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# Fully And Barely Clothed: Case Studies in Gender and Religious Employment Discrimination in the Wake of *Citizens United* and *Hobby Lobby*

Suneal Bedi\*

*In 2010, the Supreme Court handed down its decision in Citizens United v. Federal Election Commission. The Court held that for-profit corporations could receive First Amendment protection for political speech. Then, in 2014, the Court held in Burwell v. Hobby Lobby that closely held for-profit corporations could be considered persons under the Religious Freedom Restoration Act. These cases have spurred much scholarship focusing on the treatment of corporations as people and citizens. While supporters argue that these cases are consistent with corporate and First Amendment law, critics argue that the implications of these decisions could be perverse.*

*This article contributes to the critical scholarship by arguing that these two cases might lead to unexplored perverse outcomes. In particular, it argues that corporations may be designated as expressive associations under these newly minted First Amendment protections. If they are expressive associations, then for-profit corporations could discriminate against certain employees who disagree with the corporations' speech. The freedom of association jurisprudence allows expressive organizations to exclude people from membership if those people frustrate the organizations' protected First Amendment activities. Drawing upon this doctrine and using Hooters and Abercrombie & Fitch as case studies, I argue that designating for-profit companies as expressive associations could give these companies a right to exclude certain people from employment because such employees would frustrate corporate speech.*

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## I. INTRODUCTION

Can Hooters really only hire women to be waitresses? Can Abercrombie really not hire Muslim women because wearing a hijab is against their brand vision and “Look Policy”? What about civil rights legislation and employment discrimination? These are all seemingly unresolved questions. Companies can and do discriminate against employees, but only in very specific cases (instances that Hooters and Abercrombie do not qualify for). But is there another argument (outside of employment discrimination) that might give these companies a right to discriminate against men and Muslims?

I argue that in light of the Court’s recent jurisprudence on corporate rights, these corporations can effectively garnish this kind of absolute right to discriminate. Corporations can now be considered expressive associations (associations that are allowed to limit membership in their groups based upon relevant expression). This expressive association right effectively gives corporations a right to choose employees based upon certain speech rights.

In 2010 the Supreme Court handed down its decision in *Citizens United v. Federal Election Commission*.<sup>1</sup> The case held that for-profit corporations could receive First Amendment protection for political speech.<sup>2</sup> Subsequently, legal scholars and philosophers have written extensively on the opinion of the Court and on the implications of the decision.<sup>3</sup> The Court then, in 2014, handed down its decision in *Burwell v. Hobby Lobby*,<sup>4</sup> holding that closely held for-profit corporations could be considered “persons” under the Religious Freedom Restoration Act and, as such, the owners could use the corporate entity to exercise their religion.<sup>5</sup> The *Hobby Lobby* opinion has also spurred a large domain of scholarship focusing on the treatment of corporations as people and as citizens.<sup>6</sup>

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1. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

2. *See generally id.*

3. The domain of scholarship on *Citizens United* is extensive and the following list is not meant to be exhaustive by any means: Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011) (arguing that the Court has created incoherence in campaign finance jurisprudence with its ruling in *Citizens United*); Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999 (2010) (arguing that the Court’s ruling in *Citizens United* departed from the Court’s previous theories of the firm); Amy J. Sepinwall, *Citizens United and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575 (2012) (arguing that corporations are not normative citizens and hence do not need the same level of protected political speech as individuals).

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

5. *See generally id.*

6. We have not seen the full extent of scholarship on this case yet as the case came out recently. However, based upon the existing scholarship, conferences, and working papers discussing *Hobby Lobby*, it is clear that the case has spawned much controversy. Some recent papers include: Alan J.

Legal scholars have articulated support and derision at both *Citizens United* and *Hobby Lobby*. While supporters have argued that the cases are consistent with corporate and First Amendment law (in particular that companies can be established for whatever legal purpose its founders choose), critics have argued that the implications of the decisions could be perverse.<sup>7</sup>

This article contributes to the critical line of scholarship by arguing that these two cases could have problematic implications. But this article differs from previous scholarship by focusing on an implication that has not been explored. It argues that these newly minted First Amendment protections could designate for-profit corporations as expressive associations giving them a protected right to exclude members from their organization. If a corporation can promulgate substantive speech and exercise religion, then it stands to argue that the corporation can exclude people from being a part of the organization because those members disagree with its speech.

Treating corporations as expressive associations provides a problematic new defense that corporations could employ in order to skirt Title VII of the Civil Rights Act of 1964 (“The Act”). The Act outlaws employment decisions by companies (hiring, firing, promotion, and conditions or benefits of employment) based upon any one of several protected categories.<sup>8</sup>

This defense would allow for-profit corporations to exclude certain employees from their companies even though they are in protected classes, because those employees frustrate the companies’ speech. I draw upon two salient companies as examples: Hooters and Abercrombie & Fitch. Hooters is widely known as a restaurant that only hires women to be waitresses and requires them to wear revealing clothing intended to sexualize them. Lately, Hooters has been criticized heavily for these practices. Yet, since they continue to settle out of court, we do not have

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Meese and Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations are RFRA Persons*, 127 HARV. L. REV. F. 273 (2014) (arguing that the holding in *Hobby Lobby* is consistent with the corporate theory of the firm); Frederick M. Gedicks and Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014) (arguing that ruling in favor of *Hobby Lobby* would create a regime where significant costs of healthcare are going to be borne by female employees); Mark Tushnet, *Do For-Profit Corporations Have Rights of Religious Conscience?*, 99 CORNELL L. REV. ONLINE 70 (2013) (arguing that there are several relevant and important factors in determining whether or not for-profit corporations have religious conscience).

7. Compare Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 213 YALE L.J. 266 (2013) (supporting the Court in *Citizens United*), and Meese & Oman, *supra* note 6, (supporting the Court in *Hobby Lobby*), with Joseph F. Morrissey, *A Contractarian Critique of Citizens United*, 15 U. PA. J. CONST. L. 765 (2014) (critiquing *Citizens United*), and Gedicks & Koppelman, *supra* note 6 (critiquing *Hobby Lobby*).

8. 42 U.S.C. § 2000e-2(a), (e)(1) (2000).

insight into how a court would view their discrimination. Abercrombie & Fitch has also frequently violated Title VII. The Supreme Court actually heard a case in its 2015 session concerning Abercrombie's discrimination against a Muslim woman. I attempt in this article to show that recent jurisprudence could potentially give both Hooters and Abercrombie an expressive association defense against these Title VII violations.

The defense would be rooted in a speech right of both Hooters and Abercrombie. Hooters, by arguing that its purpose is to promote a misogynist view of women as servers, could be considered an expressive association. It would then get protection for exclusionary decisions such that it could legally discriminate against employees (men, in particular) that frustrate its expression. By forcing Hooters to hire men, its misogynist speech would be frustrated by Title VII requirements. Abercrombie, via its "Look Policy," could similarly argue that its policy is a type of expression (the ideal body type and style conducive for beauty) giving it the designation of an expressive association. At which point, it would argue that it should be exempt from Title VII regulations that frustrate the intent of the "Look Policy."

The argument draws upon the doctrine and defense of the expressive association. An expressive association defense arises out of the freedom of association jurisprudence.<sup>9</sup> The right effectively allows an organization to "associate for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition . . . and the exercise of religion."<sup>10</sup> Implicit in the expressive association designation is the right to exclude people from your organization if those people do not hold the same First Amendment views as you do (i.e. their presence is at odds with your speech). The Ku Klux Klan ("KKK") is an example of an expressive association. They attempt to promulgate the speech of racial hatred. And on these grounds, because that speech is protected as dissenting political speech, the expressive association defense allows the KKK to reject membership to minorities, as they would frustrate their racial hatred speech.<sup>11</sup>

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9. The freedom of association is an integral part of the First Amendment. The Court first recognized the right in *Patterson*, even though the text of the First Amendment does not explicitly grant the right. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)

10. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). It is important to note at the outset that the rights associated with the First Amendment manifest themselves in many ways (e.g., religion, privacy, political speech). In this paper, however, I am only concerned with the right to exclude that the First Amendment entails. A further discussion of how other rights associated with the First Amendment, generally, and the freedom of association, specifically, might apply to corporations is an interesting area needing further study, but it is beyond the scope of this article. For a discussion of how privacy affects corporate rights in this context see Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27 (2014).

11. *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281,

Historically, however, expressive associations have been non-profit organizations and advocacy groups. Generally, the Court and scholars have not viewed for-profit corporations as expressive associations under the freedom of association jurisprudence.<sup>12</sup> Some scholars have argued that corporations could be seen as expressive associations, but most have concluded that corporations are different in some way and hence, should not be granted the right.

This article proceeds in four parts. Part II provides a background of the freedom of association jurisprudence, in particular a summary of the cases articulating the boundaries of an expressive association. It attempts to show how the Court has effectively used a three-part test to adjudicate exclusionary rights. Part III summarizes the Court's recent jurisprudence on corporate rights (*Citizens United* and *Hobby Lobby*) and uses this to show that the Court has opened the door for a for-profit corporation to be an expressive association (the first prong of the three-part test). Part IV summarizes the current employment discrimination jurisprudence and shows how a company could use an expression association defense to circumvent Title VII legislation (the mechanism for passing parts two and three of the test). Part V applies this paper's argument to show how Hooters and Abercrombie could invoke a problematic corporate expressive association defense in order to justify their employment decisions. Part VI concludes.

This article attempts to show that treating corporations like expressive associations is dangerous and in light of recent cases is something, however, we might have to confront head on very soon. At the end of the day, this article critiques the associative view of incorporation. That owners and founders of corporations should not be allowed to express any speech they choose through corporate forms.<sup>13</sup>

## II. THE FREEDOM OF ASSOCIATION

The freedom of association is an integral right that is part of First Amendment jurisprudence. The Court first recognized the right in *NAACP v. Alabama* even though the text of the First Amendment does not explicitly mention it.<sup>14</sup> The right most basically holds that people may

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289 (D. Md. 1988).

12. See *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring) ("There is only minimal constitutional protection of the freedom of *commercial* association." (italics in original)).

13. See Tushnet, *supra* note 6, for a similar conclusion, i.e., that for-profits are unique in their profit making motive and hence should not be conduits for their founders to express individual speech rights.

14. See generally *Patterson*, 357 U.S. at 449. The case here concerned the NAACP turning over their membership list to the Alabama state legislature in order to fully comply with the state's

assemble in order to collectively express their individual right of free speech (“implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, education, religious, and cultural ends”<sup>15</sup>). Over the course of the past fifty years, the Court has defined the scope of the doctrine and articulated two separate classes of protected associations — intimate associations and expressive associations. The doctrine and the distinctions of what qualifies as each are quite muddled.<sup>16</sup> Nevertheless, providing a brief synopsis of each category will help to inform the mapping of the right onto corporations.

#### A. INTIMATE ASSOCIATION

Intimate association is reserved for personal “intimate human” relationships.”<sup>17</sup> The typical example of intimate association is marriage. Integral to the freedom of speech is the freedom to marry and associate individually with whomever you prefer. The government may not require you to personally associate with people of a certain gender, race, ethnicity or any other protected class.<sup>18</sup>

Although seemingly trivial, this is an important right. The government has the discretion, as I will discuss later, to require companies and clubs to some extent to *not* discriminate against a protected class, and instead to be inclusive with membership and employees. However, the right for an intimate association is thought to be so pure and central to personal liberty that very little government interest, if any at all, would trump it.<sup>19</sup>

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incorporation statute. The Court held that the NAACP need not turn over the list because it violated their First Amendment right to associate in order to promulgate a certain speech (one of equality for African Americans). In particular, the right of privacy was being violated.

15. *Roberts*, 468 U.S. at 623. See also *Patterson*, 357 U.S. at 460; Neal Troum, *Expressive Association and the Right to Exclude: Reading Between the Lines in Boy Scouts of America v. Dale*, 35 CREIGHTON L. REV. 641 (2002).

16. See Randall P. Bezanson et al., *Mapping the Forms of Expressive Association*, 40 PEPP. L. REV. 1, 27 (2013) (attempting to articulate what actually qualifies as an expressive or intimate association). Included in this analysis, as examined in Part III, is a discussion of whether corporations after *Citizens United* will also qualify as expressive associations.

17. *Roberts*, 468 U.S. at 618 (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Neb.*, 262 U.S. 390, 399 (1923)).

18. See generally *Patterson*, 357 U.S. at 449.

19. *Id.*

## B. EXPRESSIVE ASSOCIATION

More important for the rest of this article is the expressive association. The expressive association right is “a right to associate for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition . . . and the exercise of religion.”<sup>20</sup> The Court has articulated two requirements in order to qualify to be an expressive association, an association prong and a speech prong.<sup>21</sup> The association prong simply requires that there be some grouping or coming together of individuals to actually create an organization. This prong is self-explanatory and noncontroversial. The second prong requires that the association participate in some *speech* activity, i.e., activity that is protected by the First Amendment. This prong, however, has caused several problems in interpretation.<sup>22</sup> What does it mean for an association to participate in *speech*? Can the association have as its goal other means in addition to *speech*? The problem occurs at the “definitional level of what an expressive association is and what qualities it must possess to qualify for constitutional protection.”<sup>23</sup> This article’s discussion of how corporations might qualify as expressive associations goes to this exact uncertainty.

But before discussion of how corporations might be seen as expressive associations, it is important to do a brief summary of the current state of the protections that the government offers to these so called expressive associations.<sup>24</sup> At their most basic level, these protections exist to prohibit the government from interfering in the organization’s speech and activities via state or federal legislation. This article only focuses on one means of protection that the Court grants to expressive associations: the right to exclude. An expressive association has a right to exclude those individuals from being members of the organization if those members frustrate the organization’s speech.<sup>25</sup>

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20. *Roberts*, 648 U.S. at 618.

21. *Id.*

22. See generally Bezanson et al., *supra* note 16.

23. *Id.*; see generally Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515 (2001); Daniel A. Farber, *Foreword, Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483 (2001); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353 (2000).

24. See Bezanson et al., *supra* note 16, at 29 (arguing that even the protections which are granted to expressive associations are sometimes hard to decipher).

25. Note that an expressive association might be given further protections that arise from other First Amendment jurisprudence (e.g., right of privacy of its members). This article, however, only focuses on the right to exclude members of an organization because they frustrate an organization’s speech. Although beyond the scope of this paper, an interesting expansion of my argument would be to articulate what other protections corporations might invoke as expressive associations.



The Court's jurisprudence on the exclusionary right of the expression association is limited yet convoluted. In determining whether an organization is justified in limiting its membership, the Court and scholars have at many times conflated the determination of whether an organization is an expressive association and whether its exclusion is justified. A better way to think about the following cases is in a three-part test. The first part should ask whether or not the organization is an expressive association in the first instance. This, albeit difficult, determination goes to the purpose of the organization (i.e., what the founders of the organization had in mind). Generally, if the purpose of the organization is speech activity, then the organization is categorized as an expressive association. It is worth pointing out that the group need not have, as its only purpose, the dissemination of the speech at issue.<sup>26</sup> Only that the group have some speech that it wishes to disseminate. The second part of the test should ask whether or not the content of the organization's speech is articulated clearly (i.e., what is the nature of the speech the organizations partakes in — religious, political, or social). Finally, in the third part of the test, the Court should determine whether or not requiring the organization to open its doors to diverse members frustrates the speech articulated in the second part of the test.

Some scholars, by not recognizing the distinction between frustration and expression have too quickly dismissed certain organizations from being treated as expressive associations.<sup>27</sup> By looking at these cases with this three-part test in mind, it can be argued that designating an organization as an expressive association is easier than some scholars initially thought and, as such, protecting the exclusionary actions of organizations (in particular corporations) quickly becomes problematic.

In *Roberts v. U.S. Jaycees*, the Court overturned the Eighth Circuit Court of Appeals, holding that the Jaycees could not prohibit women from entering into their organization.<sup>28</sup> The Jaycees were a nonprofit organization that had as their objective "to pursue such educational and charitable purposes as will promote and foster the growth and development of young men . . . and [be] an avenue for intelligent participation by young

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26. *Roberts*, 468 U.S. at 655 ("Associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection.").

27. Many scholars think that the Court did not recognize an expressive association right to exclude in the Jaycees case. They argue that it is evidence of the Court rejecting the Jaycees as an expressive association. See, e.g., Bezanson et al., *supra* note 16, at 30–31. I, however, as discussed below, disagree. Using the three-part test and a close reading of the opinion, it is clear that the Court did view the group as an expressive association, but did not think its speech was adequately frustrated by rejecting women.

28. *Roberts*, 468 U.S. at 612.

men in the affairs of their community.”<sup>29</sup> Historically, the Jaycees only allowed young men to be “regular members” but did allow women and older men to be “associate members.” Associate members could not vote, hold local or national office, or participate in certain leadership training and award programs. These activities were reserved for young men.<sup>30</sup> Several women who were associate members brought suit against the Jaycees alleging a violation of the Minnesota Human Rights Act.<sup>31</sup>

In holding that the prohibition against women in the group was a violation of the Minnesota Human Rights Act, we can infer a three-part test. First, the Court determined if the Jaycees were in fact an expressive association.<sup>32</sup> In holding that the Jaycees were indeed an expressive association the Court remarked that an organization must associate to pursue any of a “wide variety of political, social, economic, education, religious, and cultural ends.”<sup>33</sup> The Jaycees are clearly an association that pursues a political or social end (one of young male success). The second test was to determine what was the substance of the Jaycees’s speech. The Court identified the group’s objective to “promote and foster the growth and development of young men’s civic organizations in the U.S. . . . to provide them with the opportunity for personal development . . . and to develop true friendship and understanding among young men” as “speech.”<sup>34</sup> Finally, it asked whether the prohibition of women furthered the speech of the Jaycees. Or, put differently, whether compelling the Jaycees to accept women would frustrate its speech.

The Court found that the group’s speech was not necessarily furthered by excluding women.<sup>35</sup> As Justice Brennan wrote for the Court, “[A] not insubstantial part’ of the Jaycees’s activities constitutes protected expression on political, economic, cultural, and social affairs.”<sup>36</sup> The Court

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29. *Roberts*, 468 U.S. at 612.

30. *Id.* at 612–13.

31. *Id.* at 612 (explaining that the Act prohibited discrimination against women).

32. The Court did attempt to determine if the Jaycees qualified as an intimate association. See *Roberts*, 468 U.S. at 617–18. Although an interesting argument, this is beyond the scope of this article, and in any case, it is quite clear that corporations would not be construed as instruments of intimate associations.

33. *Roberts*, 468 U.S. at 623. Note, however, that Justice O’Connor in her concurring opinion did not think the Jaycees were an expressive association, concluding that such right should not be extended to commercial entities. *Id.* at 633. (O’Connor, J., concurring) (explaining that the requirement “raises the possibility that certain commercial associations, by engaging occasionally in certain kinds of expressive activities, might improperly gain protection for discrimination.”).

34. *Id.* at 627–28.

35. *Id.* at 627 (rejecting the organization’s claim that “admission of women as full voting members [would] impede” the organization’s right to full expressive association by noting that such admission would “[impose] no restrictions on the organization’s ability to exclude individuals with ideologies or philosophies different from those of its existing members”).

36. *Id.* at 626 (quoting *U.S. Jaycees v. McClure*, 709 F.2d 1560, 1570 (8th Cir. 1983)).

found that including women would not “impede the organization’s ability to engage in these protected activities or to disseminate its preferred views.”<sup>37</sup> A group’s beliefs and aims, in short, must somehow be related to its membership criteria.<sup>38</sup> In effect, the Court said that Jaycees could still foster success of young men even if they were required to include women.

Even though the Court ruled against the Jaycees, it did not claim that the Jaycees were not an expressive association. As a matter of fact, the Court recognized that there was speech activity that should be protected. Only that the nature of the protection was not justified.<sup>39</sup>

After *Roberts*, the right to exclude protection for an expressive association was expanded in *Boy Scouts of America v. Dale*.<sup>40</sup> There, the Court held that the freedom of association doctrine exempted the Boy Scout’s discriminatory practices against gays from state regulation.<sup>41</sup> The Boy Scouts of America (“BSA”) historically did not allow gay men to become scoutmasters. They indicated that allowing such men to become scoutmasters was inconsistent with their long and widely held values. The Court agreed with the BSA and held that a regulation requiring the hiring of gay men and straight men equally would frustrate the speech that the BSA promulgated and “affect[] in a significant way the group’s ability to advocate public or private viewpoints.”<sup>42</sup>

We can again analyze the case with the same three-part test. In holding that the BSA was an expressive association, the Court noted that the designation of expressive association is “not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.”<sup>43</sup> The BSA’s mission is to instill “values in young people.”<sup>44</sup> The BSA imparts these values by having its adult leaders spend time with the youth members, instructing and engaging with them in activities including fishing and camping. During this time with the youth members, “the scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts’ values — both expressly

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37. *Roberts*, 468 U.S. at 627.

38. Bezanson et al., *supra* note 16, at 30.

39. *Id.* at 32.

40. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). I discuss the implications and details of this expansion below in the context of corporations as expressive associations.

41. *See id.* at 655.

42. *Id.* at 648.

43. *Id.* This an important point that the Court makes. It opens the door to organizations (and maybe corporations as I argue below) claiming to be expressive associations even though their primary objective might not be promulgation of speech. From the Court’s discussion in *Dale*, it seems that simply some message or some speech is sufficient to fail within the purview of an expressive association.

44. *Id.* at 649.

and by example.”<sup>45</sup> It was thus clear to the Court that the BSA was an expressive association. In order to determine the substance of the BSA’s speech, the Court looked to its mission, the BSA case briefs and interviews with high-level scoutmasters. The Court focused particularly on the Scout Oath and Law values of living life “morally straight” and “clean.”<sup>46</sup> It determined, while giving much deference to the BSA’s own assertion of the meaning of these terms, that the BSA “teach[es] that homosexual conduct is not morally straight,” and that it does “not want to promote homosexual conduct as a legitimate form of behavior.”<sup>47</sup>

Having determined the BSA’s speech was one of anti-gay sentiments, the Court went on to determine if allowing a gay scoutmaster would subvert the speech. Here, the Court looked to the facts of the case. Dale was an openly gay scoutmaster and an open advocate for the gay movement. The Court held that as such, his presence was “forc[ing] the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conducts as a legitimate form of behavior.”<sup>48</sup> Effectively, requiring the BSA to employ an openly gay scoutmaster like Dale would subvert the mission and speech of the expressive association. Therefore, the right to exclude was protected.

Later, the Court made a distinction in *Rumsfeld v. Forum of Academic and Institutional Rights, Inc.*<sup>49</sup> between excluded members being a part of the group in a fundamental way and those members simply interacting with the group as an “outsider.”<sup>50</sup> *Rumsfeld* contemplated military recruitment on law school campuses. Law schools attempted to restrict recruiters from interviewing on campus as the military was, at the time, an institution that discriminated against gays (the Don’t Ask Don’t Tell Policy).<sup>51</sup> Congress then passed the Solomon Amendment that restricted a school from getting federal funds if they did not allow military recruitment on campus.<sup>52</sup>

The Court did recognize that schools could legally argue the expressive association exemption even though they were not what we typically think of as voluntary expressive associations, but rather universities.<sup>53</sup> The schools’ speech then was to protest the exclusion of

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45. *Dale*, 530 U.S. 649–50.

46. *Id.* at 650.

47. *Id.* at 651. The Court looked to a 1978 position statement signed by Downing B. Jenks and Harvey L. Price (then President and Chief Scout Executive respectively) to determine the BSA’s viewpoint on homosexuality. Based upon this statement and another 1991 position statement, the Court determined that homosexuality was at odds with the mission and speech activity of the BSA.

48. *Id.* at 653.

49. *Rumsfeld v. Forum for Acad. and Inst’l Rights, Inc.*, 547 U.S. 47, 49 (2006).

50. See generally Sonu Bedi, *Expressive Exclusion: A Defense*, 7 J. MORAL PHIL. 427, 431 (2010).

51. See generally *Rumsfeld*, 547 U.S. at 47.

52. *Id.* at 52.

53. Bedi, *supra* note 50, at 431.

gays in the military. The Court ruled, however, that unlike in *Dale*, the military was not asking to become an insider in the university, or a member of the university. Rather the military was simply asking permission to be on campus and “associate” loosely with the school.<sup>54</sup> As such, the Court ruled that the Solomon Amendment was constitutional as applied to the schools. The Court here implicitly said that the schools’ speech would not be harmed or frustrated by allowing the military recruiters.

From the above survey of the Court’s recent jurisprudence, it is clear that the speech that is generally at issue is the type of speech that we as a society might find problematic.<sup>55</sup> Speech advocating the exclusion of women, the exclusion of gays and the exclusion of non-Catholics are all types of “dissenting speech.”<sup>56</sup> In order to receive exclusion protection, this dissenting speech must also be subverted by relevant state or federal regulation (Alabama corporate law, Minnesota Human Rights, Title VII).<sup>57</sup> Finally, the speech must be “public.” It is not enough that the Jaycees or the Boy Scouts exclude women and gays in their living room.<sup>58</sup>

Ultimately, the following characterization of the protected expressive association exclusion nicely summarizes its scope and purpose:

[E]xpressive exclusion creates space for democratic dissent — space that serves as a genuine counter to the majority’s decision. Such exclusion requires there to be an association, that a group of individuals share a message. The association must also proffer a public message — one that is heard by all; one that is in the “public” sphere. Expressive exclusion generates genuine room for dissent allowing a group to question, to doubt, to push up against an otherwise valid norm by excluding individuals.<sup>59</sup>

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54. *Rumsfeld*, 547 U.S. at 69.

55. In order for the right to be implicated in the first instance, there must be some government regulation that seeks to prohibit the discrimination: presumably because the discrimination is not widely socially accepted.

56. See Bedi, *supra* note 50, at 432; see also *Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (finding that the Mormon church’s firing of a non-Mormon janitor over religious reasons was protected by exemption under the Civil Rights Act because government intervention would interfere with the religious mission of the Mormon church); NANCY ROSENBLUM, OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES 171 (2000).

57. Bedi, *supra* note 50, at 438.

58. This would fall under the intimate association prong and hence would not even come under the state’s regulation generally. Each of the state regulations in *Roberts*, *Dale*, and *Rumsfeld* were concerned with organizations that present themselves to the public. The state does not purport to regulate “private” or individual discriminatory behavior. See generally Bedi, *supra* note 50; see also Stuart White, *Freedom of Association and the Right to Exclude*, 5 J. POL. PHIL. 373–91 (1997).

59. Bedi, *supra* note 50, at 438.

This article argues below that this characterization of expressive associations might include for-profit corporations in the wake of expanding First Amendment protection to such corporations.<sup>60</sup>

### III. CORPORATIONS AS EXPRESSIVE ASSOCIATIONS

The above discussion sets the stage for what kinds of associative speech the Court protects even in face of clear discrimination. This section will discuss the potential for “for-profit” corporations to be viewed as expressive associations.

Corporations might now meet the first prong of the test as described above. That is to say that expanding First Amendment protections for corporations makes it more likely that they will be seen as partaking in protected speech.

This section will first describe and analyze the expanded First Amendment protections of the recent cases *Citizen’s United* and *Hobby Lobby*. If corporations have protected political speech and can exercise religion for very specific purposes, then it stands to say that they may be considered expressive associations giving them the right to exclude members who frustrate their speech. It will conclude with a detailed discussion and argument for how a for-profit corporation can be viewed as an expressive association.

#### A. *CITIZENS UNITED*

*Citizens United v. Federal Election Commission* was a landmark Supreme Court case that in a basic sense, expanded the First Amendment political speech right for corporations, unions, and nonprofits.<sup>61</sup>

Citizens United was a conservative nonprofit lobby group who wanted to broadcast and air a film that was critical of Hilary Clinton. It wanted to do this thirty days before the 2008 Democratic primaries where Hilary Clinton along with Barack Obama were the frontrunners for the presidential nomination. Citizens United, however, was limited by section 203 of the Bipartisan Campaign Reform Act. The Act prohibited corporations and unions from making any “contribution or expenditure” on any “electioneering communications”<sup>62</sup> within thirty days before a primary

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60. Note that we will have to determine whether the company promulgates any speech, and what that speech is before we can begin to determine what exemptions, if any, corporations should receive. This will be further explored in Part IV below.

61. *Citizens United*, 558 U.S. at 310.

62. Defined as broadcast, cable, or satellite communication which refers to a clearly identified candidate for federal office. 52 U.S.C. § 30104(f)(3)(A)(i) (2015) (formerly 42 U.S.C. § 434).

or sixty days before a general election.<sup>63</sup> The intent of the statute was to prevent large corporations and very rich companies from unfairly influencing elections.<sup>64</sup>

The film “*Hilary: The Movie*”<sup>65</sup> was deemed an “electioneering communication” and hence the United States District Court for the District of Columbia held that the statute applied to restrict Citizens United from attempting to broadcast the movie.<sup>66</sup> Citizens United, however, thought that they had precedent to broadcast the movie. Previously, they had brought two separate complaints to the FEC for another political movie made by Michael Moore, “*Fahrenheit 911*.” Both of these complaints were dismissed: one because the time frame of Moore’s movie fell outside the thirty/sixty day limit and the other because the movie was seen as commercial activity as opposed to campaign expenditures.<sup>67</sup> Given the Moore movie, Citizens United thought they would be able to advertise their movie. However, the District Court ruled that the advertisement of the movie did not fall outside the thirty/sixty day limit and, as such, was banned by the Bipartisan Campaign Reform Act.<sup>68</sup>

Citizens United appealed the lower court decision to the Supreme Court and sought injunctive relief against the FEC. The Court held that the Bipartisan Campaign Reform Act as applied to corporations was unconstitutional and abridged the fundamental right of free speech codified in the First Amendment.<sup>69</sup> Justice Kennedy’s majority opinion proceeded in three parts. First, he articulated the fundamental importance of the First Amendment and that political contributions were clearly a class of protected speech.<sup>70</sup> Second, he articulated that “electioneering communications” were political speech and hence were protected under the First Amendment.<sup>71</sup> Third (and probably most controversial), the opinion

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63. See 52 U.S.C. § 30118(a), (c)(1) (2015) (formerly 42 U.S.C. § 441b); see also 52 U.S.C. § 30104(f) (2015).

64. For a fuller discussion of the purposes of the statute, see Frank J. Favia, Jr., *Enforcing the Goals of the Bipartisan Campaign Reform Act: Silencing Nonprofit Groups and Stealth PACS in Federal Elections*, 5 U. ILL. L. REV. 1081 (2006).

65. See *Hilary The Movie: About the Film*, (2008), <http://www.hillarythemovie.com/about.html> (describing the film and its contents).

66. See *Citizens United v. Fed. Election Comm'n*, 530 F. Supp. 2d 274, 275 (D.D.C. 2008), *aff'd in part and rev'd in part*, 558 U.S. 310 (2010).

67. See Bradley A. Smith & Michael E. Toner, *Fed. Election Comm'n*, MUR 507, Moore et al., (determining the movie fell within the thirty/sixty time limit of the statute) (2004); First Gen. Counsel’s Rep., Lawrence H. Norton et al., *Fed. Election Comm'n*, MURs 5474 and 5539, Clausnitzer et al., (concluding the film and its trailers “represent bona fide commercial activity, which the commission has previously declined to regulate”) (2005).

68. *Citizens United*, 530 F. Supp. 2d at 282.

69. *Citizens United*, 558 U.S. at 365–66.

70. *Id.*

71. *Id.*

argued that individuals and associations of individuals had always received First Amendment protection and that corporations were nothing more than associations of individuals.<sup>72</sup> Therefore, corporations must be given First Amendment protection for political speech including the right to make expenditures for “electioneering communications.”

Kennedy first articulated the fundamental importance of the First Amendment. Particularly, that the importance of being able to provide dissenting political opinions was at the basis of free speech. He remarked “speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”<sup>73</sup> The doctrine was, in its first form, geared to make sure that citizens could criticize their leaders and the state in order to foster a fully democratic state.<sup>74</sup>

Justice Kennedy then made clear that the speech at issue was political speech as opposed to lower valued neutral reporting.<sup>75</sup> He argued that “in light of historical footage, interviews with persons critical of her, and voiceover narration, the film would be understood by most viewers as an extended criticism of Senator Clinton’s character and her fitness for the office of the Presidency.”<sup>76</sup> As such, this was meant to be a critique of Clinton and hence was dissenting political speech.<sup>77</sup> Since this speech was political in nature, the Court must view the regulation and restriction with strict scrutiny: i.e. the government must prove that the regulation “furthers a compelling interest and is narrowly tailored to achieve that interest.”<sup>78</sup>

Justice Kennedy’s final argument drew upon how First Amendment protections should apply even to corporate entities, so that they can effectively participate in the political process.<sup>79</sup> He argued initially that the Political Action Committee (“PAC”) form of association was not a sufficient means of speech for corporations. Corporations can create PACs in order to contribute to the political process, but these PACs are distinct from the corporations. Further, they “are burdensome alternatives; they are

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72. *Citizens United*, 558 U.S. at 365–66.

73. *Id.* at 339.

74. *Id.* (“The First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” (quoting *Eu v. San Francisco Cty Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)); see generally RONALD J. COLOMBO, *THE FIRST AMENDMENT AND THE BUSINESS CORPORATION* (2014).

75. *Citizens United*, 558 U.S. at 326–29.

76. *Id.* at 325.

77. *Id.* at 325–26 (quoting several aspects of the movie to show it was clearly meant as a mode of dissent and to build fervor and turn votes against Clinton).

78. *Id.* at 340.

79. *Id.* at 314–15 (holding the Bipartisan Campaign Reform Act unconstitutional as applied to both for-profit and nonprofit corporations). Even though *Citizens United* was a nonprofit, the Court explicitly held that the Bipartisan Campaign Reform Act was unconstitutional as to all companies, even for-profit corporations.



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expensive to administer and subject to extensive regulations.”<sup>80</sup> As such, the prohibition of “corporate independent expenditures is thus a ban on speech.”<sup>81</sup>

Justice Kennedy then went on to note that corporations have always been given the freedom of speech and First Amendment protection has “been extended by explicit holdings to the context of political speech.”<sup>82</sup> Most importantly for him was that the source of the speech cannot by itself rationalize a proscription on the speech. Effectively, Justice Kennedy argued that it was just as important to protect corporate speech as it was to protect individual speech, even though corporations were not “natural persons.”<sup>83</sup> He remarked “political speech does not lose First Amendment protection ‘simply because its source is a corporation.’”<sup>84</sup>

In finding that corporate political speech should be protected, the Court overturned its holding in *Austin v. Michigan Chamber of Commerce*.<sup>85</sup> In *Austin*, the Court upheld a Michigan prohibition on independent corporate expenditures “that supported or opposed any candidate for state office.”<sup>86</sup> In that case, the Court found persuasive the possibility of corporations artificially swaying public opinion by the amount of expenditures that they were able to use. Specifically, the Court in *Austin* was sensitive to “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>87</sup> In *Citizens United*, Justice Kennedy criticized the holding in *Austin* by arguing that setting a precedent that allowed the government to restrict corporate speech would effectively render corporate speech useless.

Kennedy saw *Austin* as a check on the political power of a corporation — that allowing corporations to speak would give them an unfair advantage in the political process. But he contrasted this rationale of anti-distortion by showing that the Court had previously “rejected the premise that the Government has an interest ‘in equalizing the relative ability of

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80. *Citizens United*, 558 U.S. at 339 (arguing that PAC restrictions make corporate political speech inefficient because “a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues”).

81. *Id.*

82. *Id.* at 342.

83. *Id.* at 343.

84. *Id.* at 342 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)).

85. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1989).

86. *Citizens United*, 558 U.S. at 347 (discussing the Michigan law in *Austin*).

87. *Austin*, 494 U.S. at 660.

individuals and groups to influence the outcome of elections.”<sup>88</sup> Allowing corporations to take part in the political process would not constitute a risk of corruption.<sup>89</sup> Finally, in concluding its argument, the Court made clear that some people would appreciate the movie’s dissenting speech and that the First Amendment gives people and corporations the freedom to innovate and use new types of media and communication in order to disseminate their speech. Justice Kennedy’s concluding remarks state: “Citizens [United] must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it.”<sup>90</sup>

### B. HOBBY LOBBY

After extending the right of political speech to for-profit corporations, the Court contemplated whether or not the owner’s of a for-profit corporation could exercise religion under the Religious Freedom Restoration Act (“RFRA”) through a corporate entity. In *Burwell v. Hobby Lobby*,<sup>91</sup> the Court ruled in the affirmative and held that as a closely-held corporation, Hobby Lobby, did exercise religion as to exempt itself from the federal contraception requirement.

Hobby Lobby was founded by the Green family. What started as a small arts-and-crafts store grew to a nationwide chain that employed over 13,000 employees and operated 500 brick-and-mortar stores.<sup>92</sup> The Greens were very religious and wanted to run their company with a Christian framework in mind. Hobby Lobby’s mission statement includes “honoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.”<sup>93</sup> Hobby Lobby intended to “operate in a professional environment founded upon the highest ethical, moral, and

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88. *Citizens United*, 558 U.S. at 349 (citing *Buckley v. Valeo*, 424 U.S. 1, 48 (1976)). Kennedy also made his dissatisfaction with *Austin* clear by arguing that *Austin* went against both the founders’ notion of free speech and the “open marketplace of ideas.” *Id.* at 353–54.

89. *Id.* at 350. Note that the dissent (and the majority opinion for that matter) spends a large amount of time arguing that giving expenditure rights to corporations would create corruption. See generally Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance after Citizens United*, 20 CORNELL J.L. & PUB. POL’Y 643 (2011). This discussion however is not relevant to corporate employment discrimination. The risk of political speech swaying opinion is of greater significance than any discrimination speech. As such, this article does not attempt to summarize or argue the merits of the corruption or swaying of public opinion arguments.

90. *Citizens United*, 558 U.S. at 372 (internal quotation marks and citation omitted).

91. *Hobby Lobby*, 134 S. Ct. at 2751.

92. *Id.* at 2765. Another closely held company, Conestoga, was also at issue in the case. Since the rationale of the decision applied exactly the same to both Hobby Lobby and Conestoga, I will only discuss Hobby Lobby here. But it should be noted that the Court applied the same analysis to Conestoga to hold that it also exercised religion.

93. *Id.* at 2770 n. 23.

Christian principles.”<sup>94</sup> Furthermore, the Court noted that each family member had signed an agreement as to run the business in “accordance with the family’s religious beliefs.”<sup>95</sup>

Hobby Lobby took issue with a portion of the Department of Health and Human Services (“HHS”) mandate to provide a health policy that includes contraception to their employees.<sup>96</sup> According to Hobby Lobby, contraception goes against strict Christian principles. As such, the company wanted an exemption from having to supply contraception. The HHS did indeed have a religious exemption from its regulations under the Patient Protection and Affordable Care Act of 2010. It held that an organization could be exempted from providing contraception if it were a nonprofit organization that “holds itself out as a religious organization and opposes providing coverage for some or all of any contraceptive services required to be covered . . . on account of religious objections.”<sup>97</sup> Hobby Lobby, however, was a for-profit corporation and hence did not fit into this exemption.

Instead, Hobby Lobby argued it fit in another exemption passed by Congress, specifically the RFRA. The RFRA exemption states that a government’s regulation must receive strict scrutiny if the regulation “substantially burden[s] a person’s exercise of religion.”<sup>98</sup> Hobby Lobby argued that it was a “person” under the statute and hence was a protected organization under the RFRA and that it effectively could and did exercise its religion. If this were the case, then this would give Hobby Lobby an exemption to the HHS mandate. Hobby Lobby simply would have to show that its religion (Christianity) did not allow the use of contraception (something relatively easy to show). Then, requiring Hobby Lobby to provide contraception insurance would effectively be substantially burdening the exercise of its religion.

The Court agreed with Hobby Lobby in holding that they were protected “persons” under RFRA. In its most bold statement, the majority argued that protecting the “free-exercise rights of corporations like Hobby Lobby . . . protects the religious liberty of the humans who own and control these companies.”<sup>99</sup> In doing this, the Court departed from the widely held notion that people incorporate so as to distance a company’s actions away from the individual shareholders.<sup>100</sup>

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94. *Hobby Lobby*, 134 S. Ct. at 2764.

95. *Id.* at 2766.

96. *Id.* at 2759 (holding that HHS’s regulation was an interpretation of the Patient Protection and Affordable Care Act of 2010).

97. *Id.* at 2763 (quoting 45 CFR § 147.131(b)).

98. *Id.* at 2767 (quoting 42 U.S.C § 2000bb-1(a)).

99. *Id.* at 2768.

100. *See Hobby Lobby*, 134 S. Ct. at 2797 (Ginsburg, J., dissenting).

The dissent argued that this view of for-profit corporations is more akin to a nonprofit organization, because furthering “their religious autonomy . . . often furthers individual religious freedom as well.”<sup>101</sup> It argued that since the owners of Hobby Lobby came together to make a company they “cannot sue because they seek to make a profit for their owners, and the owners cannot be heard because the [RFRA] applies only to the companies and not the owners as individuals.”<sup>102</sup>

The majority, however, did not agree with this reasoning. It argued that the furthering of a for-profit company’s religion also furthers the shareholder’s individual religious freedom.<sup>103</sup> And that the profit-making objective of a for-profit corporation is not enough to hold that it also cannot have a religious exercise objective.<sup>104</sup> It argued that several companies have motives and missions at the expense of profits. They even might pursue these missions even though they decrease profits.<sup>105</sup> The majority believed that the free exercise protection granted to a nonprofit religious institution must be equally applied to Hobby Lobby (a for-profit corporation which has religious owners).<sup>106</sup> It is this move that provides the basis for treating for-profit corporations as expressive associations. Effectively, the Court held that the coming together and associating of people to make profit did not preclude the fact that they still, through the corporate form, could practice their religion. The Court’s reasoning used an associative view of the company (i.e., that a company fundamental rights arise from the associative rights of the individuals who create them).<sup>107</sup>

The Court also made clear that this ruling was limited to closely-held corporations. That, since shareholder views and interests could differ in large publicly held corporations, granting these large publicly corporations the right to exercise religion would not arise.<sup>108</sup> However, after doing this, the Court then rejected the dissent’s arguments that shareholders in larger

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101. *Hobby Lobby*, 134 S. Ct. at 2794 (Ginsburg, J., dissenting) (quoting *Amos*, 483 U.S. at 342).

102. *Id.* at 2767 (explaining the position of HHS that the Dissent endorsed).

103. *Hobby Lobby*, 134 S. Ct. at 2769.

104. *Id.* The Court made this argument by referring to its decision in *Braunfeld v. Brown*, 366 U.S. 599 (1961) where the Court entertained “the free-exercise claims of individuals who were attempting to make a profit as retail merchants.” *Id.* at 2769–70.

105. *Id.* (“For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives.”); see generally *Company Fact Sheet*, CHIK-FIL-A, <http://www.chick-fil-a.com/Company/Highlights-Fact-Sheets> (last visited Nov. 2015) (providing a discussion of how Chik-Fil-A adopts religious practices).

106. *Hobby Lobby*, 134 S. Ct. at 2771.

107. *Id.* at 2768. This treatment and view of the firm is very similar to how the Court views expressive associations. I argue below that this view of the firm can create an associative corporate right to exclude.

108. *Id.* at 2775.

more diverse corporations could disagree on religious viewpoints. The majority argued that “state corporate law provides a ready means for resolving any conflicts” between shareholders.<sup>109</sup> So, on the one hand, the Court rejects the notion that this holding can be expanded to larger corporations, and it, at the same time, defends the holding on the grounds that even though large companies might disagree on speech, corporate law exists to protect it. As I will show below, this line of reasoning can easily be read to predict that the right to exercise religion cannot logically be limited to a closely held corporation.<sup>110</sup>

Ultimately, the Court held that Hobby Lobby was exercising its religion and that as such, it was protected under the RFRA, so a strict scrutiny test would apply to the HHA regulation.<sup>111</sup> It then determined that the regulation could not be upheld with the Court’s strict scrutiny standard (the classical standard that applies when religious regulation is at issue). The crux of the case’s holding, for this article’s purpose, is the determination that a closely held for-profit corporation’s owners could exercise religion through the corporate form, and that the exercise is protected.

### C. THE EXPRESSIVE CORPORATION

*Citizens United* and *Hobby Lobby* have opened the door for for-profit corporations to be considered expressive associations under the freedom of association jurisprudence. At the outset, it is important to recognize that there are several types of for-profit entities (closely held corporations, partnerships, benefit corporations, publicly traded corporations, just to name a few). It is possible that different for-profits could be more easily seen as expressive associations.

Ronald Colombo argues that there are two relevant types of for-profit corporations: modern and postmodern.<sup>112</sup> In his view, the modern corporation represents our generally held beliefs about corporations (e.g., they are only created for profit, they have shareholder and manager separation of ownership, and at all times seek to advance shareholder

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109. *Hobby Lobby*, 134 S. Ct. at 2775. The Court is generally pointing to shareholder derivative lawsuits and the selling of public stock.

110. A more detailed discussion of differing shareholder values and speech is discussed below.

111. The strict scrutiny analysis occurred after the Court determined that Hobby Lobby did in fact exercise religion. The analysis is a standard First Amendment determination when religious regulation is at issue. This portion of the opinion and this jurisprudence although important is not relevant for this Article. What is relevant for my purposes is only that Hobby Lobby was seen as a for-profit corporation that could have religious views. As such, the discussion does not include the Court’s discussion of the strict scrutiny analysis.

112. COLOMBO, *supra* note 74, at 55.

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primacy). In particular, modern corporations do not “espouse values.”<sup>113</sup>

These (more traditional) corporations, Colombo argues, generally would not be seen as having speech distinct from their for-profit motives, and such viewing these as expressive associations is difficult.<sup>114</sup> He argues, “[C]onstrained by the shareholder primacy norm, the directors of the modern corporation are arguably precluded from ordinarily pursuing anything other than profit maximization.”<sup>115</sup> Postmodern corporations, however, in Colombo’s view, have evolved so as to bring together people not just for profit maximizing motives, but for other nonbusiness motives that could very well include speech. These (newer) corporations build into their charter sensibilities of charity, religion, stakeholder interests and other mechanisms that could even decrease profits. These corporations, he argues, can more easily be seen as expressing speech and being treated as expressive associations because they have come together “around a common vision or shared set of goals, values, and/or beliefs beyond those that are simply financial in nature.”<sup>116</sup>

This dichotomy misses the point because corporations today can be both modern and postmodern. The ability to systematically distinguish between the two is very difficult at the outset. Colombo does not hinge this distinction on corporate structure or number of shareholders. Actually, it is unclear on his account what would distinguish these types of firms (only that different ones exist). Companies might have characteristics of both postmodern and modern corporations. As such, it is difficult to say that some for-profit corporations can get expressive association protection and others cannot simply because they have unique characteristics.

The distinction does not do any work at the outset. Rather, the distinction might come into play with how much deference we give to the various companies. But if some for-profits are expressive associations, then it seems reasonable to grant *all* corporations the right. (The *Citizens United* Court would agree in this sense as it does not distinguish between various types of for-profit companies). However, even if one were to consider Colombo’s distinction relevant, I still posit and show below that treating post-modern companies including closely held companies as expressive associations can have perverse outcomes.

In this article, for simplicity, the definition of “for-profit corporations” is meant to include all of these various corporate forms. At the end of the

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113. COLOMBO, *supra* note 74, at 56.

114. Although he does not explicitly say this, there is a sense that part of the problem with the modern corporation is that they have several shareholders and might not have shareholder unity when it comes to speech.

115. COLOMBO, *supra* note 74, at 56.

116. *Id.* Presumably Hobby Lobby would be a postmodern corporation.

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day, the differing structures are very important, and different structures might get different protections. However, the initial determination of whether for-profit corporations as a whole are expressive associations should apply to all for-profit corporate structures.<sup>117</sup>

Moving to the crux of the argument, the definition of an expressive association has expanded while the definition of the purpose of a corporation has equally expanded so as to align how the Court views both corporations and expressive associations. More specifically in light of both *Citizens United* and *Hobby Lobby* the speech rights of a corporation seem to be best articulated as associative rights of the individuals in the corporations.

Initially, an expressive association was the coming-together of like-minded people in order to engage in only those activities protected by the First Amendment. This was the view of an expressive association under *Roberts* and *NAACP*.<sup>118</sup> An expressive association was seen as a unified form of expression. The like-minded individuals came together to promulgate and exercise speech that they were unified in, i.e., the members of these associations had similar views of the First Amendment activity they were engaging in. As a matter of fact, this was the exact reason why they associated. *Roberts* stands for the proposition that if organizations are not primarily expressive associations they will not be able to use the right to exclude to discriminate against employees.<sup>119</sup> They will not be able to “package themselves as such to avoid application of state anti-discrimination laws.”<sup>120</sup> In effect, where the group is not purely expressive, “the right to associate for expressive purposes is not . . . absolute.”<sup>121</sup> It is, however, important to note here that Justice O’Connor in her concurring opinion already thought the Court went too far in holding that the Jaycees were an expressive association. She argued that the court “raises the possibility that certain commercial associations, by engaging occasionally

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117. It is probably the case that there is a scale of protection that the Court would employ. Certain companies (closely held corporations and partnership) might get more deference and protection with their speech than other companies (publicly held companies). This however, goes to a determination after we have determined whether for-profit companies are expressive associations in the first instance.

118. See generally *Roberts*, 468 U.S. at 609 (noting that the Court has long recognized a right to associate for the purpose of activities protected by the First Amendment, a right implicated by the actions of United States Jaycees); *Patterson*, 357 U.S. at 449 (holding that an organization’s membership lists were immune from state scrutiny because the contents of such lists so closely implicated the members’ right of association).

119. See Adrienne K. Zahner, Note, *A Comprehensive Approach to Conflicts between Antidiscrimination Laws and Freedom of Expressive Association after Boy Scouts of America v. Dale*, 77 CHI.-KENT. L. REV. 373, 384, 386 (2001) (arguing that *Dale* expanded the scope of potential discrimination by allowing an expressive association to have a purpose other than dissemination of speech).

120. *Id.* at 395.

121. *Id.* at 396.

in certain kinds of expressive activities, might improperly gain protection for discrimination.”<sup>122</sup>

On the corporate side, using the above framework, we can argue that initially we thought of corporations as associations where like-minded people come together to engage in the unified purpose of profit seeking activity. This exclusive profit motive of corporations has been well-documented.<sup>123</sup> The general tenement of corporate law is that managers should run a corporation so as to maximize the profit (residual value) that goes to the shareholders.<sup>124</sup>

The definition of expressive association, however, was expanded in *Dale*.<sup>125</sup> In *Dale*, the Court expressively held that the Boy Scouts were promulgating anti-gay speech even though there might have not been membership unity. There, the Court, while allowing the Boy Scouts to have a homophobic message, argued that “the First Amendment simply does not require that every member of a group agree on every issue in order for the group’s policy to be ‘expressive association.’”<sup>126</sup> We then have a new definition of expressive association — the coming-together of people in order to engage in First Amendment activities not necessarily shared in unison. Furthermore, *Dale* also broadened what exactly an organization needs to do to gain expressive association status. The Court held that “associations do not have to associate for the ‘purpose’ of disseminating a certain message to be entitled to the protections of the First Amendment.”<sup>127</sup> Colombo argues that “[*Dale*] is profound, as it signaled a shift away from an interpretation of *Roberts* that required a group to be initially identified as an expressive association in order to invoke the freedom of association.”<sup>128</sup>

Even though Justice O’Connor in her concurring opinion in *Roberts* cautioned the Court to not grant expressive association status to commercial entities,<sup>129</sup> the Court in *Citizens United* expanded the scope of

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122. *Roberts*, 468 U.S. at 632 (O’Connor, J., concurring). Justice O’Connor correctly anticipated the concern of this Article before *Dale* and *Citizens United*.

123. See, e.g., *Dodge v. Ford Motor Co.*, 204 Mich. 459, 507 (1919); see also COLOMBO, *supra* note 74, at 54–56. Note that corporations can come together for any legal purpose and can write in their charter that they should give profits away or run a company in a certain way. This, without more, is not problematic. It is only when the State imposes a regulation on a corporation that limits its speech and associated activity where this analysis becomes relevant. See also PRINCIPLES OF CORPORATE GOVERNANCE § 2.01 (AM. LAW INST. 1994).

124. *Dodge*, 204 Mich. at 507 (“A business corporation is organized and carried on primarily for the profit of the shareholders.”). For a more recent similar view of corporate shareholder value see *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

125. COLOMBO, *supra* note 74, at 180–83.

126. *Dale*, 530 U.S. at 655 (2000).

127. *Id.*

128. COLOMBO, *supra* note 74, at 180.

129. *Roberts*, 468 U.S. at 634.



what kinds of activities corporations can partake in by extending to for-profit corporations a constitutional right to protected free speech. The Court effectively acknowledged that corporations can be created for activities other than making profit — i.e., corporations can be created in order to promulgate political speech. If this were not enough, the Court also held that this political speech need not be unified. Meaning that all members or shareholders of the corporation need not exactly agree with the political speech that the corporation is expressing. The majority in *Citizens United* argued over the dissent's objection of heterogeneous shareholder interests. Justice Kennedy argued for the majority that if shareholders did not like the speech that a company was promulgating, they could effectively raise these concerns through "the procedures of corporate democracy."<sup>130</sup> Presumably, also, the shareholders could simply sell their shares. This especially holds true in a public company that is traded on a stock exchange. So, effectively, again using the same framework, we can view a corporation as an association of people in order to engage in the unified activity of profit making and the non-unified activity of political speech.

In *Hobby Lobby*, the Court attempted to slightly rein in its expansive view of the corporation. In this case, the Court held that shareholders could exercise their religion through the corporate for-profit form (for the limited purposes of the RFRA statute) as long as it was a closely held corporation. In this way, the Court acknowledged, as it did in *Dale* and in *Citizens United*, that the corporation's purpose could be activity other than profit making (in this case exercising religion), but that this other activity should generally be unified.<sup>131</sup> The Court put a large emphasis on the fact that this ruling was only appropriate because it was clear that all the shareholders (members) were unified in wanting the company to be run with a religious mindset. Again using the same freedom of association framework, we then have a further expanded view of corporations as an association of people in order to engage in the unified activity of profit making, the nonunified activity of political speech and the unified activity of exercising religion.

We then arrive at two definitions that are very much parallel. Expressive associations are groups of people that engage in unified or nonunified First Amendment activities. Corporations are now being seen as associations where people can come together to make profits or engage in unified or nonunified expressive speech (political, religious). They

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130. *Citizens United*, 558 U.S. at 369–70. For a discussion of how *Citizens United* protected non-unified speech see Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53 (2009).

131. This is implicit in the holding being limited to closely held corporations. *Hobby Lobby*, 134 S. Ct. at 2755.

further can “employ their speech for reasons not necessarily related to profit maximization.”<sup>132</sup> The key step is the conceptualization that a corporation’s First Amendment corporate speech is protected through the associative rights of the individuals in the corporation. (i.e., the speech stems from the members of the corporation themselves.)

First Amendment activities include both political speech and the exercise of religion. But they also include social and economic speech. It can be argued that as the Court has expanded protection to political speech and religion, it is only a matter of time before it expands protection to social and economic speech, as both are also integral to First Amendment activities. Bezanson argues that “if prior experience with political or public issue boundaries in other First Amendment settings is any indication, the political speech boundary of *Citizens United* will be greatly broadened in future cases, and the Court may well ultimately conclude that all noncommercial speech by corporations is fully protected.”<sup>133</sup>

All dissenting speech contributes to the political arena and is fundamental to a democracy.<sup>134</sup> The expressive association right is meant to protect the coming together of individuals to express opinions about everything from social and economic concerns to political and religious views.<sup>135</sup> It seems then we have arrived a framework for thinking about the activities of a corporation that is more less exactly aligned with the definition of expressive association.

One can argue, however, that corporations are unique and distinct from organizations like the Jaycees and the Boy Scouts. As such, corporations will not be seen as expressive associations due to their heterogeneous shareholders, i.e., the shareholders of a company might not necessarily agree on the company’s speech position (this is particularly the case for public companies).<sup>136</sup> If Google were to posit some amount of political speech (say that it did not support Joe Biden running for president), it is unclear if that speech should be protected because every associated shareholder might not agree with it. Shareholders in a public company are heterogeneous and could very well disagree on political ideology. As such, treating Google like an expressive association might

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132. COLOMBO, *supra* note 74, at 124.

133. Bezanson et al., *supra* note 16, at 52; *see, e.g.*, Gertz v. Welch, 418 U.S. 323, 343–44 (1974) (abandoning as ungovernable the earlier matter of public concern standard).

134. *See generally* Bedi, *supra* note 50.

135. *See Roberts*, 468 U.S. at 622 (“According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.”).

136. *See generally* Bezanson et al., *supra*, note 16, at 48–52. Note that the dissent in *Citizens United* also brought up this argument so as to limit the expansion of First Amendment political protection to corporations.

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not make sense because it would not be an outlet for the true expression of the company given that it is not clear what viewpoint the shareholders collectively hold (if any at all).

Although a powerful critique, this just does not comport with either the freedom of association or corporate law cases discussed above. Both explicitly allow for nonunified speech and activity to be protected.<sup>137</sup> Bezanson argues that *Hobby Lobby* is an attempt to limit speech of companies to those in which the shareholders have unity as to the relevant speech or activity. This is a fair argument, but even if it were to be true, the vast number of corporations in the United States are not actually public corporations with thousands of shareholders. Instead, they are mostly closelyheld with few shareholders which increases the potential for these shareholders to be unified in their speech.<sup>138</sup> In any case, the argument that some companies have corporate structures that make defending their speech more difficult does not go to whether they are expressive associations, but instead goes to how much deference the Court will give to the company.

As argued in Part IV, this line of criticism relies on the fact that the speech is completely unrelated to the purpose of the company (i.e., this speech at issue has nothing to do with the nature of the business). However, when the speech at issue is one that directly relates to the company's business enterprise and hence profits, it can be argued persuasively that all shareholders probably do hold the same viewpoint by the fact that they hold the shares of the company.<sup>139</sup> When this is the case, then the argument for protecting corporate expression falls within the purview of both *Citizens United* and *Hobby Lobby* — a conclusion we need to be very concerned about.

One could also argue that corporate shareholders cannot associate for purposes other than profit making. If they wanted to, then they should use another corporate form (i.e., the benefit corporation or the nonprofit designation). The ability of companies however to exercise speech rights or religion through a for-profit corporate form does comport with the traditional economic theory of the firm. This theory of the firm views corporate law not as “a set of immutable government commands issued on a take-it-or-leave-it basis . . .” but rather “as a nexus of contracts among

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137. See *Dale* and *Citizens United* discussions above.

138. Even some very large companies are closely held. Enterprise Holding is a company that owns the rental car agencies (Alamo, Enterprise, and National). Enterprise is still a family-owned, closely held corporation.

139. This argument will be made clear in Part IV in particular, while showing that the company Hooters might be seen as an expressive association and have a certain speech that all shareholders would agree with and hence might get First Amendment protection.

suppliers or labor, capital, and other inputs.”<sup>140</sup> With this view, shareholders come together to contract to exercise whatever legal action they want simply using the corporate form.<sup>141</sup>

Another line of argumentation might be that corporations already get protected speech, so why is this any different? The Court has recognized some limited amount of corporate speech in the past. The Court does protect so called “commercial speech.” This is speech that is useful for marketing and “defending [a corporation’s] interest in the marketplace.”<sup>142</sup> This kind of speech is usually economic in nature and helps a company to facilitate whatever transaction for which it is organized. Commercial speech for a for-profit company does not generally include religious, political or even social speech.<sup>143</sup> Commercial speech therefore is limited in many ways by the government (preventing fraudulent and deceitful marketing). However, the speech protected in *Citizens United* and in *Hobby Lobby* was not “commercial speech” as the Court usually defines it. The Court expanded the scope of protected corporate speech in these cases. In *Citizens United*, the protected speech was political speech designed to dissent against a political candidate. In *Hobby Lobby*, the protected speech was religious in nature. This speech is more important than commercial speech as evidenced by the fact that Court applies strict scrutiny to its regulation.<sup>144</sup> It is true that religious speech gets more protection traditionally than social or economic speech. However, if corporate speech is social in nature, as argued below, protecting it necessarily leads us to a protected right to exclude.

Still yet, one could argue that if we are protecting for-profit as noncommercial speech, that does not give us insight into whose speech is being promulgated or protected. Is it shareholder speech, board of director speech, or maybe employee speech? This is a difficult question to resolve normatively. Here the freedom of association jurisprudence is helpful. In *Dale*, the Court recognized that all members did not have the same anti-gay

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140. Meese & Oman, *supra* note 6, at 8; *see generally*, Ronald H. Coase, *The Nature of the Firm*, *ECONOMICA*, Nov. 1937, at 386; Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, *J. FIN. ECON.*, Oct. 1976, at 305; Scott E. Masten, *A Legal Basis of the Firm*, 4 *J.L. ECON. & ORG.* 181 (1988).

141. For a more extensive discussion of *Hobby Lobby* and the theory of the firm see Meese & Oman, *supra* note 6

142. *See* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 759–61 (1976); *see also* Bezanson et al., *supra* note 16, at 50.

143. *See generally* *Valentine v. Christensen*, 316 U.S. 52 (1942) (arguing that although commercial speech was not protected, the Court has subsequently given commercial speech qualified protection); *see Va. State Bd. of Pharmacy*, 425 U.S. at 748 (an example of how commercial speech is now protected under the First Amendment).

144. *See generally* *Hobby Lobby*, 134 S. Ct. at 2751. Commercial speech does not receive the same standard of review (it receives a more stringent review) as religious or political speech that was at issue in *Hobby Lobby* and *Citizens United*.

speech, but still held that the organization overall promulgated such speech. The Court there looked to the company's activities, its policies and its public statements.<sup>145</sup> In this way, a Court will likely look to a company's charter, bylaws, employee policies and activities to determine what the company's speech is. These documents and activities are molded by not only the shareholders and managers but also the employees and consumers over the course of a company's lifespan. In this way, the speech protected represents many parties' speech and many parties' powers to influence corporate speech as the corporation evolves over time.<sup>146</sup>

But, descriptively, this question might not seem to matter. As corporate law is structured, only shareholders could really bring a suit on behalf of the company against a state imposed regulation.<sup>147</sup> As such, the type of speech that is at issue will likely be defined by the shareholders of the company and maybe to a small degree by the board of directors.

Finally, one could argue that corporations will attempt to disguise their questionable profit making activities by claiming that the activities are a type of protected speech. This is an important and strong argument against treating corporations as expressive associations, but it misses the point. Evaluating the extent of the speech comes after first determining if the corporation is an expressive association. As shown in Part II, only after an organization is seen as an expressive association is the actual speech of the organization evaluated. It very well might be the case that companies will attempt to use the expressive association jurisprudence in bad faith. (This is partly the reason for the article so as to warn of the dangers of viewing companies as expressive associations particularly *after Citizens United* and *Hobby Lobby* have opened the door.) But this critique does not speak against treating the corporation as an expressive association in the first instance.

Once we allow ourselves to view corporations as expressive associations in the same way we view the Boy Scouts, the Jaycees, or the KKK, it becomes incredibly difficult to limit and regulate the discriminatory behaviors that corporations will eventually partake in. This is because discrimination can be tied to a company's speech just as limitation of membership is tied to an organization's speech. As Colombo puts it, after *Dale* and *Citizens United*, the speech right encompasses "the

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145. See generally *Dale*, 530 U.S. at 640.

146. A more detailed discussion of how corporate speech evolves and how shareholders, managers, employees and consumers affect the speech would be a very fruitful endeavor for this arena of scholarship. See Meese & Oman, *supra* note 6, at 7-14.

147. Delaware statutory and case law hold that only a shareholder can bring an action on behalf of the company, a so called "derivative shareholder suit." See generally MODEL BUSINESS CORPORATION ACT ch. 7 (AM. BAR ASS'N 2002); PRINCIPLES OF CORPORATE GOVERNANCE § 7.15 (AM. LAW INST. 1994).

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right to keep one's membership private [and] even permits the association to deny membership, in contravention of antidiscrimination law, to those who would undermine its attempted expression."<sup>148</sup>

#### IV. EMPLOYMENT DISCRIMINATION AND THE EXPRESSIVE ASSOCIATION DEFENSE<sup>149</sup>

As argued above, the labeling of a for-profit corporation as an expressive association might hold some weight given the Court's recent jurisprudence. The Court has effectively given corporations a free pass on the first prong of its three-part test. The remaining sections detail how a corporation could pass the remaining parts two and three of the test. If the Court were to extend the freedom of association right to for-profit corporations and if corporations were to pass all three parts of the test, it would create perverse consequences particularly for employment discrimination.

The government allows a corporation to discriminate based upon gender, race, ethnicity, religious affiliation, age or handicap, for an important "business purpose" (necessity). There has never been an argument and the Court has never acknowledged one that defends employment discrimination based upon the freedom of association. However, if corporations are deemed to be expressive associations like the Boy Scouts or Jaycees, they could use the freedom of association to exclude those people who frustrate their speech (i.e., deny those people employment).

This section will proceed as follows. It will first briefly show the Court's jurisprudence for regulating employment discrimination. In particular, it will explain the domain of the only real defense the Court hears (the business necessity defense). It will then argue that treating a corporation as an expressive association gives corporations another defense under the freedom of association doctrine. This defense can be seen as a distinct argument or simply a strengthening of the business necessity defense. Part IV will then discuss the status of gender discrimination and show how two companies, Hooters and Abercrombie & Fitch might actually make a successful case for employment discrimination based upon the fact that it is an expressive association and the discrimination at issue should be protected speech.

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148. COLOMBO, *supra* note 74, at 82.

149. For this section, I focus on social and political speech as opposed to religious speech. A discrimination defense should be limited to only those people who are "essential to the [group's] expressive content" and necessary to the "preservation of its purpose and identity" as opposed to activities which "simply . . . generate revenues." *Amos*, 483 U.S. at 344 (Brennan, J., concurring).

## A. EMPLOYMENT DISCRIMINATION AND THE BFOQ DEFENSE

The United States has had a tumultuous and long standing relationship with employment discrimination. Legislation to address employment discrimination became a popular topic in the 1960s with the advent of the Civil Rights Movement. Out of the Civil Rights Movement came the federal government's guidelines in Title VII of the Civil Rights Act of 1964. These guidelines outlawed employment decisions by companies (hiring, firing, promotion, and conditions of benefits of employment) based upon any one of several categories.<sup>150</sup> These categories have been labeled "protected classes." The categories as they were originally articulated were "race, color, religion, sex, or national origin."<sup>151</sup> However, over the course of the history of Title VII, the kinds of protected classes have expanded by including things like handicap, age, and pregnancy.<sup>152</sup> Title VII was premised on the fact that as a society we have an interest in protecting those people who are shut out from the labor market. This interest is so important as to trump any personal freedom that a company has in carrying out its business. Effectively, Title VII has made clear that there are some degrees of discrimination that should be outlawed even in the face of infringing upon a company's property right to maximize profit.

But it is important to note that this "police power" is not applicable to expressive associations. The domain of Title VII is companies that affect commerce with more than fifteen employees. Bona fide nonprofit membership organizations are exempt from having to comply.<sup>153</sup> But note that just because you are a nonprofit membership organization, that does not automatically give you the right to discriminate. After all, as described in Part II, the Jaycees would be exempt under Title VII, but the Court still held that Jaycees had to include women. It is important to make clear then it is not the exemption from Title VII that is doing the work for Boy Scouts

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150. 42 U.S.C. § 2000e-2(a), 2(e)(1) (2015).

151. 42 U.S.C. § 2000e-2(a) (2015).

152. The Equal Employment Opportunity Commission is the agency that implements Title VII and has subsequently instated several further levels of protected class. See *Pregnancy Discrimination Act of 1978*, Pub. L. No. 95-555, Oct. 31, 1978, 92 Stat. 2076; *Age Discrimination in Employment Act of 1967*, Pub. L. No. 90-202, § 17, formerly § 16, Dec. 15, 1967, 81 Stat. 608, (codified at 29 U.S.C. § 634 (2015)); *Americans with Disabilities Act of 1990*, Pub. L. No. 101-336, July 26, 1990, 104 Stat. 327 (codified at 42 U.S.C. § 12101 (2015)). Some states have even extended state regulations to cover discrimination by height or weight. See *Michigan's Elliott-Larsen Civil Rights Act*, MICH. COMP. LAWS ANN. § 37.2202 (2015). Note also that several articles have been written on the history of Title VII and the justification for extending protected classes to include further the purpose of Title VII. See, e.g., Sheila Hatami & David Zwerin, *Educating the Masses: Expanding Title VII to Include Sexual Orientation in the Education Arena*, 25 HOFSTRA LAB. & EMP. L.J. 311 (2007); *Mandatory Maternity Leave: Title VII and Equal Protection*, 14 WM. & MARY L. REV. 1026 (1973).

153. 42 U.S.C. § 2000e(b) (2015).

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or the Jaycees, rather, it is the doctrine of expressive association. This is why even though for-profit companies are not exempt under Title VII, they still might receive protection on an independent ground as expressive associations.

There are two types of discrimination that Title VII outlaws. The first (not terribly relevant for this article) has been labeled “disparate impact” discrimination.<sup>154</sup> This discrimination occurs when a company does not have a facially discriminatory intention in hiring decisions, but still effectively discriminates against a protected class. This discrimination is not intent-based but instead results-based. The assumption in disparate impact discrimination is that the employer does not intend or have any discriminatory views at the outset of the hiring process. However, through the specific job interview or promotion scheme, the results of the process created drastic disparities in the employment of a protected class.

A widely used example is the case of a firehouse.<sup>155</sup> Fire Chiefs use several processes to determine who they should hire to be fire fighters. One process in the job interview is to carry a 150lb dummy down a flight of stairs. This is meant to reproduce a firefighter carrying an unconscious body out of a burning building (something that we would want a firefighter to be able to easily do). The problem here is that, on average, women are generally not as strong as men. The percentage of men who can carry a 150lb dummy down stairs is small as it is (it is a very difficult task). But the percentage of women who could accomplish this same task is even smaller. As such, we have firehouses that hire a disproportionate number of men as firefighters. This hiring of men more than women effectively shuts women out of the firefighter labor market and constitutes disparate impact employment discrimination. The job interview has a *disparate impact* on females, who are a protected class.

Title VII builds in a very important exception to the disparate impact rule. If the portion of the job interview that creates the disparate impact is necessary and essential for the intended job performance, then Title VII allows the presence of discrimination.<sup>156</sup> In the firefighter case, the ability

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154. For discussions of disparate impact discrimination see the following cases: EEOC v. Sambo's of Ga., Inc., 530 F. Supp. 86, 92 (N.D. Ga. 1981); Griggs v. Duke Power Co., 401 U.S. 424 (1977); Smith v. City of Jackson, Miss., 544 U.S. 228 (2005), and the following journal articles: Richard A. Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010); Peter Siegelman, *Contributory Disparate Impacts in Employment Discrimination Law*, 49 WM. & MARY L. REV. 515 (2007).

155. Ricci v. DeStano, 557 U.S. 557 (2009) (a famous case of firefighter disparate impact; although, not for the reason specified here). The issue in *Ricci* concerned white and Hispanic firefighters and competency written tests that had a disparate impact on Hispanics. However, the firehouse did not promote the white firefighters who scored higher on the tests for fear of appearing discriminatory. The white firefighters brought suit on a disparate impact ground. *Id.* at 562.

156. See 42 U.S.C. § 2000e-2(k) (2015) (discussing the burden of proof in disparate impact cases).



to carry a dummy down a flight of stairs is critical to the duties of an effective and successful firefighter. As such, this job interview task is justified and optimal, even though it creates a disparate impact under Title VII. Therefore, firehouses continue to use this for job interviews and are protected for any disparate impact discrimination under Title VII.<sup>157</sup>

The second type of discrimination occurs when an employer purposefully and facially makes hiring decision based upon the exact characteristics that distinguish protected classes from nonprotected ones. This discrimination is akin to choosing an employee because of the fact that they are a certain gender or a certain religion. In the Deep South in the early 1960s, white employers only hired white employees because they “favored” them over black employees. This was preference based employment discrimination. This type of discrimination — I will term it “preferential discrimination” — is arguable more problematic because it relies upon some underlying assumption that a certain aspect of a protected class makes them more or less desirable. As such, this type of discrimination is very difficult to justify and rarely gets approval so as to trump Title VII.

Title VII does, however, provide a very limited defense against a preferential discrimination charge. If successful under this exemption, a company can continue to make their preferential employment decision even though Title VII bans it. This statutory defense is called the bona fide occupational qualification (“BFOQ”). It reads in part:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.<sup>158</sup>

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157. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In that case the Court found that Duke Power Co.’s job qualification process of having a high school diploma and receiving a certain score on an IQ test had a disparate impact on black workers. *Id.* at 431. As such these black workers received jobs in the company that were lower paying while white worker received the higher paying jobs. *Id.* at 428. The Court found that the job requirements were not necessary to the job because there were already several white people performing high-paid jobs that did not have high school diplomas or high IQ test scores. *Id.* at 431–32. See also *Peggy Young v. UPS*, 707 F.3d 437 (4th Cir. 2013). This case concerns a pregnant delivery driver who was asked to go on maternity leave due to her pregnancy rather than given a position that was less strenuous. *Id.* at 441. The lower courts have held in favor of UPS while arguing that certain jobs require more physical labor and its appropriate for employers to discriminate against pregnant women in this way rather than provide accommodations. *Id.* at 451.

158. 42 U.S.C. § 2000e-2(e)(1) (2015). When the term business necessity is used as a defense, it generally applies only to a defense against a disparate impact case. This necessity defense in this article is focused on the BFOQ defense. In that vein, I will use “BFOQ necessity” to make sure there is no confusion on which defense I am referring to.

It's important to note that the BFOQ however, does not allow for preferential discrimination based upon race.<sup>159</sup> The classic example of a BFOQ is the discrimination of employees in fashion. If there is a fashion line that only carries men's clothes, it only makes sense for an employer to hire male models to market the clothing. In effect it is "necessary to the normal operation" of the business. Although maybe an easy case, the Court has developed a very confusing test on what counts as something that is "necessary to the normal operation" of a business.<sup>160</sup> Even though the Court has used a multipart test over the course of BFOQ jurisprudence, the Court's difficulty in understanding what's necessary for a business to operate has contributed to the understandable confusion of the doctrine.

There are generally three distinct tests that are sometimes employed together or separately in order to determine whether a discriminatory employment decision is a necessity for the BFOQ defense.<sup>161</sup> The first is the "all or substantially all test," the second is the "essence of the business test," and the third is the alternative test.<sup>162</sup>

In the first test, the Court determines whether all or substantially all of the members of the prejudiced class would be unable to perform the underlying duties of the relevant job. For example, if an employer were to not hire women for a job that required a certain amount of weight lifted, the employer would have to prove that all or substantially all women could not lift the weight needed for the job.<sup>163</sup> This test is generally used to evaluate gender specific discrimination based upon "physical ability, privacy concerns, or where pregnancy poses safety risks."<sup>164</sup>

The "essence of the business test" holds that discrimination is valid "only when the essence of the business operation would be undermined by not hiring members of one sex exclusively."<sup>165</sup> The Fifth Circuit articulated this test in *Diaz v. Pan American World Airways, Inc.*<sup>166</sup> There, Pan

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159. 42 U.S.C. § 2000e-2(e)(1) (2015) (If we were to see the expressive association defense as distinct from the BFOQ, this would open the door to possibly allowing even racial discrimination.).

160. See generally Katie Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL'Y 169 (2009) (arguing that the BFOQ defense should be tightened so as to further protect from unwanted employment discrimination).

161. *Id.* at 174–76.

162. See generally BARBARA T. LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 404–05 (4th ed. 2007).

163. See *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 232–34 (5th Cir. 1969) (holding that Southern Bell could not discriminate against women because some women could certainly lift the requisite weight (thirty pounds)).

164. Manley, *supra* note 160, at 174. For an extensive discussion of this test, see Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257 (2003); *Civil Rights—Dothard v. Rawlinson: A Method of Analysis for Future BFOQ Cases*, 16 URB. L. ANN. 361 (1979); John F. Cassibry, *Title VII: Sex Discrimination and the BFOQ*, 34 LA. L. REV. 3(1974).

165. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971).

166. *Id.*

American Airlines attempted to only hire women as flight attendants.<sup>167</sup> The company argued that customers preferred female flight attendants to male ones.<sup>168</sup> This type of “customer based” employment discrimination has generally been held to be unlawful under Title VII and is not protected under the BFOQ. The Fifth Circuit in *Diaz* held that the essence of an airline was not to entice passengers or make them comfortable with flight attendants. Instead, it was to take passengers safely from one place to another. It held in part:

The primary function of an airline is to transport passengers safely from one point to another. While a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide as well as . . . their apparent ability to perform the non-mechanical functions of the job in a more effective manner than most men, may all be important, they are tangential to the essence of the business involved. No one has suggested that having male stewards will so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another.<sup>169</sup>

As a product of this case, the “essence of business” test is very difficult to pass. The Court will likely always view the essence of a business as very narrow so as to prevent discrimination.<sup>170</sup>

Finally, courts have used a third defense that requires defendants to “show that no reasonable, less discriminatory alternative exists, especially in cases where privacy is at issue.”<sup>171</sup> In *Hardin v. Stynchcomb*, the Court held that a prison could not discriminate against female guards in a male prison because they could rearrange the duties of the security guards such that the prisoners’ right of privacy would not be infringed by the women.<sup>172</sup>

The Court has employed the three tests separately and together in some instances.<sup>173</sup> Some have argued that the tests are appropriately applied together because they are effectively targeted at different

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167. *Diaz*, 442 F.2d at 388.

168. *Id.*

169. *Id.* at 388.

170. Manley, *supra* note 160, at 175.

171. *Id.* at 176; *see also* LINDEMANN, *supra* note 162, at 409.

172. *Hardin v. Stynchcomb*, 691 F.2d 1364 (11th Cir. 1982); *see also* Manley, *supra* note 160, at 175.

173. *See* Manley, *supra* note 160, at 176; *see generally* *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (discussing the various circumstances in which the tests are applied).

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considerations.<sup>174</sup> “The ‘essence of the business’ test considers whether the employee’s desired trait is essential for the business to run successfully, while the ‘all or substantially all’ test focuses on whether a class-based ban is the only feasible method of revealing those unable to perform the job.”<sup>175</sup> However, these tests are all one in the same. They test whether or not the discrimination is *necessary* for the business to operate. By implementing these various tests to determine necessity, the Court skirts the critical issues: what should we consider a valid BFOQ necessity and how should we determine it. Should we look at a company’s marketing materials, investor pitches, charter, constitution to determine necessity?

There are three conceptions of what is *necessary* for a business. These three conceptions have their roots in economic theory. The Court however, has had difficulty in defining these conceptions and has avoided the issue altogether. The first and quite obvious definition of necessity is the “reproduction” conception.

In this conception, a BFOQ necessity is one that would change the business in the smallest way possible. In this definition of BFOQ necessity everything that a business does is necessary. Effectively, we have to ask if we restrict the relevant action of the business, will the business be the exact same as it was before the restriction (i.e., will it be a reproduction of the original business)? The answer will always be no. Anything that a business changes will effectively change the business in some way (even if very small). Although a trivial way to perceive necessity, it defines one end of the spectrum (i.e., the most respectful of the business self determination).

The second conception is the “indifference” consideration. This conception argues that a necessity is one that keeps a business operating, i.e., if we were to restrict the activity at issue, the business would be indifferent from operating in the first place.<sup>176</sup> This consideration is at the other end of the spectrum from the reproduction consideration. Here, generally *any* activity will be protected if it is the case that restricting it will cause the company to go out of business. Take, for example, the case of a female clothing company not being able to discriminate against male models. If the government were to require Ann Taylor to use male models it would likely frustrate the company’s business model so much that it

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174. Manley, *supra* note 160, at 175–76.

175. *Id.*; see also *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (holding that discrimination of women based upon the simple fact that they were fertile is not enough to prevent women from working with lead).

176. See generally ANDREU MAS-COLELL ET AL., *MICROECONOMIC THEORY* (4th ed. 1995) (Discussing the economics of indifference in markets. The theory holds that in a perfectly competitive market, all firms make zero profits and hence all are always indifferent among staying in the market, entering the market and leaving the market.).

would seize to be a business or would become a new business altogether. This level of deference is very low.

The third, “competitive advantage,” consideration of necessity lies in between the reproduction and the indifference considerations. The competitive advantage consideration will allow certain discriminatory tasks that maintain a company’s competitive advantage. This necessarily lies in between the two polar considerations. A competitive advantage is an advantage that allows a company to make monopoly like rents in a very competitive industry. It does this through having valuable inputs and resources that are difficult for other companies to imitate.<sup>177</sup>

A court would likely hold that *only* the indifference consideration is relevant in deciding whether a task is necessary for a business. Courts have previously held that discrimination that creates sustained profits is not a rationale for arguing BFOQ and hence a competitive advantage is probably not a sufficient necessity.<sup>178</sup> The competitive advantage is difficult to both argue for and against because on the one hand, Title VII holds discrimination as a national issue that is predicated on irrational views of people who are in some way different from others; and, on the other hand, our deference and fundamental protection of entrepreneurship and profit inducing behavior is highly valued.<sup>179</sup>

As I argue below, treating for-profit companies as expressive associations makes the determination of a BFOQ necessity more difficult and likely pushes us further towards the reproduction consideration and away from the indifference condition ultimately settling somewhere that necessarily considers competitive advantages to be relevant to employment discrimination.

## B. THE FREEDOM OF ASSOCIATION DEFENSE

Treating for-profit companies as expressive associations will expand the defenses against Title VII discriminations. It would expand the BFOQ defense by shifting the BFOQ necessity consideration from an indifference one to a competitive advantage one. The argument there would be that a company’s expressive association right and the resultant speech are integral to the operations of a business.<sup>180</sup> This right in the BFOQ context would

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177. For an extensive discussion of competitive advantage, see Jay Barney, *Firm Resources and Sustained Competitive Advantage*, J. MGMT., March 1991, at 99.

178. See, e.g., *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981).

179. See Mark S. Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318 (1987), for an extensive discussion of competitive advantage and Title VII.

180. For Hobby Lobby, religion was integral to the workings of the business. Religious practices permeated through its mission, charter and even actions. In this way, one could argue that Hobby Lobby’s exercise of religion is part of its necessity so as to move the dial from an indifferent

add another dimension to the indifference consideration thereby effectively moving the level of protection to something more akin to a competitive advantage consideration. One could view this defense simply as an expansion of the definition of the indifference consideration (i.e., more things are now considered to contribute to the indifference decision of the company) or as an expansion of the definition of necessity as a whole by providing protection to things that create competitive advantages.

A theoretical defense would have to proceed as follows: A company would first have to argue that employment decisions are analogous to membership inclusion decisions. As the cases above show, discrimination on membership grounds is protected if it is associated with speech of an expressive association. Providing employment to people in order to be part of a company is very similar to providing membership to an organization. In fact, we already protect a religious company's right to discriminate against nonreligious employees in part due to the freedom of association jurisprudence. This was the exact issue at hand in *Amos*. The Court there held that some jobs were appropriately reserved for Mormons because the speech of the Church necessitated discrimination based upon religion.<sup>181</sup>

Once shown that employment decisions are like membership decisions, a company then needs to argue that they have certain speech that they promulgate which is connected to their employment decision. A company could argue that gender, sexual orientation, or religious discrimination matter because the company has a speech agenda that hinges upon showing that one gender or one religion is more important or better.<sup>182</sup> Remember that even if this speech is perverse to our general notions of tolerance and inclusion, it is protected under the freedom of association doctrine. In fact, the whole purpose of an expressive association is to protect public dissenting speech.<sup>183</sup> A company would effectively argue that in addition to profit maximizing behavior, it also has a speech component to its business plan. This speech is protected (in light of *Citizens United* and *Hobby Lobby*) and hence the company should be treated in the same way as the Boy Scouts and Jaycees.

Lastly, the company would have to show that its speech is frustrated by imposing specific hiring (inclusion) decisions. As I will describe below, if the speech is sufficiently connected to the hiring decision, it stands to reason that restricting the employment decision will in turn frustrate and restrict the company's speech. The company would argue that as a matter

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consideration to a competitive advantage one.

181. See *Amos*, 483 U.S. at 338.

182. See below for an argument that discrimination against men is justified because it furthers speech that women are better served to be sexual objects for male desire.

183. See Bedi, *supra* note 50, at 431, 438–39.

of protecting its expression it should be allowed to continue its discriminatory practices, and that to outlaw its practices would infringe on its associative right to exclude.<sup>184</sup>

This defense might seem awkward at first glance because we have generally not thought of for-profit corporations as expressive associations. However, it is not that hard to envision a case where given the Court's recent jurisprudence, it would have to treat corporations like expressive associations. Once this happens, for profit companies become very similar to organizations like the Boy Scouts, the Jaycees, and the Mormon Church. It is hard then to rationalize treating the exclusion decisions of a corporate expressive association differently than the exclusion decisions related to non-profit membership organizations.

The next section uses the above theoretical framework to show and argue how two companies (Hooters and Abercrombie & Fitch) could successfully argue an expressive association defense to Title VII regulations.

## V. HOOTERS AND ABERCROMBIE & FITCH

### A. CASE STUDY 1: A DEFENSE OF GENDER DISCRIMINATION (HOOTERS)

Hooters is a very well-known restaurant that serves various types of American food (buffalo wings, burgers, and salads) and alcohol. The restaurant is staffed by a very unique set of servers who also wear a very unique uniform. Hooters currently only hires women as waitresses. It also makes its waitresses wear very short shorts and tight halter tops geared to sexually extenuate the bodies of its waitresses. Hooters came under scrutiny from the Equal Employment Opportunity Commission ("EEOC") starting in the late 1990s.<sup>185</sup> Since the 1990s, Hooters has been sued and challenged on its employment practices by women and men alike.<sup>186</sup> Three men sued Hooters in 1997 for denying them employment as waiters. Hooters settled this case outside of court and agreed to make *some* jobs in the restaurant available to men.<sup>187</sup> These included mainly jobs associated with bartending. In 2009, another man sued Hooters claiming that they

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184. Requiring expressive associations to comply with nondiscriminatory hiring and inclusion is effectively a type of government regulation that frustrates speech.

185. See Jeannie Sclafani Rhee, *Redressing for Success: The Liability of Hooters Restaurant for Customer Harassment of Waitresses*, 20 HARV. WOMEN'S L.J. 168 (1997), for a detailed discussion of the sexuality implications of Hooters treatment of its employees.

186. See Kenneth L. Schneyer, *Hooting: Public and Popular Discourse About Sex Discrimination*, 31 U. MICH. J.L. REFORM 551 (1998), for an extensive discussion of the lawsuits.

187. *Hooters Settles Suit by Men Denied Jobs*, N.Y. TIMES (Oct. 1, 1997), <http://www.nytimes.com/1997/10/01/us/hooters-settles-suit-by-men-denied-jobs.html>.

denied him the job of a waiter because of his sex;<sup>188</sup> again, Hooters settled. In 2010, Hooters was sued for threatening to fire a waitress because her body type did not fit the Hooters ideal waitress.<sup>189</sup> This lawsuit was filed in Michigan, which is one of the only states that outlaws discrimination based upon weight and height.<sup>190</sup> Hooters settled this case outside court. There is a pattern here. Hooters has done everything in its power so as to not litigate a case with the EEOC. Presumably this is because it suspects that its practices of only hiring women to be waitresses (it calls its waitresses “Hooters Girls”)<sup>191</sup> is likely a violation of Title VII.<sup>192</sup>

The problem for Hooters is likely two-fold. The first is simply that it discriminates against men (a Title VII issue). Hooters might be able to argue the traditional BFOQ defense. Based upon the jurisprudence of gender discrimination, though, a court would likely not favorably find in favor of Hooters. The analysis would simply be that the “essence of business” test fails. The essence of Hooters is not to sell sex or entice men, rather, its essence is to serve food. As such, men do not do a better or worse job of selling food to customers and therefore Hooters must comply with Title VII.<sup>193</sup>

The second problem for Hooters is that it clearly sexualizes women by implying that they need to have a certain body type and wear certain revealing clothes in order to be a Hooters Girl.<sup>194</sup> Hooters has come under public scrutiny for this mentality. People have argued that Hooters should not sexualize women and instead should respect the various body types and attitude that women and men have to sexuality. This is commonly referred to as the sexual harassment problem that Hooters faces.<sup>195</sup> The interesting thing here is that this “problem” could actually be the winning argument

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188. *Texas Man Settles Discrimination Lawsuit Against Hooters for Not Hiring Male Waiters*, FOXNEWS.COM (Apr. 21, 2009), <http://www.foxnews.com/story/2009/04/21/texas-man-settles-discrimination-lawsuit-against-hooters-for-not-hiring-male>.

189. Allison Hillaker, *MI Hooters Girls, Allegedly Told to Lose Weight or Lose Their Jobs, Will Settle Out of Court*, NBCNEWS.COM (June 17, 2011), <http://www.minbcnews.com/news/story.aspx?id=630941#UwKHzGeVsU4>.

190. See *Elliott-Larsen Civil Rights Act*, *supra* note 152.

191. *Careers at Hooters*, HOOTERS, <http://www.originalhooters.com/careers>, (last visited Nov. 15, 2015) (labeling the waitress position as “Hooters Girls”).

192. It is probably a shock to some readers that the legal system has not resolved these practices even though Hooters is so ubiquitous. This is due to a practical reality that most cases settle out of court. As long as Hooters continues to settle out of court, it is practically impossible for the courts to rule on the issue.

193. See Manley, *supra* note 160, at 185.

194. See Ann C. McGinley, *Babes and Beefcake: Exclusive Hiring Arrangement and Sexy Dress Codes*, 14 DUKE J. GENDER L. & POL’Y 257 (arguing that in the casino cocktail server industry, being a female should not be a BFOQ, but requiring both women and men to wear revealing clothes that sexualize their bodies should be considered a BFOQ), for a discussion of the necessity of certain uniforms meant to exude sexuality.

195. See generally Schneyer, *supra* note 186.



Hooters is looking for. By arguing that Hooters is promulgating sexually related speech it could garnish protection as an expressive association.

Gender discrimination and the BFOQ has been widely written on. In particular, discrimination that puts women in “sexually denigrating situations, especially highlighting the resulting subordination of women.”<sup>196</sup> Gender discrimination cases of this sort generally fall into three categories that closely resemble the three considerations of the necessity described in Part III above. The seminal example that allows gender discrimination and the subsequent sexual treatment of women in a very limited sense is a gentlemen’s club. For these companies, it is widely accepted that the exclusive employment of women is a necessity. After all, it is the essence of the business to sell sex. And, in order to do so, a club must be allowed to hire only women. This mentality has carried over to the company Playboy.<sup>197</sup> In these cases, the governing bodies held that the exclusive hiring of women as Playboy bunnies was amenable to a BFOQ defense. The adjudicators generally find that the Playboy’s “central mission is to sell sexual entertainment.”<sup>198</sup> Furthermore, some have argued that hiring men to be Playboy bunnies would frustrate the purpose of the business because men “lack the feminine sex appeal which is central to the mission of the Playboy Club.”<sup>199</sup>

These cases fall into the “indifference consideration.” If the government were to require gentlemen’s clubs and the Playboy Club to hire men in the same way they hire women, the companies would likely refrain from being in business in the first place.<sup>200</sup> They would effectively be indifferent between closing shop and staying in business while having to comply with Title VII regulations.

At the other end of the spectrum, there are cases that refuse to extend the BFOQ defense to the “reproduction consideration.” In *Wilson v. Southwest Airlines*, the Texas court refused to allow gender discrimination

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196. Manley, *supra* note 160, at 185; *see also* Ruth Colker, *Anti-Subordination Above All: Sex, Race and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1027 (1986) (“The statutory model of equal protection is riddled with exceptions that perpetuate women’s subordination, the most egregious of which is that sex-specific employment discrimination claims under Title VII can be defended with arguments of ‘bona fide occupational qualification’(BFOQ).”); Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147, 204 (2004); Rachel L. Cantor, *Consumer Preference for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses*, 1999 U. CHI. LEGAL F. 493, 493–94 (1999).

197. *St. Cross v. Playboy Club*, Appeal No. 773, Case No. CFS 22618-70 (N.Y. Human Rights Appeal Board, 1971); *see also* *Aromi v. Playboy Club, Inc. et al.*, Case No. X-E-ADMS-42884-761 (N.Y. State Div. Human Rights, 1985) (concluding that having the “bunny image” is a BFOQ and stating that it is bound by the *St. Cross* and *Weber* cases).

198. *See* McGinley, *supra* note 194, at 269.

199. *Id.*

200. The defense also applies in the opposite type of club, where women are denied jobs in favor of men.

because it found that the discrimination did not affect the central premise of the business.<sup>201</sup> In *Wilson*, Southwest Airlines exclusively hired female employees in order to increase its sales.<sup>202</sup> It argued that female flight attendants and greeters were better for business because across the board, people liked them more. It also claimed that hiring women furthered the intent of its then “love image” marketing campaign.<sup>203</sup> This campaign had “images and advertisements that were permeated by sex.”<sup>204</sup> The commercials had voice-overs like “in-flight love” while showing attractive women helping male passengers into their seats.<sup>205</sup> It had themed food and drink items (“love bites” and “love-potions”) and even machinery (“quickie machine” title for the ticketing machine).<sup>206</sup>

Even though Southwest made its case clear, the Texas court found that its practices did not qualify as a BFOQ defense. The court articulated that a BFOQ defense is only valid when ““vicarious sex entertainment is the primary service provided and female sexuality [is] reasonably necessary to perform the dominate purpose of the job which is forthrightly to titillate and entice male customers.”<sup>207</sup> Similarly to *Diaz*, the court in *Wilson* found that the primary business purpose of Southwest was to safely transport people from one point to another. It was not to sell sex in the same way a gentlemen’s club does.

The court has emphasized that customer based discrimination can never be a defense to Title VII regulations.<sup>208</sup> Customer based discrimination takes the form of choosing employees simply based upon that fact that customers prefer women to men, or whites to minorities, or Christians to Muslims. The argument here is a simple profit one. By hiring employees that customers like better, a company can increase profits (Southwest’s main argument in trying to exclusively hire women).<sup>209</sup> The court has clearly struck this mentality down, because “it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.”<sup>210</sup>

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201. *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 302 (N.D. Tex. 2015).

202. *Id.*

203. *Id.* at 303.

204. Manley, *supra* note 160, at 184.

205. *Wilson*, 517 F. Supp. at 294, n.4.

206. *Id.* (“Unabashed allusions to love and sex pervade all aspects of Southwest’s public image.”).

207. *Id.* at 301.

208. *Diaz*, 442 F.2d at 389.

209. *See generally* Manley, *supra* note 160.

210. *Diaz*, 442 F.2d at 389.

The EEOC guidelines which help implement Title VII regulation also make clear that customer based employment discrimination will not hold up against Title VII: “the refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers will not merit a BFOQ exception.”<sup>211</sup>

Customer based employment discrimination along the lines of Southwest Airlines fall into the “reproduction consideration” test of the essence of the business. Southwest and the like effectively argue that by not allowing them to exclusively hire women, their profits are lowered and as such they are not the exact same business as they were before. That, by having men in the same roles, they will not be able to reproduce the initial discriminating business.

The two ends of the spectrum are quite clear and generally easy undertakings. But the “competitive advantage” considerations in this context are more difficult to apply because the general purpose of the business and the selling of sex appeal are so closely intertwined that disaggregating the two is often hard to do. Hooters is the prime example of a company that falls into the “competitive advantage” category. Hooters does not sell sex in the same way that a gentlemen’s club does, but it also is not so removed from sex appeal as is Southwest Airlines. In fact, selling sex in combination with selling food is integral to the Hooters business model.<sup>212</sup> As such, it is a difficult task to determine whether or not Hooters would get the BFOQ defense.<sup>213</sup> This might be exactly why Hooters has not allowed any of its EEOC Title VII lawsuits to go to a verdict. Patricia Casey (the then-attorney of Hooters) wrote in a response to the EEOC:

The business of Hooters is predominantly the provision of entertainment, diversion, and amusement based on the sex appeal of the “Hooters Girls.” The Civil Rights Act of 1964 specifies that a company can discriminate among job applicants based on Bona Fide Occupational Qualifications (BFOQ). The Playboy Club won repeated court victories in the 1970s and 1980s when sued over its female-only Bunny policy. But throughout the EEOC’s investigation of Hooters, the agency ignored the company’s hiring rationale.<sup>214</sup>

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211. 29 C.F.R. § 1604.2(a)(1)(iii) (2015).

212. See Schneyer, *supra* note 186, at 565.

213. *Id.* See also Manley, *supra* note 160; McGinley, *supra* note 194.

214. James Bovard, *The EEOC’s War on Hooters*, WALL ST. J., Nov. 17, 1995, at A18.

Whether or not Hooters gets a BFOQ is a very fact specific inquiry and different courts might come out differently. However, Hooters might have another outlet available to argue that it should be allowed to continue gender discrimination and maybe even have a defense to the sexual discrimination implicit in its uniforms and treatment of Hooters Girls.

Hooters could potentially argue that it is an expressive association under the *Citizens United* and *Hobby Lobby* precedents. As such, its speech should be protected under the freedom of association jurisprudence giving it a right to exclude those whose inclusion would frustrate its speech. A possible framing of the argument would follow like this:

Although Hooters is a for-profit company that operates a restaurant, it is much more than that. It is an association that promulgates a certain speech. It furthers this speech by its marketing materials, its employees and its attitude towards doing business. The restaurant is supposed to resemble a beach environment, with décor including “bare wooden floors and walls with bar stools.”<sup>215</sup> The Hooters Girls also exemplify a beach atmosphere as they are skimpily clad female servers intended to reproduce attractive women in bathing suits at the beach.<sup>216</sup> The Hooters Girls are encouraged to be friendly with customers and always have a smile. Hooters also gears its marketing campaign to promote its unique competitive advantage in the restaurant market: the Hooters Girls. According to the chain’s marketing information, the servers are supposed to give the impression of “cheerleaders” or the “girl next door.”<sup>217</sup> In 1986, Hooters put out its first yearly calendar where it features several Hooters girls in not only their work outfits, but in bathing suits.<sup>218</sup> The website boasts that “the girls in our calendar aren’t models from New York. You can actually meet every girl in person at a Hooters Restaurant around the world. It’s hard to believe, but EVERY girl in the calendar must be a Hooters waitress, she may actually be the girl next door to you.”<sup>219</sup> The company’s name itself also fits in with the general theme of business. “Hooters” is a pejorative slang term for a women’s breasts. It uses an owl for its logo accentuating the “oo’s” in its name.

Hooters employee handbook reveals many of their intentions in hiring and promoting the Hooters Girl image. It reads in part:

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215. Schneyer, *supra* note 186, at 565.

216. Bill McDowell & Charles Bernstein, *Big Guns: 1995's Hottest Growth Companies*, RESTAURANTS & INSTITUTIONS, Aug. 1, 1995, at 56; *see also* Jack Hayes, *Hooters Clones Scramble for Share of Florida Market*, NATION’S RESTAURANT NEWS, Jan. 13, 1992, at 1.

217. Schneyer, *supra* note 186, at 565–66.

218. HOOTERS CALENDAR, <http://www.hooterscalendar.com/about-us/> (last visited Nov. 15, 2015).

219. *Id.*

The essence of Hooters is the Hooters Girls. Because it is essential to our success that the Hooters Girl image is always properly maintained, failure to comply with these Image and Grooming Standards may result in discipline . . . . Customers can go to many places for wings and beer, but it is our Hooters Girls who make our concept unique. Hooters offers its customers the look of the “All American Cheerleader, Surfer, Girl Next Door.”<sup>220</sup>

The handbook shows that Hooters not only recognizes its competitive advantage, but that it takes the initiative to communicate this to its employees. The “Hooters Concept” is the “entertainment through female sex appeal, of which the LOOK is a key part.”<sup>221</sup> The handbook goes on to prescribe correct methods of applying makeup, using hair accessories, jewelry, not showing tattoos, and of course several pages of detailed analysis on the metrics of the Hooters Girls uniform. Every part of the restaurant’s operation is geared towards promoting the image of the Hooters Girl. And it has a very specific idea of what a Hooters Girl must be as evidenced by the detailed employee standards on physical appearance.

In *Dale*, the Court found that although the Boy Scouts did not promulgate speech per se, the activities, the policies and the operation of the business were effectively speech that advocated against gays as being “morally straight” and “clean.”<sup>222</sup> In the same way, Hooters, although not promulgating speech per se, has instituted activities, policies and operations that can be viewed as speech advocating for the girl-next-door vision of beauty. But more than that, the business as a whole can be seen as promulgating speech that entails that these girls next door are the staple of American society and their purpose is to is to “sexually attract and titillate heterosexual males.”<sup>223</sup> Speech can come in many forms, it just happens to be that Hooters’s speech comes in the form of antiquated misogyny.<sup>224</sup> It is advocating a type of speech that maybe in the twenty-first century we find to be perverse and dissident. But Hooters would argue that this is the exact type of speech that the freedom of association exists to protect. The freedom of association protects public dissent and speech that is genuinely

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220. *So You Wanna Be a “Hooters” Girl? A peek at the beloved boobs and beer emporium’s employee handbook*, THE SMOKING GUN (Sept. 15, 2005), <http://www.thesmokinggun.com/file/so-you-wanna-be-hooters-girl?page=1> (displaying the Hooters handbook).

221. Elena Gaona, *Campaign Against Hooters Heats Up*, U-T SAN DIEGO (Nov. 15, 2015, 7:00 PM), [http://www.utsandiego.com/uniontrib/20060624/news\\_1mi24hooters.html](http://www.utsandiego.com/uniontrib/20060624/news_1mi24hooters.html) (emphasis added).

222. *Dale*, 530 U.S. at 659–61.

223. Schneyer, *supra* note 186, at 569.

224. *See generally id.*; McGinley, *supra* note 194.

counter to the majority and is offered into the public sphere.<sup>225</sup> Its speech is one that is public (advertisements, calendars, websites, etc.) and dissenting (misogyny). Why then is it wrong for it to ask for protection under the freedom of association?

If we take the holdings in *Citizens United* and *Hobby Lobby* to be that for-profit corporations can have protected speech in addition to for-profit motives, we open the door to allowing corporations to view themselves as expressive associations. They then can claim the freedom of association right to exclude members (in this case potential employees). Hooters might be able to take advantage of these short-sighted holdings and argue that its speech advocating misogyny must be protected.

If we grant Hooters this speech, the next step of the analysis is to ask whether or not requiring the company (association) to comply with employee hiring (membership inclusion) requirements would frustrate its message. It is pretty clear that if the Boy Scout's speech would be frustrated by gays, the Hooters's speech would be frustrated by requiring the company to hire men. In fact, a Hooters Girl would cease to exist if it were not a girl in the first place. Moreover, requiring Hooters to get rid of its detailed and overbearing employee handbook would also frustrate the message of women as being sexually attractive so as to generally titillate heterosexual males.

But some would argue that in order for an association to have speech, the speech must be agreed upon by all the people who are members of the association (shareholders in a for-profit corporation).<sup>226</sup> This would effectively prevent Hooters from being an expressive association. But is this criticism realistic in the Hooters case example? Maybe not. First of all, Hooters is a private company and owned by Chanticleer Holdings, LLC. There is only shareholder in this case. One could easily argue that by buying the company in the first instance after performing the due diligence routinely employed by such a transaction, Chanticleer Holdings, LLC has effectively ratified the misogynist speech of Hooters.<sup>227</sup> Moreover, even if Hooters were owned by several shareholders, it stands to reason that the public perception of Hooters along with its marketing materials and calendars make clear to potential investors that Hooters is promulgating speech. By its own accord, Hooters recognizes that its

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225. See *supra* Part II.

226. See generally Bezanson et al., *supra* note 16.

227. Even if we go back to the founding of Hooters, we get the same result. The company then had the same business model and generally the same the practices of discrimination. It was clearly a closelyheld company initially as it was owned by six individuals (Lynn D. Steward, Gil DiGiannantonio, Ed Droste, Billy Ranieri, Ken Wimmer, and Dennis Johnson). See *Hooters History*, THE ORIGINAL HOOTERS, <http://www.originalhooters.com/saga/the-beginning/> (last visited Nov. 15, 2015).

competitive advantage is the Hooters Girls, i.e., its high profits are directly tied to the concept and execution of the Hooters Girls. When investing in a company or buying its shares, shareholders are expecting to receive a profit or return. When a company's speech (e.g., Hooters's misogynist speech) is so directly tied to profits, it would be awkward if an investor wanted to own the company and gain profits from it, but did not also share the importance of the Hooters Girls. As such, with speech (however perverse) that is so closely tied to profits, it can be argued that owning shares of a company is an implicit ratification of the company's speech.<sup>228</sup>

#### B. CASE STUDY 2: A DEFENSE OF RELIGIOUS DISCRIMINATION (ABERCROMBIE & FITCH)

The Supreme Court of the United States recently ruled on a case in which Abercrombie & Fitch was accused of not accommodating a young Muslim girl's religious practice of wearing a hijab.<sup>229</sup> The lower court of appeals ruled in favor of Abercrombie because it held that the company did not have "actual knowledge" of the women's religion under a strict reading of Title VII.<sup>230</sup> The Supreme Court overturned the lower court opinion, holding that a plaintiff need only "show that his need for an accommodation was a motivating factor in the employer's decision."<sup>231</sup> Effectively, the Court ruled that actual knowledge is not the right standard. Instead, if it is shown that an employee's religion played any role in the employer's decision, then the case for intentional discrimination has been made.

Ms. Elauf (a young practicing Muslim woman) interviewed for a sales-floor position at Abercrombie and Fitch.<sup>232</sup> During this interview she wore the traditional garb for a practicing Muslim woman, the hijab. The interviewer rated Ms. Elauf on a scale of three points for various set categories. According to the company, Ms. Elauf initially received a two in each category for a combination of six, "which is a score that 'meets

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228. See William A. Sodeman, *Social Investing: The Role of Corporate Social Performance in Investment Decisions*, BUS. & SOC'Y, Aug. 1994, at 222–23; Thomas C. Berry & Joan C. Junkus, *Socially Responsible Investing: An Investor Perspective*, 112 J. BUS. & ETHICS, Feb. 2013, at 707; and Ivan Barrera-Tarrazona et al., *Measuring Investors' Socially Responsible Preferences in Mutual Funds*, 10 J. BUS. & ETHICS, Oct. 2011, at 305 for the connection between investing in a company and responsibility for the company's actions.

229. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015).

230. EEOC v. Abercrombie & Fitch Stores, 731 F.3d 1106, 1116 (10th Cir. 2013) (noting that the Title VII statute reads in part that it is unlawful for an employer . . . to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion" (quoting 42 U.S.C. § 2000e-2(a)(1))).

231. *Abercrombie & Fitch Stores*, 135 S. Ct. at 2032.

232. *Id.* at 2031.

expectations’ and amounts to a ‘recommen[dation]’ that Abercrombie hire her.<sup>233</sup> Since Ms. Elauf wore a head-scarf to the interview, the interviewer (not sure as to whether the head scarf was necessary for Ms. Elauf) decided to lower the “appearance & sense of style” score to a one. This brought Ms. Elauf’s score down to a five, a score that does not receive a recommendation for hiring.

The wearing of the hijab is at odds with Abercrombie’s “Look Policy.” Abercrombie requires its employees to comply with this policy, which is “intended to promote and showcase the Abercrombie brand, which ‘exemplifies a classic East Coast collegiate style of clothing.’”<sup>234</sup> This policy is taken very seriously at Abercrombie, so much so that in the policy it refers to the sales-floor employees as “Model[s].”<sup>235</sup> Most important for the case at hand is the policy’s prohibition on any “black clothing and caps.”<sup>236</sup> If an employee does not adhere to this prohibition or the “Look Policy” as a whole, she is subject to “disciplinary action . . . up to and including termination.”<sup>237</sup>

Abercrombie vehemently claimed that its “Look Policy” is integral to the success of the company and “is critical to the health and vitality of its preppy and casual brand.”<sup>238</sup> So much so that the company claims that the main job of a “Model” is to represent and promote the Abercrombie clothing and brand.<sup>239</sup> It is easy to see that the black hijab that Ms. Elauf wore to her interview was at odds with Abercrombie’s strict clothing policy. However, Title VII requires employers to “reasonably accommodate an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”<sup>240</sup> Abercrombie even has a similar policy and indicates that human resources managers “may grant accommodations if doing so would not harm the brand.”<sup>241</sup> The circuit court interpreted Title VII to only impose this obligation if and when the employer had actual knowledge that the employee needed an accommodation pursuant to the religion they practice.<sup>242</sup> The Tenth Circuit held that on a close reading of the statute, although Abercrombie might have suspected that Ms. Elauf was

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233. *Abercrombie & Fitch Stores*, 731 F.3d at 1113 (noting that Abercrombie’s official interview guide requires the interviewer to consider the applicant’s “appearance & sense of style,” whether the applicant is “outgoing & promotes diversity,” and whether he or she has “sophistication & aspiration”).

234. *Id.* at 1111.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Abercrombie & Fitch Stores*, 731 F.3d at 1111.

240. 42 U.S.C. § 2000e-2(a)(1) (2015); *see also* 42 U.S.C. § 2000e(j) (2015) (defying religion).

241. *Abercrombie & Fitch Stores*, 731 F.3d at 1112.

242. *Id.* at 1116–20.



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Muslim, it did not have actual knowledge (Ms. Elauf did not indicate to them that she needed an accommodation). As such, Abercrombie did not violate Title VII by refusing to hire Ms. Elauf because of her hijab.

The Supreme Court, however, read Title VII differently. It held that actual knowledge was not required. Instead, it held that an “employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.”<sup>243</sup> Since Abercrombie did consider the fact that Ms. Elauf had a scarf in their decision, they used her religion as a factor and therefore violated Title VII.

However, the posture of this case raises interesting issues on what would happen if Abercrombie attempted to argue an expressive association exemption to Title VII regulation even if it had knowledge of Ms. Elauf’s religion and need of accommodation.

Abercrombie might argue that it is an expressive association and its Look Policy is a type of protected speech. As such, their speech would be frustrated by having to provide accommodation to Ms. Elauf wearing her hijab. Although Abercrombie could be seen as an expressive association, like Hooters, I argue that the “Look Policy” would not be treated as protected First Amendment speech in the same way the Hooter’s employee handbook could be. In which case, Abercrombie could not use the expressive association defense to successfully defeat this Title VII lawsuit.

From the discussion above, it can be credibly argued that Abercrombie & Fitch is an expressive association. Although, it seeks to make profit, it too, as the Court has made clear, could also associate so as to take part in any First Amendment activity. An integral part of the freedom of association jurisprudence is the right to exclude based upon the specific speech that is promulgated. Abercrombie would have to argue that its speech is its “Look Policy.” That is to say, that it wishes to exclude those people who do not abide by its “Look Policy” because it will frustrate its speech. But what exactly is the speech in this case?

It seems that the company would argue that the “Look Policy” represents what it views as being “beautiful” or “good looking” in today’s world. That not wearing hats, dressing as an East Coast prep and being a “Model” is what its brand is attempting to promote (in effect, that following the “Look Policy” means you are cool or hip).<sup>244</sup> If we concede that this is the nature of the protected speech, it is pretty clear that a Muslim women wearing a hijab would be at odds with the speech and would frustrate it. As a matter of fact, any headgear would probably

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243. 42 U.S.C. § 2000e(j) (2015).

244. Note that this is just one take at what speech the “Look Policy” could communicate. I don’t have any unique insights into what speech Abercrombie would themselves argue if they attempted an expressive association defense.

frustrate the speech (a Sikh man wearing a turban or a Jewish man wearing a yarmulke). In this way, if a court were to protect the exclusion of Muslims, Jews or Sikhs, then it would treating the “Look Policy” as protected speech under the freedom of association jurisprudence.

I argue, however, that this is not a strong case for expressive association protection.<sup>245</sup> In effect, the “Look Policy” speech is not strong enough speech and does not “create space for democratic dissent — space that serves as a genuine counter to the majority’s decision.”<sup>246</sup> The “Look Policy” speech is of very low value, if it is even speech at all. Hence, this speech would not be protected even if Abercrombie was deemed to be an expressive association. The nature of the exclusion gives us great insight into what exactly the speech is and who it attempts to exclude.

The speech, facially, is not antireligious, pro-gender, pro-race or even pro-body type. It is simply speech that defines what a good look is.<sup>247</sup> In this way, the speech is not discriminatory on its face. The “Look Policy” speech does not say that Abercrombie will not hire people who are Muslim or Sikh or Jewish, rather it says, they will not hire people who wear hats or headgears. It just happens to be that very strict practicing Muslims, Sikhs, or Jews would be excluded from employment, because they tend to wear clothing on their head. Justice Thomas’s dissent although not suggesting that the “Look Policy” is speech, does draw upon this argument. He argues that the Abercrombie “Look Policy” is a “neutral Look Policy . . . it does not treat religious practices less favorably than similar secular practices, but instead remain[s] neutral with regard to religious practices.”<sup>248</sup> Ironically for Justice Thomas, because the policy is neutral, it garnished more protection in the case. Under the expressive association defense, a policy that is actually more targeted would garnish more protection.

This is not like the discrimination that we encountered above in the Hooters case. That discrimination was very specifically anti-male. It was an exclusion of a whole category of protected potential employees. There

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245. One reason that Abercrombie might not get expressive association protection is that it is a public company. As such, the shareholder viewpoints are very diverse that there will likely be no unity in speech between the shareholders. It could very well be the case that a practicing Muslim, Sikh or Jew could hold shares in the company and such would not support this speech. I am leaving this question aside for the time being, but one can look to the discussion of expressive association as corporations as a whole in Part III above for arguments regarding the unity versus disunity of speech that likely exists in a large publicly traded company. I proceed with this analysis assuming that a court would grant that even though the company is large and publicly held it could still be an expressive association with protected speech.

246. Bedi, *supra* note 50, at 438.

247. Body type would only be important in jurisdictions that protect it. Remember though, that at least one state, Michigan, prohibits discrimination based upon height and weight.

248. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. at 2038 (Thomas, J., concurring in part and dissenting in part).

the employer, Hooters, was advocating a personal discriminatory viewpoint. The discrimination in the Abercrombie case is more akin to disparate impact discrimination, i.e., one that is results based not intent based.

Abercrombie does not seem to dislike Muslims or Sikhs as a prima facie category of people. Rather, their speech seems to create results that disparately impact and shut out those people who happen to be Muslim or Sikh. In this way, it is less problematic than the discrimination in Hooters. It can be generally agreed upon that it would be worse for Abercrombie to outright say in the “Look Policy” that they do not want to hire Muslims, Jews or Sikhs because Abercrombie does not like them.<sup>249</sup>

Ironically, the fact that Abercrombie’s discriminatory intent does not outright denounce a religion makes it less likely that a court would protect its speech. Speech implicated in disparate impact discrimination will generally not arise to the level of dissenting speech as speech implicated in intent based discrimination. In order to be protected First Amendment speech, associative speech must contribute to some democratic debate. Speech that says hats are not cool does not seem to arise to the level of speech that claims women are inferior to men, gays are inferior to straights, or Muslims are inferior to Christians. It is the speech that is problematic in our eyes that deserves protection in the eyes of the Court.<sup>250</sup>

So, Abercrombie could argue that it is an expressive association. It, however, would not receive the same deference on that speech that Hooters would get, because the Abercrombie speech would only have a disparate impact on Muslims, Sikhs, or Jews, while Hooters’s speech would have, and does have, a direct impact on all males. Abercrombie’s practices of discrimination based upon its “Look Policy” should not concern us when viewing companies as expressive associations. It would not be able to use the freedom of association jurisprudence to hide behind its employment discrimination decisions.

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249. People might disagree here, but given that Title VII is quicker to protect disparate impact discrimination than intent based discrimination seems to provide some support for the proposition that this type of discrimination is less problematic doctrinally.

250. A detailed discussion of the nature of what speech gets First Amendment speech is would be good here, but is beyond the scope of the article. It suffices for my purposes to just say that Abercrombie’s speech and disparate impact speech is not as important as intent based discrimination. Abercrombie’s speech is low value speech, while Hooters speech would be deemed more high-value speech. The Court’s jurisprudence and scholarship on First Amendment speech is very extensive, for more detailed discussions of why speech against gender would get protection and speech against hats would not be, see the following: WOJCIECH SADURSKI, *FREEDOM OF SPEECH AND ITS LIMITS* 52 (Francisco Laporte et al., 1999); *United States v. Stevens*, 559 U.S. 460, 468-69 (2010); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 W. & MARY L. REV. 189, 189-90 (1983); R.A.V. v. St. Paul, 505 U.S. 377, 403 (1992); Genevieve Lakier, *Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015).

## VI. CONCLUSION

This article has argued that treating for-profit corporations as expressive associations, regardless of structure or number of shareholders, can create perverse outcomes for employment discrimination. In particular, treating corporations like expressive associations, as the recent Supreme Court jurisprudence might implicate, could potentially allow employers to use First Amendment protected speech to hide behind egregious employment discrimination decisions.

The freedom of association jurisprudence was created to protect a very specific type of entity, an association geared towards advocacy. The gradual movement away from this limited protection particularly with *Dale* combined with the expansive view of a corporation's role in the public discourse, risks expanding the right to exclude to for-profit corporations. In order to not overrule *Citizens United* or *Hobby Lobby*, a difficult task of limiting which kinds of companies can advocate speech through the corporate form will have to ensue. Included in this discussion will have to be whether large companies with differing shareholder viewpoints should be treated differently than closely held companies with shareholder unity in speech.

One safeguard to corporate discrimination could be the marketplace of ideas theory that Justice Holmes famously articulated. That, as long as we protect high value speech regardless of content, the public will decide through its own consumer based restrictions which speech it values and which speech it dislikes. If we are currently operating under this theory, then it is probably the case that Hooters's speech is liked in the marketplace, as people still patron their restaurants frequently.

At the end of the day, however, we have to be skeptical of any for-profit company and nonadvocacy organization (whatever its size or agenda) arguing an expressive association defense to Title VII restrictions. At the same time, courts will have to weigh our robust history of protecting the First Amendment and the open dissemination of dissenting speech with the corporate ability to discriminate. A task, I argue, will be increasingly more difficult in the wake of *Dale*, *Citizens United*, and *Hobby Lobby*.