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DISCRIMINATION, *WISCONSIN v. YODER*, AND THE FREEDOM OF ASSOCIATION

B. JESSIE HILL *

INTRODUCTION

When, if ever, should private entities be allowed to discriminate or be exempted on religious grounds from other public welfare laws that apply to nonreligious entities? This fundamental and pressing question of both morality and constitutional law defies easy answers. The factual permutations in which this issue presents itself are numerous, ranging from controversies surrounding the rights of churches to choose their ministers, to the claims of other religiously motivated employers that they are entitled to an exemption from providing certain benefits to their employees, to the insistence of the owners of small businesses engaged in commerce or public office that they need not serve all comers if their religious beliefs prohibit them from doing so. Fundamentally, however, these controversies always involve institutions of one sort or another; as such, they appear to raise different issues than the claims of individuals to religious freedom.

In this Essay, I attempt to discern the factors that make certain institutions uniquely deserving of constitutional protection when legal requirements—especially nondiscrimination requirements—conflict with their religious tenets. In Part I, I identify three elements that seem to make an institution uniquely worthy of protection from state interference. Then, accepting Professor Lawrence Sager's premise that it is the freedom of association rather than the right of free exercise that protects these organizations, I consider some additional implications of this argument. In Part II, I consider the difficulties and shortcomings that persist, despite the considerable attractiveness of freedom of association as a basis for protecting some voluntary associations. Finally, in Part III, I propose some tentative ways of addressing these difficulties.

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I. DEFINING AND PROTECTING ASSOCIATIONS

Two examples help to illustrate two extremes of the contemporary conflict between religious freedom and the rights of individuals to be free from invidious discrimination. First, there is the Catholic Church, which insists for doctrinal reasons that only men can be priests.¹ If it were not exempt, the Catholic Church would be found in violation of Title VII of the Civil Rights Act of 1964 for discriminating in employment on the basis of sex.² Yet, it hardly seems controversial that the Catholic Church must be allowed to order its internal affairs in this way. The Catholic Church thus represents the narrowest, most acceptable example of discrimination by a religious entity. It is characterized by the fact that the discrimination involves a church leader or minister; the discrimination is clearly dictated by religious doctrine and the religious hierarchy; and the discrimination is entirely internal to the religious organization—it does not involve or affect religious outsiders.³ Moreover, it is clear that the religious organization—the Roman Catholic Church—is an established and fairly cohesive religious institution, and it sometimes—perhaps often—plays a central role in individual members’ lives. All of these factors suggest that making the Catholic priesthood off-limits to women is an acceptable and even necessary form of discrimination, and that the law has no place enforcing its secular norms against it. Were it otherwise, the very identity of the church—and thus of its adherents—might be threatened.

The second example is the highly publicized case of Kim Davis, the Kentucky county clerk who not only refused to issue marriage licenses in the aftermath of the Supreme Court’s decision in *Obergefell v. Hodges*, which legalized same-sex marriage throughout the country,⁴ but also tried to prevent anyone else in her office from issuing them.⁵ Ms. Davis’s case is perhaps the least sympathetic imaginable: she was an individual employed by a public entity, but acting out of her own religious convictions (not those of a broader association). The entity that employed her, and on whose behalf she claimed to

1. See, e.g., Terrance R. Kelly, *Canaanites, Catholics and the Constitution: Developing Church Doctrine, Secular Law and Women Priests*, 7 RUTGERS J.L. & RELIGION 3 (2005) (referencing the “male-only priesthood doctrine” of Catholicism).

2. 42 U.S.C. § 2000e-2 (2012).

3. Nonetheless, a majority of Catholics disagree with the Church’s position. Laurie Goodstein & Megan Thee-Brenan, *U.S. Catholics in Poll See a Church Out of Touch*, N.Y. TIMES (Mar. 5, 2013), <http://www.nytimes.com/2013/03/06/us/poll-shows-disconnect-between-us-catholics-and-church.html?pagewanted=all> [<http://perma.cc/6G2T-PDQ6>] (citing a poll showing that approximately seventy percent of Catholics believe women should be allowed to become priests).

4. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

5. See, e.g., Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail Over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), http://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html?_r=0 [<http://perma.cc/MBV4-MH6N>].

speak, did not require, embrace, or even sanction the discriminatory act. Finally, Davis's actions burdened other people who did not share her religious beliefs. Not surprisingly, the federal courts have not sanctioned Davis's exercise of religious belief in direct conflict with applicable law.⁶

There thus appear to be three important ways in which these two cases are different. First, they differ in whether the relevant institutional hierarchy unambiguously supports the claimed religious exercise. In the case of the Catholic Church, there is a clear hierarchical structure and little question that the officials within that hierarchy have authority to speak for the church. In the Davis case, by contrast, the county clerk appeared to be acting *ultra vires*; the institutional (governmental) hierarchy did not stand with her, nor could she claim to speak for it.⁷ Second, they differ in whether the religiously motivated action primarily affects religious insiders or outsiders. In the case of the Catholic Church, only Catholics would be qualified to apply for the position of priest; thus, only women who have already subscribed to the rules of the game will likely be affected by the Church's exclusion of them from its highest offices. Kim Davis, by contrast, imposed her religious views primarily on those who did not share them—indeed, perhaps exclusively so. Third, the cases differ in whether they involve discrimination within a truly close, identifiable, voluntary association. Although the Roman Catholic Church constitutes the second largest religious denomination in the United States,⁸ the characterization of the Catholic Church as a private, “close association” may nonetheless seem fitting in some respects.⁹ The Catholic Church is divided into parishes, and parishioners are generally expected to worship together weekly. Painting in broad strokes, it seems fair to suggest that they share a common set of values. They may send their children to the parish school, as well. But this distinction is seen most clearly in the comparison: in the case of Kim Davis, the religious exercise was engaged in by a public official fulfilling a public

6. *Miller v. Davis*, 123 F. Supp. 3d 924, 930 (E.D. Ky. 2015) (“The tension between these constitutional concerns can be resolved by answering one simple question: Does the Free Exercise Clause likely excuse Kim Davis from issuing marriage licenses because she has a religious objection to same-sex marriage? For reasons stated herein, the Court answers this question in the negative.”).

7. *Id.* at 932 (noting the governor of Kentucky had issued a directive in response to some clerks' religious objections informing them that they must perform their clerical duties).

8. PEW RESEARCH CTR., AMERICA'S CHANGING RELIGIOUS LANDSCAPE: CHRISTIANS DECLINE SHARPLY AS SHARE OF POPULATION; UNAFFILIATED AND OTHER FAITHS CONTINUE TO GROW 21 (May 12, 2015), <http://www.pewforum.org/files/2015/05/RLS-08-26-full-report.pdf> [<http://perma.cc/6FU7-4ACN>].

9. The term “close association” is drawn from Lawrence Sager, *Why Churches (and, Possibly, the Tarpon Bay Women's Blue Water Fishing Club) Can Discriminate*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 77, 85 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016).

role. The institution represented by Kim Davis—the county government—was arguably the exact opposite of a private, voluntary, close association.

An analysis of these two opposing examples—one inherently sympathetic, the other inherently unsympathetic—suggests that there are three factors that determine whether a religious exercise should be exempt from legal antidiscrimination requirements. The first is whether the exercise is central to the group's identity, as sanctioned by the institutional hierarchy. The second is whether the purported discrimination affects religious insiders or religious outsiders. And the third is whether the discrimination occurs within a close, voluntary association. In describing these elements, I mean to suggest that they are independent, moving parts in the analysis. No one factor is necessarily dispositive to the analysis, but the absence or weakness of all or most factors will likely mean that the religious association will not (and should not) be entitled to discriminate. Nonetheless, on the model I have sketched out here, it seems fairly clear that the Catholic Church's discrimination is justified, whereas that of Kim Davis (like that of Hobby Lobby, discussed below) is not.

Interestingly, these factors map closely onto the original Affordable Care Act (ACA) contraceptive mandate exception for religious employers.¹⁰ This is yet another context in which religious beliefs—those of religious employers—potentially conflict with a right to be free from discrimination—the right of female employees to access preventive health care on the same terms as men. The ACA's regulations require employers, with certain limited exceptions, to provide insurance coverage for all FDA-approved contraceptive drugs and devices without cost sharing or co-pay.¹¹ In *Burwell v. Hobby Lobby*, the Supreme Court considered and upheld the right of a closely held corporation to refuse to cover certain contraceptives for its employees based on the religious views of its owners.¹² Although this conflict between religious exercise and legal norms may be understood as posing the question whether there are limits on the ability of the government to force religiously committed individuals or institutions to violate their beliefs, it also may be seen as simply posing the question with which this Essay started: when must a religiously motivated individual or institution be permitted to engage in discrimination that is required by the religion but forbidden by law?¹³

10. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,626 (Aug. 3, 2011).

11. 42 U.S.C. § 300gg-13(a)(4) (2010); 26 C.F.R. § 54.9815-2713 (2012); *Women's Preventive Services Guidelines: Affordable Care Act Expands Prevention Coverage for Women's Health and Well-Being*, HEALTH RESOURCES & SERVS. ADMIN., <http://www.hrsa.gov/womensguidelines/> [<http://perma.cc/X9XJ-FNKQ>] (last visited Feb. 18, 2016).

12. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014).

13. See, e.g., B. Jessie Hill, *Change, Dissent, and the Problem of Consent in Religious Organizations*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY*, supra note 9, at 419, 434

As originally drafted, the ACA's contraceptive coverage requirement exempted religious employers, but the class of religious employers was defined narrowly. Specifically, to qualify as religious, an employer had to (1) have a mission that was predominantly religious in nature; (2) primarily employ members of the same faith; (3) primarily serve members of the same faith; and (4) qualify as a church or a church auxiliary under the Internal Revenue Code.¹⁴ Although criticized for its under-inclusiveness, it would seem that the definition of a religious employer was intended to ensure that at least some of the factors identified above were met. By limiting the exemption to entities that have a religious mission, and primarily employ and serve co-religionists—in addition to limiting the exemption to churches, church auxiliaries, and religious orders—the regulatory language ensured that only truly “close associations” would qualify. It would have also ensured, through the requirement that the religious entity primarily employ and serve co-religionists, that the impact of the exemption on religious outsiders would be minimal. The first factor identified above—ensuring that the discrimination emanates from a command or requirement of the religion itself, as articulated by a church hierarchy—is not clearly addressed by the ACA exemption. One might nonetheless hypothesize that the regulation requires the exempted entity be a church or a church affiliate and requires that it have a religious values-driven mission in order to ensure that the discrimination is germane to an identifiable religious doctrine.

The factors identified above as qualifying a religious entity for exemption from antidiscrimination norms also fit with the characteristics identified by Professor Lawrence Sager as qualifying an association for special protection from governmental intervention. He identifies two rights of close association with the capacity to override antidiscrimination law, and these rights are applicable to religious and nonreligious groups alike: a “dyadic” right of association that arises from the relationship between a group and its leader or

(questioning the viability of the distinction between “conscientious objection” and “church autonomy” claims).

14. The original rule exempted from the contraceptives coverage requirement those employers who met the following requirements (note that all four must be met, however):

- (1) The inculcation of religious values is the purpose of the organization;
- (2) The organization primarily employs persons who share the religious tenets of the organization;
- (3) The organization serves primarily persons who share the religious tenets of the organization;
- (4) The organization is a nonprofit organization as described in [those portions of the Internal Revenue Code pertaining to churches and their “integrated auxiliaries.” See 20 U.S.C. § 6033(a)(3)(A)(i)].

Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. at 46,626.

leaders, and a “group-centered” right that arises from the relationship among group members.¹⁵ The requirement that an identifiable hierarchy support the discriminatory act, described above, fits closely with Sager’s dyadic notion of association—that the association must have an identifiable mission conveyed by its leaders, and that the association must be free to choose its leaders because of the profound importance of the leaders’ value-promoting and value-articulating function.¹⁶ Similarly, the requirement that the discrimination affect only religious insiders is implicit in Sager’s description of the right as closely affiliated with the right to privacy and as applying primarily to the right to discriminate with respect to leadership and membership.¹⁷ Finally, the notion of a sufficiently “close” association is the lynchpin of Sager’s argument: associations are protected from government intervention because they are comprised of intimate, enduring relationships formed around common values that in some cases support free expression but perhaps more importantly “nurture the development and well-being of their members” and create a structure for individuals to “find [their] own way.”¹⁸

One important difference between my description of the relevant factors and Professor Sager’s is that Professor Sager emphasizes that both religious and nonreligious “close associations” should be entitled to special treatment in the form of exemption from nondiscrimination norms.¹⁹ Thus, Professor Sager grounds the right to an exemption from at least some generally applicable laws not in the First Amendment’s protection for religious exercise, but rather in its protection of the freedom of association.²⁰ This argument, which meshes well with Sager’s equality-focused approach to religious liberty,²¹ thus suggests that there is nothing particularly unique about religious associations, as compared to secular associations, except perhaps that they are presumed to meet the qualifications of close associations entitled to exemptions from antidiscrimination laws that conflict with their tenets.

Arguably, the Supreme Court’s precedent could be read to support this view as well. Professor Sager has suggested a reading of the Supreme Court’s decision in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*²² that harmonizes it with decisions protecting the freedom of association in secular

15. Sager, *supra* note 9, at 86–88.

16. *Id.* at 87–88.

17. *Id.* at 86–88.

18. *Id.* at 86 (citing Seana Valentine Shiffrin, *What Is Really Wrong With Compelled Association?*, 99 NW. U. L. REV. 839 (2005)).

19. *Id.* at 87.

20. Sager, *supra* note 9, at 85.

21. See, e.g., CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 4 (2007) (describing the “Equal Liberty” approach to religious freedom).

22. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

contexts.²³ According to Sager, it is the dyadic right of association, rather than a right of special treatment for religious organizations, that gives rise to the ministerial exception recognized in *Hosanna-Tabor*.²⁴

Building on Sager's insight, I would also like to suggest that *Wisconsin v. Yoder*²⁵—viewed by some as a sort of high-water mark of religious exemption claims²⁶—may be read in a similar light. *Yoder*, of course, is the case in which the Supreme Court permitted Amish parents to take their children out of school at age fourteen, although state law required school attendance until age sixteen.²⁷ Applying strict scrutiny to the Amish parents' free exercise claims, in an opinion dripping with sentimentality and nostalgia for an idyllic, agrarian America, the Supreme Court held that the state's interest in requiring two extra years of school attendance was not compelling in this case, given that the Amish provided their own form of education that was at least as good as that of the public schools.²⁸

Yoder is an outlier in many respects. It is the only case outside the unemployment context in which the Supreme Court has applied strict scrutiny to a free exercise claim under the First Amendment.²⁹ Moreover, it has not been extended or applied to any other religious organization for exemption from schooling—and not for plaintiffs' lack of trying.³⁰ Further marginalizing *Yoder*, the Supreme Court in *Employment Division v. Smith* felt compelled to distinguish it as a case about so-called "hybrid rights," in which the free exercise claim was bolstered in some undefined way and to some indeterminate degree by the existence of a parental-rights claim.³¹ Professor Sager has thus suggested that "either *Wisconsin v. Yoder* was wrong; or, more likely, it was right because the Constitution gives all parents authority to make

23. Sager, *supra* note 9, at 97–101.

24. *Id.*

25. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

26. See, e.g., ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 625 (Paul Finkelman ed., 2006) (citing Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651, 657 (1991)).

27. *Yoder*, 406 U.S. at 207.

28. *Id.* at 225.

29. Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 51 (2015); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 9 (1994) ("After *Yoder*, the Court never again upheld a free exercise claim on the merits against a general law (except for three unemployment benefits cases that were virtual reruns of *Sherbert*).").

30. See, e.g., *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1067 (6th Cir. 1987).

31. *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 881–82 (1990). For some of the numerous critiques of the "hybrid rights" concept, see, e.g., James G. Dwyer, *The Good, the Bad, and the Ugly of Employment Division v. Smith for Family Law*, 32 CARDOZO L. REV. 1781, 1784 (2011); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

reasonable, coherent, systematic judgments about their children's education--whether or not they are motivated by religious beliefs."³² In other words, the result in *Yoder* may be correct, but the case's reasoning does not fit well within free exercise doctrine.

I would argue that, puzzling though it is, *Yoder* makes more sense as a freedom-of-association case than as a free-exercise case. To be sure, the Court emphasized in *Yoder* the religious nature of the association in question and of the Amish parents' claims.³³ However, it was clearly the communal or associational aspects of the Amish religion that truly drive the Court's analysis. The majority opinion repeatedly referred to "the Amish community,"³⁴ and used the term "individuals" only twice, in connection with generic statements about education and free exercise doctrine.³⁵ Indeed, what makes the Amish stand apart from other religious groups (and thus perhaps uniquely deserving of protection) is the fact that for the Amish, their religious faith and their particular communal way of life are "inseparable and interdependent."³⁶ As the Court explained, "Their way of life in a church-oriented community, separated from the outside world and 'worldly' influences," is at the heart of the free exercise claim.³⁷ It is also a claim that could sound in freedom of association—fundamentally, the Amish are seeking a right to live as a unique and separate community, with a particular set of values that do not conform to—and often conflict with—those of the larger society surrounding them. Such a claim could be made by any close-knit group organized around a common set of values or an expressive mission.³⁸

32. Todd Rakoff et al., *Contemporary Challenges Facing the First Amendment's Religion Clauses*, 43 N.Y.L. SCH. L. REV. 101, 117 (1999).

33. *Yoder*, 406 U.S. at 215 ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.").

34. *Id.* at 211–12, 218, 222–24, 227.

35. *Id.* at 220 ("It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers."); *Id.* at 221 ("Further, education prepares individuals to be self-reliant and self-sufficient participants in society."). By contrast, Justice Douglas's dissent, which expressed concern about the religious liberty of the Amish children and not just the parents, contains the assertion that "[r]eligion is an individual experience." *Id.* at 243 (Douglas, J., dissenting in part).

36. *Id.* at 215.

37. *Id.* at 216.

38. *Yoder*, 406 U.S. at 223–24 (comparing the Amish to the monks of the Middle Ages who, by maintaining their hermetic communities, preserved the values and collective knowledge of Western Civilization against the destruction of the Dark Ages). Indeed, the Amish parents' brief challenged the law as, in part, burdening their "communal association," which they described as follows:

Crucially, moreover, the Amish parents' claim was not just that their religion would be burdened by the compulsory education requirement. It was also that the education requirement posed an existential threat to their community. In their Supreme Court brief, the Amish parents argued that the state law "directly threaten[ed] the continued existence of the Amish church community, which will plainly not be able to sustain itself against the disruption caused to it by the marshaling of its youth into high schools."³⁹ They then cited *NAACP v. Alabama*, a case involving the constitutional freedom of association, ultimately concluding that "[i]n the instant case, the right of association is inseparable from the right of free exercise of religion."⁴⁰ The Court picked up on this suggestion of existential threat in asserting that the Wisconsin law "carrie[d] with it a very real threat of undermining the Amish community and religious practice as they exist today."⁴¹ Sending Amish children to high school would not only expose them to values inconsistent with Amish beliefs, but also take them out of the community when they were needed and expected to take on special responsibilities, thus threatening the continuation and sustainability of the community.⁴²

The motif of existential threat is significant because it connects *Yoder* to the established freedom-of-association cases. In cases in which an organization claims that its freedom of association is infringed by a state law, the Court always asks whether a central purpose or mission of the organization is infringed by the state's imposition.⁴³ In other words, it matters whether the

The Amish religion is a communal religion. There exists no Amish religion apart from the concept of the Amish community. A person cannot take up the Amish religion and practice it individually. The community subsists spiritually upon the bonds of a common, lived faith, sustained by "common traditions and ideals which have been revered by the whole community front generation to generation." The Amish community remains a small brotherhood where primary face-to-face relationships are essential. The Amish religion requires pursuit of the simple life of the soil and mutual assistance; it is the community which is the indispensable means for such a life. The Amish religion requires separation from the world; this separation is made possible only through the closed, symbolic community.

Brief for Respondents at 21–22, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (No. 70-110), 1971 WL 126408 (footnote omitted).

39. Brief for Respondents, *supra* note 38, at 22.

40. *Id.* The brief went on to argue that their freedom of association was an aspect of their right to free exercise of religion, rather than the reverse, as this Essay suggests.

41. *Yoder*, 406 U.S. at 216.

42. *Id.* at 211–12, 218.

43. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650–55 (2000) (considering whether the Boy Scouts were organized for the purpose of expressing certain views, and if so, whether forcing the organization to accept gay scoutmasters would undermine its ability to promote those views); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 627 (1984) ("There is, however, no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views. The Act

challenged state law threatens the continuation of the expressive community as it currently exists. If the organization cannot show that the immunity it seeks from state law is directly related to its mission and purpose, its challenge will likely fail.

In cases where religious organizations assert rights to be immune from antidiscrimination laws, by contrast, they generally do not need to show any such existential threat. For example, in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, the Supreme Court recognized an immunity for churches from antidiscrimination laws when selecting their ministerial employees.⁴⁴ The church was required to show only that the employee subjected to discrimination was a “minister”; it did not have to show that the church’s mission would be severely undermined or even burdened by requiring it to conform its conduct to antidiscrimination laws.⁴⁵ Consequently, *Yoder* is an even stronger example of the associational concerns driving religious freedom cases than *Hosanna-Tabor*.

II. SOME CRITICISMS OF THE ASSOCIATIONAL FREEDOM BASIS FOR THE CLAIMS OF RELIGIOUS ORGANIZATIONS

Despite the considerable appeal of the theory that associational freedom is the true basis for claims of religious groups that are often phrased in free exercise terms, this theory fails to address all of the problems raised by such claims. Although the freedom of association may be a more morally attractive and logically coherent basis for such organizational rights claims, it is not necessarily a more workable one. Thus, the remainder of this Essay describes the principal difficulties with each of the three factors identified above for determining when a religious organization’s discrimination is constitutionally acceptable.

First, whether religious or secular organizations are involved, it will often be difficult to determine with any certainty whether a particular act of discrimination is clearly dictated by the mission of the organization. Not every group is the Catholic Church, which has a firmly hierarchical structure and a centuries-long tradition of excluding women from the priesthood. Religious organizations and other voluntary associations are often, and perhaps even

requires no change in the Jaycees’ creed of promoting the interests of young men, and it imposes no restrictions on the organization’s ability to exclude individuals with ideologies or philosophies different from those of its existing members.”); see also Laura B. Mutterperl, *Employment at (God’s) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation*, 37 HARV. C.R.-C.L. L. REV. 389, 416 (2002) (“[T]he right of association raises a high bar against government interference when an organization *must* discriminate to *define its identity*.” (emphasis added)).

44. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012).

45. *Id.* at 707.

endemically, sites of contestation; and this contestation often includes the organization's most fundamental values.⁴⁶ As Seana Valentine Shiffrin argues:

[A]n important function of private associations is that they provide sites in which the thoughts and ideas of members are formed and in which the content of their expressions is generated and germinated (although not necessarily in harmony with other members) . . . [A]ssociations are important . . . because of what happens inside of them, not solely or even necessarily by virtue of their relationships to the outside world or even by virtue of any internal shared beliefs.⁴⁷

Indeed, notwithstanding the Catholic Church's longstanding commitment to an all-male priesthood, factions that act in non-conformity with this rule do exist, and they still consider themselves to be a part of the Roman Catholic Church—indeed, they consider themselves to have the truer interpretation of Catholic doctrine.⁴⁸ Or to give another example, after winning, in the Supreme Court, the right to exclude gay scoutmasters on the ground that the inclusion of gay leadership would contradict one of the organization's key principles,⁴⁹ the Boy Scouts of America continued to debate the subject and recently changed its official position.⁵⁰ Indeed, one might surmise that the more vibrant an organization, the more likely it is to be home to such fundamental disputes.

Second, it may be difficult to determine whether only “insiders” are being affected by the discriminatory conduct, or whether the association is infringing the rights of “outsiders” who should be entitled to the protection of the laws. Indeed, this precise issue was raised—if also somewhat minimized—by *Wisconsin v. Yoder*. Justice Douglas's partial dissent noted that granting an exemption from the schooling requirement to the Amish parents would have the effect of imposing the parents' religious views on their children.⁵¹ “Where the child is mature enough to express potentially conflicting desires,” Justice Douglas explained, “it would be an invasion of the child's rights to permit such an imposition without canvassing his views.”⁵² The majority opinion, however, marginalized this concern by insisting that only the parents' free exercise

46. Hill, *supra* note 13, at 430.

47. Shiffrin, *supra* note 18, at 865.

48. One such faction is the Roman Catholic Womenpriests, who claim that the male-only priesthood is an unjust, mistaken interpretation of Catholic history. See ROMAN CATHOLIC WOMENPRIESTS, <http://romancatholicwomenpriests.org> [<http://perma.cc/LLU6-3ERU>] (last visited Feb. 29, 2016).

49. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654 (2000).

50. Erik Eckholm, *Boys Scouts End Ban on Gay Leaders, Over Protests by Mormon Church*, N.Y. TIMES (July 27, 2015), http://www.nytimes.com/2015/07/28/us/boy-scouts-end-nationwide-ban-on-gay-leaders.html?_r=0 [<http://perma.cc/E8R4-E9RY>].

51. *Wisconsin v. Yoder*, 406 U.S. 205, 242 (1972) (Douglas, J., dissenting in part).

52. *Id.*

claims were before it and that there was nothing in the record to suggest that the children's wishes differed from their parents'.⁵³

The *Yoder* example demonstrates that sometimes members of a religious organization may wish to leave or reject its premises but are, for various reasons (such as being underage), unable to do so. However, in some cases it may simply be disputed whether a particular individual is a religious insider or outsider. For example, are non-Catholic employees of Catholic schools and Catholic hospitals to be considered insiders or outsiders? They do not share the same religion as their employers so they would appear to be outsiders. On the other hand, they may voluntarily assume the obligation to live by the employer's religious principles by signing "morals clauses" in their employment contracts. Still, there is a slippery slope here. The mere voluntariness of the employee's actions in agreeing to be employed by a religious organization cannot be enough to strip her of the protections of various antidiscrimination laws since every employment relationship is fundamentally voluntary. Logically, that voluntariness alone cannot turn religious outsiders into religious insiders, even if they are in fact "insiders" of an *organization* that happens to be religious in character.

This difficulty is particularly troubling given that associations have every incentive to cast as many people as "insiders" as possible. The sweeping protections of the ministerial exception recognized in *Hosanna-Tabor* apply only when a religious "minister"—by definition an insider, though not necessarily a minister in the narrow sense—is involved.⁵⁴ Similarly, courts are more likely to express concern about the government intruding on purely religious matters when only members of a particular religious organization are involved in a litigated dispute.

It is not entirely clear how this principle might apply to secular organizations, but it may partly explain the Supreme Court's greater solicitude for the Boy Scouts, who wished to expel an insider and a leader based on his sexual orientation, than for the Christian Legal Society, which discriminated against *potential* members based on sexual orientation.⁵⁵ The freedom-of-association claim appears stronger when it is asserted against someone who is already a member of the association than when it is asserted against an outsider.

Finally, it is difficult to say what sorts of organizations merit the associational freedoms protected by the First Amendment. The Supreme Court has recognized the importance of "expressive associations"—those centered

53. *Id.* at 230–31.

54. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705 (2012).

55. *Compare* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000), *with* *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 678–83 (2010).

around expressing a particular message—as well as “intimate associations”—close, personal relationships such as familial and romantic relationships.⁵⁶ Less concerned with the kinds of groups that are protected than with the kinds of relationships that are protected, Professor Sager has identified a “dyadic” and a “group-centered” right of association, but both of these are limited to what he calls “close” associations.⁵⁷ The definition of a close association seems to assume some robustness, in that it must be “sustained and substantive,” and it may play a role in members’ “spiritual beliefs, development, and fulfillment.”⁵⁸

Whether we focus on the “expressive” or “intimate” nature of the association, or on some even more amorphous set of qualities, such as importance to individuals’ spiritual or moral development, it will be difficult in many cases to determine which associations do and do not qualify. For example, might a for-profit corporation qualify if it is closely held and run on explicitly stated religious principles?⁵⁹ Again, it is not hard to imagine that many a secular organization will seek the status of a “close” association, especially if that status brings with it an immunity from certain kinds of liability.

Moreover, even setting secular organizations aside, it is not clear that all religious organizations—or even all churches—should qualify. It would be possible simply to presume that all churches will possess the qualities of close associations, but unless this presumption bears some resemblance to reality, it is simply another way of providing special treatment to churches and undermining the generalizability of the freedom of association beyond the religious organization’s context.

Not all religious communities are close-knit; nor, frankly, do they always occupy a central place in members’ lives. The late twentieth and early twenty-first centuries have seen the rapid growth of so-called “megachurches,” defined by one measure as churches that sustain an average weekly attendance of over 2,000 congregants.⁶⁰ This figure does not include large Catholic churches having similar attendance, of which there are roughly 3,000 in the United States.⁶¹ Indeed, the Hartford Institute for Religion Research at the Hartford Seminary, which produces extensive research on megachurches, excludes large

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

57. Sager, *supra* note 9, at 86–87.

58. *Id.* at 87–88.

59. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (holding that such a corporation was protected by the Religious Freedom Restoration Act and was entitled to an exemption from the generally applicable contraceptives coverage requirement under the ACA).

60. *Megachurch Definition*, HARTFORD INST. FOR RELIGION RES., <http://www.hartfordinstitute.org/megachurch/definition.html> [<http://perma.cc/53YT-BFVD>] (last visited Feb. 18, 2016).

61. *Id.*

Catholic congregations precisely because, unlike megachurches, they lack a “robust congregational identity,” among other things.⁶² It is hardly controversial to observe that individuals may belong to religious sects and attend religious services for numerous reasons other than religious belief and obligation, including habit, family tradition, pressure from family members or peers, social status, and a simple desire to socialize.⁶³ It is not clear that any of these latter reasons for belonging differ from the reasons why people join, say, the Jaycees, to which the Supreme Court has denied immunity from non-discrimination laws.⁶⁴

III. A GESTURE TOWARD SOLUTIONS

If the freedom of association retains some promise as a more acceptable and logical way to understand the sorts of claims that are now framed as claims of religious institutional autonomy—as Professor Sager suggests—can these considerable difficulties with the concept be overcome? Undoubtedly, a full answer to this question would require much more extensive consideration than I can afford it in this brief Essay. However, I would like to suggest a few possible ways to move forward with the freedom of association.

First, courts should have a relatively robust role in determining certain aspects of intra-associational disputes—in particular, questions such as whether a complainant is a religious insider or outsider, or whether a discriminatory act is required by an association’s mission or belief structure. If courts maintain an exceedingly deferential or “hands-off” attitude, they will in most cases simply favor the party with more power—usually the employer in employment disputes. Additionally, in most litigated disputes, institutional defendants will have a significant incentive to claim that the plaintiff is an “insider,” or even a “minister”; plaintiffs will have the opposite incentive. Courts should therefore begin to develop a jurisprudence that will make this sort of line drawing more predictable and less subject to manipulation in the course of litigation.⁶⁵

62. *Id.*

63. See Andrew Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961, 973 (2010) (“One illustrative bit of data: when a survey asked Catholics why they attended Mass, the largest group, 37 percent, pointed to ‘the feeling of meditating and communicating with God,’ while only 20 percent referred to the ‘need to receive the Sacrament of Holy Communion,’ and only 6 percent said ‘[t]he Church requires that I attend.’” (quoting JIM CASTELLI & JOSEPH GREMILLION, *THE EMERGING PARISH: THE NOTRE DAME STUDY OF CATHOLIC LIFE SINCE VATICAN II* 132 tbl.11 (1987))).

64. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628–29 (1984).

65. Cf. *Caroline Mala Corbin, The Irony of Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 106 NW. U. L. REV. COLLOQUY 96, 107–08 (2011) (noting that the Supreme Court’s failure to delineate who qualifies as a minister ironically invites judicial inquiry into theological doctrine).

In the case of secular associations, courts have already been tasked with determining whether a particular idea is central to an organization's mission so it should not be prohibitively difficult for them to do so when a religious organization is involved. Some deference may be in order here with respect to secular and non-secular organizations alike; for example, the Court acknowledged in *Dale* that "[t]he fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection."⁶⁶ But if an organization has a policy explicitly declaring that discrimination on the basis of gender or sexual orientation violates its principles, for example, it should not get a pass when it engages in such discrimination. A case like *Petruska v. Gannon University*⁶⁷ is wrongly decided in my view. In that case, the Third Circuit applied the ministerial exception to protect a Catholic university from a sex-discrimination claim, although the position held by the plaintiff was not reserved for men for religious reasons, and she had received official assurances that she would not be fired from her position because she was a woman.⁶⁸

Finally, though it may be exceedingly difficult to say what constitutes a close association, it may be a bit easier to say what definitely does *not* constitute such an association. For example, participation in the marketplace as a commercial enterprise should be considered a sufficiently public endeavor to disqualify an organization from claims of associational freedom, both with respect to customers and with respect to employees (who can usually be expected to join those enterprises out of the need for a paycheck, rather than the desire for salvation). As Justice Bosson of the New Mexico Supreme Court explained in his eloquent concurrence in *Elane Photography, LLC v. Willock*, involving a wedding photographer and her husband (the Huguenins) who declined to photograph a same-sex commitment ceremony due to their religious beliefs:

In the . . . world of the marketplace, of commerce, of public accommodation, the Huguenins have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do, illuminates this country, setting it apart from the discord that afflicts much of the rest of the world. In short, I would say to the Huguenins, with the utmost respect: it is the price of citizenship.⁶⁹

66. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000).

67. *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006).

68. *Id.* at 312.

69. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 80 (N.M. 2013) (Bosson, J., concurring).

CONCLUSION

The freedom of association may well ground the right of some institutions to be exempt from laws that apply to the public more generally. In instances where a legal mandate conflicts with a clearly defined purpose or mission of a voluntary association; where organizations' insiders are burdened by the exemption, rather than outsiders; and where the association is non-commercial, involves close relationships among its members, and plays a meaningful role in members' lives, the institution may be exempt from some legal requirements, such as antidiscrimination laws. At the same time, it is important for courts to play a role in ensuring that these requirements are actually met in order to cabin the tendency of the categories of "mission," "insiders," and "closeness" to expand, and of parties to exploit the categories' ambiguities to their own advantage.