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RELIGIOUS ASSOCIATIONS: *HOSANNA-TABOR* AND THE INSTRUMENTAL VALUE OF RELIGIOUS GROUPS

ASHUTOSH BHAGWAT[*]

ABSTRACT

In its 2012 decision in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, *the Supreme Court held that the Religion Clauses of the First Amendment require recognition of a "ministerial exception" to general antidiscrimination statutes (in that case, the ADA), because religious institutions must have autonomy in selecting their ministers. In the course of its analysis, however, the Court made a very interesting move. In response to the government's argument that the case could be resolved under the general First Amendment right of association, the Court responded that this position was "untenable," and indeed "remarkable," because the very existence of the Religion Clauses indicated that religious groups must be treated differently from secular groups. It also rejected the view that its groundbreaking decision in* Employment Division v. Smith, *which interpreted the Free Exercise Clause extremely narrowly, precluded reliance on the Religion Clauses here, curtly distinguishing* Smith *on the grounds that it did not involve "government interference with an internal church decision that affects the faith and mission of the church itself."* Hosanna-Tabor *thus appears to stand for the propositions that religious groups are different from secular groups for constitutional purposes and entitled to extra constitutional protections, and further, that religious institutions such as churches possess broader Free Exercise rights than do individuals. In this Article, I argue that both these propositions are indefensible in light of the text, history, and purposes of the Religion Clauses. I further argue that granting religious institutions special constitutional rights raises some very difficult, ultimately irresolvable boundary problems regarding the scope of the ministerial exception.*

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Ultimately, I conclude that a much better analytic course for the Court to have followed in Hosanna-Tabor *would have been to rely on the freedoms of assembly and association protected by the First Amendment, which the Court so casually rejected. The effect of relying on assembly and association would be to grant all groups whose activities are relevant to democratic politics a right of autonomy, including a right to select its members and leaders. Religious groups would certainly qualify for such a right (thus affirming the result in* Hosanna-Tabor*), but so would many secular groups on the same terms. I discuss the ways in which this vision of associational rights fits well with the overall structure of the First Amendment, and with the instrumental role that religious groups (as opposed to individuals) play in our society. Relying on assembly and association also avoids the boundary problems raised by the ministerial exception and defuses the tension with free-speech doctrine created by the Court's preferential treatment of religious groups in* Hosanna-Tabor. *I conclude by exploring the ways in which the existence of the Religion Clauses may be relevant to religious groups' assembly and associational rights, even if they are not the source of those rights.*

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INTRODUCTION

In 2012, the Supreme Court issued its most important decision in many years on the subject of the rights of religious groups: *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* ("*Hosanna-Tabor*").[1] Unfortunately, *Hosanna-Tabor*'s importance is matched only by its opaqueness. The specific holding of *Hosanna-Tabor* is that the Religion Clauses of the First Amendment[2] require recognition of a "ministerial exception" to antidiscrimination statutes—specifically, the Americans with Disabilities Act ("ADA"). This decision means religious institutions may not be sued under antidiscrimination statutes regarding employment disputes with ministers.

This result *must* be correct. After all, it is unthinkable that the Catholic Church could be legally required to hire women as priests. But *why* it is correct, as a doctrinal matter, is a rather more difficult question. In particular, it is difficult to reconcile the reasoning of *Hosanna-Tabor* with key modern Religion Clause precedents. It is the contention of this Article that such reconciliation is simply not possible. The acclamation with which *Hosanna-Tabor* has been received by constitutional scholars[3] is justified by neither text, nor history, nor theory. This is not to say that the result in *Hosanna-Tabor* is wrong, but its reasoning surely is incorrect.

If the Religion Clauses cannot justify an exemption for churches from antidiscrimination statutes, then how can the result in *Hosanna-Tabor* be correct? It is my contention that the freedom of assembly, along with the nontextual but closely related right of association protected by the latter portion of the First Amendment, provides a more than adequate basis for such an exemption. In *Hosanna-Tabor* the Solicitor General in fact argued that the right of association provided the strongest grounds for a ministerial exemption (albeit, he argued against application of the

1. 132 S. Ct. 694 (2012) (henceforth "*Hosanna-Tabor*").

2. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

3. *See, e.g.*, Richard W. Garnett, *"The Freedom of the Church": (Towards) An Exposition, Translation, and Defense*, 21 J. CONTEMP. LEGAL ISSUES 33 (2013); Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J.L. & PUB. POL'Y 821 (2012); *but see* Caroline Mala Corbin, Colloquy Essay, *The Irony of* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 106 NW. U. L. REV. 951 (2012); Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. 981 (2013); Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013).

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exemption in that case).[4] The argument was, however, off-handedly rejected by the Court as "untenable" and "remarkable."[5] My goal is to demonstrate why relying on assembly and association to protect religious groups is not only not "untenable," it is in fact entirely logical given the history, structure, and purposes of the First Amendment.[6] Such an approach avoids the doctrinal conundrums elided by the *Hosanna-Tabor* Court as well as many of the very difficult boundary problems raised by the Court's reliance on the Religion Clauses. It also fits well with the underlying purposes of the Assembly Clause and right of association. In particular, I demonstrate that the purposes of the Religion Clauses, including especially the right to free exercise of religion, are rooted in concerns about individual dignity and freedom of conscience. By contrast, the rest of the First Amendment is best understood in far more instrumental terms, as designed to protect and strengthen the democratic structure of the Constitution. It is this fact that makes the latter portion of the Amendment a far more conducive place to find protection for groups, including religious groups, than the Religion Clauses.

Part I of this Article briefly discusses the *Hosanna-Tabor* decision, placing it in the context of the Court's Religion Clause jurisprudence and recent scholarship regarding the "Freedom of the Church." Part II discusses why the Religion Clauses provide a poor home for the group right established by *Hosanna-Tabor*. Part III demonstrates that the freedom of assembly and right of association protected by the latter part of the First Amendment are, for textual, historical, and structural reasons, the logical sources of group rights. Finally, Part IV circles back to the Religion Clauses and suggests how the Establishment Clause in particular might be relevant to the analysis of the rights of religious groups, even if it is not the source of those rights.

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4. Brief for Respondent at 31–32, Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 132 S. Ct. 694 (2012) (No. 10-553), 2011 WL 3319555.

5. *Hosanna-Tabor*, 132 S. Ct. at 706.

6. Others have also defended rooting the ministerial exemption in association and/or assembly grounds. *See, e.g.*, Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391 (1987); Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71 (2001); Scott M. Noveck, *The Promise and Problems of Treating Religious Freedom as Freedom of Association*, 45 GONZ. L. REV. 745 (2009); Schragger & Schwartzman, *supra* note 3, at 976–77; McConnell, *supra* note 3, at 825–26; John D. Inazu, *The Freedom of the Church (New Revised Standard Version)*, 21 J. CONTEMP. LEGAL ISSUES 335, 360 n.133 (2013). My arguments here, however, differ substantially from earlier arguments in that they rely explicitly on fundamental differences in the structure and purposes behind the Religion Clauses on the one hand, and the rights of assembly/association on the other.

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I. *HOSANNA-TABOR* AND THE "FREEDOM OF THE CHURCH"

The *Hosanna-Tabor* litigation arose out of an employment dispute between the Hosanna-Tabor Evangelical Lutheran Church and School and Cheryl Perich, a "called" teacher at the school. A "called" teacher is one who is "regarded as having been called to [her] vocation by God through a congregation."[7] Perich received special training to become a "called" teacher and her duties included teaching both secular and religious subjects, as well as attending and sometimes leading chapel service.[8] The dispute between Perich and Hosanna-Tabor arose after Perich became sick and went on disability leave. Ultimately, Perich was refused permission to return to work. She then consulted an attorney and was fired.[9] The Church claimed that the firing was because Perich's "threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally."[10] Perich filed a charge with the Equal Employment Opportunity Commission ("EEOC"), which filed a lawsuit on her behalf, in which Perich intervened.[11] The lawsuit alleged that Perich was fired in retaliation for threatening to file a lawsuit under the ADA, which in turn violated the ADA.[12] Hosanna-Tabor defended itself on the grounds that lower courts had read the First Amendment to create a "ministerial exception" to antidiscrimination laws, prohibiting courts from intervening in employment disputes between churches and their ministers.[13] The district court granted Hosanna-Tabor summary judgment, but the court of appeals reversed, holding that although the ministerial exception existed, Perich did not qualify for it.[14]

The Supreme Court reversed and ruled in favor of Hosanna-Tabor in a unanimous opinion authored by Chief Justice Roberts. The Court began by reviewing some religious history and concluded that the Religion Clauses, in combination, required that the federal government "would have no role in filling ecclesiastical offices."[15] Based on this principle, the Court recognized the ministerial exception for the first time. The Court explained

7. *Hosanna-Tabor*, 132 S. Ct. at 699.
8. *Id.* at 699–700.
9. *Id.* at 700.
10. *Id.* at 701.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 703.

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why the application of antidiscrimination law to a dispute between a church and minister violated the Religion Clauses in these terms:

> 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. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[16]

The Court acknowledged Perich and the EEOC's argument that any right of religious groups to immunity from discrimination laws could be based on the "constitutional right to freedom of association—a right 'implicit' in the First Amendment," but found this position "untenable."[17] Importantly, the Court reasoned that the implication of relying on freedom of association meant "the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club."[18] But the Court found this implication "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations,"[19] and could not "accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers."[20] Leaving aside the doubtful premise that freedom of association cannot distinguish between a church and a "social club," the Court's rejection of association clearly rested on what the Court considered the self-evident proposition that religious groups were entitled to greater constitutional protections than secular groups.

The Court concluded its analysis by holding that Perich qualified as a "minister" for the purposes of the exception. The majority provided little clear guidance on this point and explicitly declined "to adopt a rigid formula for deciding when an employee qualifies as a minister,"[21] finding that "the exception covers Perich, given all the circumstances of her employment."[22]

Though the Court's opinion was unanimous, the majority's failure to adopt a clear definition of the term "minister" elicited two concurring

16. *Id.* at 706.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 707.
22. *Id.*

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opinions. Justice Thomas argued that to ensure religious autonomy, secular courts should not seek to define who is or is not a minister. Instead, courts should accept a church's own good faith belief that an individual was a minister.[23] Justice Alito also concurred, joined by Justice Kagan. In contrast to Justice Thomas, he argued that the courts could and should adopt a usable definition of the term minister, based on "the function performed" by the individuals rather than on the use of the term "minister" or formal ordination, in order to ensure that diverse religious groups could invoke the exception.[24] In particular, he argued that the exception "should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith."[25] In defending this definition, Justice Alito directly invoked the Court's precedents recognizing a right of "expressive association,"[26] arguing that the important expressive role of religious groups justified both the ministerial exception and the definition that he was proposing.[27] These are the same precedents that the majority opinion flatly rejected as a basis for the Court's decision.

To understand the byplay among the Solicitor General's brief for the EEOC, the majority opinion, and Justice Alito's concurrence regarding the freedom of association, some background is needed. The Supreme Court has long recognized a constitutional right of group autonomy, a right that it has variously rooted in the Assembly Clause of the First Amendment and in a right of "association" also protected by the First Amendment. Indeed, for many decades the Court used the terms assembly and association interchangeably.[28] Furthermore, many modern scholars have pointed out that the Court's protection of such rights makes perfect sense given the central role that groups of citizens have played in the democratic system of government established by the Constitution.[29] This significance

23. *Id.* at 710–11 (Thomas, J., concurring).

24. *Id.* at 711 (Alito, J., concurring).

25. *Id.* at 712 (Alito, J., concurring).

26. *Id.* at 712–13 (Alito, J., concurring) (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984); Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000)).

27. *Id.*

28. For a fuller exposition of the development and scope of the rights of assembly/association, see Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 983–85 (2011); JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 49–62 (2012).

29. *See, e.g.*, Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 555–61 (2009); John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 575–88 (2010); Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 642–44, 700–01, 730–34 (2002).

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was fully recognized by the Framers,[30] and was famously expounded early in our history by de Tocqueville.[31] Moreover, Supreme Court cases from the first and second Red Scare eras make it clear that the rights of assembly and association protect not only temporary gatherings of citizens, but also permanent groups.[32]

The Court's approach changed with its seminal decision in 1958 in *NAACP v. Alabama ex rel. Patterson*.[33] In this and subsequent cases the Court largely abandoned references to the Assembly Clause in defining group rights and narrowed its understanding of the association right to one of "expressive association," meaning a right to form groups for the purposes of speaking. The implications of this move were two-fold: first, group autonomy was no longer a textual right grounded in the Assembly Clause, but rather a non-textual "implicit" right; and second, group autonomy was no longer an independent right, but rather one derivative of free speech. This process culminated with the Court's 1984 decision in *Roberts v. U.S. Jaycees*,[34] in which the Court rejected the Jaycees' claimed First Amendment right to limit its membership to young men on the grounds that the Jaycees were not sufficiently expressive to obtain constitutional protection.[35] Since the *Jaycees* decision, associational rights have been much more difficult to invoke. It is true that the Boy Scouts did successfully invoke the association right to exclude a gay scoutmaster in *Boy Scouts of America v. Dale*,[36] suggesting that association rights may be having a resurgence. In subsequent cases, however, the Court has subsumed association claims into free speech analysis and generally dismissed them handily.[37]

This doctrinal history sheds important light on the role of association in *Hosanna-Tabor*. As John Inazu has argued, one powerful reason why the majority in that case was reluctant to rely on freedom of association or assembly to protect religious group rights is that the Court has essentially

30. Inazu, *supra* note 29, at 571–77.

31. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 189–95, 513 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1840).

32. *See* Bhagwat, *supra* note 28, at 983–84 (discussing opinions in Whitney v. California, 274 U.S. 357 (1927)); *id.* at 985 (discussing American Communications Ass'n v. Douds, 339 U.S. 382 (1950)).

33. 357 U.S. 449 (1958).

34. 468 U.S. 609 (1984).

35. *Id.* at 626–27.

36. 530 U.S. 640 (2000). These developments are described in more detail in Bhagwat, *supra* note 28, at 985–89; INAZU, *supra* note 28, at 63–149.

37. *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2730 (2010); Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2975, 2985 (2010).

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forgotten that the freedom of assembly exists and has narrowed association to the point of ineffectiveness.[38] It is telling that the Solicitor General's brief explicitly relied on the limitations of the modern right of association to argue that Hosanna-Tabor's First Amendment defense should be rejected.[39] By contrast, Justice Alito invoked a much more vigorous vision of association in his concurrence, albeit without clearly distinguishing between the Religion Clauses and freedom of association.

Given the state of modern jurisprudence, the majority's concerns make sense. However, if one recognizes a robust right of group autonomy rooted in the Assembly Clause (or a robust nontextual right of association for that matter), a right which is not derivative from free speech but is rather, in the Court's early words, "cognate to those of free speech and free press and . . . equally fundamental,"[40] then those concerns appear misplaced. As this brief discussion demonstrates, such a right of assembly/association is far better supported by history, text, and doctrine than is the modern, truncated right of expressive association. And as I will discuss in greater detail below,[41] such a right fully supports the result in *Hosanna-Tabor* without raising the intractable difficulties of the Court's approach.

Reactions to *Hosanna-Tabor* among leading Religion Clause scholars have been largely positive. *Hosanna-Tabor*'s timing fit well with what Paul Horwitz has described as the "the institutional turn" in First Amendment law.[42] Horwitz himself praises the decision as consistent with the institutional turn because it emphasizes the autonomy of religious *institutions* to a greater degree than individuals. Horowitz calls for the expansion of the case's holding to *all* church employees.[43] Similarly, Rick Garnett has argued vigorously for protection of "the Freedom of the Church," a very strong form of autonomy for religious institutions, and reads *Hosanna-Tabor* to support such a view.[44] Michael McConnell is largely in agreement,[45] as is Alan Brownstein, though with more caveats.[46] The primary dissenting voices have been those of Richard Schragger and

38. John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787 (2014).

39. Brief for Respondent, *supra* note 4, at 30–31.

40. De Jonge v. Oregon, 299 U.S. 353, 364 (1937); *see also* Thomas v. Collins, 323 U.S. 516, 530 (1945).

41. *See infra* Part III.

42. PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 8 (2013).

43. *Id.* at 187–89.

44. Garnett, *supra* note 3, at 34–35.

45. McConnell, *supra* note 3, at 836.

46. Alan Brownstein, *Protecting the Religious Liberty of Religious Institutions*, 21 J. CONTEMP. LEGAL ISSUES 201, 206 (2013).

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Micah Schwartzman. In their excellent article critiquing the "institutional autonomy" reading of *Hosanna-Tabor*, they argue that granting special protection to religious institutions is inconsistent with the modern understanding of religious freedom as rooted in a broader freedom of conscience.[47]

This Article seeks to refute the institutional understanding of the Religion Clauses adopted by most scholars. Further, it complements Schragger and Schartzman's arguments by demonstrating how differences between the Religion Clauses and the rest of the First Amendment explain not only why the Religion Clauses do not support a broad right of group autonomy, but more importantly, why the rights of assembly and association do.

II. THE PROBLEMATICS OF GROUP RIGHTS UNDER THE RELIGION CLAUSES

In this Part, I demonstrate why that the Court's efforts to locate group rights for religious institutions in the Religion Clauses ultimately must fail. Contrary to the Court's conclusory arguments, such group rights are supported neither by the text of the Religion Clauses, nor the Court's own doctrine, nor historical understandings from the Framing period, nor the purposes of the Religion Clauses. Furthermore, the *Hosanna-Tabor* Court's reliance on the Religion Clauses for its holding raises a host of boundary concerns which are unresolvable and entirely unnecessary.

A. Text and Doctrine

The ruling of *Hosanna-Tabor* that the rights of religious institutions derive from the Religion Clauses, and not the rights of assembly and association, seems at first glance perfectly logical. In fact, the Court's comment that this must be so because "the text of the First Amendment . . . gives special solicitude to the rights of religious organizations"[48] seems irrefutable. Indeed, given this seemingly obvious point one might wonder why the Solicitor General's Office—hardly an organization prone

47. Schragger & Schwartzman, *supra* note 3, at 5, 45–48. Other important critics include Caroline Corbin and Leslie Griffin. *See* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1988–89 (2007); Corbin, *supra* note 3, at 969–70; Griffin, *supra* note 3, at 996–99.

48. Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694, 706 (2012).

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to silliness—took the position that the association right was the sole source of autonomy rights for religious groups.

The reason, quite simply, is that Chief Justice Roberts's flat assertion hides a multitude of sins. As Christopher Lund points out, Roberts's description of the text of the First Amendment is simply wrong: the Religion Clauses protect religion, not religious *groups*.[49] There is no textual or historical evidence that the Framers meant either the Establishment or Free Exercise Clause to protect groups as such. At most, groups received protection if necessary to protect individual members of religious groups.

More fundamentally, the Court's own doctrine before *Hosanna-Tabor* tended to undermine claims under the Religion Clauses. The key precedent here, relied upon heavily by the Solicitor General,[50] is the Court's decision in *Employment Division v. Smith*,[51] which held that the "right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[52] The Solicitor General argued that this case fell squarely within *Smith*, since no one disputed that the ADA was a "valid and neutral law of general applicability." The *Hosanna-Tabor* Court conceded the latter point but nonetheless curtly distinguished *Smith* on the grounds that "*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."[53] In other words, the Court limited *Smith* to the external acts of individuals, holding that an "internal church decision" does receive protection, even against generally applicable laws.

This distinction has been heavily criticized, and rightly so.[54] After all, even if the Free Exercise Clause was intended to provide *some* protection to religious institutions, it is clear that the primary focus of the Clause is on individual conscience. Note in this regard that James Madison's original proposal to Congress, which eventually led to the Free Exercise Clause, stated that "[t]he civil rights of none shall be abridged on account of religious belief or worship . . . nor shall the full and equal rights of

49. Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 NW. U. L. REV. (forthcoming 2014).
50. Brief for Respondents, *supra* note 4, at 20–29.
51. 494 U.S. 872 (1990).
52. *Id.* at 879 (citation omitted).
53. *Hosanna-Tabor*, 132 S. Ct. at 707.
54. *See* Lund, *supra* note 49, at 11 & n.53.

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conscience be in any manner, or on any pretext, infringed."[55] In addition, George Mason's proposal, on which Madison's was based, read:

> That Religion or the Duty which we owe to our Creator, and the manner of discharging it, can be directed only by Reason and Conviction, not by Force or violence, and therefore all men have an equal, natural, and unalienable Right to the free Exercise of Religion according to the Dictates of Conscience.[56]

There can be no serious doubt that both of these formulations focus on the freedom of conscience of individuals, not the autonomy of groups. Further, there is no evidence in the drafting history that the changes to the language of the Free Exercise Clause were meant to alter this basic emphasis. The Court's conclusion that the Clause gives greater protection to groups than individuals thus has no basis in text or history, and indeed seems to have it exactly backwards. Finally, the Court's distinction between "external" and "internal" acts does not save the day. This distinction rests on preferring institutions to individuals, since individuals cannot *act* internally. The Free Exercise Clause is thus a very weak grounding for the sorts of group rights recognized in *Hosanna-Tabor*, at least as long as *Smith* remains the law.

But what about the Establishment Clause, which the Court also relied upon? On its face, the Establishment Clause seems an even weaker basis for the result in *Hosanna-Tabor* than the Free Exercise Clause. The "ministerial exception" is a defense against regulation. To say that the Establishment Clause requires the exemption is to say that regulation of a religious institution violates the Establishment Clause. That is very odd. Interference with religious practice naturally raises Free Exercise concerns, but it is unclear how such regulation *establishes* a religion. The Court's explanation was that when the government appoints a religious minister, it constitutes establishment. As the Solicitor General pointed out, however, actual appointment of a minister was not at issue in *Hosanna-Tabor*, since neither Perich nor the EEOC were seeking reinstatement as a remedy.[57] The Court's response was that the remedies Perich sought—mainly back- and front-pay—"would operate as a penalty on the Church

55. AMENDMENTS OFFERED IN CONGRESS BY JAMES MADISON JUNE 8, 1789, *available at* http://www.constitution.org/bor/amd_jmad.htm (last visited June 2, 2014).

56. GEORGE MASON'S MASTER DRAFT OF THE BILL OF RIGHTS, ¶ 20, *available at* http://www.constitution.org/gmason/amd_gmas.htm (last visited June 2, 2014).

57. *Hosanna-Tabor*, 132 S. Ct. at 709; Brief for Respondents, *supra* note 4, at 33. No one sought reinstatement because apparently the school had closed by the time the case reached the Supreme Court. *Id.* at 12.

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for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination."[58] This conclusory assertion might explain why the Free Exercise Clause is violated by such remedies—though *Smith* suggests it is not. It does not, however, seem to have any link to the Establishment Clause.

In short, the Court's Religion Clause analysis in *Hosanna-Tabor*, including its attempts to reconcile the holding with binding precedent, is exceedingly unpersuasive. Why then did the Court walk this path? The Court itself gave a clear answer: because in light of the existence of the Religion Clauses, it found "untenable" and "remarkable" the proposition that religious groups receive no more constitutional protection than "a labor union or a social club."[59] In other words, the Court was required to rely on the Religion Clauses because it believed that the Constitution favors religious *groups* over nonreligious ones. The result in *Hosanna-Tabor* does create such preferred protection for religious groups. Under the ministerial exception, churches enjoy an absolute immunity from suits by ministers under antidiscrimination laws, eliminating even a minister's ability to claim that the religious reasons given for firing her were pretextual.[60] In contrast, the Court's modern expressive association jurisprudence grants immunity from antidiscrimination laws to a secular group only if it can demonstrate that application of the law will interfere with the group's ability to convey its message[61]—a difficult hurdle as cases such as *Roberts v. U.S. Jaycees* demonstrate.[62]

The *Hosanna-Tabor* Court's preference for religious groups is deeply troublesome. Most basically, this preference is entirely inconsistent with another key element of the Court's First Amendment jurisprudence: the Court's repeated statements that religion should be treated as a "viewpoint" for free speech purposes.[63] If this is so, a preference for

58. *Hosanna-Tabor*, 132 S. Ct. at 709.

59. *Id.* at 706.

60. *Id.* at 709. The scope of the immunity with respect to other sorts of claims, such as government enforcement of immigration and child labor laws, or contractual disputes between a church and minister, remain unresolved. *Id.* at 710.

61. *See* Boy Scouts v. Dale, 530 U.S. 640, 648 (2000); Roberts v. U.S. Jaycees, 468 U.S. 609, 627 (1984).

62. *Id.* at 626–28.

63. Christian Legal Society v. Martinez, 130 S. Ct. 2971, 3009 (2010) (Alito, J., dissenting); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102, 107 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830–31 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393–95 (1993). Alan Brownstein and Vikram Amar have forcefully criticized the equation of religion with a viewpoint. *See* Alan Brownstein & Vikram Amar, *Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction Between Debate-Dampening and Debate-Distorting State Action*, 38 HASTINGS CONST. L.Q. 505, 537–39

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religious over secular groups would itself appear to be a form of viewpoint discrimination, violating basic free speech principles. This is because unlike the broader rights of association and assembly, a special right for religious groups is defined based on the *substantive* beliefs and goals of the protected group. This sort of ideological preferentialism is in serious tension with the Tocquevillian idea that private associations play a critical role in implementing American democracy.[64] It seems highly unlikely that there is such a sharp conflict between foundational Religion Clause and foundational Free Speech principles.

The preference also runs contrary to the wisdom in the lower courts. In a series of decisions prior to *Hosanna-Tabor*, those courts held, largely because of *Smith*, that even when a law impinges on the internal organization of a religious group, freedom of association provides *greater* protection to such groups than do the Religion Clauses.[65] In *Salvation Army v. Department of Community Affairs of the State of N.J.*,[66] the Third Circuit was faced with the question of whether an Adult Rehabilitation Center run by the Salvation Army was required to comply with New Jersey rules regulating boarding homes. The case had been litigated primarily on Free Exercise grounds, but while the case was pending on appeal the Supreme Court decided *Smith*. In response the Third Circuit rejected The Salvation Army's Free Exercise claim,[67] but nevertheless remanded the case to the district court for consideration of the Salvation Army's expressive-association claims, which it found still viable.[68]

Similarly, in *Wiley Mission v. New Jersey*,[69] a church that ran a retirement center challenged a New Jersey regulation that required the governing boards of such centers to include a resident. The church claimed that the regulation would have, in effect, required the church to admit a non-member to its governing board. The court rejected Wiley Mission's

(2011); *see also* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 164–72 (2002). My point is simply that so long as the Court continues to adhere to this approach, there is a deep tension between *Hosanna-Tabor*'s interpretation of the Religion Clauses and the Court's free-speech jurisprudence.

64. DE TOCQUEVILLE, *supra* note 31, at 189–95.

65. For a pre-*Hosanna-Tabor* scholarly identification of this point, see Noveck, *supra* note 6, at 758. For a contrary example, *see* Bronx Household of Faith v. Board of Educ. Of New York, 876 F. Supp. 2d 419 (S.D.N.Y. 2012), *rev'd*, 750 F.3d 184 (2d Cir. 2014) (enjoining on Free Exercise grounds a rule prohibiting use of school facilities for religious worship services, on remand from an appellate ruling rejecting a free-speech challenge to the same rule).

66. 919 F.2d 183 (3d Cir. 1990).

67. *Id.* at 194–96.

68. *Id.* at 200–01.

69. No. 10-3024, 2011 WL 3841437 (D.N.J. Aug. 25, 2011).

Free Exercise claim, citing *Smith*.[70] The court then granted Wiley Mission summary judgment on its freedom-of-expressive-association claim, concluding that, as in *Boy Scouts v. Dale*, forcing Wiley Mission to include a non-member on its governing board would significantly impair its ability to speak.[71] Interestingly, the court considered an argument based on the ministerial exception in a footnote. While it did not have to resolve the issue, it strongly suggested that *Smith* barred such a claim.[72]

In short, the Supreme Court's premise that the Religion Clauses dictate a preference for religious groups over secular ones is simply wrong. The Free Exercise Clause may well establish special protections for the religious practices and conduct of individuals pursuant to their conscience, including perhaps the right of individuals to form religious groups, but it says nothing about religious groups as institutions.[73] Similarly, the Establishment Clause clearly bars certain forms of governmental support to religious groups but not their secular equivalent.[74] However, it says nothing about special *rights* for religious groups.

B. History

The history of the Religion Clauses is as problematic as the text and the Court's doctrine. At the heart of *Hosanna-Tabor*, as well as of the entire concept of the Freedom of the Church, is the premise that religious institutions, as institutions, are entitled to substantial autonomy under the Religion Clauses. Rick Garnett goes so far as to describe the Freedom of the Church in terms of separate jurisdictional spheres of authority for government and religious institutions.[75] But as Alan Brownstein has extensively pointed out in a recent article, there are serious reasons to doubt if many, or most, of the Framing generation would have supported such an institutional view of religious freedom.[76] The reasons for this are

70. *Id.* at *7–*10.

71. *Id.* at *11–*16.

72. *Id.* at *16 n.16. *See also* Jews for Jesus, Inc. v. Port of Portland, Or., No. CV04695HU, 2005 WL 1109698 (D. Or. May 5, 2005), *aff'd*, 172 F. App'x 760 (9th Cir. 2006) (granting careful attention to free speech claims against a rule requiring a permit before leafleting at Portland's airport, but dismissing a free exercise claim summarily on the basis of *Smith*).

73. *See supra* notes 49–56 and accompanying text.

74. *See infra* Part IV. As I discuss later, there may well be an argument that the Free Exercise Clause may permit religious groups to claim autonomy rights on behalf of their members, which perhaps might be understood as a *quid pro quo* for the limitations placed on such groups by the Establishment Clause. *Id.*

75. Garnett, *supra* note 3, at 42–44; *see also* Schragger & Schwartzman, *supra* note 3, at 922.

76. *See* Brownstein, *supra* note 46.

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rooted in the nature of religious practice in the United States at the time of the Framing.

The Framing generation was overwhelmingly Protestant, as Catholics made up less than 1% of the population in 1787.[77] Contemporary Protestant theology, and defenses of religious liberty, rested fundamentally on the principle that each individual should have the right to read the scriptures and to judge religious matters for himself.[78] James Madison's own defense of religious liberty in his famous 1785 *Memorial and Remonstrance* (directed at Episcopalian Virginia) rested essentially on these grounds: religious freedom was grounded in the right of each *individual* to pray to the Creator as he chose.[79] It is in this context that we must read Madison's proposal to Congress in 1789 (based on George Mason's similar language) that the Constitution be amended to protect "the full and equal rights of conscience."[80] All of the focus here, rooted in post-Reformation theological developments as well as Enlightenment thinking, is on the *individual* freedom of conscience and belief.

The ugly flip side of the Framers' Protestant vision of religion was a virulent anti-Catholicism. Brownstein extensively catalogues proof of the widespread nature of this antipathy,[81] which was very much present among the Framers. At the very birth of the Revolution, the colonists listed as one of the "Intolerable Acts" adopted by the British Parliament the Quebec Act, in part because it granted free exercise to Catholics in newly-conquered Quebec.[82] Prominent revolutionaries such as John Adams, Samuel Adams, and John Jay expressed similar views, the latter two going so far as to argue that Catholics did not deserve religious toleration at all.[83] The basis for these anti-Catholic feelings was not only historical rivalry, but also the hierarchical nature of the Catholic Church, which many in the Framing generation saw as directly opposed to religious liberty.[84] In other words, it was precisely the fact that Catholicism was the preeminent example of a religious *institution* existing distinctly from members that led many leading Protestant thinkers of the time, including leading Framers, to

77. *Id.* at 221, 223 (citing JAMES M. O'NEILL, CATHOLICISM AND AMERICAN FREEDOM 17 (2006)); *see also* Eduardo Penalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 812–13 (1997) (arguing the modern concept of religion was formulated in an almost entirely Protestant context).

78. Brownstein, *supra* note 46, at 220–22.

79. *Id.* at 222 & n.59.

80. *See supra* notes 55–56 and accompanying text.

81. Brownstein, *supra* note 46, at 223–33.

82. *Id.* at 227–28.

83. *Id.* at 231 & n.109.

84. *Id.* at 229–33.

https://openscholarship.wustl.edu/law_lawreview/vol92/iss1/6

view the Church as unworthy of tolerance. These attitudes cut strongly against an institutional vision of religious liberty.[85]

This is not to say the Framers saw religion in purely individual terms. Christian worship has always been strongly communal, and from the very beginning of the Reformation, Protestant leaders recognized the importance of religious groups and group worship.[86] For many Protestants in late eighteenth century America, however, the quintessential religious group was not a complex, hierarchical institution; it was a local, democratically-controlled congregation.[87] This structure grew out of not only the historical roots of American religious life at the frontier but also the Protestant commitment to individual conscience and to principles of self-government that eventually erupted in the American Revolution.[88] This point should not be overstated. Certainly, as Brownstein concedes, over time, Protestant denominations in America had developed institutional structures and some forms of hierarchical organization, which many supported.[89] The point is simply that, given the Framing generation's views on religion, the result reached in *Hosanna-Tabor*, which grants greater protection to religious group autonomy than to individual conscience, is hard to defend.

Moreover, this understanding of the basically individualistic focus of the Religion Clauses is entirely consistent with two historical episodes, both involving James Madison, recounted by the *Hosanna-Tabor* Court. In the first, Madison, acting as Secretary of State, refused to give advice to Catholic leaders about who should be appointed to direct the Church's affairs in the Louisiana Purchase.[90] In the second, President Madison vetoed a bill to incorporate an Episcopalian church in Alexandria on the grounds that the bill established internal procedures for the church, including procedures for election and removal of clergy, all in violation of the Establishment Clause.[91] These episodes establish that the Establishment Clause forbids the government from getting involved in

85. *See* Schragger & Schwartzman, *supra* note 3, at 952–53 (recounting evidence of hostility to institutional religion in the Framing era).

86. Brownstein, *supra* note 46, at 216; Inazu, *supra* note 6, at 344–45; John D. Inazu, *Between Liberalism and Theocracy*, 33 CAMPBELL L. REV. 591, 596–98 (2011).

87. *See* Brownstein, *supra* note 46, at 233 & n.112.

88. *Id.* at 239–41; *see also* James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 302–03 (1990) (noting the role of "self-government" in local religious congregations).

89. Brownstein, *supra* note 46, at 249–52.

90. Hosanna-Tabor Evangelical Lutheran School and Church v. EEOC, 132 S. Ct. 694, 703 (2012).

91. *Id.* at 703–04.

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explicitly ecclesiastical decisions requiring ecclesiastical judgments, but the stories say little about whether religious institutions are subject to secular regulation through laws such as the ADA.

Beyond federal law, historical evidence suggests that many of the Framers believed the State did have a role to play in regulating religious institutions. For example, in the period following the American Revolution, during the same time that the states were eliminating their religious establishments, many states imposed strict limits on the amount of income and/or property that churches were permitted to earn or possess.[92] States also regulated the internal structure of religious groups to ensure their democratic nature through legislation granting lay boards of trustees, elected by congregations, control over the property of churches and the power to appoint ministers.[93] Such laws inevitably created conflicts with the institutional Catholic Church, which had very different ideas about such powers. By and large, in such conflicts, the public, including many American Catholics, and the states supported lay, democratic control.[94] This is not to say that all members of that generation supported such a view, but it is clear that many members of the Framing generation, probably a majority, believed strongly in such a local, democratic model for congregations. More significantly, the Framing generation was willing to let state governments, at the very time that they were eliminating their own religious establishments, impose such a model of control on churches.

As Schragger and Schwartzman point out, defenses of the Freedom of the Church based on a theory of independent sovereignty seem to demand a democratic structure for churches, since only then could such separate sovereignty be reconciled with Republicanism and popular sovereignty.[95] Unlike many members of the Framing generation, however, Schragger and Schwartzman (and I) take this problem to argue not for imposing a democratic structure on religious denominations, but rather against recognizing such a strong form of institutional religious autonomy rooted in the Religion Clauses. While this point will be developed in greater detail later,[96] it is important to note here that protecting religious groups' autonomy under the Assembly Clause and/or freedom of association does

92. Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307, 311–12, 321–23 (2014).

93. *Id.* at 311, 333–35; Brownstein, *supra* note 46, at 258–60.

94. *Id.* at 260–61; Gordon, *supra* note 92, at 347–55.

95. Schragger & Schwartzman, *supra* note 3, at 944.

96. *See infra* Part III.

not pose the same problems. This is because assemblies and associations do not purport to operate outside of democratic society but rather as an essential ingredient of such a society—even those groups that separate themselves to some extent in order to nurture idiosyncratic values. Within that context, and so long as membership in an assembly or association is voluntary, the State can and must grant such groups wide autonomy to structure themselves as they will, encompassing everything from hierarchical, international groups such as the Catholic Church or the Communist International, to unstructured, purely local groups.

C. Purposes

This takes us to the more basic question of *why* group rights are best secured through assembly or association rather than through the Religion Clauses. The answer, I submit, lies in the very different purposes of the Religion Clauses, on the one hand, and what I will call the democratic First Amendment—speech, the press, assembly, association, and petition—on the other. To understand why this is so, it is necessary to explore the history and internal structure of the First Amendment. Such an exploration demonstrates fundamental differences in the history and purposes of the Religion Clauses and the rest of the First Amendment.

The First Amendment as a whole reads as follows:

> 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.[97]

At first reading, this text, consisting of a single sentence, suggests a group of closely related rights, listed together because of their common roots in notions of freedom of conscience and individual dignity: religion, speech and the press, assembly for the purposes of petition. However, the text is highly misleading. For one thing, John Inazu has convincingly demonstrated that historically, assembly and petition were independent rights, constituting a right of "peaceably assembling and consulting for their common good" (to use the language of James Madison's original proposal to Congress),[98] as well as a separate right to petition the

97. U.S. CONST. amend. I.

98. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS 129 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS].

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legislature.[99] More important, the various elements of the First Amendment were *not* listed as a single proposal in the original proposed Bill of Rights as introduced to Congress by James Madison. Rather, they were listed as three separate proposals in three separate sentences: the first protecting religious rights (including "full and equal rights of conscience"), a second protecting speech and the press, and the third protecting assembly and petition.[100]

Even more tellingly, George Mason's "Master Draft" of the Bill of Rights, which provided the template both for many of the proposed amendments that emerged from state ratifying conventions *and* for Madison's own proposals to Congress, did not even list the precursors to the Religion Clauses near the other rights protected by the First Amendment.[101] Instead, the rights of assembly and petition, as well as a rejected right to instruct Representatives, constituted proposal number fifteen in the Master Draft. Speech and the press are number sixteen, but the precursors of the Religion Clauses do not appear until proposal twenty (the last of the proposed amendments).[102] Similarly, in the 1776 Virginia Declaration of Rights, which had a deep influence on the shaping of the Bill of Rights, religious liberty does not appear till the sixteenth clause, while the press is protected in clause twelve. Speech and assembly do not appear at all.[103] Indeed, the Religion Clauses did not become combined with the rest of the First Amendment until very late in the congressional deliberations, emerging (without explanation) in this form from the Senate on September 9, 1789, just a few weeks before the Amendment was adopted by Congress.[104] This uncontested fact provides an important clue that the Religion Clauses are *different* from the rest of the First Amendment.

The differences between the Religion Clauses and the democratic First Amendment come down to fundamentally different purposes. As we will explore in more detail below,[105] it is widely accepted that the speech, press, assembly and petition provisions of the First Amendment serve fundamentally instrumental goals—to further democratic self-governance. In contrast, it seems relatively clear, based on its language, drafting

99. Inazu, *supra* note 29, at 573–77.

100. AMENDMENTS OFFERED IN CONGRESS BY JAMES MADISON JUNE 8, 1789, *supra* note 55.

101. GEORGE MASON'S MASTER BILL OF RIGHTS, *supra* note 56, ¶¶ 15–16, 20.

102. *Id.*

103. *See Virginia Declaration of Rights* (1776), AVALON PROJECT, *available at* http://avalon.law.yale.edu/18th_century/virginia.asp (last visited June 2, 2014).

104. *See* THE COMPLETE BILL OF RIGHTS, *supra* note 98, at 133, 139.

105. *See infra* Part III.A.

history, and general cultural background, that the primary purpose of the Free Exercise Clause was to protect individual conscience: the right of people to worship as they chose.[106] In other words, its purpose is fundamentally dignitary. Certainly, protecting such dignitary concerns also advances instrumental values,[107] and that may well be have been a secondary motivation. But as the language of Madison's and Mason's original proposals make clear, at the heart of Free Exercise is freedom of individual conscience.[108]

Dignitary interests, however, provide a very weak basis for protecting groups as groups.[109] It is very hard to see how an institution can have a conscience. In his *Memorial and Remonstrance*, Madison argued that the reason to protect religious liberty is to ensure that believers are not forced to choose between salvation and legal obligation.[110] But again, groups do not seek or obtain salvation, except on behalf of their members. Of course, religious groups can invoke the Free Exercise Clause as a means to advance the dignitary interests of their members, and sometimes quite effectively so. Thus a law banning religious worship on Saturdays could certainly be challenged by a synagogue or a Seventh-day Adventist Church as violating the Free Exercise rights of its members, since the religious institutions in that situation would almost certainly meet the requirements of organizational standing.[111]

If the Court were ever to reconsider its decision in *Smith* and breathe serious life back into the Free Exercise Clause, those derivative rights of groups might become quite extensive. But these rights *are* derivative: they are not rights of religious groups qua groups and have little relevance to institutional claims by complex organizations. There may well be cases where an antidiscrimination claim by a minister would implicate the free-exercise rights of church members, if the lawsuit truly impinged on their ability to worship as they chose. But surely not every lawsuit by every

106. See *supra* Part II.A for a more lengthy description of the drafting history of the Religion Clauses. For more lengthy defenses of the position that the Religion Clauses serve dignitary interests, *see* Brownstein, *supra* note 46, at 207–18.

107. I have previously argued for a more purely instrumental, structural reading of the Free Exercise Clause. ASHUTOSH BHAGWAT, THE MYTH OF RIGHTS: THE PURPOSES AND LIMITS OF CONSTITUTIONAL RIGHTS 124–34 (2010). I now demur.

108. *See supra* notes 55–56 and accompanying text.

109. For similar arguments, *see* Brownstein, *supra* note 46, at 207–18; Schragger & Schwartzman, *supra* note 3, at 965–66.

110. Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1365–66 (2012).

111. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Sierra Club v. Morton*, 405 U.S. 727, 738–39 & n.14 (1972).

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"minister" as broadly defined by the *Hosanna-Tabor* Court implicates such concerns.

It becomes clear from this perspective that the sheer scope of the ministerial exception fits poorly with a dignitary theory based on the derivative free-exercise rights of churches. After all, the exception by its terms applies without any requirement that the Church prove some sort of interference with its religious practices or the religious practices of its members. On the facts of *Hosanna-Tabor* itself, it is hard to see how the school's decision to fire Perich because she consulted counsel had much direct relationship to the church's parishioners' freedom of conscience. Perhaps if the firing had involved the quality or content of Perich's teaching such a link could be proved—though even that seems a stretch since she taught primarily secular materials. At heart the dispute between Perich and Hosanna-Tabor was a managerial one, touching only lightly on religious matters. To grant a blanket dispensation to the church in those circumstances may or may not make sense, but it has little to do with individual dignity and freedom. To the contrary, the only obvious dignitary interests at stake in the case were Perich's, which the Court ignored entirely.

Group rights then, especially broad, prophylactic rights of the sort recognized in *Hosanna-Tabor*, cannot easily be defended in dignitary terms. The implications of this should be clear. First, it means that the Free Exercise Clause does not provide a solid foundation for such rights. Second, it means that if group rights are to be defended, it must be in instrumental, not dignitary terms. The Free Exercise Clause is simply not a viable source of group rights.

The Establishment Clause is, concededly, a little bit different. While the Establishment Clause no doubt protects dignitary interests,[112] it also clearly serves an instrumental goal. That instrumental purpose, however, is relatively narrow: to prevent the social discord that results from sectarian strife over control of the state. Given the Framers' intimate knowledge of the religious wars that had devastated Great Britain and the rest of Europe in the prior century, this would have been a primary consideration in their

112. One way it protects dignitary interests is through its prohibition on the imposition of taxes to fund the clergy. It was precisely such a legislative proposal that elicited Madison's foundational "Memorial and Remonstrance Against Religious Assessments" in 1785, *see* JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *available at* http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html (last visited June 2, 2014), which in turn was one of the earliest steps in the dis-establishment movement in the early United States.

https://openscholarship.wustl.edu/law_lawreview/vol92/iss1/6

minds.[113] In perhaps its most thoughtful opinion on the subject, this is precisely the position adopted by the Supreme Court.[114] Important, indeed critical, to a well-functioning society as this goal is, it is hard to understand what it has to do with the ministerial exception. The Establishment Clause clearly condemns government actions that favor or disfavor particular sects. Indeed, such preferentialism was the target of George Mason's original proposal on the subject.[115] But it is hard to see how the application of a neutral employment regulation to *all* sects and all secular groups, without preferentialism, threatens this value. Admittedly, in an extreme case where a law is passed by a religious majority precisely to interfere with the practices of a minority sect, concern might arise,[116] but no one suggests such an explanation for the ADA or any other antidiscrimination statute. Further, the Free Exercise Clause would forbid such an extreme situation, even post-*Smith*.[117] The Establishment Clause does no work here. The conclusion seems inescapable: the Religion Clauses simply cannot justify the ministerial exception recognized in *Hosanna-Tabor*.

D. Boundaries

The above discussion demonstrates the holes in the *Hosanna-Tabor* Court's legal reasoning in placing the ministerial exception in the Religion Clauses. An entirely separate problem with the Court's approach is that it raises a host of boundary problems that are ultimately unresolvable. One immediate question that arises is scope of the ministerial exception: does it bar all litigation against churches? All litigation by ministers against churches? Or just antidiscrimination suits brought by ministers against

113. As Madison made clear in his Memorial and Remonstrance, see *id.* ¶ 11 ("Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious disscord [sic],by proscribing all difference in Religious opinion.").

114. Engel v. Vitale, 370 U.S. 421, 429 (1962).

115. *See* GEORGE MASON'S MASTER DRAFT OF THE BILL OF RIGHTS, *supra* note 56, ¶ 20 ("[N]o particular religious Sect or Society of Christians ought to be favored or established by Law in preference to others.").

116. I leave aside here the question of whether such a law, to trigger concerns, must be subjectively motivated to discriminate against a minority, or whether a law which to an objective observer seems to single out a religious minority would also be suspect. The question has of course arisen extensively in the context of the Equal Protection Clause and remains extremely divisive. For a discussion of the difficulties of defining intent, see Evan Tsen Lee & Ashutosh Bhagwat, *The* McCleskey *Puzzle: Remedying Prosecutorial Discrimination Against Black Victims In Capital Sentencing*, 1998 SUP. CT. REV. 145, 150–55.

117. *See generally* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

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churches? The EEOC and Perich argued that recognizing a ministerial exception would raise questions about the application, for example, of immigration or child labor laws to churches.[118] The Court's answer was simply to fudge. It suggested that "the ministerial exception would not in any way bar criminal prosecutions . . . [or] bar government enforcement of general laws restricting eligibility for employment, because the exception applies only to suits by or on behalf of ministers themselves,"[119] but did not resolve the scope of church immunity with respect to ministers themselves. Instead, the Court limited its holding sharply to prohibit "an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her."[120]

This is quite dissatisfying. Despite the soaring language of the Freedom of the Church advocates, there must be *some* limits on even internal church autonomy, for surely we would not permit a church to engage in human sacrifice of volunteer priests or congregational members.[121] Given the absolutist language of the Court's opinion, however, it is very unclear how lines would be drawn. After all, many different kinds of government regulations, including child labor laws and even laws forbidding human sacrifice, can be described as "government interference with an internal church decision that affects the faith and mission of the church itself,"[122] depending on the church's theological beliefs. So how is a court to pick and choose which regulations are permissible and which are not? Why is it that the Court singles out antidiscrimination laws for disfavored treatment? Surely these laws do not interfere with church autonomy more than many others, down to such pedestrian regulations as health and safety codes. If all these laws are constitutionally suspect, then *Smith* is surely dead.

Another difficult boundary problem, raised and also elided in *Hosanna-Tabor*, is the definition of which employees qualify as "ministers" for the purposes of the ministerial exception. The Court split three ways on this question, with the majority opinion simply citing a number of relevant factors without giving any guidance as to how to resolve close cases.[123]

118. Hosanna-Tabor Evangelical Lutheran School and Church v. EEOC, 132 S. Ct. 694, 710 (2012).

119. *Id.*

120. *Id.*

121. *See* Mark D. Rosen, *Religious Institutions, Liberal States, and the Political Architecture of Overlapping Spheres*, 2014 U. ILL. L. REV. 737, 747–48 (using this example to critique the "separate sphere" argument for church autonomy).

122. *Hosanna-Tabor*, 132 S. Ct. at 707. This was the basis upon which the *Hosanna-Tabor* Court distinguished *Smith*. *Id.*

123. *Id.* at 707–08.

The two concurrences pointed in quite opposite directions, with Justice Thomas arguing for complete deference to churches on this question and Justice Alito championing a clear, functional test.[124] The difficulty, which both Justices Thomas and Alito acknowledged, though it led them in different directions, is that the definition of a minister is fundamentally a theological and ecclesiastical question.[125] To resolve such a question, a court must resolve questions of religious meaning, which goes against the purpose of the ministerial exception. *Hosanna-Tabor*, as well as the line of cases involving church property disputes upon which the majority relied,[126] sought to ensure that courts are not placed in such a role.

This conundrum cannot be avoided by the majority's test, which turns on such obviously ecclesiastical factors as the employee's title and formal ordination, and whether the employee performs religious duties. These factors raise problematic questions such as: what makes a title equivalent to minister? How is a court to judge what constitutes "ordination"? And what makes a particular duty religious?

The problem is compounded, as Justice Alito recognized, by the extraordinary religious diversity in the modern United States, which results in enormous variations in organization and leadership of religious groups.[127] Justice Alito sought to avoid this problem by eschewing reliance on such obviously Christian factors as the use of the term "minister," or formal ordination, and instead focus on function. But his test, which defined a minister as "any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith,"[128] still requires courts to resolve ecclesiastical questions such as what constitutes "worship services" and what are "important religious ceremonies or rituals." Justice Thomas's approach, admittedly, does avoid this problem, but at the cost of permitting such unlikely results as allowing a church to designate the building engineer in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos* as a minister.[129]

Yet another fundamental boundary problem raised by rooting the ministerial exception in the Religion Clauses and restricting it to religious

124. *Id.* at 710–11 (Thomas, J., concurring); *id.* at 714–16 (Alito, J., concurring).

125. *See* Corbin, *supra* note 3, at 966.

126. *See Hosanna-Tabor*, 132 S. Ct. at 704–05 (citing Watson v. Jones, 80 U.S. 679 (1872); Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. America, 344 U.S. 94 (1952); Serbian Eastern Orthodox Diocese for U.S. and Can. v. Milivojevich, 426 U.S. 696 (1976)).

127. *Id.* at 711 (Alito, J., concurring).

128. *Id.* at 712 (Alito, J., concurring).

129. *See generally* 483 U.S. 327 (1987).

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institutions is that this requires courts to define what constitutes a *religious* group—*i.e.*, what is the definition of a church. This problem is intractable. There is a substantial, extant literature seeking to define the term "religion" for the purposes of the Religion Clauses, with no particular success.[130] As for the courts, while they have little difficulty classifying such familiar sects as the Missouri Synod Lutheran Church in *Hosanna-Tabor* as religious, they struggle enormously when faced with less familiar traditions.[131]

If the problem of defining religion is difficult, the problem of defining what constitutes a church is even more complicated. This is because many organizations that have some unambiguously religious elements probably do not qualify as churches entitled to the ministerial exception, while similar groups might well qualify. Consider in this regard the Boy Scouts. Clearly the Boy Scouts have a religious component to them, as reflected by the Scouts' exclusion of atheist or agnostic scouts and scout leaders.[132] On the other hand, it seems peculiar to describe the Scouts as a church, or scouting leaders as ministers, and there was no mention of the ministerial exception in the *Dale* litigation. But why are the Scouts different from a Quaker congregation?

As John Inazu points out, the division between churches and other religious groups has been complicated in recent years by the tendency of Evangelical Christians to associate increasingly with "parachurches" rather than formal congregations.[133] At some point, the question of whether a particular group constitutes a church, just like the question of whether a particular person constitutes a minister, becomes an ecclesiastical one based on one's definition of what is or is not sufficiently religious activity. Courts have no place making such judgments, yet the ministerial exception forces them to do precisely that. An alternative approach rooted in assembly and association, which treats secular and religious groups the same, avoids this choice.

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130. *See, e.g.*, Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579; George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519 (1983); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984); Eduardo Penalver, *supra* note 77; Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

131. *Contrast* Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (defining transcendental meditation as a religion for Establishment Clause purposes) *with* Sedlock v. Baird, No. 37-2013-00035910-CU-MC-CTL (Superior Court of California, County of San Diego July 1, 2013) (stating yoga as taught in a public school is not religion).

132. *Duty to God*, BOY SCOUTS OF AMERICA LEGAL ISSUES WEBSITE & BLAWG (2006), *available at* http://web.archive.org/web/20080509074048/http://www.bsalegal.org/duty-to-god-cases-224.asp.

133. Inazu, *supra* note 6, at 363–66.

The ultimate problem is that the dignitary interests that underlie the Religion Clauses provide no clear basis for line drawing. If autonomy of religious groups is rooted in protecting the dignitary interests of members, then deciding which groups receive protection and which employees qualify as ministers must turn on the religious significance of the group and individual. But this sort of governmental inquiry into the nature and strength of individual religious beliefs is deeply troubling under the Religion Clauses. On the other hand, to abjure such an inquiry leads to relentless expansion of religious autonomy, culminating in claims that owners of for-profit businesses may opt out of secular regulatory mandates which conflict with their religious tenets. In the face of such challenges to the contraceptive mandate in President Obama's healthcare reform legislation, the lower courts were divided,[134] though the Supreme Court did eventually uphold the businesses' claims.[135] Regardless of the Court's decision, however, recognizing such religious exemptions is quite problematic. Not only does doing so discriminate against nonreligious, ethical perspectives—itself a profound problem under free-speech principles[136]—but if followed consistently, it could lead to the evisceration of much of the modern regulatory state, including antidiscrimination laws, at least as applied to smaller and closely-held businesses.

The logical implications of the above discussion seem clear: if strong group-autonomy rights cannot be derived from dignitary interests, then they must be justified on some other, more instrumental basis. This fact alone makes the Religion Clauses a poor home for such rights: Free Exercise because it sounds primarily in dignitary concerns and Establishment because the instrumental values it advances in addition to dignitary interests do not support exemptions from generally applicable legislation for religious groups. However, this does not doom group-

134. *Compare* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (*en banc*), *aff'd* Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014) (finding that the contraceptive mandate, as imposed on a for-profit corporation, violates the Religious Freedom Restoration Act); Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013) (same); Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208 (D.C. Cir. 2013) (finding that the contraceptive mandate likely violated the rights of owners of a closely held corporation) *with* Conestoga Wood Specialties Corp. v. Secretary of U.S. Dept. of Health and Human Services, 724 F.3d 377 (3d Cir. 2013), *rev'd* Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014) (concluding that a for-profit corporation may not bring claims under either the Religious Freedom Restoration Act or the Free Exercise Clause); Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. 2013) (same). Interestingly, in granting protection to a for-profit corporation, the Tenth Circuit explicitly held that *Hosanna-Tabor*'s grant of autonomy to religious organizations—*i.e.*, churches—did not preclude granting rights to nonreligious organizations as well. *See Hobby Lobby*, 723 F.3d at 1136.

135. Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014).

136. *See* Schwartzman, *supra* note 110, at 1374.

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autonomy rights. Even if the Religion Clauses do not advance the sorts of instrumental concerns that justify some version of a ministerial exception, other parts of the First Amendment do. It is to the rest of the First Amendment that we now turn.

III. REDEEMING *HOSANNA-TABOR*

Up to this point, we have seen that the Religion Clauses of the First Amendment in fact provide a very weak foundation for the ministerial exemption recognized in *Hosanna-Tabor*. That does not mean, however, that the case was incorrectly decided. To the contrary, as we shall see there are very strong reasons, rooted in constitutional theory and structure, why we should shield the internal workings of religious groups from government regulation. The logical source of those principles, however, lies not in the Religion Clauses but in the later provisions of the First Amendment—what I call the Democratic First Amendment.

A. The Democratic First Amendment

Whatever the uncertainties surrounding the dignitary and instrumental aims of the Religion Clauses, there is a much broader consensus regarding the primarily instrumental goals of the remaining provisions of the First Amendment, which are free speech, freedom of the press, peaceable assembly, and petition.[137] Furthermore, there is little doubt as to what that instrumental goal is: furthering democratic self-governance. Taking the last two provisions first, there seems to be no plausible argument that the rights to assembly and to petition the government for a redress of grievances serve any dignitary, natural-rights values. Rather, they are purely about self-governance and democratic accountability. This is more obvious with respect to petitioning—it is hard to imagine anyone who would consider petitioning the government a key aspect of self-identity or self-fulfillment, and the text is quite explicit that the purpose of petitioning was not self-fulfillment, but rather to secure a redress of grievances.

The same point may not be quite as obvious with regard to assembly, until one remembers the roots of this right. As originally proposed by Madison and Mason, the right of assembly was one of the people to peaceably assemble "and consult for their common Good."[138] The latter

137. U.S. CONST. amend. I.

138. GEORGE MASON'S MASTER DRAFT OF THE BILL OF RIGHTS, *supra* note 56, ¶ 15; AMENDMENTS OFFERED IN CONGRESS BY JAMES MADISON JUNE 8, 1789, *supra* note 55. There is a

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restriction makes clear that when the people assemble, they do so in their sovereign capacity and not to pursue their personal ends.[139] When the "consult for the common Good" language was dropped from the proposed amendment,[140] the legislative record gives no indication that the reason for removing this language was to change the underlying purpose of the right. If anything, the record suggests that the language was dropped to ensure that the government did not seize upon this language to bar legitimate assemblies.[141] Moreover, the sparse legislative history we have of the Assembly Clause leaves little doubt that the Framers were intimately aware of the link between assembly and democratic self-governance.[142]

There also seems to be little doubt about the fundamentally instrumental goals of the Press Clause. Again, the drafting history is helpful. Madison's original proposal read: "the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[143] Mason's proposal was essentially the same.[144] This language clearly protects the press because of its political function, not because of the dignitary interests of writers. Furthermore, the literature recognizing the key, instrumental role the press plays in a functioning democracy is extensive.[145]

So that leaves speech. It is true that over the years, in addition to its widely acknowledged role in sustaining a republican form of government, scholars and judges have pointed to speech's instrumental role in the "search for truth"[146] and its dignitary role in advancing individual self-fulfillment.[147] In the modern era, however, the vast majority of scholars and courts, including the Supreme Court, have endorsed the view that the central, if not necessarily the only, goal of the Free Speech Clause is to

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slight verb tense difference between Mason and Madison ("assemble and consult" versus "assembling and consulting") but they are identical in substance.

139. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 26–30 (1998).

140. *See* THE COMPLETE BILL OF RIGHTS, *supra* note 98, at 133.

141. *See* Inazu, *supra* note 29, at 571–73.

142. COMPLETE BILL OF RIGHTS, *supra* note 98, at 143–45.

143. AMENDMENTS OFFERED IN CONGRESS BY JAMES MADISON JUNE 8, 1789, *supra* note 55.

144. GEORGE MASON'S MASTER BILL OF RIGHTS, *supra* note 56, ¶16 ("The Freedom of the Press is one of the great Bulwarks of Liberty, and ought not to be violated.").

145. *See, e.g.*, David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983); Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631 (1975).

146. JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 20–22 (John Gray ed., Oxford Univ. Press 1998) (1859); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

147. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47–69 (1989); THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4–7 (1966).

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advance democracy. I have defended this position elsewhere,[148] and Jim Weinstein and Robert Post have expounded the same position far more ably than me.[149] I will not repeat these arguments here, but rather will proceed on the assumption that the four rights listed in the latter part of the First Amendment, separately and jointly, have the primary goal of enabling and sustaining popular sovereignty and democratic self-governance.

Two further clarifications are necessary regarding the specifics whereby First Amendment rights advance self-governance. The first is that while the four great rights are independent of each other, they are not unrelated. There seems little doubt that these rights operate in tandem, combining with each other to better effectuate citizen participation in governance.[150] Thus people assemble for many reasons, but one of them is to petition. Speech enables assembly, and vice versa. They are, in the Court's own words, "cognate rights."[151] The second point is that citizens' involvement in self-governance is not limited to voting, or educating themselves to vote, nor is it limited to polite debate.[152] Instead, it incorporates a vast amount of activity and organization relevant to *being* a citizen, including protesting, petitioning, and other obviously political activities, as well as activities which form values, build organizations and common interests, and more generally enable separation between the sovereign people and the state. Indeed, in the founding era—and in truth, until the adoption of the Nineteenth Amendment in 1920[153]—most adults were disenfranchised, and so participation in such activities was the only thing that permitted most citizens to *act* as citizens.[154]

There thus seems to be a substantial gap between the Religion Clauses and the rest of the First Amendment.[155] The Religion Clauses primarily advance dignitary interests and seek to prevent conflict due to religious preferentialism, while the speech, press, assembly and petition clauses

148. Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 32–35 (2012).

149. Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601 (1990); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491 (2011).

150. Bhagwat, *supra* note 28, at 995.

151. De Jonge v. Oregon, 299 U.S. 353, 364 (1937); Thomas v. Collins, 323 U.S. 516, 530 (1945).

152. Bhagwat, *supra* note 28, at 995–98.

153. U.S. Const. amend XIX (forbidding discrimination on the basis of sex in voting).

154. *See* Bhagwat, *supra* note 28, at 993.

155. *See supra* Parts II, III.A.

advance popular sovereignty.[156] That two different parts of the same Amendment have such different goals may seem odd, until one remembers that attaching the Religion Clauses to the later rights seems to have been more of an historical accident than anything else—as originally proposed, the Religion Clauses *were* distinct and unconnected to other First Amendment rights.[157]

What is striking, however, is how often, when examining the arguments in favor of religious rights for groups, they seem to fit more closely with self-governance than traditional Religion Clause values. Richard Garnett is perhaps the leading modern defender of the Freedom of the Church under the Religion Clauses. Yet when Garnett explains *why* church autonomy is important, he tends to fall back upon reasons grounded in democracy. Garnett describes churches as one kind of non-governmental group that contributes to the balance of power in a democratic system of government,[158] and also, along with the press, to a "civil-society space" within which citizens can speak and develop values free of the government.[159] Garnett goes so far as to acknowledge that churches in the modern state "deliver the same Tocquevillian benefits as any number of voluntary associations," all the while inexplicably insisting that religion is special and religious groups differ from secular ones for constitutional purposes.[160] Similarly, Paul Horowitz's defense of church autonomy relies on the role of churches, like other "First Amendment Institutions," in enabling public discourse and thus democracy as well.[161] In *Hosanna-Tabor* itself, Justice Alito's thoughtful concurrence explicitly invokes cases such as *Roberts* and *Dale* protecting expressive associations to justify the ministerial exception.[162] All of this suggests that the Solicitor General's efforts, supported by some previous scholarship,[163] to root the ministerial exception in association and assembly rather than the Religion Clauses was neither "untenable" nor "remarkable," contrary to the *Hosanna-Tabor* majority.[164]

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156. For a similar conclusion, see Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 91 (2006).

157. *See supra* Part II.C.

158. *See* Garnett, *supra* note 3, at 38–39.

159. *Id.* at 40–41.

160. *Id.* at 49–50.

161. HORWITZ, *supra* note 42, at 82–84, 176.

162. Hosanna-Tabor Evangelical Lutheran School and Church v. EEOC, 132 S. Ct. 694, 712 (2012) (Alito, J., concurring).

163. *See* Tushnet, *supra* note 6, at 84–86; Lupu, *supra* note 6, at 431–42.

164. *Hosanna-Tabor*, 132 S. Ct. at 706.

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There is nothing ahistorical about protecting religious groups through the Assembly Clause and the modern, derivative association right. As John Inazu points out, during the brief debates that were recorded in the First Congress regarding the Assembly Clause, a specific reference was made to the arrest of William Penn in England for illegally assembling in order to worship.[165] This shows solid historical precedent and evidence exists that the Assembly Clause protects all groups, both secular and religious. It further shows that the Assembly Clause protects religious groups not only when they are engaging in expression, but also when they gather to worship or for other religious purposes.

This conclusion, it should be noted, utterly undermines the modern Supreme Court's theory[166] that assembly and association are only protected if they are for expressive purposes. Worship, after all, may have expressive elements to it, but it is not solely or even at heart a merely expressive activity.[167] It also strongly suggests that lower court decisions granting greater protection to religious groups' expressive activities than to their religious activities are also mistaken.[168] The Assembly Clause protects many kinds of groups, including expressive groups, groups assembled to petition the government, and religious groups, because *all* of these groups contribute to the maintenance of a free society of sovereign citizens within a democratic form of government.[169] Indeed, given the significant role played by ministers in fomenting rebellion, both during the American Revolution and in seventeenth century England, it is far from clear that the Framers would have distinguished between religion and politics as such.

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165. Inazu, *supra* note 29, at 575–76 (citing THE COMPLETE BILL OF RIGHTS, *supra* note 95, at 144 (quoting 1 ANNALS OF CONG. 760 (1789) (Joseph Gales ed., 1834))).

166. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000); Roberts v. U.S. Jaycees, 468 U.S. 609, 622–23, 626–27 (1984).

167. *See* INAZU, *supra* note 28, at 141–44, 164–68.

168. *See supra* Part II.A (discussing Salvation Army v. Dep't of Cmty. Affairs of N.J., 919 F.2d 183 (3d Cir. 1990) and Wiley Mission v. New Jersey, No. 10-3024, 2011 WL 3841437 (D.N.J. Aug. 25, 2011).).

169. It should be noted in this regard that in one of its foundational freedom-of-association cases, *Roberts v. U.S. Jaycees*, the Supreme Court explicitly described the association right as "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion," *Roberts*, 468 U.S. at 618, thus clearly extending protecting beyond expressive groups. The Court's description elsewhere of the right as one "to associate for expressive purposes," *id.* at 623, or as "freedom of expressive association," *Dale*, 530 U.S. at 648, may thus simply be a shorthand for a broader right. Even the Court's broader description of the right, however, is too narrow, because it ignores the fact that the right of association/assembly is an independent right, not derivative of other First Amendment rights.

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B. The Instrumental Value of Groups

In addition to fitting well with the text, history and underlying purposes of the First Amendment, locating group religious rights in the Assembly Clause also avoids many of the worst line-drawing problems raised by reliance on the Religion Clauses. This is because dignitary theories of the sort driving the Free Exercise Clause have generally provided little guidance on boundaries. After all, human dignity is an entirely subjective, individualistic notion, and any activity can arguably be central to *someone*'s definition of self. Instrumental theories, on the other hand, ask a clearer question: does the regulated activity further the instrumental goals of the constitutional provision? In the assembly/association context, the boundary question then becomes: does the type of group being regulated play a significant role in effectuating democratic self-governance? If so, does the challenged regulation interfere with the group's ability to play that role? These questions will not, of course, always be easy to answer. In particular, there will undoubtedly be disagreements on whether particular types of groups such as commercial entities should be protected.[170] But at least we know what the question is that we are answering.

Under this approach, there is little doubt that essentially all religious groups, whether organized as formal churches or not, are entitled to full protection under the Assembly Clause. Religious groups have played a central role in American politics throughout history and continue to do so today. Actual political engagement, however, is not a prerequisite for protection. Instead, the concept of contributing to democratic self-governance must be understood in capacious terms.[171] For one thing, self-governance itself is not limited to voting; it includes a myriad of activities that play a role in maintaining the balance of power between officials and the sovereign people, including petitioning, protesting, and discussing.[172] Without groups, most of these activities would be meaningless if not impossible because it is exceedingly difficult for citizens to capture the attention of rulers unless they act together, in numbers.

In addition to providing vehicles for democratic action, groups also foster in citizens the basic values which define what kinds of citizen

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170. *Compare* Bhagwat, *supra* note 28, at 1002, *and* INAZU, *supra* note 28, at 166–68 (they should not) *with* Robert K. Vischer, *How Necessary is the Right of Assembly?*, 89 WASH. U. L. REV. 1403, 1413–15 (2012) (they should).

171. *See supra* notes 152–53 and accompanying text.

172. Including online. *See* John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093 (2013).

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individuals will be and, relatedly, in the Supreme Court's words, act "as critical buffers between the individual and the power of the State."[173] Private groups are essential to this process of value formation both because humans form values in groups and because, absent the "buffer" provided by such groups, the state would have extraordinary power to shape its citizens, thereby inverting the assumptions that underlie popular sovereignty. Finally, once one recognizes this aspect of the role groups play in self-governance, it becomes self-evident that Justice Alito was quite correct to describe religious groups as "the preeminent example" of democratic associations.[174]

Not only do religious groups play a central role in shaping citizens' values through teaching and worship, but they also provide an important opportunity for citizens to develop the skills needed to be engaged, active citizens—a role for groups that has been acknowledged since Tocqueville.[175] This insight is reinforced by the fact that the Framing generation was overwhelmingly Protestant and tended to favor (sometimes through law) church structures that were local and democratic.[176] Such institutions provided opportunities to hone skills that could translate easily into local and eventually national politics. It should be emphasized, however, that given the significance of teaching and worship as shapers of citizens' values, constitutional protection extends not just to democratically organized groups but also to hierarchical, autocratic organizations.

An argument can be made, as Justice Alito suggests in *Hosanna-Tabor*,[177] that religious groups are *especially* well suited to advance self-government. One reason for this is the stricter separation between religious groups and the state than secular groups and the state. Democratic associations advance popular sovereignty, among other ways, by acting as a source of values independent of the state and by providing what the Supreme Court has called a "buffer" between citizens and the state.[178] To serve as a source of independent values and as an effective buffer, it is

173. Hosanna-Tabor Evangelical Lutheran School and Church v. EEOC, 132 S. Ct. 694, 712 (2012) (Alito, J., concurring) (quoting *Roberts*, 468 U.S. at 619).

174. *Id.*

175. *See* MARK E. WARREN, DEMOCRACY AND ASSOCIATION 29–30 (2001).

176. *See supra* Part II.A.

177. *Hosanna-Tabor*, 132 S. Ct. at 712 (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.'") (emphasis added) (quoting *Roberts*, 468 U.S. at 619).

178. *Roberts*, 468 U.S. at 619; *see also Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring).

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essential that groups retain independence from the state. One way in which associational independence can be compromised is through regulation, which is why the Assembly Clause acts as a barrier to such regulation. But regulation is not the only danger: the state can co-opt associations by creating dependency through voluntary financial support. Dependence on such support will inevitably compromise associational independence by making groups hesitant to bite the hand that feeds them. This danger is not theoretical, as the nation's law schools discovered when they sought to challenge the military's now-defunct policy of excluding gays and lesbians.[179] As Alan Brownstein points out, however, religious groups are far less susceptible to this form of capture-by-funding than secular groups, because the Establishment Clause sharply limits the state's ability to support religious groups.[180] Admittedly, recent decisions such as *Zelman v. Simmons-Harris*,[181] which permits religious groups to participate in neutral funding schemes such as school vouchers, somewhat undermine this distinction. However, it remains true that the Establishment Clause is still a flat bar on government support for the core, religious and value-forming functions of religious groups, in a way with no secular parallel.

Further strengths of religious groups vis-à-vis secular ones are their longevity and intergenerational nature, as well as the unusually strong communal ties that bind together many religious groups. In combination, these characteristics make religious groups especially independent and effective inculcators of cultural values. These characteristics also make religious groups particularly powerful shields against intrusions of the state, as demonstrated, for example, by African American churches during the Civil Rights era. None of these strengths are unique to religious groups, of course, but given the importance of membership in religious groups to the lives of many Americans, there is an argument that such groups provide an especially easy and likely vehicle for value formation and political participation.

C. Politics and Religious Associations

Protecting religious groups because of their contribution to self-governance forces us to confront the difficult question of the appropriate

179. *See* Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006).

180. Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and the Establishment Clause are Stronger when Both Clauses Are Taken Seriously*, 32 CARDOZO L. REV. 1701, 1708 (2011); Brownstein, *supra* note 156, at 93.

181. 536 U.S. 639 (2002).

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role of religious groups in a secular democracy. One reading of the Establishment Clause—in particular, prong one of the infamous *Lemon* test requiring that all legislation must have a "secular legislative purpose"[182]—might be understood to exclude all religious motivations, and thus all religious groups, from politics. But that cannot be correct.

First of all, this obviously has not been our historical practice.[183] More fundamentally, it does not correspond with our approach in other areas and and with other groups. Under the Fourteenth Amendment, legislation adopted with an explicitly racist or sexist purpose is unconstitutional.[184] Yet that does not mean that the Ku Klux Klan ("KKK") or a male chauvinist political group can or must be excluded from politics.[185] Similarly, religious groups, speaking and acting with religious motivations, can still appropriately try and move public policy in the directions they want, so long as the policy can also be justified on *some* secular ground. Despite Jefferson's "wall of separation" metaphor,[186] the Constitution has never been understood to entirely separate church and state to this degree, and quite rightly so. To the contrary, from the very beginning of our history, the Assembly Clause has been understood to protect religious groups precisely because such groups play such a vital role in maintaining democratic government.

This vision of the interaction between religious groups and the state is entirely consistent with the line of Supreme Court cases dealing with intra-church property disputes, cited and relied upon in *Hosanna-Tabor*.[187] In each case, the Court held that secular courts could not, consistent with the Establishment Clause, reconsider decisions made by the highest authority within a church regarding which church faction controlled particular property.[188] This makes sense because, in those cases, the lower courts had reversed the decisions of ecclesiastical authorities on essentially religious grounds, thereby directly intruding on the religious group's internal

182. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

183. I am writing this sentence on the 50th anniversary of the *Reverend* Martin Luther King, Jr.'s "I have a Dream" speech, perhaps the quintessential illustration in modern American history of why religious groups can and must engage in politics and policy.

184. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222 (1985); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

185. For a related argument, see Schwartzman, *supra* note 110, at 1391.

186. Letter from Thomas Jefferson to the Danbury Baptist Association (January 1, 1802), *in* THOMAS JEFFERSON: WRITINGS 510 (Merrill D. Peterson ed., 1984).

187. *See* Hosanna-Tabor Evangelical Lutheran School and Church v. EEOC, 132 S. Ct. 694, 704–05 (2012) (citing Watson v. Jones, 80 U.S. 679 (1872); Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am, 344 U.S. 94 (1952); Serbian Eastern Orthodox Diocese for the U.S. and Can. v. Milivojevich, 426 U.S. 696 (1976)).

188. *Id.*

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religious or ideological autonomy. Such intervention would be problematic for *any* democratic association, not just a church.[189] On the other hand, the Court has also held that when a court resolves an internal church property dispute based on "neutral principles of law" rather than "religious doctrine and practice," no constitutional bar is raised.[190]

The truth is that the problem faced by the Court in the property-dispute cases—the problem of how the law should deal with internal dissent within a group, especially a group with a complex structure—is a difficult, perhaps intractable issue, regardless of whether the group is religious or secular.[191] The Court's general solution appears to be to forbid direct intervention into internal group dynamics but to permit the application of neutral laws that incidentally affect those dynamics. The key insight, however, is that, contrary to what the Court said in *Roberts*,[192] the application of antidiscrimination law is a direct regulation of group structure, not an incidental burden. It is not an incidental burden because the right to associate and assemble must include the right to organize a group as the members choose, including selecting members and choosing a leadership—and concomitantly, rejecting some individuals as members or leaders. As such, application of antidiscrimination laws burdens the association and assembly rights of all democratic associations, not just churches.[193]

Religious groups are therefore appropriately protected by the Assembly Clause and appropriately engaged in the process of self-governance. Obviously though, religious groups are not the only groups that contribute to self-governance. Nor is it clear that religious groups contribute more directly than secular and semi-secular ideological groups such as the Sierra Club or the Boy Scouts. The thrust of this discussion is to show that the Assembly Clause protects the internal autonomy of both secular and religious groups that constitute democratic associations. In turn, this means that reliance on the Assembly Clause to protect religious groups obviates the need to define what constitutes a "religious group," as is

189. This is not to say that the Establishment Clause does not mandate some distinctions between religious and secular groups, however. I examine this issue in Part IV, *infra.*

190. Jones v. Wolf, 443 U.S. 595, 602 (1979).

191. The definitive scholarly discussion of this problem is Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001).

192. 468 U.S. 609, 628 (1984) (describing the application of antidiscrimination law as causing "some incidental abridgement of the Jaycees'" rights).

193. This is not to say, of course, that the group will necessarily prevail in claiming an exception from nondiscrimination law; the strength of the state interest in combating discrimination must also be taken into account.

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required to implement a ministerial exception rooted in the Religion Clauses. As noted earlier, such a task is impossible, and asking courts, which are after all governmental bodies, to define religion is in deep tension with Establishment Clause values.[194]

Reliance on the Assembly Clause also mitigates the problem of determining what sorts of religious relationships are protected from regulation—*i.e.*, of defining who is, and is not, a "minister"—the question on which the *Hosanna-Tabor* Court splintered. As we noted, any attempt by a secular court to define the term "minister" is likely doomed to clash with the Establishment Clause. The Assembly Clause, however, does not require any such religious determination. Instead, it would extend protection to a group's right to select individuals who are relevant to the group's democratic and ideological mission. There is no doubt that there must be some deference to a group's determinations in this regard if the group's autonomy is to be meaningful, as noted by the Court in *Boy Scouts v. Dale*,[195] and by Justice Thomas in *Hosanna-Tabor*.[196] But that deference is not infinite: the Assembly Clause does not protect either the Sierra Club's or Hosanna-Tabor's right to discriminate in hiring a janitor. On the other hand, Perich surely played a role in formulating and imparting the Hosanna-Tabor school's ideological and religious commitments in her role as a teacher. Therefore, a school would clearly have a right to fire a teacher like Perich free of state interference, as long as the school claims, as Hosanna-Tabor did, that its dispute with the teacher was related to the school's ideological commitments. Note that this result would follow regardless of the school's religious affiliation, at least with respect to nonprofit schools, though most non-religious schools may have a harder time demonstrating that an employment dispute touches upon the school's ideological mission.

The implication of all of this is that the group-autonomy right recognized in *Hosanna-Tabor* is not properly described as a "ministerial" exception at all, because an exception based on the Assembly Clause should not be limited to ministers or churches. Instead, it is properly understood as a general *associational* exception covering all group members or employees who have a role in formulating or expounding the group's values, or in otherwise advancing the group's democratic participation.

194. *See supra* Part II.D.

195. 530 U.S. 640, 653 (2000).

196. Hosanna-Tabor Evangelical Lutheran School and Church v. EEOC, 132 S. Ct. 694, 710–11 (2012) (Thomas, J., concurring).

Melding the ministerial exception with the association/assembly right will require some adjustments to the latter. In particular, there is a tension between the formulation of the ministerial exception in *Hosanna-Tabor* and of the expressive association right in *Roberts v. U.S. Jaycees* regarding the level of judicial inquiry into regulations' impact on a group. *Hosanna-Tabor* holds that such an inquiry is inappropriate because it undermines the principle that courts should play no role in appointing ministers.[197] In *Roberts*, on the other hand, the Court engaged in a close inquiry into the impact of regulation on the Jaycees' expression in the course of rejecting their First Amendment claim.[198] The *Hosanna-Tabor* Court probably went too far in eschewing *any* examination of a church's asserted reasons for acting as it did. After all, if an action literally has no relationship to a church's religious functions, application of neutral law to such an action seems unproblematic, as illustrated by cases such as *Jones v. Wolf* permitting application of "neutral principles of law" to internal church disputes.[199]

But *Roberts* goes far too far in the opposite direction. The kind of searching, distrustful examination of the inner workings and beliefs of an organization that the *Roberts* Court undertook is extraordinarily dismissive of a group's autonomy and leaves the group's rights at the whim of a possibly hostile judiciary. Some deference toward a group's views regarding the impact of regulation on its ability to function seems essential if autonomy is to be meaningful, as the Court seemed to recognize in *Boy Scouts v. Dale*.[200] *Dale* was correctly decided for the same reasons that *Hosanna-Tabor* was correctly decided: in both cases, the group at issue was able to assert a good-faith belief that its ideological coherence was harmed by the continued inclusion of an individual. The problem was not, as the *Dale* Court held, that inclusion of Dale as an assistant scoutmaster in the Boy Scouts would "impair its expression."[201] The problem was that this inclusion directly infringed on the Boy Scouts' independent right to organize itself and select its members in a way that shaped the group's values and ideological commitments.

There is no question that recognition of such a broad exception from antidiscrimination laws and perhaps other employment regulations will burden society's legitimate efforts to combat discrimination and other

197. *Id.* at 709 (declining to engage in a pretext analysis for this reason).
198. *Roberts*, 468 U.S. at 626–29.
199. 443 U.S. 595, 602 (1979).
200. *Dale*, 530 U.S. at 653.
201. *Id.*

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forms of socially destructive behavior. The burden, however, should not be too great. It seems likely that most, if not quite all, commercial entities, including almost all for-profit corporations, should be categorically denied Assembly Clause protections, on the grounds that their purposes and structures make their relevance to self-governance tangential at best.[202] Furthermore, it seems unlikely that many groups will be willing to publicly take the position that they are ideologically driven to discriminate, a tendency that has no doubt been reinforced by the dramatic consequences to the Boy Scouts of its decision to do so. In addition, in some cases the government will undoubtedly be able to demonstrate a sufficiently strong interest to overcome a group's Assembly Clause rights, especially if exclusion from the group has substantial collateral consequences. However, it cannot be denied that some antisocial behavior will undoubtedly become immunized from state regulation. That is the price of a robust First Amendment in a pluralistic, self-governing society.

IV. ESTABLISHMENT CLAUSE REDUX

Until now, I have argued for an essential equivalence between religious and secular group rights, all deriving from the Assembly Clause of the First Amendment. Reliance on the Religion Clauses is historically and textually unjustified and forces the courts unnecessarily to confront unresolvable boundary problems.[203] This seems to suggest that the Religion Clauses are essentially irrelevant to the autonomy rights of religious *groups*, except insofar as such groups can claim Free Exercise Clause rights derivative of their members. The Establishment Clause seems out of the picture altogether. But that cannot be quite right. By forbidding government endorsement[204] and coercion[205] of religion, the Establishment Clause has some impact on the government's relationship with religious groups. In particular, the Establishment Clause has long been understood to forbid direct government payments to support religion.[206] It was a dispute over precisely such actions that elicited Madison's famous *Memorial and Remonstrance*.[207] There is, however, no similar prohibition of government funding of speech or secular groups,

202. See Bhagwat, *supra* note 28, at 1002, for a more extended discussion of this point.
203. *See supra* Part III.
204. Cnty. of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573 (1989).
205. Lee v. Weisman, 505 U.S. 577 (1992).
206. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 15–16 (1947).
207. *Id.* at 11–12.

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even on a selective, content-based basis.[208] Does this undermine the position advanced in Part III, that secular and religious groups are indistinguishable for group-autonomy purposes?

I would argue that it does not. First, the difference between secular and religious groups should not be overstated. Under current law, religious groups remain free to receive state funds, so long as the funds are part of a neutral program advancing a secular legislative purpose.[209] In addition, the government's supposed right to fund speech selectively must have limits. Whatever the doctrine says, it is inconceivable that any court would uphold a government program of financing political candidates that funded only Democratic candidates or only funded candidates who publicly supported a particular policy. It would seem obvious therefore that some form of the anti-preferentialism rule must carry over into the secular sphere. But it also must be acknowledged that differences remain: some content-based preferences for secular speech and groups are permitted, but official preferentialism between religions is strictly forbidden.[210]

These differences do not undermine the basic argument advanced here: religious groups' autonomy is best protected through the Assembly Clause on the same terms as secular groups. Moreover, the reason for protecting the autonomy of all groups is the instrumental one of advancing democratic self-government rather than advancing the dignitary goals of the Religion Clauses. To reiterate, the fact that the state may not act to advance religion does not mean that religious groups *must* be excluded from politics, any more than the Equal Protection Clause demands exclusion of the KKK.[211] Indeed, the separation between religious groups and the state may actually make religious groups *more* effective contributors to democratic self-governance than secular groups.[212] In other words, the distinctive treatment of religious groups under the Establishment Clause can be understood to argue for, not against, protecting such groups under the Assembly Clause.

There is another potential difference between religious and secular groups rooted in the Establishment Clause regarding the nature of the

208. *See* Rust v. Sullivan, 500 U.S. 173 (1991). This difference in funding power is an aspect of the broader distinction between religious and secular topics, that the government remains free to adopt its own positions on secular matters, but may not take sides in religious debates. *See* Brownstein, *supra* note 180, at 1711 & n.33 (citing *Lee*, 505 U.S. at 590–92).

209. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

210. Larson v. Valente, 456 U.S. 228, 244 (1982); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 696 (1994).

211. *See supra* Part III.B.

212. *See supra* Part III.C.

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protection such groups receive. To understand this possible difference, some background is needed. Under the Court's current jurisprudence, the autonomy of secular groups is protected, to the extent it is, under the derivative right of "expressive association," while religious groups also receive protection under the Religion Clauses. In the foundational expressive-association case, *Roberts v. U.S. Jaycees*,[213] the Court held that in order to establish an expressive-association claim, a group must demonstrate that it communicates a coherent message and that inclusion of an unwanted member will interfere with the group's ability to express that message. Furthermore, in the course of rejecting the Jaycees' association claim, the Court engaged in a careful examination of the group's message and the impact of regulation on the group's ability to convey that message.[214] Such an intrusive inquiry is inappropriate with respect to *all* democratic associations, because it is fundamentally inconsistent with the notion that such groups must be autonomous of the state, which of course includes the courts.

The Court's most important expressive-association case since *Roberts* tends to support this view. In *Boy Scouts v. Dale*, the Court reiterated the *Roberts* Court's position that an expressive-association claim depends on proof that a group "engage[s] in some form of expression," and that "the presence of [the person the group seeks to exclude] affects in a significant way the group's ability to advocate public or private viewpoints."[215] The Court proceeded to defer to the Boy Scouts on the crucial questions of whether the Scouts were sincerely opposed to homosexuality and whether the presence of a gay assistant scoutmaster would burden the Scout's expression.[216] The *Dale* Court was quite correct to defer to the Boy Scouts' assertion that they were opposed to homosexuality. Furthermore, given the broad reading of the Assembly Clause set forth above, the Court's separate inquiry in both *Roberts* and *Dale* into whether inclusion of a particular member will interfere with a group's *speech* is entirely unnecessary since, under a proper reading of the Assembly Clause, groups enjoy an independent right of autonomy not simply one derivative of their speech rights. Under this approach, the associational rights of secular groups become equivalent to the broad ministerial exception for religious groups recognized in *Hosanna-Tabor*, because the *Hosanna-Tabor* Court's injunction that courts may not inquire into a religious group's

213. 468 U.S. 609 (1984).
214. *Id.* at 626–28.
215. Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).
216. *Id.* at 651, 653.

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actual motivations for terminating a minister should also be followed for secular groups.[217]

It must be conceded, however, that the parallel here is not perfect. The Assembly Clause is best understood to protect not all employment relationships but only those relevant to the group's democratic and ideological mission. In adjudicating the autonomy rights of secular groups, some inquiry into whether the exclusion impacts that mission is inevitable, though, as in *Dale*, some deference is undoubtedly due to the group. With regard to religious groups, that deference may well need to be stronger. State inquiries into the ideological commitments of *all* groups are unseemly and undermine their autonomy; but inquiries into religious commitments also run head-long into the Establishment Clause, making them especially problematic. It should be emphasized, however, that this distinction is not as great as it seems. Some deference is due to all groups, and even the *Hosanna-Tabor* Court did not purport to immunize all employment decisions of religious groups. The bottom line remains that the Assembly Clause, properly understood, provides ample protection for the autonomy of both religious and secular groups, the best justification for such protection, and essentially identical protections for both types of groups.

CONCLUSION

The Assembly Clause of the First Amendment provides broad protection for the autonomy of groups, both religious and secular, that contribute to the process of democratic self-governance. Concomitantly, the Supreme Court's decision in *Hosanna-Tabor* to root religious groups' autonomy rights in the Religion Clauses of the First Amendment is supported by neither text, nor history, nor principle. The equality of religious and secular groups that I assert here is, however, controversial. Religion does seem different from more secular ideological commitments, both in its significance to individuals and in its underlying framework of justification. For that reason it may well be that, the Supreme Court's *Smith* decision notwithstanding,[218] the Religion Clauses are properly read to provide broad exemptions for religiously motivated conduct even though conduct motivated by secular ideologies would not enjoy parallel exemptions. But these arguments only relate to the protection of

217. Hosanna-Tabor Evangelical Lutheran School and Church v. EEOC, 132 S. Ct. 694, 709 (2012).

218. Employment Division v. Smith, 494 U.S. 872 (1990).

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individuals, not *groups*. There is no reason, and no justification, for fundamentally distinguishing religious groups from similar secular groups that play a parallel role in our system of popular sovereignty. Both types of groups are democratic associations, worthy of strong protections.

The defense of religious group autonomy on instrumental grounds should not, however, be taken too far. Even if the reason why the Constitution, through the Assembly Clause, protects the autonomy of religious groups is because of such groups' contributions to self-governance, religious institutions themselves often will not see this as their primary role. Furthermore, citizens obviously do not generally join and attend churches for such instrumental reasons. Finally, certain kinds of regulations of religious institutions undoubtedly will violate the Free Exercise Clause because they will violate the rights of the individuals who belong to such institutions. Simply put, however, a religious group's right to *institutional* autonomy is best located in the Assembly Clause rather than in the Religion Clauses.

A final word of caution is in order. It seems unlikely that our complex, heterogeneous society will ever come to a final consensus on the difficult questions surrounding the exercise of state authority over religious groups and the engagement of religious groups in democratic politics. Hard cases will remain and disagreements will never be fully settled. The contentiousness of these issues with regards to religious groups is undoubtedly greater than with secular groups, at least in part because of the unparalleled significance that religious convictions play in the lives of many Americans. Even the very idea of secular-religious equivalence advanced here and elsewhere[219] is no doubt offensive to some. However, the arguments advanced here do not question, or support, the primacy of individual religious autonomy over other forms of individual autonomy. They only question the preferences for religious over secular *groups* expressed in the *Hosanna-Tabor* decision. As for line drawing, that too is unavoidable and difficult. What an approach to group autonomy rooted in the Assembly Clause does avoid though, in contrast to the Religion Clauses-based approach, is drawing lines on the basis of religious doctrine and dogma. And that is no small benefit.

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219. Notably in CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007).

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