein, *supra* note 21, at 132 (citations omitted).

<sup>37</sup> *Id.* at 133-34.

<sup>38</sup> U.S. CONST. amend. I. Courts consider First Amendment rights to be “fundamental” and are willing to guard them more carefully than other constitutional rights.

and national origin, which are immutable characteristics, religion involves beliefs and conduct, both of which can present clashes between an employee's beliefs and an employer's need to run the workplace in a practical, efficient manner. However, the high level of deference that the courts and Congress give to freedom of religion under the First Amendment has translated into employers having to adjust their operations, scheduling practices, and distribution of duties in order to accommodate their employees' religious beliefs.

#### **A. Background of the Amendments to Title VII of the 1964 Civil Rights Act**

Congress enacted the Equal Employment Opportunities Enforcement Act to remedy the problems of enforcing the provisions of the Civil Rights Act of 1964. Senator Hawkins, from the Committee of Education and Labor, explained in his report submitted to accompany H.R. 1746, that, in spite of the progress made since the 1964 Civil Rights Act was enacted, "discrimination against minorities and women continues. The persistence of discrimination, and its detrimental effects [*sic.*] require a reaffirmation of our national policy of equal opportunity in employment."<sup>39</sup> Likewise, Chairman Brown of the Committee on Education and Labor, declared during his testimony on the enactment of the 1971 Act:

In this the 7th year of since historic enactment of the Civil Rights Act of 1964, and the 6th year since the establishment of the EEOC, it is no longer possible to deny effective enforcement of one of the major provisions of the act, the right for all people in this Nation, regardless of race, color, religion, sex, or national origin, to have equal rights to jobs for which they are qualified.<sup>40</sup>

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<sup>39</sup> Testimony of Representatives Hawkins, H.R. 92-238 (92d Congress, 1st Sess.), Equal Employment Opportunities Enforcement Act of 1971, to accompany H.R. 1746, at 3 (June 2, 1971). The 1972 amendment was part of a series of sweeping changes made to the Civil Rights Act when Congress enacted the Equal Opportunities Enforcement Act of 1971. Senator Hawkins, in his report accompanying House Report 1746 on the 1971 Act, explained that the purpose of the bill was to grant to the Equal Employment Opportunity Commission (EEOC) the authority to issue judicially enforceable cease and desist orders; to transfer the Attorney General's authority in practice or pattern discrimination suits to the EEOC; broaden jurisdictional coverage by deleting existing exemptions of state and local government employees and employees connected with educational institutions; and extend some protection to federal employees. *Id.*

<sup>40</sup> Testimony of Rep. Brown, H.R. 92-238 (92d Congress, 1st Sess.), Equal Employment Opportunities Enforcement Act of 1971, to accompany H.R. 1746, at 70 (June 2, 1971). Representative Brown concluded his testimony with, "I would again like to urge the committee . . . to remedy the defects of title VII as soon as possible, and to grant the EEOC the most effective enforcement powers possible so that the promises made in 1964 can become realities in

It is clear, therefore, that Congress intended to strengthen and actually enforce the requirements of the Civil Rights Act, instead of simply relying on the voluntary commitment of employers. Additionally, shortly before this testimony took place, in May of 1971, the EEOC issued a policy statement on religious and national origin discrimination to all compliance agencies.<sup>41</sup> In 1972, Congress also amended Title VII to require an employer or labor organization to “reasonably accommodate” the religious practices of an employee or prospective employee, unless such an accommodation would result in undue hardship on the business; an undue hardship requires “more than a de minimis cost.”<sup>42</sup> If there was more than one method that would not cause undue hardship, the employer would have to provide the alternative that “least disadvantages the individual with respect to his or her employment opportunities.”<sup>43</sup>

#### **B. Congress Created an Exemption for Religious Organizations from Title VII’s Mandates**

However, an equally important aspect of freedom of religion in the workplace concerns the employment decisions of *religious* organizations and entities, which also have Free Exercise rights to structure their organizations and govern themselves in accordance with their own religious tenets.<sup>44</sup> Courts traditionally allow religious organizations to hire, fire, and promote employees based on the organizations’ religious tenets or principles. This has stemmed from the government’s reluctance to “entangle” itself in religion, but also to permit religious entities to promote and adhere to their own religious beliefs.<sup>45</sup>

Section 702 of Title VII was included with the original passage of the Act to exempt

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1971.” *Id.* at 73. Clearly, the Committee was concerned with the rampant employment discrimination that persisted even seven years after the Civil Rights Act was enacted.

<sup>41</sup> H.R. 92-238 (92d Congress, 1st Sess.), Equal Employment Opportunities Enforcement Act of 1971, to accompany H.R. 1746, at 78 (June 2, 1971).

<sup>42</sup> Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (1964), amended by Pub. L. No. 92-261, 86 Stat. 103 (1972) (emphasis added); JASPER, *supra* note 1, at 18; WOLF ET AL., *supra* note 2, at 2.

<sup>43</sup> See sources cited *supra* note 42; see also *infra* discussion Part I. This paper will concern the implications of Title VII for religious *employers* and their rights under the Free Exercise Clause of the First Amendment.

<sup>44</sup> See *supra* Part I.A (discussing the history of statutory exemptions for religious organizations).

<sup>45</sup> See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

religious organizations/employers from the Act’s requirements in employment decisions related to an organization’s religious mission; in other words, they could exercise preferences based on religion in employment decisions affecting religious activities.<sup>46</sup> Otherwise, Title VII could “hinder the free exercise right of religious organizations to choose only members of their own religion to carry out their religious mission.”<sup>47</sup> Similarly, imposing Title VII’s prohibitions on religious organizations would excessively entangle the government in religious affairs.<sup>48</sup> However, exempting religious organizations altogether, instead of only activities related to their religious mission, could violate the Establishment Clause because religious organizations would be favored over secular employers. Employees and prospective employees would also be hindered from exercising their own religious beliefs while pursuing employment opportunities.

### **1. A Statutory Amendment Broadened the § 702 Exemption in 1972**

In 1972, however, Congress amended the 702 exemption to allow religion to play a role in all of a religious organization’s employment decisions, “regardless of the particular job [for] which the individual is being considered”<sup>49</sup>—primarily on the basis that “compliance with civil rights laws sometimes requires acts the religion finds unacceptable.”<sup>50</sup> Congress determined that it could not allow religious employers to discriminate on the basis of sex, race, or national origin, but that it would grant them an exemption for religious discrimination. The newly amended § 702 read: “This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational

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<sup>46</sup> Scott D. McClure, *Religious Preferences in Employment Decisions: How Far May Religious Organizations Go?*, 1990 DUKE L.J. 587, 592; Messner, *supra* note 6, at 78-81 (providing a history of the § 702 amendment).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Section-by-section analysis of S. 2515, The Equal Employment Opportunities Act of 1972, Sec. 3, at 1770 (expanding the exemption for religious corporations, associations, educational institutions, or societies).

<sup>50</sup> EVANS, *supra* note 12, at 133. These employment decisions could include restricting certain jobs to men and certain jobs to women, or employing only people who subscribe to the institution’s religious doctrines.

institution, or society of its activities.”<sup>51</sup> The absence of “religious activities” language indicates that the amendment greatly expanded the scope of the § 702 exemption. Even this exemption, however, since it only allows for discrimination based on religious grounds, still “force[s] courts to weigh the relative value of individual rights granted under the law against the pluralist value of autonomy for groups to live by their own values.”<sup>52</sup> It also forces courts to give religious institutions a privilege in hiring decisions that other kinds of employers do not have.

## ***2. The Legislative History of the Amended § 702 Reveals the Difficulties With Expanding the Exemption***

The legislative history of Title VII is telling in its illustration of the changes Congress made to the exemption in favor of religious group rights. Interestingly, the House of Representatives’s § 702 draft had exempted religious institutions for *all* purposes, but the Senate amended the exception and rejected this categorical exemption, allowing religious organizations to discriminate only for its religious activities. When it was first proposed in the House of Representatives, it contained an exemption for all religious corporations, associations, and societies,<sup>53</sup> but when the statute was enacted in 1964, it was narrowed so that religious organizations could give preferences to employees of specific religions in jobs relating to the organization’s religious activities. It did not permit these organizations to discriminate on other bases.<sup>54</sup> In the 1972 amendments, Congress deleted the words “religious activities” in § 702(a), indicating that a religious organization/employer could discriminate on the basis of religion in *any* of its capacities. Wolf suggests that this statutory exemption is actually broader than the

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<sup>51</sup> Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U.S.C. § 2000e-1 (amended 1972).

<sup>52</sup> EVANS, *supra* note 12, at 134.

<sup>53</sup> WOLF ET AL., *supra* note 2, at 19 (citing H.R. Rep. No. 914, 88 Cong., 1st Sess. 10 (1963)).

<sup>54</sup> WOLF ET AL., *supra* note 2, at 19 (citing Pub. L. No. 88-352, Title VII, Section 702).

First Amendment because it covers a wider range of church-affiliated employers, and it allows organizations to hire only employees of the particular religious faith.<sup>55</sup>

Several senators, during the debates over the amendment, argued strenuously against it. Senator Williams, for example, advocated that, “Of all the institutions in this country that should be setting the example of equal employment opportunity . . . , it is America’s religious institutions.”<sup>56</sup> He also suggested that it might be “unconstitutional for Congress to permit such discrimination. . . . In providing [services like hospitals and others] they should not be allowed to become instruments of invidious and unreasonable discrimination in employment.”<sup>57</sup> Senator Ervin, however, after reading during his testimony from the Supreme Court case *Everson v. Board of Education*,<sup>58</sup> argued that the employment decisions of religious organizations should not be subject to any regulation by the EEOC, even for secular activities (another possible amendment during the passage of the Equal Employment Opportunities Act had been to allow the EEOC to regulate the non-religious activities of religious employers):

[W]e do not erect a wall of separation between church and state when we permit the agents of the state to tell a religious corporation, a religious association, a religious educational institution, or a religious society, whom it is to employ for an purpose, whom it is to promote for any purpose, or whom it may discharge for any reason.<sup>59</sup>

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<sup>55</sup> *Id.* at 21.

<sup>56</sup> Cong. Rec., Feb. 21, 1972, Amendments Nos. 907 and 908, at 1666. Senator Williams also claimed that religious institutions’ integrity would not be compromised by requiring them to provide equal job opportunities for employees in positions that were unrelated to the institutions’ religious activities. *Id.* at 1665-66 (pointing out that such employees perform jobs identical to those in similar secular institutions and that these persons “should be given the same equal employment opportunities”). Senator Williams suggests that coverage under this statute should extend to a private hospital owned or operated by a religious organization; a private school or orphanage owned or operated by a religious organization; commercial establishments or religious organizations that produce or sell products like alcoholic beverages, baked goods, religious goods, etc.; and the administrative, executive, and other personnel that religious organizations employ. *Id.* at 1666.

<sup>57</sup> *Id.* at 12450.

<sup>58</sup> 330 U.S. 1 (1947) (“In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and state’” (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)). This senator speaks for thirteen pages in the Congressional Record, reading large excerpts from *Reynolds*, in his advocacy for allowing the EEOC to be able to regulate *any* affairs of a religious organization.

<sup>59</sup> Cong. Rec., Feb. 21, 1972, Amendments Nos. 907 and 908, at 1221.



In spite of the debate, the amendment passed. Fifteen years later, the Supreme Court received an opportunity to clarify its scope and determine its constitutionality.

### **III. OVERVIEW OF *CORP. OF PRESIDING BISHOP OF CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS V. AMOS***

In *Amos*, the Supreme Court was confronted with the question of whether applying the Title VII § 702 exemption to religious organizations' secular activities violated the Establishment Clause.

#### **A. The Majority Held that § 702 Does Not Violate the Establishment Clause**

The *Amos* decision involved the Deseret Gymnasium in Salt Lake City, Utah, a nonprofit facility open to the public, and run by the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints, and the Corporation of the President of the Church of Jesus Christ of Latter-day Saints (hereinafter "Church").<sup>60</sup> Arthur Mayson had worked at the Desert Gymnasium for approximately sixteen years as a building engineer. He and others were discharged in 1981 for failing to qualify for "temple recommends:" certificates that they were members of the Church and eligible to attend its temples.<sup>61</sup> Recommends were only issued to individuals who observed Church standards in areas like regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco.<sup>62</sup> Mayson and others sued, claiming religious discrimination under Title VII, but the Church invoked the § 702 exemption in its defense.

The district court determined that Mayson's job situation involved nonreligious activities.<sup>63</sup> The court next applied the three-part *Lemon v. Kurtzman* test to determine if the §

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<sup>60</sup> *Amos v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints*, 483 U.S. 327, 330 (1987).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 330 n.4.

<sup>63</sup> *Id.* at 332. The court's three-part test for determining whether one of the employer's religious activities was at issue involved the following: (1) examining the tie between the religious organization and the activity at issue in the context of financial affairs, day-to-day operations and management, etc.; (2) in determining whether or not there was a "close and substantial tie" between the two, the court must look at "the nexus between the primary function of the

702 exemption violated the Establishment Clause, and held that § 702 failed the second part of *Lemon* because it had the “primary effect of advancing religion.”<sup>64</sup> The court determined that § 702 singled out religious entities for a benefit, that it was not supported by long historical tradition, and that it burdened the free exercise rights of employees who worked in nonreligious jobs of religious institutions. The court thus found that the amendment was unconstitutional “as applied to secular activity.”<sup>65</sup>

The Supreme Court reversed the lower court in 1987, but it determined that it did not need to reexamine the case under *Lemon* because the § 702 exemption was “in no way questionable under the *Lemon* analysis.”<sup>66</sup> The first prong of *Lemon*, the “purpose” requirement, aimed only at preventing the government from acting with the intent of promoting or advancing a particular religion.<sup>67</sup> Thus, the Court agreed with the district court’s determination that Congress’s legislative purpose of alleviating “significant governmental interference with the ability of religious organizations to define and carry out their religious missions”<sup>68</sup> did not violate the Establishment Clause. The Court suggested, however, that it was a

significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.<sup>69</sup>

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activity in question and the religious rituals or tenets of the religious organization or matters of church administration”; and (3) if the “tie between the religious entity and activity in question is either close or remote under the first prong . . . and the nexus between the primary function of the activity . . . and the religious tenets or rituals of the religious organization or matters of church administration is tenuous or non-existent, the court must engage in a third inquiry. . . . the relationship between the nature of the job the employee is performing and the religious rituals or tenets of the religious organization or matters of church administration. If there is a substantial relationship . . . , the court must find that the activity in question is religious.” *Id.* at 332 n.6.

<sup>64</sup> *Id.* at 333.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 335.

<sup>67</sup> *Id.*; see also McClure, *supra* note 46, at 589 (providing an overview of *Amos*).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 336.

This excerpt defined the court’s reasoning for the entire decision. The difficulty in forcing religious organizations to categorize their activities as either religious or secular would, the Court feared, unduly hinder the free exercise of religion.

The Court also reasoned that the second requirement under *Lemon*—that the primary effects of the law neither inhibit nor advance religion—was not violated by § 702; the Court stated that a law that simply allowed religious organizations to advance their own religion was not the same as the government advancing religion through its own activities and influence.<sup>70</sup> The Court stated that it had “never indicated that statutes that give special consideration to religious groups are *per se* invalid,” which would “run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause.”<sup>71</sup>

The Court determined that § 702 did not offend the Equal Protection Clause<sup>72</sup> by giving less protection to the employees of religious employers than to employees of secular employers; this statute was facially neutral and was motivated by the permissible purpose of removing government interference with religious organizations’ free exercise of religion. Therefore, since strict scrutiny did not apply, the Court applied the rational basis test and found § 702 to be rationally related to a legitimate purpose—alleviating governmental interference with religious organizations’ ability to define and perpetuate their own religious activities.<sup>73</sup> Finally, the Supreme Court decided that § 702 did not “entangle[] church and state; the statute effectuate[d] a more complete separation of the two and avoid[ed] the kind of intrusive inquiry into religious belief that the District Court engaged in in this case.”<sup>74</sup> Ultimately then, the Court opted in favor of a categorical exemption from Title VII’s mandates for religious organizations’ religious *and*

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<sup>70</sup> *Id.* at 336.

<sup>71</sup> *Id.* at 338.

<sup>72</sup> U.S. CONST. amend. XIV.

<sup>73</sup> *Id.* at 339.

<sup>74</sup> *Id.*

secular activities—the “nonprofit activities of religious employers”<sup>75</sup>—rather than forcing the organizations or courts to decide which activities were religious and which were secular.

The Court had noted that the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints was organized as a nonprofit corporation under § 501(c)(3) of the Internal Revenue Code, but it mentioned this only in a footnote, and the Court did not explicitly state that all nonprofit activities under its holding would have to qualify under § 501(c)(3).<sup>76</sup>

### **B. Justices Brennan and Marshall’s Concurrence: Discussing the “Nonprofit” Difficulties**

In their concurrence, Justice Brennan and Justice Marshall pressed that the judgment in *Amos* involved a “challenge to the application of § 702’s categorical exemption to the activities of a *nonprofit* organization. . . . that the particular character of nonprofit activity makes inappropriate a case-by-case determination whether its nature is religious or secular.”<sup>77</sup> He recognized that religious organizations have a legitimate “interest in autonomy in ordering their internal affairs, so that they may be free to: ‘select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.’”<sup>78</sup> He justified this line of thought by explaining that a Church’s ability to commit itself to its religious mission furthers individual religious freedom as well because of individuals’ participation in larger religious communities. Brennan then explained that, “if certain activities constitute part of a religious community’s practice, then a religious organization should be able to require that only members of its community perform those activities.”<sup>79</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 330 n.3.

<sup>77</sup> *Id.* at 340 (Brennan, J., concurring).

<sup>78</sup> *Id.* at 341 (recognizing that religion contains communal elements for most believers, and that religious organizations must therefore be protected by the Free Exercise Clause, since individuals often worship through the vehicle of a religious organization).

<sup>79</sup> *Id.* at 343 (explaining that the “infringement on religious liberty that results from conditioning performance of *secular* activity upon religious belief cannot be defended as necessary for the community’s self-definition”).

In spite of his emphasis on the importance of an organization’s “religious mission,” Brennan explained that applying the exemption only to an organization’s religious activities would be too difficult because the character of an activity is not obvious. Courts would have to engage in a “searching, case-by-case analysis,” which would result in “considerable ongoing government entanglement in religious affairs.”<sup>80</sup> Moreover, this entanglement might result in the chilling of a religious organization’s free exercise of religion.<sup>81</sup> The organization might characterize as religious only those activities over which it is certain there would be no dispute, in order to avoid employment-related litigation.

Justice Brennan then moved into the “nonprofit” aspect of his analysis. He worried that the risk of chilling religious organizations’ free exercise activity was “most likely to arise with respect to nonprofit activities.”<sup>82</sup> He explained that a non-profit entity must “utilize its earnings to finance the continued provision of the goods or services it furnishes, and may not distribute any surplus to the owners.”<sup>83</sup> Thus, nonprofits are organized to provide community services and not simply to engage in commerce—churches, therefore, regard the provision of these services as a way to fulfill their religious duties.<sup>84</sup> Nonprofit activities, therefore, are “most likely to present cases in which characterization of the activity as religious or secular will be a close question;” Brennan explained that a categorical exemption for all nonprofit activities, whether religious or secular, was therefore justified.<sup>85</sup> He explained that, “While not every nonprofit activity may be operated for religious purposes, the likelihood that many are makes a categorical rule a suitable

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 344.

<sup>83</sup> *Id.* (explaining that this explanation of a nonprofit corporation “makes plausible a church’s contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose”). See also Gail A. Lasprogata & Marya N. Cotton, *Contemplating “Enterprise”:* *The Business and Legal Challenges of Social Entrepreneurship*, 41 AM. BUS. L.J. 67, 74-75 (2003).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 345. But see *infra* note 102 and accompanying text (discussing why nonprofit entities should not be singled out for the exemption and discussing the problems with distinguishing nonprofit from for-profit entities in *Amos*).

means to avoid chilling the exercise of religion.”<sup>86</sup> However, Justice Brennan also suggested, albeit in a footnote, that,

If it were possible easily to transform an enterprise that appeared commercial in substance into one nonprofit in form, a church’s decision to do so might signal that the church regarded the religious character of an entity as so significant that it was willing to forgo direct financial benefits in order to be able to hire persons committed to the church’s mission. Nonetheless, *if experience proved that nonprofit incorporation was frequently used simply to evade Title VII, I would find it necessary to reconsider the judgment in these cases.*<sup>87</sup>

Thus, Justice Brennan was aware of the fact that religious organizations could actually abuse the categorical exemption for nonprofit entities, making the Court’s decision potentially overbroad.

Justice O’Connor also concurred, noting her frustration with the *Lemon* test, explaining that the Court’s opinion only extended to nonprofit organizations and failed to “acknowledge that the amended § 702, 42 U.S.C. § 2000e-1, raises different questions as it is applied to profit and nonprofit organizations.”<sup>88</sup> She worried that the Court brushed off the “effects” prong of the *Lemon* test: as long as a court could characterize the government action as ““allowing”” religious organizations to advance religion, as opposed to the government action actually “directly advancing religion,” *Lemon* appeared to be met.<sup>89</sup> Justice O’Connor, however, felt that, contrary to *Lemon*, in examining an Establishment Clause challenge to a government exemption for religious organizations from a regulatory burden, a court would have to acknowledge that such an action did advance religion.<sup>90</sup> Justice O’Connor stated that in order for a government action

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 344 n.4 (emphasis added). *See infra* Part V for a discussion of why this sentence is critical to the determination that the Supreme Court must revisit its analysis of “nonprofit” and provide a more coherent definition, so as to avoid further violations to the Establishment Clause (even though the Supreme Court is not likely to actually overturn *Amos* or hold that the § 702 exemption applies only to religious activities of organizations).

<sup>88</sup> *Id.* at 346 (O’Connor, J., concurring).

<sup>89</sup> *Id.* at 347.

<sup>90</sup> *Id.*; *see also supra* note 20 (outlining several cases that have questioned the validity of *Lemon*).

to be a permissible accommodation of religion, there must actually be an “identifiable burden *on the exercise of religion* that can be said to be lifted by the government action.”<sup>91</sup>

Ultimately, Justice O’Connor explained that the amended exemption will have different applications to for-profit and nonprofit activities: “Because there is a probability that a nonprofit activity of a religious organization will itself be involved in the organization’s religious mission, . . . the objective observer should perceive the Government action as an accommodation of the exercise of religion rather than as a Government endorsement of religion.”<sup>92</sup> Importantly, Justice O’Connor determined that activities that were solely profit-making would not as likely be involved in the religious mission of an organization as nonprofit activities would be; thus, the “constitutionality of the § 702 exemption as applied to for-profit activities of religious organizations remains open.”<sup>93</sup>

### **C. The EEOC’s Policy Statement of 1987 Supported Only a Narrow Exemption**

The Equal Opportunity Employment Commission issued a Policy Statement clarifying its position that “religious organizations and religious educational institutions are *not* exempt from liability under Title VII for discriminating in compensation, terms, conditions, or privileges of employment on the basis of religion.”<sup>94</sup> It is noteworthy that the EEOC issued its policy statement on September 23, 1987, just months after *Amos* was decided (June 24, 1987).

The Commission argued that a religious institution may not discriminate in employment decisions on the basis of religion.<sup>95</sup> The Commission based this ruling on the fact that when the

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<sup>91</sup> *Id.* at 348.

<sup>92</sup> *Id.* at 349.

<sup>93</sup> *Id.*

<sup>94</sup> EEOC Policy Statement: *Religious Organization Exemption under Title VII of the Civil Rights Act of 1964, as Amended* (1987), available at [www.eeoc.gov/policy/docs/religious\\_orgs\\_exemption.html](http://www.eeoc.gov/policy/docs/religious_orgs_exemption.html).

<sup>95</sup> The Commission argued that the rationale of these cases applied to § 703(e)(2) cases as well—this was “enacted solely to insure that certain types of religious educational institutions would be exempt from liability for discrimination on the basis of religion because several Senators believed that they were not clearly covered by the exemption in § 702.” *Id.*

exemption was adopted in 1964, it only allowed for discrimination based on an organization's religious activities. The EEOC interpreted this as "unequivocally show[ing] Congress's intent to allow only a very narrow exception for religious institutions."<sup>96</sup> The EEOC also noted that two changes to the exemptions were proposed in 1972—one which expanded the exemptions so that religious institutions could hire employees of the same religion for all activities, not only those of a religious nature, and another, more limited, proposal that would have allowed religious organizations to discriminate on any basis.<sup>97</sup> Obviously Congress had chosen to circumscribe the benefits it granted to religious organizations by not allowing them to discriminate on other bases. The EEOC also relied on the rule of statutory construction that "exemptions to remedial statutes should be narrowly construed in order that the remedial purpose of the statute not be frustrated."<sup>98</sup> The Commission's interpretation of the § 702 exemption illustrates that it should not be read broadly to include more than the religious, nonprofit activities of religious organizations—supporting the idea that "nonprofit" should have a narrow meaning under *Amos*.

#### **D. Distinguishing between Religious and Secular Activities of Religious Institutions**

One of the biggest concerns of the *Amos* Court was that it did not want courts to have to argue with religious institutions about what activities they considered religious and what they considered to be secular, political, social, etc. Bruce Bagni suggests that a distinction can be made between the "purely spiritual or integral facets of the actual practice of the religion" and three concentric "emanations" from the core. The first emanation contains church-sponsored community activities; the second contains "purely secular business activities" (including employment relationships with employees who nonreligious functions); and the third contains

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* (citing 118 CONG. REC. 946 (statements of Senators Ervin and Allen); 118 CONG. REC. 1982, 1992-95 (statements of Senators Ervin and Allen); 118 CONG. REC. 4813 (statement of Senator Williams)).

<sup>98</sup> *Id.* (citing *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977); *A.H. Philips Inc. v. Walling*, 324 U.S. 490, 493 (1945)).



the completely secular world. He states that once a religious organization is outside its “spiritual epicenter,” it has subjected itself to government regulation “proportionate to the degree of secularity of its activities and relationships.”<sup>99</sup> He argues, however, that the “spiritual epicenter” must be completely free from government regulation. Professor Evans, however, argues that this proposal is not helpful because it still requires courts to determine what constitutes a “spiritual epicenter” or an “emanation” (which could violate the Free Exercise Clause).<sup>100</sup> Another alternative, as the Supreme Court decided in *Amos*, is that “the very act of distinguishing religious from nonreligious activities entangles government with religion in ways likely to violate both religion clauses.”<sup>101</sup> Therefore, courts should not make any distinction at all.

Karen Crupi asserts, however, that the Supreme Court has always inquired into the religious or secular nature of activities, and that doing this “does not rise to a impermissible level of entanglement” because “the very essence of first amendment analysis initially requires the judicial separation of religious from secular concerns.”<sup>102</sup> In *NLRB v. Catholic Bishop of Chicago*, for example, the Supreme Court looked into the religious or secular nature of teachers’ responsibilities at parochial schools, eventually concluding that applying the National Labor Relations Act to religious schools would lead to entanglement under the Establishment Clause.<sup>103</sup> Analyzing the “nature of the functions performed by the employees in determining whether an exemption was applicable” was deemed necessary by that Court.<sup>104</sup>

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<sup>99</sup> *Id.* (quoting Bruce Bagli, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1539-40 (1984)).

<sup>100</sup> EVANS, *supra* note 12, at 128.

<sup>101</sup> *Id.* at 128-29 (explaining that the Supreme Court held that the threshold question of “whether an activity of church is a religious activity” would be left to the religious institution itself to decide, in order to keep courts from “second guessing religious doctrine concerning its ministry”).

<sup>102</sup> Karen Crupi, Comment, *The Relationship Between Title VII and the First Amendment Religion Clauses: The Unconstitutional Schism of Corporation of the Presiding Bishop v. Amos*, 53 ALB. L. REV. 421, 435 (1989).

<sup>103</sup> Crupi, *supra* note 102, at 471-72 (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979)).

<sup>104</sup> *Id.*

Furthermore, Crupi argues that by granting the exemption to religious *nonprofit* employers, the Court advanced “economically dependent and more established religious sects over others.”<sup>105</sup> This creates an unconstitutional effect under *Lemon* because it denies government neutrality toward all religious organizations. She suggests that the *Amos* Court assumed that religious entities that are structured as nonprofits would inherently be religious in nature, thereby not requiring an inquiry into their secular and religious activities.<sup>106</sup> Crupi claims, however that “nonprofit” and “religious” are not synonymous.<sup>107</sup> She claims that *Amos*’s distinction based wholly upon nonprofit structure was “overinclusive” and insulated nonprofit organizations’ purely secular employment activities that otherwise did not warrant First Amendment protection; she likewise argues that they are “underinclusive” because the employment relationship of for-profit religious organizations performing primarily religious functions is not given similar protection. She ultimately argues that courts *must* examine the nature of the employment relationship in order to determine whether Title VII may apply.

#### IV. FEDERAL EXEMPTION FOR NONPROFIT CORPORATIONS

A critical aspect of Justice Brennan and Justice O’Connor’s concurrences in *Amos*, and the aspect of the case with which this paper takes issue, is the nonprofit character of the activities that are exempt from Title VII’s mandates under *Amos*. This section describes varying definitions and categories of nonprofit entities and the role they have in the federal tax code.

##### A. The Hansmann Model of Nonprofit Entities: “The Role of Nonprofit Enterprise”

Nonprofit corporations have a defined, growing role in our nation’s economy. Professor Hansmann’s 1980 article in the *Yale Law Journal*, “The Role of Nonprofit Enterprise,”<sup>108</sup>

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<sup>105</sup> *Id.* at 469.

<sup>106</sup> *Id.* at 470.

<sup>107</sup> *Id.*

<sup>108</sup> Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980).

provides an overview of the economic role of nonprofit organizations, specifically focusing on corporations that produce goods and services, or “operating” nonprofits, including “colleges, hospitals, day care centers, nursing homes, research institutes, publications, symphony orchestras, social clubs, trade associations, labor unions, churches, and organizations for the relief of the needy and distressed.”<sup>109</sup>

According to Hansmann, a nonprofit organization is one that is “barred from distributing its net earnings [profits], if any, to individuals who exercise control over it, such as members, officers, directors, or trustees.”<sup>110</sup> If the organization is incorporated, the main distinction between such corporations and their for-profit counterparts is, again, the nondistribution of earnings.<sup>111</sup> Some states have added to this requirement, or replaced it with a statement that the organization may not be formed or operated for the “purpose of pecuniary gain,” which, although usually read as meaning the same thing as the nondistribution of earnings, has also been interpreted to mean that an “organization may not be incorporated as a nonprofit even if it is intended to assist in the pecuniary gain in a more indirect manner.”<sup>112</sup>

Hansmann breaks down nonprofit corporations into several categories. He calls nonprofits that receive most or all of their income from grants or donations “donative” nonprofits; he places organizations formed to provide relief to the needy in this category,<sup>113</sup> so religious institutions that provide such services would fall into this classification. He then deems nonprofits that receive most of their income from prices charged for their services “commercial nonprofits”—thus, nursing homes and hospitals often fall into this category. He also explains

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<sup>109</sup> Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 837 (1980).

<sup>110</sup> *Id.* at 838. Hansmann notes that many nonprofit organizations actually show regular annual accounting surpluses. *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 839.

<sup>113</sup> *Id.* at 840.

that nonprofits that are controlled by their patrons are “mutual” nonprofits, whereas nonprofit organizations that are primarily free from the formal control of their patrons are “entrepreneurial” nonprofits.<sup>114</sup> He then presents four resulting categories: donative mutual; donative entrepreneurial; commercial mutual; and commercial entrepreneurial.<sup>115</sup>

Hansmann suggests that nonprofit firms might be slower to meet increased demand and might be less efficient in their use of inputs than for-profit firms are; he also points out that nonprofits may still succeed in distributing some of their net earnings (even though they technically should not) through inflated salaries, perquisites granted to employees, and other excess payments). In the case of donative nonprofit corporations, specifically the organizations that provide relief to the needy, using a nonprofit rather than a for-profit works because the purchasers, that is, the individuals who pay for the corporation to provide services to the needy, have no connection to the recipients of the goods or services. The purchasers thus cannot readily know whether the services they pay for are ever performed or performed adequately; if the corporation providing such goods and services were for-profit, “it would have a strong incentive to skimp on the services it promises, or even to neglect to perform them entirely, and, instead, to divert most or all of its revenues directly to its owners.”<sup>116</sup> Therefore, the nonprofit corporation, by its very structure, is better equipped to actually serve the less fortunate. However, Hansmann is quick to point out that nonprofits do not always need to be utilized in the context of a person (the purchaser) subsidizing another’s (the recipient) consumption.<sup>117</sup> It is only when the donor or

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<sup>114</sup> *Id.* at 841.

<sup>115</sup> *Id.* at 842.

<sup>116</sup> *Id.* at 847.

<sup>117</sup> *Id.* Hansmann explains that, for example, in the context of goods (rather than services), donors have the option of taking delivery of the goods him or herself, ensuring that the producer has sufficiently performed and sending the goods to the donee. A for-profit producer can also make delivery directly to the donee (i.e., with florist shops, the donor is likely to hear from the recipient about the quality of service, so there is “limited opportunity for abuse on the part of the florists”). Additionally, for-profit producers are often used in subsidizing demand rather than supply, as in the case of redeemable coupons like food stamps or housing vouchers (government subsidy schemes), or gift

purchaser cannot contact the donee or recipient directly in order to ensure adequate performance, but must rely on the producer of the subsidized good or service as the point of contact, that Hansmann believes that a nonprofit enterprise should be utilized.<sup>118</sup>

## **B. The Internal Revenue Code Provides Key Insights into the Nonprofit Structure**

Religious institutions are exempt from federal income taxation if they qualify as “nonprofit” corporations under § 501(c)(3) of the Internal Revenue Code (I.R.C.):

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.<sup>119</sup>

Therefore, not all nonprofit organizations are exempt from taxation.<sup>120</sup> However, the “definition of the categories of nonprofits that qualify for exemption has followed the expansion of nonprofits into new fields, rather than vice versa,” meaning that the Tax Code has been amended and reinterpreted to include new forms of nonprofits as nonprofit enterprises expand their

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certificates (private subsidy schemes); the donee or recipient is the one who polices the for-profit producers. *Id.* at 848. These are all examples in which for-profit corporations can work in subsidy/charity cases.

<sup>118</sup> *Id.* at 848.

<sup>119</sup> 26 U.S.C. § 501(c)(3) (1986).

<sup>120</sup> *See* Hansmann, *supra* note 109, at 881 n.107. Organizations that qualify for the exemption must meet the following definition:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office. *Id.* (citing 26 U.S.C. § 501(c)(3)).

activities.<sup>121</sup> These exemptions give nonprofit organizations competitive advantages over their for-profit counterparts, which has an effect on nonprofit firm development.<sup>122</sup>

Under the charitable deduction provision of the Internal Revenue Code, an individual who contributes money to a nonprofit organization that falls within a class defined by the I.R.C. (a subset of the class of nonprofit entities that qualify for exemption from the corporate income tax)<sup>123</sup> can deduct the donation from his or her income;<sup>124</sup> this provision does assist nonprofits that qualify for it. Hansmann argues, however, that charitable deductions have affected the “overall scale of nonprofit activity,” rather than the actual distribution of nonprofit activity across specific services or sectors.

If a nonprofit organization meets the following requirements, it is considered nonprofit for purposes of exemption: (1) the organization must be organized and operated exclusively for religious purposes; (2) no part of the organization’s net earnings may go towards the benefit of any private shareholder or individual; and (3) the organization must not engage in “substantial lobbying activities” or intervene in political campaigns.<sup>125</sup> The first criterion, as discussed above, is difficult because it is not always clear what a “religious” purpose is. “Churches” are also exempt from the Internal Revenue Service’s (I.R.S.) normal requirement that tax-exempt organizations must file a statement of activities and informational tax return, justifying their

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<sup>121</sup> Hansmann, *supra* note 109, at 882.

<sup>122</sup> *Id.* at 883. This effect still might not be important in determining the specific industries in which development takes place. *Id.* Hansmann suggests that a tax exemption does not appear to be the deciding factor for organizers of a certain activity when they must choose whether to organize under a nonprofit or for-profit model. *Id.* at 882-83. However, he points out that exemption from property taxes probably is more significant or helpful to these organizations than is exemption from the corporate income tax. *Id.* at 882.

<sup>123</sup> I.R.C. § 170.

<sup>124</sup> *Id.*; *see also* Hansmann, *supra* note 109, at 883-84 (explaining that, as in the case of the effect of the exemption from the corporate tax, the charitable deduction provision has also been reinterpreted and revised to coincide with the expansion of nonprofit activity into different arenas; explaining also that the availability of this deduction has not been necessary for the development of donative nonprofits, since qualifying organizations cannot always solicit meaningful donations).

<sup>125</sup> 26 U.S.C. 501(c)(3).

status.<sup>126</sup> This lack of oversight over “churches” and other religious organizations has presented tax fraud issues, as “bogus churches” have organized under § 501(c)(3) to avoid taxation.<sup>127</sup> However, the I.R.S.’s fear of infringing on the autonomy of *legitimate* institutions has made it hesitate to prosecute fraud, thus widening the scope of protection for religious institutions.

Scott McClure also provides the following explanation of the distinction between for-profit and nonprofits: “for-profits can distribute their profits for general use by the church, while nonprofit entities must utilize their earnings to finance the continued operation of the enterprise itself.”<sup>128</sup> Providing an exemption to *for-profit* corporations would violate the second prong of *Lemon* because it “permits religious organizations to pursue activities that are unconnected to the mission of the church—activities aimed solely at generating profit.”<sup>129</sup> He also analyzed this question under the third *Lemon* prong (that the law must avoid excessive entanglement with religion), looking into the nature of the benefited institutions, the nature of the aid provided, and the relationship between the government and the religious organization. If Congress or the courts provided an exemption to for-profits, it would require a case-by-case analysis of whether an activity is secular or religious (to determine what activities were connected to the religious mission and what activities were engaged in purely for a profit motive).<sup>130</sup> In McClure’s opinion, this kind of case-by-case analysis brings on unwarranted government scrutiny and entanglement, the kind the Court abhorred in *Amos*.<sup>131</sup>

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<sup>126</sup> EVANS, *supra* note 12, at 140 (pointing out that the definition of a “church” is also problematic because the Department of the Treasury’s definition is simply a “religious order or a religious organization if such order or organization (a) is an integral part of a church, and (b) is engaged in carrying out the functions of a church” (quoting Treasury Regulation § 1.511–2(a)(3)(ii)).

<sup>127</sup> EVANS, *supra* note 12, at 141.

<sup>128</sup> McClure, *supra* note 46 (citing Hansmann, *The Role of Nonprofit Enterprises*, 89 YALE L.J. 835, 838 (1980)).

<sup>129</sup> McClure, *supra* note 46, at 601.

<sup>130</sup> *Id.* at 602. McClure explains that an examination of whether a for-profit’s activity is religious or secular would apply in the case of a non-categorical exemption for for-profits. *Id.*

<sup>131</sup> *Id.*

Under the Free Exercise Clause, McClure suggests that a “blanket exemption of for-profit enterprises operated by religious institutions . . . poses the danger of infringing upon personal religious beliefs in which no countervailing state interests exists in allowing religious organizations to freely practice their own religion,” notwithstanding the offense to employees’ Free Exercise rights that a categorical exemption poses.<sup>132</sup> Ultimately, McClure advocates for a case-by-case application of the § 702 exemption to for-profits:

Only as to religious activities would a provision that allows the exercise of religious preferences remove a regulation that burdens the free exercise of religion. This rationale supports the application of section 702 only to those secular enterprises—both nonprofit and for-profit—that a religious organization can show are religious in nature and vital to the church’s religious mission. . . . A categorical denial of the exemption to all for-profits would violate an organization’s right to freely exercise its religion. However, a categorical exemption infringes on the free-exercise rights of employees. This infringement can be justified only when the state provides a compelling countervailing interest in promoting the free exercise of religious belief by the religious employer. . . .<sup>133</sup>

McClure acknowledges that a case-by-case analysis under the Free Exercise Clause should not necessarily apply to all of religious entity’s *secular* activities, both nonprofit and for-profit; this is because, again, such an inquiry poses excessive entanglement and the chilling of religious activity; he explains, however, that these dangers of analyzing the organization’s activities are “of less concern with regard to for-profits . . . since for-profit status alone casts doubt on whether the activity has religious content.”<sup>134</sup> McClure suggests that the third part of the Free Exercise test, which looks at the extent to which a statute’s objectives are impeded, would not be violated by a case-by-case approach. Ultimate, McClure argues that a case-by-case “application of the

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<sup>132</sup> *Id.* at 603.

<sup>133</sup> *Id.* at 604.

<sup>134</sup> *Id.* at 605 (suggesting that it is reasonable to require a religious institution to prove that its “profit-seeking ventures relate to its religious mission,” and that a “case-by-case approach best responds to these dangers by balancing the requirements of the religion clauses”).



exemption to those for-profits that can show that they are religious in nature best balances the requirements of the religion clauses.”<sup>135</sup>

## **V. REVISITING *AMOS* AND CLARIFYING THE DEFINITION OF NONPROFIT ACTIVITY**

The U.S. Supreme Court should revisit its holding in *Amos* and clarify its test of what constitutes a nonprofit activity. Although the Court expressed concern in the opinion about making case-by-case distinctions between the religious and secular activities of religious employers, the Court needs a more precise definition of nonprofit activity, and should thus require that courts engage in a case-by-case determination of whether a particular entity’s activities meet that definition, in order to ensure that as little discrimination as possible is occurring in the workplace. Although the Court said that it did not want to risk the chilling effect that inquiring into the religious or secular activities of religious employers might cause, it is important that the exemption for religious organizations not be unnecessarily broad.

### **A. The Legislative History of the Civil Rights Act Warrants Rethinking the *Amos* Holding**

As the legislative history shows, Title VII was enacted to correct the problems with discrimination in the workplace.<sup>136</sup> Although race and sex discrimination had posed many of the problems leading to the passage of Title VII, Congress was concerned with all forms of discrimination, and discrimination against employees or potential employees on religious grounds should be treated with as much suspicion as the other protected categories in Title VII are.<sup>137</sup> It is interesting that the 1972 Equal Employment Opportunities Act was passed with the

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<sup>135</sup> *Id.* at 606. McClure argues that such a case-by-case approach poses the “comparatively minimal dangers of slight governmental entanglement in religion and a decrease in the free exercise rights of religious institutions.” *Id.*

<sup>136</sup> See *supra* Part II.A; see also *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977) (“The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin.” (citation omitted)).

<sup>137</sup> Testimony of Rep. Brown, H.R. 92-238 (92d Congress, 1st Sess.), Equal Employment Opportunities Enforcement Act of 1971, to accompany H.R. 1746, at 70 (June 2, 1971). See also EEOC Policy Statement, *Religious Organization Exemption Under Title VII of the Civil Rights Act of 1964, as Amended* (effective date Sept.

intention of strengthening the EEOC's enforcement power to enact the provisions of the 1964 Civil Rights Act—that Congress wanted the EEOC to have more oversight and ability to investigate and prosecute Title VII actions. The debate on the floor indicates how important it was to some senators that removal of discrimination in the workplace actually be carried out, and not just remain a lofty goal. Senator Hawkins called for a “reaffirmation of our national policy of equal opportunity in employment.”<sup>138</sup> Improving the employment opportunities of all Americans in all aspects of their jobs was clearly one of Congress's goals.

And it was quite clear that some senators opposed the liberal new expansion of § 702 for religious organizations. Senator Williams, for example, believed that religious institutions should be the frontrunner in leading the charge *against* workplace discrimination—that they, of all employers, should not perpetuate and facilitate unreasonable discrimination.<sup>139</sup> Not everyone in Congress supported even allowing any exemption at all. The EEOC Policy Statement issued after *Amos* also indicates the Commission strongly disagreed with such a broad exemption from anti-discrimination laws, and that it was important not to lose sight of the original purpose of Title VII.<sup>140</sup> Regardless of the amount of support for that provision, however, it still exists and is not likely to be removed any time soon. As a matter of public policy, however, the Supreme Court should not allow the § 702 exemption to swallow any chance employees performing secular functions for religious employers have of keeping their jobs without compromising their own religious beliefs. The Court would then act consistently with the *real* intent of Title VII and

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23, 1987, expiration date Mar. 23, 1988), *available at* [http://www.eeoc.gov/policy/docs/religious\\_orgs\\_exemption.html](http://www.eeoc.gov/policy/docs/religious_orgs_exemption.html) (declaring the EEOC's position that religious organizations and religious educational institutions should not be exempt from liability under Title VII for discrimination in employment on religious grounds). *See also* JEFFREY M. BERNBACH, *JOB DISCRIMINATION: HOW TO FIGHT AND HOW TO WIN* 116 (1996) “Under the law, one's religious beliefs are accorded the same protection as one's age, race, sex, national origin, or disability. Thus, they may not be held up to ridicule in the workplace (nor, for that matter, *anyplace*.”) (emphasis in original).

<sup>138</sup> *See supra* note 39 and accompanying text (providing excerpt of Senator Hawkins's testimony).

<sup>139</sup> *See supra* note 56 and accompanying text (providing excerpt of Senator Williams's testimony).

<sup>140</sup> *See supra* Part III.C.

would protect workers from discrimination if it was not absolutely necessary for legitimate nonprofit institutions.

It is evident that Congress chose to treat religion differently than other protected characteristics under Title VII: race, color, gender, and national origin. However, Congress still did not allow religious organizations to discriminate on any other basis *except* religion. They cannot, for example, discriminate on the basis of race or sex, even if an organization would be morally opposed to hiring someone because of that person's gender or race.<sup>141</sup> Since Congress has not chosen to give religious organizations free reign over their hiring decisions, it is appropriate that an organization's right to discriminate on religious grounds be circumscribed.

#### **B. Wholly Exempting Religious Organizations from Title VII Could be Unconstitutional**

There are some who conclude that exempting religious organizations from any statutes of general applicability is unconstitutional, which should lead to a rethinking of which types of nonprofit activities should actually be exempt. Ira Lupu concludes that giving religious organizations *any* exemption from federal statutes of general applicability violates the Establishment Clause, indicating that even exempting the nonprofit activities of religious organizations is constitutionally suspect.<sup>142</sup> He argues that the Free Exercise Clause was put into place to protect individual religious freedom, and that exemptions might actually be forbidden under the Establishment Clause.<sup>143</sup> Thus, if exemptions are to be granted (and it is unlikely that the Supreme Court will overturn its precedent upholding the § 702 exemption as applied to secular activities of a religious nonprofit organization), they must be narrowly tailored.

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<sup>141</sup> *See, e.g.*, Lupu, *supra* note 28, at 422.

<sup>142</sup> *Id.* at 401.

<sup>143</sup> *Id.*

Steven Gey actually argues that it does not make sense, for exemption purposes, to distinguish between the for-profit and nonprofit entities that are both owned by bona fide religious organizations:

[I]f the owner is a bona fide religious organization, it will probably use the profits obtained from its for-profit corporations to further its own activities, most of which will be religious. If the ultimate use of the money produced by a commercial enterprise is religious in nature, then the corporate nature of the enterprise should not matter. There is no reason to give constitutional preference to a nonprofit gymnasium whose earnings may be used to finance additional weightlifting equipment, as opposed to a for-profit gymnasium whose earnings may be used to buy additional hymnals.<sup>144</sup>

Thus, he believes that singling out nonprofit entities for the exemption might not even be constitutional under the Establishment Clause. Congress would be doing more than accommodating—it would be giving “constitutional preference” to nonprofit entities.

### **C. Courts Must Look for a More Precise Definition in Order to Avoid Windfalls for Religious Organizations**

Alan Brownstein suggests that nonprofit religious entities are able to offer “less costly, more competitive, more efficient, and more cohesive services than their secular competitors.”<sup>145</sup>

Thus, religious nonprofit entities have an advantage over their secular counterparts because they can hire or fire based on religion, without regard to the mandates of Title VII, allowing them to conserve economic resources in ways that secular employers cannot.<sup>146</sup> Thus, any exemptions made for such organizations should be narrowly tailored.

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<sup>144</sup> Gey, *supra* note 25, at 93. Gey argues that the real significance of *Amos* is not “whether a commercial enterprise spends its money for religious purposes,” but “whether a secular adjunct of a religious organization can assert a constitutional interest sufficient to justify discrimination.” *Id.* at 93.

<sup>145</sup> Brownstein, *supra* note 21, at 131 (noting that an exemption having “force as an inducement does not necessarily require that a court reject it [because] the power of an exemption to induce religious belief and practice should be part of the balancing analysis a court undertakes in adjudicating a free exercise claim,” *id.* at 132).

<sup>146</sup> *See, e.g., Catholic Charities v. Superior Court*, 85 P.3d 67 (Cal. 2004). The California Supreme Court interpreted this as a case that “implicate[d] the relationship between a nonprofit public benefit corporation and its employees, most of whom do not belong to the Catholic Church. Only those who join a church impliedly consent to its religious governance on matters of faith and discipline.” *Id.* at 77. Thus, courts have not always upheld exemptions for religious entities.

In addition, Brownstein suggests that allowing such exemptions, particularly when they are legislatively mandated, might tacitly require employees to espouse or adopt the religious beliefs of their employers so as to retain job security.<sup>147</sup> Such a development would inherently infringe the Free Exercise rights of employees of religious organizations because they would either adopt certain practices at work that are consistent with their employer's beliefs, or they would fail to disclose their own religious beliefs for fear of being fired. Creating an environment in which employees feel constrained to adopt religious beliefs or practices contrary to their own is fundamentally opposed to the anti-discrimination framework of Title VII,<sup>148</sup> so the Supreme Court should carefully circumscribe its decision to exempt both the religious *and* secular activities of nonprofit religious organizations. In a similar vein, religious organizations will be able to exercise dominance or even oppression if granted an exemption that is too broad in scope. Ira Lupu argues that, “[Granting] such exemptions would enable dominant groups to gain rights unavailable to others, thus threatening the principle of *equal* religious liberty.”<sup>149</sup> Religious entities, therefore, are gaining a windfall when they are exempt from having to show that they invoked the § 702 exemption only for employment activities related to their religious mission.

Organizations might also exert sham claims purporting to be religious or nonprofit in nature in order to gain the opportunity to discriminate under the § 702 exemption. This would again provide a windfall that Congress could not have intended when it enacted the exemption. Justice Brennan acknowledged in *Amos*, albeit in a footnote, that “if experience proved that nonprofit incorporation was frequently used simply to evade Title VII, I would find it necessary

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<sup>147</sup> *Id.* Note, however, that Brownstein ultimately argues that courts and legislatures should give high deference to the freedom of religious employers under Establishment Clause grounds.

<sup>148</sup> *See supra* discussion Part II.

<sup>149</sup> Lupu, *supra* note 28, at 422.

to reconsider the judgment in these cases.”<sup>150</sup> There could be instances, therefore, where such a categorical exemption for nonprofit religious organizations would be inappropriate, even if the Excessive Entanglement doctrine<sup>151</sup> (the third prong of *Lemon*) and the “secular legislative purpose” requirement (the first prong of *Lemon*)<sup>152</sup> had prompted the Court not to inquire into whether activities went towards a religious mission. Thus, the deference shown under *Amos* is not absolute, and the Court would clearly be willing to limit the reach of its exemption if sham claims cropped up. Although there has not been widespread evidence that organizations have claimed to be religious or nonprofit in nature just to reap the benefits of § 702, there is always a possibility, as Alan Brownstein acknowledges, that some organizations would purport to abuse the legislative exemption.<sup>153</sup> The Court should not be opposed to circumscribing the ability of religious organizations to discriminate in their hiring practices, in order to avoid the possibility of shams in the first place.

Sham claims might be widespread in other religious exemption contexts, however, and courts appear to have prevented entities that are making the claims from receiving an exemption. The charitable choice provisions of President Bush’s faith-based initiatives, for example, exempted faith-based employers from laws prohibiting religious discrimination in employment

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<sup>150</sup> *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 344 n.4 (1987). Justice Brennan did not cite any examples of “shamming” actually occurring in this context, but his acknowledgement that it might happen indicates that the decision to grant such a widespread exemption could be curtailed under the right circumstances.

<sup>151</sup> *Id.* at 339 (“It cannot be seriously contended that § 702 impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case. The statute easily passes muster under the third part of the *Lemon* test.”).

<sup>152</sup> *Id.* at 334-35 (“Rather, *Lemon*’s ‘purpose’ requirement aims at preventing the relevant governmental decisionmaker—in this case, Congress—from abandoning neutrality and acting with the intent of protecting a particular point of view in religious matters. Under the *Lemon* analysis, it is a permissive legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.”).

<sup>153</sup> Brownstein, *supra* note 21, at 133-34. Brownstein argues, however, that fears of sham claims are more prevalent than they need to be, since organizations actually do not have real incentives to assert such claims. Should an organization invoke a religious exemption, it might also become ineligible for government subsidies, and there could be conditions attached to the exemption that outweigh the benefits. *Id.*; see also *infra* Part I.B.

practices; this was taken wholesale from Title VII.<sup>154</sup> Rampant discrimination has not persisted, however. Rather, “there are numerous cases where courts have decided against an FBO’s [faith-based organization] claim that employment decisions were central to their religious function and ruled that the claim merely was a sham and could not qualify for the Title VII exemption.”<sup>155</sup> Thus, sham claims could be more pervasive than has been acknowledged, but the courts have stifled most of them. However, this does not mean that such claims could not become more widespread or that courts, in the name of religious toleration and avoidance of entanglement, will be unable or unwilling to examine more closely whether a claim seems to be a sham. Ensuring that organizations that meet the definition of “nonprofit” receive the benefits of the exemption will avoid the problems of fraud and help to effectuate Congress’s true intent. As Karen Crupi also points out, the Supreme Court has always inquired into the religious or secular nature of activities, so it would not be inappropriate or anomalous for the Court to do the same in this case.<sup>156</sup> Determining whether an organization is therefore nonprofit or for-profit, according to a definition developed by the Court, would hardly be inappropriate interference or “excessive entanglement.”

Of course, the Supreme Court has not varied from the decision that *Amos* applies to nonprofit religious entities, indicating that a categorical exemption for nonprofit entities meant

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<sup>154</sup> John Farina, *A Hidden Agenda Drives Liberal Opposition to Charitable Choice—Race and Gender Discrimination Publicity—Brief Article*, BNET BUSINESS NETWORK, Feb. 26, 2001, [http://findarticles.com/p/articles/mi\\_m1571/is\\_8\\_17/ai\\_72274918](http://findarticles.com/p/articles/mi_m1571/is_8_17/ai_72274918); see also *Solomon v. Miami Women’s Club*, 359 F. Supp. 41, 45 (S.D. Fla. Miami Div. 1973) (although not a religious organization receiving the § 702 exemption, a women’s club was held not to be a mere sham to avoid the Civil Rights Act).

<sup>155</sup> Farina, *supra* note 154 (arguing that, “There are no cases where the ministerial exemption has been used successfully to defend discrimination in charitable choice programs. The framers of the religious exemption to the Civil Rights Act were not about to allow racial and sex discrimination in through the back door after they had labored so vigorously for the sweeping social reform embodied in that 1964 legislation.”).

<sup>156</sup> Crupi, *supra* note 102, at 435.

something to the Court.<sup>157</sup> The Supreme Court is not likely to overturn *Amos*, a twenty-year-old decision, and declare that the § 702 exemption is unconstitutional. The Court treads on narrow ground, however, by not allowing at least for case-by-case determinations of what constitutes nonprofit activity. If the Court were to clarify this aspect of its holding in *Amos*, it would still protect the rights of religious organizations engaging in nonprofit activities to make employment decisions based on religious grounds, but it would not further frustrate the original purpose of Title VII and allow religious organizations to discriminate unnecessarily or unjustifiably.

### **C. Searching for a Definition of “Nonprofit” Among Various Sources**

A number of sources must be explored in order to ascertain an appropriate definition of “nonprofit,” or at least what the Supreme Court might have had in mind when it determined that only the *nonprofit* secular activities of a religious organization would be exempt under § 702.

#### **1. Lower Courts Interpreting *Amos* Have Not Provided a Definition**

Lower courts have accepted *Amos*’s requirement that nonprofit activities are exempt, but they have not analyzed what religious entities actually qualify for nonprofit status under *Amos*, indicating that more religious entities than are necessary might be coming under the radar and qualifying for exemption from generally applicable mandates. The U.S. Court of Appeals for the

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<sup>157</sup> See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 710 (2005) (citing *Amos* for the proposition that accommodations to religious entities do not need to be accompanied by benefits to secular organizations or entities); *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994) (upholding the “benevolent neutrality” principle as recognized in *Amos*); *Van Orden v. Perry*, 545 U.S. 677, 684 n.3 (2005) (citing *Amos* for the principle that the Establishment Clause does not bar “any and all governmental preference for religion over irreligion”). See also *Supreme Court Declines Case About What Makes an Employer “Religious”*, THE ROUNDTABLE ON RELIGION & SOCIAL WELFARE POLICY, <http://www.religionandsocialpolicy.org/news/article.cfm?id=8162> (Apr. 22, 2008). The Supreme Court declined to grant certiorari in a case appealed out of the U.S. Court of Appeals for the Third Circuit, *LeBoon v. Lancaster Jewish Community Association*, No. 07-943 (Apr. 21, 2008). The issue was whether the Jewish Community Center could be sued for firing an evangelical Christian employee. The Third Circuit had held that it could not be sued because it was a religious entity under Title VII, and not merely a cultural organization. *Id.* This paper is not addressing the concept of what constitutes a “religious organization” for purposes of Title VII, but the Supreme Court’s decision not to hear the petition indicates that it agreed that the Center *was* a religious institution. Thus, the Court is still adhering to its precedent in terms of what types of institutions qualify for the § 702 exemption.



Seventh Circuit, in *Cohen v. Des Plaines*,<sup>158</sup> determined that the church-operated nursery schools and day care centers in the case had to be operated on a not-for-profit basis, in order for these entities to be exempt from a city zoning requirement that day care centers and nursery schools obtain special use permits to operate in residential areas.<sup>159</sup> The court did not address what “nonprofit” meant, but it clearly felt that this part of *Amos* was important enough that activities could *only* qualify for an exemption from the special use permit if they were nonprofit.<sup>160</sup>

Likewise, in *E.E.O.C. v. Townley Engineering and Manufacturing Co.*,<sup>161</sup> the Ninth Circuit stated that “Congress may create a bright line rule and exempt from regulation all of the nonprofit activity of religious corporations.”<sup>162</sup> The court did not address the meaning of “nonprofit,” but it clearly recognized that only nonprofit activities qualified for an exemption, indicating that it is important to know exactly what “nonprofit” entails. The court also held that it was necessary to examine on a case-by-case basis whether a corporation’s purpose and character were primarily religious, such that the corporation would qualify for the § 702 exemption.<sup>163</sup>

Thus, courts are willing to engage in case-by-case determinations of whether an entity is primarily religious or secular; it is not too much of a stretch, therefore, to require that they examine on a case-by-case basis whether an entity’s activities qualify as nonprofit or not.

## ***2. The Concurrences in Amos (and the Internal Revenue Code) Provide Insight***

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<sup>158</sup> 8 F.3d 484 (7th Cir. 1993).

<sup>159</sup> *Id.* at 493 (quoting extensively from Justice Brennan’s and O’Connor’s concurrences in *Amos*).

<sup>160</sup> *Id.* (quoting *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989) (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348 (1987))).

<sup>161</sup> 859 F.2d 610 (9th Cir. 1988).

<sup>162</sup> *Id.* at 623.

<sup>163</sup> *Id.* at 618 (“All significant religious and secular characteristics must be weighed to determine whether the corporation’s purpose and character are primarily religious. Only when that is the case will the corporation be able to avail itself of the exemption.”).

It is essential to cull any meaning for nonprofit activity from Justice Brennan’s and Justice O’Connor’s concurrences, since both justices acknowledged that the distinction between nonprofit and for-profit was critical to the exemption in *Amos*. As Justice Brennan explained, a non-profit entity must “utilize its earnings to finance the continued provision of the goods or services it furnishes, and may not distribute any surplus to the owners.”<sup>164</sup> This appears to also be the definition taken from § 501(c)(3) of the Internal Revenue Code,<sup>165</sup> and could be a potential starting point for what the Court considers to be “nonprofit activity.” The fact that Justice Brennan also noted that in footnote 4 of his concurrence that he would have to reconsider his opinions if it could be shown that “nonprofit incorporation” was used to evade Title VII<sup>166</sup> might indicate that Justice Brennan was referring to incorporation under § 501(c)(3).

Under the Internal Revenue Code, if an organization that meets the definition of “nonprofit” meets certain requirements, it receives an exemption under § 501(c)(3). These criteria are (1) the organization must be organized and operated exclusively for religious purposes; (2) no part of the organization’s net earnings may go towards the benefit of any private shareholder or individual; and (3) the organization must not engage in “substantial lobbying

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<sup>164</sup> *Id.* (stating that this explanation of a nonprofit corporation “makes plausible a church’s contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose”). See also *Associated Contract Loggers, Inc. v. United States Forest Service*, 84 F. Supp. 2d 1029, 1034 (D. Minn. 2000). In this case, involving the First Amendment right to petition for redress of grievances, the U.S. District Court for the District of Minnesota decided that even if the nonprofit defendants were advocates of a religion’s precepts, there was “no support for the proposition that the right to petition is restricted to citizens whose motivation is only secular.” *Id.* at 1034. Thus, courts have shown their support for the rights of both religious and secular organizations. The court here did not specifically define “nonprofit” as applied to the defendant environmental groups, but it also did not consider these nonprofit groups to be so entangled with the United States Forest Service as to be state actors. Thus, “nonprofit” actors could take a variety of forms, whether religious or secular, and the government could potentially be excessively entangled with them in violation of the First Amendment. Knowing whether “nonprofit” requires that the organization be organized for a specific purpose and whether it can have any kind of religious mission would be critical to knowing whether it could be excessively entangled (and thus violate the *Lemon* test and not qualify for the Title VII exemption).

<sup>165</sup> 26 U.S.C. § 501(c)(3) (“Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual . . .”).

<sup>166</sup> *Amos*, 483 U.S. at 344 n.4 (Brennan, J., concurring in judgment). Justice Brennan did not, however, explain what he meant by “nonprofit incorporation,” but his concurrence at least brings up the importance of the issue, which was something the majority did not consider.

activities” or intervene in political campaigns.<sup>167</sup> The Supreme Court could logically incorporate these requirements into its standards for the types of nonprofit entities would receive an exemption from Title VII, since the § 501(c)(3) is a “classic” exemption from federal laws for religious organizations. Of course, there would have to be specified levels of proof or evidentiary requirements for showing that an organization is being operated for religious purposes, not allowing its earnings to go to the shareholders or members, and not engaging in political or lobbying activities. The last requirement has become a prevalent issue as religious organizations have increasingly spoken out on certain political issues, and as there has been confusion over what constitutes “substantial lobbying activities.”<sup>168</sup>

Justice Brennan also pointed out that nonprofit activities must be used for community service activities, and not merely for commercial purposes.<sup>169</sup> It would be helpful to know to what extent an activity that qualifies for the § 702 exemption has to be for a community service purpose, or to what extent such an activity could be “commercial” (or even what “commercial” means in this context). As Gey points out, some religious organizations’ nonprofit activities might not actually be related to their “religious” mission; money raised by nonprofit activities at the Mormon gymnasium in *Amos* could have gone to finance more weightlifting equipment, whereas a for-profit religious institution could use its profits to buy more hymnals—which clearly do go toward a church’s religious mission. The *Amos* Court did not clarify what kinds of activities a nonprofit entity must fund or support in order to receive the Title VII exemption, but the Court did hold that it would not inquire into the religious *and* secular activities of nonprofit

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<sup>167</sup> 26 U.S.C. 501(c)(3) (1986); *see also supra* Part IV.B.

<sup>168</sup> *See, e.g., Politics and the Pulpit 2008: IRS Restrictions on Political Intervention and Lobbying*, THE PEW FORUM ON RELIGION AND PUBLIC LIFE, <http://pewforum.org/docs/?DocID=281> (last visited May 7, 2008); *The History of Church Electioneering*, OMB Watch, <http://www.ombwatch.org/article/articleview/2852/1/41?TopicID=2> (last visited May 7, 2008); Sidley Austin LLP, *Religious Institutions Law Alert*, FINDLAW, <http://library.findlaw.com/1999/Aug/1/128574.html> (last visited May 7, 2008).

<sup>169</sup> *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 344 (1987) (Brennan, J., concurring).

religious organizations. Thus, secular activities fall within the § 702 exemption. The scope of “nonprofit” must not sweep too broadly, however. For example, the Court could clarify its definition by revisiting Justice Brennan’s concurrence and require, for example, that only nonprofit activities that relate to or have a “community service” purpose or some other specific charitable purpose be exempt.

Justice Brennan believed that because the nonprofit activities of religious organizations would present the most problems in determining whether an activity is religious or secular, this justified a categorical rule.<sup>170</sup> It seems, however, that these are the cases where the Court *would* need to examine the activities more closely, on a case-by-case basis. Courts at least need to examine on a case-by-case basis whether an organization’s activities could be characterized as “nonprofit,” before it can make the sweeping decision that the characterization that the activities are religious or secular does not need to be made. Justice O’Connor, likewise, argued that the nonprofit nature of an activity justified a categorical rule: “Because there is a probability that a nonprofit activity of a religious organization will itself be involved in the organization’s religious mission, . . . the objective observer should perceive the Government action as an accommodation of the exercise of religion rather than as a Government endorsement of religion.”<sup>171</sup> In order to determine whether the “nonprofit activity” would actually be part of the organization’s “religious mission,” however, it seems necessary to know what the Court actually deems “nonprofit,” again before any sweeping generalizations can be made about the nature of nonprofit activities. Even Justice O’Connor’s statement that nonprofit activities are likely to be part of the religious organization’s religious mission could be too broad of a statement, as religious organizations might conduct nonprofit activities for the sake of conducting the activities, without actually tying

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<sup>170</sup> *Amos*, 483 U.S. at 345 (Brennan, J., and Marshall, J., concurring); *see also* discussion *supra* Part III.B.

<sup>171</sup> *Id.* at 349 (O’Connor, J., concurring in judgment).

a religious meaning or message to those activities.<sup>172</sup> As Karen Crupi argues, “nonprofit” and “religious” are not synonymous, and exempting all of a religious organization’s insulates nonprofit organizations’ secular employment activities that should not actually receive First Amendment protection.<sup>173</sup>

### **3. *Searching for a Definition Among Other Scholarly Sources***

Various scholars have adopted narrow definitions of “nonprofit” for their academic pursuits. Nobuko Kawashima, for example, in an article on corporate governance for the Japanese nonprofit sector, explains that Japanese Nonprofit Organizations are specifically incorporated under the Law for the Promotion of Specified Nonprofit Activities for Japan.<sup>174</sup> In the article, nonprofit activities referred only to “public interest, nonprofit corporations formed under state corporation laws, which often have tax privileged status under the Internal Revenue Code and can receive tax-deductible donations under the federal tax law.”<sup>175</sup> Kawashima also acknowledges the “very large number of unincorporated groups and associations that have the aim of serving the public interests in Japan,” which are “unincorporated and informal, but to the extent that their existence and activities are often known to their local authorities, more active on a regular basis than temporary projects.”<sup>176</sup> Thus, the author points out the complexity of the meaning of “nonprofit,” a meaning that could encompass both incorporated and unincorporated entities. The definition that Kawashima chooses to focus on, however, seems to resonate with

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<sup>172</sup> *Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309, 318-19 (D. Mass. 2006) (citations omitted) (religious organization’s use of buildings for secular activities or even to generate revenue to support religious activities might not be considered “religious exercises”); Elizabeth Ferry, *Getting a Head Start on Religious Indoctrination: The School Readiness Act of 2005*, 16 TEMP. POL. & CIV. RTS. L. REV. 145, 147 (2006) (citing *Bradfield v. Roberts*, 175 U.S. 291 (1899), for the proposition that appropriation by Congress of money to a hospital run by Catholic nuns, as compensation for the treatment of poorer patients under a contract with the District of Columbia, did not violate the Establishment Clause; the case was about the “incorporation of a hospital for the purposes for which such an institution is generally conducted.” *Id.* at 297.

<sup>173</sup> Crupi, *supra* note 102, at 470.

<sup>174</sup> Nobuko Kawashima, *Governance of Nonprofit Organizations: Missing Chain of Accountability in Nonprofit Corporation Law in Japan and Arguments for Reform in the U.S.*, 24 UCLA PAC. BASIN L.J. 81, 85 (2006).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 86. The article focuses exclusively, however, on incorporated organizations.

what the Supreme Court might have had in mind in formulating the *Amos* holding. Because Justice Brennan, for example, referred to nonprofit *incorporation* in footnote 4 of his concurrence,<sup>177</sup> it seems as if *Amos* encapsulates only nonprofit *corporate* entities—an important distinction courts must keep in mind when determining whether an organization should be granted the § 702 exemption. Similarly, the definition that Kawashima adopts—public interest corporations that often have tax-exempt status and can receive tax-deductible donations—also comports well with the language of *Amos*, which mentioned nonprofits in the context of the Internal Revenue Code in a footnote.<sup>178</sup>

The article contrasts its definition of “nonprofit” with a study of typical characteristics of nonprofit entities conducted by researchers at Johns Hopkins University.<sup>179</sup> These characteristics include independence from government; formality and continuity; that the organization is established chiefly by citizens voluntarily; that profits are not divided among members; and self-governance.<sup>180</sup> The Supreme Court certainly could have had these characteristics in mind when deciding that only nonprofit entities would receive the exemption because most of these characteristics would fit the model of a religious nonprofit entity. Religious organizations are independent from government;<sup>181</sup> they are “formal” in nature and are rooted in tradition and

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<sup>177</sup> *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 344 n.4 (1987) (Brennan, J., concurring in judgment).

<sup>178</sup> *Id.* at 330 n.3. The Court might also conclude that organizations to which taxpayers can make donations and receive a charitable deduction break on their taxes, I.R.C. § 170, would qualify as “nonprofit” under *Amos*. See Hansmann, *supra* note 109, at 883-84.

<sup>179</sup> Kawashima, *supra* note 174, at 85 (citing LESTER M. SALAMON & HELMUT K. ANHEIER, *THE EMERGING NONPROFIT SECTOR: AN OVERVIEW* 1-22 (1996)).

<sup>180</sup> Kawashima, *supra* note 174, at 85 (citing SALAMON & ANHEIER, *supra* note 179, at 1-22).

<sup>181</sup> See, e.g., Federick Mark Gedicks, *The Improbability of Religion Clause Theory*, 27 SETON HALL L. REV. 1233 (1997) (“Perhaps most importantly, neutrality implies a radically different public role for religion, one unconnected to government or to public life, as prescribed by secular individualism.”) Gedicks quotes the Supreme Court in *Everson v. Board of Education*, 330 U.S. 1 (1947): “Neither a state nor the Federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence anyone to go or to remain away from church against his will or force him to profess belief or disbelief in any religion. . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of

continuity;<sup>182</sup> religious organizations are established primarily by citizens (in the United States, they are not established by government entities);<sup>183</sup> if they are nonprofit, their profits should not be divided among the members, but should go towards the financing and continued distribution of goods or services;<sup>184</sup> and a feature of religious organization in America is certainly self-governance—another offshoot of the separation of church and state.<sup>185</sup> Thus, the general characteristics of nonprofit organizations coincide with the setup of most religious organizations. The *Amos* Court’s blanket statement that all nonprofit activities are exempt might, therefore, show that the Court believed that most religious entities, which would likely be formed as nonprofit corporations anyway, would be exempt—Justice O’Connor had already made this point in her concurrence.<sup>186</sup> However, the above characteristics are quite broad in nature, as noted by Kawashima, and nonprofit organizations can have narrower definitions or descriptions, depending on the context. In the case of *Amos*, a definition similar to that provided by Kawashima would be appropriate.

Professor Hansmann’s exploration of nonprofit entities could also provide a potential meaning of “nonprofit” in the § 702 exemption context. As Hansmann notes, nonprofit entities

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any religious organizations or groups, and vice versa.” *Id.* at 15-16. *See also* Alan Brownstein, *supra* note 21, at 92.

<sup>182</sup> *See, e.g.*, Brownstein, *supra* note 21, at 96 (religion is “grounded in tradition;” it is grounded in “institutions that operate over the long term and are less likely to be swayed by the passions of the moment”); *see also* Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 107-09 (explaining that the common lives of individuals who are attracted to particular beliefs and experiences will have “sufficiently coalesced to enable identification of a community centered on these individuals’ beliefs and experiences as core group concerns;” suggesting also that a group’s own narrative is also a way that groups establish meaning and authority).

<sup>183</sup> *See supra* Part I.

<sup>184</sup> *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 344 (1987) (Brennan, J., concurring in judgment). Churches who operate nonprofit activities often regard these as a way to fulfill their religious duties or mission. *Id.*

<sup>185</sup> *See Gedicks, supra* note 182, at 112 (suggesting that religious group existence is threatened in two ways by government regulation or intervention: the group might not remain intact, and it is uncertain what kind of group it will be if it does remain intact). *See also* Michael G. Weisberg, Note, *Balancing Cultural Integrity Against Individual Liberty: Civil Court Review of Ecclesiastical Judgments*, 25 U. MICH. J.L. REF. 955, 964-65 (1992) (explaining that religious groups have their own systems of laws and traditions that are extremely complex, precluding civil courts from intervening and deciding disputes within a religious organization).

<sup>186</sup> *Amos*, 483 U.S. at 349 (O’Connor, J., concurring in judgment).

are “barred from distributing [their] net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees.”<sup>187</sup> Thus, it is clear that any nonprofit entity receiving an exemption must truly be “nonprofit,” that is, it cannot distribute any part of its earnings to its controlling members or officers. As Hansmann maintains, no part of a corporation’s earnings can go towards the entity’s own pecuniary gain, even in an indirect fashion.<sup>188</sup> This could actually be problematic for some religious organizations that, for example, use part of the earnings from a charity fundraiser to buy holiday gifts for their employees (the employees are indirectly reaping the benefits of the earnings from the fundraiser). Thus, the Court would want to specify that under no circumstances could an organization’s members benefit, even indirectly, from the nonprofit activities. This would defeat the purpose of the Supreme Court’s intent in *Amos*, which was to provide an exemption only to organizations that are not retaining the benefits of their activities for their own good.<sup>189</sup> Of course, religious organizations often fulfill their religious mission or duties by providing goods and services to others, which technically “benefits” the religious organization’s ultimate aims, but the organizations are not rewarded with financial or material gains from the provision of goods and services.

It would also be helpful to utilize a classification system to clarify which categories or types of nonprofit entities would qualify: to borrow Hansmann’s language, only “donative” nonprofit entities would probably be exempt. These are corporations that receive most of their income from donations or grants, and they provide services to the needy.<sup>190</sup> The Court could

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<sup>187</sup> Hansmann, *supra* note 109, at 838.

<sup>188</sup> *Id.* at 840. Other ways that a religious employer might benefit its members from the financial gains of its nonprofit operations is through inflated salaries, perquisites granted to employees, and other excess payments. *Id.* at 844-45.

<sup>189</sup> *Amos*, 483 U.S. at 344 (Brennan, J., concurring in judgment).

<sup>190</sup> *See supra* discussion Part IV; Hansmann, *supra* note 109, at 840.



further break down whether “donative mutual” or “donative entrepreneurial” entities would be exempt. Donative mutual organizations are primarily controlled by their patrons, and donative entrepreneurial organizations are primarily free from the control of patrons.<sup>191</sup> Most religious entities would likely be free from the control of their patrons, provided the definition of “patrons” included individuals that received or benefited from the services provided; however, if the definition included registered members of the organization or congregation, it would be a closer call whether an organization would be “donative mutual” or “donative entrepreneurial.” Additionally, under Hansmann’s model, the donors or grantors that fund a donative nonprofit organization do not generally have a connection to the recipients of the goods or services, which makes the nonprofit structure work.<sup>192</sup> It might be difficult for the Court to enforce such a requirement in the case of religious organizations because the donors could be members of the religious organization, and could consequently have a connection with recipients of their donations, especially if the donations went towards other members of the organization.<sup>193</sup>

Ultimately, if the Supreme Court does implement a more precise definition of “nonprofit” into the *Amos* framework, it will have to enter into some kind of case-by-case inquiry to determine whether organizations meet the actual definition. The justices in *Amos* were opposed to examining the activities of religious organizations’ functions to determine if they are religious or secular because of the desire to avoid excessive entanglement with religious entities. If the

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<sup>191</sup> See *supra* discussion Part IV; Hansmann, *supra* note 109, at 842. The control aspect also brings up another important issue of nonprofit governance, and that is accountability in the nonprofit sector. Although it might be difficult for the Supreme Court to venture too far into nonprofit management and self-governance, it is important to consider that some level of accountability must be enforced in order for nonprofit organizations to remain a thriving part of the American economic and even religious landscape. See Dana Brakman Reiser, *Enron.org: Why Sarbanes-Oxley Will Not Ensure Comprehensive Nonprofit Accountability*, 38 U.C. DAVIS L. REV. 205, 210-12 (2004) (suggesting that protection of donors’ expectations and understandings, and protecting assets from misuse or loss, are important goals of nonprofit organizations). See also Peggy Sasso, Comment, *Searching for Trust in the Not-for-Profit Boardroom: Looking Beyond the Duty of Obedience to Ensure Accountability*, 50 UCLA L. REV. 1485 (2003) (discussing the duty of obedience in nonprofit corporate law).

<sup>192</sup> Hansmann, *supra* note 109, at 847.

<sup>193</sup> See *supra* notes 116-18 and accompanying text (discussing why the nonprofit structure generally works when the donors of funds or resources have no connection to the recipients or beneficiaries of a nonprofit’s activities).

original purpose behind Title VII is to be honored, and if the Supreme Court’s holding in *Amos* is to be properly curtailed so as not to exempt activities that are not truly “nonprofit,” a case-by-case approach is necessary at least to determine the “nonprofit” issue; this would still allow for a categorical exemption for any religious and secular activity of a religious institution, provided it fell into the “nonprofit” category. Scott McClure has explained that a categorical exemption for *for-profit* activities would violate the Free Exercise rights of employees of religious entities, but that applying a case-by-case approach to determine whether any for-profit activities might deserve the exemption would be appropriate.<sup>194</sup> While potentially bringing for-profit activity into the scope of § 702, McClure nonetheless advocates for a narrower extension of § 702—only to “those secular enterprises—both nonprofit and for-profit—that a religious organization can show are religious in nature and vital to the church’s religious mission.”<sup>195</sup> McClure’s argument, at least as far as it extends to nonprofit activities, does have merit—the Supreme Court should strongly reconsider whether a categorical exemption for even nonprofit activities is appropriate, or whether it should go back to the drawing board and determine if the § 702 exemption should only apply to activities that fulfill an organization’s religious mission.

### CONCLUSION

The United States Supreme Court should revisit its holding in *Amos* and provide a more precise definition of “nonprofit activity.” In order to avoid problems with the Establishment Clause and the possible government preference of religious entities over their secular counterparts in the employment context, the § 702 exemption cannot sweep too broadly. The Court might hold that only religious organizations that qualified for the tax exemption under § 501(c)(3) of the Internal Revenue Code; or that met the definition of “donative” nonprofit

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<sup>194</sup> See McClure, *supra* note 46, at 603-04; see *supra* Part IV.B.

<sup>195</sup> McClure, *supra* note 46, at 604.

entities; or that at least met the characteristics of independence from government, formality and continuity, voluntary establishment by citizens, forbidding of profits from being divided among members, and self-governance, would qualify as “nonprofit entities” under *Amos*. Religious organizations that do not meet a specified definition of “nonprofit” would not be able to discriminate against their employees under the § 702 exemption, and would thus not have an unfair competitive edge over their secular counterparts. If the Court clarified and narrowed the scope of the holding in *Amos*, Congress’s goal in enacting the Civil Rights Act of eliminating discrimination in the workplace would be further achieved.

Footnote about how corporations losing § 501(c)(3) status because of political lobbying wouldn’t affect this analysis—doesn’t mean they aren’t exempt from Title VII.

This is pressing now because of megachurches, McDonald’s in churches, what is a religious entity?? the fact that the Supreme Court has turned down *LeBoon*—it’s not going away  
Look at 2000, 1988 legislative history.