Religious Associations: Hosanna-Tabor and the Instrumental Value of Religious Groups

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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"). 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 require recognition of a “ministerial exception” to antidiscrimination statutes (there the Americans with Disabilities Act ("ADA")), meaning that 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; and in particular, it is difficult to reconcile the reasoning of *Hosanna-Tabor* with key modern Religion Clause precedents. It is the contention of this essay that in fact such a reconciliation is simply not possible. The acclamation with which *Hosanna-Tabor* has been received by constitutional scholars is justified by neither text, history, or theory. Again, this is not to say that the result in *Hosanna-Tabor* is incorrect; but its reasoning surely is.

If the Religion Clauses cannot justify an exemption for churches from antidiscrimination statutes, then how can the result in *Hosanna-Tabor* be correct? In brief, it is my contention that the Freedom of Assembly, along with the nontextual, closely related right of association protected by the latter portion of the First Amendment provide a more than adequate basis for such an exemption. In fact, this very argument was advanced in *Hosanna-Tabor* by the Solicitor General, but was off-handedly rejected by the Court as “untenable” and “remarkable.” My goal here is to demonstrate why relying on assembly and association to protect religious groups is not only not “untenable,” it is entirely logical given the history, structure, and purposes of the First Amendment. Such an approach avoids the

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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”).
5 *Hosanna-Tabor*, 132 S. Ct. at 706.
6 Others have also defended rooting the ministerial exemption on association and/or assembly. See, e.g., Ira Lupu, Free Exercise Exemptions and Religious
doctrinal conundrums elided by the Hosanna-Tabor Court, and also avoids 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.

To understand why the Assembly/Association rights provide a better vehicle for protecting religious groups than the Religion Clauses, 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.7

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. In fact, 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),8 as well as a separate right to petition the legislature.9 More important, for our purposes, is the fact that the various elements of the First Amendment were not listed as a single proposal in the original, proposed Bill of Rights 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

7 U.S. Const., Amend I.
press, and the third protecting assembly and petition. 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. Instead, the rights of assembly and petition (as well as a rejected right to instruct Representatives) constituted proposal number 15 in the Master Draft, speech and the press are number 16, but the precursors of the Religion Clauses don’t appear till proposal 20 (the last of the proposed amendments). 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). 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 Committee on Detail. This uncontested fact provides an important clue that the Religion Clauses are different from the rest of the First Amendment. This essay follows up on that clue, ultimately arguing 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 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 source 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.

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

13 See The Complete Bill of Rights at 133.
“called” teacher at the school. A “called” teacher is one who is “regarded as having been called to their vocation by God through a congregation.”

Perich received special training to become a “called” teacher, and her duties included teaching both secular and religious subjects, as well attending and sometimes leading chapel service. 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, and after she consulted an attorney was fired (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”). She filed a charge with the Equal Employment Opportunity Commission (“EEOC”), which filed a lawsuit on Perich’s behalf (in which Perich intervened) alleging that Perich was fired in retaliation for threatening to file a lawsuit under the ADA, which in turn violated the ADA.

Hosanna-Tabor defended on the grounds that the lower courts have read the First Amendment to create a “ministerial exception” to antidiscrimination laws, which prohibited courts from intervening in employment disputes between churches and their ministers. 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.

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 on that basis concluded that the Religion Clauses, in combination, required that the federal government “would have no role in filling ecclesiastical offices.” On this basis, the Court (for the first time) recognized the ministerial exception. It explained 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.”

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 as noted earlier, it found this position

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14 Hosanna-Tabor, 132 S. Ct. at 699.
15 Id. at 699-700.
16 Id. at 700.
17 Id. at 701.
18 Id. at 701.
19 Ibid.
20 Ibid.
21 Id. at 703.
22 Id. at 706.
“untenable.”23 Importantly, the reason the Court gave for its conclusion was that the implication of relying on freedom of association was that “the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club.”24 But this implication “is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization’s freedom to select its own ministers.”25 Leaving aside the doubtful premise that freedom of association cannot distinguish between a church and a “social club” (whatever that is), the Court’s rejection of association thus clearly rested on what the Court considered the self-evident proposition that religious groups were entitled to greater constitutional protections than secular groups.

Finally, the Court concluded its analysis by holding that Perich qualified as a “minister” for the purposes of the exception. On this point, however, the majority provided little clear guidance, and indeed explicitly declined “to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.”26

Though the Court’s opinion was unanimous, the majority’s failure to adopt a clear definition of the term “minister” elicited two concurring opinions. Justice Thomas argued that to ensure religious autonomy, secular courts should not seek to define who is or is not a minister. Instead, they should accept a church’s own good faith belief that an individual was a minister.27 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. 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.”28 In the course of defending this definition, Justice Alito directly invoked the Court’s precedents recognizing a right of “expressive association,”29 arguing that the important expressive role played by religious groups justified both the ministerial exception itself, and the definition he was proposing.30 These of course are the same precedents that the majority opinion flatly rejected as a basis for the Court’s decision.

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23 Ibid.
24 Ibid.
25 Ibid.
26 Id. at 707.
27 Id. at 710-711 (Thomas, J., concurring).
28 Id. at 711-712 (Alito, J., concurring).
30 Id. at 712-713 (Alito, J., concurring).
To understand the byplay between 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 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. 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. This significance was fully recognized by the Framers, and was famously expounded early in our history by de Tocqueville. 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.

Beginning with its seminal decision in 1958 in *NAACP v. Alabama ex rel. Patterson*, however, the Court’s approach changed. 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 implication’s 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*, in which the Court rejected the Jaycee’s 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. Since the *Jaycees* decision associational rights have been much more difficult to invoke. It is true that the Boy Scouts’ did successful invoke the association right to

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33 Inazu, *supra* note __, 84 Tul. L. Rev. at 571-577.
38 Id. at 626-627.
exclude a gay scoutmaster in *Boy Scouts of America v. Dale*,\(^\text{39}\) suggesting that association may be having a resurgence, but in subsequent cases the Court continues to subsume association claims into free speech analysis, and generally dismiss them handily.\(^\text{40}\)

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 because the Court has essentially forgotten that the freedom of assembly exists, and has narrowed association to the point of ineffectiveness.\(^\text{41}\) Indeed, 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.\(^\text{42}\) 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. If, however, one recognizes a robust right of group autonomy rooted in the Assembly Clause (or for that matter a robust nontextual right of association), 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,”\(^\text{43}\) then things change radically. As this brief discussion demonstrates, such a right 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,\(^\text{44}\) such a right fully supports the result in *Hosanna-Tabor* without raising the intractable difficulties of the Court’s approach.

It is almost time to turn to those difficulties. First, however, there is some value in discussing reactions to *Hosanna-Tabor* among leading Religion Clause scholars. It has been largely highly positive. *Hosanna-Tabor’s* timing fit well with what Paul Horwitz has described as the “the institutional turn” in First Amendment law.\(^\text{45}\) 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, and indeed he calls for the expansion of the case’s holding to *all* church employees.\(^\text{46}\) Similarly, Rick Garnett has argued vigorously for protection of “the Freedom of the Church,” a very strong form of autonomy for religious


\(^{42}\) *Brief of Federal Respondent, supra* note __, at 30-31.


\(^{44}\) See infra Part III.

\(^{45}\) Paul Horwitz, *First Amendment Institutions* 8 (Harvard 2013).

\(^{46}\) *Id.* at 187-189.
institutions, and reads *Hosanna*-*Tabor* to support such a view.\textsuperscript{47} Michael McConnell is largely in agreement,\textsuperscript{48} as is Alan Brownstein (though with more caveats).\textsuperscript{49} The primary dissenting voices have been those of Richard Schragger and Micah Schwartzman, in their excellent article critiquing the “institutional autonomy” reading of *Hosanna*-*Tabor* and arguing that granting special protection to religious institutions is inconsistent with the modern understanding of religious freedom as rooted in a broader freedom of conscience.\textsuperscript{50} This essay seeks to refute the institutional understanding of the Religion Clauses adopted by most scholars, and 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.

\textbf{II. THE PROBLEMATICS OF GROUP RIGHTS UNDER THE RELIGION CLAUSES}

The ruling of *Hosanna*-*Tabor* that the rights of religious institutions derive from the Religion Clauses, instead of from more generic rights of assembly and association, seems at first glance perfectly logical, and 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”\textsuperscript{51} seems irrefutable. Indeed, given this seemingly obvious point one might wonder why the EEOC and the Solicitor General’s Office – hardly an organization prone 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. First of all, 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.\textsuperscript{52} There is no evidence, textual or historical (on which more later\textsuperscript{53}), that the Framers meant either the Establishment or Free Exercise Clauses to protects groups as such (as opposed to protecting them if necessary to protect individuals). But more fundamentally, the Court’s own doctrine before *Hosanna*-*Tabor* was decided tended to undermine a claim under the Religion

\begin{itemize}
\item \textsuperscript{47} Garnett, \textit{supra}, \textit{ibid.} at 7-8.
\item \textsuperscript{48} McConnell, \textit{supra} note \textsuperscript{46}, 35 Harv. J.L. & Pub. Pol’y at 836.
\item \textsuperscript{51} *Hosanna*-*Tabor*, 132 S. Ct. at 706.
\item \textsuperscript{52} Christopher Lund, \textit{Church Autonomy Reenconceived: The Logic and Limits of *Hosanna-*Tabor*} at 11 (Working Paper 2013).
\item \textsuperscript{53} See \textit{infra} at \textsuperscript{49}.
\end{itemize}
Clauses. The key precedent here – relied upon heavily by the Solicitor General\textsuperscript{54} -- is the Court’s decision in \textit{Employment Division v. Smith},\textsuperscript{55} which held that “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).”\textsuperscript{56} The Solicitor General argued that this case fell squarely within \textit{Smith}, since no one disputed that the ADA is a “valid and neutral law of general applicability.” The \textit{Hosanna-Tabor} Court conceded the latter point, but nonetheless curtly distinguished \textit{Smith} on the grounds that “\textit{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.”\textsuperscript{57} In other words, the Court limited \textit{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,\textsuperscript{58} and rightly so. After all, even if the Free Exercise Clause was intended to provide some protection to religious institutions (a doubtful proposition, as we shall see\textsuperscript{59}), there can be no doubt 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 lead to the Free Exercise Clause, stated that ”The civil rights of none shall be abridged on account of religious belief or worship, . . . nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed,”\textsuperscript{60} and George Mason’s proposal on which Madison based his, 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.”\textsuperscript{61} There can be no serious doubt that both of these formulations focus on the freedom of conscience of individuals, not the autonomy of groups. Nor is there any 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 also does not save the day. This is because the distinction again rests on preferring institutions to individuals, since individuals cannot act internally.

\textsuperscript{54} Brief of Federal Respondents, supra note __, at 20-29.
\textsuperscript{55} 494 U.S. 872 (1990).
\textsuperscript{56} Id. at 879.
\textsuperscript{57} \textit{Hosanna-Tabor}, 132 S. Ct. at 707.
\textsuperscript{58} See Lund, supra note __, at 12 & n.53 (citing sources).
\textsuperscript{59} See infra at __.
\textsuperscript{60} Amendments Offered in Congress by James Madison June 8, 1789, available at http://www.constitution.org/bor/amd_jmad.htm.
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 does the Free Exercise Clause. The “ministerial exception” is a defense against regulation. To say that the Establishment Clause requires it is to say that regulation of a religious institution violates the Establishment Clause. But that is very odd. Interference with religious practice naturally raises Free Exercise concerns (but for *Smith*), but in what sense does such regulation establish a religion? The Court’s response is to say that when the government appoints a religious minister, that constitutes an establishment. Perhaps. But as the Solicitor General pointed out, actual appointment of a minister was not at issue in *Hosanna-Tabor*, since neither Perich nor the EEOC were seeking reinstatement as a remedy (not least because apparently the school had closed by the time the case reached the Supreme Court).62 The Court’s response is that the remedies she did seek—mainly back- and frontpay—“would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination.”63 This conclusory assertion might explain why the Free Exercise Clause is violated by such remedies (again, but for *Smith*); but it does not seem to have any link to the Establishment Clause.

In short, the Court’s Religion Clause analysis in *Hosanna-Tabor*, including in particular its attempts to reconcile its 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.”64 In other words, the Court was required to rely on the Religion Clauses because it firmly believed that the Constitution favors religious groups over nonreligious ones. And in fact, 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 pretextual65 (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 unresolved66). In contrast, the Court’s modern expressive association jurisprudence grants immunity from antidiscrimination laws to a secular group only if it can demonstrate that

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63 *Hosanna-Tabor*, 132 S. Ct. at 709.
64 Id. at 706.
65 Id. at 709.
66 Id. at 710.
application of the law will interfere with the group’s ability to convey its message\textsuperscript{67} – a difficult hurdle as cases such as \textit{Roberts v. U.S. Jaycees} demonstrate.\textsuperscript{68}

The \textit{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.\textsuperscript{69} If this is so, however, then a preference for religious over secular groups would itself appear to be a form of viewpoint discrimination, violating basic free speech principles. This flows from the fact that unlike the broader rights of association and Assembly a special right for religious groups is defined based on the \textit{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.\textsuperscript{70} It seems most unlikely that there is such a sharp conflict between foundational Religion Clause and foundational Free Speech principles.

The preference also runs contrary to the received wisdom in the lower courts. In a series of decisions prior to \textit{Hosanna-Tabor}, those courts had held (largely because of \textit{Smith}) that even when a law impinges on the internal organization of a religious group, freedom-of-association provides \textit{greater} protection to such groups than do the Religion Clauses.\textsuperscript{71} Thus in \textit{Salvation Army v. Dep’t of Cmty. Affairs of State of N.J.},\textsuperscript{72} the Third Circuit was faced with the question

\begin{itemize}
  \item \textsuperscript{67} See \textit{Boy Scouts v. Dale}, supra, 530 U.S. at 648; \textit{Roberts}, supra, 468 U.S. at 627.
  \item \textsuperscript{68} See supra at __.
  \item \textsuperscript{70} See supra at __.
  \item \textsuperscript{71} For a pre-\textit{Hosanna-Tabor} scholarly identification of this point, see Scott Novacek, \textit{The Promises and Problems of Treating Religious Freedom as Freedom of Association}, 45 Gonz. L. Rev. 745, 758 (2009). For a contrary example, see \textit{Bronx Household of Faith v. Board of Educ. of City of New York}, 876 F.Supp.2d 419 (S.D.N.Y. 2012) (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).
  \item \textsuperscript{72} 919 F.2d 183 (3d Cir. 1990).
of whether a 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, but nevertheless remanded the case for the district court to consider the Army's expressive-association claims, which it found still viable. Similarly, in Wiley Mission v. New Jersey, the court was faced with a challenge by a church that ran a retirement center to a New Jersey regulation which required the governing boards of such centers to include a resident, and so which in-effect would have required the church to admit a non-member to its governing board. The court rejected Wiley Mission’s Free Exercise claim citing Smith, but then granted the church 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. Interestingly, in the course of so holding, the court in a footnote considered an argument based on the ministerial exception, and while it did not have to resolve the issue, it strongly suggested that Smith barred such a claim.

In fact, the Court’s premise that the Religion Clauses dictate a preference for religious groups over secular ones is simply wrong, and is not supported by either the text, history, or purposes of the Religion Clauses. The textual problem we have already noted: 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. Similarly, the Establishment Clause clearly does bar certain forms of governmental support to religious groups but not their secular equivalent, but again it says nothing about special rights for religious groups (though 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).

The history is equally problematic. At the heart of Hosanna-Tabor, as well as much modern “Freedom of the Church” scholarship, is the premise that religious institutions, qua institutions, are entitled to substantial autonomy under the

73 Id. at 194-196.
74 Id. at 200-201.
76 Id. at *7-*10.
77 Id. at 11-16.
78 Id. at *16 n.16. See also Jews for Jesus, Inc. v. Port of Portland, Or., CV04695HU, 2005 WL 1109698 (D. Or. May 5, 2005), aff’d 172 Fed. Appx. 760 (9th Cir. 2006) (granting careful attention to free speech claims against a rule requirement a permit before leafleting at Portland’s airport, but dismissing a free exercise claim summarily on the basis of Smith).
79 See supra at __.
80 I explore these issues further in Part IV, infra.
Religion Clauses. Indeed, 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. 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. The reasons for this are 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. Contemporary Protestant theology, and defenses of religious liberty, rested fundamentally on the principle that each individual should have the right to read the scriptures for himself, and to judge for himself on religious matters.

James Madison's own defense of religious liberty in his famous 1785 Memorial and Remonstrance (directed at Episcopalian Virginia) rested essentially on these grounds, that religious freedom was grounded in the right of each individual to pray to the Creator as he chose. It is in this context that we must read Madison’s proposal to Congress in 1789 (based on George Mason’s identical language) that the Constitution be amended to protect “the full and equal rights of conscience.” 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, furthermore, a virulent anti-Catholicism. Brownstein extensively catalogues proof of the widespread nature of this antipathy, and I will not repeat his convincing arguments except to emphasize that these attitudes were 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. And prominent revolutionaries such as John Adams, Samuel Adams, and John Jay expressed similar views, in the latter two cases going so far as to argue that Catholics do not deserve religious toleration. Moreover, importantly, the basis for these anti-Catholic feelings was not just historical rivalry, but also the hierarchical nature of the Catholic Church, which many in the Framing generation saw as directly opposed to religious liberty. In other words, it was precisely the fact that the Catholic was (and is) the preeminent example of a religious institution existing distinctly from

81 Garnett, supra note __, at 15-17; see also Schragger & Schwartzman, supra note __, 99 Va. L. Rev. at 922.
82 Brownstein, supra note __, at 14, 16 (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, 812-813 (1997) (the modern concept of religion was formulated in an almost entirely Protestant context).
83 Brownstein, supra note __, at 14-16.
84 Id. at 15 & n.59.
85 See supra at __.
86 Brownstein, supra note __, at 16-23.
87 Id. at 22 & n.109.
88 Id. at 20-23.
members that lead many leading Protestant thinkers of the time, including leading Framers, to view the Church as unworthy of tolerance. Again, these attitudes seem to cut strongly against a institutional vision of religious liberty.  

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. 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. This structure grew out of the historical roots of American religious life at the frontier, but also out of the Protestant commitment to individual conscience and to principles of self-government that eventually erupted in the American Revolution. This point should not be overstated. Certainly, as Brownstein concedes, over time Protestant denominations in America had developed institutional structures, and some form of hierarchical organization, which many supported. 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. In the second, President Madison vetoed a bill to incorporate an Episcopalian church in Alexandria on the grounds that the bill established internals procedures for the church, including procedures for election and removal of clergy, all in violation of the Establishment Clause. All these episodes establish is that the Establishment Clause forbids the government from getting involved in explicitly ecclesiastical decisions requiring ecclesiastical judgments. It says little about whether religious institutions are subject to secular regulation through laws such as the ADA.

Indeed, if one moves beyond federal law, the historical evidence suggests that many of the Framers believed the State did have a role to play in regulating even the internal structure of religious groups, to ensure their democratic nature. In

89 See also Schragger & Schwartzman, supra note __, at 99 Va. L. Rev. at 952-953 (recounting evidence of hostility to institutional religion in the Framing era).
91 See Brownstein, supra note __, at 23 & n.112.
93 Brownstein, supra note __, at 35-37.
94 Hosanna-Tabor, 132 S. Ct. at 703.
95 Id. at 703-704.
fact, many states in the years following the Revolution adopted legislation granting boards of trustees, elected by congregations, control over the property of churches, and also granting them the power to appoint ministers.\textsuperscript{96} Needless to say, such laws inevitably created conflicts with the institutional Catholic Church, which had very different ideas about such powers, but by and large in such conflicts the public—including many American Catholics—and the states supported lay, democratic control.\textsuperscript{97} Again, this is not to say that all members of this generation supported such a view. But what is clear is that many members of the Framing generation, probably a majority, believed strongly in such a local, democratic model for congregations, and more significantly, were willing to let state governments (who were not yet subject to the dictates of the Establishment Clause) impose such a model.

Indeed, as Schragger and Schwartzman point out, defenses of Freedom of the Church based on a theory of independent sovereignty almost seems to demand a democratic structure for churches, since only then would such separate sovereignty be reconciled with Republicanism and popular sovereignty.\textsuperscript{98} Unlike many members of the Framing generation, however, Schragger and Schartzman (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,\textsuperscript{99} it is important to note here that protecting religious groups’ autonomy under the Assembly Clause and/or freedom of association does 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 (albeit some groups may choose to separate themselves to some extent, in order to nurture idiosyncratic values). Within that context, and so long as membership in an assembly/association is voluntary, the State can and must grant such groups wide autonomy to structure themselves as they will, encompassing everything from an hierarchical, international group such as the Catholic Church (or the Communist International), to unstructured, purely local groups.

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. It seems relatively clear, based on its language, drafting 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.\textsuperscript{100} In other words, the purposes are fundamentally dignitary. Certainly, protecting such dignitary concerns also

\textsuperscript{96} Brownstein, \textit{supra} note __, at 42-43.

\textsuperscript{97} \textit{Id.} 43-44.

\textsuperscript{98} Schragger and Schwartzman, \textit{supra} note __, 99 Va. L. Rev. at 944.

\textsuperscript{99} See Part III, \textit{infra}.

\textsuperscript{100} For more lengthy defenses of this position, see Brownstein, \textit{supra note} __, at 5-6.
advances instrumental values, and that may well be have been a secondary motivation; but as the language of Madison and Mason’s original proposals make clear, at the heart of Free Exercise is freedom of individual conscience.

Dignitary interests, however, provide a very weak basis for protecting groups as groups. 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. 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. Moreover, if the Court were ever to reconsider its decision in Smith and breath serious life back into the Free Exercise Clause, those derivative rights might become quite extensive. But the point is that these rights are derivative, they are not rights of religious groups qua groups, and have little relevance therefore 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 “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. And on the facts of Hosanna-Tabor itself, it is hard to see how giving a school owned by church the power to fire a teacher who taught primarily secular materials, for reasons having nothing to do with the quality or content of her teaching, had much direct relationship to the church’s parishioners’ freedom of conscience. 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.

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102 See supra at __.

103 For similar arguments, see Brownstein, supra note __ at 7-11; Schragger & Schwartzman, supra note __, 99 Va. L. Rev. at 965-966.


To the contrary, the only obvious dignitary interests at stake in the case were Perich’s, but the Court ignored those 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 thus 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 (for example through its prohibition on the imposition of taxes to fund the clergy\textsuperscript{106}), 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. Certainly, given the Framers’ intimate knowledge of the religious wars that had devastated Great Britain and the rest of Europe in just the prior century, this would have been a primary consideration in their minds.\textsuperscript{107} And in perhaps its most thoughtful opinion on the subject, this is precisely the position adopted by the Supreme Court.\textsuperscript{108} Important, indeed critical, to a well-functioning society that 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 (and that alone) was the target of George Mason’s original proposal on the subject.\textsuperscript{109} 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;\textsuperscript{110} but no one suggests such an explanation for

\begin{itemize}
  \item \textsuperscript{106} 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 \url{http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html}, which in turns was one of the earliest steps in the dis-Establishment movement in the early United States.
  \item \textsuperscript{107} 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 discord, by proscribing all difference in Religious opinion”).
  \item \textsuperscript{108} Engel v. Vitale, 370 U.S. 421, 429 (1962).
  \item \textsuperscript{109} George Mason’s Master Bill of Rights ¶ 20, available at \url{http://www.constitution.org/gmason/amd_gmas.htm} (“no particular religious Sect or Society of Christians ought to be favored or established by Law in preference to others”).
  \item \textsuperscript{110} 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
\end{itemize}
the ADA (or any other antidiscrimination statute), and such an extreme situation would be forbidden by the Free Exercise Clause even post-Smith. The Establishment Clause does no work here. The conclusion thus seems inescapable: the Religion Clauses simply cannot justify the ministerial exception recognized in Hosanna-Tabor.

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 churches? The EEOC and Perich in fact argued that recognizing a ministerial exception would raised questions about the application, for example, of immigration or child labor laws to churches. The Court’s response 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,” but did not resolve the issue. Instead, it limited its holding sharply to “an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her.” All of this, however, is quite dissatisfying. Despite some of the soaring language of “Freedom of the Church” advocates, clearly there must be some limits on even internal church autonomy – surely we would not permit a church to engage in human sacrifice of volunteer priests or congregational members. But given the absolutist language of the Court’s opinion, 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” (recall, this was the basis upon which the Hosanna-Tabor Court distinguished Smith), 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, in particular, that the Court singles out antidiscrimination laws 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 and Ashutosh Bhagwat, The McCleskey Puzzle: Remediying Prosecutorial Discrimination Against Black Victims in Capital Sentencing, 1998 S. Ct. Rev. 145, 150-155.

112 Hosanna-Tabor, 132 S. Ct. at 710.
113 Ibid.
114 See Mark D. Rosen, Religious Institutions, Liberal States, and the Political Architecture of Overlapping Spheres, 2013 U. Ill. L. Rev. __, 9-10 (forthcoming 2013) (using this example to critique the “separate sphere” argument for church autonomy).
115 Hosanna-Tabor, 132 S. Ct. at 707.
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 fudged in Hosanna-Tabor, is the definition of which employees qualify as “ministers” for the purposes of the ministerial exception. As discussed earlier, the Court split 3 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. The two concurrences, on the other hand, 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. The difficulty, which both Justices Thomas and Alito acknowledged though it lead them in different directions, is that the definition of a minister is, fundamentally, a theological/ecclesiastical question. To resolve it, a court must resolve questions of religious meaning – but the whole point of the ministerial exception, as well as the line of cases involving church property disputes upon which the Hosanna-Tabor Court relied, was to ensure that courts are not placed in this 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 (what makes a title equivalent to minister? how is a court to judge what constitutes “ordination”?) and whether the employee performs religious duties (what makes a particular duty religious?). This problem is compounded, as Justice Alito recognizes, by the extraordinary religious diversity in the modern United States which results in enormous variations in organization and leadership of religious groups. Justice Alito seeks to avoid this problem by eschewing reliance on such obviously Christian factors as the use of the term “minister,” or formal ordination, and instead focuses on function. But his test, which defines as a minister “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,” 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.

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

116 See supra at __.
117 See Corbin, supra note __, 106 Nw. U. L. Rev. at 966.
118 See Hosanna-Tabor, 132 S. Ct. at 704-705 (citing Watson v. Jones, 80 U.S. 679 (1872); Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94 (1952); Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich, 426 U.S. 696 (1976)).
119 Id. at 711 (Alito, J., concurring).
120 Id. at 712 (Alito, J., concurring).
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.\(^{122}\) 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.\(^{123}\) And 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 to them probably do not qualify as churches entitled to the ministerial exception, while similar groups might. 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.\(^{124}\) On the other hand, it seems peculiar to describe the Scouts as a church, or scouting leaders as ministers—certainly there was no mention of the ministerial exception in the *Dale* litigation. But why are the Scouts different from a Quaker congregation? Furthermore, 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 more and more with “parachurches” rather than formal congregations.\(^{125}\) 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.

The ultimate problem here 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 for that matter 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 itself deeply troubling under the Religion Clauses. On the other hand, to


\(^{123}\) Contrast Malnak *v.* Yogi, 592 F.2d 197 (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) (yoga as taught in a public school is not religion).


\(^{125}\) Inazu, *supra* note __, *The Freedom of the Church* at 31-34.
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, courts have divided.126 It seems to me, however, that recognizing such religious exemptions must be wrong. Not only does doing so discriminate against nonreligious, ethical perspectives – itself a profound problem under free-speech principles127 – but if followed consistently it will lead to the evisceration of much of the modern regulatory state, including antidiscrimination laws, at least as applied to smaller 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. That fact alone makes the Religion Clauses a poor home for such rights – Free Exercise because it sounds primarily in dignitary concerns, and Establishment because, as noted earlier,128 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 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

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. Furthermore, there is also little doubt what that instrumental goal is: furthering democratic self-governance. Taking the last two provisions first, there seems to be no plausible

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126 Contrast Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (en banc) (finding that contraceptive mandate, as imposed on a for-profit corporation, violates Religious Freedom Restoration Act); Korte v. Sebelius, 2013 W.L. 596092 (7th Cir. 2013) (same); Gilardi v. U.S. Dep’t of Health & Human Servs., 2013 W.L. 5854246 (D.C. Cir. 2013) (finding that 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 (3rd Cir. 2013) (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. Hobby Lobby Stores, supra, at *16.
127 See Schwartzman, supra note __, 79 U. Chi. L. Rev. at 1374.
128 See supra at __.
argument that the rights to assembly and to petitioning the government for a redress of grievances serve any dignitary, natural-rights values. Rather, they are purely about self-governance and democratic accountability (though as we shall see, those concepts must be defined capaciously). This is most obvious, of course, with petitioning – it is hard to imagine anyone who would consider petitioning a key aspect of self-identity or self-fulfillment. 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 was one of the people to peaceably assembly “and consult for their common good.”129 The latter restriction makes clear that when the people assembled, they were doing so in their sovereign capacity and not to pursue their personal ends.130 When the “consult for the common good” language was dropped from the proposed amendment (why this happened is quite unclear),131 the legislative record gives no indication that the purpose was to change the underlying purpose of the right. If anything, it suggests that the language was dropped to ensure that the government did not seize upon this language to bar legitimate assemblies.132 Indeed, the sparse legislative history we have of the Assembly Clause leaves no doubt that the Framers were intimately aware of the link between Assembly and democratic self-governance.133

Moving back further in the First Amendment, there also seems little doubt about the fundamentally instrumental goals of the Press Clause. Again, 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,”134 and Mason’s was essentially the same.135 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.136 So that leaves speech. It is true that over the years, in addition to its obvious role in sustaining a republican form of government, scholars

132 See Inazu, supra note __, 84 Tul. L. Rev. at 571-573.
133 COMPLETE BILL OF RIGHTS, supra note __, at 143-145.
135 George Mason’s Master Bill of Rights ¶¶ 15, 16, 20, available at http://www.constitution.org/gmason/amd_gmas.htm (“the Freedom of the Press is one of the great Bulwarks of Liberty, and ought not to be violated”).
and judges have pointed to speech’s instrumental role in the “search for truth,” and to speech’s dignitary role in advancing individual self-fulfillment. It seems safe to say, however, that in the modern era 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 advance democracy. I have defended this position elsewhere, and Jim Weinstein and Robert Post have expounded the same position far more ably than me. 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. As I have extensively argued elsewhere, there seems little doubt that these rights operate in tandem, combining with each other to better effectuate citizen-participation in governance. 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.” The second point, which I have also elucidated in more detail before, is that citizens’ involvement in self-governance is not limited to voting, or educating themselves to vote. Nor is it limited to polite debate. Instead, it incorporates a vast amount of activity and organization relevant to being a citizen, including protesting, petitioning, and other obviously political activities; but also activities which form values, build organizations and common interests, and more generally enable separation between the sovereign people and the state. Indeed, in an era in which most adults lacked the franchise, participation in such activities was the thing that permitted most citizens to act as citizens.

141 Bhagwat, supra note __, 120 Yale L.J. at 995.
143 Bhagwat, supra note __, 120 Yale L.J. at 995-998.
144 See id. at 993.
The above discussion, combined with the discussion in the previous Part, would seem to suggest a substantial gap between the Religion Clauses and the rest of the First Amendment. The Religion Clauses primarily advance dignitary interests, or seek to prevent conflict due to religious preferentialism, while the speech, press, assembly and petition clauses advance popular sovereignty. That two different parts of the same Amendment have such different goals might 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. What is striking, however, is how often when one starts to examine arguments in favor of the religious rights of groups, they seem to sound more in self-governance than in traditional Religion Clause values. Richard Garnett, for example, 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 instrumental reasons sounding in democracy, describing churches as one kind of non-governmental group that contributes to the balance of power in a democratic system of government, and describes it as, along with the press, contributing to a “civil-society space” within which citizens can speak and develop values free of the government. Indeed, 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 insisting (inexplicably from my perspective) that religion is special, and religious groups different from secular ones. Similarly, Paul Horowitz’s defense of church autonomy relies on the role of churches, like other “First Amendment Institutions,” in enabling public discourse, and so enabling democracy. Indeed, 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. All of this suggests that the Solicitor-General’s efforts (supported by some previous scholarship) 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.

Nor is there anything ahistorical about protecting religious groups through the Assembly Clause (and the modern, derivative association right). As John Inazu

\[145\] For a similar conclusion, see Alan Brownstein, Taking Free Exercise Rights Seriously, 57 Case Western L. Rev. 55, 91 (2006).
\[146\] See supra at __.
\[147\] See Garnett, supra note __, at 11.
\[148\] Id. at 13-14.
\[149\] Id. at 29.
\[150\] Horowitz, supra note __, FIRST AMENDMENT INSTITUTIONS at 82-84, 176.
\[151\] Hosanna-Tabor, 132 S. Ct. at 712 (Alito, J., concurring).
\[153\] Id. at 706.
points out, during the brief debates (at least 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. There is thus solid historical precedent and evidence that the Assembly Clause protects all groups, both secular and religious; and further, that it 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 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. It also strongly suggests that the lower court decisions in cases such as Salvation Army v. Dep’t of Cmty. Affairs of State of N.J. and Wiley Mission v. New Jersey granting greater protection to religious groups’ expressive activities than to their religious activities, are also mistaken. 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. Indeed, given the significant role played by ministers in fomenting rebellion, both during the American Revolution and in England in the 17th Century, it is far from clear that the Framers would have distinguished between religion and politics as such.

In addition to fitting well with text, history and the 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 provide little guidance on boundaries – after all, human dignity is an entirely subjective, individualistic thing, and arguably any activity can be central to someone’s definition of self. Instrumental theories, on the other hand,

154 Inazu, supra note __, 84 Tul. L. Rev. at 575-576 (citing at The Complete Bill of Rights at 144 (quoting 1 Annals of Cong. 760 (Joseph Gales ed., 1834))).
156 See Inazu, supra note __, LIBERTY’S REFUGE at 141-144, 164-168.
157 See supra at __.
158 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,” 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.
provide a clearer principle: does the activity being regulated 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, and if so, does the regulation being challenged interfere with the group’s ability to play that role. This question will not, of course, always be easy to answer, and there will undoubtedly be disagreements on whether particular types of groups such as commercial entities should be protected; 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 of course continue to do so today. But actual political engagement is not a prerequisite for protection. As discussed earlier, the concept of contributing to democratic self-governance must be understood in capacious terms. 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. Moreover, groups contribute to self-governance not simply by engaging in such activities (though without groups, most such activities would be meaningless if not impossible), but also by fostering in citizens the values and skills needed to be active citizens and (in the Supreme Court’s words) acting “as critical buffers between the individual and the power of the State.” Private groups are essential to this process of value-formation both because humans do form values in groups, but also 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 such democratic associations. Not only are 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. This insight is reinforced by the fact, discussed earlier, that the Framing generation was overwhelmingly Protestant, and tended to favor (sometimes through law) church

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159 Compare Bhagwat, supra note __, 120 Yale L.J. at 1002 and Inazu, supra note __, Liberty’s Refuge at 166-168 (they should not) with Robert Vischer, How Necessary is the Right of Assembly?, 89 Wash. U. L. Rev. 1403, 1413-1415 (2012) (they should).
160 See supra at __
163 Ibid.
structures that were local and democratic.\footnote{165} Such institutions provided opportunities to hone skills that would 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.

Indeed, an argument can be made, as Justice Alito suggests in \textit{Hosanna-Tabor},\footnote{166} that religious groups are \textit{especially} well-suited to advance self-government. One reason for this is the stricter separation between religious groups and the state than secular groups. The role of democratic associations in advancing popular sovereignty, it must be remembered, is to act as a source of values independent of the state, and to provide what the Supreme Court has called a “buffer” between citizens and the state.\footnote{167} To play that role effectively, however, it is essential that these groups retain independence from the state, for obvious reasons. 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. Another way in which the state can co-opt associations is 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. Nor is this danger theoretical, as the nation’s law schools discovered when they sought to challenge the military’s now-defunct policy of excluding gays and lesbians.\footnote{168} 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.\footnote{169} Admittedly, recent decisions such as \textit{Zelman v. Simmons-Harris},\footnote{170} permitting religious groups to participate in neutral funding schemes such as school vouchers, somewhat undermines this distinction, but it remains true that the Establishment Clause remains a flat bar on government support for the core, religious (and value-forming) functions of religious groups, in a way with no secular parallel. Furthermore, 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, as well as

\footnote{165} See supra at __.
\footnote{166} \textit{Hosanna-Tabor}, 132 S. Ct. at 712 (Alito, J., concurring) (“[t]hroughout 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 \textit{Roberts}, supra, 468 U.S. at 619).
\footnote{167} \textit{Roberts}, supra, 468 U.S. at 619; see also \textit{Hosanna-Tabor}, supra, 132 S. Ct. at 712 (Alito, J., concurring).
\footnote{169} Brownstein, \textit{supra} note __, 32 Cardozo L. Rev. at 1708; Brownstein, \textit{supra} note __, 57 Case Western L. Rev. at 93.
\footnote{170} 536 U.S. 639 (2002).
particularly powerful shields against intrusions of the state (as demonstrated, for example, by African American churches during the Civil Rights era).

Protecting religious groups because of their contribution to self-governance, however, forces us to confront the difficult question of the appropriate 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"\textsuperscript{171} – might be understood to exclude all religious motivations, and so all religious groups, from politics. But that cannot be correct. First of all, it obviously has not been our historical practice.\textsuperscript{172} But more fundamentally, it does not correspond with our approach in other areas, with other groups. Thus under the Fourteenth Amendment, legislation adopted with an explicitly racist or sexist purpose is unconstitutional.\textsuperscript{173} Yet surely that does not mean that the Ku Klux Klan, or a male chauvinist political group, can or must be excluded from politics.\textsuperscript{174} 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,\textsuperscript{175} 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, moreover, entirely consistent with the line of cases in the Supreme Court dealing with intra-church property disputes, cited and relied upon in Hosanna-Tabor.\textsuperscript{176} In each of these cases, 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 faction within the church controlled particular property. But this makes sense. In those cases, courts had reversed the decisions of ecclesiastical authorities on essentially religious grounds, thereby directly intruding on the religious group’s internal autonomy on religious/ideological grounds. Such intervention would be problematic for any democratic association, not just a

\begin{itemize}
  \item \textsuperscript{171} Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
  \item \textsuperscript{172} 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.
  \item \textsuperscript{174} For a related argument, see Schwartzman, supra note __, 79 U. Chi. L. Rev. at 1391.
  \item \textsuperscript{176} See Hosanna-Tabor, 132 S. Ct. at 704-705 (citing Watson v. Jones, 80 U.S. 679 (1872); Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94 (1952); Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich, 426 U.S. 696 (1976)).
\end{itemize}
church. 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. 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 one regardless of whether the group is religious or secular. The Court’s general solution appears to be to forbid direct intervention into internal group dynamics, but permit the application of neutral laws which incidentally affect those dynamics. The key insight, however, is that (contrary to what the Court said in Roberts) the application of antidiscrimination law is such a direct regulation of group structure, 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 (or not). As such, application of antidiscrimination laws burdens the assembly/association rights of all democratic associations, not just churches.

So, religious groups are appropriately protected by the Assembly Clause, and are appropriately engaged in the process of self-governance. Obviously, however, religious groups are not the only groups that contribute to self-governance, nor indeed is it clear that they contribute more directly than secular and semi-secular ideological groups such as the Sierra Club, or the Boy Scouts. Indeed, the whole thrust of the discussion so far is that the Assembly Clause protects the internal autonomy of both secular and religious groups that constitute democratic associations. What that means, in turn, is that reliance on the Assembly Clause to protect religious groups obviates the need to define what is meant by a religious group, as is required to implement a ministerial exception rooted in the Religion Clauses. As noted earlier, that task is impossible, and having governmental bodies such as courts trying to define religion is in deep tension with Establishment-Clause values.

Reliance on the Assembly Clause also mitigates the problem of determining what sorts of religious relationships are protected from regulation – i.e., from 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

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177 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.
179 The definitive scholarly discussion of this problem is Madhavi Sunder, Cultural Dissent, 54 Stan. L. Rev. 495 (2001).
180 468 U.S. at 628 (describing the application of antidiscrimination law as causing “some incidental abridgement of the Jaycees’ rights”).
181 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.
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/ideological mission. There is no doubt that there must be some deference to a group’s determinations in this regard – as noted by the Court in Boy Scouts v. Dale,182 and by Justice Thomas in Hosanna-Tabor183 – if the group’s autonomy is to be meaningful. 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 as a teacher surely played a role in formulating and imparting the Hosanna-Tabor school’s ideological/religious commitments, and so Hosanna-Tabor would clearly have a right to fire her free of state interference, so long as the school claims (as it did) that its dispute with her related to the school’s ideological commitments. Note, furthermore, 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).

Of course, 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 it should not be limited to ministers or churches. Instead, it is properly understood as a general associational exception covering all group members/employees who have a role in formulating or expounding the group’s values and/or ideological commitments. Moreover, 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 closeness of the judicial inquiry into the impact of regulation on the group. Hosanna-Tabor takes the position that such an inquiry is inappropriate, because it undermines the principle that courts should play no role in appointing ministers.184 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.185 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 Jones v. Wolf. 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 Court undertook is extraordinarily dismissive of a group’s autonomy, and leaves its rights at the whim of a possibly hostile judiciary. Some deference towards a groups’ views regarding the impact of regulation on its ability to function seems essential if autonomy is to be meaningful – as the Court seemed to

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182 530 U.S. at 653.
183 132 S. Ct. at 710-711 (Thomas, J., concurring).
184 132 S. Ct. at 709 (declining to engage in a pretext analysis for this reason).
185 468 U.S. at 626-629.
recognize in *Boy Scouts v. Dale*.\(^{186}\) *Dale* was correctly decided for the same reasons that *Hosanna-Tabor* was correctly decided: because 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,”\(^{187}\) it is that this inclusion directly infringes the Boy Scouts’ independent right to organize themselves and select their members in a way that shapes 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 forms of socially destructive behavior. The burden, however, should not be too great. For one thing, in my view (though it is beyond the scope of this article), commercial entities including 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.\(^ {188}\) Furthermore, it seems most unlikely that very 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 their decision to do so. And 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

Till 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, I have argued, is historically and textually unjustified, and forces the courts unnecessarily to confront unresolvable boundary problems. All of this would seem 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. Clearly, by forbidding government endorsement\(^ {189}\) and coercion\(^ {190}\) 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

\(^{186}\) 530 U.S. at 653.

\(^{187}\) *Dale*, 530 U.S. at 653.

\(^{188}\) See *Bhagwat*, *supra* note __, 120 Yale L.J. at 1002, for a more extended discussion of this point.


to forbid direct government payments to support religion\textsuperscript{191} – indeed, it was a dispute over precisely such actions that elicited Madison’s famous Memorial and Remonstrance.\textsuperscript{192} There is, however, no similar prohibition of government funding of speech, or of secular groups, even on a selective, content-based basis.\textsuperscript{193} 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 should not. First of all, 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.\textsuperscript{194} In addition, the government’s supposed right to fund speech selectively should not be overstated. Whatever the doctrine says, is it really conceivable 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 that some form of the anti-preferentialism rule must carry over into the secular sphere. But it 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.\textsuperscript{195}

These differences, however, should not be understood to undermine the basic argument advanced here: that religious groups’ autonomy is best protected through the Assembly Clause on the same terms as secular groups, and that the reason for protecting such autonomy is the instrument one of advancing democratic self-government. For one thing, as noted earlier, 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.\textsuperscript{196} Indeed, as also noted earlier,\textsuperscript{197} the separation between religious groups and the state may actually make religious groups more effective contributors to democratic self-governance than secular groups. 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.

\textsuperscript{192} Id. at 11-12.
\textsuperscript{193} 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 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, 1711 & n.33 (2011) (citing Lee v. Weisman, supra, 505 U.S. at 590-592).
\textsuperscript{194} Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
\textsuperscript{196} See supra at _.
\textsuperscript{197} See supra at _.

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There is another potential difference rooted in the Establishment Clause between religious and secular groups, in this case regarding the nature of the protection such groups receive. To understand this (supposed) difference, some background is needed. Under the Court’s current jurisprudence, the autonomy of secular groups is protected, to the extent that 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*, 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, 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, in the course of rejecting the Jaycees’ association claim. My own view is that 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.

Indeed, 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 depended 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.” However, the Court then proceeded to defer to 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. 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 actual motivations for terminating a minister should also largely be followed for secular groups.

However, it must be conceded that the parallel here is not perfect. Remember that the Assembly Clause is best understood to protect not all employment relationships, but only those relevant to the group’s democratic/ideological mission. In adjudicating the autonomy rights of secular

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199 Id. at 626-628.
201 Id. at 651, 653.
groups, some inquiry into whether the exclusion impacts that mission is inevitable, though as in *Dale* some deference is undoubtedly due them. With religious groups, however, that deference may well need to be stronger, because while inquiring into the ideological commitments of secular groups is unseemly and undermines their autonomy, state inquiries into religious commitments run head-long into the Establishment Clause. It should be emphasized, however, that this distinction is not as great as it seems because 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, provides the best justification for such protection, and provides essentially identical protections for both types of groups.

**CONCLUSION**

The primary thesis of this article is that 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, and concomitantly that the Supreme Court’s decision in the *Hosanna-Tabor* case to root religious groups’ autonomy rights in the Religion Clauses of the First Amendment is supported by neither text, 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. This is no doubt true, and it may well be that the Supreme Court’s *Smith* decision notwithstanding, the Religion Clauses are properly read to provide broad exemptions for religiously motivated conduct, with no secular parallel. But these arguments relate to the protection of individuals, not groups. The basic contention here is that for religious groups, there is no reason, and no justification, for fundamentally distinguishing them from similar, secular groups who play a parallel role in our system of popular sovereignty. Both types of groups are democratic associations, worthy of strong protections.

This sort of instrumental defense of religious group autonomy should not, however, be taken too far. In particular, to say that the reason why the Constitution, through the Assembly Clause, protects the autonomy of religious groups is because of such groups’ contributions to self-governance does not mean that religious institutions themselves see this as their primary role, or that citizens join and attend churches for such instrumental reasons. Furthermore, certain kinds of regulations of religious institutions undoubtedly will violate the Free Exercise Clause, because they will violate the rights of individuals who belong to such institutions. The argument here is simply that 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

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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. Furthermore, 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 is no doubt offensive to some, to whom the superior claims of religion seem obvious and necessary. To reiterate, however, nothing in my argument questions (or supports) the primacy of individual religious autonomy over other forms of autonomy, it only questions preferences for religious over secular groups. 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.