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John D. Inazu
Washington University in St. Louis School of Law, jinazu@wustl.edu

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THE FOUR FREEDOMS AND THE FUTURE OF RELIGIOUS LIBERTY*

JOHN D. INAZU**

The First Amendment's rights of speech, press, religion, and assembly were once "interwoven" but distinct. Together, these freedoms strengthened a pluralist skepticism of state orthodoxy that protected religious and other forms of liberty. The connections among these rights were evident at the Framing. They were also prominent during the 1930s and 1940s, when legal and political rhetoric recognized the "preferred position" of the "Four Freedoms."

We have lost sight of these Four Freedoms, supplanting their unified distinctiveness with an undifferentiated free speech framework driven by unsatisfying concepts like content neutrality and public forum analysis. The consequences of losing this pluralist vision are nowhere more evident than in the diminishing constitutional protections for religious groups, which are paradigmatic of the expressive, dissenting, and culture-forming groups of civil society. Returning attention to the Four Freedoms reminds us that the boundaries of religious liberty have never rested solely in the First Amendment's Free Exercise Clause; religious liberty is best strengthened by ensuring robust protections of more general forms of liberty. But the normative effort to reclaim these pluralist protections is not without costs,

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** Associate Professor of Law and Political Science, Washington University School of Law. Thanks to Steve Smith, Chris Lund, Chip Lupu, Bill Marshall, Rick Garnett, Chad Flanders, Micah Schwartzman, Ash Bhagwat, Zoe Robinson, Zak Calo, Adam Rosenzweig, Guy Uriel-Charles, Anthony Deardurff, Randy Kozel, Ron Levin, Greg Magarian, Joseph Blocher, Deborah Dinner, Nathan Chapman, Russell Osgood, and Michael Hefland; to participants at the Freedom of the Church Conference at the University of San Diego and workshops at Duke, DePaul, Notre Dame, Missouri, and Washington University for helpful comments; and to William Osberghaus, Ethan Rodkin, and Michael Martinich-Sauter for excellent research assistance. Thanks also to Troy Shelton and the editors of the *North Carolina Law Review*. Finally, I am grateful to Nelson Tebbe for his thoughtful engagement with this Article. *See* Nelson Tebbe, *Associations and the Constitution: Four Questions About* Four Freedoms, 92 N.C. L. REV. 917 (2014).

and it confronts powerful objections from antidiscrimination norms pertaining to race, gender, and sexual orientation. This Article confronts these objections in arguing for a renewal of the pluralist emphasis once represented by the Four Freedoms.

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INTRODUCTION

The First Amendment's freedoms of speech, press, religion, and assembly once reinforced each other. They protected citizens from forced participation in state orthodoxy and created spaces for these citizens to generate and pursue ideas and ways of life apart from the watchful gaze of government. They protected, among other things, a pluralistic civil society that tolerated genuine disagreement and shielded private groups from the imposition of majoritarian norms. These interconnections were evident to the Framers of the First Amendment. During the 1930s and 1940s, as the United States confronted a global threat to its freedoms and its way of life, Americans underscored the importance of and unity among these

four rights, giving them a "preferred position" in our constitutional scheme. They called these rights the Four Freedoms.[1]

Today, the "Four Freedoms" are usually taken to refer to President Roosevelt's quartet of freedom of speech and expression, freedom of worship, freedom from want, and freedom from fear. That was not always the case. In an earlier era, the Four Freedoms meant four of the five rights enumerated in the First Amendment: speech, press, religion, and assembly.[2] As one Supreme Court opinion asserted, these rights were "interwoven" with one another.[3]

We have lost sight of the significance of the Four Freedoms, supplanting their unified distinctiveness with an undifferentiated free speech framework.[4] First Amendment claims that would have fit more naturally under one of the other Four Freedoms now masquerade as free speech claims, squeezed into free speech doctrines like content neutrality and public forum analysis. But the

1. For more on the significance of the Four Freedoms in historical context, see John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 601–03 (2010); *infra* Parts I.B, I.C.

2. *See* U.S. CONST. amend. I. The First Amendment guarantees five rights (the fifth being petition), but mid-twentieth century American political and legal rhetoric emphasized speech, press, religion (presumably covering aspects of both free exercise and non-establishment), and assembly. The rhetorical focus of this Article builds upon the Four Freedoms, but the fifth freedom is not without significance, and a more complete account of the First Amendment's role in guarding dissent from state orthodoxy would need to account for the right of petition. For an example of others that have begun that work, see generally RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES (2012).

3. Prince v. Massachusetts, 321 U.S. 158, 164 (1944).

4. The extent of this modern phenomenon is reflected in the near-total divide between the religion clauses and other First Amendment rights in law school casebooks and legal scholarship. *See, e.g.*, THOMAS EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT, at ix (1967) ("No attempt is made in this essay to treat the provisions of the First Amendment which relate to freedom of religion."); Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 994 (2011) (arguing that "self-governance . . . [provides] a theory of the First Amendment generally or at least the provisions of the First Amendment other than the Religion Clauses"); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1765–66 (2004) (emphasizing that the focus of his inquiry is on "American free speech doctrine"). For rare exceptions, see GEOFFREY STONE ET AL., THE FIRST AMENDMENT 622–25 (2003); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 769–70 (2001) (asserting that his approach "reintegrates the two strangely disjoined halves of the First Amendment: the freedom of speech and the freedom of religion"). I leave to the side (for the moment) scholars who have suggested that free exercise is subsumed by some other First Amendment right. *See, e.g.*, William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 545 (1983); Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 91 (2001).

Court's free speech jurisprudence, having lost its connections to the other Four Freedoms, now divorces the expression of ideas from the groups and relationships that allow those ideas to form in the first place.[5] The net result is a loss of pluralism and difference in our First Amendment jurisprudence, an encroachment on the rights of the private groups of civil society to pursue their own visions of the good, and a reduction in the ability of those groups to stand in opposition to majoritarian norms.

It did not have to be this way, and it may not be too late to change course. The central objective of this Article is to reclaim the pluralist emphasis once represented by the Four Freedoms.[6] I focus on religious groups, which are paradigmatic of the expressive, dissenting, and culture-forming groups of civil society.[7] Religious groups also influenced early understandings of the Four Freedoms.[8]

5. Ashutosh Bhagwat has helpfully advocated a return to these connections through the idea of "associational speech." *See* Bhagwat, *supra* note 4, at 981. Professor Bhagwat defines associational speech as "speech that is meant to induce others to associate with the speaker, to strengthen existing associational bonds among individuals including the speaker, or to communicate an association's views to outsiders (including government officials)." *Id.*

6. A handful of other scholars have proposed stronger links between religious liberty and First Amendment rights other than the free exercise right. *See, e.g.*, CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 64–65 (2007) (construing religious freedom as part of a "right to band together for political—or more generally, expressive—purposes"); William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 88–89 (1986) (making a similar argument for "cultural association" that includes some religious groups); Scott M. Noveck, *The Promise and Problems of Treating Religious Freedom as Freedom of Association*, 45 GONZ. L. REV. 745, 752 (2010) (arguing for religion as a form of expressive association). One problem with many of these efforts is that they have linked religious liberty too closely to the doctrinally unstable right of association. *See* Marshall, *supra*, at 91 ("The test for cultural association, in short, should closely parallel the test for expressive association."); Noveck, *supra*, at 753 ("Religious associations fall well within [the] protected category of intimate association."). As I explore more fully later in this Article, expressive association is one of the casualties of the pluralist decline and is unlikely to offer significant protection to religious groups.

7. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 712 (2012) (Alito, J., concurring) ("Throughout our Nation's history, religious bodies have been the preeminent example of private associations that have 'act[ed] as critical buffers between the individual and the power of the State.' " (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984))).

8. *See, e.g.*, Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 16 (2000) ("[T]he struggle for the freedom to publish religious tracts was a precursor to the struggle for the freedom of the press more generally, as the freedom to gather together for purposes of religious worship was for the freedom of assembly."); John Howard Yoder, *Response of an Amateur Historian and a Religious Citizen*, 7 J.L. & RELIGION 417, 416–17 (1989) ("There was a long British Puritan history, from the age of Milton to the 1689 Bill of Rights, in the course of which the civil freedoms of speech, press, and assembly arose out of religious agitation, not the other way round.").

They embody the value of pluralism and may be among those groups most threatened by its decline.[9] But the Four Freedoms also remind us that the boundaries of religious liberty have never rested solely in the First Amendment's Free Exercise Clause; religious liberty is best strengthened by ensuring robust protections of more general forms of liberty.

Part I of this Article situates the pluralist vision in American constitutional history. It calls attention to connections among the Four Freedoms that emphasize the importance of groups apart from the messages they express in discrete gatherings. Our current approach is much different. Because we frame much of our First Amendment inquiry around the Free Speech Clause (and derivative concepts like the right of "expressive association"), we value groups today, constitutionally and otherwise, just to the extent that they convey a coherent expression reducible to oral or written form. But messages take time to develop. They emerge *out of* groups.

By appealing to history, I do not mean to claim that our constitutional tradition reflects an unbroken commitment to pluralism. The history of religious liberty emerges through a complicated and fractured narrative that includes periods of heightened commitment to pluralism and periods of intense neglect. The treatment of Mormons in the late nineteenth century represents a well-known nadir.[10] The widespread oppression of African-American religious communities is another.[11] Catholics, Jews, and Native Americans have all borne witness to a pluralist theory unmatched by practice.[12] But the pluralist vision is a part of our constitutional story, and it has set out important markers over the course of that narrative. My objective is to highlight some of those

9. Religious groups form the focus of my inquiry in this Article, but that focus is exemplary rather than exhaustive—it does not capture the universe of pluralist claims brought under the First Amendment. As I explain later, the claim of strong pluralism that emerges out of the Four Freedoms extends to nonreligious as well as religious groups. Conversely, not all religious liberty claims are rooted in pluralist arguments, and even those that are will not always rely on all Four Freedoms. For example, most of the religious liberty cases discussed in this Article do not involve the freedom of the press.

10. *See, e.g.*, Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890); Reynolds v. United States, 98 U.S. 145 (1879).

11. *See, e.g.*, JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 29–35 (2012).

12. *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 878 (1990) (denying a religious exemption to members of a Native American church for the sacramental use of peyote); Philips v. Gratz, 2 Pen. & W. 412, 415 (Pa. 1831) (denying a religious exemption request by a Jewish litigant in seeking to delay a court appearance until after the Sabbath); Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST AMEND. L. REV. 45, 60–61 (2003) (discussing the anti-Catholic motivations behind the Blaine Amendments).

markers and to suggest why they ought to play a more determinative role in our current normative debates.

Part II traces the decline of the pluralist vision in modern First Amendment jurisprudence. It pays particular attention to three doctrinal developments. The first is increased reliance on the Free Speech Clause to the neglect of other First Amendment rights, which is nowhere more evident than in the growing confusion over the purpose and scope of the public forum doctrine. The second is the scaling back of protections for religious groups under the Free Exercise Clause. The third is the emergence of the judicially recognized right of expressive association, which has largely supplanted the right of assembly.[13]

My focus on religious groups is complicated by the Supreme Court's conflicted doctrine surrounding religious liberty. In *Employment Division v. Smith*,[14] the Court announced that religious liberty claims brought under the First Amendment's Free Exercise Clause receive no special protection under the Constitution,[15] and in *Christian Legal Society v. Martinez*,[16] the Court asserted that this rule extended to religious groups that resist antidiscrimination norms.[17] But in *Hosanna-Tabor v. EEOC*,[18] a unanimous Court opined that the First Amendment grants "special solicitude" to religious organizations and protects churches from employment discrimination lawsuits involving certain leadership positions under a doctrine

13. The doctrinal developments surrounding the free press right have been largely unrelated to the pluralist decline, but that right has also fallen out of favor in recent years. *See, e.g.*, Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1027 (2011) (noting that the Supreme Court has not addressed in thirty years whether the Press Clause has "significance separate from the Speech Clause"). As with the other Four Freedoms, contemporary treatment of the freedom of the press contrasts earlier understandings. *See, e.g.*, Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) ("The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historical connotation comprehends every sort of publication which affords a vehicle of information and opinion."); *see also* Citizens United v. FEC, 558 U.S. 310, 351–55 (2010) (discussing the scope of the press right).

14. 494 U.S. 872 (1990).

15. *Id.* at 878–79.

16. 130 S. Ct. 2971 (2010).

17. *Id.* at 2995 n.27 ("CLS briefly argues that Hastings' all-comers condition violates the Free Exercise Clause. Our decision in *Smith* forecloses that argument. In *Smith*, the Court held that the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct. In seeking an exemption from Hastings' across-the-board all-comers policy, CLS, we repeat, seeks preferential, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause." (citations omitted)).

18. 132 S. Ct. 694 (2012).

known as the "ministerial exception."[19] The Court may try to reconcile *Hosanna-Tabor* and *Martinez* by drawing distinctions between churches and religious student groups or ministers and non-ministers. But these distinctions will not hold indefinitely: the Court's two approaches to the constitutional boundaries of religious groups in *Hosanna-Tabor* and *Martinez* are on a collision course.[20]

Part III addresses an important objection to the pluralist argument: similar arguments were raised by white segregationists in defense of the private schools they formed to resist integration during the 1960s and 1970s. The courts rejected these appeals. The failed arguments of segregationists lead to what I call the *standard objection* to the pluralist vision: if pluralism means greater autonomy for private, noncommercial groups, then were courts wrong to reject the segregationists' arguments? If not, then how are these earlier arguments distinguishable, and what limiting principles apply? Part III considers four possible responses to the standard objection. The *religion is special* approach resolves the standard objection by insisting that religiously motivated discrimination is constitutionally different than other forms of discrimination. The *status is different* approach rejects the pluralist argument when groups distinguish on the basis of status but not when they distinguish on the basis of the

19. *Id.* at 706, 710 ("The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC's and Perich's view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.").

20. Consider, for example, a Baptist campus ministry run out of a Baptist church at a public university that adopts an all-comers policy. Suppose this particular Baptist church believes that every member is a minister of the gospel, and while anyone is welcome to attend the group, only those who adhere to the church's creeds and ministerial requirements can join. How does that case come out under *Hosanna-Tabor* and *Martinez*? It is not clear that both lines of analysis can hold. *Compare Martinez*, 130 S. Ct. at 2993 n.24 ("In arguing that the all-comers policy is not reasonable in light of the . . . forum's purposes, the dissent notes that Title VII, which prohibits employment discrimination on the basis of religion, among other categories, provides an exception for religious associations. The question here, however, is not whether Hastings *could*, consistent with the Constitution, provide religious groups dispensation from the all-comers policy by permitting them to restrict membership to those who share their faith. It is instead whether Hastings *must* grant that exemption. This Court's decision in [*Smith*] unequivocally answers no to that latter question." (citations omitted)), *with Hosanna-Tabor*, 132 S. Ct. at 710 ("The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.").

conduct or belief. The *race is different* approach rejects the pluralist argument in the context of racial discrimination. The *strong pluralist* approach, which I adopt, argues for robust protections for private noncommercial groups.[21]

Part IV describes the contours of strong pluralism in the areas of toleration (whether the government will permit the existence of certain groups) and subsidy (whether the government will extend generally available funding and facilities to these groups). Strong pluralism rejects a bright-line distinction between toleration and a generally available subsidy. In today's regulatory state, almost any form of toleration involves some form of subsidy. Faced with this reality, I argue that private, noncommercial groups should be permitted to make membership and leadership decisions on any basis, including race, and that generally available benefits ought to extend to these groups. This approach challenges the prevailing legal orthodoxies and leads to unattractive bedfellows, but it may be the most plausible way to renew the pluralist vision of the First Amendment.[22]

21. I think there is a strong case to be made for a pluralist emphasis in the original public meaning of the provisions of the First Amendment, but my arguments do not rely exclusively upon those claims. Rather, the interpretive methodologies underlying the constitutional claim to strong pluralism are themselves pluralist. As Randy Kozel argues, many of the Justices on the current Supreme Court appear to embrace this kind of pluralist methodology to constitutional interpretation. *See* Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1879 (2013); *see also id.* at 1881 (noting that Chief Justice John Roberts, during his confirmation hearings, "made no pretense of consulting a unified principle to guide the weighing of relevant factors across different types of cases").

22. Strong pluralism is also consistent with the overwhelming thrust of free speech doctrine, which permits even harmful speech, expression, and protest. *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) ("As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."); United States v. Stevens, 599 U.S. 460, 470 (2010) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs."); Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988) (asserting that speech may not be restricted "because [it] may have an adverse emotional impact on the audience"); Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21, 24 (Ill. 1978) (permitting the wearing of swastikas in parade through village with high concentration of Holocaust survivors and concluding that while "we do not doubt that the sight of [the swastika] is abhorrent to the Jewish citizens of Skokie, and that the survivors of the Nazi persecutions, tormented by their recollections, may have strong feelings regarding its display . . . it is entirely clear that this factor does not justify enjoining defendants' speech"). *But cf.* JAMES BOYD WHITE, LIVING SPEECH: RESISTING THE EMPIRE OF FORCE 41 (2006) ("We cannot ask of the Supreme Court . . . that it create a world in which only living speech exists, and in which advertising and propaganda, and other forms of trivializing and dehumanizing speech, have no place, but we can ask of our courts, as of ourselves, that

I. THE PLURALIST FRAMING OF THE FOUR FREEDOMS

The pluralist vision that I advocate is driven by a suspicion of state power and state orthodoxy, with a particular skepticism of the government's ability to interpret the meaning and value of the practices of a group.[23] It prioritizes difference at the risk of instability. As a matter of political theory, the pluralist vision denies ontological primacy to the state and insists that the groups existing apart from the state may lay claim to a distinctive kind of "politics" within a given domain.[24]

As a matter of constitutional theory, the pluralist vision draws upon our constitutional text and the history that informs it. We see it embedded in the Madisonian notion of faction.[25] It is captured in debates over the First Amendment.[26] It embraces Justice Jackson's challenge that

> we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse, or even

they seek to imagine speech in a worthy way—to distinguish what has real value as speech from that which is destructive of the value of speech . . . .").

23. I draw from a number of intellectual resources in arriving at this characterization of the pluralist vision, including Alasdair MacIntyre, Sheldon Wolin, and Ludwig Wittgenstein. For a more detailed explanation, see INAZU, *supra* note 11, at 150–62. One important corollary to this perspective is an epistemic agnosticism about the value or meaning of a given practice to its participants. For this reason, I do not offer a substantive account or defense of the intrinsic worth of any particular group or practice.

24. This kind of pluralism also bears resemblance to the school of British pluralism represented by figures like Frederic Maitland, John Figgis, and Harold Laski. *See* PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 181–83 (2013); INAZU, *supra* note 11, at 98–99. It stands in contrast to the American pluralist political thought arising out of mid-twentieth century liberalism and represented in the writings of scholars like David Truman and Roald Dahl. For a critique of the latter, see INAZU, *supra* note 11, at 96–117.

25. Madison was keenly aware of the dangers of factions:

> A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to cooperate for their common good.

THE FEDERALIST NO. 10, at 41–42 (James Madison) (Terrence Ball ed., 2003). Factions, by Madison's definition, were adverse "to the permanent and aggregate interests of the community." *Id.* at 41. But Madison also recognized the importance of differing interests to countering majoritarian interests, which could be "unjust and interested," *id.* at 46, and sacrifice to their "ruling passion or interest both the public good and the rights of other citizens," *id.* at 43. He relied on these competing interests to ensure that a majority would be "unable to concert and carry into effect schemes of oppression." *Id.* at 43.

26. *See infra* Part I.A (discussing debates in the House of Representatives).

> contrary, will disintegrate the social organization. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.[27]

The pluralist vision confronts the façade of the well-ordered and stable society that thrives on an imagined consensus.[28] It reveals that our politics is dynamic rather than static and that the complexities of living together are always contingent and open-ended. And, as Richard Garnett reminds us, it is anchored in our private groups, which are "alternative sources of meaning and education, and are essential both to genuine pluralism and to freedom of thought and belief."[29]

Some of the most well-known progressive voices of our own era echo these views. Kenneth Karst insists that "[o]ne of the points of any freedom of association must be to let people make their own definitions of community."[30] William Eskridge reaches a similar conclusion: "The state must allow individual nomic communities to flourish or wither as they may, and the state cannot as a normal matter become the means for the triumph of one community over all others."[31] And David Richards reflects, "The best of American

27. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943); *see also* William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 5 (1995) ("The proscription against compelled state orthodoxy underlies the compelled speech cases, including *Barnette*, in which the Court has consistently struck down provisions which arguably require individuals to profess adherence to a particular idea.").

28. The consensus narrative has been advanced powerfully by thinkers like Roald Dahl and John Rawls. For a critique of these consensus claims, see INAZU, *supra* note 11, at 96–114.

29. Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1857 (2001); *see also id.* at 1846 (describing "the indivisible process of acquiring beliefs, premises, and dispositions that are our windows on the world, that mediate and filter our experience of it, and that govern our evaluation and judgment of it").

30. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 688 (1980); *see also* Roberts v. U.S. Jaycees, 468 U.S. 609, 633 (1984) (O'Connor, J., concurring) ("Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.").

31. William N. Eskridge Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2415 (1997).

constitutional law rests, I have come to believe, on the role it accords resisting voice, and the worst on the repression of such voice."[32]

Religious groups have often exemplified the pluralist vision. As Michael McConnell has noted, religious freedom embodies "counter-assimilationist" ideals that allow people "of different religious faiths to maintain their differences in the face of powerful pressures to conform."[33] Professor McConnell has also observed that "[g]enuine pluralism requires group difference," and that difference "requires that groups have the freedom to exclude, as well as the freedom to dissent."[34] Former Secretary of State Hillary Clinton recently reinforced a similar idea:

> Religious freedom is not just about religion. It's not just about the right of Roman Catholics to organize a mass or Muslims to hold a religious funeral or Baha'is to meet in each other's homes for prayer, or Jews to celebrate high holy days together. As important as those rituals are, religious freedom is also about the right of people to think what they want, say what they think and come together in fellowship without the state looking over their shoulder.[35]

The pluralist vision bears a particular connection to the First Amendment's right of assembly.[36] While we may tend to conceive of

32. DAVID A. J. RICHARDS, FUNDAMENTALISM IN AMERICAN RELIGION AND LAW: OBAMA'S CHALLENGE TO PATRIARCHY'S THREAT TO DEMOCRACY 13 (2010).

33. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1139 (1990); *see also* Ashutosh A. Bhagwat, *Assembly Resurrected*, 91 TEX. L. REV. 351, 369 (2013) (reviewing INAZU, *supra* note 11) ("[I]n the modern world, the epitome of the 'dissenting, political' assembly that Inazu seeks to defend is the religious assembly."); Richard A. Epstein, *Forgotten No More*, ENGAGE, Mar. 2012, at 138, 138 (reviewing INAZU, *supra* note 11) (noting "the connection between assembly and the protected freedoms of religion and speech, with which it has been historically linked").

34. Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 466 (2000).

35. Hillary Rodham Clinton, U.S. Sec'y of State, Address to Carnegie Endowment for International Peace (July 30, 2012), *available at* http://www.state.gov/secretary/20092013clinton/rm/2012/07/195782.htm. Secretary Clinton continued:

> That's why the free exercise of religion is the first freedom enshrined in our First Amendment, along with the freedoms to speak and associate. Because where religious freedom exists, so do the others. It's also why the Universal Declaration of Human Rights protects freedom of thought, conscience and religion – all three together, because they all speak to the same capacity within each and every human being to follow our conscience, to make moral choices for ourselves, our families, our communities.

Id.

36. *See* INAZU, s*upra* note 11, at 4–7 (discussing the four principles "counsel[ing] for strong protection for the formation, composition, expression, and gathering of groups").

assemblies today as temporal gatherings like school celebrations or political protests, many gatherings emerge from social practices that give meaning to the moment of expression. Protecting the expression depends upon protecting the group that makes the expression possible.

Richard Epstein has expressed doubt that the textual formulation of the right (in the form of the infinitive "to assemble") protects more than the momentary gathering of a physical assembly.[37] But the verb "assemble" presupposes a noun—an assembly. And while some assemblies occur spontaneously, most do not. As Professor McConnell has recently asserted,

> [F]reedom of assembly was understood to protect not only the assembly itself but also the right to organize assemblies through more or less continual associations and for those associations to select their own members by their own criteria. The Sons of Liberty's public meetings were not purely spontaneous gatherings; they were planned, plotted, and led by men who shared a certain vision and met over a period of time, often secretly, to organize them. In this respect, the freedom of assembly is preparatory to the freedom of speech. The freedom of speech presumably suffices to protect what is said at an assembly. Freedom of assembly or association is necessary to protect the seedbed of free speech: the group that plans and guides the speech.[38]

Most assemblies flow out of groups of people who gather to eat and talk and share and pray long before they make political speeches or enact agendas.[39]

An amicus brief filed in *Hosanna-Tabor* noted similarly that "[a]s originally understood, the constitutional right of free assembly included the right to form groups—for political, religious, or even social purposes." Brief for Int'l Mission Bd. of the S. Baptist Convention et al. as Amici Curiae in Support of Petitioner at 7, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 103 S. Ct. 694 (2012) (No. 10-553); *see also id.* at 19–20 (contending that the right of assembly permitted citizens "to join together in groups for any peaceful purpose and to exclude others from their assemblies").

37. Epstein, *supra* note 33, at 138–39 ("[F]or a close textualist, Inazu's most significant maneuver is to transform the constitutional text, which refers to the right of the people to peaceably assemble, into the freedom of assembly, a phrase that, unlike freedom of speech, nowhere appears in the Constitution at all. I believe that this subtle transformation undercuts Inazu's determined effort to make the Assembly Clause the focal point of an expanded right of freedom of association. The two do not map well into each other.").

38. Michael W. McConnell, *Freedom by Association*, FIRST THINGS, Aug.–Sept. 2012, at 39, 41 (reviewing INAZU, *supra* note 11).

39. *Cf.* INAZU, *supra* note 11, at 5 ("[A]lmost every important social movement in our nation's history began not as an organized political party but as an informal group that

The connections between assembly, religious liberty, and the broader pluralist vision underlying the Four Freedoms appear throughout our nation's history. The following pages provide snapshots of three such appearances: the debates surrounding the assembly clause in the First Congress, the mid-twentieth century claims of Jehovah's Witnesses, and the popular embrace of the Four Freedoms in the 1930s and 1940s.

A. The Framing of the First Amendment

The importance of religious pluralism may be one of the reasons that we even have a right of assembly protected under the First Amendment. During the House debates over the language of the Bill of Rights, Representative Theodore Sedgwick of Massachusetts criticized the proposed right of assembly as redundant in light of the freedom of speech: "If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question; it is derogatory to the dignity of the House to descend to such minutiae."[40] John Page of Virginia responded with an allusion to the trial of William Penn, a reference that historian Irving Brant has described as "equivalent to half an hour of oratory" before the First Congress.[41]

Page's reference stemmed from a sermon Penn had preached to his fellow Quakers on August 14, 1670, in violation of the 1664 Conventicle Act, which forbade religious assemblies of five or more people conducted outside of the authority of the Church of England.[42] Responding to the charges against him and a fellow Quaker, Penn proclaimed,

formed as much around ordinary social activity as extraordinary political activity."); Bhagwat, *supra* note 4, at 998 ("An association is a coming together of individuals for a common cause or based on common values or goals. Associations do not form spontaneously. Individuals seeking to form an association must be able to communicate their views and values to each other, to identify their commonality. They must also be able to recruit strangers to join with them, on the basis of common values.").

40. 1 ANNALS OF CONG. 759 (1790) (Joseph Gales ed., 1834) (Statement of Representative Sedgwick).

41. IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 55 (1965). This Article's account of Penn's trial and the subsequent reference during the House debates is drawn from INAZU, *supra* note 11, at 21–23.

42. Conventicle Act, 1664, 16 Car. 2, c. 4 (Eng.), *reprinted in* SOURCES OF ENGLISH CONSTITUTIONAL HISTORY: A SELECTION OF DOCUMENTS FROM A.D. 600 TO THE PRESENT 553 (Carl Stephenson & Frederick George Marcham eds., 1937).

> We confess our selves to be so far from recanting, or declining to vindicate the Assembling of our selves, to Preach, Pray, or Worship the Eternal, Holy, Just God, that we declare to all the World, that we do believe it to be our indispensable Duty, to meet incessantly upon so Good an Account; nor shall all the Powers upon Earth be able to divert us from Reverencing and Adoring our God, who made us.[43]

After a jury acquitted the two men on the charge that their public worship constituted an unlawful assembly, the case gained renown throughout England and the American colonies. Brant reports that "[e]very Quaker in America knew of the ordeal suffered by the founder of Pennsylvania and its bearing on freedom of religion, of speech, and the right of assembly."[44]

Congressman Page's allusion to Penn made clear that the right of assembly under discussion in the House encompassed more than meeting to petition for a redress of grievances: Penn's gathering was an act of religious worship. As Penn himself once observed: "For any to say, our meetings are not religious, is not only a poor evasion but great incharity; for that is properly a religious assembly where persons are congregated with a real purpose of worshiping God, by prayer, or otherwise . . . ."[45] After Congressman Page spoke, the House defeated Sedgwick's motion to strike assembly from the draft amendment by a "considerable majority."[46]

William Penn's connection to the debate around the First Amendment's Assembly Clause highlights the importance of robust religious dissent as a founding-era principle. Penn insisted that

43. WILLIAM PENN, THE PEOPLE'S ANCIENT AND JUST LIBERTIES ASSERTED, *reprinted in* THE POLITICAL WRITINGS OF WILLIAM PENN 9–10 (Andrew R. Murphy ed., 2002).

44. BRANT, *supra* note 41, at 61. Brant observed that "[e]very American lawyer with a practice in the appellate courts was familiar with it, either directly or through its connection with its still more famous aftermath." *Id.* Penn and Mead were fined for contempt of court for wearing their hats after they had in fact been ordered by an officer of the court to put them on. In addition to its pronouncement on the right of assembly, the case became an important precedent for the independence of juries. Following their verdict of acquittal, the trial judge had imprisoned the jurors, who were later vindicated in habeas corpus proceedings. *Id.*

45. WILLIAM PENN, THE GREAT CASE OF LIBERTY OF CONSCIENCE, *reprinted in* THE POLITICAL WRITINGS OF WILLIAM PENN, *supra* note 43, at 118.

46. NEIL H. COGAN, THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 145 (1997) (quoting 1 ANNALS OF CONG. 761 (1789) (Joseph Gales ed., 1834)). The final text of the amendment thus read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." *Id.* at 136.

religious liberty meant "not only a meer Liberty of the Mind, in believing or disbelieving . . . but [also] the Exercise of our selves in a visible Way of Worship."[47] He believed that religious liberty was so foundational to political freedom that he once wrote of Pennsylvania: "[T]he first fundamental of the government of my country" was "that every person that does or shall reside therein shall have and enjoy the free possession of his or her faith and exercise or worship towards God."[48] Penn at times even cabined his defense of dissent to religious matters: "[W]e have not defended any Dissenters, whose Quarrel or Dissent is rather Civil and Political, than Religious and Conscientious; for both we really think such unworthy of Protection from the English Government, who seek the Ruin of it . . . ."[49] We know today—as did the Founders—that "civil and political" dissent is also of great importance. But Penn himself demonstrated an equally important corollary: "religious and conscientious" dissent can also be "civil and political."[50]

B. Preferred Freedoms

The Jehovah's Witnesses of the mid-twentieth century offer a second example of the convergence of political and religious dissent. Their beliefs and practices were not the soft-pedaling evangelism that

47. PENN, *supra* note 45, at 85.

48. EDWARD BEATTY, WILLIAM PENN AS SOCIAL PHILOSOPHER 160 (1939) (quoting William Penn, *The Fundamentall Constitutions of Pennsilvania*, 20 PA. MAG. HIST. & BIOGRAPHY 283, 286–87 (1896)). Beatty observed that this view "did not guarantee freedom of religion for atheists, nor did it contemplate free speech for those who lacked proper respect for the Christian faith or doctrine." *Id*. Penn nevertheless grew increasingly nearer to the position that "truth can and must be found by free inquiry and debate." Hugh Barbour, *William Penn, Model of Protestant Liberalism*, 48 CHURCH HIST. 156, 164 (1979).

49. PENN, *supra* note 45, at 119.

50. The extent of the Quakers' anti-orthodoxy in seventeenth century colonial America is difficult to overstate. *See, e.g.*, CARLA GARDINA PESTANA, QUAKERS AND BAPTISTS IN COLONIAL MASSACHUSETTS 12 (1991) ("[T]he initially disorganized Quakers shocked English and New English Puritans as well as most Baptists by minimizing the role of Scriptures, elevating the potential worth of human nature, and advocating preaching by women and children."). Even Roger Williams, himself no adversary to religious liberty, loathed the Quakers and argued for limits on their religious practices. *See, e.g.*, Robert J. Lowenherz, *Roger Williams and the Great Quaker Debate*, 11 AM. Q. 157, 161 (1959). The Quakers gained some political and cultural acceptance in the middle of the seventeenth century (especially in Pennsylvania and Maryland), but King James II's support for English Quakers meant that the Glorious Revolution brought "an immediate loss of political influence as settlers in Massachusetts, New York, and Maryland who staged revolutions against purported agents of James regarded Friends with suspicion." HUGH BARBOUR & J. WILLIAM FROST, THE QUAKERS 88 (1988). Barbour and Frost report that "[e]ssentially the same process of restriction of religious liberties and Quaker rights occurred in the Carolinas." *Id.* at 89.

many of us have experienced at our doorsteps, but abrasive street preaching, untoward ridiculing of other faiths, and a staunch refusal to comport with the patriotism that infused a country at war.[51] In response to the Witnesses' practices, states and local communities "enacted new laws or applied existing ones to suppress their First Amendment freedoms of religion, speech, and assembly."[52] The Witnesses turned to the courts, and in doing so, they shaped a generation of First Amendment jurisprudence. Between 1938 and 1946, their litigation efforts produced dozens of opinions, including twenty-three decisions at the Supreme Court.[53]

Two dimensions of the Witness's well-documented story are particularly important in the context of this Article. The first is their constant challenge to "the questionable assumption that pluralism and liberalism were natural partners."[54] As Sarah Gordon has noted, "[T]he Witnesses were not interested in brotherhood; they were after converts. And the culture of tolerance that embraced them, even after the Supreme Court recognized the constitutional dimensions of their witness, did not produce a complementary tolerance within the Watch Tower Society."[55] The Witnesses sought liberty from the state for their own practices; they never acquiesced in replicating that liberty within their own boundaries or endorsing its value more universally.[56]

51. *See* William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 U. CIN. L. REV. 997, 1001–03 (1987).

52. SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION 11 (2000).

53. *Id.* at 13; *see also id.* at 127 (describing over 100 state court victories). Michael Klarman has questioned the extent of the Jehovah's Witnesses' marginalization (and the correlative significance of the Supreme Court's countermajoritarian intervention) during the 1930s and 1940s. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 12 (1996). Klarman's thesis is that "the Court identifies and protects minority rights only when a majority or near majority of the community has come to deem those rights worthy of protection." *Id.* at 17–18. He asserts that the Court's decisions "might well have been significantly countermajoritarian in the 1920s, but they hardly qualified as such by the time of the Second World War." *Id.* at 12–13. But Klarman's characterization of the Jehovah's Witnesses misses the widespread nature of both legislative efforts to restrict their practices and physical violence wrought against them during the 1930s and 1940s. *See, e.g.*, PETERS, *supra* note 52, at 8, 10, 153, 163 (describing some of the violence).

54. SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA 41 (2010).

55. *Id.* at 47.

56. The Witnesses' refusal to extend civic friendship to others sometimes hindered their cause. As Shawn Peters notes, "Even their staunchest defenders conceded that the Witnesses could be extraordinarily bothersome as they preached the Gospel in public." PETERS, *supra* note 52, at 33; *see also id.* at 82 (noting an editorial in the *New York Herald Tribune* that the Witnesses "have often gone out of their way to look for trouble").

The second lesson to highlight from the story of the Witnesses is the way in which the State repeatedly sought to neutralize the significance of their practices. Restrictions against the Witnesses were routinely justified by ostensibly neutral policies enacted to preserve broader societal values. One particularly egregious example arose out of the prosecution of R.E. Taylor and other Witnesses under a Mississippi law enacted in 1942 "to secure peace and safety of the United States and State of Mississippi during war."[57] Although the law was widely understood as a measure to suppress the Witnesses, state officials insisted that it "is in no sense an anti-religious act and is not intended to interfere with proper religious liberty as recognized and enforced in the courts of this nation and the states."[58] Instead, they argued that the law would only regulate those "whose religious views conflict with the law of the land."[59] A unanimous Supreme Court disagreed and reversed the convictions.[60]

The Witnesses' resistance to majoritarian norms[61] also led to one of the most stunning reversals in Supreme Court history. In its 1940 decision *Gobitis v. Minersville School District*,[62] the Court rejected the pleas of the Witnesses to refuse to swear an oath to the United States in public schools.[63] Just three years later, the Court overruled *Gobitis* in *West Virginia v. Barnette*.[64] The pluralist vision is worth underscoring in an oft-quoted passage from *Barnette*:

57. *Id.* at 188–91.

58. *Id.* at 194.

59. *Id.*

60. Taylor v. Mississippi, 319 U.S. 583, 590 (1943). Government officials employed similar descriptions in other cases. *See* PETERS, *supra* note 52, at 40 (quoting Superintendent Charles Roudabush's claim that the flag salute at issue in *Gobitis* "is not a religious exercise in any way and has nothing to do with anybody's religion"); *id.* at 221 (quoting the instructions to the jury of the trial judge in *Chaplinsky*: "We are not concerned here with freedom of speech or religious freedom or anything of that kind. The sole question is whether there has been a violation of a statutory law.").

61. Peters reports that "the Witnesses were sensitive to charges that their abhorrence of the flag salute betrayed a lack of loyalty to the United States" and even formulated a modified Pledge that read in part: "I respect the flag of the United States and acknowledge it as a symbol of freedom and justice for all. I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law as set forth in the Bible." PETERS, *supra* note 52, at 35.

62. 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

63. *Id.* at 600.

64. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). The Witnesses endured a significant amount of violence between *Gobitis* and *Barnette*. *See* PETERS, *supra* note 52, at 8, 10, 153, 163.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[65]

From that premise, Justice Jackson continued, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[66]

C. Four Freedoms

The Supreme Court located the pluralist claims of the Witnesses at the intersection of the Four Freedoms of speech, press, religion, and assembly.[67] Even though *Barnette*'s holding is generally regarded as grounded in free speech, the principles and rhetoric framing the decision reached across the First Amendment.[68] As Justice Jackson emphasized, "freedoms of speech and of press, of assembly, and of worship . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."[69]

The Court underscored the significance of the Four Freedoms in numerous opinions that heralded their "preferred position" among

65. *Barnette*, 319 U.S. at 638.

66. *Id.* at 642.

67. The Court's focus on the Four Freedoms was aided by the litigation strategy of the Jehovah's Witnesses and their attorney, Hayden Covington, who routinely asserted violations of all four rights (often unsuccessfully). *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569, 571 (1941) (noting that appellants based their claims on the rights of speech, press, religion, and assembly); Douglas v. City of Jeannette, 130 F.2d 652, 655 (3d Cir. 1942) (same); Trent v. Hunt, 39 F. Supp. 373, 374 (D. Ind. 1941) (same); Bevins v. Prindable, 39 F. Supp. 708, 709 (E.D. Ill. 1941) (same).

68. *See, e.g.*, Vincent Blasi & Seana V. Shiffrin, *The Story of* West Virginia State Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought*, *in* FIRST AMENDMENT STORIES 115 (Richard W. Garnett & Andrew Koppelman eds., 2012) ("In questioning the general power of government to compel participation in a flag salute, the Court transformed the case from a dispute over special religious exemptions to one that implicated the freedom of speech of all students. . . . This re-conception of the central constitutional issue at stake came largely at the Court's own initiative. The briefs of the Witnesses and their amici had focused almost exclusively on freedom of religion.").

69. *Barnette*, 319 U.S. at 639.

the constitutional guarantees.[70] The "preferred" rhetoric originated in Justice Douglas's 1943 opinion in *Murdock v. Pennsylvania*.[71] The following year, Justice Rutledge observed that "the great liberties insured by the First Article . . . [a]ll have preferred position in our basic scheme. All are interwoven together."[72] A year later, Rutledge added that the "preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment" meant that only "the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[73] When the Court issued its decision in *Dennis v. United States*,[74] Justice Black's dissent hoped "that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."[75]

The special attention to the rights of speech, press, religion, and assembly extended to popular culture.[76] Four years prior to *Barnette*, the Four Freedoms headlined the New York World's Fair of 1939.[77] In March of that year, Columbia University president Nicholas Butler

70. *See, e.g.*, Walton H. Hamilton & George D. Braden, *The Special Competence of the Supreme Court*, 50 YALE L.J. 1319, 1349 (1941) ("The current bench, accentuating a trend which for a decade has been in the making, has in effect set up a presumption of unconstitutionality against all legislation which on its face strikes at freedom of speech, press, assembly, or religion.").

71. 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position.").

72. Prince v. Massachusetts, 321 U.S. 158, 164 (1944).

73. Thomas v. Collins, 323 U.S. 516, 530 (1945).

74. 341 U.S. 494 (1951).

75. *Id.* at 581 (Black, J., dissenting); *see also* Kovacs v. Cooper, 336 U.S. 77, 106 (1949) (Rutledge, J., dissenting) ("[T]he First Amendment guaranties of the freedoms of speech, press, assembly and religion occupy preferred position not only in the Bill of Rights but also in the repeated decisions of this Court."); Saia v. New York, 334 U.S. 558, 561 (1948) ("Unless we are to retreat from the firm positions we have taken in the past, we must give freedom of speech in this case the same preferred treatment that we gave freedom of religion in the *Cantwell* case, freedom of the press in the *Griffin* case, and freedom of speech and assembly in the *Hague* case."); Feldman v. United States, 322 U.S. 487, 501 (1944) (Black, J., dissenting) ("The first of the ten amendments erected a Constitutional shelter for the people's liberties of religion, speech, press, and assembly. This amendment reflects the faith that a good society is not static but advancing, and that the fullest possible interchange of ideas and beliefs is essential to attainment of this goal. The proponents of the First Amendment, committed to this faith, were determined that every American should possess an unrestrained freedom to express his views, however odious they might be to vested interests whose power they might challenge.").

76. This paragraph draws from INAZU, *supra* note 11, at 55–57.

77. Fair organizers commissioned Leo Friedlander to design a group of statues commemorating each of the Four Freedoms, and New York mayor Fiorello La Guardia called the site of Friedlander's four statues the "heart of the fair." *Mayor Dedicates Plaza of Freedom*, N.Y. TIMES, May 1, 1939, at 4.

penned a *New York Times* editorial that warned of the "millions upon millions of human beings living under governments which not only do not accept the Four Freedoms, but frankly and openly deny them all."[78] The following month, the *Times* ran an editorial by the eminent historian Henry Steele Commager, who denounced the assaults on the "four fundamental freedoms."[79] Two years later, celebrations around the country recognized the Four Freedoms as part of the sesquicentennial anniversary of the Bill of Rights,[80] and even President Roosevelt, as chair of the Sesquicentennial Committee, heralded them as "the pillars which sustain the temple of liberty under law."[81]

Roosevelt's 1941 State of the Union Address posited a different four freedoms: freedom of speech and expression, freedom of religion, freedom from want, and freedom from fear.[82] But popular recognition of the original Four Freedoms persisted in many corners. In 1942, the Coast Guard formed a women's auxiliary called SPARS that eventually boasted 10,000 members. The acronym combined the Latin and English versions of the Coast Guard's motto ("Always Ready") but colloquially came to be known as signifying the Four Freedoms: Speech, Press, Assembly, and Religion.[83] The 1942

78. Nicholas Murray Butler, *The Four Freedoms*, N.Y. TIMES, Mar. 5, 1939, at AS5 (publishing pictures of Friedlander's statues alongside Butler's editorial).

79. Henry Steele Commager, *To Secure the Blessings of Liberty*, N.Y. TIMES, Apr. 9, 1939, at SM3. Commager concluded: "The careful safeguards which our forefathers set up around freedom of religion, speech, press and assembly prove that these freedoms were thought to be basic to the effective functioning of democratic and republican government. The truth of that conviction was never more apparent than it is now." *Id.*

80. *See Day Will Honor Bill of Rights*, N.Y. TIMES, Nov. 29, 1941, at 19 (describing President Roosevelt's proclamation of the Bill of Rights Day).

81. INAZU, *supra* note 11, at 58 (quoting *Our Bill of Rights: American Re-dedication to Liberty*, AMES DAILY TRIB., Dec. 12, 1941, at 1, *available at* http://www.newspaperarchive.com/ames-daily-tribune/1941-12-12/).

82. *See* President Franklin D. Roosevelt, 1941 State of the Union Address (Jan. 6, 1941), *available at* http://www.presidency.ucsb.edu/ws/?pid=16092. The new formulation quickly overtook the old. Seven months later, Roosevelt and Churchill incorporated two of the new four freedoms into the Atlantic Charter—freedom from fear and freedom from want. *See* Franklin D. Roosevelt & Winston Churchill, *The Atlantic Charter* (Aug. 14, 1941), *available at* http://www.nato.int/cps/en/natolive/official_texts_16912.htm. In 1943, Norman Rockwell created four paintings inspired by Roosevelt's four freedoms. The *Saturday Evening Post* printed the paintings in successive editions, accompanied by matching essays expounding upon each of the freedoms. *See* INAZU, *supra* note 11, at 57.

83. *See* T. MICHAEL O'BRIEN, GUARDIANS OF THE EIGHTH SEA: A HISTORY OF THE U.S. COAST GUARD ON THE GREAT LAKES 73 (2001) (attributing the origins of the colloquialism to the father of Captain Mildred McAfee, Director of the Waves); Frances DeVore, *SPAR Yeoman Meets Dempsey by Chance*, OCALA STAR-BANNER (Fla.), Nov. 21, 1990, at 7B (quoting former SPAR member Joan "Dody" Walters as saying, "A spar is

California Negro Directory featured the original Four Freedoms on its cover.[84] That same year, artist Kindred McLeary completed a sprawling painting of the Four Freedoms that spanned fifty feet by twelve feet.[85]

The year after *Barnette*, the Court made clear in another case brought by the Witnesses that the guarantees of the First Amendment

> have unity in the charter's prime place because they have unity in their human sources and functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.[86]

In 1947, the Report of the President's Committee on Civil Rights asserted that the "great freedoms" of religion, speech, press, and assembly were "relatively secure."[87]

II. THE DECLINE OF THE FOUR FREEDOMS

The preceding Section highlighted the judicial, political, and cultural recognition of the pluralist vision that undergirds the Four Freedoms. The modern era has witnessed a decline in the commitment to this pluralist vision and the distinctiveness of the rights contained in the First Amendment. Part of that decline is attributable to anticommunist fear during the McCarthy era and the

a part of a ship, and SPAR stands for the four freedoms – speech, press, assemblage, and religion").

84. Chris Treadway, *WWI Vet's Estate Yields Treasure*, CONTRA COSTA TIMES (Cal.), Dec. 26, 2006, at F4 (describing the cover of directory found in estate of George Johnson).

85. *See* Press Release, U.S. Dep't of State, On-the-Record Briefing on the Release of the Department of State's Annual Report on International Religious Freedom (Sept. 14, 2007), *available at* 2007 WLNR 18186958 ("The 50 x 12 foot painting by Kindred McLeary was completed in 1942, at the height of one of the most challenging periods in our country's history. It depicts four freedoms which have been pivotal to our nation's heritage: freedom of speech, freedom of assembly, freedom of the press and freedom of worship. . . . In all, the mural serves today as a potent reminder that even at times of great national challenge and threat, the heart of our nation's identity encompasses the protection and promotion of fundamental freedoms, including freedom of worship."). McLeary's giant mural is now displayed at the State Department after being covered with plywood for decades. *See* John Kelly, *Pulling the Curtain on State Department Mural's Past*, WASH. POST (Jan. 21, 2012), http://articles.washingtonpost.com/2012-01-21/local/35439348_1_works-progress-administration-projects-home-state-state-department.

86. Prince v. Massachusetts, 321 U.S. 158, 164–65 (1944). The decision upheld a restriction against distribution of religious literature on public roads by minor children. *See id.* at 170.

87. PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 47 (1947).

political theory of mid-twentieth century liberalism.[88] Supreme Court decisions denying First Amendment protections to communist groups were particularly dismissive of the pluralist vision out of a (sometimes misplaced) deference to national security concerns.[89] But even as the commitment to pluralism wavered, the constitutional doctrine retained a degree of simplicity and straightforwardness.

The doctrinal developments that began in the 1970s were more complex, and they brought a new set of challenges to the pluralist vision. As Professor McConnell has recently observed,

> The drafters of the First Amendment made one thing clear: [its] freedoms are separate and warrant individual enumeration and protection. In the past thirty years, without offering any reason and without considering this history, the Supreme Court has committed the one error the drafters most clearly tried to prevent.[90]

The conflation of First Amendment rights has developed alongside doctrinal complexity. We have, in other words, the worst of both worlds: a neglect of the ways in which First Amendment rights fit together and complement one another and serious confusion over how each right is separately analyzed. Consider the state of our current doctrine in the areas of speech, religion, and association (the modern stand-in for the right of assembly).[91]

The Supreme Court has told us that the free speech right not only requires that the government treat groups neutrally and not discriminate on the content of a group's message, but also permits the government to express its own message by withholding funding for, and recognition of, private groups (including religious groups).[92]

88. For an account of the influence of these developments on the right of assembly, see INAZU, *supra* note 11, at 63–117.

89. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 501–02 (1951).

90. McConnell, *supra* note 38, at 40. McConnell refers specifically to the rights of speech, press, assembly, and petition—the past decades have also seen the conflation of the free exercise right into free speech doctrine. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 269–71 (1981).

91. For an extended consideration of the shift from assembly to association in Supreme Court jurisprudence, see generally INAZU, *supra* note 11.

92. *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2995 n.27 (2010) (approving of the government message of antidiscrimination); Locke v. Davey, 540 U.S. 712, 715 (2004) (government speech analysis); Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 834 (1995) (viewpoint neutrality). As Joseph Blocher has argued, "Although the government speech doctrine does not permit total bans on the expression of a private viewpoint, it does allow what had previously been thought forbidden: the burdening, even if not silencing, of private

We also know that the free exercise right gives no special protection to religious groups from neutral laws of general applicability but might provide elevated protection when combined with some other right (like the right of association). And the right may sometimes—in conjunction with the Establishment Clause—protect religious groups when non-religious groups are not protected.[93]

Finally, we know that the judicially created right of association is a derivative right that extends no more protection than the primary right that it furthers and sometimes "merges" with other First Amendment rights.[94] And the modern right of association neglects any mention of assembly or its historical and constitutional context.[95]

This complex state of affairs has not been good for pluralism. It leaves free exercise and association rights particularly attenuated. In making these claims, I do not mean to suggest that any of these developments reflect a concerted move away from pluralism. The doctrinal changes flow from far too many different forces and factors to attribute to any one cause. In fact, the story that has unfolded is neither a liberal nor a conservative one. There is no nefarious force behind the loss of the Four Freedoms—it developed through a series of reactions and counter-reactions to cases, statutes, and social movements. But whatever the causes, the state of our current doctrine is far removed from the Four Freedoms of the 1930s and 1940s and the understanding of these rights at the Founding.

The following pages retrace the story of how these developments have come to affect religious groups. But the story is complicated by an inauspicious beginning.

A. The Right Not to Associate

In the 1960s and 1970s, Southern resistance to *Brown v. Board of Education*[96] threatened to undermine the push toward racial equality. When the Supreme Court ordered integration in public schools, many white southerners turned to private schools that maintained racially

viewpoints because the government disagrees with them." Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 697 (2011).

93. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 703 (2012); *Martinez*, 130 S. Ct. at 2295 n.27; Emp't Div. v. Smith, 494 U.S. 872, 877 (1990).

94. *See Martinez*, 130 S. Ct. at 2971; Roberts v. U.S. Jaycees, 468 U.S. 609, 617 (1984).

95. *See* INAZU, *supra* note 11, at 7 (noting that the Supreme Court has not addressed an assembly claim in thirty years).

96. 347 U.S. 483 (1954).

discriminatory policies.[97] In 1976, the Court prohibited the existence of nonreligious, racially discriminatory private schools in *Runyon v. McCrary*.[98] The case began as a class action by African-American plaintiffs pursuant to 42 U.S.C. § 1981. Relying on *Jones v. Alfred H. Mayer Co.*,[99] the Court concluded that Section 1981 "reaches purely private acts of racial discrimination."[100] Writing for the majority, Justice Stewart argued that the right of association protected the message of discrimination, but the exclusion of African Americans counted only as an act of discrimination.[101] In other words, according to Stewart, the right of association only extended to the expression of ideas, and exclusion wasn't expression.[102]

The Court did not address *Runyon*'s applicability to religious schools, which was particularly significant given that many of the segregationist schools established in the wake of *Brown* were religious, and many of them raised religiously grounded reasons for

97. *See* DAVID NEVIN & ROBERT E. BILLS, THE SCHOOLS THAT FEAR BUILT: SEGREGATIONIST ACADEMIES IN THE SOUTH 12–14 (1976).

98. 427 U.S. 160 (1976). Justice Stewart's majority opinion construed a provision of the Civil Rights Act of 1866 to bar racial discrimination by "private, commercially operated, nonsectarian schools." *Id.* at 168. Stewart argued that

> [f]rom [the principle of the freedom of association] it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle.

Id at 176.

99. 392 U.S. 409 (1968).

100. *Runyon*, 427 U.S. at 170 (citing *Alfred H. Mayer Co.*, 392 U.S. at 441 n.78). The Court emphasized that Congress's authority for enacting Section 1981 derived from the Thirteenth Amendment and explicitly noted that the case did "not present any question of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity." *Id.* at 167; *see also id.* (noting that the case does not "present the application of § 1981 to private sectarian schools that practice *racial* exclusion on religious grounds").

101. *See id.* at 175–76.

102. Stewart's argument makes an arbitrary distinction between speech and conduct that could be applied to any form of symbolic expression. *See, e.g.*, LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 8 (2005) ("All expression requires conduct of some sort, and any conduct can be communicative."); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1009–12 (1978) (critiquing the speech-action distinction advanced in THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970)); *see also* Lathrop v. Donohue, 367 U.S. 820, 882 (1961) (Douglas, J., dissenting) ("Joining is one method of expression.").

their discrimination.[103] *Runyon* seemingly suggested that religious groups could discriminate even when non-religious groups no longer could.[104] That distinction left open a related question of whether religious groups that discriminated on the basis of race could be denied tax-exempt status. In 1971, the Internal Revenue Service ("IRS") had issued Revenue Rule 71-447, which declared that "a school not having a racially nondiscriminatory policy as to students . . . does not qualify as an organization exempt from Federal income tax."[105] Shortly thereafter, the IRS denied an exemption to a number of racially discriminatory religious schools, including Bob Jones University in South Carolina and Goldsboro Christian Schools in North Carolina.[106] Both schools maintained racially discriminatory policies based on their interpretations of the Bible.[107] Bob Jones accepted African-American students but prohibited interracial dating (a "conduct" restriction); Goldsboro Christian refused to admit African-American students (a "status" restriction).[108]

Both schools challenged the application of Revenue Rule 71-447. Goldsboro Christian struck first—and lost.[109] In 1977, a North

103. *See* Olatunde Johnson, *The Story of* Bob Jones University v. United States*: Race, Religion, and Congress' Extraordinary Acquiescence*, *in* STATUTORY INTERPRETATION STORIES 127, 131–32 (William N. Eskridge, Jr. et al. eds., 2011).

104. *See Runyon*, 427 U.S. at 167 (noting that the question of whether § 1981 applied to private schools that practiced racial discrimination on religious grounds was not reached). *But see* Brown v. Dade Christian Schs., 556 F.2d 310, 311–14 (5th Cir. 1977) (concluding that § 1981 applied to a religious private school that excluded African Americans based on the finding that the school did not do so for religious reasons).

105. Rev. Rul. 71-447, 1971-2 C.B. 230, *available at* http://www.irs.gov/pub/irs-tege/rr71-447.pdf.

106. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 581, 583 (1983) (consolidating and ruling on both Bob Jones Univ. v. United States, 468 F. Supp. 890 (D.S.C. 1978), and Goldsboro Christian Sch., Inc. v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977)).

107. *See id.* at 580, 583.

108. *Id.* There were other differences as well. Bob Jones was a freestanding institution unaffiliated with any church or denomination; Goldsboro Christian was founded by and attached to the Second Baptist Church in Goldsboro. *Compare* Bob Jones Univ. v. United States, 468 F. Supp. 890, 893 (D.S.C. 1978) ("Plaintiff is not affiliated with any religious denomination . . . ."), *with* Goldsboro Christian Sch., Inc. v. United States, 436 F. Supp. 1314, 1316 (E.D.N.C. 1977) ("The Second Baptist Church of Goldsboro, an independent, fundamentalist institution, figured prominently in plaintiff's establishment, and has continued to figure prominently in its operation."). Bob Jones was a K-12 school and a university, and Goldsboro Christian was only a K-12 school. *Bob Jones*, 461 U.S. at 580, 583.

109. In the more widely known cases, Goldsboro Christian Schools brought suit in 1977, *Goldsboro Christian*, 436 F. Supp. at 1314, and Bob Jones brought suit in 1978, *Bob Jones*, 468 F. Supp. at 890. Bob Jones technically struck first, however, in a case that preceded the better-known litigation. In 1971, the district court found in favor of Bob Jones and enjoined the IRS from revoking the university's tax-exempt status. *See* Bob Jones Univ. v. Connally, 341 F. Supp. 277, 286 (D.S.C. 1971). The Fourth Circuit reversed,

Carolina federal district court reasoned that because "benefit to the public is the justification for the tax benefits, it would be improper to permit tax benefits to organizations whose practices violate clearly declared public policy."[110]

The following year, a South Carolina federal district court reached the opposite conclusion with respect to Bob Jones.[111] The court first noted that the university's "Biblical beliefs permeate every facet of the institution."[112] It first distinguished the earlier decision on the ground that Goldsboro Christian maintained a status-based "admissions policy which totally excluded blacks" in contrast to Bob Jones's conduct prohibition of interracial dating.[113] It then reasoned,

> The secular interest being advanced in Goldsboro could be considered compelling, for that interest concerned granting blacks equal access to educational institutions, an interest which this Court earlier recognized was in keeping with clearly declared public policy. On the other hand, this Court can discern no public policy of comparable magnitude with respect to the prohibition of discrimination by private institutions on the basis of the race of one's spouse or companion.[114]

The government appealed to the Fourth Circuit, which reversed the district court's judgment.[115] Judge Widener's dissent warned that the denial of tax-exempt status threatened the existence of religious organizations.[116] Several months later, the Fourth Circuit summarily affirmed the lower court's decision involving Goldsboro Christian.[117]

holding that the suit was barred by the Anti-Injunction Act, Bob Jones Univ. v. Connally, 472 F.2d 903, 904 (4th Cir. 1973), and the Supreme Court affirmed on that basis, Bob Jones Univ. v. Simon, 416 U.S. 725, 726–27 (1974).

110. *Goldsboro Christian*, 436 F. Supp. at 1318. The court found no violation of either the Free Exercise or Establishment Clauses. *See id.* at 1319.

111. *See Bob Jones*, 468 F. Supp. at 899. The IRS revoked Bob Jones's tax exemption in 1976 and applied the revocation retroactively to 1970. Bob Jones filed returns for these years, paid $21.00 in unemployment tax for one employee for 1975, and requested a refund. The IRS refused, Bob Jones sued for the $21.00, and the IRS countersued for $490,000 in back taxes. MARK TAYLOR DALHOUSE, AN ISLAND IN THE LAKE OF FIRE: BOB JONES UNIVERSITY, FUNDAMENTALISM, AND THE SEPARATIST MOVEMENT 157 (1996).

112. *Bob Jones*, 468 F. Supp. at 895.

113. *Id.* at 899.

114. *Id.*

115. *See* Bob Jones Univ. v. United States, 639 F.2d 147, 149 (4th Cir. 1980).

116. *See id.* at 158 (Widener, J., dissenting).

117. Goldsboro Christian Sch., Inc. v. United States, 644 F.2d 879 (4th Cir. 1981) (per curiam).

Goldsboro Christian and Bob Jones both appealed to the Supreme Court, which consolidated the cases for review.[118] The schools argued that their discriminatory practices were protected under the First Amendment's Free Exercise and Establishment Clauses.[119] They lost eight to one.[120] Chief Justice Burger's opinion for the majority located the source of the tax exemption in the "public benefit" and contended that an "institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred."[121] He concluded that "racial discrimination in education is contrary to public policy."[122] The *New York Times* ran the headline: "Tax-Exempt Hate, Undone."[123] The *Washington Post* raved that Bob Jones had been "trounced" at the Court.[124] Despite popular reaction to the decision, commentators warned that "it is a mistake to think *Bob Jones* an easy case."[125]

Two weeks after the Court issued its opinion in *Bob Jones*, Grove City College filed its merits brief in a case challenging the application of Title IX restrictions against gender discrimination.[126] The Christian school had refused to sign a Title IX compliance document from the Department of Education that prohibited "discrimination under any education program or activity for which [it] receives or benefits from Federal financial assistance."[127] Grove City argued that the Title IX restrictions violated its "First Amendment

118. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

119. *See id.* at 603, 604 n.30.

120. *Id.* at 576.

121. *Id.* at 592. Burger insisted that "[h]istory buttresses logic to make clear that, to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest." *Id.* at 591–92.

122. *Id.* at 595.

123. *See* Editorial, *Tax-Exempt Hate, Undone*, N.Y. TIMES, May 25, 1983, at A26.

124. *See* Editorial, *Bob Jones U Trounced 8-1*, WASH. POST, May 25, 1983, at A24.

125. Mayer G. Freed & Daniel D. Polsby, *Race, Religion, and Public Policy:* Bob Jones University v. United States, 1983 SUP. CT. REV. 1, 2.

126. *See* Brief for Petitioners, Grove City Coll. v. Bell, 465 U.S. 555 (1984) (No. 82-792), 1983 U.S. S. Ct. Briefs LEXIS 292, at *1.

127. *Grove City*, 465 U.S. at 560–61; *see also* Brief for Petitioners, *supra* note 126, at *14 (noting Grove City's refusal to sign the form). Grove City "inculcates in its students the importance of economic freedom, religious liberty, and the individual responsibility to conform those values to standards of Christian ethics." Brief for Petitioners, *supra* note 126, at *82. The college made clear that "discrimination on the basis of race or sex is morally repugnant to its principles" and that there was no indication that it had ever discriminated on these grounds. *Id.* at *9; *see also Grove City*, 465 U.S. at 577 (Powell, J., concurring) (noting that it was undisputed that Grove City had not discriminated on the basis of race or sex).

rights to academic freedom and association."[128] But that other Christian college hadn't fared so well two weeks earlier, and Grove City treaded lightly with its argument. The Court paid little attention to Grove City's First Amendment claims,[129] noting that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept."[130] Like *Bob Jones*, *Grove City College v. Bell*[131] suggested that private schools had to accept funding constraints arising from federal antidiscrimination law or policy.[132] The religious nature of the schools seemed not to matter.

B. More Developments in Speech and Association

As the Court placed limits on the right of association, a separate line of cases had begun to reflect the channeling of free exercise claims to free speech doctrine. The Jehovah's Witness cases in the 1930s and 1940s had frequently drawn connections between free exercise and free speech, but they had never lost sight of the religious nature of the litigants. By the 1980s, these connections were beginning to wear thin.

In 1981, the Supreme Court's opinion in *Widmar v. Vincent*[133] upheld access to a state university's facilities by a registered student religious group on free speech principles.[134] The Court's analysis gave little weight to the distinctiveness of the religious liberty claims, noting instead that "religious worship and discussion" were "forms of speech and association protected by the First Amendment."[135] *Widmar*'s analysis rested squarely on free speech doctrine: "In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must

128. Brief for Petitioners, *supra* note 126, at *80. The government asserted in its brief that "[a]lthough Grove City College is affiliated with the Presbyterian Church, petitioners do not contend that the College's refusal to assure compliance with Title IX is based upon any religious tenet." Brief for Respondent, *Grove City*, 465 U.S. 555 (No. 82-792), 1983 U.S. S. Ct. Briefs LEXIS 294, at *79 n.55.

129. *See Grove City*, 465 U.S. at 575 (majority opinion) (noting that Grove City's First Amendment claims "warrant[ed] only brief consideration").

130. *Id.*

131. 465 U.S. 555 (1984).

132. In both cases, the Court gave only passing attention to the constitutional claims raised by the schools. For the Court's narrow focus on statutory analysis, see generally *Grove City*, 465 U.S. 555; Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

133. 454 U.S. 263 (1981).

134. *See id.* at 277.

135. *Id.* at 269.

therefore satisfy the standard of review appropriate to content-based exclusions."[136]

Widmar's reliance on speech and association was not by itself problematic. Indeed, Justice Jackson had appealed to rights beyond free exercise in *Barnette*.[137] But Jackson's rhetoric had framed a speech analysis in a way that resisted subsuming the free exercise of religion into the category of speech.[138] Justice Powell's *Widmar* opinion—with more doctrine and less rhetoric—risked signaling that religion had no special significance beyond speech and association.

Widmar's reliance on speech and association took on added significance in light of a reshaping of the Supreme Court's right of association doctrine in *Roberts v. U.S. Jaycees*.[139] The Jaycees, a private charitable organization, had argued that their speech and association rights were violated by a state statutory requirement that had been interpreted to require them to accept women as full members of their organization.[140] The Supreme Court upheld the constitutionality of the statute without a dissent.[141] Justice Brennan's opinion announced three categories for the right of association: intimate, expressive, and nonexpressive association.[142] Although Brennan concluded that the Jaycees was an expressive association, he found the constitutional right was trumped by the state's general interest in ending gender discrimination.[143]

136. *Id.* at 269–70.

137. *See* W. Va. Bd. of Educ. v. Barnette, 319 U. S. 624, 639 (1943) ("[F]reedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds."); *id.* at 638 ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

138. *See id.* at 638–39; *see also id.* at 643 (Black and Douglas, JJ., concurring) ("We believe that the statute before us fails to accord full scope to the freedom of religion secured to the appellees by the First and Fourteenth Amendments.").

139. 468 U.S. 609 (1984).

140. *See id.* at 615.

141. *Id.* at 631. Justice O'Connor wrote a concurrence. *Id.* at 631–40 (O'Connor, J., concurring).

142. Brennan contended that intimate and expressive association represented, respectively, the "intrinsic and instrumental features of constitutionally protected association." *Id*. at 618 (majority opinion). These differences meant that "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case." *Id.* For a discussion and critique of the *Roberts* framework, see generally John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149 (2010).

143. *See Roberts*, 468 U.S. at 628–29. Numerous commentators have critiqued the Court's reasoning. *See, e.g.*, AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 40 (1995) ("Surely the Jaycees . . . will be a different organization. Surely that difference will

Roberts meant that the state could force private groups like the Jaycees to alter their membership policies and practices. That rationale presumably applied to religious as well as non-religious groups.[144] After all, the Court had concluded that the Jaycees was an expressive association—worthy of elevated constitutional protection—and still found that the state's interest in ending gender inequality outweighed the associational right.[145] It is not immediately apparent why a church or religious group, which like the Jaycees would qualify as an expressive but not an intimate association, would raise a *greater* claim for protection than the Jaycees under the framework announced in *Roberts*.[146]

In fact, the intimation that *Roberts* failed to extend any special protection to religious groups was borne out in freedom of association claims raised by religious groups in the lower courts in the years after *Roberts*.[147] Few of these cases even mentioned the religious nature of

be felt throughout an intricate web of relationships and different voices in immeasurable but nonetheless significant ways."); George Kateb, *The Value of Association*, *in* FREEDOM OF ASSOCIATION 35, 55 (Amy Gutmann ed., 1998) ("Brennan's claim that young women may, after their compulsory admission, contribute to the allowable purpose of 'promoting the interests of young men' is absurd."); McConnell, *supra* note 38, at 43 ("By focusing only on public advocacy—the 'expressive' nature of the association—the Court essentially eliminated all constitutional protection for the group itself."); Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, *in* FREEDOM OF ASSOCIATION, *supra*, at 75, 78 ("The Jaycees' 'voice' was undeniably altered once it was forced to admit young women as full members along with young men.").

144. The Jaycees noted in their brief that Minnesota's public accommodations law could be read to apply to "such religiously affiliated organizations as the Knights of Columbus." Brief for Appellee, *Roberts*, 468 U.S. 609 (No. 83-724), 1984 U.S. S. Ct. Briefs LEXIS 724, at *42–43; *see also id.* at *72–73 (arguing that "private associations based on religious belief" would be regulated under the Act); *id.* at *30 n.2 (arguing that "there is no distinction" between the Jaycees and the National Organization for Women).

145. *See Roberts*, 468 U.S. at 628–29.

146. Justice Alito's concurrence in *Hosanna-Tabor* hinted otherwise in suggesting that the forced inclusion of unwanted members that might impair a group's ability to express its views "applies with special force with respect to religious groups, whose very existence is dedicated to the collective expression and propagation of shared religious beliefs." Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 712 (2012) (Alito, J., concurring). That assertion seems wrong on two counts. First, not all religious groups would acquiesce in Alito's characterization of the ends toward which their "very existence" is dedicated—consider, for example, the mandate to worship God, which might be neither externally "expressive" nor intended to propagate shared beliefs. Second, it is unclear why a constitutional principle should apply with "special force" to paradigmatic groups or how distinctions between "special" force and "regular" force would be made.

147. *See* Nichols v. United States, No. 98-15508, 1999 U.S. App. LEXIS 10992, *6–7 (9th Cir. May 25, 1999) (rejecting a right of association claim); St. German of Alaska E. Orthodox Church v. United States, 840 F.2d 1087, 1092 (2d Cir. 1988) (rejecting a right of association claim); Matter of Full Gospel Tabernacle, 536 N.Y.S.2d 201, 203 (N.Y. App. Div. 1988) (listing but ignoring a right of association claim).

the groups raising association claims.[148] The reconfigured association doctrine revealed the extent of the pluralist decline in First Amendment jurisprudence.[149]

As the Supreme Court chipped away at the right of association, religious groups turned to statutory relief. The most important statutory protection during this era was the Equal Access Act,[150] a 1984 law pushed by conservative religious groups that compelled federally funded secondary schools to offer their facilities on the same basis to religious and nonreligious extracurricular clubs.[151] Religious

148. It is also instructive that post-*Roberts* cases challenging the application of Title VII to religious groups did not even bother to raise the right of association. *See* EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1366–70 (9th Cir. 1986) (holding that Title VII prevented a religious school from granting medical insurance to married men but not to married women); Dayton Christian Sch. v. Ohio Civil Rights Comm'n, 766 F.2d 932, 955 (6th Cir. 1985) (upholding a religious school's challenge to the state's antidiscrimination law on free exercise grounds), *rev'd on other grounds*, 477 U.S. 619 (1986); McLeod v. Providence Christian Sch., 408 N.W.2d 146, 151–53 (Mich. App. 1987) (striking down a religious school's policy of not hiring women with preschool-aged children under state antidiscrimination law); *see also* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169–72 (4th Cir. 1985) (upholding a church's hiring decision under ministerial exception); *cf.* Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 137 (1989) ("The Supreme Court's freedom of association decisions provide little protection for the religious group interest in self-definition.").

149. The most significant decision since *Roberts* on the right of association is *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). *Dale* upheld the right of the Boy Scouts to exclude from their membership a homosexual scoutmaster against a challenge brought under a state antidiscrimination law. *See id.* at 659. I have argued elsewhere that *Dale* stands in deep tension with *Roberts*. *See* INAZU, *supra* note 11, at 143–44; *see also Dale*, 530 U.S. at 679 (Stevens, J., dissenting) ("[U]ntil today, we have never once found a claimed right to associate in the selection of members to prevail in the face of a State's antidiscrimination law. To the contrary, we have squarely held that a State's antidiscrimination law does not violate a group's right to associate simply because the law conflicts with that group's exclusionary membership policy.").

150. Equal Access Act, Pub. L. No. 98-377, 98 Stat. 1302 (1984) (codified at 20 U.S.C. §§ 4071–74 (2012)).

151. The Court upheld the constitutionality of the Act against an Establishment Clause challenge in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 253 (1990). Three dimensions to this statutory relief are useful to highlight in the context of the present story. First, its content-neutral focus on access meant that groups both sympathetic and unsympathetic to conservative religious groups would benefit from the law's protections—and, in fact, the act became an important protection for gay and lesbian student groups that formed in secondary schools in subsequent years. *See* Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ., 258 F. Supp. 2d. 667, 693 (E.D. Ky. 2003) (granting a high school's Gay Straight Alliance a preliminary injunction); Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135, 1149–51 (C.D. Cal. 2000) (granting a high school's Gay Straight Alliance a preliminary injunction). Second, the act demonstrated the ability of conservative religious groups to seek relief through the political process. That success—which would be replicated a few years later, see *infra* note 165 and accompanying text—suggests that these groups either reflected or could appeal to majoritarian sympathies.

groups also benefited from an exception in Title VII of the Civil Rights Act of 1964[152] that allowed religious employers to discriminate on the basis of religion.[153]

In addition to statutory protections like the Equal Access Act and Title VII's exception, religious groups sought relief in the ministerial exception, a judicially created doctrine that provided a jurisdictional bar to employment discrimination lawsuits brought against churches when the employment dispute involved a "ministerial" position.[154] The ministerial exception first emerged in a 1972 Fifth Circuit opinion that built upon earlier Supreme Court decisions involving church property disputes.[155] Two years later, the Fifth Circuit reviewed a case brought by a Methodist minister who alleged that his former church had fired him because he had married interracially.[156] The minister maintained that he was dismissed "because of the color of his wife's skin, a racial dispute, not a religious dispute."[157] The Fifth Circuit concluded that "the law is clear: civil courts are barred by the First Amendment from determining ecclesiastical questions."[158] Other federal appellate courts adopted similar reasoning in subsequent cases.[159]

Finally, and related to the preceding point, by affording relief through the political process, the act mitigated the need for religious groups to resist unfavorable changes to First Amendment doctrine.

152. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

153. *See id.* § 2000e-1(a). The Supreme Court upheld the exception against an Establishment Clause challenge in a decision that permitted the Mormon Church to deny a non-church member employment as a building engineer in a gymnasium operated by the church and open to the public. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329–30 (1987). Justice Brennan's concurrence emphasized that "[w]e are willing to countenance the imposition of such a condition because we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities." *Id.* at 342–43 (Brennan, J., concurring).

154. For an overview of the doctrine, see generally Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1 (2011).

155. McClure v. Salvation Army, 460 F.2d 553, 558–61 (5th Cir. 1972).

156. Simpson v. Wells, 494 F.2d 490, 493 (5th Cir. 1974).

157. *Id.*

158. *Id.*

159. *See, e.g.*, McCants v. Ala.-W. Fla. Conference of U.M.C., 372 F. App'x 39, 42 (11th Cir. 2010) (affirming dismissal of a pastor's claims that he was denied reappointment solely on the basis of race); Bethea v. Nation of Islam, 248 F. App'x 331, 333 (3d Cir. 2007) (affirming dismissal of Bethea's claims that he was not hired because of racial discrimination).

C. The Not-So-Free Exercise of Religion

In 1990, the Supreme Court dramatically altered the scope of the Free Exercise Clause in *Employment Division v. Smith*.[160] The case involved a challenge to the denial of a religious exemption for the use of peyote by members of the Native American Church.[161] Justice Scalia's opinion for the Court concluded that neutral laws of general applicability need only pass rational basis scrutiny to survive constitutional challenge.[162] In a perversion of the pluralist integration of the Four Freedoms, Scalia suggested that even if infringements upon the free exercise of religion from generally applicable neutral laws were not themselves constitutionally suspect, laws that reached activities implicating free exercise alongside some other constitutional right might be subjected to a higher level of scrutiny.[163] As an example of this "hybrid rights" approach, Scalia contended that "it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns."[164]

160. 494 U.S. 872 (1990). The Court's standard departed from earlier free exercise cases that had applied strict scrutiny to laws affecting religious conduct. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); Sherbert v. Verner, 374 U.S. 398, 403 (1963). For an argument that *Smith* was less problematic than I suggest, see generally Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 CARDOZO L. REV. 1815 (2011).

161. *See Smith*, 494 U.S. at 874.

162. *See id.* at 881–82.

163. *See id.*

164. *Id.* at 882. Within months of *Smith*, a Third Circuit opinion illustrated the problem with hybrid rights. In *Salvation Army v. Department of Community Affairs*, 919 F.2d 183 (3rd. Cir. 1990), the court emphasized the "derivative" nature of the right of expressive association:

> We would not expect a derivative right to receive greater protection than the right from which it was derived. . . . As we have seen, the primary right of free exercise does not entitle an individual to challenge state actions that are not expressly directed to religion. Accordingly, the derivative right to religious association could not entitle an organization to challenge state actions . . . .

Id. at 199. The reasoning in *Salvation Army* was recently mirrored in *Wiley Mission v. New Jersey*, Civ. No. 10-3024, 2011 U.S. Dist. LEXIS 96473, at *37 (D. N.J. Aug. 25, 2011) ("[B]ecause [the statute] is neutral and generally applicable, the Church's underlying free-exercise claim, standing alone, must fail. Consequently, the Church's freedom-of-association claim predicated on the Free-Exercise Clause also fails."). Scores of commentators and judges have raised similar indictments about the internal incoherence of the hybrid rights doctrine. As Christopher Lund notes, "[E]ven its originator, Justice Scalia, seems to have given up on the idea." Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 631–32 (2003) (citing Justice Scalia's

Smith signaled a new era of religious liberty jurisprudence, but three subsequent developments mitigated its effects. First, legislative responses at the federal and state levels restored elevated scrutiny to some free exercise claims.[165] Second, the Supreme Court clarified in a later decision that strict scrutiny would continue to apply post-*Smith* when a law or regulation appeared to single out free exercise for hostile treatment.[166]

The third post-*Smith* development proved to be the most important and the least stable: protection for religious groups under the public forum doctrine's viewpoint neutrality requirement. The public forum doctrine now associated with the free speech right had originated in a case on the right of assembly, *Hague v. Committee for Industrial Organization*.[167] Justice Roberts had written, "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[168]

concurrence in *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 171 (2002)).

165. Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA") with overwhelming bipartisan support. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)). The Supreme Court curtailed Congress's attempt to rebut *Smith* when it held provisions of RFRA as they applied to the states to be unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). RFRA's federal provisions remain valid, however. *See, e.g.*, Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. 418, 439 (2006) (affirming that the federal government failed to demonstrate a compelling interest in barring a church group's ceremonial use of hallucinogenic tea). In response to *Smith* and *City of Boerne*, a number of post-*Smith* state legislative acts or constitutional amendments provided increased protections for religious freedom. *See generally* MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 197 (3d ed. 2011) (discussing state religious freedom acts enacted after *Smith*).

166. *See* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.").

167. 307 U.S. 496 (1939). The pivotal case drew a much-heralded amicus brief from the American Bar Association's Committee on the Bill of Rights, which emphasized that "the integrity of the right 'peaceably to assemble' is an essential element of the American democratic system." Brief for Comm. on the Bill of Rights of the Am. Bar Ass'n as Amicus Curiae Supporting Respondents at 4, *Hague*, 307 U.S. 496 (No. 651); *see also* INAZU, *supra* note 11, at 54–55 (discussing the ABA's amicus brief and its reception).

168. *Hague*, 307 U.S. at 515. Professor McConnell has explained that the Court was wrong in its assertion: "In Britain, the people were not free to assemble in the streets and parks without official permission. Unauthorized groups of twelve or more could be charged and prosecuted . . . for unlawful assembly. Colonial governors tried to suppress the Sons of Liberty on similar legal bases. America's declaration of a freedom of assembly was a break from this history . . . ." McConnell, *supra* note 38, at 41.

By the 1990s, the nature of the public forum had shifted. In Justice Kennedy's oft-quoted words, "Minds are not changed in streets and parks as they once were."[169] One of the places where minds were now being changed was in the generally available facilities of public educational institutions. In a series of three decisions, the Court clarified and expanded the notion that religious groups had not only a statutory but also a constitutional right of equal access to these facilities.[170]

Despite the victories for religious groups in these cases, by the turn of the century, the effect of the pluralist decline on religious liberty was well underway. *Smith* had diminished the plausibility of the free exercise right, and *Roberts* had vastly weakened the associational right that *Widmar* had suggested might be available for religious groups.

The clearest example to date of the consequences of these developments is the Court's 2010 decision in *Christian Legal Society v. Martinez*.[171] The case began when the University of California, Hastings College of the Law denied official recognition to a student chapter of the Christian Legal Society because the group imposed membership restrictions based on sexual conduct and religious belief, thus violating the school's "all-comers" policy that required any student group to accept any student as a member.[172] In addition to withholding modest funding and the use of its logo, Hastings denied the Christian Legal Society the opportunity to send mass e-mails to the student body, to participate in the annual student organizations fair, and to reserve meeting spaces on campus.[173]

The religious dimensions in *Martinez* were clear: the group subscribed to a theological creed and met regularly for Bible study and prayer.[174] It was also clear that this case involved a religious

169. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 802–03 (1996) (Kennedy, J., concurring in part and dissenting in part).

170. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001) (reaffirming the right of religious groups to participate in a public forum); Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 829–31 (1995) (holding that the denial of funding to a religious student group in a limited public forum amounted to viewpoint discrimination); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (holding that the use of public school facilities for after-school religious instruction posed no Establishment Clause concerns).

171. 130 S. Ct. 2971 (2010).

172. *See id.* at 2979–81.

173. *See id.* at 2979; John D. Inazu, *Factions for the Rest of Us*, 89 WASH. U. L. REV. 1435, 1449 n.80 (2012).

174. *See* Brief for Petitioner at 5, *Martinez*, 130 S. Ct. 2971 (No. 08-1371) ("Student chapters, such as that at Hastings, invite speakers to give public lectures addressing how to

group. The associational dimensions teed up the possibility advanced by a number of scholars that diminished religious liberty under *Smith* would be offset by the *Roberts* expressive association framework.[175] But in *Martinez*, a five-to-four majority dismissed the Christian group's free exercise claim in a footnote and concluded that its association claim "merge[d]" with its speech claim.[176] That meant the case would be resolved solely under a free speech public forum analysis.

Justice Ginsburg's opinion for the Court rejected the Christian group's public forum argument.[177] She characterized the all-comers policy as "textbook viewpoint neutral."[178] But a policy that requires recognized student groups to accept any student who wants to be a member of the group is "neutral" in name only. As a practical matter, most groups will have little problem with such a policy. But groups that require a commitment to certain beliefs or practices for membership—groups like conservative religious organizations—will face significant consequences. To the extent that these groups are unwilling to alter their creedal commitments, the all-comers policy will operate against them like a classic prior restraint—ensuring that they are forced out of the forum before their ideas and values ever manifest.[179]

integrate Christian faith with legal practice, organize transportation to worship services, and host occasional dinners. The signature activities of the chapters are weekly Bible studies, which, in addition to discussion of the text, usually include prayer and other forms of worship.").

175. Steven Smith observed just after *Smith* that "[p]roposals to collapse the commitment to religious freedom into other values such as freedom of speech, freedom of association, and equal protection have proliferated." Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 239 n.363 (1991). In 2001, Mark Tushnet suggested that "[t]he free speech doctrine and the newly defined right of expressive association go a long way to providing an adequate substitute for the Free Exercise Clause." Tushnet, *supra* note 4, at 94.

176. *Martinez*, 130 S. Ct. at 2985, 2995 n.27. This merging of the speech and association claims misses the expressiveness inherent in any act of associating and in this way obscures religious liberty claims that are tied to the group's existence. *See* John D. Inazu, *Justice Ginsburg and Religious Liberty*, 63 HASTINGS L.J. 1213, 1231–37 (2012) (critiquing the majority's reasoning in *Martinez*).

177. *Martinez*, 130 S. Ct. at 2990. Justice Ginsburg's public forum analysis ignored an apparent tension between government speech and viewpoint discrimination. *See* Inazu, *supra* note 176, at 1240.

178. *Martinez*, 130 S. Ct. at 2993.

179. The litigation surrounding the all-comers policy occasionally invoked arguments and counterarguments about "takeover" scenarios in which a majority of students hostile to a group's mission would flood its membership and destroy the group—for example, Republican students could take over the Democrat student group or pro-choice students could take over the pro-life group. Those scenarios, while not impossible, are unlikely. Most people have better things to do with their time, and in a genuine public forum,

Martinez demonstrates the full extent of diminished free exercise and association rights. Neither right offered *any* protection to the religious group. The practical irrelevance of these two rights in *Martinez* cannot be overstated. In each case, it wasn't that the Christian Legal Society lost on a balancing analysis—the Court did not even bother to apply the analysis.

D. Recent Developments

Two years after *Martinez*, *Hosanna-Tabor* further evidenced the doctrinal complications that had emerged over the past half-century. All nine Justices endorsed the ministerial exception and the view that a church had an absolute right to select its ministers:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments.[180]

There were just a few problems with this reasoning, not the least of which was *Smith*. In an effort to distinguish the earlier case, Chief Justice Roberts reasoned,

> It is true that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.[181]

The distinction between "outward physical acts" and "an internal church decision" has some facial appeal but is ultimately unsupportable. The "outward physical act" of peyote use is also a

interest groups coalesce most naturally and most efficiently around more constructive goals. *See id.* at 2992.

180. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012).

181. *Id.* at 707 (citation omitted).

sacrament of the Native American Church.[182] It is for this reason *essentially* an inward defining practice, like the selection of a minister. Conversely, the "internal church decision" of firing a minister affects the broader society by harming the terminated employee and disrupting antidiscrimination norms.

Hosanna-Tabor is problematic for a more fundamental reason. While its holding ensures that the ministerial exception survives in some form, the decision leaves unresolved who counts as a "minister" or what counts as a "church" or how these lines will be drawn.[183] And given that only four of the justices in *Hosanna-Tabor* supported the Christian Legal Society in *Martinez*, the reach of the ministerial exception may be significantly curtailed when religious liberty confronts sexual orientation discrimination beyond the narrow confines of "ministerial" positions.[184]

The likely limits on the ministerial exception are even more troubling given the Court's express disavowal of the free exercise and association rights that should have protected the church. As to the first, the Court's decision to distinguish rather than overrule *Smith* points to the continued vitality of *Smith*'s weakening of the Free

182. Emp't Div. v. Smith, 494 U.S. 872, 874, 903 (1990).

183. Christopher Lund has noted that many lower courts "have applied the ministerial exception beyond the paradigmatic priest." Lund, *supra* note 154, at 22 n.99. Lund notes cases applying the exception to a church organist, a Kosher supervisor, a church choir director, a chaplain of a church-affiliated hospital, and a principal of a Catholic school. *See id.*

184. Chief Justice Roberts and Justices Alito, Scalia, and Thomas dissented in *Martinez*. *See Martinez*, 130 S. Ct. at 3000 (Alito, Roberts, Scalia, and Thomas, JJ., dissenting). Justice Kagan, who replaced Justice Stevens after *Martinez*, may play a crucial role going forward. She joined Justice Alito's concurrence in *Hosanna-Tabor*, which expressed themes similar to his *Martinez* dissent. *See Hosanna-Tabor*, 132 S. Ct. at 713 (Alito and Kagan, JJ., concurring) ("Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith. When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters. Religious teachings cover the gamut from moral conduct to metaphysical truth, and both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers. A religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses."); *Martinez*, 130 S. Ct. at 3014 (Alito, J., dissenting) ("[A] group's First Amendment right of expressive association is burdened by the forced inclusion of members whose presence would affect in a significant way the group's ability to advocate public or private viewpoints. . . . Religious groups like CLS obviously engage in expressive association, and no legitimate state interest could override the powerful effect that an accept-all-comers law would have on the ability of religious groups to express their views." (internal quotation marks and brackets omitted)).

Exercise Clause.[185] With respect to association, the Court intimated that this more generalized right would be insufficient to protect religious groups. In rejecting the government's assertion that the Lutheran Church could have relied on the right of association in lieu of the ministerial exception, the Court noted that "[the argument] that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club . . . is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."[186] One of the reasons that the right of association is insufficient for religious groups is that it is insufficient for nonreligious groups.[187]

The current constitutional landscape leaves unclear the contours of the pluralist vision for religious groups. On the one hand, *Hosanna-Tabor* insists that "[t]he church must be free to choose those who will guide it on its way" and that the First Amendment protects "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission."[188] On the other hand *Bob Jones, Smith*, and *Martinez* suggest that outside of the ministerial exception, religious groups may still have membership requirements imposed upon them by liberal egalitarian norms.

The potential reach of *Martinez* is quite broad. Consider, for example, whether a Catholic charity can refuse to hire a Muslim social worker or a Jewish student group can deny membership to a Baptist.[189] Title VII's statutory exemption for religious employers and the Supreme Court's decision in *Presiding Bishop v. Amos*[190] support the idea that some religious groups can make membership decisions

185. *See* Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J.L. & PUB. POL'Y 821, 823 (2012) ("As a longtime critic of the *Smith* decision, I would have preferred that the Court modify or overrule that decision, which would open up a straightforward way to reach the correct result in *Hosanna-Tabor*. It is evident, however, that the Supreme Court is too deeply invested in *Smith* to entertain the possibility of reconsideration.").

186. *Hosanna-Tabor*, 132 S. Ct. at 706 (majority opinion). Justice Alito's concurrence is in some tension with the majority opinion on this point. *See id.* at 712–13 (Alito, J., concurring) ("As the Court notes, the First Amendment 'gives special solicitude to the rights of religious organizations,' but our expressive-association cases are nevertheless useful in pointing out what those essential rights are. Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith." (citations omitted)).

187. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 626–28 (1984).

188. *Hosanna-Tabor*, 132 S. Ct. at 710 (majority opinion).

189. I have selected these examples because they likely fall outside of the ministerial exception as currently construed.

190. 483 U.S. 327 (1987).

on the basis of religion.[191] But *Martinez* endorses the idea that the government can require private groups—including religious ones—to accept "all comers" as a condition of eligibility for generally available public benefits and access to the public forum.[192]

Two recent Ninth Circuit opinions echo the reasoning in *Martinez*. In *Truth v. Kent*,[193] the court concluded that a high school Bible club violated a school district's antidiscrimination policies because the club's requirement that its members "possess a 'true desire to . . . grow in a relationship with Jesus Christ' inherently excludes non-Christians."[194] Three years later, the Ninth Circuit relied on *Martinez* in *Alpha Delta v. Reed*[195] to suggest that a public university might deny official recognition to Christian student groups because "their members and officers profess a specific religious belief, namely, Christianity."[196]

III. RESPONSES TO THE STANDARD OBJECTION TO PLURALISM

Cases like *Truth* and *Alpha Delta* represent the logical extension of *Martinez*. They illustrate the loss of the pluralist vision at the mercy of a rudderless public forum doctrine and a malleable concept of viewpoint neutrality that have neglected the values and constitutional significance of other First Amendment rights like assembly and the free exercise of religion. And the consequences are spreading. The entire California State University system has recently instituted the all-comers policy blessed by *Martinez*.[197] Other public and private universities are following suit, with the direct consequence of forcing conservative religious groups off campus.[198]

191. *See* 42 U.S.C. § 2000e-1(a) (2006); *Amos*, 483 U.S. at 331, 339.

192. *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2991 (2010).

193. 542 F.3d 634 (9th Cir. 2008).

194. *Id.* at 645.

195. 648 F.3d 790 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1743 (2012).

196. *Id.* at 795–96.

197. *See* Memorandum from Charles B. Reed, Chancellor, Cal. State Univ., to Presidents of Cal. State Univ. (Dec. 25, 2011), http://www.calstate.edu/eo/EO-1068.html (mandating an all-comers policy for all campuses in the California State University system).

198. *See, e.g.*, COLUMBIA-GREENE CMTY. COLL., 2013–2014 STUDENT HANDBOOK, *available at* http://www.sunycgcc.edu/forms_publications/student_handbook/0studenthandbook.pdf ("To become a recognized student club/organization, a group would have to comply with all appropriate regulations, including the college's 'all-comers' policy."); *Student Activities: RSO Policies*, EVERGREEN ST. COLL., http://www.evergreen.edu/activities/handbook/policies.htm#nondiscrim (last visited Nov. 7, 2013) ("Student Activities interprets The Evergreen State College Non-discrimination Policy, as it relates to a Registered Student Organization ("RSO"), to mandate acceptance of all comers. In

Vanderbilt University's all-comers policy is illustrative in its effects (causing a number of religious groups to move off campus) and its inconsistency (exempting fraternities and sororities from the restriction on gender-based discrimination).[199] Meanwhile, the Second Circuit has recently upheld a ban on religious worship as viewpoint neutral under public forum analysis.[200] We have come a long way from the Four Freedoms.

We have also come a long way toward bettering equality for all citizens. The antidiscrimination norms and laws that arose during the Civil Rights Era have made significant advances in equality of opportunity—though that goal is far from fully realized. The law has played an important role in these developments, particularly in the areas of employment discrimination and public accommodations laws.[201] The social changes enabled by and reflected in these laws have helped to break logjams in public and commercial spaces. With respect to racial integration during the Civil Rights Era, the law also

practice this means RSOs must allow any currently enrolled Evergreen State College student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs."); Jesse O'Neill, *Some Feel OSU's New Non-Discrimination Policy is Still "Unfair*," THE LANTERN (Ohio St. Univ.) (Apr. 10, 2011), http://thelantern.com/2011/04/some-feel-osus-new-non-discrimination-policy-is-still-unfair/ ("Student religious organizations at Ohio State soon will have to accept members regardless of their sexual orientation, religious beliefs, gender identity or anything that does not comply with the organizations' values."); Cathryn Sloane, *Supreme Court Ruling Will Affect UI Religious Group*, DAILY IOWAN (June 29, 2010), http://dailyiowan.com /2010/06/29/Metro/17739.html ("The Christian Legal Society, which has a chapter at the University of Iowa College of Law, will be forced to either change part of its constitution banning gays and lesbians as officers and voting members or face the possibility of losing funding from the university.").

199. *See Schools Work to Balance Gay, Religious Rights*, WALL ST. J. (Feb. 22, 2012), http://online.wsj.com/article/APe5a55d600b4e4b8397b3d0f5cf3ed0ad.html. For a short video-critique of Vanderbilt's policy, see Found. for Individual Rights in Educ., *Exiled From Vanderbilt*, YOUTUBE (Aug. 20, 2012), http://www.youtube.com/watch?v= dGPZQKpzYac. The video features strong critiques from Vanderbilt Law Professor Carol Swain, country music star Larry Gatlin, and journalist Jonathan Rauch. The trio includes a gay man and an African-American woman—the all-comers policy doesn't just threaten straight white men.

200. *See* Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30, 36, 45 (2d Cir. 2011). The Supreme Court has elsewhere imposed questionable limits on the predicate question of what constitutes a public forum. *See* Locke v. Davey, 540 U.S. 712, 715, 720 n.3 (2004) (finding that a state-run scholarship program is not a public forum). *But cf.* Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 830 (1995) (holding that public forum principles apply with equal force to fora that are "metaphysical" as opposed to "spatial or geographic"); Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 842–45 (6th Cir. 2000) (applying public forum analysis to a website).

201. *See, e.g.*, 42 U.S.C. § 2000a (2006) (prohibiting discrimination in places of public accommodations); *id.* § 2000e-2(a) (prohibiting racial discrimination in employment decisions).

broke the logjam in some private spaces, including private educational institutions.[202] But the social changes connected with antidiscrimination norms do not by themselves justify the application of those norms across all groups and institutions. In fact, the pluralist vision stands in tension with the application of those norms in civil society.

Given the history of our country, the preceding claim leads to one of the most powerful objections to the pluralist vision: If pluralism demands that private groups have the freedom to make their own membership decisions, does this mean that the Civil Rights decisions denying this autonomy to private segregationist schools were wrong? If not, why? I will call this objection, which has a great deal of political and moral force, the *standard objection*.

I address below four possible responses to the standard objection.[203] The first response, *religion is special*, permits discrimination by religious groups but prevents nonreligious groups from discriminating in their membership on the basis of race, gender, or sexual orientation. The second response, *status is different*, argues that conduct- or belief-based discrimination is permissible, but status-based discrimination is not. The third response, *race is different*, holds that our history of slavery and Jim Crow means that racial discrimination cannot be tolerated under any circumstances but permits other forms of discrimination by certain private groups. The fourth response, *strong pluralism*, permits most groups to make membership decisions on any basis.

The discussion that follows—and the strong pluralism theory that I endorse—is limited to the voluntary associations of civil society. It excludes organizations in the commercial marketplace.[204] Centering

202. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 176 (1976) (holding a provision of the Civil Rights Act to prohibit racial discrimination in private, non-religious schools).

203. I do not contend that these are the only responses or even the best ones. I do think that the standard objection requires a more direct and engaged response than advocates of pluralism typically provide.

204. *See* Bhagwat, *supra* note 4, at 1000–01; Inazu, *supra* note 173, at 1450–54; McConnell, *supra* note 38, at 43. Thus, for example, strong pluralism as I have conceived of it has nothing to say about the *constitutional* analysis of challenges to contraception coverage under the Affordable Care Act by for-profit businesses. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1120–21 (10th Cir. 2013) (upholding challenge to contraception coverage on statutory grounds), *cert. granted*, 134 S. Ct. 678 (2013). I am not the first to propose this particular line-drawing. For example, Michael McConnell argued on behalf of the Christian Legal Society that "[a]ll noncommercial expressive associations, regardless of their beliefs, have a constitutionally protected right to control the content of their speech by excluding those who do not share their essential purposes and beliefs from voting and leadership roles." Brief for Petitioner at 2, Christian Legal Soc'y Chapter of the

the pluralist vision on civil society to the exclusion of the marketplace requires a pragmatic and imperfect line-drawing. It is open to criticism from different perspectives: Feminists warn of the artificiality of the public/private distinction,[205] and libertarians critique the exclusion of commercial groups.[206] But from Tocqueville to Robert Putnam, this kind of line has persisted in the American ethos.[207] It represents a pragmatic middle ground to the feminist or libertarian alternatives. There is also a sense in which the distinction between commercial and noncommercial groups is consistent with an equal protection jurisprudence rooted in the Fourteenth Amendment. To the extent that the Fourteenth Amendment conditions or modifies the guarantees of the First Amendment, these changes unfold most often in commercial settings governed by employment discrimination and public accommodations laws.

Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971 (2010) (No. 08–1371), 2010 WL 711183, at *2. Andrew Koppelman has attributed a similar view to an array of scholars including Dale Carpenter, John McGinnis, Michael Paulsen, and Nancy Rosenblum. *See* ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE?, at xii, 72–75 (2009).

205. *See, e.g.*, SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 124–33 (1989); Ruth Abbey, *Back Toward a Comprehensive Liberalism? Justice as Fairness, Gender, and Families*, 35 POL. THEORY 5, 16 (2007).

206. *See* Epstein, *supra* note 33, at 139–40 ("[T]he effort to take a notion of assembly or association and assume that it cannot or should not apply to commercial institutions, broadly conceived, shows what I regard as the central deficit of modern constitutional theory: the willingness to divide constitutional rights into first and second class rights, depending on tests that have no grounding in first principles."); *see also* Robert K. Vischer, *How Necessary Is the Right of Assembly?*, 89 WASH. U. L. REV. 1403, 1414–15 (2012) ("If a for-profit corporation dissents from the moral norms embodied in a particular law, and we are confident that the dissent is not solely related to the avoidance of an economic burden, why should we not want to protect its right of assembly?").

207. *Cf.* Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274, 280 (2010) ("The distinction reflects widely shared and legally embodied beliefs about the exercise of authority by individuals, intermediate associations, and state institutions."); McConnell, *supra* note 38, at 40, 44. *See generally* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000) (examining and summarizing trends in American Democracy and civil society with the development of technology); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835) (containing a description of American democracy from the point of view of a French scholar after returning from a visit to the United States). The "civil society" line leaves unresolved how the law ought to treat a number of important groups that reflect both civil society values and quasi-governmental or market tendencies. *Cf.* INAZU, *supra* note 11, at 16 (leaving unresolved "how a theory of assembly would address highly regulated groups like political parties, labor unions, and professional associations").

A. The Religion Is Special Approach

The first response to the standard objection argues for a kind of religious exceptionalism. In *Hosanna-Tabor*, all nine Justices on the current Supreme Court adopted a version of this view in concluding that discrimination by religious groups is sometimes permissible even when non-religious groups are denied the same protections.[208] Even the parties arguing *against* the ministerial exception conceded that religion is different.[209] These views join a long tradition of political and legal thought that emphasizes the distinctive treatment of religious groups.[210] But courts and scholars have increasingly struggled to articulate a coherent argument for *why* religion is special.[211]

208. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012). In fact, the strong version of the *religion is special* approach underlying the ministerial exception likely protects even race-based discrimination. *See* McCants v. Ala.-W. Fla. Conference of U.M.C., 372 F. App'x 39, 41–42 (11th Cir. 2010); Bethea v. Nation of Islam, 248 F. App'x 331, 333 (3d Cir. 2007); Simpson v. Wells Lamont Corp., 494 F.2d 490, 494 (5th Cir. 1974); Carl H. Esbeck, *A Religious Organization's Autonomy in Matters of Self-Governance:* Hosanna-Tabor *and the First Amendment*, ENGAGE, Mar. 2012, at 168, 168, 172 n.3 (ministerial exception trumps Section 1981 claims). *But see* Mary-Michelle Upson Hirschoff, Runyon v. McCrary *and Regulation of Private Schools*, 52 IND. L.J. 747, 752 (1977) ("Assuming that the Court's interpretation of the powers granted to Congress by the thirteenth amendment is correct, section 1981, as an exercise of that power, must be constitutional. The thirteenth amendment, having been adopted after the first and fifth amendments, would be considered to have overridden the earlier amendments to the extent necessary to effectuate its purposes." (footnotes omitted)).

209. *See Hosanna-Tabor*, 132 S. Ct. at 706 ("The EEOC and Perich acknowledge that employment discrimination laws would be unconstitutional as applied to religious groups in certain circumstances. They grant, for example, that it would violate the First Amendment for courts to apply such laws to compel the ordination of women by the Catholic Church or by an Orthodox Jewish seminary.").

210. *See, e.g.*, VA. CODE ANN. § 57-1 (2012) ("The General Assembly, on January 16, 1786, passed an act in the following words: . . . 'Be it enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever . . . .' "); JOHN LOCKE, A LETTER CONCERNING TOLERATION 55 (James H. Tully ed., Hackett Publ'g Co. 1983) (1689); JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST THE GENERAL ASSESSMENT (Boston, Lincoln & Edmands 1819) (advocating against a bill that proposed to establish the teachers of the Christian religion); NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS 73, 79 (1998); Kent Greenawalt, *Freedom of Association and Religious Association*, *in* FREEDOM OF ASSOCIATION, *supra* note 143, at 109, 136; Nancy L. Rosenblum, Amos*: Religious Autonomy and the Moral Uses of Pluralism*, *in* OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH 165, 165–66 (Nancy Rosenblum ed., 2000).

211. Steven Smith has expressed similar concerns, noting that "under current constitutional doctrine, explanations for *why* churches enjoy [certain immunities] seem strained." STEVEN D. SMITH, THE DISENCHANTMENT OF SECULAR DISCOURSE 142–43 (2010); *see also* Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 967 (2013) ("[T]he only thing that seems to distinguish churches from other voluntary associations is their subject matter. . . . The

Even the strongest arguments encounter difficulty. Consider the efforts of one of the most prominent religious liberty scholars, Douglas Laycock. In a 1996 article, Professor Laycock suggested three propositions "sufficient to justify a strong commitment to religious liberty."[212] Laycock first emphasized that "governmental attempts to suppress disapproved religious views" led to "vast human suffering in Europe and in England and . . . on a smaller scale in the colonies that became the United States."[213] This historical fact gave the American Founders a "prima facie reason to forever ban all such governmental efforts."[214] Laycock then suggested that religious liberty was necessary because "beliefs about religion are often of extraordinary importance to the individual—important enough to die for, to suffer for, to rebel for, to emigrate for, to fight to control the government for."[215] Finally, he noted that "beliefs at the heart of religion—beliefs about theology, liturgy, and church governance—are of little importance to the civil government."[216]

Each of these reasons plausibly explains why the Framers took care to include specific protections for religious liberty in the First Amendment. And Laycock is surely right to appeal to the language in *Marbury v. Madison*[217] that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect."[218] But our current approach to constitutional interpretation requires more than an originalist appeal to the text and its meaning.[219] As Laycock laments, " '[B]ecause the Constitution says so' does not appear to be a sufficient reason to persuade many Americans to support a

difficulty with the subject matter distinction is that it has outlived its usefulness."); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1377–1403 (2012) (arguing that, in the context of constitutional protections, religion cannot be distinguished on principled theoretical basis from some non-religious belief systems); Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1884 (2009) (noting that while "[r]eligious speech, practice, and association might still enjoy substantial protection under other constitutional provisions and principles—free speech, perhaps, or equal protection," there may be "no good justification for treating religion as a special legal category").

212. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 316 (1996).

213. *Id.* at 317 (footnotes omitted).

214. *Id.*

215. *Id.*

216. *Id.*

217. 5 U.S. (1 Cranch) 137 (1803).

218. Laycock, *supra* note 212, at 340 n.119 (quoting *Marbury*, 5 U.S. (1 Cranch) at 174).

219. *See* Kozel, *supra* note 21, at 1878.

constitutional right unless they are also persuaded of the wisdom of the right at issue."[220]

Viewed in this light, Laycock's three assertions are less persuasive today. The Framers' familiarity with widespread human suffering resulting from governmental attempts to control religion might not support a ban in perpetuity if the state's methods of control and suppression were today more effective and less deadly than in a previous era. Similarly, if large swaths of religious believers became captive to other values—suppose they became more "American" than "Christian"—then far fewer might be willing to die, suffer, rebel, emigrate, or fight for their values. Finally, if beliefs about theology, liturgy, and church governance collided with laws enacting governmental norms—such as antidiscrimination norms—then these beliefs would become important to the civil government. Each of these three changes has arguably unfolded in contemporary American society. In other words, each of the reasons that Laycock offered to justify protections for religious liberty has proven to be historically contingent and arguably lacks persuasive power in today's constitutional debates.[221]

The historically contingent nature of Laycock's arguments and others like them is even more problematic for a reason that Mark Tushnet flagged in a 1986 article: "[T]he constitutional law of religion . . . is founded on a tradition that we no longer fully understand."[222] Tushnet observed that despite both liberal and republican influences on the Framers, the overwhelming success of the liberal tradition means that "the republican tradition is far less available to us than it was to the framers."[223] Notions like the "common good" are not

220. Laycock, *supra* note 212, at 315.

221. Professor Laycock has recently reasserted the continued salience of his earlier arguments. *See* Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 430 (2011) [hereinafter Laycock, *Sex, Atheism, and the Free Exercise of Religion*] ("I have argued in earlier work that there are secular justifications for religious liberty—to avoid the human suffering inherent in enforced legal penalties or in coerced violation of conscience, and to avoid the social conflict that inevitably arises from attempts to inflict such suffering. These reasons still have force today, even if they had even more force in the sixteenth century."). *But see* Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. (forthcoming 2014) [hereinafter Laycock, *Culture Wars*] (manuscript at 1, 33), *available at* http://www.ssrn.com/abstract=2304427 (identifying "deep disagreements over sexual morality" as the core of contemporary religious liberty disputes and speculating that "[t]he consequence of [religious conservatives] fighting the Sexual Revolution so hard and so long may be to permanently turn much of the country against religious liberty—or at least to turn public opinion towards a very narrow, more French-like understanding of religious liberty").

222. Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 734–35 (1986).

223. *Id.* at 736.

cognizable within the liberal tradition.[224] And, as Tushnet recognized, we have no coherent way to recover them: "The republican tradition, as a conservative tradition, insisted on the historicity of institutions and public policy," which "makes it impossible to impose on today's society solutions drawn from a less-than-vital, indeed to some extent imaginary, tradition [of liberalism]."[225]

Having diagnosed this seemingly insurmountable challenge, Tushnet offered a curiously sanguine appeal:

> Citizens [in a culture of mutual forbearance] would understand that the public policy was intended to advance the public good. They would recognize that civic actions that generated intense hostility would be unlikely to advance the public good, so they would forbear from taking such actions. These citizens would also see that civic actions designed to promote intensely held values would be likely to advance the public good—even if some individuals thought those actions unwise or even troublesome on grounds of conscience—so they would then forbear from challenging such actions.[226]

The admonition for mutual forbearance—even with respect to actions "troublesome on grounds of conscience"—presumes an ordering of allegiances antithetical to many religious traditions.[227] But even if the premise were conceptually plausible, our current political discourse suggests little hope of the vision that Tushnet advocates.[228]

224. *See* ALASDAIR MACINTYRE, AFTER VIRTUE 23–34 (1981) (developing this critique at length).

225. Tushnet, *supra* note 222, at 736. The challenges to recovering a tradition-based understanding of religious freedom are amplified by growing philosophical and sociological ambiguities over the definitional boundaries of "religion." *See generally* George C. Freeman III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519 (1983) (arguing that judicial attempts to define religion are unsatisfactory and misguided and that courts can decide cases under the religion clauses without attempting such a definition); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984) (arguing that courts should define religion in reference to what is indisputably religious, that no single characteristic should be considered essentially religious, and that the presence of religious elements should not necessarily invoke strict scrutiny). A related argument is that religious preferences cannot be distinguished from expensive tastes. *See, e.g.*, BRIAN BARRY, CULTURE AND EQUALITY 34–36 (2001).

226. Tushnet, *supra* note 222, at 738.

227. These arguments have been forcefully advanced by the theologian Stanley Hauerwas. *See, e.g.*, STANLEY HAUERWAS, *Hope Faces Power*, *in* CHRISTIAN EXISTENCE TODAY, 199, 215–17 (1988).

228. *See* Laycock, *Culture Wars*, *supra* note 221 (manuscript at 43) ("There is no apparent prospect of either side agreeing to live and let live. Each side respects the liberties of the other *only* when it lacks [the] votes to impose its own views. Each side wants a total win.").

While Tushnet's prescription of forbearance has been rendered increasingly unlikely in the years since he wrote his article, his diagnosis of the loss of shared convictions has been resoundingly confirmed. Our society now agrees even less about fundamental questions of truth, meaning, and ethics, or even whether those categories retain any coherence.[229] On discrete policy issues, the culture wars show little sign of dissipating.

To be sure, the importance of religious freedom as a generalized or abstracted ideal has not yet lost its cultural and political salience in the United States. Indeed, our government advocates for religious freedom around the globe.[230] Support for religious liberty is also reinforced by the text of the First Amendment.[231] One need not be an originalist to acknowledge that constitutional text matters.[232] That, in fact, is one of the insights of the Four Freedoms—a rhetorical reminder, then and now, that some of the rights and values in our current constitutional discourse draw upon a rich history and tradition that spans the life of our nation. For this reason, the *religion is special* argument retains some salience even under *Smith*'s approach to free exercise.

Nevertheless, religious liberty is encountering increased resistance, particularly when it conflicts with questions of sexual freedom.[233] In this cultural context, even a reinvigorated free exercise jurisprudence may not suffice to overcome the standard objection, and the *religion is special* argument may offer little constitutional protection against antidiscrimination norms applied to private noncommercial groups. *Hosanna-Tabor* could well be construed narrowly in later decisions, and the rest of the Supreme Court's First Amendment jurisprudence is far less accommodating of religious

229. *See* MACINTYRE, *supra* note 224, at 6–21.

230. *See, e.g.*, Clinton, *supra* note 35 ("For the United States, of course, religious freedom is a cherished constitutional value, a strategic national interest and a foreign policy priority.").

231. *See* U.S. CONST. amend I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.").

232. *Cf.* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 9 (1986) ("The fact that the likely intent of the framers of a constitutional provision (narrowly read) may provide one form of legitimacy does not mean that it provides the only form. Still, appeal to historically existing common values is one characteristic of a community. Where valid, the appeal should not be discarded simply because the method may not answer all possible questions correctly from the critic's point of view.").

233. *See* Laycock, *Culture Wars*, *supra* note 221 (manuscript at 8–25).

liberty, particularly when religion clashes with other core commitments of contemporary liberalism.[234] The suggestion that the *religion is special* argument alone may not prevail against the standard objection underscores the importance of reinforcing religious liberty with other, more general forms of liberty.

B. The Status Is Different Approach

The *status is different* approach holds that discrimination on the basis of one's conduct or belief is permissible but discrimination on the basis of one's status is not. This is the position taken by the Christian Legal Society in *Martinez*. During oral argument, lead counsel Michael McConnell insisted that the policy at Hastings was "a frontal assault on freedom of association," which is "the right to form around shared beliefs."[235] Justice Sonia Sotomayor pushed back, asking if Hastings' forum would have to accept a group that "wanted to exclude all black people, all women, all handicapped persons, whatever other form of discrimination a group wants to practice."[236] McConnell responded that a group could not "exclude someone on the basis of status."[237]

One difficulty with McConnell's distinction is that if the principles underlying freedom of association include "the right to form around shared beliefs," then it is not easy to explain why a shared belief about status is constitutionally different than a shared belief about conduct. Conversely, if status discrimination by a private group is constitutionally impermissible, even when it rests upon a sincerely held belief, then it is difficult to defend discrimination against conduct that some people tie closely to status.

The *status is different* argument was one of the ways that courts tried to parse the different forms of racial discrimination employed by Bob Jones University (whose ban on interracial dating represented a conduct distinction) and Goldsboro Christian Schools (whose exclusion of African Americans amounted to a status distinction). The Supreme Court explicitly rejected the argument:

234. *See, e.g.*, Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2978 (2010); Bob Jones Univ. v. United States, 461 U.S. 574, 584–85 (1983).

235. Transcript of Oral Argument at 9, *Martinez*, 130 S. Ct. 2971 (No. 08-1371), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1371.pdf.

236. *Id.*

237. *Id*. at 10.

> [Bob Jones] contends that it is not racially discriminatory. It emphasizes that it now allows all races to enroll, subject only to its restrictions on the conduct of all students, including its prohibitions of association between men and women of different races, and of interracial marriage. Although a ban on intermarriage or interracial dating applies to all races, decisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination.[238]

Today, the *status is different* argument arises most prominently with respect to religious groups that exclude on the basis of sexual conduct rather than sexual orientation. For example, the Christian student group in *Martinez* welcomed gay and lesbian members but required that they not engage in or advocate sexual activity.[239] Justice Ginsburg's opinion for the Court asserted, "Our decisions have declined to distinguish between status and conduct" in the context of sexual orientation.[240] William Eskridge has argued even more forcefully that "[s]tatus, conduct, and message have been the holy trinity of religion-based discrimination and subordination of both citizens of color and homosexual citizens."[241] After noting McConnell's distinction during the *Martinez* oral argument, Eskridge suggested that the "close link among conduct, message, and status also fit the religious liberty arguments made by Bob Jones in the 1980s."[242]

I have argued elsewhere that collapsing the status-conduct distinction in the context of the membership policy of a private, noncommercial group is mistaken.[243] Conduct is sometimes but not always constitutive of status, and the lack of complete overlap has different ramifications for private groups than for public actors.[244] But even if I am correct about the problems with conflating the distinction, the *status is different* argument confronts a seemingly insurmountable objection from the skeptic who stipulates to the distinction but then asks why it matters. In other words, even if the Christian Legal Society's membership requirements were based on

238. *Bob Jones*, 461 U.S. at 605.

239. *See Martinez*, 130 S. Ct. at 2990 ("CLS proposes that Hastings permit exclusion because of *belief* but forbid discrimination due to *status*.").

240. *Id.*

241. William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 711 (2011).

242. *Id.*

243. Inazu, *supra* note 176, at 1234–37.

244. *See id.*

conduct and not status, it is difficult to articulate why conduct-based discrimination is any less harmful or less problematic than status-based discrimination from the perspective of those who are excluded from a group.

C. The Race Is Different Approach

The third response to the standard objection constrains the pluralist limits to racially discriminatory groups. The *race is different* approach is consistent with much equal protection jurisprudence, which has long differentiated between discrimination on the basis of race, gender, and sexual orientation.[245] But the problem with rooting a pluralist defense of the standard objection in this approach is the difficulty with articulating *why* racial discrimination is worse (constitutionally, morally, or otherwise) than discrimination on the basis of gender or sexual orientation. Or, to phrase the question more sharply: How is gender or sexual orientation discrimination "less harmful" than racial discrimination today? A historical distinction alone may not suffice—the particular harm of racial discrimination in the 1960s (and before) does not by itself justify less concern for other forms of discrimination today.[246]

Consider, for example, Richard Garnett's efforts to distinguish the racial discrimination of Bob Jones University from other kinds of discrimination. Garnett argues that Bob Jones practiced a form of discrimination "that almost everyone agrees is *wrongful* discrimination."[247] He distinguishes the exclusionary practices of the Christian Legal Society in *Martinez* because "it is not as clear as it was in *Bob Jones* that the discrimination at issue really is wrongful, or 'invidious.' "[248] He concludes that

> the social meaning of even religiously grounded racial discrimination is . . . easier to identify as demeaning—and so eligible for the government's disapproval through nonsupport,

245. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197–98 (1976) (applying intermediate scrutiny for gender-based classifications).

246. *See, e.g.*, Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 123, 153 (Douglas Laycock et al. eds., 2008) ("If I am denied a job, an apartment, a room at a hotel, a table at a restaurant, or a procedure by a doctor because I am a lesbian, that is a deep, intense, and tangible hurt.").

247. Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, *in* MATTERS OF FAITH: RELIGIOUS EXPERIENCE AND LEGAL RESPONSE (Austin Sarat ed.) (forthcoming) (manuscript at 194, 208), *available at* http://ssrn.com/abstract=2087599.

248. *Id.* (manuscript at 210).

> even if not regulation—than is the social meaning of, say, the Catholic Church's all-male ministerial priesthood.[249]

Garnett's reasoning may well reflect current understandings of "social meaning." Most people today are probably less troubled by the male priesthood of the Catholic Church than by the racial discrimination of Bob Jones. But most people today are probably *more* troubled by the Catholic Church's exclusions on the basis of sexual conduct than they are by the male priesthood (an inversion of the traditional equal protection categories).[250] Garnett's reliance on the distinction between "wrongful" discrimination in *Bob Jones* and presumably "appropriate" discrimination in *Martinez* hangs on a tenuous thread of public opinion.

There are two ways to strengthen the *race is different* approach. The first construes it narrowly in terms of constitutional doctrine. The second construes it broadly in terms of an irrebuttable national commitment. The following pages explore each of these alternatives but ultimately express skepticism about their viability.

1. Narrowing the Race Is Different Approach

The narrow construction of the *race is different* approach acknowledges that *Runyon* clearly encroached upon the pluralist vision of civil society—the private school was not a state actor, a commercial enterprise, or a public accommodation.[251] But it responds to the standard objection by insisting that *Runyon* represents a discrete limitation on the pluralist vision. That limitation, precisely stated, restricts race-based discrimination in private schools.[252] It does not extend to discrimination on any other basis.

Runyon emphasized that Congress's authority for enacting § 1981 derived from the Thirteenth Amendment and explicitly noted

249. *Id.* (manuscript at 219).

250. Consider, for example, Laura Underkuffler's charge that religious believers who discriminate on the basis of sexual orientation are engaged in "odious discrimination" and should not be exempt from generally applicable antidiscrimination laws. *See* Laura S. Underkuffler, *Odious Discrimination and the Religious Exemption Question*, 32 CARDOZO L. REV. 2069, 2072 (2011).

251. *See* Runyon v. McCrary, 427 U.S. 160, 168 (1976). Justice Stewart's characterization of the private school as "commercially operated" relies on the fact that the schools charged tuition: "Under those contractual relationships, the schools would have received payments for services rendered, and the prospective students would have received instruction in return for those payments." *Id.* at 172.

252. It is also possible that *Runyon* is limited to race-based exclusions against African Americans. *See* Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate, 470 F.3d 827, 829 (9th Cir. 2006) (en banc) (upholding private school's Hawaiian-only admissions policy against a § 1981 challenge).

that the case did "not present any question of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity."[253] Thirteen years later, the Supreme Court declined to revisit *Runyon*'s holding in *Patterson v. McLean Credit Union*.[254] The Court reasoned,

> In *Runyon*, the Court considered whether § 1981 prohibits private schools from excluding children who are qualified for admission, solely on the basis of race. We held that § 1981 did prohibit such conduct .... The arguments about whether *Runyon* was decided correctly in light of the language and history of the statute were examined and discussed with great care in our decision. It was recognized at the time that a strong case could be made for the view that the statute does not reach private conduct, but that view did not prevail. . . . We conclude after reargument that *Runyon* should not be overruled, and we now reaffirm that § 1981 prohibits racial discrimination in the making and enforcement of private contracts.[255]

Patterson thus reaffirmed *Runyon*'s specific holding as to "racial discrimination in the making and enforcement of private contracts."[256] Two years later, Congress codified this prohibition in the Civil Rights Act of 1991.[257]

The narrow version of the *race is different* approach thus answers the standard objection by accepting *Runyon*'s holding but insisting on the limits of that holding.[258] But the problem with an argument resting in doctrine and constitutional authority is that neither the Court nor the American public is always careful about recognizing the boundaries of these kinds of arguments. Consider, for example, the strained logic of *Roberts v. U.S. Jaycees*, which cites *Runyon* for the view that "invidious discrimination in the distribution of publicly

253. *Runyon*, 427 U.S. at 169.

254. 491 U.S. 164 (1989).

255. *Id.* at 171–72.

256. *Id.* at 172.

257. Pub. L. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981).

258. I do not think that endorsing the holding of *Runyon* commits me to a full-fledged acceptance of the *race is different* approach, which Professor Epstein has ascribed to me in a review of my book, *Liberty's Refuge*. Epstein, *supra* note 33, at 140 ("[O]nce he blinks on the question of race, Inazu finds it hard to construct a consistent theory as to when the antidiscrimination principle trumps the freedom of association principle."). I wrote in *Liberty's Refuge* that "treating race differently in all areas ultimately undercuts a vision of assembly that protects pluralism and dissent against state-enforced orthodoxy," and I concluded that "[w]e cannot move from the premise that genuine pluralism matters to an effort to rid ourselves of the groups that we don't like." INAZU, *supra* note 11, at 14.

available goods, services, and other advantages" is "entitled to no constitutional protection."[259] That conclusion, applied in the context of gender-based discrimination, is unsupported by either § 1981 or Congressional authority under the Thirteenth Amendment.[260]

2. Expanding the Race Is Different Approach

The alternative to narrowing the *race is different* approach is to embrace fully the distinction between racial discrimination and other forms of discrimination in the regulation of the private groups of civil society (recall that nothing in this Article challenges the application of Title VII or other antidiscrimination laws to commercial organizations). That kind of distinction would hinge on more than the difference between "wrong" and "appropriate" discrimination. It would have to rely on a kind of constitutional "super-norm" that express racial discrimination in any form is beyond the pale of our society.[261]

259. Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984); *cf.* Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 54 (2005) (citing *Runyon* for the proposition that "[w]hen, however, the employment relation is at stake, government has powerful reasons, including the rights of individuals to pursue their livelihood and the efficient operation of labor markets, to forbid faith-based discrimination").

260. *See, e.g.*, Friedel v. City of Madison, 832 F.2d 965, 966 n.1 (7th Cir. 1987) ("[C]laims of sex discrimination are not cognizable under section 1981."); *cf.* Inazu, *supra* note 142, at 149 ("The Talmudical Institute of Upstate New York, the Holy Trinity Orthodox Seminary (Russian Orthodox), and Morehouse College admit only men to their programs; Barnard College, Bryn Mawr College, and Wellesley College admit only women."). *But see* Alexander Tsesis, *Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641, 1695 (2012) ("While courts have historically only interpreted the Thirteenth Amendment within the framework of racial discrimination, its protection of liberty applies equally to cases of gender discrimination. Congressional authority under Section 2 is triggered whenever an act of discrimination is rationally related to a legislatively or judicially recognized incident or badge of involuntary servitude.").

261. The idea of a constitutional "super-norm" bears some resemblance to arguments for recognizing "super-statutes." *See generally* WILLIAM N. ESKRIDGE & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010) (arguing that certain statutes are central to modern constitutionalism); William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001) (arguing that a few, select statutes penetrate normative culture to provide super-norms). But the threshold for establishing a constitutional super-norm would be far greater than whatever the threshold for a super-statute might be. The number of super-norms is conceptually limitless. We could, for example, theoretically establish the same absolutist rule for gender or sexual orientation discrimination. But we have in practice recognized few super-norms, and our history reveals that we typically find ourselves releasing old norms rather than creating new ones. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (homosexual sodomy); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (birth control).

These kinds of super-norms are not wholly unfamiliar in law—they are in some ways the background assumptions that inevitably constrain all rights.[262] A group committed to human sacrifice will not be eligible for generally available resources and, if it pursues its vision, will not be permitted to exist.[263] Private groups that use illegal drugs like LSD for religious reasons encounter similar fates.[264]

It may be that our society has reached a consensus that express racial discrimination by private noncommercial groups (and particularly discrimination against African Americans) is as out-of-bounds as child sacrifice and LSD use.[265] We fought a civil war, enacted a series of constitutional amendments (of which, for purposes of the reach of antidiscrimination law to civil society groups, the Thirteenth Amendment is the most important), endured a legacy of Jim Crow, and continue to witness the widespread lingering effects of racism today.[266]

But if race *is* different, then *Bob Jones* should have been little more than an afterthought to *Runyon*. And the decades of rhetoric that followed these decisions should have said as much in using the law to bring the existence of certain civil society groups to an end. Robert Cover made this argument inimitably: The state's killing of a normative tradition demands an unambiguous commitment to an overriding constitutional norm.[267]

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262. As Peter de Marneffe has observed,

> Some may think of rights as "absolute," believing that to say that there is a *right* to some liberty is to say that the government may not interfere with this liberty for *any* reason. But if this is how rights are understood, there are virtually no rights to liberty—because for virtually every liberty there will be *some* morally sufficient reason for the government to interfere with it.

Peter de Marneffe, *Rights, Reasons, and Freedom of Association*, *in* FREEDOM OF ASSOCIATION, *supra* note 143, at 145, 146.

263. *See* Davis v. Beason, 133 U.S. 333, 344 (1890) ("Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?").

264. *See, e.g.*, United States v. Kuch, 288 F. Supp. 439, 448 (1968) (rejecting a religious exemption claim for LSD and marijuana use).

265. A prohibition on racial discrimination against African Americans by private *commercial* groups may already be a constitutional super-norm in light of the Fourteenth Amendment and subsequent statutory enactments.

266. The current state of our educational system is a stark reminder that the end of *de jure* segregation in public and private schools has not moved us to a "post-racial" society. *See* Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 972 (2010) (suggesting that "the history, social reality, and life circumstances of people of color in this country do not support a broad adoption of the post-racial perspective within equal protection analysis").

267. *See* Robert Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and*

This kind of normative commitment would strengthen the *race is different* approach and complicate arguments to limit the autonomy of the private groups of civil society for reasons other than racial discrimination. Our nation has wronged many people throughout its history, but with the exception of the genocide that it wrought against Native Americans, no other group of people comes close to the harms inflicted against African Americans. Past and present injustices against other minorities and disadvantaged groups may well require ongoing constraints upon public and commercial entities to facilitate equality of opportunity.[268] But the focus of this Article is the extent to which the pluralist vision should be sacrificed within the private noncommercial groups of civil society. In that area, the state's interest should be compelling and clear—enough to justify the destruction of competing normative traditions.[269]

D. The Strong Pluralism Approach

Each of the preceding responses to the standard objection has some plausibility. The *religion is special* approach—rooted in the free exercise clause of the First Amendment and reinforced by *Hosanna-Tabor*—warrants ongoing attention in spite of *Smith*. The *status is different* approach deserves greater consideration than it was given in *Martinez*. The *race is different* approach—particularly through a committed expansion or a careful narrowing of its scope—has much to commend in light of our nation's history. I would, in fact, be quick to endorse either the careful narrowing or deliberate expansion of the *race is different* argument that I described in the preceding Section if either of those alternatives were likely to gain broader political traction. But each of these approaches has fallen short in discussions surrounding contemporary political theory and popular rhetoric. No approach is likely to prevail against the standard objection.

The remaining response to the standard objection is *strong pluralism*.[270] Professor Laycock offered a version of this argument in

Narrative, 97 HARV. L. REV. 4, 66–67 (1983).

268. I have in mind in particular women, sexual minorities, and other racial minorities (including my own grandparents, who were stripped of all their possessions and incarcerated for four years because they were Japanese Americans).

269. Cover, *supra* note 267, at 67 n.195 (stating that the rejection of a community's normative tradition "ought to be grounded on an interpretive commitment that is as fundamental as that of the . . . community").

270. Strong pluralism does not require rejecting the wisdom of *Runyon* in its time. We might, for example, reject the premise of the standard objection today by answering the *constitutional* question of an all-white private school differently in 2012 than we did in 1976. That would not be unprecedented—we accept the idea of time-limited remedies in

an essay focusing on the free exercise dimensions of *Bob Jones*, written when the Supreme Court was still considering the case. Laycock asserted, "Opinion polls cannot substitute for the Constitution; the very purpose of constitutional rights is to insulate important freedoms from changes in majority opinion."[271] From that premise, he relied on the Free Exercise Clause to critique the IRS's denial of tax-exempt status to Bob Jones University.[272]

Laycock also articulated an important rationale for defending Bob Jones's entitlement to tax-exemption: "When one seeks to affiliate with a church, or with a pervasively religious school, he must do so on the church's terms. Similarly, when the church ventures into secular society, it must do so on society's terms."[273] Elaborating on the two sides of his observation, Laycock observed that "[a] religiously motivated citizen who is conscientiously opposed to racial equality encounters legally required nondiscrimination almost everywhere he goes."[274] Indeed, "[o]ur societal commitment to racial equality is so important that the views of dissenting churches are regularly

other race-related areas of the law. *See, e.g.*, Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 211 (2009) ("More than 40 years ago, this Court concluded that 'exceptional conditions' prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today."); Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."); Freeman v. Pitts, 503 U.S. 467, 491–92 (1992) ("[W]ith the passage of time, the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish"); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion) ("In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future."); Green v. Cnty. Sch. Bd., 391 U.S. 430, 435–38 (1968) (holding that a school district may be declared unitary and lacking racial discrimination based on satisfactory performance in five areas of a school district's operations).

271. Douglas Laycock, *Observation: Tax Exemptions for Racially Discriminatory Religious Schools*, 60 TEX. L. REV. 259, 263 (1982).

272. *See id.* at 261.

273. *Id.* at 263.

274. *Id*. Laycock continued:

> His government cannot discriminate; his places of public accommodation cannot discriminate; his employer cannot discriminate; his landlord cannot discriminate. Indeed, he cannot discriminate himself. If he owns a business, he must hire and serve all races on an equal basis. If he buys or sells property, he must deal with blacks and whites on equal terms. His objection to racial equality does not entitle him to be excused from these obligations; when he participates in government or the secular economy, he must obey the secular rules that apply to all.

Id.

subordinated to it whenever the church, or an individual believer, ventures into the outside world."[275] But within the church, "the balance must be struck the other way. The churches must be free to select their own members on any terms they choose, and to discriminate among those members on any terms the faithful will accept."[276] Although Laycock rooted his arguments in the free exercise of religion, his analysis is equally applicable to nonreligious private groups. Nothing that he writes is conceptually limited to religious groups. In fact, the kinds of distinctions that Laycock makes underlie the strong pluralist arguments for voluntary associations in civil society.[277]

IV. THE CONTOURS OF STRONG PLURALISM

A. Toleration and Subsidy

Having suggested the approach of strong pluralism, I turn now to a closer consideration of its boundaries. We are in many ways a robustly pluralist nation. We have more political, cultural, social, and religious diversity than at any other point in our history. But the contours of strong pluralism remain vulnerable along two lines: toleration and subsidy.

The first question arises at the level of existence: the government's refusal to tolerate certain illiberal groups, as evidenced in cases like *Runyon* and *Roberts*. Some commentators have distinguished *Martinez* from cases like *Runyon* and *Roberts* on the basis that *Martinez* involved a government subsidy of a discriminatory practice rather than simply its toleration.[278] But the heart of *Martinez* involved access to a public forum, not a subsidy of any significance. The monetary subsidy to the Christian Legal Society at Hastings totaled $250 in travel funds, which was financed by vending machine sales commissions.[279] Far more important than this modest subsidy

275. *Id*. at 264.

276. *Id.*

277. *Cf.* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 134 (1989) ("[T]he function of constitutional rights, and more specifically the role of the right of assembly, is to protect self-expressive, nonviolent, noncoercive conduct from majority norms or political balancing and even to permit people to be offensive, annoying, or challenging to dominant norms . . . .").

278. *See, e.g.*, Susan Frelich Appleton, *Liberty's Forgotten Refugees? Engendering Assembly*, 89 WASH. U. L. REV. 1423, 1424–25, 1427 (2012); Lupu & Tuttle, *supra* note 207, at 299 n.119 (characterizing *Martinez* as involving "the right of a state law school to refuse to provide funding and other benefits to a student organization").

279. Joint Stipulation of Facts for Cross-Motions for Summary Judgment ¶ 37, Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of the Law v. Kane, No. C

was the denial of access to avenues of communication, meeting space, and the student activities fair.[280] These denials strike at the heart of meaningful participation in the public forum, which at least in theory extends to all viewpoints.[281]

The second question concerns the government's refusal to extend *generally available* funding and resources to the full range of groups in civil society.[282] For example, in *Martinez*, the facilities and funding that came through official recognition were available to a broad range of recipients representing diverse ideologies—they are conceptually different than a government endorsement. Caroline Corbin suggests otherwise, arguing that generally available subsidies "put[] the state's stamp of approval on [an] organization's discriminatory practices" and "send[] the message that this conduct, and the stereotypes motivating it, are not so bad or inaccurate after all."[283] But Corbin's

04-04484 JSW, 2006 WL 997217 (N.D. Cal. May 19, 2006) ("In early September 2004, Ms. Haddad and Mr. Fong applied to the Office of Student Services for travel funds to travel to CLS-National's annual conference. On or about September 9, 2004, Ms. Chapman informed Ms. Haddad via email that the Office of Student Services had set aside $250.00 in travel funds to cover Ms. Haddad and Mr. Fong's expenses associated with attending the conference." (citations omitted)). Travel funds came from vending machine sales commissions. *Id.* ¶ 9 n.2. The society was ineligible for other funding because it was never approved as a registered student organization, *id.* ¶¶ 9(f), 10, and nothing in the record indicates that the society planned on requesting additional funding.

280. *See* Michael Stokes Paulsen, *Disaster: The Worst Religious Freedom Case in Fifty Years*, 24 REGENT U. L. REV. 283, 301–02 (2012) (stating that the Court's determination that "access to facilities, funds, or recognition" was a subsidy was inconsistent with prior Supreme Court precedent); Timothy J. Tracey, *The Demise of Equal Access and a Return to the Early-American Understanding of Student Rights*, 43 U. MEM. L. REV. 557, 582 (2013) (stating that the Court violated its precedent by holding that "a school's giving of classrooms, corkboards, and money was a 'subvention' of student group expression—a government subsidy, rather than the creation of a forum for private speakers").

281. *Cf.* Healy v. James, 408 U.S. 169, 181–82 (1972) ("If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial."); McConnell, *supra* note 38, at 44 (stating that the Court's current doctrine allows the government to choose which groups it will allow to assemble on public property, taking away the freedom to assemble that the Framers believed they had given to all).

282. By "generally available funding," I mean to distinguish government funding provided in the context of a limited public forum from discretionary grants like government contract awards.

283. Caroline Mala Corbin, *Expanding the* Bob Jones *Compromise*, *in* LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS 123, 141 (Austin Sarat ed., 2012). Martha Nussbaum recently expressed similar sentiments. *See* David V. Johnson, *The New Religious Intolerance: An Interview with Martha Nussbaum*, BOS. REV. (July 11, 2012), http://www.bostonreview.net/books-ideas-

reasoning does not pan out in other First Amendment contexts. Granting a tax exemption to a church does not mean that the state approves of the church's religious beliefs.[284] And allowing a gay student group access to school facilities in the 1970s[285] did not "send the message" that the school endorsed gay rights. In fact, the theoretical framework undergirding generally available funding, resources, and facilities is rooted in an aversion to orthodoxy and deference to pluralism. That is why *Bob Jones*, while normatively attractive to almost everyone, is conceptually wrong.

Setting aside the separation of powers issues that complicated the Supreme Court's resolution of the case,[286] *Bob Jones* is wrongly decided because the government cannot coherently engage in viewpoint discrimination with respect to a generally available benefit like the tax-exemption granted to charitable organizations.[287] The Court's opinion pronounced that racially discriminatory policies are

arts-culture/new-religious-intolerance-David-V-Johnson ("The government was in effect giving Bob Jones a massive gift of money. The same is true today of Catholic universities, all of which (excepting Georgetown, which now has a lay president) have statutory prohibitions against a female candidate for president. By giving them a large gift, the government is cooperating with sexism." (quoting Martha Nussbaum)).

284. *See* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 666–67 (1970) (holding that a property tax exemption for religious entities does not violate Establishment Clause).

285. *See generally* Gay Students Org. of the Univ. of N.H. v. Bonner, 509 F.2d 652, 661 (1st Cir. 1974) (holding the University's ban on the Gay Students Organization's social events unconstitutional).

286. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 612 (1983) (Rehnquist, J., dissenting).

287. That is the principle underlying *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819, 845–46 (1995). *Cf.* Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditure?*, 112 HARV. L. REV. 379, 382 (1998) ("[F]or First Amendment purposes, there is no workable, bright-line distinction between tax benefits as a broad category and direct spending programs defined in similarly generic terms. *Rosenberger* was decided correctly because the entitlement-type spending at issue in that case was similar, though not identical, to the classic tax benefits upheld in *Walz*."). The point is also illustrated in the D.C. Circuit's decision in *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980), which reversed the IRS's denial of tax-exempt status to a feminist publication. *Id.* at 1033, 1040. The IRS and the district court had both concluded that Big Mama Rag failed to qualify as a tax-exempt "educational" organization because of its "political and legislative commentary" and its "articles, lectures, editorials, etc., promoting lesbianism." *Id.* at 1033. Judge Mikva noted that "the discriminatory denial of tax exemptions can impermissibly infringe free speech." *Id.* at 1034 (citing Speiser v. Randall, 357 U.S. 513, 518 (1958)). The holding of *Big Mama Rag* rests on the vagueness of the IRS's definition of "educational," but the underlying pluralist implications are also evident in the opinion. *See id.* at 1040 ("IRS officials earlier advised appellant's counsel that an exemption could be approved only if the organization 'agree[d] to abstain from advocating that homosexuality is a mere preference, orientation, or propensity on par with heterosexuality and which should otherwise be regarded as normal.' "); *id.* ("Objective standards are especially essential in cases such as this involving those espousing nonmajoritarian philosophies.").

"contrary to public policy" and placed the school outside of the "public benefit."[288] As John Colombo and Mark Hall have argued, this kind of justification for the tax exemption "relegate[s] it to merely another mechanism for the government to, in effect, make direct spending decisions by selecting which nonprofit activities confer a sufficient benefit to the community to deserve tax relief."[289] In contrast, the longstanding charitable exemption is best justified through a theory of pluralism that allows donors to determine which charities they will fund.[290]

The stakes of access to generally available funding are heightened by the vast reaches of the federal government and its financial hooks. That is evident not only in the tax exemption under *Bob Jones* but also in the federal funding at issue in *Grove City*. Dale Carpenter has helpfully framed the challenge posed by these kinds of funding restrictions:

> We need a realistic understanding of how government power operates today. This power can be reined in, perhaps slightly, through robust substantive protection for speech and association, and through an unconstitutional conditions

288. *See Bob Jones*, 461 U.S. at 595.

289. JOHN D. COLOMBO & MARK A. HALL, THE CHARITABLE TAX EXEMPTION 155 (1995). Justice Powell expressed similar concerns in his *Bob Jones* concurrence. *Bob Jones*, 461 U.S. at 611 (Powell, J., concurring). Professor Corbin suggests that the concern "should be assuaged" for three reasons: "First, nonprofit status is linked to conduct, not viewpoint. Second, no organization is banned; some are simply not encouraged. Third, invidious discrimination on the basis of race or sex should be affirmatively discouraged." Corbin, *supra* note 283, at 166. The first argument is simply a matter of describing viewpoint as conduct. The second is the distinction between toleration and funding that is not well theorized under our system of tax exemptions. Accordingly, Corbin's arguments collapse into a normative preference against discrimination. That is certainly a constitutional position that one might adopt, but the unavoidable question that remains is whether it should trump the concern for pluralism.

290. *See* COLOMBO & HALL, *supra* note 289, at 155. Justice Rehnquist's dissent emphasized a separate reason for upholding the tax-exemption to Bob Jones: the disjunction between "charitable" and "educational" in the Internal Revenue Code. *Bob Jones*, 461 U.S. at 614, 623 (Rehnquist, J., dissenting). According to Rehnquist, because the university clearly qualified as an "educational" organization, its tax-exempt status should have been upheld even if it were found to fall outside the definition of "charitable." *Id.* The majority hints in a footnote at one reason that the denial of the tax exemption to Bob Jones might be uniquely justified: "We deal here only with religious *schools*—not with churches or other purely religious institutions; here, the governmental interest is in denying public support to racial discrimination in education." *Id.* at 604 n.29 (majority opinion). That rationale would be consistent with the "Narrowing the Race is Different Approach" discussed earlier, particularly given the proximity of *Bob Jones* to cases like *Runyon*. *See* discussion *supra* Part III.C.1. It is less clear whether the majority's reasoning would support the denial of tax-exempt status to Bob Jones in 2014, given the assumptions underlying our system of tax exemptions.

> doctrine that fetters Congress' ability to eat away at federalism and liberty through funding conditions. A constitutional theory unable to account for and deal with this threat cannot be considered very protective of either federalism or liberty in the 21st century.[291]

As Carpenter's observations suggest, the difference between toleration and subsidy is more likely one of degree than of kind.[292]

B. Implementing Strong Pluralism

The pluralist vision requires a constitutional commitment to the Four Freedoms—not to the doctrinal strands that currently surround these rights, but to the principles that have underlain them for most of our nation's history. The rights of speech, press, religion, and

291. Dale Carpenter, *Unanimously Wrong*, 2006 CATO SUP. CT. REV. 217, 232, *available at* http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2006/9/carpenter.pdf. Carpenter's article focused on the Supreme Court's decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), which upheld the application of the Solomon Amendment to public and private law schools over speech and association claims. *See id.* at 56–58; Carpenter, *supra*, at 217–20. The Court relied in part on *Grove City*, asserting that in *Grove City* "[w]e concluded that no First Amendment violation had occurred—without reviewing the substance of the First Amendment claims—because Grove City could decline the Government's funds." *Rumsfeld*, 547 U.S. at 59 (citing Grove City Coll. v. Bell, 465 U.S. 555, 575–76 (1984)). The speech and association claims in *Rumsfeld* are somewhat confounded because the petitioners included both public and private law schools. It is difficult to conceptualize a First Amendment right of association within the context of a state entity, although there may be separate federalism concerns. *Cf.* Paul M. Secunda, *The Solomon Amendment, Expressive Associations, and Public Employment*, 54 UCLA L. REV. 1767, 1779–80 (2007) (describing the Court's obfuscation of the differences between the public and private petitioners). But Carpenter's critique of the decision makes sense with respect to the private school petitioners.

292. Justice Stevens indirectly reinforced this point in advocating for the standing of African-American plaintiffs to sue the IRS for enforcement of the denial of tax-exempt status to discriminatory private schools. Allen v. Wright, 468 U.S. 737, 785 (1984) (Stevens, J., dissenting). Stevens asserted that "[i]f the granting of preferential tax treatment would 'encourage' private segregated schools to conduct their 'charitable' activities, it must follow that the withdrawal of the treatment would 'discourage' them, and hence promote the process of desegregation." *Id.* He continued,

> This causation analysis is nothing more than a restatement of elementary economics: when something becomes more expensive, less of it will be purchased. Sections 170 and 501(c)(3) are premised on that recognition. If racially discriminatory private schools lose the "cash grants" that flow from the operation of the statutes, the education they provide will become more expensive and hence less of their services will be purchased.

Id. at 788.

assembly are indeed "interwoven."[293] They "depend on the outcome of no elections."[294]

These commitments do not flow seamlessly into doctrine, but they do provide some doctrinal contours. Interwoven freedoms do not mean "merged" freedoms.[295] The Framers wisely recognized that the First Amendment's rights reinforced one another, but they also realized that these rights protected distinct interests and values. When religious groups raise pluralist claims rooted in the Four Freedoms, they should prevail based upon the interests and values protected under any one right—the government bears the burden of explaining why none of the relevant freedoms is impinged.

What might this look like in practice? One example can be illustrated by criticizing the reasoning in *Martinez*, which utterly ignored the free exercise and association claims raised by the Christian Legal Society. A thicker commitment to the kind of pluralism embodied in the Four Freedoms would at least have required the Court to evaluate each of these constitutional claims.

Consider first the free exercise claim. Three years after *Smith*, the Court clarified in *Church of the Lukumi Babalu Aye v. City of Hialeah*[296] that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."[297] One key factor in this analysis is whether a law grants any non-religious exceptions.[298] It is possible that a very small number of non-religious exemptions might be enough to trigger heightened scrutiny under *Lukumi*, which is the position taken by Justice Alito in an oft-cited decision that he authored prior to his elevation to the

293. Prince v. Massachusetts, 321 U.S. 158, 164 (1944).

294. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

295. *Contra* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2985 (2010).

296. 508 U.S. 520 (1993).

297. *Id.* at 546.

298. *See generally* Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith, Lukumi, *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850 (2001) (arguing that laws must be generally applicable in order to be constitutional and that if a law contains exceptions, it is subject to strict scrutiny).

Supreme Court.[299] In the case of an all-comers policy, it is plausible that any non-religious exceptions could trigger heightened scrutiny.[300]

The expressive association claim in *Martinez* also warranted analysis from the Court.[301] There is little doubt that a Christian group that meets for Bible study and prayer qualifies as an expressive association. Under current doctrine, the state should be required to articulate a compelling interest for infringing upon that right. And it would have been difficult to argue that membership in a small Christian group at a public law school in San Francisco was crucial to advancing equality of opportunity.[302]

It may be that the current doctrinal limits of free exercise (*Smith*), association (*Roberts*), and speech (*Martinez*) do not support the pluralist vision for the religious groups that have been the focus of this Article. But each of these doctrines is under pressure—none of the weaknesses described in this Article have been persuasively defended or accepted as settled jurisprudence.[303] And *Hosanna-Tabor*

299. *See* Fraternal Order of Police v. Newark, 170 F.3d 359, 360 (3d Cir. 1999) (holding that a police department's policy prohibiting officers from wearing beards must include a religious exception because it authorized exemptions for medical reasons and for certain undercover officers); *see also* Rader v. Johnston, 924 F. Supp. 1540, 1554–55 (D. Neb. 1996) (using a similar analysis to invalidate a state university's policy that all full-time first-year students live on campus).

300. *See, e.g.*, Memorandum from Charles B. Reed, *supra* note 197 (mandating an all-comers policy for all campuses in the California State University system but exempting fraternities and sororities from gender based discrimination).

301. Some scholars express considerable optimism that the doctrine of expressive association will go a long way toward fostering the pluralist vision and protections for religious liberty. *See* Marshall, *supra* note 6, at 79; Schragger & Schwartzman, *supra* note 211, at 978; Tushnet, *supra* note 4, at 84–85. I do not share that optimism. *See* John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093, 1096 (2013). But I would at least want a judicial opinion to explain why the right does or does not protect the claimed interest.

302. Nor did the Christian Legal Society at Hastings College of the Law threaten to undermine the democratic theory of free speech advanced by Owen Fiss and others. *See, e.g.*, OWEN M. FISS, THE IRONY OF FREE SPEECH 16 (1996) (expressing concern for private expression that would "make it impossible for . . . disadvantaged groups even to participate in the discussion"). In fact, given the prevailing orthodoxies at Hastings and in San Francisco, the democratic theory of free speech may well have been best served by protecting rather than constraining the Christian Legal Society. *See id.* at 17 ("[T]he theory that fostering full and open debate—making certain that the public hears all that it should—is a permissible end for the state."); *id.* at 18 (stating that the state is "trying to establish essential preconditions for collective self-governance by making certain that all sides are presented to the public" and that "[s]ometimes we must lower the voices of some in order to hear the voices of others"); *id.* at 19 (stating that "the state is trying to preserve the fullness of debate"); *id.* at 47 ("Perhaps the state need not provide megaphones to anyone, but once it decides to do so, it cannot give them out in such a way as to perpetuate an orthodoxy.").

303. Here I disagree with Professor Tebbe's claim that the jurisprudence in this area is settled and his correlative assertion that the claims of strong pluralism represent a

opens new avenues of challenge and debate.[304] There is, moreover, the right of assembly, which the Supreme Court has not addressed in decades.[305]

For all of these reasons, religious (and nonreligious) groups should be emboldened to argue for the pluralist vision in civil society. At a minimum, courts should be required to articulate a compelling reason that explains why none of the Four Freedoms will prevail. Those reasons will sometimes be justified—strong pluralism is not absolute pluralism. For example, I have previously argued that the constitutional scrutiny applied to laws that burden the membership decisions of private noncommercial groups should account for situations in which exclusion from membership meaningfully curtails access to broader social or economic participation.[306] If membership in the Christian Legal Society at Hastings was a prerequisite to the most desirable legal jobs, then the Christian Legal Society may well lose its constitutional protections.[307]

But these situations will be rare among the private noncommercial groups in civil society today. And the state's reasons for constraining strong pluralism should be defended with precision rather than with broad platitudes.[308] In contrast to the sweeping

dramatic departure from that purported settlement. *See* Nelson Tebbe, *Associations and the Constitution: Four Questions About* Four Freedoms, 92 N.C. L. REV. 917, 922–29 (2014).

304. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) ("[T]he text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations.").

305. *See* INAZU, *supra* note 11, at 186 ("One eminently practical way to challenge the weakened right of association is to raise the freedom of assembly as an independent constitutional claim in First Amendment litigation. Although it is possible that courts would conclude that assembly is an antiquated precursor to the right of association, it would be odd for a judicially constructed right completely to subsume a right enumerated in the text of the Constitution."). Professor McConnell has observed that while free speech "logically carries no entitlement to use government resources" because it is "ordinarily a negative freedom, not a positive claim on public property," the right of assembly creates a "right of access." McConnell, *supra* note 38, at 41.

306. *See* INAZU, *supra* note 11, at 166–75.

307. *See id.* at 15.

308. *See id.* at 172–73 ("When courts are unable to offer a convincing account of this overreaching of private power—supported with factual rigor rather than aspirational values—they should defer to the values of assembly . . . . The importance of the fact-specific contextual analysis that I am advocating is illustrated by Amy Gutmann's attempt to limit the implications of [*Roberts v. U.S. Jaycees*]. Gutmann suggests that a 'small exclusive country club, whose activities consist of golf, tennis, swimming, and socializing, is private in a way that the Jaycees is not.' But that argument depends on the location of the club and the supply and demand for the goods it offers. In some small towns, the country club may be the social hub in which networking occurs, deals are brokered, and careers are made or broken. Or the club may offer a good not elsewhere available—for example,

purpose of "eradicating discrimination against . . . female citizens" recognized in *Roberts*,[309] the state would need to articulate an interest and a justification "beyond broadly formulated interests."[310] Equality of opportunity is a crucial part of our constitutional ethos, but it is not self-justifying in all of its applications. Relatedly, equality of opportunity ought to focus on genuine access to power and resources, not on the important but distinct interests in protecting dignity and self-respect. Larry Flynt and Fred Phelps undoubtedly injured the dignity and self-respect of the targets of their expression.[311] But those very real injuries were not enough to overcome First Amendment protections.[312]

CONCLUSION

The Four Freedoms of speech, press, religion, and assembly once reflected a pluralist vision of the First Amendment. The loss of this vision has been particularly acute for the constitutional protections for religious groups. This Article has suggested that neither the doctrinal mazes of isolated First Amendment rights nor a half-hearted pluralism that dodges the difficult questions of race is likely to restore these protections. Strong pluralism—and a reintegration of the vision that once undergirded the Four Freedoms—may offer the

if it were the only or perhaps simply the 'best' option for golf in the area. In these circumstances, the club may be far more 'public' than the St. Paul and Minneapolis Jaycees. Its exercise of private power may well cause it to lose the protections of assembly, but that conclusion requires assessing the underlying facts and circumstances." (citations omitted)).

309. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) ("We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms.").

310. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006) ("In [earlier] cases, this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants.").

311. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) (holding that, even though church members' words were hurtful to the family of a dead soldier, the First Amendment protected the church members' right to picket the soldier's funeral); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57 (1988) (holding that intentional infliction of emotional distress when inflicted by the publication of a caricature cannot support a claim for damages under the First Amendment).

312. *See Hustler*, 485 U.S. at 55 (citing NAACP v. Clairborne Hardware Co., 458 U.S. 886, 910 (1982)) (speech may not be restricted "because [it] may have an adverse emotional impact on the audience"); *see also* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2670 (2011) ("Speech remains protected even when it may stir people to action, move them to tears, or inflict great pain." (quoting *Snyder*, 131 S. Ct. at 1220) (internal quotation marks omitted)).

best future for religious liberty. It is a costly vision, but as Justice Jackson cautioned in *Barnette*, protecting genuine freedom means passing beyond mere platitudes: "[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."[313]

313. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).