

NOTES

EMPLOYMENT DISCRIMINATION AND THE FIRST AMENDMENT: CASE ANALYSIS OF CATHOLIC CHARITIES

I. INTRODUCTION

There is an inherent conflict between the First Amendment rights of religious or private organizations and anti-discrimination legislation. Many scholars advocate the complete elimination of gender discrimination and discrimination based on sexual orientation, while failing to recognize that those organizations *must* discriminate against certain individuals in order to carry out a religious or moral message. This Note will argue that discrimination should be allowed only in the very narrow circumstances where it would substantially burden the organizations' First Amendment rights protected by the U.S. Constitution. The exemption should be limited to those activities which are "essential to the [group's] expressive content" and necessary to the "preservation of its purpose and identity"¹ as opposed to activities which "simply. . .generate revenues."²

This Note argues that organizations primarily operating for business purposes, which cater to the public at large, should not be exempt from Title VII or similar state laws. Furthermore, private organizations that operate for public welfare, such as private hospitals, should also be prohibited from discriminating against certain applicants for employment, due to the nature of the organization's purpose, namely medical care or other activities which serve the well-being of the community. Thus, incidental burdens on associational rights in these contexts are allowable.

1. Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 848 (2nd Cir. 1996) (holding that a requirement that all officers of an after-school Bible Club be Christian is integral to the group's message and is thus exempt from the Roslyn School District's policy prohibiting all student groups from discriminating on the basis of religion, among other things).

2. Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 344 (1987) (Brennan, J., concurring).

This Note will start out by discussing *Boy Scouts of America v. Dale*,³ in section II. *Dale* is a controversial case which has been viewed as opening a doorway for discrimination in the workplace, although in *Dale* case, a statute regulating *places of accommodation*, not employment was at issue. This Note points out the differences between places of accommodation and market places in section III and discusses the regulation of employment as it exists today, including the relevant Title VII exemptions for religious employers and private membership clubs. Section IV analyzes a 2004 California Supreme Court case, *Catholic Charities of Sacramento, Inc. v. Superior Court*,⁴ which brought forth a new and important issue, namely whether a statute requiring some religious employers, such as Catholic Charities to provide contraceptives is constitutional, when its use is prohibited according to the employer's religious tenets. This Note proposes a clear-cut test in section V, encompassing four elements, which the courts could apply in future cases involving employers seeking exemption from state or federal workplace regulations prohibiting employment discrimination. Section VI evaluates the holding of *Catholic Charities* under the proposed test and discusses where the California Supreme Court's analysis was proper and where it diverged from the rule proposed.

II. DALE AND PUBLIC ACCOMMODATION STATUTES

In the seminal case on the issue at hand, *Boy Scouts of America v. Dale*,⁵ Dale, an applicant for the Eagle Scouts leader position alleged that the Boy Scouts, a private non-profit organization, violated New Jersey's public accommodations law,⁶ by revoking his membership because of his homosexuality.⁷ The facts revealed that Dale was outspoken about his sexual orientation.⁸ The Boys Scouts argued that the statute, as applied, violated their First Amendment rights because it was essential for the organization to associate with only those adult leaders who furthered the Boy Scouts' moral mission to instill certain values in youth through example and mentoring.⁹ The U.S. Supreme Court agreed that Dale's

3. 530 U.S. 640 (2000).

4. 85 P.3d 67 (Cal. 2004), cert. denied, 125 Sup. Ct. 53 (2004).

5. 530 U.S. 640 (2000).

6. N.J. STAT. ANN. §§ 10:5-4, 10:5-5 (2002). (prohibiting, among other things, discrimination on the basis of sexual orientation in places of public accommodation).

7. See *Dale*, 530 U.S. at 645.

8. See *id.* at 643.

9. See *id.* at 654.

presence would mistakenly implicate that the group accepted homosexual conduct.¹⁰ It held that the state's interests embodied in the statute did not justify such a severe intrusion on the group's rights to freedom of expressive association.¹¹

Although the *Dale* case has been criticized as a step backwards in the overall goal of eliminating discrimination,¹² it is not an outlier case,¹³

10. See *id.* at 653 (“Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message...that the Boys Scouts accepts homosexual conduct as a legitimate form of behavior.”).

11. See *id.* at 656 (“[F]orced inclusion of an unwanted person” infringes on a group’s expressive association “if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”). However, note the appellate court’s finding that:

There is absolutely no evidence before us...supporting a conclusion that a gay scoutmaster, solely because he is a homosexual, does not possess the strength of character necessary to properly care for, or to impart [the Boy Scouts’] humanitarian ideals to the young boys in his charge. Nothing before us even suggests that a male, simply because he is gay, will somehow undermine BSA’s fundamental beliefs and teachings.

Dale v. Boy Scouts of America, 706 A.2d 270, 289 (N.J. Super. Ct. App. Div. 1998), *rev’d*, 530 U.S. 640 (2000).

12. See, e.g., Andrew Koppelman, *Signs of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Nondiscrimination*, 23 CARDOZO L. REV. 1819, 1819-20 (2002) (*Dale* stands for the proposition that “[a]ll antidiscrimination laws are unconstitutional...[and] [c]itizens are allowed to disobey laws whenever obedience would be perceived as endorsing some message.” Professor Koppelman argues that *Dale* is a “disastrous opinion...offer[ing] a useful cautionary lesson in the First Amendment jurisprudence.” *Id.*

13. The U.S. Supreme Court has held that a parade council could deny a gay organization opportunity to participate in a parade, reasoning that “a private club could exclude an applicant whose manifest views were at odds with a position taken by the club’s existing members.” *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 573-75 (1995). The Court noted that by allowing certain individuals, namely gays and lesbians to march behind the organization’s banner would suggest that the parade coordinators find homosexuality to be socially acceptable even though they may not truly believe so. See *id.* at 574. The *Dale* holding is also consistent with several circuit court opinions. The Third Circuit Court of Appeals, after determining that an international organization is a private membership club, held that it was exempt from a New Jersey statute prohibiting discriminatory actions based on gender in places of accommodation; See *Kiwanis Int’l v. Ridgewood Kiwanis Club*, 811 F.2d 247 (3rd Cir. 1987). Similarly, the Eleventh Circuit held that a young men’s civic and service organization denying membership to women has a compelling freedom of association right under the First Amendment, because a substantial part of its activities involved the expression of social and political beliefs. *U.S. Jaycees v. McClure*, 709 F.2d 1560 (8th Cir. 1983), *rev’d sub nom. Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). The U.S. Jaycees is a non-profit corporation organized “for such educational and charitable purposes as will promote and foster the growth and development of young men’s civic organizations...to provide [young men] with opportunity for personal development and achievement and an avenue for intelligent participation...in the affairs of their community.” *McClure*, 468 U.S. at 1562. The organization does not receive public funding and is exempt from federal taxation. *Id.* Acknowledging that the U.S. Supreme Court has held that First Amendment must sometimes yield to state interests, the Eighth Circuit held that Minnesota’s interest in limiting discrimination was outweighed by the fact that the Jaycees is “not just a vehicle for the delivery of commercial goods and services.” *Id.* at 1571. Additionally, “recruitment for membership in the Minneapolis Jaycees is not held out to all members of the public.” *Id.* at 1572. The court reasoned that governmental interference with the Jaycees’ membership

nor has it been overruled. What makes *Dale* so controversial is that it extends the right to associate, and hence to discriminate, into the *employment* context. Before that decision, courts had held that organizations with a particular moral message may prohibit *membership* to certain individuals where accepting these applicants would compromise the group's ideology.¹⁴ However, the scoutmaster leadership position at issue in *Dale* is more akin to employment. After all, Boy Scout leaders are paid an annual starting salary of \$32,000 and receive benefits including major medical, dental, vision, and prescription coverage in addition to long-term disability, accident, life insurance, and retirement plans.¹⁵ Thus, the fear is that the *Dale* holding will open up a can of worms and will give employers a loophole which will allow them to discriminate against individuals, at least on the basis of sexual orientation, by merely claiming to hold a distinct moral or ethical message.

Courts have been struggling to find a bright line rule distinguishing "employers" who are bound by anti-discrimination laws, from exempted religious or private organizations. Whereas some jurisdictions seek to draw the line where an organization is "religious" by certain articulated standards,¹⁶ others draw the line where the organization operates as a place of public accommodation. In general, public accommodation statutes prohibit discrimination in relation to the admission and treatment of any person in a place that accepts the patronage of the general public,¹⁷ or "offers privileges or advantages to the public."¹⁸ To fall within a public accommodation statute, the organization need not necessarily be for-profit. As the Oregon Court of Appeals noted in *Lahmann v. Grand Aerie of Fraternal Order of Eagles*,¹⁹ even community service organizations could qualify as business or commercial enterprises for the purposes of public accommodations statutes.²⁰

Rather than looking at whether the organization offers "business-related advantages or privileges," to fall under the public accommoda-

practices would produce a direct and substantial intrusion. *Id.* The court finally noted that upholding the claimed right of association would impair the asserted compelling state interest, but only to a limited extent since the Jaycees is not place of public accommodations. *Id.* at 1572-73.

14. See, e.g., *Hurley*, 151 U.S. at 557; *Kiwanis Int'l* 811 F.2d at 247; *McClure*, 709 F.2d at 1560.

15. Boy Scouts of America National Council: Scouting: Compensation and Benefits, at <http://www.scouting.org/hr/benefits.html> (last visited Sept. 16, 2004).

16. See *supra* text accompanying notes 140-64 (discussing the burden on religion).

17. See *Donaldson v. Farrakhan*, 762 N.E.2d 835, 838 (Mass. 2002)

18. *Lahmann v. Grand Aerie of Fraternal Order of Eagles*, 143 P.3d 1130, 1135 (Or. Ct. App. 2002).

19. *Id.* at 1130.

20. See *id.* at 1135.

tions statute, the courts may prefer to look at whether the place or service is a “business or commercial enterprise and whether its membership policies are so unselective that the organization can fairly be said to offer its services to the public.”²¹ In *Schwenk v. Boy Scouts of America*,²² the court was asked to decide whether the Boy Scouts violated a public accommodations statute by denying membership to a girl.²³ The *Schwenk* court looked at the statute’s legislative history, and found that a place of public accommodation does not include any “institution, bona fide club or place of accommodation which is in its nature distinctly private.”²⁴ Thus, the Oregon legislature did not intend to force organizations like the Boy Scouts to change long established membership policies. Likewise, their exclusion of the girl was not inappropriate under the statute.²⁵

In *Dale*, the Supreme Court noted that if the definition of “public accommodation” expanded “from clearly commercial entities to membership organization[s] such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment right of organizations [would intensify].”²⁶ The Boy Scouts have consistently been deemed outside the binds of various statutes that seek to prohibit discrimination in various jurisdictions. In *Boy Scouts of America v. D.C. Commission on Human Rights*,²⁷ for example, the Boy Scouts avoided liability under the Human Rights Act, which intended to restrict discriminatory practices, after a homosexual male applied for, and was denied, a leadership position.²⁸ The court deferred to the *Dale* decision, which held that the Boy Scouts’ official position on homosexual conduct was sufficient for First Amendment protection.²⁹

Similarly, in *Louisiana Debating & Literary Association v. New Orleans*,³⁰ the Fifth Circuit Court of Appeals invalidated a New Orleans statute that prohibited discrimination in places of public accommodation.³¹ The court placed great weight on the club’s private status in al-

21. *Id* at 1137. (citing *Lloyd Lions Club v. Int’l Ass’n. of Lions Clubs*, 724 P.2d 887 (Or. Ct. App. 1986)).

22. 551 P.2d 465 (Or. 1976).

23. *See id.*

24. *Id* at 466.

25. *See id* at 467.

26. *Boy Scouts of America v. Dale*, 530 U.S. 640, 657 (2000).

27. 809 A.2d 1192 (D.C. 2002).

28. *See id.* at 1195.

29. *See id.* at 1194.

30. 42 F.3d 1483 (5th Cir. 1995).

31. *See id.* at 1494; New Orleans, La., Code ch. 40C (New Orleans public accommodations statute requiring private clubs to apply for exemption every three years and including any club which has more than seventy five members under its definition of a public accommodation).

lowing it to discriminate against a black membership applicant. In determining whether a particular organization is sufficiently private so as to warrant constitutional protection, the court looked at “(1) the organization’s size, (2) its purposes, (3) the extent of their selectivity in choosing members, (4) the geniality among its members, and (5) whether other individuals are excluded from critical aspects of the organization’s affiliation.”³² In finding that the club was, in fact private, the Fifth Circuit held that it was accordingly outside the grip of the public accommodation statute. Furthermore, the application of the statute violated the club’s First Amendment right against unjustified government interference with the club’s choice to enter into and maintain intimate or private relationships.³³

III. EMPLOYMENT REGULATION

A. Background

Statutes regulating places of public accommodations, like the New Jersey statute at issue in *Dale*, have potentially broad application into people’s private lives. This is because almost any establishment can be deemed a place of public accommodation. For example, under the Americans with Disabilities Act,³⁴ not only are places of lodging and educational establishments considered public accommodations, but the category also includes social service centers such as retirement homes.³⁵ If it can be said that the government, whether state or federal, can regu-

32. Louisiana Debating, 42 F.3d at 1494.

33. See *id.* at 1483.

34. Americans with Disabilities Act, 42 U.S.C. §§ 12182-83 (2000) (prohibiting discrimination against individuals with disabilities in all places that serve the public and requiring all commercial facilities be constructed or altered in an accessible fashion).

35. The ADA encompasses a broad definition of what constitutes a public accommodation. Title III defines public accommodations as places of lodging (including inns, hotels, and motels), establishments serving food or drink (including restaurants or bars), places of entertainment (such as theaters and music halls), places of public gathering (auditoriums and convention centers), shopping centers, service establishments (such as hospitals or spas, for example), museums, places of recreation (amusement parks and zoos), educational establishments, and social service centers (including homeless shelters and adoption agencies). 42 U.S.C. § 12181. Moreover, unlike the definition of “employer” under Title VII, the term “public accommodation” under the ADA is not limited to entities of a certain size or having a certain number of employees. *Id.* Note however, that the ADA specifically exempts private clubs or establishments not covered under the Civil Rights Act of 1964, as well as religious organizations or entities controlled by such organizations, including places of worship. 42 U.S.C. § 12187.

late seemingly private facilities, such as retirement homes, it can surely be argued that more extensive regulation of marketplaces and commercial activities is allowable, because such regulations are presumed to be of public concern.³⁶ Thus, the government can more readily regulate the activities of commercial employers, such as prohibiting workplace discrimination.³⁷ In fact, traditionally and historically, governmental regulation of commerce has received deferential treatment. In other words, the government has always been afforded a certain amount of deference by the courts of this country in passing legislation that seeks to police commercial activity. For example, in the *Slaughter-House Cases*, the U.S. Supreme Court held that the state of Alabama could permissibly regulate the commercial activities of certain slaughterhouses by granting monopolies.³⁸ Similarly, in *Williams v. Lee Optical*, the Court deferred to the Oklahoma Legislature to balance the advantages and disadvantages of their new law, which made it unlawful for any person who was not a licensed optometrist or ophthalmologist to fit lenses.³⁹ Finally, in

36. The ADA also reaches "commercial facilities" or private, non-residential facilities whose operations affect interstate commerce. § 12183. Congressional regulation of interstate commerce became necessary in the name of public welfare during the aftermath of the Civil War because the economies of the states became interconnected and problems were no longer localized. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 160 (Aspen Publishers 4th ed. 2001). The Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890 are hallmarks of this new era. *Id.* Congress also passed a great deal of statutes responding to the economic crisis of the 1930's, although much of this New Deal legislation was struck down by the Supreme Court. *Id.* at 166. Thereafter, not only did congressional legislation seek to promote commercial goals, Congress also often acted to directly promote social goals which were wholly apart from their relation to economic development. *Id.* at 160.

37. Title VII was passed as part of the Civil Rights Act of 1964. Its purpose was to achieve equality of employment opportunities and remove barriers which operated in the past to favor an identifiable group of white employees over other employees. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

38. *Slaughter-House Cases*, 83 U.S. 36 (1873). In that case, a group of butchers operating in New Orleans contended that a state statute forbidding the slaughtering of animals for food anywhere within the city except by a particular chartered company (the Crescent City Live-Stock Landing and Slaughter-House Company) was an unconstitutional infringement on their trade since it effectively created a monopoly to their detriment and exclusion. *See id.* at 57-61. The Court however upheld the legislation, reasoning that the restrictions on the slaughtering of animals were state police powers matters and that the government had an interest in regulating such commercial activities due to public safety concerns. *See id.* at 61-63. The Court stated that regulation of the place and the manner of conducting the slaughtering of animals, the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of police power. *Id.* at 63.

39. *Williams v. Lee Optical*, 348 U.S. 483 (1955). The statute at issue in that case (59 OKL. STAT. § 1951) effectively prohibited opticians from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist. *Id.* at 486. Additionally, the regulation prohibited the advertising of eyeglasses and lenses by professionals dealing with the human eye. *See id.* at 489 n.2. Williams, an optician sought to have the statute invalidated on due process and equal protection

Katzenbach v. McClung, the Court held that the federal government, by the power granted to it by the Commerce Clause of the U.S. Constitution, could prohibit discrimination in restaurants, reasoning that such discrimination has a direct and highly restrictive effect on interstate travel by African Americans.⁴⁰

B. Workplace Regulation

As it stands now, Title VII has three exceptions relevant to the present topic. Under its definition of “employer” subject to the Act, Title VII excludes a “bona fide private membership club which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954.”⁴¹ Additionally, section 2000e-1 states that the Act is not applicable to “employment of individuals for performance of activities of religious corporations, associations, educational institutions, or societies.”⁴² Legislative history and case law reveal that the primary function of section 702 (2000e-1) has been “to exempt churches, synagogues, and the like, and organizations closely affiliated with those entities.”⁴³ Finally,

grounds. The Supreme Court upheld both state provisions, reasoning that although the former may seem wasteful, it is for the legislature not for the courts to balance its advantages against its disadvantages. *Id.* at 487. In other words, state laws regulating business and industrial conditions may not be struck down as violating the due process clause of the Fourteenth Amendment merely because such laws are “unwise, improvident, or out of harmony with a particular school of thought.” *Id.* at 488. As to the latter requirement (prohibition on advertising), the Court determined that there was no due process violation because the state government could, in the interest of the public, treat all who dealt with the human eye as members of a profession who should use no merchandising methods for obtaining customers. *See id.* at 490.

40. *Katzenbach v. McClung*, 379 U.S. 294 (1964). Plaintiff, Ollie’s Barbeque, a family-owned restaurant located on a state highway, although fully catering to whites, only offered take-out service to African Americans. *Id.* at 296. The Court applying Title II of the Civil Rights Act of 1964, held that this practice was illegal. *See id.* at 304-305. Title II commands that all persons shall be entitled to the full and equal enjoyment of the goods and services of any place of public accommodation, without discrimination or segregation on the ground of race, color, religion, or national origin. *Id.* at 298. The Court determined that the federal regulation of restaurants that cater to interstate travelers is a reasonable application of congressional power. *Id.* at 304-305. Furthermore, even if an activity is local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce. *Id.* at 302. “The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere.” *Id.* at 305.

41. Civil Rights Act of 1964 § 701, 42 U.S.C. § 2000e(b) (2000). Under the Act, the term “employer” is defined as any individual engaged in an industry affecting commerce who employs at least fifteen (formerly, i.e., prior to the 1972 Amendments, twenty-five) workers. *Id.*

42. 42 U.S.C. § 2000e-1(a) (2000).

43. Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 343 (1999).

section 2000e-2 provides that “it shall not be an unlawful employment practice for an employer to hire employees on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of that particular business or enterprise.”⁴⁴ The Act further states:

[I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such...[an] institution [is] owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if [its] curriculum is directed toward the propagation of a particular religion.⁴⁵

Private Membership Club Exemption

In order to be exempt from Title VII coverage under the private membership club exemption, a “club” must be an association of persons with limited conditions for membership and operating for the promotion of social purposes or some common literary, scientific, or political objective.⁴⁶ Further characteristics of such clubs include: (1) separateness from the general public; (2) the exercise of control over internal procedure by the club’s members; and (3) an absence of support by public funds.⁴⁷ It is the defendant that retains the burden of proving that it is exempt from Title VII via the private membership club exemption.⁴⁸ It must be noted however, that the Title VII private membership exemption does not prevent states from exercising their power by enacting more protective anti-discrimination legislation and thus including membership clubs under their anti-discrimination coverage.⁴⁹

44. 42 U.S.C. § 2000e-2(e) (2000).

45. *Id.* Note that Title VII defines “religion” broadly; the term encompasses all aspects of religious observance and practice, as well as belief. *See id.* § 2000e(j).

46. *Quijano v. Univ. Fed Credit Union*, 617 F.2d 129, 131 n.11 (5th Cir. 1980).

47. EEOC Dec. No. 78-47 (Oct. 2, 1978).

48. *EEOC v. The Chicago Club*, 881 F. Supp. 350, 352 (N.D. Ill. 1995).

49. *See Bohemian Club v. Fair Employment Hous. Comm’n.*, 231 Cal. Rptr. 769, 779 (Cal. Ct. App. 1986) (holding that California’s subjection of a private membership club under the Fair Employment and Housing Act “in no way hindered the overriding objective of eliminating employment discrimination in Title VII”).

Religious Organization (Ministerial) Exemption

Section 2000e(1) implicitly creates a ministerial exception, insulating from Title VII scrutiny, a religious organization's employment decisions regarding its ministers.⁵⁰ The purpose of the exemption has been to avoid inquiry as to whether an organization's activities are sufficiently religious.⁵¹ The ministerial exception is mandated by both the Free Exercise and the Establishment Clauses of the First Amendment.⁵² It guarantees religious groups the right to choose who should advocate, support, and explain the group's religious beliefs, not only to its own members, but to the world at large.⁵³ The Act permits certain church-owned non-profit businesses to restrict employment to church members even where the jobs in question are not religious in nature.⁵⁴ The term "religious organization" however excludes closely held for-profit corporations, even those intending to spend their profits for religious purposes.⁵⁵ The religious organization exemption is also somewhat limited in that it only exempts discrimination on the basis of religion and is thus inapplicable to cases involving alleged discrimination on the basis race, sex, or national origin.⁵⁶ As a further limitation, the exemption only applies to hir-

50. See *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1301 (11th Cir. 2000).

51. See *Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987).

52. See *Gellington*, 203 F.3d at 1302.

53. *King's Garden, Inc. v. FCC*, 498 F.2d 51, 56 (D.C. Cir. 1974).

54. See *id.* (The employee in this case, a building engineer was discharged after the employer determined that he did not meet the criteria for church membership with the Church of Jesus Christ of Latter-Day Saints.).

55. See *EEOC v. Townley Eng'g & Mfg. Co.*, 675 F. Supp. 566, 568 (D. Ariz. 1987), *rev'd in part on other grounds*, 859 F.2d 610 (9th Cir. 1988) (The *Townley* court noted that the corporation's activities were not clearly religious and that according its articles of incorporation, the company was founded for the purpose of manufacturing mining equipment not for the performance of religious rituals.).

56. See *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985). In fact Title VII's prohibition against employment discrimination is fully operative against a sectarian school where the hiring decision was made on the basis of sex, not religion. See *e.g.*, *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 269 (N.D. Iowa 1980); *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 1999) (holding that because discrimination based on pregnancy is a clear form of discrimination based on sex, and since Title VII applies to religious institution charged with sex discrimination, religious schools cannot discriminate against its pregnant teachers); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 808 (N.D. Cal. 1992) (holding that the fact that parochial school's dislike of pregnancy outside of marriage stems from religious belief may be relevant to court's First Amendment analysis, but it does not automatically exempt school's termination decision from Title VII scrutiny).

ing decisions and has no force behind the organization's decision to withhold fringe benefits.⁵⁷

Bona Fide Occupational Qualification (BFOQ) Exemption

One must firstly note that the BFOQ exemption under Title VII only allows discrimination based on sex, religion, or national origin when such discrimination is a bona fide occupational qualification; discrimination based on other protected categories, such as race, for example is not exempt.⁵⁸ In regards to sex discrimination, courts have held that a BFOQ is not established merely on an assumption or stereotype that few women could perform a particular job.⁵⁹ Additionally, even reliance on a *statute* limiting women's working conditions is inappropriate to establish a BFOQ.⁶⁰ BFOQ cases fall into 2 categories: (1) "ability to perform" where the employer claims that the plaintiff, due to his sex, religion, or national origin is unable to effectively perform the job in question; and (2) "same sex," where the employer claims that it must only hire individuals of a particular sex in order to accommodate the personal privacy of its clients, customers, or other employees.⁶¹ The latter category raises concerns that the employer's choice is guided by customer preferences, which is an impermissible justification under Title VII.⁶²

The primary example of a BFOQ defense in the context of religion is *Kern v. Dynalectron Corp.*⁶³ The employer in that case flew helicopters over crowds of Moslems making their pilgrimage to Mecca in order to protect against any violent outbreaks and help fight fires which would occasionally erupt during the pilgrimages.⁶⁴ Some of the pilots were thus

57. See generally *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (rejecting the argument that the Title VII exemption for religious organizations encompasses *all* employment practices, including health insurance compensation plans).

58. See 42 U.S.C. § 2000e-2(e) (2000).

59. See *Ridinger v. General Motors Corp.*, 325 F. Supp. 1089 (S.D. Ohio 1971), *rev'd on other grounds*, 474 F.2d 949 (6th Cir. 1972).

60. See *Kober v. Westinghouse Elec. Corp.*, 325 F. Supp. 467 (W.D. Pa. 1971), *aff'd*, 480 F.2d 240 (3rd Cir. 1973).

61. See *Sutton v. National Distillers Prods. Co.*, 445 F. Supp. 1319 (S.D. Ohio 1978), *aff'd*, 628 F.2d 936 (6th Cir. 1980).

62. See *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (holding that the preference of airline passengers to be served by female attendants does not support a bona fide occupational qualification based on gender, reasoning that the statutory exception for bona fide occupational qualifications must be given narrow reading and should not be based upon preferences of co-workers, employer, clients, or customers).

63. 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984).

64. *Id.* at 1197.

required to fly into the holy area of Mecca.⁶⁵ The Islamic religion however prohibits the entry of any non-Muslim into Mecca under the penalty of death.⁶⁶ As a result, the employment contract between the company and its pilots required all such pilots to convert to Islam.⁶⁷ One employee, Kern, who was a Baptist, refused to convert and thereafter filed a complaint against the company with the EEOC for workplace discrimination on the basis of religion.⁶⁸ Although the court determined that Kern was constructively discharged,⁶⁹ it held that the employer met its burden of producing a legitimate reason for discriminating, by setting forth evidence that all non-Muslims are unable to perform the said job safely because they would be beheaded by Saudi Arabian authorities if caught.⁷⁰ The court reasoned that “Dynalectron’s discrimination against non-Moslems in general, and Wade Kern specifically, is not unlawful, since hiring Moslems exclusively for this job ‘is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business.’”⁷¹

Similarly, in the context of religious educational institutions, the EEOC has stated that a school which is created, established, wholly owned, supported, controlled, and managed by the Christian Church could discriminate against Jewish applicants for teaching positions pursuant to the exemption contained in section 2000e-2(e)(2).⁷² However, to qualify for the said exception, an educational institution must prove that virtually all its support, control, and management comes from, or is in hands of, a religious group.⁷³

65. *Id.*

66. *Id.* at 1198.

67. *See id.*

68. *Id.*

69. *Id.* The court held that Kern had met his initial burden of proving: (1) his bona fide belief that conversion to Islam is contrary to his religious faith; (2) that he informed his employer of his beliefs; and (3) he was discharged because of his refusal to convert. *Id.* “Although Kern was not actually fired from his job, both Kern and Dynalectron understood that the job required Kern’s conversion.” *Id.*

70. *Id.* at 1200.

71. *Id.* (quoting 42 U.S.C. § 2000e-2(e)).

72. EEOC Decision No. 75-186 (Feb. 21, 1975).

73. *Pime v. Loyola Univ. of Chicago*, 585 F. Supp. 435 (N.D. Ill. 1984), *aff’d*, 803 F.2d 351 (7th Cir. 1986) (The court held that the university was not exempt under section 2000e-2(e)(2) of Title VII because it did not prove that all, or a considerable amount, of its support, control, or management came from, or was in the hands of the religious society, reasoning however that it could hire an employee on the basis of religion in certain instances where religion is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise as allowed by section 2000e-2(e)(1). This exemption is not restricted to those purposes that promoting religion, or to those positions solely for the performance of religious functions.). *See also*

Business Necessity Defense

If a plaintiff's theory is disparate impact as opposed to disparate treatment, (i.e., when the employment policy at issue, regardless of the absence of discriminatory intent, adversely affects a protected group), an employer can claim that the said discrimination was appropriate under Title VII's "business necessity" defense.⁷⁴ In order for the business necessity defense to vindicate an employment policy or practice which has a discriminatory effect, three conditions must be met: (1) the business purpose must be sufficiently compelling; (2) the challenged practice must effectively carry out the business purpose it is alleged to serve; and (3) there must be no other acceptable alternative policies or practices available which would better accommodate the business purpose advanced, or accomplish it equally well with lesser discriminatory impact.⁷⁵ Note that the ultimate burden of production and persuasion as to business necessity rest with the employer.⁷⁶ Courts have mandated a narrow construction of the business necessity defense.⁷⁷ It must be narrowly confined to those unusual instances where a segregationist policy is absolutely essential to the achievement of a legitimate business need; dollar cost alone is an immaterial consideration under business necessity doctrine.⁷⁸

State Regulation of Workplaces

Note that Title VII does not prohibit discrimination based on sexual orientation because sexual orientation is not one of the protected categories under the Act.⁷⁹ Thus, even if the Court determined that the Boy

Little v. St. Mary Magdalene Parish, 739 F. Supp. 1003 (W.D. Pa. 1990) *aff'd sub nom* Little v. Wuerl, 929 F.2d 944 (3rd Cir. 1991) (holding that a religious organization employer did not violate Title VII when it refused to renew a teacher's employment contract because she had remarried without first obtaining an annulment of her first marriage, which the employer considered to be a public rejection of Catholic doctrine).

74. See Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 131 (3rd Cir. 1996).

75. See Neely v. Grenada, 438 F. Supp. 390, 407-408 (N.D. Miss. 1977).

76. Lanning v. SEPTA, 181 F.3d 478, 485 (3rd Cir. 1999).

77. See, e.g., Chrapliwy v. Uniroyal, Inc., 458 F. Supp. 252, 269 (N.D. Ind. 1977) (where the company maintained that during the phase-out of one of its divisions, discriminatory transfer rules adversely affecting women were required as a matter of business necessity.).

78. See *id.* at 271.

79. 42 U.S.C. § 2000e-2 (2000). The Act merely provides that "it shall be an unlawful employment practice for an employer...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.* Note that there was a bill proposed in the House of Representa-

Scouts was an “employer” within the meaning of Title VII, Dale would still have no recourse under the statute. While most states have versions of Title VII, some states are more restrictive, prohibiting even discrimination based on sexual orientation. For example, New York Human Rights Law guarantees the opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sexual orientation, military status, sex or marital status.⁸⁰ The N.Y. statute applies to all “employers” or those entities employing four or more workers and does not cover religious corporations “deemed to be in its nature distinctly private.”⁸¹ The California civil rights statute, the Unruh Civil Rights Act,⁸² is another notable piece of legislation which took an approach similar to Title VII by excluding sexual orientation as a protected category.⁸³ It provides that “no business establishment of any kind whatsoever shall discriminate against or refuse contract with any person in this state because of the race, creed, religion, color, national origin, sex, disability, or medical condition of the person or of the person’s partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers.”⁸⁴ Note that the term “business establishment” within the meaning of the Unruh Civil Rights Act has a broad reach and includes all commercial and non-commercial entities open to and serving the general public.⁸⁵ Many states and municipalities also enact anti-discrimination *ordinances* which could be as protective as, or more protective than federal legislation. Most ordinances also contain some form of exception for religious organizations.

A problem arises as to whether religiously associated employers such as Catholic Charities fall under Title VII’s religious exemption or similar state exemptions for religious institutions. Catholic Charities USA is a non-profit, nation-wide membership association and one of the

tives in January 2003 “to amend the Civil Rights Act of 1964 (Title VII) to prohibit discrimination on the basis of...sexual orientation” although the bill was never passed. H.R. 214, 108th Cong. (2003).

80. N.Y. EXEC. LAW § 291(1) (2004). The statute also affords the same protections as to education, housing, and the use of places of public accommodation. *Id.* § 291(2).

81. *Id.* § 292(5), (9).

82. CAL. CIV. CODE § 51 (2005).

83. *Id.* § 51.5

84. *Id.*

85. See *Pines v. Tomson*, 206 Cal. Rptr. 866 (Ct. App. 1984) (holding that publishers of advertisements placed solely by born-again Christians had business-like attributes as to fall within the meaning of a “business establishment” despite the fact that the publishers operated under the support of a nonprofit religious corporation and felt their work was a ministry).

largest social service networks.⁸⁶ Its stated mission is “to reduce poverty, support families and empower communities,”⁸⁷ “regardless of religious, social, or economic backgrounds.”⁸⁸ There are more than 1,600 local Catholic Charities agencies across America,⁸⁹ providing emergency services (such as disaster relief, food banks, shelters, and financial assistance), offering elderly care, youth counseling, health services, and refugee resettlement, and running youth camps and community centers.⁹⁰ The organization depends upon donations in order to maintain its numerous paid employees.⁹¹ Thus, although Catholic Charities has religious ties, in that it operates in connection with the Roman Catholic Church, the organization is also an employer. Overall, Catholic Charities agencies have about 51,000 paid employees,⁹² some of which are not themselves Catholic. Thus, the issue arises as to whether these agencies should be exempt from state and federal employment regulations under their respective religious organization exceptions.

IV. CATHOLIC CHARITIES CASE ANALYSIS

In a new application of the current problem of religious employers, the California Supreme Court, in *Catholic Charities of Sacramento, Inc. v. Superior Court*,⁹³ held that a nonprofit public benefit corporation “operat[ing] in connection with the Roman Catholic Bishop of Sacramento”⁹⁴ was required to provide its employees prescription contraceptive methods, despite the fact that birth control is contrary to the Catholic Church’s religious tenets.⁹⁵ The court reasoned that Catholic Charities, Inc. did not qualify as a religious employer under the

86. Catholic Charities USA: About Us, at <http://www.catholiccharitiesusa.org/about/index.cfm?cfid=830076&cftoken=25544861> (last visited Mar. 9, 2005).

87. Catholic Charities USA: Mission Statement, at <http://www.catholiccharitiesinfo.org/mission/> (last visited Mar. 9, 2005).

88. Catholic Charities USA: General, at <http://www.catholiccharitiesinfo.org/faqs/general.htm> (last visited Mar. 9, 2005).

89. Catholic Charities USA: Your Local Agency, at <http://www.catholiccharitiesinfo.org/about/> (last visited Mar. 9, 2005).

90. Catholic Charities USA: Provide Services, at <http://www.catholiccharitiesinfo.org/about/services.htm> (last visited Mar. 9, 2005).

91. Catholic Charities USA: Job Opportunities, at <http://www.catholiccharitiesinfo.org/jobs/> (last visited Mar. 9, 2005).

92. Catholic Charities: General, at <http://www.catholiccharitiesinfo.org/faqs/general.htm> (last visited Mar. 9, 2005).

93. 85 P.3d 67 (Cal. 2004).

94. *Id.* at 75.

95. *See id.* at 73-74.

Women's Contraception Equity Act (WCEA).⁹⁶ WCEA directs that any "health care service contract that provides coverage for prescription drug benefits shall include coverage for a variety of prescription contraceptive methods."⁹⁷ However, the Act contains an exemption for religious employers whose teachings oppose the use of contraceptives.⁹⁸ It defines a "religious employer" subject to the exemption as any entity (1) whose purpose is "the inclusion of religious values"; (2) "primarily employ[ing] persons who share the religious tenets of the entity"; (3) "serv[ing] primarily persons who share the religious tenets of the entity"; and (4) is a nonprofit organization according to the Internal Revenue Code (IRC).⁹⁹

The court determined that "[t]he corporate purpose of Catholic Charities is not the direct inculcation of religious values," but the offering of social services to the general public.¹⁰⁰ Although Catholic Charities described itself as "an organ of the Roman Catholic Church," the facts revealed that the nonprofit corporation "offer[ed] a multitude of social services and private welfare programs [not directly religious in nature] includ[ing] providing immigrant resettlement programs, elder care, counseling, food, clothing and affordable housing for the poor and needy, [and] housing and vocational training" for the disabled.¹⁰¹ The California Supreme Court also found that Catholic Charities does not primarily employ Catholics,¹⁰² and "serve[d] people of all faith backgrounds."¹⁰³ Finally, the corporation did not meet the standards for nonprofit status under the relevant sections of the IRC.¹⁰⁴ Catholic Charities had filed an action seeking a declaratory judgment that the WCEA is unconstitutional under the Establishment and Free Exercise Clauses of the U.S. and California Constitutions.¹⁰⁵ Thus, the California Supreme Court did not decide this case under a freedom of association claim.

96. *Id.* at 75.

97. *Id.* at 74 n.3.

98. *See id.*

99. *Id.*

100. *Id.* at 75. (The court acknowledged that Catholic Charities' objectives were to "promote a just, compassionate society that supports the dignity of individuals and families, to reduce the causes and results of poverty, and to build healthy communities through social service programs.")

101. *Id.*

102. *Id.* at 75 (stating that the corporation employed a "diverse group of persons of many religious backgrounds.").

103. *Id.*

104. *Id.*

105. *Id.* at 76.

A. Establishment Clause

The court first addressed the corporation's claim under the Establishment Clause, namely that "the WCEA impermissibly interferes with matters of religious doctrine and internal church governance,"¹⁰⁶ thus infringing of the Catholic Church's religious autonomy. Refusing to apply a "ministerial exemption,"¹⁰⁷ the court held that "the case does not implicate internal church governance" but merely "the relationship between a nonprofit public benefit corporation and its employees, most of whom do not belong to the Catholic Church."¹⁰⁸

Next, the California Supreme Court, in deciding whether the First Amendment forbids the government to premise the exemption at issue in terms of whether the institution's activities are "religious" or "secular," determined that such a distinction is permissible and does not offend the Establishment Clause because "the government may constitutionally exempt religious organizations from generally applicable laws in order to alleviate burdens on religious exercise."¹⁰⁹ The court noted, that "a rule barring religious references in statutes intended to relieve burdens on religious exercise would invalidate a large number of statutes" such as Title VII and the California Fair Employment and Housing Act.¹¹⁰ Under a similar claim, Catholic Charities also contended that the first three requirements under the WCEA exemption lead to "excessive entanglement" into "the employer's religious purpose and into its employees' and clients' religious beliefs."¹¹¹ The California Supreme Court dis-

106. *Id.* Catholic Charities offered "two reasons for deferring to religious authorities on religious questions": (1) that the "courts are simply incompetent to decide matters of faith and doctrine"; and (2) that "members of the church, by joining, implicitly consent to the church's governance in religious matters." *Id.* at 77.

107. *Id.* at 77-78. The "ministerial exemption...operates as a non-statutory, constitutionally compelled exception to [T]itle VII" and "bars the courts from reviewing employment decisions by religious organizations affecting employers with religious duties of ministers." *Id.* at 78.

108. *Id.* (The fact that the WCEA conflicts with Catholic Charities' religious beliefs "does not mean the Legislature has decided a religious question.")

109. *Id.* at 79. The court however warns that "a law targeting religious beliefs . . . is never permissible." *Id.* at 80.

110. *Id.* at 84.

111. *Id.* at 80. The U.S. Supreme Court, in *Lemon v. Kutzman* has held that a law violates the establishment clause if it "fosters an excessive governmental entanglement with religion." *Catholic Charities*, 85 P.3d at 80. The *Lemon* Court also developed two other tests for determining whether a statute violates the establishment clause; the courts must look at (1) whether the statute at issue has a "secular legislative purpose" and (2) whether its "principal or primary effect . . . advances [or] inhibits religion." *Catholic Charities* 85 P.3d at 80 n.6, 84. (concluding that the WCEA's sole purpose is to "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions" is a permissible secular legislative purpose under

missed this claim because Catholic Charities actually conceded that it does not satisfy any of the four WCEA criteria, thus “no entangling inquiry has occurred or is likely to occur.”¹¹²

B. Free Exercise Clause

The court also addressed the corporation’s challenge to the WCEA exemption under the Free Exercise Clause¹¹³ by relying on the rule articulated by the U.S. Supreme Court in *Oregon Department of Human Resources v. Smith*.¹¹⁴ The Court in *Smith*, rejecting a strict scrutiny analysis, held that “religious beliefs do not excuse compliance with otherwise valid laws regulating matters the state is free to regulate.”¹¹⁵ The California Supreme Court determined that the *Smith* rule disposes of Catholic Charities’ free exercise claim, reasoning that the WCEA “appl[ies] neutrally and generally to all employers, regardless of religious affiliation” except the few that are exempt, “addresses a matter the state is free to regulate [namely] insurance policies for the purpose of eliminating a form of gender discrimination in health benefits, [and] conflicts with Catholic Charities’ religious beliefs only incidentally.”¹¹⁶

Lemon).

112. *Id.* at 80-81. *But see id.* at 105 (Brown, J., dissenting) (“A substantial amount of federal case law supports Catholic Charities’ claim that the Legislature’s attempt to draw distinctions between religious and secular activities. . . is an impermissible government entanglement in religion.”).

113. The court however stated that because WCEA’s religious exemption benefits religion, as opposed to burdening it, “it is not tested under the free exercise clause but under the establishment clause.” *Id.* at 83.

114. 494 U.S. 872 (1990).

115. *Catholic Charities*, 85 P.3d at 81.

[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes . . . conduct that his religion proscribes . . . To permit religious beliefs to excuse acts contrary to law would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

Id. (citing *Smith*, 494 U.S. at 879) (internal quotations omitted). However, Judge Brown’s dissenting opinion stated:

Under *Smith*, the right of free exercise does not relieve an *individual* of the obligation to comply with a valid and neutral law of general applicability even if the law requires conduct that contravenes a religious belief, but “it does not follow that *Smith* stands for the proposition that a *church* may never be relieved from such an obligation.

Id. at 100 (Brown, J., dissenting) (quoting *Equal Emp. Opp. Comm’n v. The Univ. of Amer.*, 83 F.3d 455, at 462).

116. *Id.* at 82. Note that the legislative history of WCEA revealed that at the time, 75% of all Catholic hospitals already provided contraception coverage, 59% of all Catholic women of child-bearing age practiced contraception, and 88% of Catholics believed that someone who uses birth control methods can still be a good Catholic. *Id.* at 103 n.3.

Catholic Charities offered two arguments as to why the WCEA is not a “neutral or generally applicable” law and must thus be subjected to strict scrutiny analysis, namely that (1) the statute is facially unconstitutional because it is not neutral; and (2) that by enacting the WCEA, the Legislature “gerrymandered the law to reach only Catholic employers.”¹¹⁷ As to the latter claim, the organization contended that “the Legislature drafted the ‘religious employer’ exception with the specific intention of excluding Catholic hospitals and social service agencies like Catholic Charities,”¹¹⁸ and “acted out of spite towards the Church.”¹¹⁹ A law is facially unconstitutional in the context of free exercise if it lacks neutrality towards religion, namely if its “object is to infringe upon or restrict practices because of their religious motivation” or if it “refers to a religious practice without a secular meaning discernable from the language or context.”¹²⁰ A law is not generally applicable if it “imposes burdens on conduct in a selective manner and [is] motivated by religious belief.”¹²¹ Although acknowledging that “neutrality and general applicability are interrelated,”¹²² the California Supreme Court declared that the facial neutrality inquiry is not triggered because the alleged burden on the Catholic religion does not arise “from the religious terminology used in the exemption.”¹²³ Furthermore, the court noted that “the state may require an organization claiming the benefits of a religious-organization exemption from a regulatory statute to prove that it is a religious organization within the meaning of the statute.”¹²⁴

The California Supreme Court acknowledged that apart from facial neutrality, the First Amendment also “protects against subtle departures from neutrality” and “overt” or “masked” governmental hostility.¹²⁵ However, it determined that the WCEA does not discriminate against the

117. *Id.* at 82

118. *Id.* at 86.

119. *Id.* at 87 n.11.

120. *Id.* at 82-83 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 543 (1993)) (internal quotations omitted).

121. *Id.* at 82 (quoting *Lukumi*, 508 U.S. 520 at 543) (internal quotations omitted).

122. *Id.* at 83. (citing *Lukumi* 508 U.S. at 531) (internal quotations omitted).

123. *Id.* at 83. *But see id.* at 102 (“The conception of religion entertained by the City was that it had to be purely spiritual or evangelical...This broad definition of secular is part of the problem.”) (Brown, J., dissenting). Moreover, Judge Brown maintains that from the church’s perspective, the WCEA is not neutral because demanding that contraception be funded despite religious objections is equated to taking sides. *Id.* at 104.

124. *Id.* at 83 (citing *Larson v. Valente*, 456 U.S. 228, 255 n.30 (1982)) (internal quotations omitted).

125. *Id.* at 84 (“[The] court must survey meticulously the circumstances of governmental categories to eliminate...religious gerrymanders.”) (citations omitted).

Catholic Church because it was at the church's request, that the Legislature added the exemption in the first place.¹²⁶ Additionally, the WCEA is equally applicable to religious and non-religious organizations, because non-exempt religious employers "are treated precisely the same as all other employers" under the Act.¹²⁷

Hybrid Rights

Cases involving hybrid rights are those that implicate other constitutional provisions, along with the Free Exercise Clause, thus triggering a strict scrutiny analysis.¹²⁸ The hybrid rights claim was created by the *Smith* court as one involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents to direct the education of their children."¹²⁹ Thus, theoretically, strict scrutiny analysis could be triggered where a particular workplace regulation such as an anti-discrimination statute, implicates the First Amendment's right to expressive association, as well as the Constitution's Free Exercise Clause, although no court has upheld such a claim. The California Supreme Court rejected Catholic Charities' free speech claim, holding that "compliance with a law regulating health care benefits is not speech."¹³⁰

C. Strict Scrutiny

Under the strict scrutiny standard, a law which burdens religious beliefs must be "the least restrictive means of achieving a compelling

126. *Id.* The fact that the exemption in question is "not sufficiently broad enough to cover all organizations affiliated with the Catholic Church" does not mean that it discriminates against the Church. *Id.*

127. *Id.* at 85. "[T]he WCEA does not under any circumstance treat Catholic employers less favorably than any other employers." *Id.* To the contrary, it "treats some Catholic organizations more favorably than all other employers by exempting them." *Id.* at 87. The court notes that "a Catholic diocese or parish, acting as an employer, would typically qualify under the exemption." *Id.* at 85 n.10. *But see id.* at 106, 106 n.7 (The WCEA's view of religion is so constricted that "it would define the ministry of Jesus Christ as a secular activity...Even churches that do not operate schools, hospitals, or social service agencies would have trouble with the WCEA's religious test.") (Brown, J., dissenting).

128. *Id.* at 87. However, Justice Souter has warned that "if a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule." *Id.* at 88.

129. Oregon Department of Human Resources v. Smith, 494 U.S. 872, 881-82 (1990).

130. *Catholic Charities*, 85 P.3d at 87. ("The law leaves Catholic Charities free to express its disapproval of prescription contraceptives and to encourage employees not to use them.").

[government] interest,” or in other words, must be narrowly tailored.¹³¹ Despite the fact that the WCEA does not require an employer to offer insurance coverage for prescription drugs, applying only to employers who *choose* to offer such coverage, Catholic Charities maintained that its religious beliefs required it to do so.¹³² The California Supreme Court, in deciding the question of whether the Catholic Charities’ belief that providing healthcare coverage is required out of “justice and charity,” constitutes a *religious* belief, determined that the claim must be “rooted in religious belief and not on philosophical choices or a way of life, however virtuous or admirable.”¹³³ The court went on to hold that even if the WCEA does in fact, substantially burden Catholic Charities’ religious beliefs, the law nevertheless serves a compelling state interest of eliminating gender discrimination and is narrowly tailored to achieve that interest.¹³⁴ Moreover, the court suggested that granting the exemption to Catholic Charities would impose the employer’s religious faith on its employees, who were not Catholic.¹³⁵ Finally, “[a]ny broader exemption increases the number of women affected by discrimination in the provision of health care benefits.”¹³⁶

131. *Id.* at 91 (“A law substantially burdens a religious belief if it conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to...violate his beliefs.”) (citing *Thomas v. Rev. Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 717-18 (1981) (internal quotations omitted)).

132. *Id.* at 91-92. One teaching of the Roman Catholic Church is that “all employers, religious or otherwise, are to provide just wages,...benefits, [and adequate health-care coverage] to employees, regardless of their religious affiliations or beliefs, as an obligation arising from Gospel message of justice and charity.” *Id.* at 92.

133. *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972)) (internal quotations omitted). The *Catholic Charities* court noted that although at some point, this might lead to significant burdens on religious exercise, one option for the organization was to decline all prescription drug coverage and offer its employees “a raise to offset the reduced benefits.” *Id.* at 92 n.19.

134. *Id.* at 92. The court pointed to evidence that women spend close to 70% more in out-of-pocket healthcare costs due to contraceptives and unintended pregnancies. *Id.* “The elimination of this economic inequality [is] the [Act’s] principal object.” *Id.* Moreover, approximately nineteen other states have adopted similar laws which require employers to provide prescription contraceptives. *Id.* at 93 n.20. *But see id.* at 97 (“[T]he majority does not explain how the [exemption] is ‘closely fitted’ to the elimination of gender discrimination.”) (Kennard, J., concurring).

135. *Id.* at 93 (“When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed...on others in that activity.”).

136. *Id.* at 94

D. Rational Basis Test

Catholic Charities' last argument was that the WCEA fails the rational basis test because it defines the religious employer exemption with "arbitrary criteria."¹³⁷ However, the California Supreme Court stated that the WCEA criterion that a religious employer must primarily employ persons of the same religion to qualify for the said exemption "serves the legitimate interest of . . . barring interference with the relationship between the church and its ministers."¹³⁸ Moreover, it extends the exemption to more employees than the ministerial exemption does.¹³⁹

V. HOW COURTS SHOULD APPLY THE FIRST AMENDMENT POST-*DALE*

In order to determine whether a religious or charitable organization is an "employer" and thus is bound to comply with Title VII and state workplace anti-discrimination laws, the deciding court must consider the following factors:

- (1) Whether the government regulation burdens the entity's ability to observe its religious beliefs;
- (2) Whether the organization's primary purpose or function is to make profit as opposed to conveying a particular moral or religious message;
- (3) Whether its services or activities are open to the public and are unselective; and
- (4) Whether there are any substantial overriding governmental interests which would impose only minute incidental restrictions on the organization's associational rights.

A. Burden on Religious Institutions

It has been suggested that because of the typically communal and institutional nature of religion, it is essential that believers, through their involvement in religious organizations, be able to organize themselves

137. *See id.*

138. *Id.*

139. *Id.* at 95. The court however notes that a possible problem could arise when one imagines a "hypothetical soup kitchen run entirely by the ministers of the church, which [espouses] religious values to those who come and [which] would lose its claim to an exemption from the WCEA if it chose to serve the hungry without discrimination instead of serving co-religionists only." *Id.*

and be autonomous.¹⁴⁰ Courts are often reluctant to become involved with matters of the church, and generally recognize that decisions as to church governance, in addition to faith and doctrine, are to be kept in the exclusive decision-making power of the church.¹⁴¹ Specifically, religious institutions must be permitted “to control their own organization; to formulate and enforce their own doctrine; to choose their own structure; to select their own officials; to recognize their own criteria for membership; and to adopt their own set of relationships between believer and institution and between hierarchy and subordinate” to carry out its religious goals.¹⁴² Government intrusion into these actions will result in an intrusion into the church’s free exercise, essentially causing the church to lose its independent existence.¹⁴³

The people of the United States have not yet bestowed Congress with the power to vest courts with jurisdiction to settle purely ecclesiastical disputes.¹⁴⁴ In fact, generally, deference is given to the highest judicatories of a religious organization’s hierarchy on “matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.”¹⁴⁵ Should the government attempt to justify an intrusion into these matters with a claim that an individual is not capable of judging his own interests, or a claim that the individual will be exploited by powerful institutions, it would be confronted with an attack that government regulation that is either paternalistic or protective does not belong in the context of religion.¹⁴⁶

Religion, in some cases surviving centuries of social change, may not always comport with the social climate of a particular age. However, it is not the government’s place to reform the church.¹⁴⁷ For example,

140. See Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 Nw. U. L. REV. 146, 159 (1986). The Supreme Court has placed more weight on the free exercise rights of religious organizations than on those of individual believers. See Battaglia, *supra* note 43, at 333 n.862 (citing *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982)). See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (recognizing the communal and associational nature of religion by supporting the cultural and religious tradition of the Old Amish Order).

141. See Church Law & Tax Report 5 (July/August 2004), available at www.churchlawtoday.com (last visited June 18, 2005).

142. McConnell, *supra* note 140, at 159.

143. *Id.*

144. See *Simpson v. Wells Lamont Corporation*, 494 F.2d 490 (5th Cir. 1974).

145. See *Madsen v. Erwin*, 481 N.E.2d 1160, 1165 (Mass. 1985).

146. McConnell, *supra* note 140 at 159.

147. See *id.* But see, *State ex rel. Swann v. Pack*, 527 S.W. 2d 99, 111 (Tenn. 1975) (“The right to the free exercise of religion is not absolute and unconditional. Nor is its sweep susceptible of discrete and concrete compartmentalization. Free exercise of religion does not include the right to violate statutory law...However, the scales are always weighted in favor of free exercise and the state’s

despite a governmental interest in eliminating discrimination, religious institutions are certainly allowed to choose leaders and members without governmental interference. The right to choose leaders is an important part of internal governance that is vital to the welfare of the church, "for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large."¹⁴⁸ More specifically, a church is free to choose its priests. It may also insist that its priests be male and celibate. These institutions must be permitted a certain level of autonomy from governmental action.

In recognizing the essential nature of autonomy of religious institutions in choosing their leaders, many jurisdictions look to the ministerial exception of Title VII.¹⁴⁹ In *Starkman v. Evans*,¹⁵⁰ the court sought to develop an objective test with which religious employees could more clearly ascertain their status with respect to Title VII. Specifically, the court used this test to determine whether a church music director's position fell within the ministerial exception.¹⁵¹ The Fifth Circuit first asked whether the employment decision was based largely on religious criteria, then whether the employee was qualified and authorized to perform the ceremonies of the church, and lastly, whether the employee engaged in activities traditionally considered ecclesiastical or religious, including whether the employee attends to the religious needs of the faithful.¹⁵² The court noted that because the music director's duties included acting as a spiritual leader, which required her to be educated in religion, her position was akin to a minister as opposed to a janitorial or secretarial employee.¹⁵³ As a result, a claim could not be sustained against the church for the music director's discharge based on her sexual orienta-

interest must be compelling; it must be substantial; the danger must be clear and present and so grave as to endanger paramount public interests.").

148. *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 656 (10th Cir. 2002).

149. See Church Law & Tax Report, *supra* note 141, at 3.

Under the so-called ministerial exception, employment relationships between religious associations and their ministerial staff are exempt from the requirements of Title VII. Whether an employee is covered by the ministerial exception or is secular depends upon the function of the position. One need not be an actual ordained minister to fall within this exception...The ministerial exception has been almost universally recognized by both federal and state courts, and it provides churches with virtual immunity from employment discrimination claims by current or former ministers.

Id. at 9.

150. 198 F.3d 173 (5th Cir. 1999).

151. See *id.* at 175-76.

152. See *id.* at 176.

153. See *id.* at 177.

tion. *Starkman* is illustrative of the autonomy that religious institutions are afforded with regard to bringing in or keeping certain individuals within its enterprise, despite a governmental interest in preventing discrimination, because doing so could substantially alter the institution's religious message and contravene its free exercise rights.

Plainly, religious organizations maintain that anti-discrimination laws are antithetical to carrying out their religious goals, and therefore should not fall within their grip.¹⁵⁴ For example, since homosexuality is not an acceptable behavior by the Catholic Church, organizations sponsored by that church will continually refuse to hire all gays. This exclusionary desire towards homosexuality from the church has been compared to that of promiscuity, as a relative concept of institutional morality.¹⁵⁵ Although modern society may view the discharge of a gay or lesbian individual as violating institutional norms, religious institutions would likely argue that hiring a homosexual employee would be outside the religious organization's institutional norms.¹⁵⁶ It can further be argued that sexual orientation is a component of the collective and expressive aspects of an individual's identity. Similarly, religion plays an essential role in individual and group conceptions of identity.¹⁵⁷ A person's religious self-definition is important not only in terms of "what

154. In *Dignity Twin Cities v. Newman Ctr. & Chapel*, the Minnesota Court of Appeals found "excessive entanglement" in "enforcing civil rights protection against a religious organization enforcing conformity of its members to certain standards of conduct and morals." 472 N.W.2d 355, 357 (Minn. Ct. App. 1991).

155. One scholar argues that "[a]n organization whose concept of morality condemns homosexuality should be permitted to exclude an openly homosexual individual, just as an organization whose concept of morality condemns promiscuity should have the right to exclude both homosexual and heterosexual individuals whose public expressions or statements exhibit a preference for non-monogamous sexual relationships." Andrew J. Breuner, *Comment, Expression by Association: Towards Defining an Expressive Association Defense in Unruh-based Sexual Orientation Actions*, 33 SANTA CLARA L. REV. 467 at 509-10 (1993).

First, groups claiming that certain beliefs and ideas justify the exclusion of persons with different philosophies must establish that the organizational views asserted are collective ones. Second, the organization must establish that the collective beliefs are expressed in some manner. Third, there must be a reasonable basis for inferring the presence of expressive interests from the organization's expressive activities. Finally, real ideological differences between the organization and the excluded individual must be identified.

Id. at 503. Nan Hunter, a professor at Brooklyn Law School points out that freedom of association primarily aids in the development of identity. Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1718 (1993). This is significant because "[b]oth sexual orientation and religion play a fundamental role in shaping an individual's concept of identity and personhood." Battaglia, *supra* note 43, at 326.

156. Roderick M. Hills, Jr., *You Say You Want a Revolution? The Case Against the Transformation of Culture Through Anti-discrimination Laws*, 95 MICH. L. REV. 1588, 1615 (1997).

157. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 635 (1980).

it says to him but also by what it says (or what he thinks it says) to others.”¹⁵⁸ Therefore, as a policy argument, because religion plays a fundamental role in shaping an individual’s concept of identity, allowing an organization that wishes to stay loyal to its religious teachings and beliefs to discriminate in order to achieve these ends, is essential to maintaining the sanctity of the religion for all who chose to follow it. Thus, according to this view, no level of the governmental interest in eliminating discrimination should infringe upon the religious community’s compositional autonomy.¹⁵⁹

Beyond autonomy and with respect to composition, some courts have declined to assess tort claims involving alleged sexual orientation discrimination in religious practices, citing the First Amendment. For example, in *Madsen v. Erwin*,¹⁶⁰ an employee of a church-published newspaper was fired because of her sexual orientation and later brought an unsuccessful claim against the Church.¹⁶¹ The court noted that publishing the newspaper was a religious activity run by the church, that “‘homosexuality is a deviation from the moral law’ as expounded by Christian Science, and that it is expected that every employee of the Church will uphold the Church’s requisite standard of sexual morality.”¹⁶² The court did not assess the tort claims brought by the plaintiff, because doing so “would involve the court in a review of an essentially ecclesiastical procedure whereby the church reviews its employees’ spiritual suitability for continued employment.”¹⁶³

The *Madsen* court accepted the notion that an *employee* of a religious organization must be submissive to church authority in the same way as a *member* of the organization, because churches rely on its employees to carry out the church’s mission in harmony with its teachings.¹⁶⁴ The court further proclaimed that compelling the defendant to pay damages for maintaining its religious beliefs by firing an employee

158. *Id.*

159. David B. Cruz, *Note, Piety and Prejudice: Free Exercise Exemption From Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. Rev. 1176, 1205 (1994). Professor Epstein of the Chicago Law School even goes so far as to suggest that all private associations should have expressive association rights similar to the Boys Scouts in *Dale*, even though this “calls for the constitutional invalidation of much of the Civil Rights Act, including Title VII.” Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 142 (2000).

160. 481 N.E.2d 1160, 1164 (Mass. 1985).

161. *Id.* at 1164.

162. Battaglia, *supra* note 43, at 304 (citing *Madsen*, 481 N.E.2d at 1164).

163. *Madsen*, 481 N.E.2d at 1166.

164. *See id.* at 1165.

on the basis of sexual orientation, would place a substantial burden on defendant's right to free exercise of religion.¹⁶⁵

B. Purpose of the Organization

1. Profit vs. Nonprofit Distinction

In determining whether an organization associated with a religious or moral message should be exempt from anti-discrimination laws, the courts should look to the purpose of the organization. To determine the organization's purpose, it is necessary to distinguish between organizations that are run primarily to maximize profits, on the one hand, and non-profit charitable organizations functioning chiefly to advance spiritual and/or ethical goals, on the other. If the courts recognize a religious organization as being non-profit and run exclusively to expand their religious message, the organization should be effectively outside the category of "employers" subject to anti-discrimination laws. This exemption should apply to such organizations, despite offering a product for sale in the marketplace, hiring a salaried staff, and possibly providing benefits to its staff. Limited protection in the context of commercial activity is often justified as a consequence of entering the marketplace while non-profit activities are deemed more likely to be religious.¹⁶⁶

As noted in the discussion about government regulations burdening religion,¹⁶⁷ the government should not force religious institutions to hire an individual who is not a believer or whose values are at odds with the religious doctrine, where the job of the applicant is *primarily to advance the organization's religious message*. Organizations that are established and run primarily to advance a spiritual message are a direct extension of the larger religious institution itself. As such, churches are permitted to insist on individual loyalty when employing individuals to run its organizations. In accepting such employment, the individual accepts responsibility to act in furtherance of the religious mission and in accord with the church teachings. In doing so, the employee must yield to

165. *Id.* at 1166. The court cited *Macauley v. Massachusetts Commission Against Discrimination*, which held that the applicable state statute which proscribes employment discrimination based on sex, does not include discrimination based upon sexual preference, thereby precluding jurisdiction over complaints based on sexual orientation discrimination. *Macauley v. Mass. Comm'n Against Discrimination* 397 N.E.2d 670, 671-72 (Mass. 1979).

166. Battaglia, *supra* note 43, at 332-33.

167. *See supra* text accompanying notes 140-64 (discussing burden on religion).

church authority in the same way as a member.¹⁶⁸ For example, in the context of religious schools, it has been suggested that “compel[ling] a religious institution to rehire a person to a teaching position despite that person’s departure from religious doctrine, [causes] the church [to lose] the ability to control its voice.”¹⁶⁹

The problem arises where these organizations, although sponsored by religious institutions, take the appearance of business enterprises. In other words, if to the ordinary observer an entity gives the impression that it is commercial in nature, working primarily to make profits, and catering to the public at large, it would be inherently unfair to allow the enterprise to discriminate against certain individuals by refusing to hire them, or allowing the enterprise to fire them, without good cause. The employers’ alleged freedom of association and religion rights would allow them to circumvent Title VII and similar legislation. Additionally, it would lead to an unjust standard whereby businesses are essentially saying “we will take your money, but we will not employ you.”

Courts have, in fact, looked at the function and purpose of private organizations to determine whether the organization is run primarily for profit, or whether it is a non-profit organization in a purely religious capacity, to determine whether they are exempt from employment discrimination laws. In *Curran v. Boy Scouts of America*,¹⁷⁰ the California Supreme Court recognized a fundamental difference between charitable organizations and organizations resembling commercial or business establishments.¹⁷¹ The court observed that charitable organizations direct their services “to a distinct religious, cultural, gender, ethnic or age group, in a way that would be unacceptable in a business.”¹⁷² Furthermore, charitable organizations undertake activities as a result of a distinct mission, rather than for the purpose of making profit.¹⁷³ The court therefore held that given the organization’s overall purpose and function, the Boy Scouts is not a business establishment whose membership decisions are subject to the Unruh Civil Rights Act,¹⁷⁴ as it is an expressive

168. See *Madsen*, 481 N.E.2d at 1165.

169. McConnell, *supra* note 140, at 160.

170. 29 Cal. Rptr. 2d 580 (Cal. Ct. App. 1994).

171. Note that a religious association that does not engage in religious practice receives the same degree of protection that an ethnic or cultural association does. See William P. Marshall, *Discrimination and the Right of Association*, 81 Nw. U.L. REV. 68, 85-86 n. 105 (1986).

172. *Curran*, 29 Cal. Rptr. 2d at 602.

173. *Id.*

174. The Act provides that “[a]ll persons within [the state] . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments . . . no

social organization whose primary function is to instill values in its young members.¹⁷⁵

In the context of alleged discrimination in admitting members to a private club, the U.S. Supreme Court has also looked at whether the enterprise is or is not a business establishment. In *Board of Directors of Rotary International v. Rotary Club*,¹⁷⁶ the Court held that the Rotary Club, a non-profit corporation providing “humanitarian services, encourag[ing] high ethical standards in all vocations, and help[ing] build good will and peace in the world,” wrongfully excluded women as potential members.¹⁷⁷ The Rotary Club was not exempted from the California civil rights statute because the organization was more akin to a business institution than a private membership club due to the fact that it provided goods, services, and facilities to its members.¹⁷⁸

In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,¹⁷⁹ Justice Brennan, in a concurring opinion, contrasted organizations “operat[ing] simply in order to generate revenues for the church” with “activities themselves infused with a religious purpose.”¹⁸⁰ However, in a footnote, Brennan warned that courts must be careful of organizations which will “transform an enterprise that appeared commercial in substance into one non-profit in form . . . simply to evade Title VII.”¹⁸¹ In that case, a gymnasium open to the public and operated by a non-profit corporation affiliated with the Church of Jesus Christ of Latter-Day Saints discharged an engineer, after he failed to be certified as a member of the church eligible to attend service at its temples.¹⁸² The engineer sued the corporation under Title VII.¹⁸³ The Supreme Court dismissed his case, pointing out that the religious organization exemption contained in section 702 of Title VII, under which the corporation falls, serves to minimize governmental interference with religion.¹⁸⁴

matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition.” CAL CIV CODE § 51 (2004).

175. See *Curran*, 29 Cal. Rptr 2d at 598-600.

176. 481 U.S. 537 (1987).

177. *Id.* at 548-49.

178. See *id.* at 546-47.

179. 483 U.S. 327 (1987).

180. *Id.* at 344.

181. *Id.* at 344 n.4.

182. See *id.* at 330-31.

183. *Id.*

184. See *id.* at 339-40.

The beliefs of individuals running a religious organization are not enough to place the organization within section 702's purview.¹⁸⁵ Courts must weigh all significant secular and religious characteristics and resolve whether the corporation's purpose and character are primarily religious.¹⁸⁶ Moreover, although a close affiliation to a religious institution is important, it is not enough "if the organization's activities are not themselves sufficiently religious."¹⁸⁷ In *University of Great Falls v. NLRB*,¹⁸⁸ the court noted that "non-profit institutions have a more compelling claim to [an] exemption . . . than for profit business."¹⁸⁹ The court recognized as "religious" a school which "[holds] itself out to students, faculty, and community as providing religious educational environment; . . . is organized as a nonprofit; [is] affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion."¹⁹⁰ In determining whether subjecting a "religious" school to collective bargaining under the National Labor Relations Act (NLRA) would violate the Religious Freedom Restoration Act (RFRA), by substantially burdening the religious freedom of the university, the National Labor Relations Board (NLRB) considered the "involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of the faculty."¹⁹¹

2. Expressive Nature of the Organization

In his examination of anti-discrimination laws after *Dale*, Professor Carpenter recognized three categories of associations: (1) expressive associations; (2) quasi-expressive associations; and (3) commercial associations.¹⁹² Although quasi-expressive associations are expressive in some respects, they are afforded lesser protection than purely expressive associations because they enter the marketplace.¹⁹³ In line with this rea-

185. Battaglia, *supra* note 43, at 344.

186. *See id.*

187. *Id.*

188. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002).

189. *Id.*

190. *Id.* at 1343.

191. *Id.*

192. Dale Carpenter, *Expressive Association and Anti-Discrimination Law after Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1517 (2001).

193. *See id.* at 1517-18 (discussing the benefits of the tripartite approach).

soning, it could be argued that the Boy Scouts are a quasi-expressive association; although the organization holds itself out to be functioning solely to instill a particular set of morals in young boys, it had “entered the marketplace with extensive marketing of Boy Scouts equipment and uniforms, even to the extent of owning and operating retail stores.”¹⁹⁴ Considering the above, why was the Boy Scouts’ decision to exclude Dale upheld by the Supreme Court? Scholars suggest that perhaps “[b]ecause Dale was a scout *leader*, the Boys Scouts would be justified in excluding him as a homosexual.”¹⁹⁵

The U.S. Supreme Court has indicated that although corporations have First Amendment rights, namely the right to expressive association, these rights are “not reserved for advocacy groups....[t]o come within its ambit, a group must engage in some form of expression, whether it be public, or private.”¹⁹⁶ It can be argued that religious teachings are expressive in nature. A problem arises when the government takes the initiative to determine what conduct has religious significance, and is therefore expressive, and what conduct does not. In *Salvation Army v. Department of Community Affairs of New Jersey*,¹⁹⁷ the court asserted that “sometimes . . . an activity that would ordinarily be considered secular takes on religious significance. Giving a man a cracker, for example, is often simply a way of feeding him, but sometimes it is a sacrament.”¹⁹⁸ Thus, one scholar suggests that so long as the believer has “a religious reason for desiring to engage in or refrain from particular conduct,” their free exercise of religion will be burdened by government regulation of that conduct.¹⁹⁹

The for-profit/non-profit distinction in conjunction with the quasi-expressive nature of the organization becomes problematic in the context of businesses such as bookstores selling exclusively religious books. In response, one scholar warns of such for-profit activities containing a religious character.²⁰⁰ However, those “businesses” should be permitted to insist on employing only those individuals who are believers knowledgeable in the religious teachings and capable of assisting the typical consumer, and should be able to do so without government interference.

194. See generally MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 571 (Aspen Publishers 6th ed. 2003) (discussing analogous cases).

195. *Id.* (emphasis added).

196. See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

197. 919 F.2d 183 (3rd Cir. 1990).

198. *Id.* at 188.

199. See David B. Cruz, Note: *Piety and Prejudice: Free Exercise Exemption From Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. REV. 1176, 1231-32 n.320 (1994).

200. Battaglia, *supra* note 43, at 333.

In such cases, perhaps the inquiry into the purpose of their organization should be extended one additional step. If the for-profit business contains a religious character, the court should consider into whose hands the profits will ultimately fall. If the profits are being channeled back into the religious organization, either directly or through significant donations, then, perhaps the organization should be exempt from anti-discrimination laws, even though it is operating as a profit-making entity.

It could be argued that a religious bookstore selling books, which are exclusive to a particular religion, is expressive because distributing such literature to the public advances the teachings and message of that religion. Moreover, the owner of a religious bookstore wishes to advance the teachings contained in the books by marketing and selling them to the public. Finally, a religious bookstore may be categorized as expressive, despite the fact that it operates "for profit," when it makes significant donations to the sponsoring religion. Therefore, by donating profits to a religious institution such as the Roman Catholic Church, the bookstore is in effect voicing the religion's teachings.

C. Open to the Public

This Note proposes that a distinction could be drawn, not only on the basis of the organization's purpose, but also according to whom the organization caters. In other words, the distinction is made on the basis of the organization's "consumers." For example, a private hospital caters to the general public. It is rare that an individual being rushed to an emergency room would first stop to consider whether he or she agrees with the religious views of the sponsoring institution, before receiving vital treatment, and would reconsider going elsewhere. Additionally, the purpose of the hospital, providing medical care and attention, does not require its employees to be knowledgeable in religious teachings. Therefore, private hospitals, regardless of their religious affiliation should not be allowed to discriminate against certain individuals in their employment policies. Typical consumers of religious bookstores on the other hand, are individuals associated with that particular religion, or those who are purchasing books to learn about how the faith is promulgated by those who follow its teachings. Thus, even though such a business operates in part to make profits, it should be allowed to hire employees which share religious values with the sponsoring institution in order to

serve these consumers better. In *Boy Scouts of America v. Till*,²⁰¹ a Florida district court held that because a school board allowed all sorts of groups to use its school facilities, in effect creating a “public forum,” it was prohibited from discrimination of those using the facilities based on sexual orientation.²⁰²

D. Overriding Governmental Interests

The purpose for the inclusion of a governmental interest prong to the proposed test is to be consistent with the common law’s general treatment of the First Amendment right of freedom of expression.²⁰³ It can be argued that allowing a court to recognize a situation where the government’s interest is so substantial that it outweighs a religious organization’s First Amendment rights, would be to condone governmental infringement on the free exercise of an entity that is a direct extension of a religious institution. As noted in the above discussion on governmental regulations which burden religion,²⁰⁴ it may be dangerous to allow the government to determine what conduct is religious in nature, and to what extent regulating that conduct would infringe upon the free exercise of the religion. Arguably, the government, as a comprehensive body, is not well-suited to make religious determinations, in part, because the United States has embraced the concept of separation of church and state. However, situations where there’s a substantial interest in the public welfare and a compelling need for workplace regulation are not inconceivable. Under such circumstances, an incidental infringement upon a religion would be appropriate. In such a case, the courts must balance governmental interests against the burden on expression and free exercise rights of a religious organization.

201. 136 F. Supp. 2d 1295, 1308 (S.D. Fla. 2001).

202. *See id.* at 1308-10.

203. For example, a government regulation of protected expressive conduct under the First Amendment is sufficiently justified if it is “within the constitutional power of the government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.” *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

For purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen a statement of support for the law or its purpose. Such a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 89 (Cal. 2004), *cert. denied*, 125 Sup. Ct. 53 (2004).

204. *See supra* text accompanying notes 140-64 (discussing burden on religion).

In this weighing process, courts must be deferential to testimony presented on the part of the organization, regarding the extent to which the regulation will burden its religious practices. It would be improper for the court to impose its own views as to the significance of a particular religious practice because the court may have a different interpretation or idea of the practice's significance, or may simply believe that the significance is minute or inconsequential, at best.²⁰⁵ In *Catholic Charities*, the organization argued under the Supreme Court's decision in *Watson v. Jones*,²⁰⁶ which held that "[w]henver....questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories....the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."²⁰⁷

However, the Supreme Court has also held that a party must comply with otherwise valid regulatory laws, regardless of their opposing religious beliefs.²⁰⁸ The *Smith* Court reasoned that permitting religious beliefs to excuse illegal acts would be to dethrone the nation's laws as supreme, and render the law of the *individual* superior.²⁰⁹ As the Supreme Court noted:

Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.²¹⁰

The Court's decision in *Smith* was reaffirmed in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*,²¹¹ restating "the general proposition that a

205. In *Catholic Charities*, the court cited to their decision in *Smith* where the Court "warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Catholic Charities*, 85 P.3d at 92 (citing Employment Div. Ore. Dept. of Human Res. v. Smith, 494 U.S. 872, 887 (1990)).

206. 80 U.S. 679, 727 (1871).

207. *Catholic Charities*, 85 P.3d at 77 (citing *Watson v. Jones* 80 U.S. 679, 727 (1871)).

208. See *Smith*, 494 U.S. at 877-882.

209. See *Smith*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879)).

210. *Catholic Charities*, 85 P.3d at 93 (citing *Tony and Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290, 303-06 (1985)). The court in *Catholic Charities* opined that this rule should be applied to nonprofit corporations that enter the general labor market. *Id.* at 565.

211. 508 U.S. 520, 531(1993).

law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice.”²¹² A law that is “neutral” and “general[ly] applicable” is one in which the law’s purpose is not to “infringe upon or restrict practices because of their religious motivation” or “[selectively impose] burdens only on conduct motivated by religious belief.”²¹³

Whenever the government claims to have a substantial interest in regulating a religious organization’s behavior, the court must balance the government’s interest against the burdens it places on the affected party. In the context of a religious organization’s constitutional rights, it has been held that “the governmental interest in protecting gay people from employment discrimination [does] not outweigh the burden on the Church’s First Amendment rights.”²¹⁴ The New Jersey Supreme Court has held that a compelling state interest in eliminating discrimination would justify an infringement on First Amendment rights, so long as the infringement is narrowly tailored to further the governmental goal.²¹⁵

The California Supreme Court placed great weight on the government’s substantial interest in public welfare, by directing that a “church has a lesser right of autonomy and privacy in the operation of a hospital than in the running of its churches or schools.”²¹⁶ Hospitals operate primarily to provide individuals with medical care and attention. The government has an overwhelming interest in the effective continued operation of medical facilities, aside from its governmental interest in preventing discrimination in employment. If private hospitals were permitted to discriminate against certain individuals by claiming a religious exemption, this would undermine both of these governmental interests. Although the goal of thwarting discrimination in the workplace must always be balanced against an organization’s First Amendment rights, the fact that the organization provides services in which the government has a great interest, such as public welfare, health, and safety, tends to support any minute incidental restrictions on such constitutional rights.

Similarly, in *EEOC v. Southwestern Baptist Theological Seminary*,²¹⁷ the Fifth Circuit was asked to “balance the interest of the federal

212. *Catholic Charities*, 85 P.3d at 82 (citing *Lukumi*, 508 U.S. at 531).

213. *Lukumi*, 508 U.S. at 531-33.

214. Battaglia, *supra* note 43, at 304 (citing *Walker v. First Presbyterian Church*, 22 Fair Empl. Prac. Cas. (BNA) 762, 764-65).

215. ZIMMER, *supra* note 194, at 571.

216. *O’Connor Hosp. v. Superior Court*, 240 Cal. Rptr. 766, 774 (Cal. Ct. App. 1987).

217. *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981).

government in enforcing Title VII against the First Amendment rights of a religious institution of higher learning.²¹⁸ In doing so, that court articulated a three-step test relevant to statutory violations of the Establishment Clause. To determine whether an act of Congress violates the Establishment Clause a party must determine “(1) whether the statute has a secular purpose; (2) whether its primary effect neither advances nor inhibits religion; and (3) whether it fosters an excessive government entanglement with religion.”²¹⁹ To determine whether the governmental action is so entwined with religion that the entanglement is deemed excessive, one must examine “whether the character of the institution is affected, the nature of the aid (or burden) provided, and the resulting relationship between church and state.”²²⁰ In deciding whether a constitutional violation of the Free Exercise Clause has occurred, the court must consider: (1) the magnitude of the statute’s impact upon the exercise of the religious belief; (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief, and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state.²²¹

VI. CATHOLIC CHARITIES DECISION EVALUATED UNDER THE PROPOSED TEST

Although the challenges to California’s Women’s Contraception Equity Act (WCEA) in the *Catholic Charities* case were constitutional, the California Supreme Court had hinted that the affected employees could have also brought a Title VII claim – namely that the employer’s policy of prohibiting prescription contraceptives could constitute disparate impact on the basis of sex.²²² If such a claim had been brought, the application of our proposed test points to the conclusion that the *Catholic Charities* case was in fact, correctly decided. Specifically, Catholic Charities would be considered an “employer” under Title VII and a policy of prohibiting prescription contraceptives would not be afforded the protection under the religious exemption in Title VII.²²³ The proposition

218. *Id.* at 279.

219. *Id.* at 286.

220. *Id.*

221. *Id.*

222. *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 85 P.3d 67, 106 (Cal. 2004), *cert. denied*, 125 S. Ct. 53 (2004).

223. See discussion *infra* Religious Organization (Ministerial) Exception p. 11-12.

that providing birth control to employees violates the religious beliefs of the organization does not hold water under the elements of the proposed test.²²⁴ Catholic Charities does not qualify for the exemption for “religious employers” in the WCEA, should not be exempted under Title VII, and should consequently be compelled to provide birth control to their employees in compliance with both Acts.

A. Burden on Religion

Catholic Charities would argue that being forced to adopt a message that it, and by affiliation, the Roman Catholic Church, supports the use of birth control, would significantly burden its religious beliefs. When one looks at the burden on a religious organization, one must consider the composition of the organization (employees), the mission of the organization with respect to faith, and the manner in which it operates. Despite the claims of burden made by Catholic Charities, an examination of that organization’s employee composition, the mission of the organization with respect to faith, and the manner in which its work is carried out, reveals that any burden on religion seems negligible at best.

Catholic Charities of Sacramento is one of 1,600 agencies of Catholic Charities USA, a non-profit nationwide network.²²⁵ The purpose of Catholic Charities is to provide humanitarian services, not to espouse religious beliefs. It provides immediate or emergency services such as disaster relief and soup kitchens,²²⁶ as well as longer-term assistance, including counseling and social services.²²⁷ In fact, the organization helps or caters to individuals of all religious affiliations. According to the or-

224. See discussion *infra* p. 25 (“In order to determine whether a religious organization, such as a charity is an “employer” exempt under Title VII and state workplace anti-discrimination laws, the deciding court must consider the following factors: (1) Whether the government regulation burdens the entity’s ability to observe its religious beliefs; (2) Whether the organization’s primary purpose or function is to make profit as opposed to conveying a particular moral or religious message; (3) Whether its services or activities are open to the public and are unselective; and (4) Whether there are any substantial overriding governmental interests which would impose only minute incidental restrictions on the organization’s associational rights.”).

225. Catholic Charities USA: Your Local Agency, at <http://www.catholiccharitiesinfo.org/about/> (last visited June 18, 2005).

226. “In 2000, more than 5.9 million people received emergency services such as cash assistance, clothing, help with utility bills, temporary shelter, and food through soup kitchens and food banks.” Catholic Charities USA: Programs and Services, at <http://www.catholiccharitiesinfo.org/faqs/services.htm> (last visited June 18, 2005).

227. “Social services include: adoption, family support, help for at-risk children, housing assistance, job training, respite care, home care, parenting education, pregnancy counseling, prison ministry, refugee and immigration assistance, and treatment for drug and alcohol abuse.” *Id.*

ganization's website, its local Catholic Charities agencies "provide help . . . regardless of religious, social, or economic backgrounds."²²⁸ Thus, under this view, the California Supreme court correctly held that the corporate objective of the Catholic Charities of Sacramento is not the "inculcation of religious values." Therefore, Catholic Charities did not meet the requirements of the religious organization exception contained in the WCEA.²²⁹

As pointed out in the preceding paragraph, the work that the organization carries out is wide-ranging, and such services are provided, regardless of the recipients' religion. This generalized, religion-neutral charitable work (although similar to that which would be done by the Catholic Church) can be carried out by *any* charitable organization, even with no religious affiliation whatsoever. Therefore, the organization is not sufficiently connected to the religious beliefs of the Catholic Church, in particular. Because Catholic Charities employs people of various faiths, there is no guarantee that its charitable work is carried out for the purpose of furthering the specific religious beliefs of the Catholic faith.

The counter-argument which was put forward by Catholic Charities is that the organization sees catering to the public in this way, as promoting Catholic values. However, because the actual entity itself does not require its workers to adhere to the Catholic faith, merely catering to the public does not necessarily endorse the religious beliefs of any individual employee, nor of the organization in general. It is possible that the employees may be engaging in this charitable work with the intention of fulfilling the religious beliefs of another religion, or with the intention of fulfilling moral duties in general.²³⁰ It would be difficult to expect a court to recognize an entity as "religious," and thus qualified under the WCEA or Title VII religious exemptions, where the employees of the said entity do not have to swear allegiance to the Catholic faith, nor to carry out any of the organization's practices with Catholicism in mind, heart, or spirit. Although the reason for the work of Catholic Charities can be tied to the Catholic faith, the work itself is religion-neutral, and is welcome by Catholic Charities to be completed by employees of all faiths.

228. Catholic Charities USA: General, at <http://www.catholiccharitiesinfo.org/faqs/general.htm> (last visited June 18, 2005).

229. *Catholic Charities*, 85 P.3d at 75.

230. One may even argue that because non-Christian employees can do this charitable work with their own faith in mind, their particular religious beliefs are not actually being burdened, despite working under the Catholic Charities name. This is not to say that no employees will feel that their religious beliefs are being compromised. However, Catholic Charities does not make it a condition of employment to swear devotion to the Catholic religion or God.

Therefore, the composition of the organization, the mission of the organization with respect to faith, and the manner in which the work of the organization is carried out, indicate a weak link between the organization and religion. Requiring Catholic Charities to provide birth control to their employees does not create a sufficient burden on its religious objective, since Catholic Charities could not actually prove that promoting religion was its goal. Therefore, under this prong of the proposed test, Catholic Charities cannot be excepted from the regulation.

B. Purpose of Organization

This prong of the test requires one to determine whether the organization's primary purpose or function is to make profit as opposed to convey a particular moral message.²³¹ The *Catholic Charities* court,²³² determined that the corporation did not qualify for nonprofit status under the IRC.²³³ Despite Catholic Charities' insistence on being affiliated with the Catholic Church, the organization's primary function is to generate money as a means to achieve a positive end in the way of charitable giving, not to carry out the teaching of the Catholic Church.²³⁴ As discussed in the previous section,²³⁵ Catholic Charities employees are not required to be versed in the teachings of the Catholic faith, nor are they required to be practicing Catholics.²³⁶ It would be a stretch to conclude that the primary purpose of an organization consisting of multi-faith employees is to convey a particular religious message. To qualify as a religious institution, as opposed to an "employer" under Title VII, an organization must show that its purpose is sufficiently religious or moral. Catholic Charities has not met this burden, thus there is a problem with recognizing Catholic Charities as a religious non-profit institution. Although the activities of Catholic Charities, namely their charitable giving, may be viewed as "moral," the activities are not sufficiently particularized to constitute the kind of religious message the proposed test requires.

Catholic Charities had unsuccessfully argued that because the provision of these social services are provided pursuant to the organization's religious beliefs, the organization is effectively espousing reli-

231. See *infra* note 222.

232. 85 P.3d 67 (Cal. 2004).

233. *Id.*

234. See *id.* at 75.

235. See *infra* p. 225-27.

236. See *infra* p. 226.

religious convictions.²³⁷ Thus, it should be afforded deference in its contention that its activities, such as helping the needy in the name of God, are religiously expressive. This Establishment Clause argument was made in association with the California Supreme Court's determination that the Catholic Charities' work is not religious in nature and does not impermissibly interfere with matters of religious doctrine and internal church governance. That court therefore also rejected the Catholic Charities' related arguments that the courts are "simply incompetent to decide matters of faith and doctrine"²³⁸ and that it is improper for the government to decide whether an act is religious, regardless of how mundane the act might seem to appear.²³⁹

However, because Catholic Charities is not discriminating against *who receives what aid*, based on religion, it is hard to distinguish this aid from aid that the *government* has been providing to the public. More specifically, the government provides those in need (i.e. welfare recipients and the elderly) "charitable aid" in the form of welfare, food stamps, and Medicare.²⁴⁰ The government, although not outwardly espousing its "morality," is in effect engaging in behavior which politicians feel is their moral duty to take part in. Like the aid provided by Catholic Charities, the aid provided by the U.S. government is not limited by the recipient's religious faith or morals. Therefore, one may argue that there is no difference between the neutral aid offered to those in need by the U.S. government and that furnished by Catholic Charities.

C. Open to the Public

As previously noted, Catholic Charities provides services to the general public; it is not religiously selective as to whom it renders help.²⁴¹ The aid that Catholic Charities provides is analogous to that provided by private hospitals. Just as an emergency room patient would not refrain from receiving critical aid from medical doctors at a hospital af-

237. See *supra* text accompanying notes 192-200 (expressive nature of the organization).

238. *Catholic Charities*, 85 P.3d at 77.

239. See *infra* p. 227.

240. See generally The Official U.S. Site for People with Medicare (March 31, 2005), available at <http://www.medicare.gov> (last visited June 18, 2005); Jacob G. Hornberger, *Morality, the Welfare State, and Freedom*, Freedom Daily, July 2001, available at <http://www.fff.org/freedom/0701a.asp> (last visited June 18, 2005) ("This double-barreled concept of state morality underlies every aspect of the socialistic welfare state: public housing, Medicare, Medicaid, food stamps, public schooling, education grants, farm subsidies, foreign aid, and even foreign interventions and foreign wars.").

241. See *infra* note 226.

filiated with a particular religion, recipients of the aid given by the Catholic Charities (i.e., those who are impoverished, in need of disaster relief, food, shelter, financial assistance, etc.) would unlikely refuse such help because of the Catholic Charities' affiliation with the Roman Catholic Church (even if that association meant all of the employees were required to be practicing Catholics).

Furthermore, the fact is that Catholic Charities employ numerous non-Catholics.²⁴² Thus, the California Supreme Court correctly held that excluding the organization under the religious exemption would be equivalent to imposing the employer's religion on its non-Catholic employees.²⁴³ Such a superimposition of religious values on others is clearly inappropriate.

Moreover, the fact that Catholic Charities does not discriminate against employees or applicants on the basis of religion, shows that the organization either did not fall within the religious exception under Title VII, or made the choice willingly. If Catholic Charities had chosen to employ persons of all religious backgrounds willingly, the organization still opened itself up for compliance with further governmental anti-discrimination measures, such as the WCEA. When an employer chooses to hire indiscriminately, it must thereafter provide its employees with equal or equally appropriate benefits and facilities. An analogy could be drawn to a religious employer who willingly hires a female priest but fires her as soon as she requests maternity leave or a Catholic bookstore voluntarily employing Jews but refusing to accommodate their Sabbath observances. These results seem inherently unfair. Thus, Catholic Charities would fail this prong of the proposed test because by choosing to hire persons of all religious persuasions, this employer inherently subjected itself to further anti-discrimination legislation.

D. Governmental Interests

In the case of private hospitals, we determined above that there is a possible compelling state interest in providing adequate medical care to the general public. This interest would trump the organization's associational rights since the provision of medical care to all (regardless of re-

242. *Catholic Charities*, 85 P.3d at 76 ("Catholic Charities does not primarily employ persons who share its Roman Catholic religious beliefs, but, rather employs a diverse group of persons of many religious backgrounds...Catholic Charities serves people of all faith backgrounds, a significant majority of whom do not share its Roman Catholic faith.").

243. *See id.* at 93.

ligion) is vital. Unlike the Boy Scouts in *Dale*,²⁴⁴ Catholic Charities does not seek to exclusively employ members of the Catholic faith.²⁴⁵ The Boy Scouts considered it important for their employees, carrying out the “moral” work of the organization, to “associate” with the organization’s moral guidelines and beliefs.²⁴⁶ The Supreme Court honored their associational rights perhaps because of this strong tie to their work.²⁴⁷ Catholic Charities, on the other hand, had argued that its religious beliefs require them to provide aid to those in need, regardless of the needy individuals’ faiths, even if this is to be accomplished through employees who are also not exclusively Catholic.²⁴⁸ Because Catholic Charities does not make it a requirement of employment that the employees practice a particular faith, it is arguable that Catholic Charities does not really believe its work to be religious. Therefore, it is unlikely that the Supreme Court would find the Catholic Charities’ claim of associational rights compelling.

The next consideration would be whether a court would find the purpose of the legislation at issue in *Catholic Charities*, which is to eliminate gender discrimination in health benefits, compelling so as to trump the organization’s freedom of association rights. The WCEA sought to limit inequality between the sexes as its principal purpose. Prior to the said legislation, female employees who did not receive insurance coverage of contraceptives, incurred additional and substantial out-of-pocket costs.²⁴⁹ The California Supreme Court described this legislative purpose as a “compelling state interest.”²⁵⁰ Despite this, the statute does not impose contraception coverage on all religious employers, but rather exempts those religious organizations whose purpose is the “inculcation of religious values” primarily employing and serving persons who share the institution’s religious tenets.²⁵¹ The governmental interest prong thus boils down to whether the WCEA is narrowly tailored to achieve California’s compelling interest.

Catholic Charities would likely argue that the WCEA is a restriction on the organization’s religiously expressive conduct of reducing

244. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

245. *See infra* note 230.

246. *See infra* note 11.

247. *See id.*

248. *See Catholic Charities*, 85 P.3d at 75.

249. *Id.* at 92.

250. *Id.*

251. *Id.* at 75.

poverty, supporting families, and empowering communities.²⁵² It would argue that although this statute addresses an important or substantial governmental interest, the religious organization exception is not the least burdensome, nor is the most narrowly tailored, because it fails to take into account several important factors in determining which organizations fall under the said exemption. Although the Act excludes those entities whose purpose is to instill religious values (an element which according to our analysis, Catholic Charities did not meet since it does not primarily employ nor serve persons sharing the organization's religious views), the Act fails to take into account the extent of the burden this governmental intrusion would impose on the religious organization, and on the greater religious institution, the Roman Catholic Church. Catholic Charities would additionally argue that the exception at issue also fails to acknowledge that activities which are seemingly social services to the general public, may nonetheless have a deeper religious significance. After all, "[c]hurches often regard the community services provided by affiliated nonprofits as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster."²⁵³

The most obvious problem with these foregoing claims is that an analysis under the proposed test reveals that the organization does not qualify as a "religious employer" for the purposes of WCEA, or even Title VII. Therefore, with respect to Catholic Charities in particular, whether the statute is narrowly tailored or overbroad is inconsequential. Specifically, since the organization would not meet the standard for "religious employer" under WCEA or Title VII, the organization would have no claim for freedom of association or religion. Therefore, there is no need to evaluate whether there is a compelling state interest that would trump such a right.

If the statute, as Catholic Charities' hypothetical arguments suggest, took into account whether activities which are seemingly social services to the general public have a deeper religious significance, then Catholic Charities would be condoning the same kind of government intrusion that they sought to escape when making the argument that the government has no place in determining which activities have religious significance.²⁵⁴ The inclusion of this additional inquiry would essentially en-

252. Catholic Charities USA: Mission Statement, at <http://www.catholiccharitiesinfo.org/mission/> (last visited June 18, 2005).

253. *Catholic Charities*, 85 P.3d at 101 (Brown, J., dissenting) (citing Justice Brennan's concurring opinion in *Bishop v. Amos*, 483 U.S. 327, 334 (1987)) (quotations omitted).

254. See discussion *infra* Establishment Clause pp. 205-06, Free Exercise pp. 206-08.

able the government to make arbitrary determinations about the significance of religious practices.

VII. CONCLUSION

In *Dale*,²⁵⁵ the Boy Scouts sought exemption from legislation prohibiting discrimination based on sexual orientation.²⁵⁶ The Supreme Court recognized the Boy Scouts' freedom of association rights and permitted that organization to discriminate based on sexual orientation (in an employment context) based on the organization's adherence to, and practice of, particular moral beliefs.²⁵⁷ In *Catholic Charities*,²⁵⁸ however, although no claim of First Amendment associational rights was brought to light, the organization sought exemption from legislation that would compel it to provide birth control to employees, in conflict with the organization's religious beliefs. The California Supreme Court reasoned that Catholic Charities would not qualify under the exemption for "religious employers" in the WCEA, thus compelling them to provide birth control, in compliance with that Act.²⁵⁹ Although a Title VII claim was not raised at trial, had it been raised by the effected employees, under the proposed test,²⁶⁰ the organization would not likely qualify under a religious exemption thereunder either. Although the reason for the work of Catholic Charities can be linked to the Catholic faith, the work itself is religion-neutral, and is encouraged by Catholic Charities to be completed by employees from a multitude of faiths. As to the purpose of the organization, it would be unlikely that a court would determine that the primary purpose of Catholic Charities is to convey the particular message of the Catholic Church. Although its charitable activities may be viewed as "moral," such activities are not sufficiently particularized to constitute a religious message. Catholic Charities is open to the public, in that it provides services to the general public without using relig-

255. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

256. *Id.*

257. *Id.* at 653.

258. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004).

259. *Id.* at 75.

260. See discussion *infra* p. 210 ("In order to determine whether a religious organization, such as a charity is an "employer" exempt under Title VII and state workplace antidiscrimination laws, the deciding court must consider the following factors: (1) Whether the government regulation burdens the entity's ability to observe its religious beliefs; (2) Whether the organization's primary purpose or function is to make profit as opposed to conveying a particular moral or religious message; (3) Whether its services or activities are open to the public and are unselective; and (4) Whether there are any substantial overriding governmental interests which would impose only minute incidental restrictions on the organization's associational rights.").

ion as a determining factor as to who receives its aid. It is possible to imagine a scenario where the government would have a compelling interest that would trump an organization's associational rights, such as in the case of the legislation at issue in the Catholic Charities case, the WCEA. However, with respect to Catholic Charities, since the organization did not meet the standard for "religious employer" it has no claim for freedom of association, and therefore there is no need to evaluate whether there is a compelling state interest that would trump such a right. Thus, this case was decided correctly.

In sum, organizations primarily operating for business purposes, which cater to the public at large, should not be exempt from Title VII or similar state laws. Furthermore, private organizations that operate for public welfare, such as private hospitals should also be prohibited from discriminating against certain applicants for employment because the government has a great interest in the organization's purpose, namely medical care or other activity which serves the well-being of the citizenry. Incidental burdens on associational rights in these contexts are allowable. Although *Dale*²⁶¹ is a controversial case, which has been viewed as opening a doorway for discrimination in the workplace, the application of the proposed test will help limit the extent to which discrimination will be tolerated in the workplace, and make it more difficult for organizations to use a loose affiliation with a religious entity as a way to circumvent legislation they find unfavorable.

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261. 530 U.S. 640 (2000).

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