CORPORATION OF THE PRESIDING BISHOP V. AMOS AFTER THIRTY YEARS: EXPLORING LIMITS OF RELIGIOUS FREEDOM, CHURCH EMPLOYMENT, AND THE CIVIL RIGHTS ACT

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ABSTRACT

This article argues the secular business interests of religious organizations should not be exempt from discriminating against individuals on the basis of religion. The Supreme Court in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos* held that the Church's gym (a secular business open to the public) was exempted under Section 702 of the Civil Rights Act of 1964 and was permitted to discriminate against employees on the basis of religion although the church's gym had no religious tie to the church's mission. This holding allows for and has allowed churches to own insurance companies, radio stations, farms, construction companies, candy stores, roofing companies, banks, and other secular interests while simultaneously allowing the secular business interests of these churches to hire exclusively from the participating members of their faith. This article examines potential, if not existing problems, for civil society if *Amos*' broad interpretation is not curtailed. It analyzes three analytical frameworks for courts to follow when difficult cases arise that pose challenges in determining whether a business should be exempt from Title VII anti-discrimination clauses. In addition to the three analytical frameworks to resolve *Amos*-type cases, the scholarly contribution of this article is made

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by exploring thirty years of legal scholarship, case law, the decisions in *Amos I*, *Amos II*, the briefs of the amici curiae, and the Supreme Court's opinion of 1987. Finally, this paper analyzes the *Amos* problem through the lens of organizational justice.

I. INTRODUCTION

This article addresses thirty years of case law and legal scholarship regarding the 1987 Supreme Court case, *The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*.[1] With the rise of contentious debates over the tension between religious liberties and secular interests, the *Amos* case finds itself at the center of what will likely be a central concern for religious organizations and civil rights advocates in the coming years: how should secular business owned by religious organizations be regulated? This article addresses critical issues in the *Amos* case that are little noticed in other law reviews and case law but are clearly addressed at the heart of the federal district court's memorandum decision. Finally, this paper examines three existing analytical frameworks upon which courts may draw to reach future decisions. The article also provides proposed solutions to the inevitable future disputes that will arise over the role of religious organizations' secular business holdings in the United States.

The core question the *Amos* Court addressed was whether a religious organization should be exempted from the Civil Rights Act and be able to discriminate on the basis of religion in their non-religious business enterprises.[2] The Supreme Court answered in the affirmative, confirming that the Section 702 exemption for employment matters extended not only to religious activities but to all of the activities of religious organizations.[3]

Amos represents a significant protection for religious organizations' employment relations in their secular business activities.[4] At present, this protection is solely based in the Title VII exemption and therefore is more fragile than if it were grounded in the free exercise of religion.[5] This fragility is rooted in the federal district court's ruling that "the direct and immediate effect of the exemption of religious organizations from Title VII for religious discrimination in secular, non-religious activities is to advance religion in violation of the establishment clause of the first amendment to the United States Constitution."[6] Any congressional tampering with the current statutory exemption will undoubtedly result in future Free Exercise Clause litigation.

This paper argues that the *Amos* decision was inadequate because it did not draw a bright line to aid individuals and religious organizations in

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[1] Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) [hereinafter "*Amos*"].

[2] *Id.* at 329-30.

[3] *Id.*

[4] *See generally, id.*

[5] Amos v. Corp. of Presiding Bishop, 594 F. Supp. 791, 828 (D. Utah 1984) [hereinafter "*Amos I*"].

[6] *Id.*

determining the protections afforded to the secular business interests of religious organizations in the employment context. A line must be drawn between secular commercial activities and religious activities, or risk arises of religious sectarianism obtaining a commercial advantage against other commercial competitors. Today's churches have broad secular business interests with employment practices that exceed the exemptions of the Civil Rights Act of 1964.[7]

We explore the argument that the secular business interests of religious organizations should not be exempt from the Civil Rights Act's prohibition on religious discrimination. If a religious organization, such as the one in *Amos*, discriminates on the basis of religion in its commercial activities, the practice should not only be deemed a statutory violation but also unconstitutional. Additionally, we argue that Justice William Brennan's concurring opinion in *Amos* proves prescient, but not sufficient, when he anticipates reason "to reconsider the judgment in this case."[8] This article follows a line of reasoning advanced by the district court in *Amos I, Amos II, Tony and Susan Alamo Foundation v. Secretary of Labor*, and *Spencer v. World Vision, Inc.*[9] The district court appeared to fear that sustaining the exemption would permit churches with financial resources to impermissibly extend their influence and propagate their faith by entering the commercial, profit-making world.[10]

In Section II, we explore Justice Brennan's caution about religious organizations' secular business practices. In Sections III through V, we analyze the background to *Amos*, the district court's two decisions in *Amos I* and *Amos II*, and why the district court's reasoning is persuasive and creates better public policy than the Supreme Court's decision. In Section VI, we explore the unanimous decision of the Supreme Court, the confusion the decision caused, and the warnings set forth in the concurring opinions. In Section VII, we discuss the contribution of thirty years of scholarship since the 1987 *Amos* opinion, including the scholarly advances to *Amos*-type problems.

In Section VIII, we propose three possible solutions to improve upon *Amos*-type problems, all of which would require application of Title VII to religious organizations' secular business activities. First, we address the holding in *Tony and Susan Alamo Foundation v. Secretary of Labor,* where

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[7] *Amos*, 483 U.S. 327; *see also* D. MICHAEL QUINN, THE MORMON HIERARCHY: WEALTH & CORPORATE POWER 38 (2017).

[8] *Amos,* 483 U.S. at 344 n.4 (Brennan, J., concurring).

[9] Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985); Spencer v. World Vision, Inc., 619 F.3d 1109 (9th Cir. 2010); Amos v. Corp. of Presiding Bishop, 618 F. Supp. 1013 (D. Utah 1985) [hereinafter "*Amos II*"]; *Amos I*, 594 F. Supp. at 791.

[10] *Amos I*, 594 F. Supp. at 825 (quoting King's Garden, Inc. v. F.C.C., 498 F. 2d 51, 55 (D.C. Cir. 1974)).

the Supreme Court differentiated between religious noncommercial employees and commercial employees to find that a religious organization operating a commercial enterprise is not exempt from the Fair Labor Standards Act.[11] Second, we analyze the approaches of the three-judge panel in *Spencer v. World Vision, Inc.*[12] Finally, we explore the quadrant analysis for close-call *Amos*-type cases by Professor Karen Crupi.[13]

II. JUSTICE BRENNAN'S CONCURRING OPINION URGES CAUTION ABOUT A SOCIETY WHERE CHURCHES' SECULAR BUSINESS INTERESTS CAN DISCRIMINATE ON THE BASIS OF RELIGION

A. *Justice Brennan's Opinion*

The *Amos* concurring opinion is an exception for Justice Brennan.[14] As Professor Lupu notes:

> It is true . . . that Justice Brennan wrote a concurring opinion in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos,* in which the Court upheld religious organizations' statutory exemption from the federal ban on religious discrimination in hiring. But in every other case in which permissive accommodations were challenged during his Court tenure, Justice Brennan voted against them.[15]

In his concurrence, Justice Brennan expressed caution about the role of non-religious nonprofits and, by implication, secular business interests of religious organizations.[16]

The *Amos I* court noted the D.C. Circuit, in dictum, concluded that a religious organization that owns and operates any of a variety of commercial entities "could limit employment to members of the sect without infringing the Civil Rights Act. If owned and operated by a non-religious organization, the enterprise could not use sectarian criteria in hiring, except where the particular job position carried a 'bona fide occupational qualification' of a religious character."[17] We posit that this

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[11] Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985).

[12] Spencer v. World Vision, Inc., 619 F.3d 1109 (9th Cir. 2010).

[13] Karen M. Crupi, *The Relationship Between Title VII and First Amendment Religious Clauses: The Unconstitutional Schism of* Corporation of the Presiding Bishop v. Amos, 53 ALB. L. REV. 421 (1989).

[14] Ira C. Lupu, *The Religion Clauses and Justice Brennan in Full,* 87 CAL. L. REV. 1105, 1110 (1999).

[15] *Id.*

[16] Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 340 (Brennan, J., concurring).

[17] Amos v. Corp. of Presiding Bishop, 594 F. Supp. 791, 821 n.54 (citing King's Garden, Inc. v. F.C.C., 498 F.2d 51, 54–55 (D.C. Cir. 1974)) (finding commercial entities

employment practice should not only be deemed a statutory violation but also a constitutional violation because it "burden[s] the religious liberty of prospective and current employees."[18] Additionally, Justice Brennan's concurring opinion anticipates reason "to reconsider the judgment in this case" if religious organizations avoid Title VII compliance in extensive secular business activities.[19]

Justice Brennan urges religious organizations to exercise caution in expanding their nonprofit enterprises.[20] Justice Brennan's admonishment in his *Amos* concurring opinion states that "if experience proved that nonprofit incorporation was frequently used simply to evade Title VII, I would find it necessary to reconsider the judgment in this case."[21] The district court framed the issue similarly well:

> "There is little doubt that Congress is compelled to exempt religious organizations from Title VII with regard to religious discrimination in their religious activities to avoid clashing with the free exercise clause. That is not the issue, however. The question is whether requiring the defendants to refrain from discriminating on the basis of religion in their secular, non-religious activities infringes the free exercise of their religious beliefs."[22]

B. *The Mormon Church as an Example of Churches' Secular Business Interests*

The question of religious accommodation from employment discrimination is critical in light of new sociological trends amongst churches. The Pew Research Center's striking data shows a steep decline in church attendance and participation among 18-to 30-year-olds across religions.[23] This reduction must have a substantial impact on the tithe intake of religious organizations and may force religious organizations to diversify their operations and sources of financial income.[24] For example,

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include a bank, radio station, a trucking firm, a chain of motels, a race-track, a telephone company, a railroad, a fried chicken franchise, or a professional football team).

[18] *Amos,* 483 U.S. at 340 (Brennan, J., concurring).

[19] *Id.* at 344 n.4 (Brennan, J., concurring).

[20] *See* Lupu, *supra* note 14, at 1105-06.

[21] *Amos*, 483 U.S. at 344 n.4.

[22] *Amos I*, 594 F. Supp. at 818.

[23] PEW RESEARCH CENTER, RELIGIOUS LANDSCAPE STUDY, http://www.pewforum.org/religious-landscape-study/age-distribution/18-29/ (last visited Oct. 22, 2017).

[24] Alina Tugend, *Donations to Religious Institutions Fall as Values Change*, N.Y. TIMES (Nov. 3, 2016), https://www.nytimes.com/2016/11/06/giving/donations-to-religious-institutions-fall-as-values-change.html.

one historian of Mormonism, D. Michael Quinn, reported to Bloomberg that "It's as spiritual for Mormons to give alms to the poor as it is to make a million dollars."[25] Quinn, a former Brigham Young University professor, estimates the Church of Jesus Christ of Latter-day Saints (Mormon Church) took in around $33 billion in tithes in 2010 and takes in another $15 billion each year from its profit-generating investments.[26] Quinn points out that "no institution, no church, no businesses, no nonprofit organization in America has had this kind of history."[27] Other religious organizations may follow this path. If churches begin to conduct secular, for-profit businesses, should they still be exempt from Title VII in their hiring practices?

The Petitioners' unrelated secular business activity in the *Amos* case may serve as a case study to demonstrate why the *Amos* decision is bad for society. The Mormon Church has been diversifying its corporate and financial portfolio since at least Brigham Young and his followers reached Utah in 1847.[28] The Mormon Church's "mix of personal spirituality, religious commitment, and entrepreneurial drive" has provided great impetus "for the hierarchy's ardent capitalists."[29] The Mormon Church does not have a professionally-trained clergy, which has led to a policy of hiring individual members of the church to manage its affairs, including its business affairs.[30] Since the modern Mormon Church's incorporation in 1915, it has hired professional managers to manage its complex business interests; these managers are also the church's spiritual leaders.[31] They are often highly experienced businessman, lawyers, or otherwise corporate officers.[32] For example, the Dean and Associate Dean of Harvard Business School ("HBS"), in what is an impressive employment decision for both the employees and the employer, left their prestigious employment at Harvard

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[25] Caroline Winter, *How the Mormons Make Money*, BLOOMBERG: BUSINESS (July 18, 2012, 9:45 PM), https://www.bloomberg.com/news/articles/2012-07-18/how-the-mormons-make-money; *see also* Peggy Fletcher Stack, *Historian Digs into the Hidden World of Mormon Finances, Shows How Church Went from Losing Money to Making Money – Lots of It*, SALT LAKE TRIB. (Oct. 14, 2017), http://www.sltrib.com/religion/local/2017/10/14/historian-digs-into-the-hidden-world-of-mormon-finances-shows-how-church-went-from-losing-money-to-making-money-lots-of-it/.

[26] Fletcher Stack, *supra* note 25.

[27] *Id.*

[28] *See generally* QUINN, *supra* note 7.

[29] *Id.* at 37-8.

[30] *How Do Mormon Ministers Qualify to Preside?*, MORMON CHURCH: MEMBERS SHARING BELIEFS (Apr. 25, 2009), https://mormonchurch.com/691/how-do-mormon-ministers-qualify-to-preside.

[31] QUINN, *supra* note 7, at 2-4.

[32] The top fifteen leaders of the Church were trained in law, medicine, and business. *See General Authorities and General Officers*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.lds.org/church/leaders?lang=eng (last visited May 17, 2019).

Business School to manage and operate the Mormon Church's satellite campuses of Brigham Young University.[33] In a recent study on the church's corporate holdings, Quinn explains that church leaders invested "in more than 1,800 businesses before 1933, nearly 1,200 of which were managed by actively serving [church leaders]."[34] Currently, religious organizations like that of the Petitioner in *Amos* are exempt from the Civil Rights Act and therefore can discriminate on the basis of religion in their hiring practices.[35]

C. *Organizational Justice as a Guiding Principle for Religious Organizations*

The *Amos I* court scrutinized the Petitioner's business interests and held that they should not be exempt from the Civil Rights Act.[36] In doing so, the court highlighted the critical function of the Civil Rights Act as labor law.[37] As such, a view of the impact of this holding on society may be further informed through the field of organizational justice, the study of fairness in organizations. Two dimensions of organizational justice are particularly salient in this case: distributive justice (the fairness of outcomes in the workplace) and procedural justice (the fairness of the procedures used to arrive at those outcomes).[38] Nearly fifty years of scholarly research demonstrates strong attitudinal and behavioral reactions to unfair practices in businesses.[39] In addition to job-related responses from affected individuals, broader reactions of anger and retributive behaviors are associated with perceptions of injustice at the hands of organizations, even

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[33] *Dean of Harvard Business School to Be New BYU-Idaho President,* THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS: MORMON NEWSROOM (June 6, 2005), https://www.mormonnewsroom.org/article/dean-of-harvard-business-school-to-be-new-byu-idaho-president:

> Arguably one of the best minds in the business world will be taking the reins at Brigham Young University-Idaho after a long and illustrious career at Harvard University. Gordon B. Hinckley, president of The Church of Jesus Christ of Latter-day Saints, today announced the appointment of Kim B. Clark, dean of the Harvard Business School, as president of Brigham Young University-Idaho in Rexburg.

[34] QUINN, *supra* note 7, at 38.

[35] Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 330 (1987).

[36] Amos v. Corp. of Presiding Bishop, 594 F. Supp. 791, 828 (D. Utah 1984).

[37] *See id.*

[38] Robert. J. Bies & J. S. Moag, *Interactional Justice: Communication Criteria of Fairness*, 1 RES. ON NEGOT. IN ORG. 43 (1986); J. Stacy Adams, *Inequity in Social Exchange*, 2 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 267, 296 (1965).

[39] *See* Jason A. Colquitt et al., *Justice at the Millennium, a Decade Later: A Meta-Analytic Test of Social Exchange and Affect-Based Perspectives*, 98 J. OF APPLIED SCI. 199, 220 (2013).

when the observer is not personally affected by the injustice.[40]

Where the public perceives injustice within government and religious organizations, it will have strong negative reactions. In and of itself, discrimination is a morally charged issue and the experiences of Amos and Mayson are examples of distributive and procedural injustices.

To the extent that religious organizations take advantage of the incentive provided by exemption from the Civil Rights Act, as Justice Brennan contemplates, we may expect a wider public and societal impact, turning this into an issue of social justice.[41] Currently, the broad definition of activities as they pertain to religious organizations contained in the Civil Rights Act is a codification of distributive injustice, with religious organizations clearly benefitting compared to secular organizations running business entities. Employees, customers, and the general public may be expected to form persistent judgments that religious organizations running business entities are receiving and exercising preferential treatment from the government, both a distributive and a procedural injustice. Market pressures that affect the sustainability of religious organizations, the systematic advantage conferred by codification in the Civil Rights Act, and an increasingly aware and justice-sensitive public mean that the findings in *Amos* may have far reaching societal consequences.

III. BACKGROUND TO *CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS V. AMOS*

The *Amos* case arose after decades of case law seeking to eradicate discrimination in schools.[42] Title VII had become the primary tool to

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[40] D. P. Skarlicki & C. T. Kulik, *Third-Party Reactions To Employee (Mis)treatment: A Justice Perspective*, 26 RES. IN ORG. BEHAV. 183, 184 (2005); Katalin Takacs Haynes, Joanna Tochman. Campbell, & Michael A. Hitt, 43 *When More Is Not Enough: Executive Greed and Its Influence on Shareholder Wealth*, J. OF MGMT. 555, 563 (2017).

[41] *See* Richard Thompson Ford, *Rethinking Rights After the Second Reconstruction*, 123 YALE L.J. 2942, 2945-47 (2014) (discussing institutionalized disadvantages that are main sources of social injustice, and proposing pragmatic interpretations of the law to "reduce unjustified decisions affecting vulnerable groups in the run of cases, breaking down patterns of segregation and hierarchy").

[42] Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) ("the Government has a fundamental, overriding interest in eradicating racial discrimination in education."); E.E.O.C. v. Pacific Press Publ'g Assoc., 676 F.2d 1272, 1280 (9th Cir. 1982) ("Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions."); Dayton Christian Schs. v. Ohio Civil Rights Comm'n, 578 F. Supp. 1004, 1037 (S.D. Ohio 1984) ("the state has a compelling and overriding interest in eliminating sex discrimination in the employment setting."), *rev'd*, 766 F.2d 932 (6th Cir. 1985), *vacated and remanded to state commission*, 477 U.S. 619, 106 (1986).

challenge discriminatory employment policies and decisions.[43] However, Title VII permitted and still permits discrimination in certain specified situations. An employer can employ an employee on the basis of religion or sex where such classifications are a "bona fide occupational qualification reasonably necessary to the normal operations of that particular business or enterprise."[44] In addition, a religious educational institution can hire and employ on the basis of religious criteria when the institution is "in whole or in substantial part, owned, supported, controlled or managed by a particular religion or by a particular corporation, association, or society, or where the curriculum is directed toward the propagation of a particular religion."[45] *Amos* extends this rationale to secular business interests owned or operated by a religious organization.[46]

More generally, Title VII exempts "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[47] Before 1972, the above exemptions applied only to "religious activities" and not the secular activities of religious organizations.[48] The effect of the exemption was to grant religious organizations the traditional normative employment standard; that is, they could impose their religious requirements without judicial interpretations or administrative agencies' interpretations as to a religious organization's employment decisions.[49]

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[43] *Pacific Press Publ'g Assoc.*, 676 F.2d at 1281 ("Title VII establishes a compelling governmental interest in eliminating employment discrimination."); Amos v. Corp. of Presiding Bishop, 594 F. Supp. 791, 819 (D. Utah 1984) ("Congress' compelling interest in eradicating discrimination is sufficient to justify any actual burden that Title VII's application to secular, nonreligious activities would impose on the exercise of sincerely held religious beliefs.").

[44] 42 U.S.C. § 2000e-2(e) (2018).

[45] *Id.*

[46] *Amos*, 483 U.S. at 330.

[47] 42 U.S.C. § 2000e-1(a) (2018).

[48] Section 702 originally provided as follows:

> This title shall not apply to . . . a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.

Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (1964), amended by Pub. L. No. 92-261, 86 Stat. 103 (1972).

[49] *See* Amos v. Corp. of Presiding Bishop, 594 F. Supp. 791, 806-12 (D. Utah 1984).

Notwithstanding the broad exemptions for religious institutions, litigation occurred over the denominational employment preference of a college, secular versus religious functions of different kinds of employees, and the differing relationships among employees and their employer.[50] Outside the narrow category of "minister-church relationship," the application of Title VII was undefined and unpredictable.[51] Factors included: job title of employees; tasks performed by employees; specificity of religious beliefs to hiring as opposed to discharge situations; and degree of church control of a college or university.[52] Legal scholars and judges have constructed analytical models of permissible religious discrimination in relationship to degrees of secular function to justify exemption from or imposition of Title VII sanctions.[53] But such writers have failed to address some basic

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[50] Maguire v. Marquette Univ., 627 F. Supp. 1499 (E.D. Wis. 1986) (holding that university-theology professor relationship similar to church-minister and thus University was permitted under free exercise and establishment clauses to hire only men in the theology department); E.E.O.C. v. Sw. Baptist Theological Seminary, 485 F. Supp. 255 (N.D. Tex. 1980) *rev'd in part by* 651 F.2d 277 (5th Cir. 1981) (exempt from EEOC routine filing of employee data were "the President and Executive Vice President of the Seminary, the chaplain, the deans of men and women, the academic deans, and those other personnel who equate to or supervise faculty" but not exempt were several hundred full and part-time support personnel and "those administrators whose function relates exclusively to the Seminary's finance, maintenance, and other non-academic departments."); E.E.O.C. v. Mississippi Coll., 451 F. Supp. 564 (S.D. Miss. 1978), *vacated,* 626 F.2d 477 (5th Cir. 1980) (holding that college must present "convincing evidence" that it had preference for hiring Baptists to foreclose EEOC investigation of sex discrimination charge for failure to hire female Presbyterian). *See also* E.E.O.C. v. Sw. Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981).

[51] The seminal case establishing the first amendment protection from Title VII inquiry into the minister-church relationship is McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972), *cert. denied* 409 U.S. 896 (1972) (failure to promote female ordained minister in Salvation Army not subject to Title VII scrutiny). *See also* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985) (sex discrimination charge in failure to hire female pastors barred by Title VII and free exercise clause because "the role of associate in pastoral care is so significant in the expression and realization of Seventh-Day Adventist beliefs. . ."); Walker v. First Orthodox Presbyterian Church, No. 760-028, 1980 WL 4657, at *2 (Cal. Super. Ct. Apr. 3, 1980) (city ordinance prohibiting discrimination on basis of sexual orientation not applicable to church organist position where "the organist in a congregation is part of the worship team").

[52] *See generally* Jamie Darin Prenkert, *Liberty, Diversity, Academic Freedom, and Survival: Preferential Hiring Among Religiously-Affiliated Institutions of Higher Education*, 22 HOFSTRA LAB. & EMP. L.J. 1 (2004); Julie Manning Magid & Jamie Darin Prenkert, *The Religious and Associational Freedoms of Business Owners*, 7 U. PA. J. LAB. & EMP. L. 191 (2005).

[53] *See* Douglas Laycock, *Civil Rights and Civil Liberties*, 54 CHI. KENT L. REV. 390, 428-30 (1977) (uses three inquiries—employees affected by regulation, interference with control over employees of church control—to evaluate four categories of employees:

questions, including (1) whether a court can properly define a religious function as opposed to a secular function, and (2) even if it could, how such an exercise could take place without inhibiting religious practices. This question raises concerns for Justice Brennan and "suggests that, ideally, religious organizations should be able to discriminate on the basis of religion *only* with respect to religious activities, so that a determination should be made in each case whether an activity is religious or secular."[54] For a court to inquire into the religious quality of a function being performed or to suggest that an employee cannot be discharged as long as he or she does not interfere with the religious organization's mission raises problems.[55] However, it is essential to make such an inquiry. Where a defendant raises Title VII religious exemptions as a defense to discrimination complaints, the threshold questions considered by the district court in *Amos* were (1) whether the religious exemptions themselves are violations of the Establishment Clause and, (2) whether the exemptions are required by the Free Exercise Clause.[56]

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employees of believers, employees of church working in church-owned commercial businesses, employees of church performing jobs without religious content in church's religious operations, and employees of church performing jobs with religious content); Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1539 (1979) (begins with epicenter of purely spiritual life of church and moves outward to church-sponsored community activities and church's purely secular business activities).

[54] Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 343 (1987).

[55] *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1411 (1981); Bagni, *supra note* 53, at 1539; King's Garden, Inc. v. F.C.C., 498 F.2d 51, 54 (D.C. Cir. 1974) (hiring requirement of only evangelical Christians for radio station owned by religious organization held to be violation of Title VII "where a job position has no substantial connection with program content, or where the connection is with a program having no religious dimension [and thus] enforcement of the anti-bias rules will not compromise the licensee's freedom of religious expression"). *See also* Bob Jones Univ. v. United States, 461 U.S. 574, 603-04 (1983) (loss of tax exemption did not prevent University from its religious teaching mission); NLRB v. World Evangelism, Inc., 656 F.2d 1349 (9th Cir. 1981) (engineer's time in religious organization's building complex was engaged in commercial activities and no proof of interference with propagation of beliefs through union representative); Polynesian Cultural Ctr. v. NLRB, 582 F.2d 467 (9th Cir. 1978) (enforcement of church rule of chastity outside marriage was inconsistent when complainant subsequent to discharge had been offered job in another of church's organization where same rule was in effect); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1368 (S.D.N.Y. 1975) (defendant's motion to dismiss denied where white female employee allegedly dismissed for relationship with black male because the "discharge was [not] based on the doctrinal policies of the Seventh-day Adventist Church or the relationship between the church and its clerical help [touching] . . . the heart of church administration").

[56] Amos v. Corp. of Presiding Bishop, 594 F. Supp. 791, 798 (D. Utah 1984).

IV. FEDERAL DISTRICT COURT OF UTAH – *AMOS I*: THE PROBLEM OF SECULAR BUSINESS INTERESTS OF RELIGIOUS ORGANIZATIONS AND RELIGIOUS DISCRIMINATION IN EMPLOYMENT

The federal district court was willing to view the Mormon Church's nonprofit activities similarly to how Justice Sandra Day O'Connor would later describe them in her concurrence, namely "as an accommodation of the exercise of religion rather than as a Government endorsement of religion."[57] However, the federal district court wisely stopped short of this reasoning when it came to employees at the Deseret Gymnasium.[58]

When the Mormon Church applied religious qualifications and terminated the plaintiffs for failure to meet those qualifications, the plaintiffs in *Amos* sought back pay and reinstatement of their jobs.[59] The Mormon Church argued that Section 702 of the Civil Rights Act allowed the application of religious qualifications for secular, non-religious jobs and shielded them from liability.[60] The plaintiffs also raised claims under Utah law, but the Supreme Court did not address those issues.[61] An important undisputed fact was that "[the defendants or the Mormon Church are religious entities; what they contend is that application of the exemptions to employees performing secular, non-religious jobs is unconstitutional and that the plaintiffs were employees performing secular, non-religious jobs."[62] The district court addressed the threshold issue of whether the case involves "religious" activities; if the activities are not religious, the court states it must examine Section 702.[63] At the district court level, two plaintiffs had filed two separate cases. The Supreme Court granted *certiorari* because the case was an issue of first impression, thus bypassing the appeals court and consolidating both cases.[64] 28 U.S.C.A. § 1252 authorized the bypass of the appeals court.[65]

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[57] *Amos*, 483 U.S. at 349 (O'Connor, J., concurring).

[58] *Amos I*, 594 F. Supp. at 798 ("[Deseret Gymnasium's] purpose, as discussed earlier, is secular.").

[59] *Id.* at 797.

[60] *Id.*

[61] *See* UTAH CODE ANN. § 34A-35-6(1)(a)(i) (2016):

> An employer may not refuse to hire, promote, discharge, demote, or terminate a person, or to retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against a person otherwise qualified, because of: (A) race; (B) color; (C) sex; (D) pregnancy, childbirth, or pregnancy-related conditions; (E) age, if the individual is 40 years of age or older; (F) religion; (G) national origin; (H) disability; (I) sexual orientation; or (J) gender identity.

[62] *Amos I*, 594 F. Supp. at 798.

[63] *Id.*

[64] *See* Amos v. Corp. of Presiding Bishop, 618 F. Supp. 1013 (D. Utah 1985).

[65] *Id.*

Amos involved five plaintiff employees of a secular business owned by the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints ("Corporation of the Presiding Bishop") and the Corporation of the President of the Church of Jesus Christ of Latter-day Saints ("Corporation of the President").[66] The Corporation of the Presiding Bishop and the Corporation of the President are corporations sole. A corporation sole is a legal entity that Utah statutorily discontinued in 2004.[67] A corporation sole allows for one director and officer of the religious corporation, which enables ease in succession of officers and transfer of ownership of real and personal property.[68]

The district court wrote that the church discharged all five employees because they were unable or refused to satisfy the Mormon Church worthiness requirements for a temple recommend.[69] Four of the employees had jobs with an explicit religious function, while the fifth employee worked in a secular business owned by the Mormon Church. The four employees worked at Beehive Clothing Mills ("Beehive"), which made clothing for use in Mormon temple worship.[70] The fifth employee, Arthur Frank Mayson ("Mayson"), had been employed as a building engineer for fifteen years by the Deseret Gymnasium (Deseret) when terminated.[71] The district court noted "[a]s building engineer, Mayson was responsible for maintaining the physical facility at Deseret, the equipment in the facility and the outside grounds."[72] Christine Amos worked for Beehive and "[h]er responsibilities included the typing and processing of insurance forms and employment applications."[73] The three other women worked as seamstresses at Beehive.[74] The district court noted, "[a]s seamstresses, all

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[66] *Amos I*, 594 F. Supp. at 791, *aff'd.*, Amos v. Corp. of Presiding Bishop, 618 F. Supp. 1013 (D. Utah 1985).

[67] James B. O'Hara, *The Modern Corporation Sole,* 93 DICK. L. REV. 23 (1988-89).

[68] *Id.* at 25.

[69] *Amos I*, 594 F. Supp. at 796.

[70] One plaintiff worked in the personnel department typing and processing insurance and employment applications; the other three worked as seamstresses. *Id.*

[71] *Id.* at 802.

[72] *Id.* at 796; *see also id.* at 802:

> Specifically, the plaintiff's duties included the following. He had to maintain the swimming pools and chlorinating equipment, the whirlpools, exercise machines, athletic equipment, locks and lockers, electric motors, air compressors, air conditioners, furnaces, washer and dryer, showers and other plumbing and the electrical system. In addition, he was responsible for ordering the custodial and certain other supplies. Plaintiff Mayson supervised fourteen custodians and parking-lot attendants.

[73] *Id.* at 796.

[74] *Id.*

three women performed various steps in the manufacturing of garments and temple clothing before the garments were marked with certain religiously significant symbols."[75] The plaintiffs' complaint was a Title VII cause of action alleging that the Title VII religious exemption as applied to employees performing nonreligious jobs violated the Establishment Clause as well as the Due Process and Equal Protection clauses.[76]

The federal district court dismissed the wrongful discharge and intentional infliction of emotional distress claims brought by the plaintiffs but addressed two major questions holding in favor of the plaintiffs: whether plaintiffs were performing religious work and whether the key Title VII exemption violated the Establishment Clause.[77]

The two questions addressed by the lower court involved a three-prong test.[78] This test examined: (1) "the tie between the religious organization and the activity at issue with regard to areas such as financial affairs, day-to-day operations and management;"[79] and (2) "the nexus between the primary function of the activity in question and the religious rituals or tenets of the religious organization. . . ."[80] Where the tie under the second

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[75] *Id.*

[76] 42 U.S.C. § 2000e-2(a) makes it an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, *religion*, sex or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, *religion*, sex, or national origin. (emphasis added); *Amos I*, 594 F. Supp. at 796. Plaintiffs also alleged tort violations under state law for wrongful discharge and intentional infliction of extreme mental and emotional injury. In addition, the Utah religious exemption from the state's anti-discrimination statute, which is similar to Title VII, was alleged to violate the establishment, due process and equal protection provisions.

[77] *Amos I*, 594 F. Supp. at 792, 831.

[78] *Id.* at 792:

(1) three-prong test was utilized in applying religious activities exemption of Title VII; (2) gym operated by church-owned corporation was not engaged in any religious activities; (3) as applied to secular, nonreligious activities, the religious activities exemption violates the establishment clause; (4) under Utah law, an at-will employee has no cause of action for alleged wrongful discharge; and (5) conduct in subjecting plaintiffs to church requirements and firing them for inability or unwillingness to satisfy worthiness requirements did not meet Utah requirement of outrageous and intolerable conduct necessary to recover for emotional distress.

[79] *Id.* at 799.

[80] *Id.*

prong is tenuous or nonexistent, a third prong is necessary, namely consideration of "the relationship between the nature of the job the employee is performing and the religious rituals or tenets of the religious organization."[81] The district court proceeded to analyze the organizations associated with the Mormon Church.

A. *Beehive Clothing as Non-Religious Purpose*

The federal district court found the record before it was inadequate to allow the court to make a finding as to whether Beehive and the Mormon Church had a sufficient connection to render Beehive's activities religious.[82] The Court instructed counsel to conduct further discovery, which occurred and was addressed in *Amos II*.[83] In *Amos II*, the court found the Mormon Church's arguments that Beehive Clothing's manufacturing of garments and temple clothing were a religious activity unpersuasive.

> Despite the defendants' contention that the facts surrounding the foreign manufacture of garments is not critical to the resolution of American constitutional rights, the court believes otherwise. The Mormon Church asserts that the manufacture of garments and temple clothing is a religious activity. If it believes that the manufacture of garments should be done by Mormons if at all possible, then the

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[81] *Id.*

[82] *Id.* at 802-03:

> The limited facts in the record indicate that Beehive and its employees create a much closer question as to whether there are sufficient relationships between the religious organizations, Beehive and the Beehive employees to find that the case, as it relates to Beehive, involves religious activity. After carefully reviewing the record, however, the court is left with the distinct impression that the present state of the record is not sufficient to form the basis for a ruling on the religious nature of Beehive or the jobs of the plaintiffs who were employed there. Although there are facts indicating that Beehive may not be a religious activity and that plaintiffs' jobs are not "religious," the court believes that discovery needs to be conducted to supplement the record. Among other areas, the court thinks that plaintiffs are entitled to conduct discovery in the following areas: (1) the manufacturing of garments prior to 1960 and any subsequent changes; (2) the distribution of garments prior to 1960 and any subsequent changes; (3) the tax exempt status of Beehive; (4) the past and current employees who were or are non-members of the Mormon Church; (5) Beehive's contracts, both past and current, with private commercial enterprises for the production of garments; and (6) current hiring practices of the defendants' garment and temple clothing manufacturing plants in Mexico and England. Until those areas and others have been fully developed, the court cannot rule on whether this case, as it relates to Beehive, involves religious activities.

[83] *Id.*

> manufacture of garments throughout the world should be reflective of that belief. Practices resting "solely upon considerations of policy, pragmatism, or expediency", *Welsh v. United States,* 398 U.S. 333, 342–43, 90 S. Ct. 1792, 1797–98, 26 L.Ed.2d 308 (1970) (plurality opinion of Black, J.) will not support a finding that they are religiously motivated.[84]

The argument advanced by the district court appears to be insensitive to foreign legal requirements that forced the Mormon Church's hand on the issue of the manufacturing of religious garments.[85] Additionally, the Mormon Church made a logical and strong argument in favor of a nexus, averring that despite what occurs internationally with the manufacture of religious garments, in the United States, they deem the manufacturing of said garments as a religious activity.[86] However, the nexus is almost non-existent with the Deseret Gymnasium.[87]

B. *Deseret Gymnasium as Non-Religious Purpose*

Before exploring the context of the Deseret Gymnasium, the Court looked to the 1983 case, *Feldstein v. Christian Science Monitor,* for guidance in analyzing the issue at bar. The federal district court noted the *Christian Science Monitor* had a long history and ties to its religious purpose of advancing the religious tenets of Christian Science.[88] The court distinguished *Feldstein* from the work of Mayson at the Deseret Gymnasium, thus determining that the work of the building engineer at a gym was a nonreligious activity.[89] The Court found:

> . . . there is nothing in the running or purpose of Deseret that suggests that it was intended to spread or teach the religious beliefs and doctrine and practices of sacred ritual of the Mormon Church or that it was intended to be an integral part of church administration. Rather, its primary function is to provide facilities for physical exercise and athletic games. Deseret is open to the public for annual membership fees or for daily or series admission fees. It offers the same facilities

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[84] Amos v. Corp. of Presiding Bishop, 618 F. Supp. 1013, 1017-22 (D. Utah 1985).

[85] *Id.* at 1022.

[86] *Id.*

[87] *Id.*

[88] *Amos I,* 594 F. Supp. at 802.

[89] In *Feldstein,* the court reached the conclusion that the Christian Science Monitor was a religious activity after finding that there was a "close and significant relationship existing between the Christian Science Church, the Publishing Society and The Monitor" and that "the declared purpose, both at the time of its founding and until the present, of the Monitor [was] to promulgate and advance the tenents of Christian Science." Feldstein v. Christian Sci. Monitor, 555 F. Supp. 974, 978 (D. Mass 1983). *See also Amos I,* 594 F. Supp. at 802.

> and services that are available in other gymnasiums, and the employees perform the same jobs that are performed at any public gymnasium or athletic club.[90]

The federal district court cited a religious dedicatory prayer at the opening of Deseret but determined the prayer supported the finding that Deseret had a non-religious purpose.[91] "It offers the same facilities and services that are available in other gymnasiums, and the employees perform the same jobs that are performed at any public gymnasium or athletic club."[92] The court addressed Mayson's duties at the gym, which included

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[90] *Amos I*, 594 F. Supp. at 800-01.

[91] *Id.* at 800 n.15. The dedicatory prayer provides, in part:

> "Our Father in Heaven, we are assembled for the purpose of dedicating this Recreation Center, or Deseret Gymnasium, as a place where Thy sons and daughters may come to obtain training and exercise beneficial to their physical condition, that their minds may be kept alert and their bodies fitted to the many duties and responsibilities which may be required of them in their daily occupations. Provision has been made for various kinds of exercise that will be suited to the needs of one and all, that will help to fit them for the various vicissitudes of mortal life. Skilled and faithful teachers will be provided so that all that is done by way of activity will be conducted under proper direction and in keeping with the laws of physical health. Lessons in relation to the care of the body will be provided for all.
>
> Moreover the day will begin with humble prayer and it is the intention that whatever is done by way of exercise, training and recreation of those who patronize this gymnasium will be done in the spirit of prayer and obedience of Thy commandments.
>
> We pray that no unclean thing may enter here but that the spirit of peace, fellowship and faithful obedience to Thy divine will and commandments may permeate this building and that all who assemble for exercise, physical development and recreation may be impressed with the fact that Thy spirit is hereFalse
>
> We pray our Father that . . . the exercises, games and other activities will leave an impression to cause those who take part to seek for righteousness.
>
> [M]ay all who assemble here, and who come for the benefit of their health, and for physical blessings, feel that they are in a house dedicated to the Lord. [W]e pray that . . . all who come may keep the commandments of the Lord.
>
> [M]oreover we pray that all who come may feel that the Spirit of the Lord is here, whether it be in athletic fields or in the gatherings which will come for religious purposes.
>
> . . .
>
> Now, our Father, we thank Thee for this building. May we always keep it sweet and clean morally, physically and spiritually and that the influence of Thy Holy Spirit may abide here. We ask Thee to accept our labors and Thy blessings be made manifest through all time, we humbly pray in the name of Jesus Christ Thy Beloved Son. Amen."

[92] *Id.* at 801:

> Furthermore, the plaintiffs do not contend and there is no evidence that it is a

janitorial and repair supervisory work.[93] The court found:

> None of those duties is even tangentially related to any conceivable religious belief or ritual of the Mormon Church or church administration. Furthermore, none of those duties can potentially further any alleged religious activity in which Deseret may engage. Thus, there is no basis on which the court can find that this case, as it relates to Deseret, involves religious activities.[94]

1. Federal District Court Title VII Analysis

The federal district court then turned to an analysis of Title VII. In analyzing the relationship of the Title VII exemption to the Establishment Clause, the court used the standard *Lemon* tripartite test: the statute must have a secular purpose; the statute's primary purpose must be to neither advance nor inhibit religion; and the statute must not foster an excessive government entanglement with religion. The court found a secular purpose in the government remaining neutral and not interfering with the decision-making process of religious organizations.[95] The court based its finding as to whether the defendant's religion was neither advanced nor inhibited through application of Title VII on a line of cases that applied federal regulations to religious institutions.[96]

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fundamental tenet of the Mormon Church that its members must engage in physical exercise and activity and must do so in a gymnasium owned and operated by the Mormon Church and in which all employees are practicing members of the Mormon Church. In addition, defendants do not contend and there is no evidence that engaging in physical exercise is a religious ritual of the Mormon Church, or that Deseret is used as a means of teaching or spreading the Mormon Church's religious beliefs or practices.

[93] *Id.* at 802: Specifically, the plaintiff's duties included the following. He had to maintain the swimming pools and chlorinating equipment, the whirlpools, exercise machines, athletic equipment, locks and lockers, electric motors, air compressors, air conditioners, furnaces, washer and dryer, showers and other plumbing and the electrical system. In addition, he was responsible for ordering the custodial and certain other supplies. Plaintiff Mayson supervised fourteen custodians and parking-lot attendants.

[94] *Id.*

[95] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); *Amos I*, 594 F. Supp. at 812.

[96] *Amos I*, 594 F. Supp. at 813-17. *See generally* Bob Jones Univ. v. United States, 461 U.S. 574, 574 (1983) (application of nonracial discrimination policy does not prefer religions who favor mixing races because policy founded on neutral, secular basis); E.E.O.C. v. Mississippi Coll., 626 F.2d 477, 486-89 (5th Cir. 1980); E.E.O.C. v. Sw. Baptist Theological Seminary, 651 F.2d 277, 285-86 (5th Cir. 1981) (ascertainment of minister-like function does not excessively intrude into religious school); E.E.O.C. v. Pacific Press Publ'g Assoc., 676 F.2d 1272, 1280 (9th Cir. 1982) (church doctrine prohibiting lawsuits by members subordinate to alleged retaliation discrimination in discharging female employee for filing

In determining that the Title VII exemption violated the Establishment Clause, the federal district court also found no free exercise violation because the exemption was not facially neutral, lacked any historical tradition, and did not subject the defendant to the burdens of secularism.[97] The issue, of course, was whether a statute separating religious nonprofit organizations necessarily runs afoul of the Establishment Clause by advancing religion.[98] The district court cited the *Mueller*, *Widmar*, and *Walz* cases as authority for declaring the Title VII exemption unconstitutional, primarily because each of those cases involved benefits to more than just religious organizations and thus were constitutional.[99] Finally, under the third *Lemon* test, the court found excessive entanglement because Deseret was not an integral part of the Mormon Church, and the statutory exemption benefited religion by not creating restrictions against advancing religion through employment practices.[100]

The district court addressed the First Amendment issue of free exercise of religion:

> Preventing religious discrimination in those instances can have no significant impact on the exercise of "any sincerely held religious belief" of the Mormon Church. *Southwestern Baptist,* 651 F.2d at 286. While the impact on the defendants of prohibiting religious discrimination in secular, non-religious activities could be profound, the relevant inquiry "is not the impact of the statute upon the institution, but the impact of the statute upon the institution's exercise of its sincerely held religious beliefs." *Mississippi College,* 626 F.2d at 488.[101]

The district court noted that the Supreme Court had recently upheld a

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Title VII complaint).

[97] *Amos I*, 594 F. Supp. at 821-825.

[98] *See* Bagni, *supra* note 53, at 1548 ("This exemption runs afoul of the establishment clause, because it singles out religious organizations for preferential treatment and thus confers a benefit or withholds a burden on the basis of a purely religious classification.").

[99] *See* Mueller v. Allen, 463 U.S. 388, (1983) (tax deductions of $500 and $700 for parents of children in both public and private schools held constitutional); Widmar v. Vincent, 454 U.S. 263 (1981) (public forum for both religious and nonreligious speech on public university campus held constitutional); Walz v. Tax Comm'n of the City of New York, 397 U.S. 664 (1970) (tax exemption for nonprofit organizations, including religious ones, held constitutional).

[100] *Amos I*, 594 F. Supp. at 826-828. The *Lemon* test for excessive entanglement requires that a court "must examine the character and purpose of the institutions that are benefitted, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority." *Lemon*, 403 U.S. at 615. The *Amos* court found the Title VII exemption violated the first two criteria but not the third.

[101] *Amos I*, 594 F. Supp. at 818.

lower court's denial of tax-exempt status to private religiously-oriented schools practicing racial discrimination even though that religious school believed in discrimination.[102] Similarly, the district court cited to a Supreme Court decision where it held the Free Exercise Clause did not require an exemption from Social Security taxes for Amish employers, even though the Amish religion prohibits both the acceptance of Social Security benefits and the payment of contributions by the Amish to the Social Security system.[103] The district court also cited *EEOC v. Pacific Press Publ'g Ass'ns*, where the Ninth Circuit held that "an exemption from Title VII for religious discrimination in secular, non-religious activities would seriously undermine" Congress's attempt to eliminate discrimination.[104] The district court also highlights the Ninth Circuit's reasoning that to permit religious organizations to engage in religious discrimination in all their secular, non-religious activities would "withdraw Title VII's protection from employees at the hundreds of diverse organizations affiliated with [religious entities], including businesses which process food, sell insurance, invest in stocks and bonds, and run schools, hospitals, laboratories, rest homes and sanitariums."[105] The same concerns were later raised in Justice Brennan's concurrence.

The *Amos* district court also cited to the D.C. Circuit case, *King's Garden, Inc. v. Federal Communications Commission*.[106] The *King's Garden* court noted that the religious group exemption was unconstitutional because its "exemption invites religious groups, and them alone, to impress a test of faith on job categories, and indeed whole enterprises, having nothing to do with the exercise of religion."[107] In *King's Garden*, the court determined this was a violation of the First Amendment, which demands neutrality of treatment between religious and non-religious groups. In reaching this conclusion, the *King's Garden* court explained as follows:

> In covering all of the "activities" of any "religious corporation, association, educational institution, or society," the exemption

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[102] Bob Jones Univ. v. United States, 461 U.S. 574, 603 (1983) ("[n]ot all burdens on religion are unconstitutionalFalse The State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." (citing United States v. Lee, 455 U.S. 252, 257-58 (1982)).

[103] *Lee*, 455 U.S. 252.

[104] *Amos I*, 594 F. Supp. at 820 (citing E.E.O.C. v. Pacific Press Publ'g Assoc., 676 F.2d 1272, 1280–81 (9th Cir. 1982)).

[105] *Amos I*, 594 F. Supp. at 820 (citing *Pacific Press Publ'g Assoc.*, 676 F.2d at 1280. The District Court in *Amos* also states that "[to] allow discrimination to go on in all those activities involving all those employees would impede achievement of the important objectives of Title VII.)

[106] King's Garden, Inc. v. F.C.C., 498 F.2d 51 (D.C. Cir. 1974).

[107] *Id.* at 54–55.

> immunizes virtually every endeavor undertaken by a religious organization. If a religious sect should own and operate a trucking firm, a chain of motels, a race track, a telephone company, a railroad, a fried chicken franchise, or a professional football team, the enterprise could limit employment to members of the sect without infringing the Civil Rights Act. If owned and operated by a non-religious organization, the enterprise could not use sectarian criteria in hiring, except where the particular job position carried a "bona fide occupational qualification" of a religious character.[108]

An example of a statutory benefit that impermissibly relies on religious criteria is the religious exemption in Title VII, which permits a religious organization to practice employment discrimination on the basis of religion in any of its activities.[109] This exemption runs afoul of the Establishment Clause because it singles out religious organizations for preferential treatment and thus confers a benefit or withholds a burden on the basis of a purely religious classification.[110]

The *Amos* district court also rejected the argument that the case at bar needed "to protect religious organizations from the burdens of secularism."[111] The *King's Garden* court found it conceivable that there are "many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all-embracing secularism." However, *King's Garden* limited the breadth of that notion, saying: "But it hardly follows that the state may favor religious groups when they themselves choose to be submerged, for profit or power, in the 'all-embracing secularism' of the corporate economy. . . ."[112]

The *King's Garden* court also highlighted that the framer's intent behind the Establishment Clause was also to prevent churches from becoming too powerful, a rationale which was acknowledged by the district court in *Amos*:

> While the establishment clause's condemnation of "sponsorship" usually is aimed at financial sponsorship, in drafting the Clause the Founders were taking equally keen aim at all non-financial 'sponsorship' of religious organizations by governmentFalse And sponsorship is what this exemption accomplishes. It is a sure formula for concentrating and vastly extending the worldly influences of those religious sects having the wealth and inclination to buy up pieces of

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[108] *Amos I*, 594 F. Supp. at 821 n.54 (citing *King's Garden, Inc.*, 498 F.2d at 54–55).

[109] 42 U.S.C. § 2000e-1(a) (2018).

[110] *Amos I*, 594 F. Supp. at 82, n.54 (citing Bagni, *supra* note 53, at 1547–48).

[111] *Amos I*, 594 F. Supp. at 825 (citing *King's Garden, Inc.*, 498 F.2d at 57).

[112] *King's Garden, Inc.*, 498 F.2d at 55.

the secular economy.[113]

The court in *King's Garden* noted that, in many American religious groups, wealth and the inclination to acquire wealth exists.[114] Thus, for good reason the critical question of whether a religious organization is engaging in a secular or religious activity is crucial, and such a question should not violate the First Amendment.

2. Federal District Court's Statutory Language and Legislative History Analysis.

The federal district court recognized that the application of the exemption from Title VII, allowing religious organizations to discriminate on the basis of religion, raised "serious constitutional questions."[115] One scholar noted in 1987 that the "amendment's legislative history appears ambiguous" addressing the relevant 1972 amendment and the deletion of "religious" before "activities," a matter of much interpretation.[116] Both the federal district court and the Supreme Court struggled with this interpretation as highlighted by the district court's request for more discovery "to supplement the record" and the Supreme Court's three concurrences.[117]

The federal district court examined the legislative history in order to "determine whether Congress expressed an affirmative intention to include those employees within the exemption of Section 702."[118] The court noted that Section 702 allows for religious organizations broad discretion to discriminate on the basis of religion with respect to all their activities, including non-religious activities.

> Section 702, as amended in 1972, provides clearly and unequivocally, that religious corporations, associations, educational institutions and societies are exempt from the coverage of Title VII "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by [such an entity] *of its activities.*" 42 U.S.C. § 2000e–1 (emphasis added). Under a fair reading of that provision, designated religious entities may discriminate against employees on religious grounds with respect to *all* their activities, not

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[113] *Amos I*, 594 F. Supp. at 825 (citing *King's Garden, Inc.*, 498 F.2d at 55).

[114] *King's Garden, Inc.*, 498 F.2d at 55 n.9.

[115] *Amos I*, 594 F. Supp. at 803.

[116] Duane E. Okamoto, Note, *Religious Discrimination and Title VII Exemption for Religious Organizations: A Basic Values Analysis for the Proper Allocation of Conflicting Rights*, 60 S. CAL. L. REV. 1375, 1383 (1987).

[117] *Amos I*, 594 F. Supp. 791, 802–03; Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 328 (1987).

[118] *Amos I*, 594 F. Supp. at 802 (citing Yu Cong Eng. v. Trinidad, 271 U.S. 500, 518 (1926)).

just their religious activities.[119]

The court cited to only one statement by one congressman, Rep. John Erlenborn of Illinois:

> Religious institutions will be covered, but with a broad exemption for anyone employed by the religious institution rather than only those people who might be utilized in religious work per se. So that I think it was clearly the thought of the conference that if a religious institution is engaged in a profit making venture they still are not covered by the provisions of this act.[120]

Because of clear language in the statutory provision that religious organizations may discriminate on the basis of religion, the court looked to the Plaintiff's challenge to Section 702 by examining the First Amendment's Establishment Clause.[121]

Senators discussed how broad the 1972 amendment to Title VII should be and weighed the implications of allowing only educational institutions to discriminate on the basis of religion as opposed to all activities of religious organizations, including secular business interests. The district court looked deeper within the legislative history in order to determine whether the legislative purpose was secular.[122] The federal district court discovered that when the proposed bill amending Section 702 reached the Senate in 1972 there were a number of attempts to further amend Section 702. In particular, Sen. James Allen of Alabama brought to the Senate floor an amendment that would strike out the word "religious" where it appears before the word, "activities."[123]

> If it were a college supported by the Catholic Church or the Baptist Church or the Episcopal Church, the bill as submitted would protect it only as to the employment of someone for enabling it to carry on its religious activity. So that in a church supported school, if the Baptist supported school wanted to employ a Baptist to teach theology or if a Catholic supported school wanted to employ a Catholic to teach theology, it would be protected.[124]

Like Sen. Allen, Sen. Samuel Ervin of North Carolina sought to broaden a church's ability to regulate its secular business activities. The rallying cry was, "We ought not to let Caesar undertake to control what belongs to

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[119] *Amos I*, 594 F. Supp. at 803.

[120] *Id.* at 804 (citing 118 CONG. REC. 7567 (1972) (statement of Rep. Erlenborn)).

[121] U.S. CONST. amend. I (*The Religion Clauses*).

[122] *Amos I*, 594 F. Supp. at 812 n.35 ("The court merely is examining the legislative history to determine whether the legislative purpose was secular.").

[123] *Id.* at 808-09 (citing 118 CONG. REC. 948 (1972)).

[124] *Id.* at 808-09.

God."[125] Sen. Ervin argued during a Senate debate that religious activities should not be subject to the EEOC's review, but that the more "mundane" activities of a religious organization should be subject to the EEOC.[126]

V. FEDERAL DISTRICT COURT OF UTAH – *AMOS II*

Over one and a half years later, after permitting the United States to intervene on behalf of Defendants, the same federal district court reconsidered the *Amos* set of facts on Plaintiffs' motion for summary judgment and Defendant's motion to strike.[127]

The Beehive employees' motion for summary judgment was denied because the court found two factual areas remained in dispute.[128] The court found the plaintiffs' jobs at Beehive were religious even though nonmembers had been employed in the past because religious standards had not been imposed on employees of commercial companies manufacturing temple clothing under a license and more stringent standards were imposed on employees after they were hired.[129]

The district court explained that in a 1982 review of 399 employees at Beehive, plaintiffs were among 84 individuals "identified as employees who were not worthy of a temple recommend."[130] Plaintiffs along with thirteen others were terminated "after refusing to complete or failing to complete satisfactorily a probationary period to become eligible members."[131] The district court emphasized the non-religious nature of plaintiffs' job responsibilities:

> Plaintiffs Bawden, Kanon, and Riding were employed as seamstresses. Plaintiff Arriola was employed as a cutter of temple clothing at the time of her termination. Adamson was employed as a cutter of garments. Amos was employed as an employee service aid. At no

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[125] *Id.* at 809-10 (citing 116 CONG. REC. 34,565 (1970) (statement of Sen. Ervin)).

[126] *Id.* (the court states "On February 22, 1972, Senator Ervin offered Amendment No. 860, which would have exempted teachers and other faculty members of the public schools from the coverage of Title VII. *Id.* at 4917. That amendment was defeated by a voice vote. *Id.* On that same day, Senators Ervin and Allen offered Amendment No. 844, which would have removed from the coverage of Title VII all employment practices of all educational institutions. That amendment also was defeated; this time by a vote of 15 to 70.") (citations omitted).

[127] Amos v. Corp. of Presiding Bishop, 618 F. Supp. 1013, 1013-14 (D. Utah 1985).

[128] *Id.* at 1021. The two areas involved applicants hired even though they answered "no" to the question of whether they kept the standards of the church and manufacture abroad of Mormon garments by non-Mormon companies without imposition of Mormon Church standards.

[129] *Id.* at 1018-20.

[130] *Id.* at 1020-21.

[131] *Id.*

> time did any of the plaintiff's positions of employment require any of them to describe, explain or proselytize the doctrine and beliefs of the Mormon Church. At no time did any of plaintiff's positions require any of them to engage in worship, ritual or ministerial duties of the Mormon Church nor in matters of Mormon Church administration.[132]

In an amended complaint, a discharged employee of another Mormon organization, Deseret Industries, alleged religious discrimination under Title VII.[133] The district court found that Deseret Industries was an integral part of the Mormon Church's welfare services program providing employment and goods for sale or distribution.[134] The company was found to be "a religious activity as there is an intimate connection between Industries and defendants and the Mormon Church and between the primary function of Industries and the religious tenets of the Church."[135] Factors that the court found dispositive of its conclusion were employee awareness of the relationship with the Mormon Church, daily devotional services on the premises, dependence on the Mormon Church for financial support, and the church's use of Deseret Industries to provide charity and to help members help themselves.[136]

VI. SUPREME COURT DECISION IN *AMOS*: HOW THE SUPREME COURT MISTAKENLY OVERTURNED THE DISTRICT COURT.

The Court's decision in *Amos* broke with prior federal court decisions. The *Amos* Court specifically addressed where to draw the line for exempting religious organizations and the tie to secular activities.[137] This section explores the impact of the Court's decisions and focuses on religious organizations' secular activities and whether the secular activities crossed the line for exemption under Section 702 of the Civil Rights Act and the *Amos* decision.

The Civil Rights Act of 1964 and its 1972 amendments explicitly recognize the right of an individual to be free from discrimination.[138] Additionally, Congress has had equal concern for an individual's right to worship as she or he feels appropriate without governmental interference.[139] The First Amendment also extends the right to churches to

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[132] *Id.* at 1020-21.

[133] *Id.* at 1016.

[134] *Id.*

[135] *Id.* at 1027.

[136] *Id.* at 1026, 1027.

[137] *Id.* at 1018.

[138] Amos v. Corp. of Presiding Bishop, 594 F. Supp. 791, 821 (citing King's Garden, Inc. v. F.C.C., 498 F.2d 51, 55 (D.C. Cir. 1974)).

[139] *Amos II*, 618 F. Supp. at 1027.

manage their own internal affairs as best meets their religious beliefs without government interference; this allows churches to rightfully hire their own clergy and the right to make other hiring decisions based on their religious beliefs, a right denied secular employers.[140] In *Corporation of the Presiding Bishop v. Amos,* these two interests collided.[141] The Court held that Section 702 exemptions were constitutional and further broadened the exemption to apply to secular, non-profit activities of a religious group.[142]

The 1987 unanimous Supreme Court specifically held that a building manager at the Deseret Gymnasium had not committed religious discrimination under Title VII of the Civil Rights Act of 1964 when the church fired employees who refused to live the church standards or were ineligible to become members of the church.[143] The Court held that Sections 702 and 703 of the Act did not violate the First Amendment's Establishment Clause.[144]

The employees of the Mormon Church argued that if Section 702 allowed religious employers to be exempt from liability for secular jobs, the exemption would, in effect, be promoting religion in violation of the Establishment Clause.[145] The Court disagreed with the Plaintiff employees and noted the gym was "intimately connected to the Church" and that *Lemon v. Kurtzman* provides constitutional protection for religious organizations to advance their beliefs and that Section 702 does not violate a person's civil rights even when a church terminates someone because of their religion in a secular workplace.[146]

The Court examined the exemption in the light of the property tax exemption upheld in *Walz v. Tax Commissioner of New York* and measured it against the Establishment Clause, as interpreted in *Lemon.*[147] The exemption, even when extended to the secular activities of religious organizations, does not devolve into "an unlawful fostering of religion" according to the Court.[148] The exemption has a legitimate secular purpose, namely, to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.[149] The Appellees argued that no valid secular purpose existed because Section

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[140] *Id.* at 1026.

[141] Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987).

[142] *Id.* at 338.

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[147] Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664 (1970); *Lemon*, 403 U.S. at 612–13.

[148] Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 145 (1987).

[149] *Amos*, 483 U.S. at 338.

702 provided adequate protection for religious employers prior to the 1972 amendment when it exempted only the religious activities of such employers from the statutory ban on religious discrimination.[150] The Court disagreed:

> We may assume for the sake of argument that the pre-1972 exemption was adequate in the sense that the Free Exercise Clause required no more. Nonetheless, it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.
>
> After a detailed examination of the legislative history of the 1972 amendment, the District Court concluded that Congress' purpose was to minimize governmental "interfere[ence] with the decision-making process in religions." We agree with the District Court that this purpose does not violate the Establishment Clause.[151]

The second requirement under *Lemon* is that the law in question must have "a principal or primary effect . . . that neither advances nor inhibits religion."[152] A law is not unconstitutional simply because it allows churches to advance religion – that is the church's very purpose.[153] For a law to have forbidden "effects" under *Lemon*, it must be shown that the government itself has advanced religion through its own activities and influence.[154] As the Court observed in *Walz*, "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[155]

The district court appeared to fear that sustaining the exemption would permit churches with financial resources to impermissibly extend their influence and propagate their faith by entering the commercial world.[156] The Supreme Court, however, unanimously overturned the lower court's decision because the case involved a nonprofit activity instituted over

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[150] *Id.* at 335.

[151] *Id.* at 336.

[152] *Lemon*, 403 U.S. at 612.

[153] *Id.*

[154] *Id.* at 614.

[155] Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664, 668 (1970); *See also Lemon*, 403 U.S. at 612.

[156] *Walz*, 397 U.S. at 668.

seventy-five years prior in the hope that "all who assemble here, and who come for the benefit of their health, and for physical blessings, [may] feel that they are in a house dedicated to the Lord."[157] Moreover, the Court found no persuasive evidence in the record that the Mormon Church's ability to propagate its religious doctrine through the gymnasium was any greater than it was prior to the passage of the Civil Rights Act in 1964.[158] In such circumstances, the Court did not see how any advancement of religion achieved by the gymnasium could be fairly attributed to the government, as opposed to the church: "Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities."[159]

The Court concluded that no one could seriously argue that Section 702 impermissibly entangles church and state.[160] The statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the district court undertook in this case.[161] This separation accomplished the goal of the third part of the *Lemon* test by avoiding excessive entanglement between government and religion.[162]

Justice Brennan, concurring, advanced the opinion that a case-by-case analysis of the activities of religious organizations to determine whether such activities were religious or secular, would both be unproductive, and it would have a drastic chilling effect upon the free exercise of religion and engage courts in the kind of entanglements the Establishment Clause sought to avoid.[163] In her concurring opinion, Justice O'Connor cautioned that while a broad exemption was permissible for the non-profit activities of a religious organization, the extension of the Section 702 exemption to the for-profit activities of religious organizations may be unconstitutional and remained an open question.[164] However, whether a relevant constitutional distinction exists between the for-profit and non-profit activities of a religious organization is questionable in light of the Supreme Court's recent decision in *Burwell v. Hobby Lobby*.[165] In *Burwell*, the Court's holding supported a privately-held, for-profit company (not religious organization)

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[157] Amos v. Corp. of Presiding Bishop, 594 F. Supp. 791, 800–01 n.15 (D. Utah 1987) (quoting dedicatory prayer for the gymnasium).

[158] Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987).

[159] *Id.* at 338.

[160] *Id.* at 336.

[161] *Id.*

[162] *Id.*; *See also* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[163] *Amos*, 483 U.S. at 340-46 (1987) (Brennan, J., concurring).

[164] *Id.* at 346–49 (O'Connor, J., concurring).

[165] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (decided together with Conestoga Wood Specialties Corp. v. Sebelius, 571 U.S. 1067 (2013)).

whose religious owners made religious-based objections to a governmental regulation.[166]

In *Amos*, the Court held that a broad religious exemption from the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964 pose no threat to the Establishment Clause.[167] The Court in that same case approved the exemption regardless of whether the activities of a religious organization were religious or secular.[168] This sweeping approval designed to protect the core autonomy of churches portends additional legal exemptions designed to protect religious organizations from otherwise applicable legal obligations. The decision comported with the Court's prior decision in *National Labor Relations Board v. Catholic Bishop of Chicago*, in which it struck down the National Labor Relations Board's jurisdiction over parochial schools and reaffirmed congressional intent not to interfere in the hiring policies of church organizations based on religious criteria.[169] *Amos* also foreshadowed future Supreme Court decisions such as *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.* that likewise protects the autonomy of religious organizations.[170]

However, the far-reaching implications of *Amos* seem to affirm that religious organizations alone are the final arbiters of the activities they undertake in pursuit of their religious mission.[171] As a result, religious organizations will have out-sized influence in secular business activities. This principled result was eloquently stated by Justice Brennan in his *Amos* concurrence:

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.[172]

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[166] *Burwell*, 573 U.S. at 690-93.

[167] *Amos*, 483 U.S. at 338.

[168] *Id.*

[169] *See* N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

[170] Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C., 565 U.S. 171, 195-97 (2012).

[171] *See* Treaver Hodson, Comment, *The Religious Employer Exemption Under Title VII: Should a Church Define Its Own Activities?*, 1994 BYU L. REV. 571 (1994).

[172] *See* Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J.,

However, since religious organizations can discriminate only on religious grounds and not on the basis of race or sex, some courts have required a determination as to what the employment decision was based on: either the employee's religion, or something else that would not be exempted under Title VII.[173] For example, in *Vigars v. Valley Christian Center of Dublin, California*, a librarian employed in a parochial school was fired when she informed the administrator she was pregnant by a man who was not her husband, whom she was in the process of divorcing. [174] The Ninth Circuit denied the school's motion for summary judgment based on a factual dispute as to the exact reason for the termination: the pregnancy out of wedlock or adultery.[175] Pregnancy alone under the pregnancy discrimination amendment to Title VII would involve prohibited sex discrimination while adultery would constitute a protected religious reason for the dismissal.[176] These types of decisions should remain the sole domain of religious organizations, but not their secular business arms.[177]

The application of the Section 702 exemption has also been denied when an organization was found not to be a qualifying religious organization. In *E.E.O.C. v. Kamehameha Schools/Bishop Estate*, a private unaffiliated school, endowed in trust as a Protestant institution, was successfully sued for religious discrimination when it refused to employ a non-Protestant French language teacher.[178] Because the school was not officially incorporated as a part of a recognized church, it was denied the Section 702 exemption.[179] The question of what constitutes a religious organization for purposes of the Section 702 religious exemption is taken up in the final section, but it can be noted here that the *Kamehamea* decision is flawed because of its close religious tie to a Protestant institution.[180]

In his concurring opinion in *Amos*, Justice Blackmun held open the question of the constitutionality of the Title VII exemption as applied to "for-profit activities of religious organizations."[181] Justice O'Connor found the *Lemon* test inadequate in cases not having to do with financial aid.[182]

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concurring) (citations omitted).

[173] *See* Vigars v. Valley Christian Ctr. of Dublin, 805 F. Supp. 802 (1992).

[174] *Id.*

[175] *Id.*

[176] 42 U.S.C. § 2000e(k) (1991).

[177] *Id.*

[178] *See* E.E.O.C. v. Kamehameha Schs./Bishop Estate, 990 F.2d 458 (9th Cir. 1993).

[179] *Id.*

[180] *Id.*

[181] Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 346 (1987) ("surely, the 'question of the constitutionality of the § 702 exemption as applied to for-profit activities of religious organizations remains open'").

[182] *Id.* For a more complete expression of Justice O'Connor's views see Wallace v.

She explained that the test is either enforced too strictly to invalidate all religious exemptions or enforced too loosely so that accommodation of the Free Exercise Clause vitiates the Establishment Clause.[183] In place of the three-prong *Lemon* test, Justice O'Connor would establish a two-step test.[184] First, there must be recognition that any lifting of a government regulation "*does* have the effect of advancing religion."[185] Second, an inquiry must be made "whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement."[186] In determining "whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute."[187] A balance was struck in favor of the constitutionality of the Title VII exemption.[188] Lifting of an identifiable burden on the exercise of religion would be viewed under *Amos* "as an accommodation of the exercise of religion rather than as a government endorsement of religion."[189]

The *Amos* decision overwhelmingly cuts in favor of religious organizations and, although the decision does not address the question of whether the for-profit arms of such organizations would be protected by the Section 702 exemption, the decision leans toward upholding the statutory interpretation of Section 702 in favor of them.[190]

During the Supreme Court adjudication of *Amos*, fifteen amicus briefs were filed.[191] Ten of the fifteen amicus briefs supported the Appellants and five supported the Appellees.[192] The breakdown is as follows:

Jaffree, 472 U.S. 38, 82 (1985) ("The challenge . . . is how to define the proper Establishment Clause limits on voluntary efforts to facilitate the free exercise of religion. . . . Any statute pertaining to religion can be viewed as an 'accommodation' of free exercise rights.").

183 *Id.*

184 *Amos*, 483 U.S. at 346-48.

185 *Id.*

186 *Id.* (citing *Wallace*, 472 U.S. at 69).

187 *Id.*

188 *Id.*

189 *Id.* at 348-49.

190 *Id.*

191 *Id.* at 329.

192 *Id.*

Name of Amicus Curiae	In favor of:
Brief Amicus Curiae of Concerned Women for America	Appellants
Brief of the General Conference of Seventh-Day Adventists as Amicus Curiae	Appellants
Brief of the National Jewish Commission on Law and Public Affairs ("COLPA")	Appellants
Brief of the General Conference of Seventh-Day Adventists	Appellants
Brief for the Catholic League for Religious and Civil Rights	Appellants
Brief Amicus Curiae of the American Association of Presidents of Independent Colleges and Universities, the American Association of Bible Colleges, the American Association of Christian Schools, the Christian College Coalition, the Department of Education Services of the Church of the Nazarene, the Division for College and University Services of the American Lutheran Church, and the Transnational Association of Christian Schools	Appellants
Brief of the American Jewish Congress	Appellants
Brief Amicus Curiae of Christian Legal Society, the Lutheran Church-Missouri Synod, and National Association of Evangelicals	Appellants
Brief of the Baptist Joint Committee on Public Affairs	Appellants
Brief of the United States Catholic Conference	Appellants
Brief of the Employment Law Center of the Legal Aid Society of San Francisco	Appellees
Brief of Council on Religious Freedom	Appellants
Brief of the Anti-Defamation League of B'nai B'rith	Appellees
Brief of the American Federation of Labor and Congress of Industrial Organizations and the Service Employees International Union, AFL-CIO	Appellees
Brief of the Women's Legal Defense Fund, the National Council of Jewish Women, the National Coalition of American Nuns and the Institute of Women Today,	Appellees

VII. THE CONTRIBUTIONS OF THIRTY YEARS OF LEGAL SCHOLARSHIP TO *AMOS*-TYPE PROBLEMS

Many articles have addressed the *Amos* case, and this section addresses the legal scholarship over the past thirty years and key arguments from it. Although many articles address *Amos* only in passing, some articles delve into the core issues, but very few explore whether Section 702 should apply to the for-profit arms of religious organizations.[193]

A. *1987 to 1991*

Scholars explored the issue in *Amos* beginning in the late 1970's and early 1980s. In 1981, a legal scholar proposed that the free exercise of religion should include the right of religious organizations to hire preferentially for religious employees in non-religious positions.[194] However, starting soon after the district court decided *Amos I*, scholars took note of the serious implications of allowing religious employers such an advantage in their secular businesses. One scholar noted that "[t]he narrowest reading of Section 702 as amended occurred in [*Amos I*]."[195]

The scholarship leading up to *Amos* played a role for the Supreme Court.[196] Justice Brennan's concurring opinion in *Amos* cites to a 1981 article by Prof. Douglas Laycock, in which Laycock recognized religious organizations have an "interest in autonomy in ordering their internal affairs."[197] Prof. Laycock proposes a sphere of autonomy to protect religious organizations for decisions regarding clergy selection, definition of doctrine, dispute resolution, and management of the religious organizations in the absence of a compelling government interest.[198]

Columbia Law Review published Prof. Bruce N. Bagni's article, *Discrimination in the Name of the Lord: A Critical Evaluation of*

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[193] *See* Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99 (1989); Jennifer M. Burman, Corporation of the Presiding Bishop v. Amos*: The Supreme Court and Religious Discrimination by Religious Educational Institutions*, 3 NOTRE DAME J.L. ETHICS & PUB. POL'Y 629 (1989); Crupi, *supra* note 13; Scott Klundt, *Permitting Religious Employers to Discriminate on the Basis of Religion: Application to For-Profit Activities*, 1988 BYU L. REV. 221; Scott D. McLure, *Religious Preferences in Employment Decisions: How Far May Religious Organizations Go?*, 1990 DUKE L.J. 587 (1990).

[194] Laycock, *supra* note 53.

[195] Okamoto *supra* note 116, at 1394.

[196] Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 341-42 (1987) (Brennan, J., concurring) (citing Laycock, *supra* note 53, at 1389).

[197] *Id.*

[198] Laycock, *supra* note 53, at 1388-92.

Discrimination by Religious Organizations in 1979.[199] Bagni argued that any activities by a religious organization occurring within the epicenter of a religious entity (including secular business interests) "must be outside the scope of civil regulation because otherwise there would invariably be too great an infringement of free-exercise rights."[200]

The University of Chicago Law Review published an article that examined *Amos I* in 1987 without the benefit of the Supreme Court's decision.[201] The author posited that the:

> *Amos I* analysis is convincing in light of the framer's intentions. An exemption of religion from its civil obligations was precisely what underlay Locke's and Jefferson's fears that a religious institution might establish itself as a national religion.[202] The history of the first amendment compels the conclusion that at time the state must assert its interest in regulation the secular employment activities of religious organizations.[203]

In a 1988 article, a researcher commented on *Amos I* stating that "[d]espite these holdings, one federal judge recently rushed in where others feared to tread" and the Supreme Court "corrected the district court's gross misapplication of the *Lemon* standard."[204]

In a 1989 article, researcher Gerard V. Bradley framed the *Amos* case as about a "shared religious belief provided an ordering principle in the community's employment practices."[205] This 1989 article advances support of "church autonomy," which Bradley understands as the legal principles that protect religious communities from having their internal rules of interpersonal relations displaced.[206] Thus, *Amos I* would be an abominable holding for Bradley, even though the gymnasium has no tie to the religious beliefs of the Mormon Church. Nonetheless, this author highlights that the Supreme Court decision and concurring opinions were

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[199] Bagni, *supra* note 53.

[200] *Id.* at 1539.

[201] Elizabeth Tucker Bradley, *A New Approach to NLRB Jurisdiction over the Employment Practices of Religious Institutions*, 54 U. CHI. L. REV. 243 (1987)

[202] *Id.* at 257 (1987) (citing JOHN LOCKE, *A Letter Concerning Toleration, in* LOCKE ON POLITICS, RELIGION AND EDUCATION 104-46 (Maurice Cranston ed., 1965).

[203] Tucker Bradley, *supra* note 201, at 257.

[204] Kenneth W. Brothers, Note, *Church-Affiliated Universities and Labor Board Jurisdiction: An Unholy Union Between Church and State?*, 56 GEO. WASH. L. REV. 558, 594 (1988).

[205] Gerard V. Bradley, *Church Autonomy in the Constitutional Order: The End of the Church and State?*, 49 LA. L. REV. 1057, 1062 (1989).

[206] *Id.*

"inconclusive" and "make conjecture most risky."[207] Bradley would like to have seen the Supreme Court establish a stronger "church autonomy" doctrine, which would protect religious organizations in their secular business pursuits.[208]

One of the most important articles addressing the *Amos* case was a comment by Karen M. Crupi in 1989.[209] Crupi constructs a quadrant analysis (a four-tiered approach for resolving disputes) for determining the power of Congress, under Title VII, to regulate employment discrimination within religious organizations.[210] The decisive factor for Crupi is the employee's function and whether it is religious or secular.[211] Crupi argues that when applying this type of employee variable, courts should make an independent assessment about the secular or religious nature of the employee's activities, and thus courts are not bound to accept the religious organization's characterization of those activities.[212] The courts ought to follow the Fifth Circuit's analysis in *E.E.O.C. v. Mississippi College*, where the court engaged in a detailed examination of the employment status of a faculty member employed by a liberal arts college and held that "the college's faculty and staff do not function as ministers" and; therefore, did not constitute religious function employees.[213] In short, as suggested by Crupi, if the function is religious, the government must accommodate the religious organization's class discrimination; if the function is secular, the government may not accommodate the religious discrimination.[214]

Later in 1994, G. Sidney Buchanan provided a similar framework to Crupi's, but his model provided stronger support for a religious organization's accommodation to discriminate in what he called a modified quadrant analysis.[215] Buchanan also cautions against the likely counter-argument from a religious organization, which was raised in *Amos*, that "all of the activities engaged in by its employees are an outward expression of the entity's religious doctrine."[216]

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[207] *Id.* at 1066. *See also*, Scott D. McClure, Note, *Religious Preferences In Employment Decisions: How Far May Religious Organizations Go?*, 1990 DUKE L.J. 587 (1990) (this manuscript explores the state of Section 702 and highlights the confusion arising out of the *Amos* case).

[208] Gerard Bradley, *supra* note 205, at 1066.

[209] Crupi, *supra* note 13.

[210] *Id.* at 455-56.

[211] *Id.* at 453-56, 473.

[212] *Id.* at 445.

[213] E.E.O.C. v. Mississippi Coll., 626 F.2d 477, 485 (5th Cir. 1980).

[214] *Id.*

[215] G. Sidney Buchanan, *The Power of Government to Regulate Class Discrimination by Religious Entities: A Study of Conflicting Values*, 43 EMORY L.J. 1189 (1994).

[216] *Id.* at 1215.

A number of articles address the *Amos* case in the context of religiously-affiliated colleges and universities (RAC). Marjorie Reiley Maguire noted that "[t]he implication of *Amos* for the question of a RAC's eligibility for a religious institution exemption is unclear."[217] Maguire emphasizes that the implications for funding are unclear due to the fact that most religiously affiliated colleges and universities are not owned by a church.[218] RACs are entitled to government funding, but the Desert Gymnasium is not.[219] She argues that "the decision in *Amos* does not indicate that RACs may claim a religious institution exemption allowing them religious preference in employment."[220] The opposite position is taken in a 1988 article by Jennifer Mary Burman.[221] Burman writes: "The *Amos* decision is a logical outgrowth of the expanded view of organizational religious liberty presaged by *Yoder*."[222] Burman argues that "*Yoder* and *Amos* represent the elevation of religious doctrine and organization over individual conscience and religious nonconformity."[223]

B. *1992 to 2017*

In a 1990 Duke Law Review article, Scott McClure explores the status of Section 702.[224] McClure delves into an examination of whether the *Amos* analysis should apply to both nonprofit and for-profit secular activities, or "whether the coverage of for-profits should extend only to those activities that are religious in nature."[225] McClure explored the "breadth of the right to discriminate granted to religious organization by Section 702 lead[ing] to claims that this provision conflicts with the religion clauses' requirement that government not show favoritism toward religion."[226] Helpfully, McClure provides an analysis of the EEOCs approach to Section 702 up to the 1987 *Amos* decision.[227]

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[217] Marjorie Reiley Maguire, *Having One's Cake and Eating It Too: Government Funding and Religious Exemptions for Religiously Affiliated Colleges and Universities*, 1989 WIS. L. REV. 1061, 1094 (1989).

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] Burman, *supra* note 193, at 661-62.

[222] Steven G. Grey, *Why is Religion Special?: Reconsidering The Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 92 (1990).

[223] *Id.* at 94.

[224] McClure, *supra* note 207, at 588 (exploring the state of Section 702 and highlights the confusion arising out of the Amos case).

[225] *Id.* at 588.

[226] *Id.* at 587.

[227] *Id.* at 589-600.

After 1990, legal scholars largely cite to *Amos* with little analysis or merely restate the existing scholarship.[228] A number misunderstand *Amos* as applying to noncommercial activities of religious organizations, including a leading scholar on the constitutional issue of accommodation.[229] A 1992 law review described *Amos* as a "high-water mark" of religious accommodation, meaning the perception of scholars was that future courts would not similarly allow religious institutions to discriminate against gymnasium employees on account of their religious affiliations.[230]

In 1994, Scott Idleman argued that *Amos* was a "relatively unreliable case" because it created more confusion over the First Amendment's protections of religious organizations' liberty and individual religious liberty.[231] In 1995, David Steinberg argued that from an originalist view the framers must have intended that government would allow religious accommodation.[232]

It was not until 1996 that legal scholars addressed the specific impact *Amos* could have on residents of Utah, the state where the Mormon Church is headquartered.[233] Jane Rutherford wrote: "In a state like Utah, where the church controls many of the available jobs, permitting such discrimination may seriously limit the job prospects of non-Mormons.[234] The Court never

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[228] Roberto L. Corrada, *Religious Accommodation and the National Labor Relations Act*, 17 BERKELEY J. EMP. & LABOR L. 185, 255-57 (1996); Deidre M. Glasser, Note, *The Curious Case of Kiryas Joel*, 63 U. CIN. L. REV. 1947, 1960, 1970 (1995); R. Collin Mangrum, *Shall We Pray? Graduation Prayers and Establishment Paradigms*, 26 CREIGTON L. REV. 1027, 1038-39 (1993); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 709 (1992). *See e.g.*, Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 257-60 (1999); Stacey M. Brandenburg, *Alternatives to Employment Discrimination at Private Religious Schools*, 1999 ANN. SURV. AM. L. 335, 343-45 (1999); Laura L. Coon, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481, 494-96 (2001); Rochel Z. Schnur, *Recent Decisions: The United States Court of Appeals for the Fourth Circuit*, 61 MD. L. REV. 1141, 1149 (2002).

[229] *See* McConnell, *supra* note 228, at 731 ("thereby allowing them to favor members of their own faith in hiring for positions in noncommercial activities of the church").

[230] Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 769 (1992).

[231] Scott Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 291 (1994).

[232] David E. Steinberg, *Rejecting the Case against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241, 266 (1995).

[233] Jane Rutherford, *Equality As the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049 (1996).

[234] *Id.* at 1112.

even considered whether the exception violated the Equal Protection Clause.[235] As a result, the Court loaned state power to encourage individuals to join the Mormon Church."[236]

A 1996 law review article argued in support of Justice Brennan's caution.[237] James M. Donovan argues that "the limiting principle proposed here suggests that the conflict should be weighed in favor of Mayson. The Supreme Court saw it otherwise, and presumed that maximal flexibility should be granted the church and not the individual."[238]

The year 1999 saw a number of law review articles examining the *Amos* case in light of litigation arising out of the Religious Freedom Restoration Act (RFRA) of 1993.[239] Caitlin Garvey's 1999 note explores the impact of *Amos vis-à-vis* the RFRA in the Eighth Circuit case, *Young v. Crystal Evangelical Free Church.*[240] In *Young,* the Eighth Circuit held that a bankrupt couple's tithes to their church could not be recovered by a bankruptcy trustee seeking funds to pay creditors.[241] The author argues the Eighth Circuit relied too heavily on a strained interpretation of the *Amos* Court's decision.[242] In his article, Erwin Chemerinsky asks whether the states' RFRAs violate the Establishment Clause or separation of powers.[243] Chemerisnky notes with perspicacity that "the line between accommodation and advancement will never be clear, but a difference exits between government action that fosters religion and government action that permits people to practice their religions. The former is an impermissible advancement; the latter accommodation."[244] He further notes that "*Amos* thus strongly supports a distinction between accommodating religion and advancing religion, though 'accommodation' has never been defined with any precision."[245]

In 2000, *Amos* continued to be cited as an example of the application of

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[235] Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987).

[236] *Id.*

[237] James M. Donovan, *Restoring Free Exercise Protections by Limiting Them: Preventing A Repeat of* Smith, 17 N. ILL. U. L. REV. 1, 22 (1996).

[238] *Id.*

[239] Caitlin Garvey, Note, *Through Amos-Colored Glass: The Eight Circuit Fails to See the RFRA's Real Meaning in* Young v. Crystal Evangelical Free Church, 24 U. DAYTON L. REV. 491 (1998).

[240] *Id.*

[241] *Id.* at 491-92, 494.

[242] *Id.* at 493-500.

[243] Erwin Chemerinsky, *Do State Religious Freedom Restoration Acts Violate the Establishment Clause or Separation of Powers?*, 32 U.C. DAVIS L. REV. 645 (1999).

[244] *Id.* at 655.

[245] *Id.* at 656.

the *Lemon* Test.[246] However, in 2001, legal scholars began to analyze *Amos* in a new light as a result of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[247] The argument was that RLUIPA was consistent with the *Amos* analysis and did not have an impermissible purpose or effect of advancing or inhibiting religion, thus rendering it consistent with the Establishment Clause.[248]

In 2002, legal scholar Steven K. Green explored whether the *Amos* analysis could extend to public funding.[249] The author argued that the *Amos* analysis did not answer the "question [of] whether this license to discriminate on the basis of religion does or should extend to human service positions that are funded in whole or in part by public dollars, such as a registered dietician hired to run an [Salvation] Army soup kitchen."[250]

Further scholarship has expanded on *Amos* in the context of RFRA legislation.[251] A 2011 article addressed *Spencer v. Word Vision, Inc.*, a decision by a three-judge panel for the Ninth Circuit, where the Court held that the "Christian humanitarian organization" qualified for an exemption from Title VII prohibition of religiously-based employment discrimination upheld in *Amos*.[252] "In a split decision, the Ninth Circuit found that World Vision did meet the qualifications for the religious organization exemption, thereby precluding any legal challenges for religiously motivated employment discrimination."[253]

In 2015, at least one scholar addressed whether *Amos*'s accommodation would apply to a newer legal entity, a benefit corporation if the benefit corporation was organized by a religious organization.[254] Additionally, in 2015, few legal scholars addressed the impact of *Hobby Lobby* on the *Amos*

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[246] Mary Jean Dolan, *The Constitutional Flaws in the New Illinois Religious Freedom Restoration Act: Why RFRAs Don't Work,* 31 LOY. U. CHI. L.J. 153, 187 (2000).

[247] Romand P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 997-98 (2001).

[248] *Id.*

[249] Steven K. Green, *Religious Discrimination, Public Funding, and Constitutional Values*, 30 HASTINGS CONST. L.Q. 1, 34-41 (2002).

[250] *Id.* at 4.

[251] Janet S. Belcove-Shailin, *Ministerial Exception and Title VII Claims: Case Law Grid Analysis*, 2 NEV. L.J. 86, 98-102 (2002).

[252] Brandon S. Boulter, *Goldilocks and the Three-Judge Panel:* Spencer v. World Vision, Inc. *and the Religious Organization Exemption of Title VII*, 2011 BYU L. REV. 33, 33 (2011).

[253] *Id.*

[254] Mark A. Greendorfer, *Blurring Lines Between Churches and Secular Corporations: The Compelling Case of the Benefit Corporation's Right to the Free Exercise of Religion (with a Post-Hobby Lobby Epilogue),* 39 DEL. J. CORP. L. 819, 829-40 (2015).

analysis.[255] One article stands out for its discussion and analysis of religious exemptions, but the article fails to address the *Amos* case.[256]

And finally, while the scholarly activity on tax exemption is robust, this scholarship does not directly incorporate analysis of *Amos*.[257]

VIII. PROPOSED SOLUTIONS TO *AMOS*-TYPE PROBLEMS OF RELIGIOUS ORGANIZATIONS' SECULAR BUSINESSES DISCRIMINATING ON THE BASIS OF RELIGION

Whether a business or organization is religious for purposes of qualifying for exemption under Title VII may not warrant analysis. However, there are times when it is not as close, such as with Beehive Clothing, Deseret Industries, or the Deseret Gymnasium as analyzed by the federal district court and Supreme Court. This section provides a number of frameworks the courts could follow, all of which require application of Title VII to religious organizations' secular businesses and commercial activities. First, this section addresses the 1985 Supreme Court case, *Tony and Susan Alamo Foundation v. Secretary of Labor*, and the rationale the Court follows in that case, which does not exempt a religious organization from minimum wage regulation of the Fair Labor Standards Act (FLSA).[258] Second, this section analyzes the approaches in *Spencer v. World Vision, Inc.*[259] Finally, this section examines the quadrant analysis described by Prof. Karen Crupi.[260]

A. *Tony and Susan Alamo Foundation v. Secretary of Labor*

The FLSA expressly exempts from its coverage employees of religious organizations engaged in noncommercial activities.[261] However, in 1985

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[255] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); Greendorfer, *supra* note 254, at 855; Karen Gantt, *Balancing Women's Health and Religious Freedom Under the ACA*, 17 QUINNIPIAC HEALTH L. 1, 42 (2014); Emily Pitt Mattingly, *"Hobby-Lobby"-ing for Religious Freedom: Crafting the Religious Employer Exemption to the PPACA*, 102 KY. L.J. 183, 198 (2014).

[256] Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions,* 38 HARV. J.L. & GENDER 35 (2015).

[257] *E.g.*, Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 1008 n.189 (1991).

[258] Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985).

[259] Spencer v. World Vision, Inc., 619 F.3d 1109 (9th Cir. 2010).

[260] Crupi, *supra* note 13, at 429-32.

[261] *See* Leda E. Dunn, Note, *"Protection" of Volunteers Under the Federal Employment Law: Discouraging Volunterism?*, 61 FORDHAM L. REV. 451, 454 (1992):

> Congress passed the Fair Labor Standards Act during the nation's devastating Great Depression. Through the statute's minimum wage and overtime pay provisions, Congress intended to protect workers from the deleterious effects of "wages too low

the Supreme Court considered whether the FLSA applies to workers engaged in a religious organization's commercial activities and, if so, whether applying the FLSA in this manner violates the Free Exercise Clause.[262]

The Department of Labor brought suit against the Tony and Susan Alamo Foundation, a nonprofit religious corporation that had an articulated purpose to "establish, conduct and maintain an evangelistic church, and generally to do those things needful for the promotion of Christian faith, virtue and charity."[263] The Department of Labor claimed that the foundation violated the minimum wage, overtime, and record-keeping provisions of the FLSA.[264] The foundation operated a wide spectrum of commercial businesses, including service stations, a roofing company, a motel, a candy company, restaurants, hog farms, and retail stores; all of which were staffed in large part by over three hundred volunteer "associates."[265] The "volunteers" had been drug addicts or criminals of some sort before their rehabilitation.[266] The "volunteers" received no wages, but the foundation did provide them with food, clothing, shelter, and other benefits such as medical and dental care.[267]

The Tony and Susan Alamo Foundation claimed that the FLSA did not cover its associates because they were volunteers, not employees, and because these volunteers were engaged in religious activities exempt from the FLSA.[268] The foundation also argued that application of the FLSA to its activities violated the Free Exercise Clause of the First Amendment.[269]

The Supreme Court unanimously found that the foundation's associates were in fact employees since they engaged in the work of the foundation with the expectation of receiving substantial in-kind benefits in exchange for their labor.[270] The Court applied the economic realities test to a

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to buy the bare necessities of life and from long hours of work injurious to health." In addition, Congress sought to protect employers complying with the FLSA's terms from the "unfair method of competition" that would give a competitive advantage to employers violating the Act;

see also Fed. Reg. Empl. Serv. (Law. Co-op) § 21;1, at 10; 29 U.S.C. § 206 (1988 & Supp. II 1990).

262 Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 291-92 (1985).

263 *Id.* at 292.

264 *Id.* at 293.

265 *Id.* at 292-93.

266 *Id.* at 292.

267 *Id.* at 290, 292.

268 *Id.* at 298-99.

269 *Id.* at 303-06.

270 *Id.* at 306.

nonprofit religious organization's workers.[271] The Court also found that the volunteers engaged in commercial activities despite the foundation's tax exempt status as a nonprofit organization.[272] Significant to the Court was the fact that the foundation's various business interests competed with nonreligious commercial enterprises and that the foundation's various businesses were allowed to pay substandard wages. The Court concluded the foundation would have an unfair competitive advantage over their secular competitors.[273] Thus, the Court held that the FLSA applied to the foundation's associates.[274]

The Court's solution and rationale to the constitutional question of whether application of the FLSA to the commercial activities of religious organizations could be squared with the Free Exercise Clause could and should have been applied to *Amos*.[275] The Court concluded that the FLSA's minimum wage and overtime pay requirements did not infringe on the associates' free exercise rights because the associates were free to give their wages back to the foundation.[276] Likewise, the Court concluded that the record-keeping requirements that the statute imposed on the foundation were not so onerous as to entangle the government excessively with religion.[277]

In the years since the Supreme Court's 1985 decision, courts have continued to refuse to exempt the commercial activities of religious organizations from FLSA coverage while retaining an exemption for employees engaged in noncommercial activities.[278] Equally appropriate, courts have continued to maintain that FLSA coverage of the commercial activities of religious organizations does not violate the Free Exercise Clause.[279] In short, the Supreme Court's holding makes for sound public

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[271] *See* Dunn *supra* note 261, at 456 n.55:

> The Alamo Foundation uses the help of workers, 'most of whom were drug addicts, derelicts, or criminals before their conversion and rehabilitation by the Foundation' in its commercial businesses. The Foundation's income is derived mainly from the operation of these businesses, which 'include service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a recordkeeping company, a motel, and companies engaged in the production and distribution of candy.

[272] *Id.* at 456-57.

[273] *Id.*

[274] *Alamo Found.*, 471 U.S. at 306.

[275] *Id.* at 304.

[276] *Id.* at 304.

[277] *Id.* at 305.

[278] *See, e.g.*, Alicea–Hernandez v. Catholic Bishop of Chi., 320 F.3d 698 (7th Cir. 2003).

[279] *See, e.g.*, Shaliehsabou v. Hebrew Home of Greater Washington, Inc., 369 F.3d 797,

policy: "The Foundation's businesses constitute an "enterprise" within the meaning of the Act and are not beyond the Act's reach because of the Foundation's religious character."[280]

B. *Spencer v. World Vision, Inc. Approaches*

In a split decision, the Ninth Circuit held that World Vision qualified for the religious organization exemption under Title VII and, therefore, could not be liable for employment discrimination based on religion.[281] Three of the judges provided frameworks to guide lower courts in deciding when a business or organization is religious for the purpose of qualifying for Tile VII exemption.[282] According to Judge O'Scannlain in his majority opinion, the Ninth Circuit had previously decided only two cases, *Townley* and *Kamehameha,* in which the answer to this question was not readily apparent.[283]

1. Judge O'Scannlain's Majority Opinion

Judge O'Scannlain rejected the calls of both parties in the case to apply a strict "factor test" similar to that found in *Kamehameha* because he believed such a test could run afoul of the requirements of the First Amendment's religion clauses.[284] Judge O'Scannlain found support for his rationale in Justice Brennan's concurrence in the *Amos* case, where Justice Brennan argued that "determining whether an activity is religious or secular requires a searching case-by-case analysis . . . [, which] results in considerable ongoing government entanglement in religious affairs . . . [and] raises [the] concern that a religious organization may be chilled in its free exercise activity."[285] Based on this reasoning, Judge O'Scannlain created his own test, which he argued "minimizes any untoward differentiation among religious organizations and any unseemly judicial inquiry into whether an activity is religious or secular in nature."[286] Judge O'Scannlain's test is as follows:

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800 (4th Cir. 2004) ("the FLSA, by its own terms, 'reaches only the 'ordinary commercial activities' of [those] organizations and only those [employees] who engage in those activities in expectation of compensation.'") (quoting *Alamo Found.,* 471 U.S. at 302 (citing 29 C.F.R. § 779.214)).

[280] *Alamo Found.*, 471 U.S. at 291-92.

[281] Spencer v. World Vision, Inc., 619 F.3d 1109 (9th Cir. 2010).

[282] *Id.* at 1100 (O'Scannlain, J., majority), 1126 (Klienfeld, J., concurring), 1133 (Berzon, J., dissenting).

[283] *Id.* at 1112.

[284] *Id* at 1115-19.

[285] *Id.* at 1116 (quoting Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 343-44 (1987) (Brennan, J., concurring)) (internal quotation marks omitted).

[286] *World Vision, Inc.*, 619 F.3d at 1119.

> [A] nonprofit entity qualifies for the section 2000e-1 exemption if it establishes that it (1) is organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents), (2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and (3) holds itself out to the public as religious.[287]

Applying this test, which "permits an institution to acknowledge its own religiosity" by "evaluating the purpose provided by the organization against the organization's practice," Judge O'Scannlain found that World Vision did qualify as a religious organization under Title VII and upheld summary judgment in its favor.[288] While Judge O'Scannlain's test provides some flexibility and draws the much-needed line in *Amos*-type cases, religious organizations will be much tempted to blur this line by expanding the definition of religious purpose, which is at the core of the problem in *Amos*.

2. Judge Kleinfeld's Concerns in His Concurring Opinion

Although Judge Kleinfeld agreed with Judge O'Scannlain's ultimate finding, he disagreed with the test Judge O'Scannlain applied, believing it was "too inclusive."[289] Judge Kleinfeld wrote that "Judge O'Scannlain's test is too broad because it would allow nonprofit institutions with church affiliations to use their affiliations as a cover for religious discrimination in secular employment."[290] This certainly is what happened in the *Tony and Susan Alamo Foundation* and *Amos* cases.[291] Judge Kleinfeld cautioned that reliance on this test would force "courts to look into the hearts of [executives] and make a judgment about their real purposes."[292] Therefore, Judge Kleinfeld proposed a test based on "one big objectively ascertainable difference: how [the organizations] charge."[293] Under Judge Kleinfeld's proposed analysis:

> To determine whether an entity is a "religious corporation, association, or society," [a court must] determine whether it is organized for a religious purpose, is engaged primarily in carrying out

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[287] *Id.* (citing Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1343 (D.C. Cir. 2002)).

[288] *World Vision, Inc.*, 619 F.3d at 1119, 1126.

[289] *Id.* at 1127 (Kleinfeld, J., concurring).

[290] *Id.* at 1130.

[291] Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 291-92 (1985); Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) .

[292] *Id.* at 1132.

[293] *Id.* (explaining that, while a "hospital gets money by exchanging valuable services for their market value in cash," "the Salvation Army gives its homeless shelter and soup kitchen services away, or charges nominal fees, perhaps eight dollars a night for a bed worth fifty dollars a night").

> that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.[294]

The final and much-needed question in Judge Kleinfeld's analysis would allow a court to distinguish organizations "designed to exchange goods or services for money, from those designed to give them away except perhaps for nominal charges in order to serve a religious objective."[295] Although under this formulation, Judge Kleinfeld concluded that World Vision would qualify as a religious corporation, the Deseret Gymnasium in *Amos* would not qualify for Title VII exemption.[296]

3. Judge Berzon's Dissenting Opinion

Judge Berzon's dissent expresses more accurately the concerns of *Amos*-type cases. In her dissent, Judge Berzon rejected the tests proposed by Judge O'Scannlain and Judge Klenfeld as too expansive, cautioning that both approaches would "transform what has always been a narrow exemption from the general prohibition on religious discrimination into an exceedingly broad one, with no obvious stopping point."[297] Based on her narrow reading of Title VII's religious organization exemption, Judge Berzon would apply the exemption only to those organizations whose "primary activity . . . consists of voluntary gathering for prayer and religious learning."[298] Judge Berzon's test might swing the constitutional propriety too far the other way, but it hits closer to the appropriate constitutional target.

C. *Prof. Karen Crupi's Quadrant Analysis of Amos-type Problems*

Prof. Karen Crupi developed a quadrant analysis in her 1989 comment.[299] The quadrants are as follows, with Quadrant III being the focus of this discussion:[300]

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294 *Id.* at 1133.

295 *Id.* at 1132.

296 *Id.* at 1133.

297 *Id.* at 1134 (Berzon, J., dissenting).

298 *Id.* at 1148.

299 Crupi, *supra* note 13, at 429-32.

300 *Id.*

Quadrant I	**Quadrant II**
Religious Employment Discrimination against Religious Function Employee	Nonreligious Employment Discrimination against Religious Function Employee
Quadrant III	**Quadrant IV**
Religious Employment Discrimination against Secular Function Employee	Nonreligious Employment Discrimination against Secular Function Employee

Crupi, seeking to determine the proper constitutional balance between Title VII and the religious clauses, proposes to analyze the "employment relationship between a religious organization and its employees from the perspective of two variables: the employment status of the aggrieved employee, and the type of discrimination alleged by that employee."[301]

Quadrant III is relevant to the present discussion.[302] In cases involving *Amos*-type claims where religious discrimination is charged by an employee performing a secular function (such as in Quadrant III), Crupi suggests "the constitutional propriety of title VII regulation is dependent upon the type of activity performed by that employee."[303] Crupi argues that:

> to properly balance the competing constitutional interests inherent within Quadrant III, a court must examine whether there exists a demonstrable nexus between the employment activity performed by the aggrieved employee and the religious mission of the employer. In the absence of such a nexus, the employer's first amendment interests are diminished, and the compelling governmental interest in eradicating employment discrimination dictates that the Quadrant III relationship falls within title VII review.[304]

Quadrant III of Crupi's analysis is a reasonable approach that would guide courts well in preserving constitutional propriety for individuals and religious organizations in future cases.

IX. CONCLUSION

The federal district court answered the *Amos* problem correctly, and the

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[301] *Id.* at 429.

[302] *Id.* at 431.

[303] *Id.*

[304] *Id.* at 431-32.

Supreme Court decided it wrongly.[305] The court in *King's Garden* noted that, in many American religious groups, wealth and the inclination to acquire wealth exists.[306] Thus, for good reason, the critical question is whether a religious organization is engaging in a secular activity or religious activity. Where the activity is secular, the religious group should not be allowed to violate the First Amendment.

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[305] Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 343-44 (1987); Amos v. Corp. of Presiding Bishop, 618 F. Supp. 1013 (D. Utah 1985).

[306] King's Garden, Inc. v. F.C.C., 498 F.2d 51, 55 n.9 (D.C. Cir. 1974).