

# Being FAIR to Religion: *Rumsfeld v. FAIR*'s Impact on the Associational Rights of Religious Organizations

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*Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)* garnered much political attention because of the issue underlying the case: whether “don’t ask, don’t tell” is a sound policy.<sup>1</sup> However, that question was not before the Supreme Court. The Court considered only whether law schools’ protests against the policy—refusing military recruiters access to students—were constitutionally protected speech.<sup>2</sup> The Court was not sympathetic; in ruling against FAIR, a consortium of law schools, it limited a protection that it had greatly expanded only six years earlier: the right to expressive association.<sup>3</sup>

The effects of this limitation are yet to be seen, but will likely come as a disappointment to libertarians who saw great promise in the broad association rights set forth in *Boy Scouts of America v. Dale*.<sup>4</sup> Interestingly, the impact of *FAIR* may be felt most by religious organizations—groups that have traditionally had their own associational protections, but which today may rely only on the right of expressive association. The irony of this is that *FAIR*, a case noted for its defense of an anti-homosexual policy, may have its greatest impact on religious organizations that seek to keep homosexuals out.

This Essay explores the possible impacts of *FAIR* on the associational rights of religious groups. Part I discusses the background constitutional protections for both religious and secular associations prior to *Rumsfeld v. FAIR*. Part II discusses how *FAIR* has altered the doctrine of expressive association and why it likely impacts religious organizations after *Employment Division v. Smith*.<sup>5</sup> Part III argues that *FAIR*'s limitations should be applied against religious organizations, whether or not the church autonomy doctrine survived *Smith*.

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<sup>1</sup> See 547 U.S. 47 (2006); see also Editorial, *Law Schools, Gays and the Military*, N.Y. TIMES, Oct. 5, 2003, at A12.

<sup>2</sup> *Rumsfeld v. FAIR*, 547 U.S. 47.

<sup>3</sup> *Id.* at 70.

<sup>4</sup> 530 U.S. 640 (2000); See, e.g., Richard A. Epstein, *Free Association: The Incoherence of Antidiscrimination Laws*, NAT'L REV., Oct. 9, 2000, at 38, 40 (“All organizations can be masters of their own fate. That’s the true meaning of *Dale*, once we liberate it from Chief Justice Rehnquist’s excessively narrow application to ‘expressive organizations.’”).

<sup>5</sup> 494 U.S. 872 (1990).

## I. HISTORY OF EXPRESSIVE ASSOCIATIONS AND CHURCH AUTONOMY

The right of association has a firm foundation in our legal structure.<sup>6</sup> For religious organizations, association has also traditionally included the right to exclude those with whom the organization does not agree. Prior to *FAIR*, exclusionary protections for secular organizations were also increasing, reaching levels equivalent to those for religious organizations.<sup>7</sup>

This Part discusses the development of the doctrines protecting both religious and secular organizations. Part I.A explores the historic constitutional protections provided to religious organizations under the church autonomy doctrine. Part I.B traces the development of the doctrine of expressive associations protected by the First Amendment. Part I.C. then compares these two doctrines and notes their striking similarity.

A. *Protections for Religious Associations*

The First Amendment explicitly protects the freedom of religion.<sup>8</sup> Courts have developed a church autonomy doctrine that largely insulates religious organizations from government regulation. The church autonomy doctrine allows a religious organization to exclude any individual, regardless of law to the contrary, on the grounds that the association would violate a religious belief—a claim that is nearly unreviewable by courts.<sup>9</sup> A court is barred from investigating the religious beliefs at issue in the decision to exclude,<sup>10</sup> and whether the individual's presence in the group would violate those beliefs.<sup>11</sup> “Because ‘the Free Exercise Clause protects the act of deci-

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<sup>6</sup> For a history of the right of assembly and association, see Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 721–42 (2002).

<sup>7</sup> See *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

<sup>8</sup> U.S. Const. amend. I.

<sup>9</sup> See *Paul v. Watchtower Bible and Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 883 (9th Cir. 1987) (finding that “[t]he Jehovah's Witnesses' practice of shunning is protected under the First Amendment of the United States Constitution”). The doctrine covers not only the inclusion or exclusion of individuals, but also their treatment within the organization. See *McClure v. Salvation Army*, 460 F.2d 553, 560–61 (5th Cir. 1972).

<sup>10</sup> See *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969).

<sup>11</sup> See *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 33 (D.D.C. 1990) (finding that a group's religious requirements for membership barred court review of membership determinations). Of course, even the associational rights of the church autonomy doctrine may be overridden by a legitimate and compelling state interest. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 603–04 (1983) (finding IRS's denial of tax exempt status due to racially discriminatory admissions policy violated universities' associational freedoms under the Free Exercise Clause, but the violation was justified to further the legitimate and compelling interest of eradicating racial discrimination); *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 31–32 (D.C. 1987) (finding D.C.'s interest in eradicating discrimination against homosexuals to be compelling, overriding the University's free exercise rights to refuse to recognize a student group).

sion rather than a motivation behind it,'<sup>12</sup> 'it is the decision itself which is exempt—the courts may not even look into the reasoning.'"<sup>13</sup> The sole question left open to the court is to decide whether the religious organization is being sincere in its description of its beliefs.<sup>14</sup>

While the Court has not been clear on whether the church autonomy extends from the Free Exercise Clause or from the Establishment Clause,<sup>15</sup> the general reasoning behind the doctrine is that courts lack the capability to adjudicate questions of faith.<sup>16</sup> Simply put, "[t]his church autonomy doctrine prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity."<sup>17</sup> Coupled with the Court's broad definition of what constitutes a religion,<sup>18</sup> this approach can be quite expansive.

### B. *Protections for Expressive Associations*

Courts traditionally afforded secular groups a number of speech rights, but it was not until *Roberts v. United States Jaycees* that the Court extended to secular groups the same power as religious organizations to choose their members.<sup>19</sup> Eventually, the Court expanded this doctrine in *Dale v. Boy Scouts of America*, granting protections similar to those afforded to religious organizations.<sup>20</sup>

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<sup>12</sup> Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exception from Antidiscrimination*, 75 *FORDHAM L. REV.* 1965, 1975 (2007) (quoting *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000)).

<sup>13</sup> *Id.* (quoting *Werft v. Desert Sw. Annual Conference of United Methodist Church*, 377 F.3d 1099, 1103 (9th Cir. 2004)).

<sup>14</sup> *See* *United States v. Ballard*, 322 U.S. 78, 84–88 (1944) (reinstating district court decision to withhold question of truth of the defendants' religious statement from jury but allowing jury to investigate sincerity of speaker).

<sup>15</sup> *Compare* Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 *Nw. L. REV.* 146 159–60 (1986) (noting that exemption from government regulation can reduce entanglement in the same way as exclusion from government aid) *with* 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, 1403 (1981) [hereinafter Laycock, *Towards a General Theory*] (arguing that free exercise, and not entanglement, should be the basis of church autonomy doctrine).

<sup>16</sup> *See* *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990) (citing *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)) (finding an overriding interest in keeping government "out of the business of evaluating the relative merits of differing religious claims").

<sup>17</sup> *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002).

<sup>18</sup> *See* *United States v. Seeger*, 380 U.S. 163, 176 (1965) ("A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."). *But see* *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("A way of life, however virtuous and admirable, may not be interposed as a barrier to a reasonable state regulation . . . if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.").

<sup>19</sup> 468 U.S. 609, 622–23 (1984).

<sup>20</sup> 530 U.S. 640 (2000).

## 1. Roberts v. United States Jaycees

At the time of the suit, the Jaycees were a secular organization that “promote and foster the growth and development of young men’s civic organizations” and “provide [young men] with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community.”<sup>21</sup> The national by-laws of the organization limited membership to men.<sup>22</sup> After the Minnesota Supreme Court determined that the Minnesota Human Rights Act applied to the Jaycees and prohibited this limitation, the group appealed to the Supreme Court.<sup>23</sup>

In deciding the case, the Supreme Court outlined two forms of protected associations, the second of which applied to the Jaycees: expressive association.<sup>24</sup> “An individual’s freedom to speak, to worship, and to petition the government for redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in a group effort toward those ends were not also guaranteed.”<sup>25</sup> Expressive association protects groups from government interference in their membership and organization.<sup>26</sup>

The Court admitted that “[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.”<sup>27</sup> Nevertheless, the Court ruled that the intrusion of Minnesota’s anti-discrimination law in the Jaycees’s affairs was justified because the Jaycees failed to prove that the intrusion imposed a serious burden on their group.<sup>28</sup> The Court concluded that the admission of women would not interfere with the organization’s ability to express itself, particularly because the Act did not restrict the group’s ability to “exclude individuals with ideologies or philosophies different from those of its existing membership.”<sup>29</sup> The Court rejected the lower court’s and plaintiff’s assumptions that women would not share the interest of supporting young men and that therefore they could be excluded as a class under the presumption that their ideology was different than that of the organization’s.<sup>30</sup>

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<sup>21</sup> 468 U.S. at 612–13 (quoting Brief of Appellee 2).

<sup>22</sup> *Id.* at 613.

<sup>23</sup> *See id.* at 616–17.

<sup>24</sup> The Court found that the Jaycees, a large, unselective group, was not protected under the first type of association, intimate association. *Id.* at 621.

<sup>25</sup> *Id.* at 622.

<sup>26</sup> *Id.* (citing *Healey v. James*, 408 U.S. 169, 180–84 (1972); *Brown v. Socialist Workers ‘74 Campaign Comm.*, 459 U.S. 87, 91–92 (1992); *Cousins v. Wigoda*, 419 U.S. 477, 487–88 (1975)).

<sup>27</sup> *Jaycees*, 468 U.S. at 623.

<sup>28</sup> *Id.* at 626.

<sup>29</sup> *Id.* at 626–27.

<sup>30</sup> *See id.* at 627–28. This ruling may play an important role in *FAIR*’s impact. *See infra* notes 62–67 and accompanying text.

## 2. Boy Scouts of America v. Dale

In 2000, the Supreme Court again took up the question of whether an association could exclude an individual in violation of a state's nondiscrimination policy.<sup>31</sup> The Boy Scouts of America revoked the adult membership as a Scout leader of James Dale, an "avowed homosexual gay rights activist" on the grounds that the Boy Scouts "specifically forbid membership to homosexuals."<sup>32</sup> Dale filed suit under New Jersey's public accommodation statute, which "prohibits, among other things, discrimination on the basis of sexual orientation in places of public accommodation."<sup>33</sup>

The Court considered whether the Boy Scouts expressed a view regarding homosexuality that would be impaired by Dale's membership.<sup>34</sup> The majority accepted the Boy Scouts' assertion that their organization's principles would be violated by allowing Dale to remain a member, noting that the only inquiry required was to ask whether the Boy Scouts were being sincere in their assertion of the principle.<sup>35</sup> On the question of whether Dale's presence would impair the ability of the Boy Scouts to deliver its message, the majority was again deferential.<sup>36</sup> The Court placed no importance on Dale's leadership position, leaving to the group the question of the level of interaction necessary to implicate the expressive association doctrine.<sup>37</sup>

*Dale* expanded the protections afforded under the doctrine of expressive association.<sup>38</sup> To be covered, a group would first need to demonstrate that it "engage[d] in some form of expression, whether it be public or private."<sup>39</sup> The group need not associate for the purpose of expressing the message in question, nor must it clearly articulate or agree upon every issue.<sup>40</sup> The court is simply to accept the assertion of the organization that it expresses the viewpoint in question, inquiring only as to whether the assertion is sincere.<sup>41</sup> Finally, the court must determine whether the association in question would "significantly burden" the organization's expression.<sup>42</sup> However, once again, the court must "give deference to an association's view of what would impair its message."<sup>43</sup> *Dale* thus greatly expanded the expressive association doctrine created in *Jaycees*.

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<sup>31</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

<sup>32</sup> *Id.* at 644, 645.

<sup>33</sup> *Id.* (citing N.J. Stat. Ann. §§ 10:5-4, :5-5 (2000)).

<sup>34</sup> *Id.* at 648.

<sup>35</sup> *Id.* at 651.

<sup>36</sup> *Id.* at 653 ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression.").

<sup>37</sup> *See id.*

<sup>38</sup> Corbin, *supra* note 12, at 2029 (finding that *Dale* considerably strengthened the right of expressive association).

<sup>39</sup> *Dale*, 530 U.S. at 648.

<sup>40</sup> *Id.* at 655-56.

<sup>41</sup> *Id.* at 651.

<sup>42</sup> *Id.* at 653.

<sup>43</sup> *Id.*

### C. *Similarity Between Expressive Association and the Church Autonomy Doctrines*

Professor Kent Greenawalt noted that post-*Dale*, “[i]t is not now clear that religious groups have more liberty to choose participants than do non-religious expressive associations.”<sup>44</sup> Indeed, the deference provided to the Boy Scouts was remarkably similar to that provided to religious organizations. The Boy Scouts were free to determine and interpret what they were expressing and were largely free to determine when an association would infringe on that expression.

Such similarity may be well founded. Justice Scalia paralleled the investigation into religious beliefs with that of expression in *Employment Division v. Smith*: “It is no more appropriate for judges to determine the ‘centrality’ of religious beliefs . . . than it would be for them to determine the ‘importance’ of ideas.”<sup>45</sup> Justice Brennan pointed to the protections afforded religious groups in creating the doctrine of expressive association.<sup>46</sup> One writer noted that religious and secular expressive associations “have a comparable interest in managing their own affairs without fear of governmental interference.”<sup>47</sup>

## II. *RUMSFELD v. FAIR* AND RELIGIOUS ORGANIZATIONS

The previous Part discussed the nature of the church autonomy and expressive association doctrines up to the Supreme Court’s decision in *Boy Scouts of America v. Dale*. The recent decision in *Rumsfeld v. FAIR* has now altered that landscape. Part II.A discusses *Rumsfeld v. Fair* and its implications for the doctrine of expressive association. Part II.B discusses why this case may have an unexpected impact on religious associations.

### A. *Rumsfeld v. FAIR*

When law schools began denying access to military recruiters because they did not conform to the schools’ nondiscrimination policies,<sup>48</sup> Congress responded by passing the Solomon Amendment.<sup>49</sup> The Amendment conditioned an entire university’s receipt of federal funds upon allowing military

<sup>44</sup> KENT GREENAWALT, *RELIGION AND THE CONSTITUTION* 389 (2006).

<sup>45</sup> 494 U.S. 872, 886–87 (1990).

<sup>46</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (“An individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.” (emphasis added)).

<sup>47</sup> Steffen N. Johnson, *Expressive Association and Organization Autonomy*, 85 MINN. L. REV. 1639, 1651–52 (2001) (comparing *Dale*, 540 U.S. at 640 with *Serbian Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976)).

<sup>48</sup> See *FAIR v. Rumsfeld*, 390 F.3d 219, 225 (3d Cir. 2004).

<sup>49</sup> 10 U.S.C. § 983 (2000 & Supp. 2006); National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994).

recruiters access to campus.<sup>50</sup> After the Defense Department interpreted this legislation as “requir[ing] universities to provide military recruiters access to students equal in quality and scope to that provided to other recruiters,”<sup>51</sup> a group of law schools joined together to create the Forum for Academic and Institutional Rights (FAIR) and filed suit alleging violation of, inter alia, their right to expressive association.<sup>52</sup>

Two years later, when the parties came before the Supreme Court, the Justices unanimously dispensed with FAIR’s claims in language one scholar has called “contemptuous.”<sup>53</sup> On the question of the law schools’ right to expressive association, the Court determined that FAIR’s reliance on *Dale* was unfounded.<sup>54</sup> The Court ruled that the military recruiters’ presence furthered a “substantial government interest,”<sup>55</sup> and held that the recruiters’ association did not impair the law schools’ ability to express their disagreement with “don’t ask, don’t tell.”

In so ruling, the Court eliminated the ability of groups to determine when an association would interfere with their message.<sup>56</sup> The Court made no mention of any deference owed to the law schools’ determination of what interactions would substantially interfere with their expression.<sup>57</sup> The Court ruled that judges should determine whether the “forced inclusion . . . would significantly affect [the organization’s] expression,”<sup>58</sup> and the group’s simple assertion that an association would impair their message was insufficient.<sup>59</sup> Regardless of what the Court may have stated in *Dale*, under *FAIR*, the courts and not the groups at issue make this decision.

The Court’s return to limiting groups’ discretion in determining when an association interferes with their message could signal the increasing importance of a little noticed argument in *Jaycees*.<sup>60</sup> There the Court refused to accept the Jaycees’ contention that the group could ban female members on the assumption that women would necessarily differ in viewpoint from men.<sup>61</sup> The Court implied that a group cannot reject a class of individuals on the presumption that the class disagrees with the organization’s views, even

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<sup>50</sup> 10 U.S.C. § 983.

<sup>51</sup> *Rumsfeld v. FAIR*, 547 U.S. 47, 53 (2006) (quoting *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 282 (D.N.J. 2003)).

<sup>52</sup> *FAIR*, 291 F. Supp. 2d at 274–75.

<sup>53</sup> *FAIR*, 547 U.S. at 69–70 (Alito, J. not participating). See Dale Carpenter, *Unanimously Wrong*, 2006 CATO SUP. CT. REV. 217, 234 (2006) (describing Court’s language as showing “contempt”).

<sup>54</sup> *FAIR*, 547 U.S. at 69.

<sup>55</sup> *Id.* at 67.

<sup>56</sup> See *id.* at 69 (stating that law schools cannot “erect a shield against laws requiring access simply by asserting that mere association would impair its message” (internal quotations omitted)).

<sup>57</sup> See *id.* at 68–70.

<sup>58</sup> *Id.* at 68.

<sup>59</sup> *Id.* at 68.

<sup>60</sup> *Jaycees*, 468 U.S. 609.

<sup>61</sup> See *id.* at 627–28.

if those views are to the detriment of that class.<sup>62</sup> Thus, *Dale*'s emphasis that the plaintiff was not just a homosexual, but an "avowed homosexual gay rights activist" may be of more importance than it first appears.<sup>63</sup> If Dale were a homosexual, but not an activist, then his presence may have been insufficient to substantially burden the Boy Scouts' expression.<sup>64</sup> Just as the Jaycees could not assume that women's viewpoints differed from those of men, the Boy Scouts could not assume that homosexuals' viewpoints differed from those of heterosexuals. Under such an interpretation, the person's expression and level of commitment to that expression would count, not her status.<sup>65</sup> Obviously these developments would signal a significant retreat from the strong expressive association doctrine that *Dale*'s language promised.

### B. *Can FAIR Impact Religious Organizations?*

While lower courts have still to digest the impact of *FAIR*, it is clear that the case will have a significant impact on secular organizations. What is less clear is whether, in light of the parity achieved between religious and secular organizations pre-*FAIR*, the case signals a limitation on protections for religious groups. There are two ways in which *FAIR* may impact religious organizations. First, religious organizations may be subject to the same level of interference as secular groups after *Employment Division v. Smith*, the Supreme Court's landmark religious freedom case—a level of interference that is much higher after *FAIR*. Second, *FAIR* may signal a general retreat from associational rights that could affect religious organizations. The remainder of this Part investigates why *FAIR* could impact religious organizations.

#### 1. *Free Exercise After Smith*

Whether *FAIR* impacts the right of religious organizations to control their internal organization, including membership, depends largely on whether religious organizations must rely solely on expressive association

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<sup>62</sup> Christian Malagna similarly argues that *Dale* should be read to rely on the fact that the forced association was with an avowed activist and not merely with a homosexual. See Christian A. Malagna, *Expressive Association – Student Organizations' Right to Discriminate: A Look at Public Law Schools' Nondiscrimination Policies and Their Application to Christian Legal Society Student Chapters*, 29 W. NEW ENG. L. REV. 757, 779 (2007).

<sup>63</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 643 (2000).

<sup>64</sup> The Seventh Circuit recently came close to such a finding. In *Christian Legal Society v. Walker*, the Court defended the student organization's exclusion of homosexuals as protected by the doctrine of expressive association partly on the grounds that the group "requires its members and officers to adhere to and conduct themselves in accordance with a belief system regarding standards of sexual conduct, but its membership requirements do not exclude members on the basis of sexual orientation." 453 F.3d 853, 860 (2006) (emphasis in original).

<sup>65</sup> The Supreme Court in *Dale* even hints at this point by defending the Boy Scouts' policy on the grounds that it would exclude a heterosexual that took the view that homosexuality was "consistent with Scouting values." *Dale*, 530 U.S. at 656 n.1.

protections, or whether they still enjoy separate protections under the church autonomy doctrine. The survival of this latter doctrine is debatable in light of one of the most important Free Exercise cases of the recent Court: *Employment Division v. Smith*.<sup>66</sup>

*Smith* limited the ability of individuals to seek exceptions from laws due to religious beliefs, holding that “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”<sup>67</sup> However, *Smith*’s impact on organizational claims, and in particular those which rely on the church autonomy doctrine, has been less clear.<sup>68</sup> Courts that have had to consider the matter of a constitutional protection have generally found that the church autonomy doctrine survives *Smith*.<sup>69</sup> As one court stated:

These courts reason that, unlike *Smith*, the ministerial exception addresses the rights of the church, not the rights of individuals. In addition, the ministerial exception cases rely on a long line of Supreme Court cases affirming the church autonomy doctrine, which protects the fundamental right of churches to decide for themselves matters of church government, faith, and doctrine. These cases’ rationale extends beyond the specific ministerial exception to the church autonomy doctrine generally, and we therefore find that the church autonomy doctrine remains viable after *Smith*.<sup>70</sup>

The Supreme Court has yet to take up the matter. Part III returns to this question, but for now it is worth noting that if *Smith*’s holding applies to religious organizations, then it is possible that those organizations will be unable to appeal to their traditional protections under the church autonomy doctrine and will have to rely on the right of expressive associations to protect their internal membership decisions. However, even if the church autonomy doctrine survives *Smith*, religious organizations may still find that *FAIR* impacts their autonomy. The equity that had been achieved between

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<sup>66</sup> *Employment Div. v. Smith*, 494 U.S. 872, 872 (1990).

<sup>67</sup> *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)).

<sup>68</sup> See GREENAWALT, *supra* note 44, at 291 (“After *Employment Division v. Smith*, it is doubtful whether the federal Free Exercise Clause will be interpreted to [allow religious groups to defend against tort claims by members].”).

<sup>69</sup> See, e.g., *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006); *Bryce v. Episcopal Church*, 289 F.3d 648 (10th Cir. 2002); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795 (4th Cir. 2000); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1303–04 (11th Cir. 2000) (“[T]he Court’s rejection in *Smith* of the compelling interest test does not affect the continuing vitality of the ministerial exception.”); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 349–50 (5th Cir. 1999) (concluding the same); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462–63 (D.C. Cir. 1996) (same). *But see Catholic Charities of the Diocese of Albany v. Serio*, 808 N.Y.S.2d 447, 453, 454–55 (N.Y. App. Div. 2006) (finding *Smith* applicable to an organization’s religious claim); *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 796 N.E.2d 286 (Ind. 2003) (same); *Newport Church of Nazarene v. Hensley*, 56 P.3d 386, 392–93 (Or. 2002) (same).

<sup>70</sup> *Bryce*, 289 F.3d at 656–67.

the doctrines of expressive association and religious association may signal that the two doctrines are to be kept on equal footing.

## 2. *Continuing Parity Between Expressive and Religious Associations?*

The doctrines of expressive association and church autonomy were remarkably similar prior to *FAIR*.<sup>71</sup> It is thus unclear whether *FAIR* applies only to the secular half of the autonomy equation, reinstating the gap between protections for secular and religious organizations, or whether the parity survives *FAIR* and the case signals a general retreat across the board.

In *Jaycees*, the Court specifically pointed to the protections afforded to religious groups when constructing its notion of expressive associations.<sup>72</sup> Indeed, the Court pointed to the protection of the First Amendment in its entirety, further implicating the notion that the doctrine derives as much from the Free Exercise Clause as the Free Speech Clause.<sup>73</sup> The Court's language thus opened up the possibility that it was incorporating protections for religious organizations under the rubric of expressive associations. If such incorporation indeed occurred, then any ruling that impacts expressive association would automatically affect the autonomy of religious organizations.

While the Court has not explicitly subsumed religious autonomy protections under the expressive association doctrine of *Jaycees*,<sup>74</sup> it is possible the doctrines will remain equal in their effect. The general parity of free speech rights and free exercise rights has been widely noted,<sup>75</sup> and scholars have argued that the Constitution requires such parity, lest the Government favor or disfavor religion.<sup>76</sup> The Court has similarly noted strong parallels between the two rights. Justice Kennedy stated that "[t]he Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment."<sup>77</sup> Recall Justice Scalia's parallel of free speech and free exercise rights in *Smith*: "It is no

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<sup>71</sup> See *supra* Part I.C.

<sup>72</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-29 (1984).

<sup>73</sup> *Id.* at 618.

<sup>74</sup> For an argument that church autonomy can be derived from associational rights, see Christopher Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1275-77, 1311-14 (1994) (arguing that the church autonomy is protected as a right of intimate association); Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 84-91 (2001) (finding that the right of expressive association provides the constitutional basis for religious group autonomy).

<sup>75</sup> See, e.g., Tushnet, *supra* note 74, at 84-91.

<sup>76</sup> See, e.g., Lisa Schultz Bressman, *Accommodation and Equal Liberty*, WM. & MARY L. REV. 1007, 1044-45 (2001); Frederick Mark Gedicks, *An Uniform Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555 (1998); Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 23-24 (1979).

<sup>77</sup> *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

more appropriate for judges to determine the ‘centrality’ of religious beliefs . . . than it would be for them to determine the ‘importance’ of ideas.”<sup>78</sup> Given such parity, it would be enigmatic for two particular doctrines arising from these nearly equal clauses, regarding nearly equal claims and facts, to diverge in their legal application.

*FAIR* could impact the rights of religious organizations either because (1) *Employment Division v. Smith* ended religious organizations’ unique associational rights, leaving only the protections for expressive associations and any limitation to them, upon which all other organizations must rely, or (2) religious organizations’ associational rights under the religious freedom clauses may be identical to the rights afforded other groups under the Free Speech Clause. Either of these possibilities would make religious organizations subject to the Court’s decision in *FAIR*.

### III. A *FAIR* APPLICATION TO RELIGIOUS ORGANIZATIONS

Given the possibilities outlined above, it is highly likely that courts will not insulate religious organizations from the effects of *Rumsfeld v. FAIR*. The remainder of this Essay argues that courts should apply *FAIR* equally to religious organizations and secular organizations. Part III.A argues that lower courts have underestimated *Smith*’s impact on religious associations and that *Smith*’s holding eliminated the church autonomy doctrine. Part III.B argues that even if the church autonomy doctrine survives *Smith*, the policy justifications for *FAIR* apply equally to church autonomy and expressive associations. Lastly, Part III.C notes that *FAIR*’s alteration of the associational rights landscape does not eliminate the associational protections of religious organizations, but nonetheless signals that courts will enforce a limit to them.

#### A. *Smith*’s Application to the Church Autonomy Doctrine

Lower courts have been hesitant to apply *Smith*’s holding to the protections previously afforded religious organizations.<sup>79</sup> This hesitation has preserved the church autonomy doctrine. However, besides a general unease with the holding of *Smith*, courts have failed to put forth a valid justification for why they should not apply *Smith* to religious organizations and to the church autonomy doctrine.

These courts have principally relied on three justifications for limiting *Smith*: (1) *Smith* is aimed only at individual religious practices, not at groups;<sup>80</sup> (2) the church autonomy doctrine does not present the dangers that

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<sup>78</sup> *Employment Div. v. Smith*, 494 U.S. 872, 886–87 (1990).

<sup>79</sup> See *supra* Part II.B.1.

<sup>80</sup> See, e.g., *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996). While arguing that two separate interests are involved, courts have not gone so far as to argue that the

were of concern in *Smith*;<sup>81</sup> and (3) the “long line of Supreme Court cases that affirm the fundamental right of churches to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”<sup>82</sup> However reluctant courts have been to apply *Smith*’s holding to religious organizations, it is clear that there is little reason for refusing to do so.

First, it would be paradoxical for an individual to have no free exercise claim while holding that a group of individuals have such a claim.<sup>83</sup> Such a distinction would force courts to draw arbitrary lines in an attempt to determine just how many people make a “church,” and only then to grant exceptions under the Free Exercise Clause. It would also likely result in an easy loophole to *Smith*’s holding on essentially the same facts. If the Native American Church were the plaintiff instead of the individual users, it is difficult to believe that the Court would have reached a different holding.

Second, allowing such an exception regime would lead to the very problem *Smith* sought to avoid: allowing one “to become a law unto himself.”<sup>84</sup> There is little reason to assume that individual exemptions would be particularly less worrisome than group exemptions.<sup>85</sup> Both would result in an unmanageable variety of exclusions.

Third, the last concern courts have raised appears to be no more than a general disagreement with the holding of *Smith*. While precedent supports the church autonomy doctrine, precedent also supported a compelling interest test for individual free exercise claims.<sup>86</sup> Just as Justice Scalia found that cases which supported individual free exercise claims were really based on more general principles, the church autonomy doctrine itself can be supported by a more general principle: the doctrine of expressive association.

### B. Parity of Religious and Expressive Associations

If the Court ultimately finds that the church autonomy doctrine survives *Smith*, the same limits should apply to that doctrine as apply to the doctrine of expressive associations.

First, there is little reason to believe that religious organizations require greater protection than secular organizations. A major justification behind the church autonomy doctrine was the desire to keep a court from deciding religious questions. Yet this reasoning is equally applicable to secular orga-

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church autonomy doctrine extends from the Establishment Clause, and thus would survive *Smith*, as that case applied only to the Free Exercise Clause.

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

<sup>82</sup> *Id.* (internal quotation omitted).

<sup>83</sup> See Corbin, *supra* note 12, at 1990–97 (criticizing attempts to distinguish *Smith* on the ground that it applies to individuals and not to organizations).

<sup>84</sup> *Catholic Univ. of Am.*, 83 F.3d at 462 (quoting *Smith*, 494 U.S. at 885).

<sup>85</sup> Corbin, *supra* note 12, at 1989 (noting that “[a]s with individual exemptions, allowing a religious institution complete freedom in its internal affairs permits it to become a law unto itself.”).

<sup>86</sup> See *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

nizations, which should be free from judgments of whether their views are right, wrong, or even coherent.<sup>87</sup> If the rationale for expressive associations justifies all of the protections afforded under the church autonomy doctrine, then the limits of those justifications should apply equally to both doctrines.<sup>88</sup>

Scholars have pointed to the text of the First Amendment to ground a difference in treatment, eschewing a functionalist attempt to explain why greater protections are necessary.<sup>89</sup> They argue that failing to provide additional protections under the Free Exercise Clause makes the clause redundant and subsumes the right under a general right to free speech. Yet, we already accept this result in a number of other constitutional areas. As Justice Thomas has pointed out, the current interpretation of the Commerce Clause provides the basis for many of the powers listed in Article I, making those more specific clauses redundant.<sup>90</sup> This reading of the Constitution has been recognized as “seriously flawed,” and has not been adopted by the Court.<sup>91</sup> In fact, the First Amendment includes a similar subsumed term, the freedom of the press, which grants no rights greater than the freedom of speech.<sup>92</sup>

Second, attempts to distinguish between which groups are religious and which are secular raise their own constitutional concerns. “[R]equiring the Government to distinguish between ‘secular’ and ‘religious’ benefits or services . . . may be ‘fraught with the sort of entanglement that the Constitution

<sup>87</sup> This concern is reflected in the expressive association doctrine’s high level of deference to organization’s determination of their viewpoints. See *supra* notes 38–40 and accompanying text.

<sup>88</sup> Similarly, equality concerns lead some to argue for expanding expressive association protections. See, e.g., Kathleen Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633, 1706 (2004) (“The proper response to this concern [of equality between religious and secular institutions] is not to diminish protections for religious organizations but to expand them for secular associations that play similar roles in the lives of individuals and the larger community.”).

<sup>89</sup> See Kent Greenawalt, *Freedom of Association and Religious Association*, in FREEDOM OF ASSOCIATION 109, 122 (Amy Gutmann ed., 1998); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 314 (1996) (“[T]he Constitution does give special protection to liberty in the domain of religion . . . .”); Douglas Laycock, *Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 16; Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 GEO. WASH. L. REV. 685, 717 (1992). But see Tushnet, *supra* note 74, at 94 (arguing that the Free Exercise Clause may be redundant with the Free Speech Clause under contemporary First Amendment doctrine and may therefore provide no special protection for religion).

<sup>90</sup> See *United States v. Lopez*, 514 U.S. 549, 588–89 (1995) (Thomas, J., concurring) (“[I]f Congress could regulate matters that substantially affect interstate commerce, . . . much if not all of Art. I, § 8 . . . would be surplusage . . . .”).

<sup>91</sup> Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court’s Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2228 (1996).

<sup>92</sup> See *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (“The Constitution does not, however, require government to accord to the press special access to information not shared by members of the public generally.”). Such repetition is perhaps unsurprising when one is reading the Bill of Rights. The Founding Fathers did not possess the Court precedent we have now, and so could not be sure that the government would interpret free speech to include religious speech, or that free speech would be interpreted broadly to include beliefs or expressive conduct. Reiteration in such a case is desirable.

forbids.’”<sup>93</sup> Even Douglas Laycock, the author responsible for popularizing the concept of church autonomy, recognized that failure to offer equal protections for secular associations could present constitutional problems.<sup>94</sup>

Although religious organizations deserve associational autonomy, it is not clear that the church autonomy doctrine would or should provide any defense against the issues in *FAIR*. As the next Part discusses, post-*FAIR*, religious organizations will still receive associational protections, but courts now enjoy greater power to define those protections.

### C. *FAIR's Implications for Religious Associations*

This Essay argues that *FAIR* has limited the doctrine of expressive association outlined in *Dale*, and that, as a result of *Smith*, religious organizations must now rely on the expressive association doctrine. Yet this does not mean that religious organizations are unprotected. While *FAIR* has limited the doctrine of expressive association that *Dale's* broad language espoused, it has not eviscerated the concept, and the doctrine remains very similar to the church autonomy doctrine. Nevertheless, *FAIR* demonstrates that the decision of the appropriate level of interference is now squarely with the courts.

Lastly, the extent of this limit may depend largely on whether the Court is willing to return to language in *Jaycees* that prohibited a group from assuming that the views of those it sought to exclude were necessarily adverse to the group. A church that believes in the divinity of Jesus or that homosexuality is a sin would have good grounds to keep out someone who denies such beliefs. However, it may not be able to assume an individual's belief based on physical traits, race, nationality, or sexual preference.

When a court decides whether an association significantly interferes with a group's expression, it must decide rationally, even if the group's beliefs are not rational. A group may truly believe that discrimination is good, and their right to express that viewpoint must be protected. The court must also protect the organization from associations that would impair its ability to express that view. But the court need not, and cannot, adopt irrational presumptions in determining whether there is interference. Unless discrimination is actually necessary to protect the group's ability to express itself, the court must uphold any law that prohibits discrimination. The right of an organization to believe that discrimination is good does not include a right to discriminate.

This last point is only a possibility, but it *is* possible under *FAIR*. While religious organizations will continue to enjoy the protections traditionally afforded under the church autonomy doctrine, the limits of those protections

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<sup>93</sup> *Hernandez v. C.I.R.*, 490 U.S. 680, 697 (1989) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971)).

<sup>94</sup> See Laycock, *Towards a General Theory*, *supra* note 15, at 14–15.

are not an autonomous decision for the association: they are a decision for the courts.

#### CONCLUSION

*FAIR* surely signals a move by the Court away from the strong protections afforded to all expressive associational organizations under *Dale*. Given *Smith*'s holding, the rationale of *FAIR*, and the constitutional problems in distinguishing between religious speech and other speech, courts should read *FAIR* as applying to all organizations, secular and religious. *FAIR* is not an end to associational protections for religious groups, but it should mean a fair application of the Constitution to both secular and religious groups, and to those they seek to exclude.

