ABSTRACT

Religious Institutions and Associational Freedom
in U.S. Supreme Court Jurisprudence

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My dissertation explores the nature, source and scope of the rights of religious institutions in the American legal tradition. I analyze the Supreme Court's treatment not only of houses of worship, but of religious non-profits, businesses, and student groups at public universities as well. I argue that the protection of religious institutions should concern all citizens because, to say nothing of the sacredness of freedom of conscience, religious institutions play an essential structural role in democratic societies. Religious institutions and other private, voluntary associations defend individuals against the tyranny of the state as well as tyranny of the majority, which Alexis de Tocqueville described as the "greatest danger" to the American republic.

While the current Supreme Court justices have been unanimous in their opinion that houses of worship should possess at least a certain degree of autonomy, they have been much more divided concerning the scope of the rights of other religious organizations. For example, in the 2014 case of *Burwell v. Hobby Lobby*, only a bare majority of the justices sustained a closely held corporation's right to exercise religion.

Justice Ginsburg, embracing an individualistic understanding of religion and rights in her dissenting opinion, argued that religion cannot be exercised by "artificial legal entities" but only by "natural persons." In the 2010 case of *Christian Legal Society v. Martinez*, a five-justice majority effectively denied the expressive association rights of a small Christian student group at a public university by upholding a policy that required every registered student group to accept members, even leaders, who rejected the group's core beliefs.

My dissertation explores these and other cases, demonstrating how a proper understanding of group personhood led to a sound decision in the *Hobby Lobby* case, and how the *Martinez* opinion, on the other hand, was informed by an impoverished understanding of associations and community. I analyze inconsistencies in the Court's jurisprudence concerning freedom of religion and freedom of association; I explore the (individualistic) philosophical assumptions animating the justices' reasoning in some of these cases; and I articulate the principles that are necessary for the full protection of religious institutions.

Religious Institutions and Associational Freedom in U.S. Supreme Court Jurisprudence

by

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TABLE OF CONTENTS

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For my mother, Karen O'Malley

CHAPTER ONE

Introduction

In her dissenting opinion in *Burwell v. Hobby Lobby*, Justice Ginsburg laments the Court's inclusion of for-profit corporations as "persons" under the federal Religious Freedom Restoration Act. "The exercise of religion is characteristic of natural persons," she argues, "not artificial legal entities."[1] In the wake of the ruling, many commentators agreed with Ginsburg, some even calling for a constitutional amendment stating that corporations cannot be considered persons under the law.[2]

Justice Ginsburg's position that religion can only be exercised by natural persons reflects the individualistic perspective from which religious freedom is typically treated in America. Yet it is undeniable that religion is most frequently exercised in groups, and that the group itself is often crucial to this exercise. Individual believers join churches and other religious communities not only to worship a particular deity, but also to seek guidance from the teachings of those communities. As Justice Brennan states in a 1987 case, "[A religious] community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals."[3] In short, it is

[1] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. _, 723 (2014) (Ginsburg, J., dissenting).

[2] *See, e.g.* Jeff Clements, "The Case for a 28th Amendment," *U.S. News & World Report*, July 25, 2014, accessed June 28, 2017, http://www.usnews.com/opinion/articles/2014/07/25/pass-the-28th-amendment-to-ensure-corporations-are-not-people/.

[3] *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), at 342 (Brennan, J., concurring).

necessary to recognize that the group itself is greater than the sum of the individual members.

My dissertation explores the nature, source and scope of the rights of religious associations. Though many scholars have focused on the rights of particular types of groups, such as churches, schools, and businesses, few scholars have provided an analysis of the associational element shared by these groups, explaining how their similarities and differences should affect the degree of protection they each possess. For example, those who argue against recognizing freedom of religion rights for businesses often point out that businesses are not churches. But does this undeniable point necessarily lead to the conclusion that businesses cannot exercise religion at all? For those who do claim that businesses can exercise religion, how can this be so when they hire employees who do not share their faith?

The majority of my dissertation focuses on Supreme Court jurisprudence throughout American history. Since several cases addressing the rights of certain religious groups fall under the Court's arguably unsettled freedom of association jurisprudence,[4] I explore these cases as well as Free Exercise Clause cases. While the current Supreme Court justices have been unanimous in their opinion that churches should be autonomous,[5] they have been much more divided concerning the scope of the rights of other religious institutions. For example, while the majority of the Court upheld the free exercise rights of corporations in *Burwell v. Hobby Lobby*, a five-justice majority in the 2010 case of *Christian Legal Society v. Martinez* effectively denied the expressive

[4] *See* John D. Inazu, "The Unsettling 'Well-Settled' Law of Freedom of Association," *Connecticut Law Review*, 43 (2010).

[5] *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, et al.*, 565 US _ (2012).

association rights of a small Christian student group at a public university. The Court upheld a policy that would prompt the group—and all other groups—either to admit members and leaders who disagree with their beliefs or otherwise forfeit university benefits, putting these groups at an significant disadvantage in the university's forum of ideas. Under policies such as this, a basic constitutional guarantee seems to be denied and meaningful dialogue on campus compromised. I explore these and other cases, seeking to explain how a proper understanding of both corporate personhood and the rights of groups led to the correct result in *Hobby Lobby* and how the majority in *Christian Legal Society* failed to protect the essential link between a group's composition and its message. The fullest protection for religious institutions depends upon a proper understanding of the freedom of all associations.

Literature Review

As many scholars have noted, First Amendment literature and jurisprudence routinely emphasizes the individual and often fails to acknowledge institutions.[6] First Amendment scholar Paul Horwitz explains: "Most of them focus primarily on the classic model of a lone speaker arrayed against the terrible power of the state."[7] In recent years,

[6] Paul Horwitz *First Amendment Institutions* (Harvard University Press, 2013), 27, 41. Gerard V. Bradley, "*Forum Juridicum*: Church Autonomy in the Constitutional Order," *Louisiana Law Review* 49, (1987): 1064; Richard W. Garnett, "Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?" *St. John's Journal of Legal Commentary*, 22 (2007): 516 ("The special place, role, and freedoms of groups, associations, and institutions are often overlooked."); Frederick Schauer, "Institutions as Legal and Constitutional Categories." *UCLA Law Review*, 54 (2007): 1749 (First Amendment jurisprudence tends to treat all speakers as "lone dissenters," thus ignoring important First Amendment values that are served by different types of institutions in the context of both speech and religion.); Frederick Mark Gedicks, "The Recurring Paradox of Groups in the Liberal State," *Utah Law Review*, 2010 (2010): 58 (American constitutional rights doctrine is "relentlessly individualistic.").

[7] Horwitz *First Amendment Institutions*, 41.

scholarship on institutional rights has begun to re-emerge,[8] but it has mostly focused on the freedom of churches and other houses of worship.[9] Much of this was prompted by the Court's 9-0 decision in *Hosanna-Tabor v. EEOC*, which affirmed the principle of institutional rights for churches by declaring that the government cannot intervene in a church's decision to fire a minister.[10]

Though the Supreme Court justices were unanimous on this question, legal scholars are not.[11] Many arguments against the freedom of churches are premised on the broader idea that religion ought not to be "singled out" for special protection at all.[12]

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[8] Paul Horwitz notes that these debates over institutional rights are not new. Many of them mirror debates from the late 19th and early 20th century that were sparked by the "British pluralists," who argued for the importance of non-state institutions in reining in the dangers of the state. According to Horwitz, these debates "return to prominence every scholarly generation or so." Paul Horwitz, "Defending (Religious) Institutionalism," *Virginia Law Review*, 99 (2013): 1049.

[9] *See e.g.* Richard Garnett, "'The Freedom of the Church': (Towards) an Exposition, Translation, and Defense," *Journal of Contemporary Legal Issues*, 21 (2013); Paul Horwitz, "Freedom of the Church Without Romance," *Journal of Contemporary Legal Issues*, 21 (2013); Douglas Laycock, "Church Autonomy Revisited," *Georgetown Journal of Law and Public Policy* 7 (2009); Michael W. McConnell, "The Problem of Singling out Religion," *DePaul Law Review*, 50 (2000).

[10] *Hosanna-Tabor* 565 US _ (2012).

[11] In defense of the institutional rights of churches, see Christopher C. Lund, "In Defense of the Ministerial Exception," *North Carolina Law Review*, 90 (2011): 63; Michael W. McConnell, "Reflections on *Hosanna-Tabor*," *Harvard Journal of Law and Public Policy*, 35 (2012): 837; Horwitz, "Defending Religious Institutionalism;" Garnett, "The Freedom of the Church;" Douglas Laycock, "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy," *Columbia Law Review*, 81 (1981); Laycock, "Church Autonomy Revisited;" Douglas Laycock, "*Hosanna-Tabor* and the Ministerial Exception," *Harvard Journal of Law and Public Policy*, 35 (2012). In opposition to institutional rights for churches, see Caroline Mala Corbin, "Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law," *Fordham Law Review*, 75 (2007); Marci A. Hamilton, *God vs. the Gavel: Religion and the Rule of La*w (Cambridge: Cambridge University Press, 2005); Richard Schragger & Micah Schwartzman, "Against Religious Institutionalism," *Virginia Law Review*, 99 (2013); Leslie C. Griffin, "The Sins of *Hosanna-Tabor*," *Indiana Law Journal*, 88 (2013).

[12] *See* Micah Schwartzman, "What if Religion Is Not Special?" *University of Chicago Law Review*, 79 (2012); Issac Kramnick & R. Laurence Moore, *The Godless Constitution: The Case Against Religious Correctness* (New York: Norton & Company, Inc., 1996); Stephen Gey, "Why Is Religion Special?: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment," *University of Pittsburgh Law Review*, 52 (1990); Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge: Harvard University Press, 2007). Even Justice John Paul Stevens thinks the Religious Freedom Restoration Act violates the Constitution by "singling out" religion for special protection: see *City of Boerne*, 521 U.S. at 536-537 (1997) (Stevens, J., concurring).

Most notable among these scholars are Christopher Eisgruber and Lawrence Sager, who contend that the Religion Clauses were merely enacted to put religion on an equal footing with other commitments and did not intend to secure heightened protection for religious individuals and organizations. Other scholars opposed to broad freedom for churches base their arguments on a skepticism of freedom for institutions as well as an opposition to heightened protection for religion. The most prominent proponents of this position are Professors Richard Schragger and Micah Schwartzman. They agree with Eisgruber and Sager that churches should not receive special protection simply for being religious, but they are also skeptical of group rights as such. They argue that any rights groups may have are merely reducible to the rights of their individual members. Hence, churches can claim no more autonomy than what the individual rights of conscience, privacy, and association can provide them.[13]

Several legal scholars have challenged these ideas. For example, Professor Douglas Laycock argues that church autonomy[14] claims are necessarily distinct from individual conscience claims (also refereed to throughout this dissertation as "conscientious objector" claims or claims requesting "accommodations"). Church autonomy claims are based on the principle that churches should be able to control their own internal affairs, whereas conscientious objection involves an individual declaring that, for religious reasons, he cannot do what the government demands. "The essence of

[13] Schragger & Schwartzman, "Against Religious Institutionalism," 921.

[14] Throughout the dissertation, I will use three different terms to describe the freedom of churches and other houses of worship: "church autonomy," "freedom of the church," and "institutional rights of churches." Different scholars ascribe different meanings to each of these terms. When discussing each scholar, I will use and explain his preferred terms, but when speaking more generally I will say "institutional rights of churches." This simply refers to the idea that the church or religious body itself has rights.

church autonomy is that the Catholic Church should be run by duly constituted Catholic authorities and not by legislators, administrative agencies, labor unions, disgruntled lay people, or other actors lacking authority under church law."[15] When a church is managing its internal affairs, it thus does not have to point to a particular doctrine or conscience claim in every case. It can simply state that the matter at hand is internal to the church. In other words, the church, as a distinct body rather than a composite of individuals, receives protection.

But why is it that a church should receive protection in the first place? The literature reflects, roughly, two main schools of thought. The first is that religion has been singled out for special protection by our Constitution and tradition, and therefore religious communities should receive special protection that may not be available to other groups. This is the claim put forth by First Amendment scholar Michael McConnell, who notes that the government is free to subsidize or promote an ideological position in almost every area of public debate except religion.[16] This supposed requirement of government neutrality towards religion under the non-establishment principle is difficult to justify if religion does not have a special status under the Constitution. If we deny freedom to religious institutions on the grounds that religion is not special, then it logically follows that the government may violate the neutrality principle and favor particular religious views. Because of the special constitutional protection for religion, McConnell suggests that such institutions ought to receive more protection than other

[15] Laycock, "Church Autonomy Revisited." 254. Laycock argues that some church autonomy claims fall under the realms of both conscience and structure: refusing to ordain a female priest is both a conscience claim and an internal management claim.

[16] McConnell, "The Problem of Singling out Religion," 10.

institutions.[17] First Amendment scholars Steven Smith and Richard Garnett also hold this position, arguing that the Medieval concept of "freedom of the church" undergirds this special protection.[18]

The second school of thought in favor of the institutional rights of churches asserts that all groups, whether religious or not, should be free from government interference. Hence, the justification for church autonomy is not grounded in the special status of religion, but simply the idea that all types of associations possess a certain amount of sovereignty. This is the position taken by Paul Horwitz, who argues that churches, like all First Amendment institutions, should receive the amount of deference appropriate to their function.[19] First Amendment scholar John Inazu also shies away from the position that religion is special, not because he finds it to be false, but because it

[17] McConnell treads a careful line with this suggestion. He clarifies that he does support robust protection for other civil society associations, lamenting that the current weak protections for freedom of association are "disturbing," and that we should use the Religion Clauses as a model for heightening the protection afforded to those non-religious groups. Nonetheless, other associations cannot be treated exactly the same way as religious associations. Here, McConnell gives practical rather than constitutional reasons: "The concept of 'civil society' is too diverse to eliminate the need for special provisions for religious associations. Religious institutions are the clearest and most firmly established examples of 'civil society' institutions" McConnell, "The Problem of Singling out Religion," 23.

[18] Steven Smith, *The Rise and Decline of American Religious Freedom* (Cambridge: Harvard University Press, 2014), 7, 33, 35, 37, 46 (arguing for the Medieval roots of "freedom of the church" and their importance to American constitutional law); Steven Smith, "Freedom of Religion or Freedom of the Church?" in *Legal Responses to Religious Practices in the United States: Accommodation and Its Limits*, Austin, Sarat ed. (Cambridge: Cambridge University Press, 2012), 281 (arguing that a fuller commitment to "freedom of the church" would extend broader jurisdictional protection to churches, but not necessarily to other types of religious organizations, such as religious schools); Garnett, "The Freedom of the Church," 59-61 ("Engagement with the 11th century Investiture Crisis, the "Papal Revolution,' and the *libertas ecclesiae* principle could be helpful, if not essential, to an understanding of constitutionalism generally and, more specifically, of the religious freedom protected by the First Amendment to our Constitution."); Garnett, "Religion and Group Rights" (suggesting that the concept of *libertas ecclesiae* would require churches to have a greater claim to autonomy than other voluntary associations such as the Boy Scouts).

[19] Horwitz, "Defending Religious Institutionalism," 1053 ("Nor do I argue that 'churches should receive more deference than other kinds of mediating institutions.' They perform a *distinctive* function, and the deference they receive should reflect that function.").

is simply difficult to justify in our contemporary climate.[20] Instead of relying heavily on the Religion Clauses, he argues, "religious liberty is best strengthened by ensuring robust protections of more general forms of liberty."[21] Like Horwitz, he argues that First Amendment freedoms, including freedom of religion, are only fully protected when the Court acknowledges the vital role that all associations play in our liberal, pluralistic society.

Even if the first school is correct that churches should receive heightened protection, questions about the rights of all other associations must still be addressed by those who wish to fully protect religious freedom. Indeed, individuals practice religion through a myriad of organizations, from parochial schools that provide religious instruction to corporations that are designed to spread the religious message of their owners. Hence, an examination of the nature and role of associations within civil society is necessary. Inazu has provided thoughtful scholarship on the Court's freedom of association jurisprudence and its failure to properly recognize this role.[22] Using the Court's designated terms, he notes that the Court has divided associations into two categories: "intimate" associations and "expressive" associations. Large, "non-intimate" groups that do not exist specifically for the promotion of particular ideas have thus failed to receive protection by the Court.[23] Inazu argues that the Court's framework is

[20] John D. Inazu, "The Four Freedoms and the Future of Religious Liberty," *North Carolina Law Review*, 92 (2014): 830-835 (noting that many arguments in favor of the special treatment of religion are historically contingent and unpersuasive in a society that views principles such as non-discrimination as more important than religious freedom).

[21] Inazu, "The Four Freedoms," 791.

[22] Inazu, "The Unsettling 'Well-Settled' Law of Freedom of Association," 149; John D. Inazu, "A Confident Pluralism," *Southern California Law Review*, 88 (2015); John D. Inazu, "The First Amendment's Public Forum," *William and Mary Law Review*, 56 (2015).

[23] *See Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

problematic in part because it fails to recognize the "expressive potential inherent in all groups."[24]

Richard Garnett, who thinks churches do possess heightened protection, also presents a defense of the freedom of all associations. Like Inazu, he gives a strong defense of their expressive potential. In his seminal 2001 article, "The Story of Henry Adams' Soul: Education and the Expression of Associations," he states: "while it is true that we speak and express ourselves through associations, we are also spoken to and formed by them and by *their* expression."[25] Scholars often neglect to recognize the latter. In this article, Garnett analyzes Supreme Court cases addressing the rights of schools and families, and argues that the Court has embraced the principle of subsidiarity[26] in these cases, respecting the role that these institutions play in shaping their members.[27] Garnett's article was written nine years before the Court denied protection for a religious association in *Christian Legal Society v. Martinez*, but the principles he articulates can be instructive in determining how student groups and other associations can better be protected.

Thus far, I have addressed scholars who focus primarily on either freedom of religion or freedom of association; few scholars have provided a comprehensive

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[24] Inazu, "The Unsettling 'Well-Settled' Law of Freedom of Association," 154.

[25] Richard W. Garnett, "The Story of Henry Adams' Soul: Education and the Expression of Associations." *Minnesota Law Review, 85* 1849 (2001).

[26] The principle of subsidiarity, most commonly associated with Catholic social teaching and often used to describe the functioning of the European Union, dictates that social tasks should be left to the smallest social unit that can perform them effectively. *See* David P. Currie, "Subsidiarity," *Green Bag* 1, No. 2 (1998); Kyle Duncan, "Subsidiarity and Religious Establishments in the United States Constitution." *Villanova Law Review*, 52 (2007).

[27] Garnett discusses *Mitchell v. Helms* 530 U.S. 793 (2000) and *Troxel v. Granville* 530 U.S. 57 (2000).

treatment of both. Paul Horwitz is the only scholar who has done so in recent years. In his 2013 book *First Amendment Institutions*, he critiques the Court for being both too individualistic and too acontextual in its approach to the First Amendment. He argues that the Court formulates rigid rules and broad categories that take little account of real-world contextual differences. For example:

> The word "library" should not just be a label for a particular entity that happens to be a plaintiff or defendant in First Amendment cases to which we strain to apply legal categories such as "public forum." It should be a legally relevant category in its own right, a category informed by the particular cultural role and institutional practices of the "library"— how it fits into our system of public discourse, what ends it serves, and what unique challenges it faces.[28]

Horwitz dedicates chapters to universities and schools, the press, churches, libraries, and associations. In each chapter, he critiques the Court's jurisprudence and offers a better context-focused framework for how the Court should address each type of institution.

Horwitz has rightly diagnosed the problems of both extreme individualism and acontextuality. He successfully dismantles much of the Court's problematic framework, but I argue that what he replaces it with still fails to fully protect the rights of groups. For example Horwitz addresses the aforementioned case of *Christian Legal Society v. Martinez* (2010). In this case, to which I dedicate a full chapter, the Court reviewed a non-discrimination policy of the University of California at Hastings Law School that required all officially recognized student groups to accept as a member or leader any student who wanted to join regardless of that student's status or beliefs. The Christian Legal Society was denied this official recognition, thus losing many benefits including funding and access to university advertising opportunities, because it required all

[28] Horwitz, *First Amendment Institutions*, 78.

members to adhere to certain beliefs about the Christian faith, sexual morality, and marriage. Under its limited public forum doctrine, which allows universities to place certain "reasonable and viewpoint-neutral" restrictions on student forums,[29] the Court concluded that Hastings' accept-all-comers policy did not violate CLS' rights of expressive association.

Horwitz rejects the Court's use of the limited public forum doctrine, but he accepts its conclusion in this case. He laments that public universities are often treated by the Court in the same way that the government is treated, even though the university is a distinct type of institution, government-funded or not. For example, individual students frequently win free speech claims against state universities because the Court insists that "the government" should not be making claims about the value of particular speech. But, according to Horwitz, "this is exactly the job of universities: to judge student speech on its merits— and, often, to find it wanting."[30] Hence, universities should not be subject to the Court's "public forum" doctrine. They are not, indeed, public forums at all. They should be allowed to determine whether they want to require political correctness or not when it comes to sponsoring student organizations.[31]

Horwitz' book and his other scholarly articles provide an excellent starting point for evaluating how the Court has treated First Amendment institutions, and I embrace his

[29] Supreme Court precedent has sorted government property into three categories: 1. Traditional public forums, such as streets and parks, 2. Government property that is not traditionally used as a public forum but is intentionally opened up for that purpose, and 3. Government property that is "limited to use by certain groups or dedicated solely to the discussion of certain subjects" (561 U.S. 661, footnote 11, 2010). Student group forums at universities are a prime example of the third type of forum, since they are typically limited to students. Strict scrutiny is used to review speech restrictions that take place in the first two types of forum. In the third, however, the government must simply show that any restrictions are "reasonable and viewpoint neutral."

[30] Horwitz, *First Amendment Institutions*, 115.

[31] Horwitz, *First Amendment Institutions*, 237.

context-based approach when proceeding in my own analysis. Nonetheless, I argue in chapter three that Horwitz grants so much autonomy to the state university that he allows the university to undermine the very purpose of its existence: to be a "marketplace of ideas."[32] Hence, Horwitz' own framework—evaluating the purpose of *particular* types of institutions—should have led to the conclusion that the Court decided wrongly. I address the tension that he raises between two types of associations: the university and the student groups embedded within it. Yet rather than rejecting the "public forum" doctrine altogether as applied to universities, I explain how a better understanding of both the public forum and the rights of associations could have led to a sounder conclusion in this case.

Overall, I seek to learn how a fuller understanding of associational freedom can be applied to cases dealing with religious institutions, but I am also interested in associations for their own sake. I argue, with Smith and Garnett, that religious communities should indeed possess more protection than other groups because of the jurisdictional boundary recognized by our constitutional tradition, but I will also contend that this heightened protection should not undermine the sovereignty that other types of associations have, whether they are religious or not. Each chapter will address a different type of association and articulate the proper scope of freedom appropriate to its nature.

[32] In the case of *Keyishian v. Board of Regents,* the Court stated that the classroom is "peculiarly the 'marketplace of ideas'" 385 U.S. 589 (1967) at 603.

Chapter Outline

Chapter Two: Religious Free Exercise: An Unfair Privilege or a Sacred Right?

In order to address questions concerning religious institutions, it is necessary to explore how the Supreme Court has treated the free exercise of religion more broadly. In chapter two, I address the question of whether religious free exercise does indeed receive special treatment under the Constitution. While the answer to this question may appear to be obvious, given that the First Amendment specifically contains a clause stating that Congress shall make no law prohibiting the free exercise of religion, the true meaning of these words has been called into question in recent years. Chapter two primarily addresses the arguments of legal scholars Christopher Eisgruber and Lawrence Sager, who argue that equality and a concern for unjust discrimination against religious persons are the true principles that motivated the Religion Clauses, and that these principles apply to secular as well as religious people and organizations.[33]

While the Supreme Court has never gone so far as to embrace their view that secular and religious organizations must be treated equally under the Free Exercise Clause, it has embraced Eisgruber and Sager's claim that the primary concern of the Clause is discrimination. This has affected the way the Court has treated different types of religious freedom claims. In the case of *Employment Division v. Smit*h, which will be analyzed in chapter two, the Court concluded that the Constitution demands no remedy for the burdens on religious practice that are created by neutral, generally applicable laws. In other words, if a law was not intended to negatively impact religion but does so

[33] Eisgruber and Sager, *Religious Freedom and the Constitution*, Kindle locations 575-580.

incidentally, the Free Exercise Clause requires no accommodation, no matter how severe the burden.

I explore the drafting history of the Free Exercise Clause, as well as the history of free exercise jurisprudence, to determine how our legal tradition has understood the purpose and scope of the Free Exercise Clause. I reach two main conclusions. First, it is unequivocally clear from the First Amendment drafting history and Supreme Court tradition that the Free Exercise Clause does single out religious belief and practice for special protection, contrary to Eisgruber and Sager's claim that the Constitution requires equal treatment to all forms of commitments. Second, I conclude that, while the drafting history gives little clear guidance on the exact scope of free exercise, the Framers seem to have chosen the specific language of the Free Exercise Clause in order to allow courts and legislatures to work out the full meaning of free exercise over time, and this concept is certainly broad enough to include the requirement of accommodations. I argue that the Court in *Smith* erred in limiting the Clause to preventing overt discrimination against religious people, and that other Supreme Court precedents provide an approach to free exercise that makes more sense of not only the language of the clause, but of our nation's commitment, from the time of the Founding, to protecting a variety of religious groups, including minority religious sects. Essentially, the purpose of this chapter is to provide the legal and historical context within which I discuss a variety of institutions throughout the next three chapters.

Chapter Three: Christian Legal Society v. Martinez and the Diminution of Freedom of Association

In chapter three, I turn from the free exercise of religion to the freedom of association, the long-recognized right to form groups voluntarily in order to engage in a joint pursuit of ends. The Court has primarily grounded this right in the First Amendment's Free Speech Clause, since individuals express ideas, whether explicitly or implicitly, when they unite into groups for a common cause. Understanding freedom of association, which applies to all groups whether religious or not, is crucial to understanding the freedom of religious institutions. This is because the Court's freedom of association cases have adumbrated certain principles concerning the rights of associations, such as the idea that associations must be free to exclude members whose presence may undermine the group's message. The Court has hence stated that freedom of association "plainly presupposes a freedom not to associate."[34]

Yet, as I demonstrate in this chapter, the Court in recent years has diminished its commitment to freedom of association just as it has to religious free exercise. In the 2010 case of *Christian Legal Society v. Martinez,* the Supreme Court concluded that a public law school may condition its official recognition of a student group, and the benefits that flow from such recognition, on the group's willingness to open eligibility for leadership and membership to all students. I argue that this conclusion amounts to a denial of the core principle articulated above, and that the Court's errors in this case stemmed from an individualistic philosophy that prioritizes individuals over groups. I focus primarily on Justice Kennedy's concurrence, arguing that his reasoning reveals a troubling skepticism of association itself.

[34] *See Roberts v. United States Jaycees,* 468 U.S. 609 (1984) at 623.

Chapter Four: Hosanna-Tabor v. EEOC and the Institutional Rights of Churches

Critical to Eisgruber and Sager's argument discussed in chapter two is the idea that religious freedom does not need its own specific, exclusive protection because other basic constitutional freedoms will be enough to protect religious individuals and groups. They argue that freedom of association is one of these freedoms. This raises an interesting question: if the Court returns to its once robust understanding of freedom of association, would this freedom be sufficient for protecting the institutional rights of churches? This very question was addressed in the Court's 2012 case of *Hosanna-Tabor v. EEOC*, to which this chapter is dedicated.

The answer to the question above depends largely upon the philosophical foundation for the institutional freedom of churches: is this freedom simply an extension of individual rights, or does the church reside in its own sovereign sphere, largely untouchable by government? While Schragger and Schwartzman argue the former, Steven Smith argues the latter. He does not deny that Enlightenment individualism played a role in the American Founders' articulation of religious freedom, but he contends that the story is more complicated. They were, in fact, constitutionalizing the Medieval, and Christian, idea of *libertas eccleas*iae, or freedom of the church, as well as the later Protestant idea of the individual conscience as an "inner church."[35] Historically and philosophically, the rights of conscience were an outgrowth of the rights of the church. As such, institutional rights are conceptually prior to conscience rights, but both ideas reflect the principle that church and state are two separate spheres each with its own proper domain. Thus, the state should not be attempting to regulate the internal affairs of

[35] Smith, *The Rise and Decline of American Religious Freedom*, 7.

the church not only because it would infringe upon individual conscience rights but because to do so would be to overstep its boundary.

Indeed, in the 2012 case of *Hosanna-Tabor v. EEOC*, which addressed the authority of houses of worship over the selection of their own ministers, the unanimous Court did not treat the church autonomy claim as an ordinary conscience claim rooted in the Free Exercise Clause alone; rather, the justices argued that this right is grounded in both the Free Exercise and Establishment Clauses. At issue in this case was the "ministerial exception," or a church's ability to hire and fire its own ministers without interference by employment discrimination laws. The Court traced the sources of the "ministerial exception" back to the English struggle for freedom of the church, citing the Magna Carta as well as the Puritans' desire for the freedom to select their own ministers. "By forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices."[36] This reflects the idea that freedom of religion is not merely a claim of personal autonomy, but is also a jurisdictional claim.[37] I argue that the Court's other cases dealing with the institutional rights of churches also rely on a distinct jurisdiction for religious bodies, not merely an associational claim or conscience claim. I then defend this tradition, seeking to demonstrate why treating the rights of churches as a mere associational or conscience claim is problematic.

[36] *Hosanna-Tabor v. EEOC*, 565 U. S. __ (2012) at 703.

[37] McConnell, "The Problem of Singling Out Religion," 29.

Chapter Five: Corporations as Religious Associations?: The Challenge of Burwell v. Hobby Lobby

Even if one grants that churches should have autonomy over their internal affairs, this does not mean that any organization claiming a religious mission should receive such protection. The 2014 case of *Burwell v. Hobby Lobby* is the prime example of a non-church association seeking to exercise religion, and it is certainly the most controversial example. The Court concluded that a for-profit corporation, the craft store chain Hobby Lobby, could not be forced by the federal government to provide its employees with abortion-inducing contraceptives in violation of the owners' religious beliefs. Specifically, the Court ruled that Hobby Lobby qualifies as a "person" under the Religious Freedom Restoration Act (RFRA), a law passed by Congress in 1993 securing heightened protection for religious persons seeking exemptions to laws that incidentally burden their religious liberty.[38]

This case raises important questions about how to determine whether a particular group can be a rights-bearing entity under the law. In her dissent, Ginsburg argues that, while our legal tradition supports the institutional right of churches to exercise religion, no such solicitude has traditionally been offered to corporations.[39] In explaining this disparate treatment, she observes that members of church communities share the same beliefs, whereas the employees of Hobby Lobby do not share the store owners' religious beliefs. [40] But what exactly *is* the community, the rights-bearing entity, in this case? The

[38] *Burwell v. Hobby Lobby*, 573 U.S. __ (2014) at 695.

[39] *Burwell v. Hobby Lobby*, 573 U.S. __(2014) at 724.

[40] The arguments given by Ginsburg seem to reflect the idea that the rights of churches are simply derived from the rights of the individual members. Churches can exercise religion because all of the members wish to exercise the same religion; it is a collective exercise of the conscience.

Greens, the owners of Hobby Lobby, seem to believe that their family is the rights-bearing entity, and that their employees are those outside of their community whom they seek to serve. If they are correct, then why can't they collectively exercise a conscience in the way that Ginsburg believes churches do? The *Hobby Lobby* case thus demonstrates that, prior to understanding whether an association can exercise religion, we must first determine what the association *is*. In other words, a proper understanding of the scope of freedom for non-church religious groups depends upon a proper understanding of associational freedom more generally. In this chapter, I explore the writings of William Blackstone as well as Supreme Court Justices John Marshall and Joseph Story. I argue that their insights concerning the nature of a corporation should be instructive in demonstrating that Hobby Lobby, even as a profit-making entity, can exercise religion.

With that said, no one would dispute the claim that churches and corporations are different kinds of entities. Certainly customers do not frequent Hobby Lobby in order to participate in a worship service in aisle five. Because of this, I argue, there are indeed different levels of constitutional protection appropriate to different types of organizations. But the key point—the theme that ties these past three chapters together—is that the institution itself, which is greater than the sum of its individual members, does possess rights.

Chapter Six: Conclusion

In the conclusion, I offer final thoughts on what is at stake in the area of institutional freedom, particularly concerning religious institutions. I examine Alexis de

Tocqueville's warnings about majority tyranny, and explain how institutions can help to guard against this threat, as well as tyranny of the state.

Significance

My research is driven by the idea that religious institutions and other associations play an essential role in liberal democratic societies. There are at least three ways in which this role is manifest. First, and most obviously, religious organizations often provide invaluable social services to their communities. Second, religious organizations and other groups provide individuals with a sense of community and belonging, which is crucial in democracies where the social structures that once provided a sense of place are lacking. Third, associations protect individuals from the dual tyranny of the state and the majority. As the Supreme Court explained in *Roberts v. U.S. Jaycees*, associations are "critical buffers between the individual and the power of the State."[41] But state hegemony is not the only threat to freedom in democratic societies. Alexis de Tocqueville identifies the "absolute empire of the majority" as the "very essence" of democratic societies and the greatest threat to American liberty.[42] Associations provide viewpoints and alternative sources of authority that serve to counter the current controlling majority trends, encouraging robust public debate. The rights of religious associations, therefore, are important not only because these groups are vehicles through which individuals exercise their sacred rights of conscience, but also because religious institutions themselves are a part of the very structure of democratic societies. By supplying

[41] *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) at 618-19.

[42] Alexis de Tocqueville, *Democracy in America*. Harvey Mansfield and Delba Winthrop, trans. first edition (University of Chicago Press, 2012), I.II.6, 235.

invaluable services to the community, providing individuals with a sense of place, and by countering the dominating tendencies of the state and the majority, associations help to secure freedom for the entire society, not just the individuals who join them.

CHAPTER TWO

Religious Free Exercise: An Unfair Privilege or a Sacred Right?

The question of whether religious institutions should receive a heightened degree of protection presupposes a much more general question: why should religious liberty, whether practiced by individuals or groups, be singled out for special solicitude at all? Some scholars, as well as much of the public, lament the idea that religious persons and organizations should be able to opt out of neutral, generally applicable laws simply because the requirements of those laws conflict with their religious beliefs. The dissatisfaction with this idea is most recently seen in the controversy over religious exemptions to antidiscrimination laws. After the Court's recent decisions affirming a constitutional right to same-sex marriage, several states have attempted to pass laws that exempt religious persons and organizations, including for-profit businesses, from antidiscrimination policies that may otherwise require them to have a role in same-sex wedding ceremonies. In many media outlets, writers refer to "religious liberty" using scare quotes and argue that this term is simply subterfuge for what is really overt discrimination against a marginalized class of people.[1]

[1] See e.g. Doug Stanglin, "Indiana governor signs amended 'religious freedom' law," *USA Today*, April 2, 2015, accessed June 29, 2017, https://www.usatoday.com/story/news/nation/2015/04/02/indiana-religious-freedom-law-deal-gay-discrimination/70819106//; Antonia Blumberg, "Critics Say Kentucky's New 'Religious Freedom' Bill Targets LGBTQ Students," March 22, 2017, accessed June 29, 2017, http://www.huffingtonpost.com/entry/critics-say-kentuckys-new-religious-freedom-bill-targets-lgbtq-students_us_58d2c64ee4b02d33b747f21a/; Kristen M. Clark, "Lawmakers push for more 'religious liberties' in Florida public schools," *Miami Herald*, March 6, 2017, accessed June 29, 2017, http://www.miamiherald.com/news/politics-government/state-politics/article136810518.html/; Ali Vitali, "Trump Signs 'Religious Liberty' Executive Order Allowing for Broad Exemptions," *NBC News*, May 4, 2017, accessed June 29, 2017, http://www.nbcnews.com/news/us-news/trump-signs-religious-liberty-executive-order-allowing-broad-exemptions-n754786/.

In this chapter, I assess the constitutional arguments surrounding heightened protection for religious free exercise—specifically the act of requiring religious exemptions or accommodations to neutral, generally applicable laws.[2] For example, does the Constitution require that religious pacifists be exempt from the draft, or that doctors be released from requirements to perform abortions or other services to which they object on religious grounds? There are, broadly speaking, two different positions that scholars take concerning such accommodations. The first view is that the Free Exercise Clause does require such accommodations, and that the judiciary must enforce them if legislatures fail to provide them. Accordingly, I call this the Accommodation position. The second position, which I call the Nondiscrimination position, embraces a more narrow reading of the Free Exercise Clause. It holds that the Clause forbids governments from invidiously targeting religious groups or individuals through their laws, but it does not require governments to make accommodations for religious people whose free exercise is *incidentally* burdened by neutral laws such as those in the two examples above. There are both practical and principled reasons for holding to this position. While some argue that accommodations are simply unworkable because they would require too much judicial interference with both government and religion, others argue that the constitutional commitment to equality is violated by the provision of accommodations for individuals with religious objections, but not for those who have secular objections.

[2] I focus on accommodations because most people generally agree that the government cannot, for example, pass a law forbidding a particular religion from existing within a community. The question is whether the Free Exercise Clause demands more than a prohibition on overt discrimination against a particular religion.

In section 1, I briefly outline the scholarly debate surrounding the issue of accommodations. In section 2, I explore the drafting of the First Amendment and other Founding documents that shed light on the Framers' understanding of the Religion Clauses. In section 3, I survey the Supreme Court's continuously changing approach to the question. Based on my analysis of the relevant history and precedent in sections 2 and 3, I argue that the American legal tradition embodies an ongoing tension between the two positions described above. Notably while the tradition has sometimes embraced the Nondiscrimination position, the idea that accommodations are not constitutionally required, the rationale has always been practical rather than principled. In other words, almost nowhere in the tradition do we find the idea that such accommodations would violate the principle of equality by unjustly favoring religious persons. Religion was unequivocally treated with special solicitude, even by those who thought it would soon be snuffed out by Enlightenment ideas. In section 4, my concluding section, I provide an analysis of these different positions, evaluating their strengths and weaknesses. Ultimately, I argue that the Framers did enshrine a robust understanding of the free exercise of religion in the Constitution, but that they left the contours of this right to be determined and constructed by the courts as well as the legislatures. The Accommodation approach is the most consistent with this robust understanding. Specifically, I argue that the Court's "*Sherbert* test" is the best way of working through the contours of the Clause because it protects the sacred right to free exercise of religion while also allowing for resolution of the potential problems caused by such robust protection—a concern shared by both the Framers and citizens today.

Section 1: Literature Review

While the Supreme Court has recently embraced the Nondiscrimination position for practical reasons, as we will see, most academics who hold this position do so for principled reasons. In their book *Religious Freedom and the Constitution*, Christopher Eisgruber and Lawrence Sager deny that religion is a "constitutional anomaly, a category of human experience that demands special benefits and/or necessitates special restrictions."[3] Among the "special benefits" for religion that they contest are conscience-based accommodations to neutral, generally-applicable laws. To demonstrate the problematic nature of such accommodations, the authors give the compelling example of two women who live across the street from each other and who each wish to defy a zoning ordinance that prevents them from opening soup kitchens to feed the homeless in their community.[4] One woman has religious reasons for wanting to do this, while the other has non-religious humanitarian reasons. Eisgruber and Sager argue that it is unjust for the religious woman to be permitted to defy the ordinance simply because her reason for serving people is a religious one. Not only do they argue that the Constitution does not "demand special benefits" for religion; they strongly imply that it forbids them.[5] Exempting the religious woman from the ordinance but not the secular woman "seems at

[3] Eisgruber and Sager, *Religious Freedom and the Constitution*, Kindle locations 69-70.

[4] Eisgruber and Sager, *Religious Freedom and the Constitution*, Kindle location 131.

[5] Eisgruber and Sager imply that religion-based accommodations violate the Equal Protection Clause. Eisgruber and Sager, *Religious Freedom and the Constitution*, Kindle location 3816. Case Western Reserve University Law Professor William P. Marshall also holds this view, and adds that they violate free speech commitments as well: "This favoritism for religious belief over other beliefs itself raises serious constitutional concerns. Most obviously, a constitutional preference for religious belief cuts at the heart of the central principle of the Free Speech Clause-that every idea is of equal dignity and status in the marketplace of ideas." William P. Marshall, "In Defense of Smith and Free Exercise Revisionism," *University of Chicago Law Review*, 58 (1991), 320.

odds with the essence of religious freedom in that it imposes a test of religious orthodoxy as a condition of constitutional entitlement."[6]

Rather than relying on a notion of religious freedom for protecting religious individuals and groups, Eisgruber and Sager propose the concept of "Equal Liberty." This theory demands that all people be treated equally regardless of the religious or spiritual foundation of their commitments. Everyone should have equal access to basic liberties such as "free speech, personal autonomy, associative freedom, and private property."[7] These liberties are "neither uniquely relevant to religion nor defined in terms of religion," but they "will allow a range of religious beliefs and practices to flourish."[8] In other words, basic freedoms that are not specific to religion, so long as they are enforced equally, will suffice to protect religious people and groups.

To be clear, Eisgruber and Sager are not attempting to *replace* the First Amendment with this concept; rather, they make a normative argument that Equal Liberty is the best lens through which to understand the First Amendment. Since the historical record gives us little guidance in interpreting the Religion Clauses, they contend, it makes sense to pick an approach that remains consistent with our country's devotion to the principle of equality.[9] Though the text of the Constitution singles out

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[6] Eisgruber and Sager, *Religious Freedom and the Constitution*, Kindle location 134.

[7] Eisgruber and Sager, *Religious Freedom and the Constitution*, Kindle location 55.

[8] Eisgruber and Sager, *Religious Freedom and the Constitution*, Kindle location 53.

[9] They think that Equal Liberty is one of multiple possible interpretations of the elusive Religion Clauses:

> Those normative questions are the ones we ought to be arguing about-not because we are free to ignore the Constitution's text and history, but because it is obvious that Equal Liberty and a whole slew of competitors are equally consistent with that text and history insofar as they are constitutionally relevant. Kindle Locations 811-814.

religion for special protection, Eisgruber and Sager argue that this is "only because of [religion's] vulnerability to hostility and neglect."[10] Aside from this "deep and important concern with discrimination," there is no reason to provide religion with special benefits or impose on it special disabilities.[11]

Under their view, it is necessary for legislatures and judges to require accommodations for conscientious objections so long as they are doing so only because equivalent accommodations have been made for other non-religious reasons. For example, if a police department exempts certain officers from a requirement to shave their beards because those officers have a skin condition that makes shaving painful, the department must also make an exemption for officers who have religious reasons for wearing a beard.[12] The corollary is that, if others have not requested secular accommodations, religious people are not entitled to them either: "The Constitution requires accommodation when and only when a failure to accommodate bespeaks a failure of equal regard."[13] Essentially, Eisgruber and Sager interpret the Free Exercise

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So, while multiple interpretations are consistent with the text, the Equal Liberty interpretation is most consistent with American principles overall.

[10] Eisgruber and Sager, *Religious Freedom and the Constitution*, Kindle locations 575-580.

[11] Eisgruber and Sager propose that the Religion Clauses are "nothing more than specific versions of more general norms included within the Equal Protection Clause[.]" Eisgruber and Sager, *Religious Freedom and the Constitution*, Kindle location 777. In other words, the concern about discrimination that motivated the Religion Clauses came to full fruition in its application to other categories through ratification of the Equal Protection Clause. It seems to follow from this that, under their view, religion-based accommodations, while never required by the Constitution, did not actually *violate* the Constitution until the Equal Protection Clause was ratified.

[12] Eisgruber and Sager, *Religious Freedom and the Constitution*, Kindle location 1288.

[13] Eisgruber and Sager, *Religious Freedom and the Constitution*, Kindle location 1021. But this puts members of minority religions at the mercy of everyone else: if another person or group does not have a need for an exemption, then the minority religious group will likewise not receive one. Eisgruber and Sager anticipate this objection and argue that only in an "imaginary world" will there be no secular or other analogous accommodation with which to compare the religious one Eisgruber and Sager, *Religious Freedom and the Constitution*, Kindle location 1175. Nonetheless, if circumstances existed such that there is nothing comparable, Eisgruber and Sager would approve the refusal to grant the exemption to the

Clause as a text concerned entirely with preventing discrimination. The denial of a religion-based accommodation is problematic only when a comparable accommodation was not denied to someone else. "The relevant question is whether the government, in coordinating diverse life projects, is sharing burdens fairly among them. To ask about fair shares is to ask a question that is inherently comparative."[14] The Religion Clauses do not single out religion, but rather ensure that religion is treated equally amongst a wide variety of commitments and interests.[15]

The most prominent defender of religious accommodations provided by the Constitution is First Amendment scholar Michael McConnell. While McConnell also concedes that the original meaning of the Religion Clauses is difficult to decipher, his argument is that the most coherent approach to the Religion Clauses as a whole must allow for religious exemptions. McConnell contends that it makes little sense to argue that religion cannot be treated as special in the context of free exercise but that it *must* be

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religious person. This is precisely because their concern is preventing discrimination, not protecting the conscience. While I am not persuaded that every possible religious exemption will have a secular analogy, the deeper problem with their overall position is that it seems to make equality the only good. A deprivation of liberty is permissible so long as liberty is denied to everyone.

[14] Eisgruber and Sager, *Religious Freedom and the Constitution*, Kindle locations 1193-1194.

[15] Eisgruber and Sager argue that the defense of special exemptions for religion is based on the problematic "separationist" school of approaching religious freedom: the idea that the core principle underlying the First Amendment is the separation of church and state. This principle prohibits government from providing any benefits for religious projects but requires it to provide special exemptions for people and groups who have religious objections to otherwise neutral laws. According to Eisgruber and Sager, this approach unfairly disfavors religion in the former case and unduly favors it in the latter. As to the former, a strong view of separation would prohibit religious people from having an equal voice in the public square, which Eisgruber and Sager find troubling: "political argument and justification flowing from a wide variety of nonreligious sources would be heard, but the public official or citizen whose moral compass was religiously inspired would be silenced."[15] Eisgruber and Sager, *Religious Freedom and the Constitution*, Kindle locations 554-555. Special exemptions for religious people, on the other hand, violate the basic American principle of equality by favoring religious practice over all others. The separationist view is not only unjust but also unworkable: "Separation simply makes no sense: because many Americans are religious, church and state inevitably intersect."[15] Eisgruber and Sager, *Religious Freedom and the Constitution*, Kindle locations 424-425. The Equal Liberty position avoids these problems and provides a better, fairer approach to protecting freedom.

treated as special in the context of exclusion from government support—an exclusion clearly required by the Establishment Clause and supported by virtually everyone today. McConnell points out that the government funds and promotes a number of ideas and institutions, such as Planned Parenthood, Mexican Independence Day, and even controversial art exhibits, yet it cannot subsidize or promote religious ideas and institutions.[16] This is, of course, because the Establishment Clause prohibits the government from holding positions concerning religious orthodoxy. So, the very text of the Constitution, the Establishment Clause, refutes Eisgruber and Sager's argument that religion can never be singled out for special treatment and must always be treated as equal to other commitments. Objecting to accommodations simply because they single out religion necessarily leads to the conclusion that government may endorse, promote, or finance religion just as it does with everything else.[17] The fact that the Establishment Clause forbids this makes clear that religion is treated by the Constitution as distinct from all other human activity. The Religion Clauses are concerned with more than discrimination and assurance of equal treatment. Yet, he explains, "religion receives

[16] McConnell, "The Problem of Singling out Religion," 9-10. The one exception is that the government is free to subsidize certain secular programs of religious institutions so long as it treats them on equal terms and does not favor one religious institution over another. This is the current state of the law, and McConnell finds it to be sound. Eisgruber and Sager would likely argue that McConnell's position is inconsistent because he wants religion to receive heightened protection when it comes to accommodations but to be treated on equal terms when it comes to government benefits. While this topic is worthy of an entire chapter, I offer a brief response here. Both accommodations and equal treatment with regard to government benefits are necessary for the full participation of religious people and organizations in civil society, which was clearly a central goal of the religion clauses, as we will see throughout this chapter. Governments must attempt to allow this participation without thereby allowing the government itself to establish religion. There is a clear distinction between, for example, allowing a student who receives a state scholarship to attend a religious college and offering a state scholarship only for students who wish to attend a Baptist university. The former allows religious students to pursue the education and career of their choice, while the latter attempts to steer students toward the Baptist religion.

[17] To be clear, there may be other legitimate reasons for objecting to exempting religious observers from generally applicable laws. The point here is that arguing that religion is not special and should receive no special status under the law, including exemptions, necessarily leads to the permissibility of establishments.

special consideration, not so that it can be privileged, but rather, that it may be left alone."[18]

Not only does McConnell argue that the Constitution *permits* treating religion with special solicitude, including the provision of religion-based exemptions to neutral laws, but he also provides a textual and historical defense of their inclusion in the Free Exercise Clause. His argument is modest. He does not argue that such exemptions are unequivocally protected by the Clause, but simply that such exemptions were clearly "within the contemplation" of its framers and ratifiers, and that exemptions are consistent with the popular understanding of religious free exercise at the time of the drafting.[19] McConnell analyzes the state constitutions and dictionaries of the time to argue that free exercise meant more than freedom from discrimination or freedom to privately worship within church walls. Rather, the full free exercise of religion was understood to entail the ability to exercise religious duties, whether they were manifest in private worship or actions in public life. Properly protecting such duties would necessarily involve making accommodations for religious objections to neutral laws. In the next section, I analyze the First Amendment drafting history and related documents from the Founding to determine how our first freedom was understood in 18th century America and what implications this may have on the meaning of the Free Exercise Clause today.

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[18] McConnell, "Singling out Religion," 12.

[19] Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," *Harvard Law Review* 103, (1990): 1415. "Exemptions were not common enough to compel the inference that the term 'free exercise of religion' necessarily included an enforceable right to exemption, and there was little direct discussion of the issue. Without overstating the force of the evidence, however, it is possible to say that the modern doctrine of free exercise exemptions is more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation." McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," 1512.

Section 2: First Amendment Drafting History

At the time of the drafting of the First Amendment, explicit protection of religious freedom was left primarily to means other than the federal government.[20] It was thought that religious pluralism would serve as a natural safeguard for religious freedom. As James Madison explains in Federalist 51, "a multiplicity of sects" would prevent one denomination from gaining too much power and threatening the religious rights of others.[21] Religious freedom was also protected by all thirteen state governments, either through their constitutions or, in the case of Rhode Island and Connecticut, through their retained colonial charters. Most of these state protections, though, were not very robust. First Amendment scholars John Witte, Jr. and Joel Nichols explain:

> Every early state constitution guaranteed "free exercise" rights of some sort— often adding the familiar caveat that such exercise must not violate the public peace nor the private rights of others. Most early state constitutions limited their guarantee to "the free exercise of religious worship" or the "free exercise of religious profession"— thereby leaving the protection of other forms of religious expression and action beyond worship to other constitutional or statutory protections, if any. A few states provided more generic, and thus more robust, free exercise guarantees.[22]

The state constitutions, of course, only applied against the actions of state and local governments. When the Articles of Confederation failed and a new federal constitution

[20] I specified "explicit" protection because the Constitution, even without a bill of rights, did indeed intend to protect religious freedom, but in a way that is perhaps not obvious from the text. The limited powers of the federal government were thought to be the strongest safeguard against tyranny. In Federalist 84, Alexander Hamilton explains that including a bill of rights in the Constitution would actually be dangerous because it would entail listing exceptions to powers that were not even granted: "Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" Alexander Hamilton, "Federalist #84," *The Federalist Papers*, The Avalon Project, accessed June 28, 2017, http://avalon.law.yale.edu/18th_century/fed84.asp/.

[21] James Madison, "Federalist #51," *The Federalist Papers*, The Avalon Project, accessed June 28, 2017, http://avalon.law.yale.edu/18th_century/fed51.asp/.

[22] John Witte, Jr. and Joel A. Nichols, *Religion and the American Constitutional Experiment, Fourth Edition*, (New York: Oxford University Press, 2016), Kindle edition, Kindle locations 1321-1324.

was proposed, creating a much stronger federal government, many in the Founding generation feared that this new government would pose a serious threat to rights, a threat that needed to be addressed within the text of the Constitution itself. Hence, nine of the thirteen original states demanded a bill of rights be added to the 1789 Constitution during the First Congress. These states submitted draft proposals of bills of rights, which included religious liberty provisions.

Notably, the language in these proposals suggests protection that is more robust than what was offered by the state constitutions. None of them simply refer to the "free exercise of religious worship" or "free exercise of religious profession." Rather, they contain broader language referring to conscience and the free exercise of religion more generally. For example New Hampshire's proposal states, "Congress shall make no laws touching religion, or to infringe the rights of conscience."[23] New York's proposal states, "That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience…"[24] Several of them require the assurance of particular accommodations, namely the right of religious pacifists to forego the bearing of arms, and the right of those religiously opposed to swearing oaths to make "affirmations" instead.

After reviewing these proposals from the states, James Madison submitted a first draft of the bill of rights to the House of Representatives on June 8, 1789. Madison's original draft contained two separate provisions on religion:

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[23] Witte and Nichols, *Religion and the American Constitutional Experiment,* Kindle location 7797.

[24] Witte and Nichols, *Religion and the American Constitutional Experiment,* Kindle locations 7805-7806.

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or any pretext infringed.
>
> No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.[25]

The first provision primarily seems to address the budding federal government, while the second clause extends the conscience protection to the states (though, notably, not the prohibition on religious establishment). In the first proposed provision, Madison seems to distinguish three different, but related, concepts: the abridgment of civil rights on account of religious belief or worship, the establishment of a national religion, and the infringement of the "full and equal rights of conscience." While the first and third concepts may contain a significant amount of overlap in their meaning, Madison's use of the word "nor" suggests that they are not perfectly synonymous. The "full and equal rights of conscience" seems to entail something distinct from the prohibition of denying one his civil rights because of his religion.

The House appointed a committee of eleven representatives, one from each state, including Madison himself, to review Madison's draft. On July 28, they put forward a new draft that now contained three separate provisions dealing with religion:

> No religion shall be established by law, nor shall the equal rights of conscience be infringed.
>
> No person religiously scrupulous shall be compelled to bear arms.
>
> No State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases.[26]

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[25] Annals of Congress, House of Representatives, 1st Congress, 1st Session, 451, accessed June 1 2017, https://memory.loc.gov/cgi-bin/ampage

[26] Witte and Nichols, *Religion and the American Constitutional Experiment*, Kindle locations 2113-2114.

Madison's interpretation of the first provision is illuminating. He explains that he interprets the language in this draft to mean that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to *worship God in any manner contrary to their conscience*."[27] This suggests that the "rights of conscience," for Madison, only entail the right to worship. The provision offering accommodations to pacifists, then, would be seen as an exception to the otherwise narrow protection that would have been provided by this clause if it had become a part of the Constitution. On August 15, the House voted to approve an amended version of this first provision: "Congress shall make no laws touching religion, or infringing the rights of conscience."[28] On August 17, the House passed, with minor revisions, the third provision, which required the states to protect the rights of conscience as well as other fundamental rights.

Three days later on August 20, the House passed the provision protecting the rights of those religiously opposed to bearing arms, but only after significant debate. The absence of this clause in the final draft of the Constitution is perhaps the strongest argument against the Accommodation interpretation of the Free Exercise Clause, so the congressional discussion merits careful examination. If the Framers meant to enshrine religion-based accommodations in the First Amendment, then why did they ultimately decline to provide constitutional status to what was arguably the most significant conscientious objection of their time?

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[27] Annals of Congress, House of Representatives, 1st Congress, 1st Session, 758.

[28] Witte and Nichols, *Religion and the American Constitutional Experiment*, Kindle locations 2150-2151.

Indeed, the concept of making accommodations for pacifists was quite familiar to the draftsman: at this point, the nation had a history of providing such accommodations under the law. The Continental Congress had passed a resolution that protected pacifists from being forced to violate their consciences by fighting in the Revolutionary War. Religious groups such as the Quakers, Brethren, and Mennonites had objected to fighting for religious reasons. The resolution, passed in 1775, exempted them from battle but "recommended" that they serve their fellow countrymen in ways that would not violate their beliefs:

> As there are some people, who from religious principles, cannot bear arms in any case, this Congress intends no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren, in the several colonies, and do all other services to their oppressed Country, which they can consistently [do] with their religious principles.[29]

The resolution clearly sought to respect their consciences while also admonishing them to perform their duty as citizens. The language sheds light on the understanding of free exercise at the time. It states that such religious people "*cannot* bear arms in any case." This reflects the idea that the conscience is binding upon these individuals; the bearing of arms is not a valid option that they are stubbornly refusing. Because the conscience is a legitimate source of authority, taking such an action is no option at all. The question before the draftsmen was whether the protection for those who hold this conviction should be elevated to a constitutional status.

Those who supported the provision argued that it would be unjust to force individuals with religious objections to fight when they would rather die than do so.

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[29] Derek Davis, *Religion and the Continental Congress, 1774-1789: Contributions to Original Intent (Religion in America),* (Oxford: Oxford University Press, 2000), 165.

Elias Boudinot from New Jersey states that this clause would "show the world" that we will not allow the government to "interfere with the religious sentiments of any person."[30] Some supported the clause with certain exceptions. For example, Elbridge Gerry approved of it, but wished that it would specifically protect only those "belonging to a religious sect scrupulous of bearing arms."[31] This would protect the clause from abuse. James Jackson supported it so long as it included a provision stating that pacifists would be required to "pay[] an equivalent." He thought it would be unjust for one part of the country to defend the other without some sacrifice on the part of the latter. Several representatives objected to requiring such a payment. Sherman, for example, noted that many pacifists would rather die than pay an equivalent or find a substitute for themselves. In other words, including such a caveat would still result in the violation of their consciences. Nonetheless, Sherman did not think such a clause was necessary at all. Among other reasons, he stated that the government would surely not be "arbitrary," and that the regulation of the militias, for the most part, would be a state matter. This last point is particularly important, given that the Bill of Rights would end up applying to the federal government only. Perhaps this is why the provision did not make it into the final text.

The most forceful argument against the inclusion of this clause came from Egbert Benson, a representative from New York:

> Mr. BENSON moved to have the words "but no person religiously scrupulous shall be compelled to bear arms," struck out. He would always leave it to the benevolence of the Legislature, for, modify it as you please, it will be impossible to express it in such a manner as to clear it from

[30] Annals of Congress, House of Representatives, 1st Congress, 1st Session, 796.

[31] Annals of Congress, House of Representatives, 1st Congress, 1st Session, 779.

> ambiguity. No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government. If this stands part of the constitution, it will be a question before the Judiciary on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not… I have no reason to believe but that the Legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left for their discretion.[32]

This passage is critical in part because it foreshadows the argument that the Court will eventually make in the seminal free exercise case of *Employment Division v. Smith*. In this case, the Court concluded that the Free Exercise Clause does not require accommodations for people whose consciences were incidentally burdened by neutral, generally applicable laws. Benson is concerned that raising conscientious objection to constitutional status will result in a cumbersome judicial review of all military policies. In the *Smith* case, discussed in full later in this chapter, Justice Scalia was also concerned about the judiciary's role in determining which exemptions are required by the Free Exercise Clause. Both reject the idea that the judiciary should be involved in such balancing, and making the issue a constitutional one will necessarily lead to that. Both therefore point to the legislature as a more appropriate institution for handling the matter at hand. The only difference is that Benson is considering the passage of a constitutional clause that addresses conscientious objection in the specific context of war; he is not necessarily making general claims about all such accommodations.[33] Scalia, writing from the position of an interpreter rather than a drafter, states more generally that the Free

[32] Annals of Congress, House of Representatives, 1st Congress, 1st Session, 779-780.

[33] One may contest this statement by arguing that Benson thinks accommodation is not a "natural right," but when he says that "it" Is not a natural right, he is clearly referring to the specific pacifist persuasion of the objector, not religious accommodations in general. Abstaining from war, in other words, is not a natural right.

Exercise Clause does not require any accommodations. His claim is more far-reaching, but he and Benson share the same concerns.

Another serious objection against the pacifism clause was put forth by Thomas Scott, who argued that "a militia can never be depended upon" if such a clause were enacted. It would violate the right to bear arms that is also being listed in these amendments, and it would lead to a standing army, a fear that regularly emerged in the political debates in the Founding era.[34] He clarified that he did not want truly religious pacifists to be forced to fight against their consciences; he was simply concerned that the clause would be abused by those "who are of no religion." This danger is especially real given that religion, according to Scott, was said to be on the decline: "for when the time comes that religion shall be discarded, the generality of persons will have recourse to these pretexts to get excused from bearing arms."[35] Like Mr. Benson, Scott supported conscientious objection to bearing arms solely as a matter of legislative discretion. And, like Elbridge Gerry, he was concerned that non-religious people would hijack the clause in order to evade their duty to defend their country. This provides strong evidence against Eisgruber and Sager's claim that the Constitution is offended by religion-based accommodations when no secular counterpart is offered.[36] Indeed, not one of the congressmen involved in the ratification of the First Amendment suggested that protecting religious freedom would be unfair to those who did not profess religious

[34] Annals of Congress, House of Representatives, 1st Congress, 1st Session, 796.

[35] Annals of Congress, House of Representatives, 1st Congress, 1st Session, 796.

[36] McConnell comments on Scott's arguments as well: "Why the proposed language ('religiously scrupulous') was not adequate for Scott's purposes is hard to say, but his underlying view of the proper scope of free exercise exemptions is clear: they should be reserved for cases of conflict with actual religious beliefs." McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," 1496.

belief.[37] Their concern was merely a formal one: what is the best way to protect religious freedom without sacrificing the common good or making the judicial process too cumbersome?

Despite these objections, a clause protecting these rights was initially adopted by the House, and the religion clauses were sent to a House-style committee along with the other adopted rights provisions. This committee's final report dropped the pacifism clause, however, and there is no recorded explanation for the omission.[38]

On August 20, the House passed a new draft of the first of the three provisions from their original proposal, revised by Fisher Ames, which now included a reference to both conscience and the free exercise of religion: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."[39] This raises the question of whether and what difference there may be between the free exercise of religion and the rights of conscience. Were these two ideas distinct, expressing two different types of protections, or were the Framers merely repeating the same concept for the purpose of style or emphasis? This was to be the final House draft of the religion clauses, which was sent to the Senate on August 25.[40]

There is no record of the Senate debates, but the Journal of the Senate reports that three different versions of the religion clauses were proposed and defeated before a fourth

[37] One may argue that James Jackson expressed this view when he stated that it would be unjust to let one part of the country fight without some sacrifice on the part of the pacifists. But it should be noted that he was not objecting to protections specifically for religious pacifists. Rather, he was stating the general principle that everyone must sacrifice for the good of the country in wartime. Rather than requesting that the pacifists be forced against their consciences to fight, he desired that they pay an equivalent.

[38] Witte and Nichols, *Religion and the American Constitutional Experiment*, Kindle location 2235.

[39] Witte and Nichols, *Religion and the American Constitutional Experiment*, Kindle location 7830.

[40] Witte and Nichols, *Religion and the American Constitutional Experiment*, Kindle location 2239.

one was adopted on September 3.[41] It read: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof." Their commitment to it was brief, however; they passed a different version on September 9, now combined with clauses concerning speech, the press and assembly:

> Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the Government for the redress of grievances.[42]

The House rejected this version, so a joint committee was appointed to draft a consensus version.[43] On September 24, 1789, this committee, representing a variety of denominations from Puritan to Catholic, decided upon the language that we now see in the First Amendment of the United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." It went into effect on December 15, 1791.

The history of the Free Exercise Clause is well-trod ground, and most First Amendment scholars are in agreement that the record of the debates leaves very little

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[41] The three different rejected versions read as follows:

> Congress shall make no law establishing One Religious Sect or Society in preference to others, nor shall the rights of conscience be infringed.
>
> Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society.
>
> Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed. (Witte and Nichols, 7834.)

[42] Senate Journal, 1st Congress, 1st Session, 77, accessed June 1, 2017, https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(sj001133))

[43] The committee was composed of three representatives, James Madison, Roger Sherman, and John Vining, all of whom were members of the original committee that drafted the July 28 version of the clauses, and three senators, Oliver Ellsworth, William Patterson, and Charles Carroll. Witte and Nichols, *Religion and the American Constitutional Experiment,* Kindle locations 2263-2264.

guidance as to how exactly these clauses ought to be interpreted.[44] Nonetheless, the chosen language provides insights as to the most plausible of the available interpretations. Two major changes can be seen in the text that appeared in the final draft. First, as we have seen, previous versions prohibited Congress from "infringing," "touching," or "violating" the free exercise of religion, while the final draft simply states that Congress may not "prohibit" it.[45] This can be read to support the Nondiscrimination reading of the Free Exercise Clause. So long as the government does not explicitly prevent, or "prohibit" an individual from exercising his religion, it may actually hinder the exercise of religion in a variety of ways. Words such as "touching" and "infringing" seem to forbid a broader range of activity than "prohibiting." A law may incidentally infringe on religious practice without prohibiting it altogether.

Yet, as several scholars have noted, the interchangeability of these terms at the time is demonstrated by comments made by James Madison concerning the choice of language in the various clauses of the First Amendment:

> [I]f Congress may regulate the freedom of the press, provided they do not abridge it, because it is said only "they shall not abridge it," and is not said, "they shall make no law respecting it," the analogy of reasoning is conclusive that Congress may regulate and even abridge the free exercise of religion, provided they do not prohibit it; because it is said only "they

[44] McConnell explains that the "historical evidence is limited and on some points mixed." McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," 1511. Eisgruber and Sager contend that understanding the Religion Clauses entails "interpretation of ambiguous text and multivocal history." Eisgruber and Sager, *Religious Freedom and the Constitution*, Kindle Location 811. Witte and Nichols explain: "Whether such exemptions should be accorded by the legislature or by the judiciary, and whether they were a constitutional right or an equitable exception (both questions that garner much scholarly contention today), the eighteenth-century sources at our disposal do not dispositively say." Witte and Nichols, *Religion and the American Constitutional Experiment*, Kindle locations 1243-1245.

[45] Witte and Nichols, *Religion and the American Constitutional Experiment*, Kindle location 2300. For example, New Hampshire's proposal stated, "Congress shall make no laws touching religion, or to infringe the rights of conscience." Witte and Nichols, *Religion and the American Constitutional Experiment*, Kindle locations 2063-2065.

> shall not prohibit it," and is not said "they shall make no law respecting, or no law abridging it."[46]

Madison's language strongly suggests that the Free Exercise Clause does indeed forbid more than the outright prohibition of religious free exercise. Since it may be understood to prevent Congress from making a law "respecting" or "abridging" free exercise, if Madison is correct in his interpretation, this can be understood to protect religious groups and individuals from government action that only incidentally burdens their rights. As Daniel Carroll reminded his colleagues during the congressional drafting debates, the rights of conscience are delicate and "will little bear the gentlest touch of governmental hand."[47] While it cannot be said with absolute certainty which reading is correct, the Accommodation approach is congruent with Madison and Carroll's understanding of the free exercise of religion.

The second and arguably more consequential alteration in the language of the First Amendment is the absence of a reference to "freedom of conscience." As we have seen, many of the drafts considered by Congress contained reference to this freedom, yet no explicit reference to conscience appears in the final text, and there is no record explaining why this is so. Was it merely an aesthetic change, or do the terms have different meanings? Witte and Nichols have noted that the phrase "liberty of conscience" had ancient roots and encompassed a variety of meanings, including "free exercise of

[46] James Madison, "Report on the Virginia Resolutions (January 1800)," in Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution* (Chicago: University of Chicago Press, 1987), chap. 8, doc. 42, accessed June 28, 2017, http://press-pubs.uchicago.edu/founders/documents/v1ch8s42.html/. Witte and Nichols discuss this document at Witte and Nichols, Religion and the American Constitutional Experiment, Kindle locations 2551-2553. Michael McConnell also discusses it. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," 1488.

[47] Annals of Congress, House of Representatives, 1st Congress, 1st Session, 757-758.

religion,"[48] which suggests that the terms were indeed synonymous, but other writings from the Founding era support the idea of two distinct meanings. For example, the writings of Thomas Jefferson and James Madison during the Virginia disestablishment struggle, which were influential in the drafting of the First Amendment,[49] referred to the conscience as a human faculty essential to the formation of men's beliefs, religious or otherwise.[50] In his *Memorial and Remonstrance against Religious Assessments,* Madison explained that "the opinions" of men "depending only on the evidence contemplated by their own minds cannot follow the dictates of other men,"[51] and thus the religion of every man must be "left to the conviction and conscience of every man."[52] Here, we see Madison making an epistemic claim about how men form opinions more generally, religious or otherwise: opinions cannot be chosen or imposed, but they form involuntarily as a result of the contemplation of evidence. This is why, he explains, the right to

[48] Witte and Nichols, *Religion and the American Constitutional Experiment*, Kindle location 1176-1180.

[49] In *Everson v. Board of Education*, Justice Rutledge stated, "The great instruments of the Virginia struggle…became warp and woof of our constitutional tradition" 330 U.S. 1 (1947). While I do not contend that the views of Madison and Jefferson alone are controlling (indeed, their views are not even perfectly congruent), their writings can be helpful in ascertaining the original public meaning of the First Amendment, especially since Madison's *Memorial and Remonstrance* was widely circulated and signed by people from a variety of religious denominations. Daniel L. Dreisbach, "Church-State Debate in the Virginia Legislature: From the Declaration of Rights to the Statute for Establishing Religious Freedom" in *Religion and Political Culture in Jefferson's Virginia*, eds. Garrett Ward Sheldon and Daniel L. Dreisbach (MD: Rowman & Littlefield Publishers, 2000), 151-152.

[50] Though they are specifically speaking about religion in the writings I address here, their arguments about the conscience following only the evidence placed before it would logically extend to other types of ideas, including moral claims.

[51] Jefferson's Bill for Establishing Religious Freedom offers the same idea. It begins by stating that "the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds[.]" Thomas Jefferson, "A Bill for Establishing Religious Freedom," June 18, 1779, National Archives—Founders Online, accessed June 28, 2017, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082/.

[52] James Madison, "Memorial and Remonstrance against Religious Assessments," June 1785, National Arichves—Founders Online, accessed June 28, 2017, https://founders.archives.gov/documents/Madison/01-08-02-0163/.

conscience is "unalienable." Similarly, in his Bill for Establishing Religious Freedom, Jefferson argued that God "created the mind free," and that He wills that it shall remain so, which is evident by the fact that He made it "altogether insusceptible of restraint."[53] According to Jefferson and Madison, a free conscience is one that is left to contemplate the evidence before it without coercion.

The free exercise of religion, however, encompasses more than just the free pursuit of Truth. Madison began the Memorial by quoting Article XVI of the Virginia Declaration of Rights, defining religion as "the duty which we owe to our Creator and the manner of discharging it," and stating that it can be "directed only by reason and conviction, not by force or violence." Hence, it appears that freedom of conscience is the ability to form beliefs (religious or otherwise) with as little interference as possible, while freedom of religion is the ability to "discharge" the duties that arise from distinctly religious beliefs, also with as little interference as possible. Though they are closely related, freedom of conscience primarily addresses the formation of opinion or belief while freedom of religion addresses action related to religious duties. Freedom of religion therefore depends upon freedom of conscience—one cannot exercise his duties if he is not free to discern what they are—but encompasses a broader range of religious activity. Hence, one possible reason for the omission of a reference to "conscience" is that it could be read too narrowly, and including a reference to both "conscience" and "religion" would be a redundant superfluity. As McConnell notes, the inclusion of both

[53] Jefferson, "A Bill for Establishing Religious Freedom."

"religion" and "conscience" in multiple earlier drafts by several different writers does suggest that the Founding generation did not view these terms as synonymous.[54]

Another possible interpretation is that the choice of the word "religion" over "conscience" clarified that the Constitution protected only religious belief rather than more general, secular conscience claims. As noted above, the arguments concerning the freedom of conscience articulated by Madison and Jefferson—though they wrote within the context of religion in particular—could have logically applied to other types of belief systems. Hence, while freedom of conscience may be understood more narrowly than freedom of religion in one sense—applying only to the free formation of beliefs—in another sense it may be understood more broadly, applying to a variety of religious and secular convictions. Perhaps the Framers switched to "religion" in order to assure that religious belief and practice only would be protected. There is evidence for this interpretation. As we saw above, some of the Framers were concerned about the potential pacifism clause being abused by those without actual religious commitments. Though we cannot be certain, perhaps these concerns ultimately affected the choice of language in the final draft.

While the Free Exercise Clause is indeed vague, other constitutional clauses can illuminate its meaning. Article VI assures that no religious test be used to determine who can hold public office:

> All government officers "shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States. Article VI, Section 3.

[54] McConnell, "Singling out Religion," 12.

The prohibition of a religious test is an example of the concern for equality and nondiscrimination that Eisgruber and Sager believe lay at the heart of the Framers' view of religious freedom. But Section 3 of Article VI actually contains a second protection for religious freedom, one less obvious than the first. Article VI, along with Articles I and II of the Constitution, provide a clear accommodation for Quakers by allowing the President, Senators, and other government officials to take an oath "or Affirmation." Quakers objected, based on their religious beliefs, to the swearing of oaths. Hence, it would be impossible for them to serve in a political office if doing so required them to "swear" to uphold the Constitution. The Framers thus found a way to protect the Quakers' deeply held beliefs while still reaching their own legitimate goal of ensuring fidelity to the nation's highest law.

These protections against swearing oaths, which were present in the Constitution before the First Amendment was passed, certainly suggests that the Framers thought that at least some accommodations were necessary for the full free exercise of religion. This can serve as a clue to what the Founders meant by the term "free exercise" when they used it in the First Amendment; even neutral legal requirements should include accommodations when possible. Yet the most significant objection to this broad reading of the Free Exercise Clause is the fact that the Framers ultimately rejected a clause protecting the rights of pacifists opposed, on religious grounds, to going into battle. If the Framers meant to enshrine accommodations into the Free Exercise Clause as a general matter, then surely they would not have been opposed to constitutionalizing this specific example of conscientious objection to war. Further, the "affirmation" accommodation was a simple one to write into the Constitution's text, and could not have been provided

by a legislature;[55] hence, its presence does not necessarily entail that the Free Exercise Clause requires other accommodations.

These are important objections, yet the Framers' rejection of the specific conscientious objector clause is not necessarily fatal to a broad reading of the Free Exercise Clause. A critical distinction between taking affirmations instead of oaths and refusing to bear arms is that the former poses a significantly smaller, if any, risk to the welfare of the nation, whereas the latter raises serious concerns about the state being able to meet its very basic end of self-preservation. Hence, the refusal to include a clause protecting conscientious objection to bearing arms should not be read as proof against the constitutional necessity of accommodation or exemption. Rather, it should be read to demonstrate that the Framers recognized the complexity of offering accommodations. Given this complexity, the lack of an enumeration of accommodations does not necessarily mean that accommodations are unprotected by the Constitution. Instead of listing any accommodations, the Framers elected to protect the "free exercise of religion" in general and allow the political branches and the courts to work through the difficult issues of what accommodations this right may require.

While the Framers held various positions concerning the best way to provide exemptions for religiously-inspired pacifists, none of them asserted that offering special protection for religious free exercise was fundamentally unjust or inconsistent with the spirit of the Constitution. What is clear from these debates is that the Framers possessed a deep concern for religious scruples in particular, and crafted the Free Exercise Clause so

[55] Legislatures cannot take actions in defiance of the Constitution. U.S. Constitution, Article VI, Clause 2 states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

as to reflect that concern. Hence, it is clear from the text and the drafting history that the Religion Clauses were not simply inspired by the principle of equality, as Eisgruber and Sager contend. And the evidence weighs more heavily in favor of the Accommodation reading than the Nondiscrimination reading. Even so, Eisgruber and Sager may argue that the elasticity of the clauses may allow for a transformation of the text as history progresses. In the next section, I will evaluate how the Supreme Court has attempted to make sense of a clause that has left so many baffled.

Section 3: Supreme Court Free Exercise Jurisprudence

This section will provide an overview of the Court's religious freedom jurisprudence, specifically focusing on Free Exercise Clause cases. Just as with the drafting history of the First Amendment, the legal history presents a competition between the Nondiscrimination position and the Accommodation position. The Court has shifted back and forth between these two positions.

The 1879 case of *Reynolds v. United States* was the first significant case addressing a conflict between religious belief and a criminal law. The question was whether a federal statute prohibiting polygamy in the federal Utah territory violated the Free Exercise Clause.[56] In an opinion by Chief Justice Waite, the Court unanimously ruled in the negative. Embracing a narrow view of free exercise, the Court concluded that the Free Exercise Clause only protects belief and not action: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were

[56] *Reynolds* addressed an action of the federal government. The Free Exercise Clause was not incorporated against the states until the 1940 case of *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

in violation of social duties and subversive of good order."[57] Interestingly, the Court used the writings of Thomas Jefferson[58] to interpret the Free Exercise Clause as enshrining only the concept of freedom of conscience described in the previous section. Under the standard used in *Reynolds*, no accommodations were required by the Free Exercise Clause.

The Court's reasoning is not entirely clear. While the Court reiterates the distinction between belief and action throughout the opinion, presumably some actions are not within the realm of legislative power, since the Court specifically cabined off actions that are "in violation of social duties and subversive of good order." But this can potentially encompass a wide variety of religious action. For example, could a person who is peacefully distributing religious literature on the street be considered subversive of good order?[59] What about a religious group that wanted to practice animal sacrifice within their own walls in a community that found the practice to be offensive?[60] Overall, under the *Reynolds* rule, government that burdened a religious person's practice simply

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[57] *Reynolds v. United States*, 98 U.S. 164 (1878).

[58] The Court quotes Jefferson's Letter to the Danbury Baptists: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions -- I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties." For an in-depth discussion of this case, see Donald L. Drakeman, *Church, State, and Original Intent* (Cambridge: Cambridge University Press, 2010).

[59] The Supreme Court has stated that "one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word." *Jamison* v. *Texas*, 318 U.S. 413 (1943) at 416.

[60] The Court addressed such a scenario in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) and ruled in favor of the Church of Lukumi Babalu Aye, which used animal sacrifice in their acts of worship.

had to demonstrate a rational basis for doing so. This case put forth the narrowest reading of the Free Exercise Clause ever embraced by the Court.[61]

A few decades later, the Court used this belief/action dichotomy to deny the right of religious objection to bearing arms in war as well.[62] Several such cases actually dealt not with resistance to an actual draft, but with the denial of citizenship to those who, because of their religion, could not swear an oath to take up arms in defense of the nation.[63] In the 1931 case of *United States v. Macintosh*, the Court explicitly stated that religiously-motivated refusal to bear arms is not protected by the Constitution, echoing the view held by some of the ratifiers of the First Amendment that it was to be left to the legislatures' discretion. The Court eventually reversed course in the particular area of citizenship oaths. In *Girouard v. United States* (1946), the Court held by a 5-4 vote that the willingness to bear arms by those seeking citizenship was required by neither the Constitution nor the federal law at issue.[64] While the Court did not actually state a constitutional right to conscientious objection to bearing arms, and has consistently

[61] It is unclear whether the Court's principle could even fall under the Nondiscrimination interpretation. If the Constitution only protects opinion and not action, then could the government regulate, for example, the peaceful preaching of a particular religion? Preaching is an action, though it involves the dissemination of opinions. Presumably the *Reynolds* Court would say no, but their principle does not give a clear reason why.

[62] See *Arver v. United States*, 245 U.S. 366 (1918).

[63] See *United States v. Schwimmer*, 279 U.S. 644 (1929); *United States v. Macintosh*, 283 U.S. 605 (1931); *United States v. Bland*, 283 U.S. 636 (1931); *Hamilton v. Regents of the Univ. of Ca.*, 293 U.S. 245 (1934).

[64] This case primarily concerned statutory interpretation. The Court interpreted the Nationality Act of 1940, as amended by the Act of March 27, 1942, and concluded: "The oath required of aliens does not in terms require that they promise to bear arms. Nor has Congress expressly made any such finding a prerequisite to citizenship. To hold that it is required is to read it into the Act by implication. But we could not assume that Congress intended to make such an abrupt and radical departure from our traditions unless it spoke in unequivocal terms." *Girouard v. United States*, 328 U.S. 61 (1946) at 64.

rejected such a right since then,[65] the majority opinion by Justice Douglas strongly pointed towards the Accommodation reading of the Free Exercise Clause:

> The struggle for religious liberty has, through the centuries, been an effort to *accommodate the demands of the State to the conscience of the individual*. The victory for freedom of thought recorded in our Bill of Rights recognizes that, *in the domain of conscience, there is a moral power higher than the State*. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.[66]

If Douglas' language here is to be read as a suggestion that the Free Exercise Clause prevents the government from conditioning citizenship on the willingness to make a promise that one will take up arms for the nation, it would seem to follow that the Clause would also protect the right to abstain from taking up arms. Indeed, Douglas provides an extensive discussion of the many ways in which religiously-motivated pacifists can contribute (and have contributed) to war efforts without also violating their obligations to God.[67]

Essentially, Douglas raises the question of whether the government could reach its very important interest by a means that did not force individuals to violate their religious beliefs. The Court began to embrace this exact form of analysis in the 1963 case of *Sherbert v. Verner*. Adele Sherbert, a Seventh Day Adventist woman from South Carolina, could not work on Saturday because, according to her religious beliefs, Saturday is to be a Sabbath day dedicated to worship and rest. She applied for unemployment benefits, but was denied these benefits because she declined Saturday

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[65] See *Gillette v. United States*, 401 U.S. 437 (1971) and *Clay v. United States*, 403 U.S. 698 (1971).

[66] *Girouard* at 68 (emphasis added).

[67] *Girouard* at 64-69.

work.[68] Sherbert argued that the denial of these benefits forced her to choose between working and following her religious beliefs.

In an opinion by Justice Brennan, the Supreme Court ruled in Sherbert's favor, arguing that, while unemployment benefits are indeed a privilege rather than a right, she cannot be denied a government privilege because of her religion: "[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." Here, the Court utilized the doctrine of "unconstitutional conditions," which we will encounter again in the next chapter. This doctrine holds that the government may not condition a benefit on the beneficiary's forfeiture of a constitutional right, even if the government may withhold that benefit altogether.[69]

The *Sherbert* case is important because it raised the standard of protection for free exercise claims, creating what is now known as the *Sherbert* test. The test requires that any government entity imposing a "substantial burden" on a person's religious practices must offer an exemption unless denying the exemption is the "least restrictive means" to achieving a "compelling government interest."[70] In other words, even if a law only incidentally burdened a person's religion, the burden of proof is on the government to show that it could not have reached its compelling goal in any other manner. In this case,

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[68] *Sherbert v. Verner*, 374 U.S. 398 (1963) at 401.

[69] *See* Kathleen M. Sullivan, "Unconstitutional Conditions," *Harvard Law Review* 102 (1989): 1415.

[70] Witte and Nichols helpfully explain how the Court responds to failure of the test: "If the law in general does not meet these two criteria ['compelling interest' and 'least restrictive means'], the Court will strike it down entirely. If the law in general meets these two criteria but the particular application of the law to this free exercise litigant does not, the Court will uphold the law but grant the claimant an exemption from compliance with it." Witte and Nichols, *Religious Freedom and the American Constitutional Experiment*, Kindle locations 3356-3359.

the state's interest was to combat fraudulent claims that would dilute the state's unemployment funds. Since the state court did not review this interest in its proceedings, the Supreme Court declined to do so, but strongly suggested that an influx of fraudulent claims was unlikely.[71]

The creation of the "Sherbert test" inaugurated the Court's transition into the Accommodation position on free exercise, which it would hold for several decades. Under this standard, free exercise claimants won at the Supreme Court four times after *Sherbert*. Three of those cases were "near clones" of *Sherbert.*[72] The other was the 1972 case of *Wisconsin v. Yoder*, which addressed the request of several Amish families to be exempt from a Wisconsin law requiring public or private schooling until the age of 16. The Amish in the Old Order Amish sect and the Conservative Amish Mennonite Church do not believe in conventional education for children after the 8th grade.[73] While they provide their children with formal education until that point, they are opposed to conventional high schooling for two reasons. First, while high school prepares students for a competitive life of the intellect, Amish society emphasizes "informal 'learning through doing.'"[74] Hence, they prefer their children to learn skills related to agriculture and the "simple life." Second, they believe that the competitive, worldly environment of high school can endanger their children's salvation as well as the survival of the whole Amish community. Old Order Amish communities are characterized by a "fundamental belief that salvation requires life in a church community separate and apart from the

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[71] *Sherbert* at 407.

[72] Eisgruber and Sager, *Religious Freedom and the Constitution*, Kindle location 481.

[73] *Wisconsin v. Yoder*, 46 U.S. 205 (1972) at 207.

[74] *Yoder* at 211.

world and worldly influence."[75] High school would remove them from this community "physically and emotionally" during an extremely formative time of life. Forcing Amish children to attend high school against the wishes of their parents would thus "ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today."[76] Hence, this exemption, according to the Amish, will determine the survival of their entire faith community.

In a unanimous opinion by Justice Burger (with a partial dissent by Justice Douglas), the Court concluded that the state failed strict scrutiny and that the Amish must be exempt from the compulsory school attendance law. While the Court found that the state's interests in its compulsory education system were compelling, it nonetheless concluded that forcing the Amish children to attend such schooling for two extra years "would do little to serve those interests."[77] The means, in other words, were not the least restrictive ones available. These two extra years of education may be necessary to prepare the child for modern life, but they are not necessary to prepare him for the agrarian life embraced by the Amish.[78]

Further, Burger argued, the record shows that the Amish have been productive and law-abiding citizens: "Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit

[75] *Yoder* at 210.

[76] *Yoder* at 212.

[77] *Yoder* at 222.

[78] Wisconsin argued that people who decide to leave the Amish community will be unprepared for life in the modern world if they do not receive these two additional years of formal education. On the contrary, the Court notes that there is no evidence that such individuals, who have been taught by the Amish to be industrious and self-sufficient, would become burdens on society. *Yoder* at 224.

within our society, even if apart from the conventional 'mainstream.'"[79] Indeed, the Court notes, their idiosyncrasies typify the diversity that we admire and encourage in America.[80] The Court even went so far as to suggest that isolated religious groups and individuals have been essential in shaping our society: "We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles."[81]

The justices affirmed Wisconsin's view that "[p]roviding public schools ranks at the very apex of the function of a state."[82] Indeed, the state can legitimately set certain standards for education that even the Amish must meet.[83] Nonetheless, in the Court's 1925 opinion of *Pierce v. Society of Sisters*, this legitimate function yielded to "the right of parents to provide an equivalent education in a privately operated system." While *Peirce* was not a religious freedom case, it is significant for *Yoder* because the Court ruled that parents had a right to direct the education of their children, which includes enrolling them in church-operated schools. "As that case suggests, the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society."[84] The Court echoes the claim made in

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[79] *Yoder* at 222.

[80] *Yoder* at 226.

[81] *Yoder* at 223.

[82] *Yoder* at 213.

[83] Indeed, Justice Stewart, joined by Justice Brennan, authored a concurring opinion in which he clarified that the case would be "very different" for him if the Amish claimed that their religion prohibited them from sending their children to any school at any time and "from complying in any way with the educational standards set by the State." *Yoder* at 238 (Stewart, J. concurring).

[84] *Yoder* at 213-214.

Pierce that "[t]he child is not the mere creature of the state."[85] Under the American tradition, there are other sources of authority besides the state. In *Pierce* and subsequent cases, the Court grounded the right of parents to guide their children's education in the Due Process Clause of the Fourteenth Amendment. The Court's precedents hence recognize the essential link between education and religious free exercise.

While the Court in *Yoder* refers to these parental rights, which were grounded in the Due Process Clause, the justices make clear that the right at issue in Yoder is a free exercise right: "Long before there was general acknowledgment of the need for universal formal education, the Religion clauses had specifically and firmly fixed the right to free exercise of religious beliefs…"[86] Notably, the Court made clear that this exemption did not extend to everyone who simply did not wish to send their children to school because of, for example, progressive views of education. It needed to be a religious reason:

> Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion clauses.[87]

Here, the Court's argument is twofold. First, the justices offer a textual argument: the Religion Clauses pertain only to religious practice. Second, their argument is practical:

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[85] To be sure, the freedom granted to parents is not limitless. If the parents' decision appears to "jeopardize the health or safety of the child, or have a potential for significant social burdens" the state may intervene. *Yoder* at 234.

[86] *Yoder* at 214.

[87] *Yoder* at 215-16.

in order for "ordered liberty" to be maintained, the government cannot allow just anyone who disagrees with a law to be exempt from it. But the implication is that ordered liberty is not threatened when only religious persons are exempt.

The Court also addressed whether belief and action can be separated under the First Amendment, which is what the Court held in *Reynolds*. The state of Wisconsin had embraced this view, arguing that the Free Exercise Clause protects beliefs from state control, but not religiously-motivated actions. The Court rejects this argument and explains that, while religious activities are often subject to regulation by the state police power, there are "areas of conduct protected by the Free Exercise Clause" that are beyond the power of the state, even under regulations of that are neutral and generally applicable.[88] Justice Burger explained, "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."[89] In other words, a neutral law may have effects that seriously undermine religious practice. It is the burden created by the law, not simply the intention of the law's drafters, that matters.

The Court changed its approach again in the landmark case of *Employment Division v. Smith*, where we see the *Reynolds* tradition re-emerge and the Nondiscrimination position firmly established. The state of Oregon criminalized the possession of "controlled substances" unless prescribed by a doctor, and such substances included the hallucinogen peyote. Alfred Smith & Galen Black were members of the Native American Church, and they ingested peyote for sacramental purposes. They were

[88] *Yoder* at 220.

[89] *Yoder* at 220.

fired from their jobs at a drug rehabilitation clinic and were subsequently denied unemployment benefits because they were fired for work-related misconduct. The question the Court addressed was whether the free exercise of religion protected by the First Amendment requires an individual to "observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)."[90] In this particular case, Smith and Black are asserting that the First Amendment places them beyond the sanction of a criminal law that was not specifically directed at their religious practice.

In an opinion by Justice Scalia, the Court concluded that the Free Exercise Clause did not require exemptions to neutral, generally applicable laws that were otherwise constitutional but had the "incidental effect" of burdening religion. "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[91] Scalia argues that using strict scrutiny, or the *Sherbert* test, for neutral, generally applicable laws would allow each man to be a law unto himself: "Any society adopting such a system would be courting anarchy…,"[92] but this is especially the case in a diverse society such as ours. Almost every civic obligation could be defied by a religious objection, including, but not limited to, compulsory military service, tax payments, child labor regulations, and vaccination requirements. Instead, when reviewing such laws, Scalia concluded, the Court should henceforward use the rational basis test, as it did in *Reynolds*. Scalia's core concern is that requiring strict scrutiny puts federal judges in the untenable position of balancing the

[90] *Employment Division v. Smith*, 494 U.S. 872 (1990) at 878.

[91] *Smith* at 878-89.

[92] *Smith* at 892.

importance of religious claims against the importance of general laws.[93] Hence, Scalia's objection to the Sherbert test is more about practicality than principle. He does not join Eisgruber and Sager's critique that religious accommodations are unconstitutional; he simply holds that they are not constitutionally required. Legislatures remain free to determine whether to write exemptions into their laws, but the courts will not impose such exemptions themselves. Laws that directly attack religion, on the other hand, such as a law prohibiting the rosary, would still be subject to strict scrutiny. On this point, he is in agreement with Eisgruber and Sager: the main purpose of the Free Exercise Clause is to prevent overt discrimination.[94] This is the Nondiscrimination interpretation of the Free Exercise Clause, and the Court relies on it to this day.

Scalia's claim that the Court has never required a free exercise-based exemption to an otherwise valid law, however, is dubious. Accordingly, Scalia attempts to grapple with *Sherbert*, *Yoder*, and other cases that did require exemptions to neutral, generally applicable laws.[95] He distinguishes these cases by stating that they involved not the Free Exercise Clause alone, but "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press….or the right of parents…to direct the education of their children."[96] He states that a freedom of

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[93] *Smith*, footnote 5. "It is a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."

[94] The difference in the two approaches is that Scalia thinks the Free Exercise Clause was meant to prevent discrimination against religious persons, whereas Eisgruber and Sager think the Religion Clauses can actually be read to prohibit discrimination against persons based on any commitment they may hold, whether secular or religious.

[95] The Court in Smith distinguished *Sherbert* by pointing out that Sherbert was not trying to evade criminal laws, but the Amish families in Yoder were certainly under the threat of criminal sanction for not sending their children to school. *Yoder* at 218.

[96] *Smith* at 881.

association claim would also be reinforced by a Free Exercise claim. In other words, in these cases of "hybrid rights,"—when the free exercise right is accompanied by another constitutional right— the Constitution requires strict scrutiny analysis (the *Sherbert* test). A law does not violate the Free Exercise of religion if it does not attempt to "regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs."[97] Given the categories he sets aside for protection, it seems that Scalia thinks the Free Exercise Clause primarily focuses on beliefs: their formation and communication. Indeed, he quotes *Reynolds* in stating that laws "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices…"[98] This case does not deal with one of these categories, so only rational basis review is necessary.

Of course, the case of *Sherbert v. Verner*, which established the use of strict scrutiny in free exercise claims, does not involve a claim of "hybrid rights." It addresses a free exercise claim alone, rather than free exercise accompanied by another right. In *Sherbert* and two other previous cases, the Court invalidated state unemployment compensation rules that did not accommodate religious people who could not find work consistent with their beliefs. Scalia explains that the unemployment context is different because it necessarily involves individualized assessments of a person's reason for not finding work. "As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual

[97] Hence, *Smith* is a bit clearer than *Reynolds* in that the Court, rather than making only general claims about belief versus action, tries to enumerate specific categories of religious exercise related to belief that even a neutral, generally applicable law cannot interfere with. In this sense, *Smith* embraces a broader view of the Free Exercise Clause than does *Reynolds*.

[98] *Reynolds* at 166.

exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[99] In other words, religious reasons for not being able to find work should not be treated as inferior to other reasons for not being able to work. Here, he takes Eisgruber and Sager's approach that religious exemptions cannot be denied if exemptions for other reasons are offered.[100] But regardless of the reason for using the test in the unemployment context, it is at least clear that the decisions where the test was used have "nothing to do with an across-the-board criminal prohibition on a particular form of conduct."[101] Even though the Court has sometimes used the *Sherbert* test on such laws, Scalia argues, they have never actually used the test to invalidate one. "We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges."[102] In sum, the Sherbert/strict scrutiny test can only be used in cases dealing with "hybrid rights" and in the context of unemployment when a criminal law is not involved.

In a fiery concurrence that reads more like a dissent, Justice O'Connor agreed with the Court's conclusion concerning Smith's request for an exemption, but sharply disagreed with the Court's broader decision to lower its standard of review to rational basis. "In my view, today's holding dramatically departs from well settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious

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[99] *Yoder* at 884.

[100] Yet he never states that the Constitution prohibits a scenario flipped the other way: a legislature offering exemptions for religious reasons, but not for secular reasons. Scalia's opinion does not demand the equality that Eisgruber and Sager's theory demands.

[101] *Smith* at 884.

[102] *Smith* at 885.

liberty…."[103] Harkening back to the *Yoder* tradition, she reminds the Court that belief and practice cannot be neatly separated: "Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause."[104] A law that prohibits conduct that happens to be an act of worship for someone plainly prohibits that person's free exercise of religion. O'Connor finds that such an infringement would violate the First Amendment.

Similarly, she argues that the First Amendment does not distinguish between laws that directly attack religion and laws that incidentally burden religion, as the majority insists. In fact, few states would be naive enough to pass the former type of law: "If the First Amendment is to have any vitality, it ought not to be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice."[105] She further joins the tradition of the Yoder Court by concluding that what matters is not intention of the law's drafters, but the burden on religious practice:

> In my view, however, the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that in effect make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community.[106]

[103] *Smith* at 891 (O'Connor, J. concurring).

[104] *Smith* at 893 (O'Connor, J., concurring).

[105] *Smith* at 894 (O'Connor, J., concurring).

[106] *Smith* at 897 (O'Connor, J., concurring).

Such an individual, she argues, is forced to choose between exercising his religion or facing criminal penalties. What matters is the legal pressure placed on the individual to abandon his religious beliefs.

O'Connor also disputes the Court's reading of the legal tradition addressing neutral laws that incidentally burden religious practice. Indeed, she notes, all of the Court's free exercise cases have dealt with generally applicable laws that significantly burdened religious practice, and, contra Scalia, the Court has interpreted the Free Exercise Clause to be implicated by such laws, such as in *Yoder* and *Cantwell v. Connecticut*. While Scalia distinguished such cases by arguing that they involved "hybrid rights," O'Conner asserts, "there is no denying that both cases expressly relied on the Free Exercise Clause, and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence."[107]

She also disputes the claim that the legislature is sufficient to protect the free exercise of religion through creating exemptions. Minorities in particular are often neglected by legislatures: "The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish."[108] O'Connor also addresses the parade-of-horribles that Scalia fears. While Scalia thinks that the wide variety of religious beliefs in America render the strict scrutiny standard unworkable and liable to create anarchy, O'Connor argues that the wide variety of state regulations can easily infringe upon religious belief, thus rendering the rational basis test ineffective in

[107] *Smith* at 896 (O'Connor, J., concurring).

[108] *Smith* at 902 (O'Connor, J., concurring).

protecting religious freedom: "Given the range of conduct that a State might legitimately make criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment never requires the State to grant a limited exemption for religiously motivated conduct."[109] She supports a case-by-case approach wherein judges use the strict scrutiny test, which does contain within it the recognition that states have compelling interests that sometimes outweigh free exercise. In this particular case, she thinks the state passed the test and that Smith and Black do not need to receive the exemption. Although the question is "close," she ultimately concluded that the state of Oregon's interest in uniform application of this criminal prohibition is "'essential to accomplish' its overriding interest in preventing the physical harm caused by the use of a Schedule 1 controlled substance."[110]

Congress responded to *Smith*'s diminished protection of religious freedom by asserting its own interpretation of the Free Exercise Clause in 1993. It passed the federal Religious Freedom Restoration Act (RFRA), which reinstated the *Sherbert* test for all courts, whether state or federal. RFRA was then challenged in the 1997 case of *Boerne v. Flores*. In that case, the Court struck down RFRA as applied to the states, but it is still applicable to the actions of the federal government. RFRA was litigated in the 2014 landmark case of *Burwell v. Hobby Lobby*, which will be discussed in full in chapter five, and is the legislation under which the Little Sisters of the Poor and other religious groups have claimed refuge against the HHS' contraception mandate. Hence, when it comes to

[109] *Smith* at 899-900 (O'Connor, J., concurring).

[110] *Smith* at 905 (O'Connor, J., concurring). Justice Blackmun dissented, joined by Justice Brennan and Justice Marshall, agreeing with O'Connor's desire to preserve strict scrutiny but arguing that the state of Oregon failed its test.

federal action, the Accommodation position has prevailed per RFRA, yet when it comes to state action, the Nondiscrimination position is the law of the land.[111]

Eisgruber and Sager contend that their theory of Equal Liberty can actually be found within several of the cases said to be in what I have called the Accommodation tradition. For example, concerning *Sherbert v. Verner*, they argue that the most compelling feature of the case is the unequal treatment of Saturday worshippers and Sunday worshippers:

> Adell Sherbert and other Saturday observers were the victims of drastically unequal treatment. South Carolina law prevented employers from ever insisting that their employees work on Sundays; so only Saturday observers could be denied unemployment benefits because of their insistence on respecting the Sabbath as dictated by their faith.[112]

But the Court did not rule in Sherbert's favor simply because other means were available; rather, the fact that other means were available served as evidence against the government's claim that it had used the least restrictive means. In other words, this information was helpful in the strict scrutiny analysis, but this analysis was triggered in the first place because religious freedom itself is an important right.[113]

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[111] States can pass laws ensuring a higher degree of protection of rights than what is required by federal law. Twenty-one states have enacted state versions of RFRA. "State Religious Freedom Restoration Acts," National Conference of State Legislatures, accessed June 28, 2017, http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx/.

[112] Eisgruber and Sager, *Religious Freedom and the Constitution*, Kindle locations 166-168.

[113] The language of the case makes it clear that the Court was concerned specifically about the restriction on her free exercise, not simply whether she was treated equally: "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Sherbert* at 404.

Section 4: Conclusion

Just as legal scholars have struggled with interpreting the elusive Free Exercise Clause, so has the Court. And yet, while the original meaning is difficult to decipher, the various cases reviewed by the Court have illuminated the various weaknesses and strengths of the Accommodation and Nondiscrimination positions. While Scalia's practical concerns about the *Sherbert* test are weighty, O'Connor's argument seems more consistent with the very purpose of a bill of rights: the Free Exercise Clause would have little force if only laws directly attacking religion were prohibited. Oddly, though Scalia recognizes that the drafters of the First Amendment were concerned with overt persecution, and hence such persecution must be a possibility, he seems confident that legislatures will protect citizens from even subtle infringements of their free exercise:

> Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.[114]

Some of the First Amendment's drafters, as we saw, shared Scalia's confidence, at least in the context of solicitude for pacifists. But the very presence of the Bill of Rights, and more generally the written Constitution, rests on the assumption that society may not always value basic fundamental rights. As Scalia himself said in a debate with Justice Breyer at American University, sometimes societies "rot."[115] Even without slipping into such a deep deterioration, sometimes they simply fail to consider the interests of minority

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[114] *Smith* at 890.

[115] "Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer," American University Washington College of Law, last modified January 14, 2005, accessed June 28, 2017, http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument/.

groups, including minority religions. Overall, the First Amendment exists because rights are not always protected. As Elbridge Gerry stated during the debate over the conscientious objector clause, "This declaration of rights, I take it, is intended to secure the people against the mal-administration of the Government; if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed."[116]

Given the complex nature of religious objections and the accommodations that would serve them, the *Sherbert* test, based on the Accommodation interpretation of the Free Exercise Clause, seems to be the most reasonable way for the government to protect free exercise while also reaching its compelling aims. Indeed, the type of debate that we saw concerning the conscientious objection clause is the very type that we see during strict scrutiny review. The justices raise the question of whether the government has a compelling interest in the end that it is trying to meet, and whether denying the accommodation is the least restrictive means of meeting that end. In this case, they debated whether the militias would be undermined by such an accommodation ("compelling interest"). They also debated what kind of accommodation would be sufficient to meet the qualms of those who objected ("least restrictive means"). For example, when it was recommended that language be added clarifying that such persons must pay an equivalent, Sherman responded by pointing out that "those who are religiously scrupulous of bearing arms are equally scrupulous of getting substitutes or

[116] Witte and Nichols, *Religion and the American Constitutional Experiment*, Kindle Locations 2164-2166

paying an equivalent. Many of them would rather die than do either one or the other…"[117]

Interestingly, after explaining that using strict scrutiny would cause problems for the Court, Scalia actually listed several cases in which the Court used strict scrutiny and found the test to be satisfied (*United States v. Lee* and *Gillette v. United States*). He mentions these cases in the context of arguing that the test is not firmly a part of the free exercise legal tradition. "Although we have sometimes purported to apply the *Sherbert* test in contexts other than [the unemployment context], we have always found the test satisfied…"[118] But the fact that the government passed the test in those cases renders them no less relevant to the defense of strict scrutiny; in fact, it only suggests that the test has worked well. As Justice O'Connor argues, "Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us."[119]

Overall, even if the Framers were uncertain of whether the Free Exercise Clause should extend to require accommodations (indeed, few such accommodations were needed at the time, given the limited scope of the government), they used language broad enough to encompass it. It is plausible that the broad language in the Clause was intended to allow future generations of judges and legislatures to engage in similar debates, working out the contours of the free exercise right over time. And indeed it has. The *Yoder* case, for example, revealed that the very existence of certain religious groups

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[117] Witte and Nichols, *Religion and the American Constitutional Experiment*, Kindle location 2179.

[118] *Smith* at 883.

[119] *Smith* at 897 (O'Connor, J., concurring).

would be seriously threatened without such accommodations. Since the scope of the national government is increasing, it is to be expected that more religious denominations that find themselves outside of the mainstream will find it difficult to practice their faith. The Framers' choice of the words "free exercise of religion" over "freedom of worship" certainly allows for the requisite protections for these groups without going beyond the plain meaning of the constitutional text.

While there is much debate over what type of protection is necessary for protecting the free exercise of religion, one point is abundantly clear: the First Amendment singles out the free exercise of religion for special treatment. As a basic textual matter, and with support from the constitutional history, the free exercise of religion cannot be reduced to speech, association, and the other freedoms that Eisgruber and Sager enumerate.

Yet Eisgruber and Sager are correct that these other freedoms can serve to protect religious freedom. The freedom of association, for example, protects the rights of groups to fulfill their mission through possessing the freedom to select their members and especially their leaders. Unfortunately, just as the Court has stepped away from its once robust protection of free exercise, it has also recently embraced a diminished view of freedom of association. In the next chapter, I explore whether the Court's treatment of a religious student group at a public university demonstrates an impoverished view of association that further threatens religious freedom.

CHAPTER THREE

Christian Legal Society v. Martinez and the Diminution of Freedom of Association

In the 2010 case of *Christian Legal Society v. Martinez*, the Supreme Court concluded that a public law school may condition its official recognition of a student group, and the university benefits that flow from such recognition, on the group's willingness to open eligibility for leadership and membership to all students, regardless of whether they agree with the group's core tenets. Critics argue that the Court's decision ultimately deprives student groups of their First Amendment right to freedom of association because the group's ability to control its message is dependent on its ability to control its composition. In this chapter, I argue that an impoverished understanding of associations and the goods they bring to society, as well as an overly individualistic understanding of rights, led the Court to deny CLS its constitutional rights.

In section 1, I provide a summary and analysis of the Court's decision, highlighting the individualistic foundations of its reasoning. In section 2, I argue that the Court (with Justice Ginsberg speaking for the majority) presents a confused understanding of association that rejects its value as a unique form of expression. After exploring the majority's flawed assumptions about associations, I then focus specifically on Justice Kennedy's concurrence, which brings out these assumptions and their implications even more clearly. I argue that Kennedy, viewing associations as a threat to diversity and rational discourse between students, ultimately elevates the individual autonomy of prospective group members above the associational rights of the groups.

Contrary to Justice Kennedy's presentation, this elevation of the individual over the group deprives society of the actual benefits of viewpoint diversity, which can be preserved only by robust protection for associations.

In section 3, I analyze the Court's precedents and describe two different approaches the Court has taken to dealing with conflicts between individuals and groups. The Court's confusion over association began in the 1984 case of *Roberts v. United States Jaycees*, wherein the Court articulated a framework that provides diminished protection for associations that are not "intimate" and abandoned the close connection between the group's composition and its message, an abandonment that came to full fruition in *Martinez*. However, in the 2000 case of *Boy Scouts of America v. Dale*, the Court provided a firmer case for the freedom of associations to govern their internal affairs, defending the connection between the group's composition and its message. When the Court recognized this connection, it ceased to elevate the interests of the excluded individual over those of the group.

Lastly, in section 4, I address the argument that, if private associations should be free to control their composition, public universities, too, should have the authority to regulate their student groups. Relying on Supreme Court precedent, I argue that this position neglects the important distinction between public universities and the public forum *within* the university. The university is free to express its own views on substantive issues, but the public forum solely represents the voices of the students, whose constitutional rights to speech, association, and religious free exercise are protected no less on public college campuses than anywhere else.

The import of *CLS v. Martinez* stretches far beyond the rights of a small Christian law student group at Hastings. Protecting associations such as CLS is in the interest of the whole society, not just those members who wish to maintain the group's orthodoxy. Associations serve as barriers between individuals and the efforts of hegemonic governments, and they also protect individuals against the tyranny of the majority, which Alexis de Tocqueville famously described as the "greatest danger" to modern democracies. Hence, rather than being a threat to the individual that the majority of the Court in *Martinez* suggests they are, associations ultimately serve to protect the liberty of all individuals by resisting the dual tyrannies of the majority and of the state.

CLS v. Martinez is also important because it demonstrates the close connection between freedom of religion and freedom of association. Especially since the Court has offered diminished protection for the free exercise of religion in certain facets of its jurisprudence,[1] other freedoms, such as association, can be helpful for protecting religious institutions (whether they are sufficient, however, we will explore in the next chapter). Freedom of association and freedom of religion are intertwined, and insights from one line of jurisprudence can be helpful in strengthening the other.[2]

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[1] As we saw in the last chapter, the Court's final word on the Free Exercise Clause was that it does not protect individuals against incidental burdens created by neutral, generally applicable laws. The Court has been more consistently solicitous of religious freedom in the area of church autonomy. See *Hosanna-Tabor v. EEOC*, 565 U. S. __ (2012), which will be discussed in the next chapter.

[2] Other scholars have suggested this possibility. John Inazu argues that "religious liberty is best strengthened by ensuring robust protections of more general forms of liberty," including freedom of assembly. John D. Inazu, "The Four Freedoms and the Future of Religious Liberty," *North Carolina Law Review*, 92 (2014): 787. Similarly, Paul Horwitz argues that the Court's freedom of association jurisprudence can serve as a secondary support for church autonomy: "[*Boy Scouts v. Dale's*] broad reading of freedom of association would offer vital protection for church autonomy if the Religion Clauses themselves were unavailable" Paul Horwitz, "Defending (Religious) Institutionalism," *Virginia Law Review*, 99 (2013). In the reverse direction, Michael McConnell argues that the Court's Free Exercise Clause decisions can serve as a model for how all associations can better be protected. He agrees with Horwitz that *Boy Scouts v. Dale* is a step in the right direction, but he observes that the Court has more firmly recognized the right of a group to control its leadership and membership within the context of

Section 1: CLS v. Martinez and the Victory of Individual Autonomy

Christian Legal Society v. Martinez involved a challenge to the University of California Hastings College of the Law's "accept-all-comers" policy, a nondiscrimination policy that requires all student groups to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs."[3] The Law School asserts that, by bringing together people with diverse backgrounds and beliefs, the policy "encourages tolerance, cooperation, and learning among students."[4] An organization that refuses to comply with this policy cannot become a Registered Student Organization (RSO). RSO status carries with it certain benefits that allow student groups to better communicate with Hastings students and professors.[5] Groups that are denied RSO status will not be excluded from campus, but they will not have access to these benefits or the university funding that is supplied through mandatory fees on all students.

In 2004, the Christian Legal Society (CLS) was the first and only group to have been denied RSO status.[6] Founded in 1961, CLS is a "nationwide association of lawyers, law students, law professors, and judges who share a common faith and seek to honor

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religious institutions. Hence, his "suggestion would be to extend the free exercise doctrine more broadly, as a matter of freedom of association." Michael W. McConnell, "The Problem of Singling out Religion," *DePaul Law Review*, 46 (2000).

[3] *Christian Legal Society v. Martinez, et al*., 561 U.S. 661 (2010) at 671.

[4] *Martinez* at 689.

[5] RSOs may place announcements in a weekly student newsletter, advertise events on designated bulletin boards, send mass emails to the student body using a Hastings email address, and participate in an annual student group recruitment fair. They may also utilize Hastings' facilities for office space and meetings as well as use Hastings' name and logo in their communications. *Martinez* at 669.

[6] *Martinez* at 710 (Alito, J., dissenting).

Jesus Christ in the legal profession."[7] The group, which has chapters at many law schools across the country, provides its members with fellowship and mentorship opportunities, and encourages them to furnish legal services to the poor. Per the requirements of CLS-National, students who wish to be officers or voting members, or to lead Bible studies must sign a statement of faith, affirming their agreement with, and promising to live by, the organization's core tenets. These tenets include the divinity of Jesus Christ and the teaching that sexual activity should occur only within marriage between a man and a woman. Thus, a student with religious and moral views different from those described in the statement of faith or who engages in conduct that is inconsistent with those views may not become a member of CLS. Because CLS barred students based on religion and sexual orientation, Hastings denied the group RSO status.

CLS filed suit, contending that this accept-all-comers policy impairs its First and Fourteenth Amendment rights of free speech, expressive association, and free exercise of religion by prompting the group to admit members who do not share the group's beliefs about religion and sexual morality. Such a requirement, they argue, severely burdens their ability to control and present their message.[8] The policy as written does not create this problem for CLS only, they contend, but will infringe upon the freedom of any group with a political, social, or religious message.[9] For example, under this policy, Jewish groups would ostensibly be required to admit anti-Semites or Holocaust deniers in order to obtain RSO status. Similarly, LGBT groups would be forced to admit students who

[7] Brief for Petitioner, *Christian Legal Society v. Martinez* (2010) 4-5.

[8] Brief for Petitioner, *Christian Legal Society v. Martinez* (2010) 30.

[9] *Martinez* at 731 (Alito, J., dissenting).

oppose gay rights.[10] After the federal district court and Ninth Circuit Court of Appeals ruled in favor of Hastings, CLS appealed to the U.S. Supreme Court.

In addition to the freedom of religion claim, CLS asked the Supreme Court to evaluate the university's policy under two distinct lines of cases that deal with expression more generally: the Court's freedom of association jurisprudence and the Court's "limited public forum" jurisprudence. The freedom of association entails the idea that a group should be free to determine its own membership and leadership, which necessarily includes the ability to exclude members and leaders. The Court has thus stated that freedom of association "plainly presupposes a freedom not to associate."[11] In a 1995 freedom of association case affirming the right of a private organization to exclude an Irish gay pride group from its St. Patrick's Day parade in Boston, Justice Souter wrote for a unanimous Court: "Every participating unit affects the message conveyed by the private organizers."[12] In order to preserve the integrity of a message, exclusion is sometimes necessary. Because individuals often unite into groups in order to form and express their ideas, the Court has recognized "freedom of association" as a right implied by the First Amendment's Free Speech Clause, Assembly Clause, and Petittion Clause.[13]

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[10] *See* Brief of Gays & Lesbians for Individual Liberty, *Amicus Curiae* in Support of Petitioner, *Christian Legal Society v. Martinez* (2010).

[11] *See Roberts v. United States Jaycees,* 468 U.S. 609 (1984) at 623.

[12] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557 (1995) at 572.

[13] The Supreme Court case that established the doctrine of "freedom of association" was *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Other association cases include: *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971); *NAACP* v. *Button*, 371 U.S. 415 (1963); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293 (1961); *Healy v. James*, 408 U.S. 169 (1972); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995); *California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

The "limited public forum" cases also fall under the Court's free speech jurisprudence. The more general "public forum" doctrine entails the idea that certain types of government property and resources, including funding, may be used by private groups to express their ideas. A wide array of public entities constitute public forums, including city parks, public sidewalks, websites, libraries, and student activity funds at public universities, such as Hastings' RSO forum.[14] Certain forums are specifically labeled "limited" public forums.[15] Under this doctrine, a government entity may regulate the use of its own property, such as state university facilities, by placing certain limitations on the speech that may occur there. For example, a state university may decide that only university students may advertise on the university's bulletin boards. Any access restrictions in a "limited public forum" must be "reasonable and viewpoint neutral."[16] A university thus cannot deny forum access to organizations, including religious organizations, because of their viewpoints. Although both freedom of association and limited public forums are grounded in the Free Speech Clause, they each have their own distinct line of cases.

The Court rejected CLS' request to evaluate its claim independently under both lines of cases and instead "merged" the two claims, assessing the law school's policy

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[14] John D. Inazu, "The First Amendment's Public Forum," *William and Mary Law Review*, 56 (2015): 1164.

[15] Supreme Court precedent, the majority in *Martinez* explains, has sorted government property into three categories: 1. Traditional public forums, such as streets and parks, 2. Government property that is not traditionally used as a public forum but is intentionally opened up for that purpose, and 3. Government property that is "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Martinez* at footnote 11. Strict scrutiny is used to review speech restrictions that take place in the first two types of forums. In the third, however, the government must simply show that any restrictions are "reasonable and viewpoint neutral."

[16] *Rosenberger v. Rector*, 515 U. S. 819 (1995) at 829; *Good News Club v. Milford Central School*, 533 U. S. 98 (2001) at 106-107; *Lamb's Chapel v. Center Moriches Union Free School D*ist., 508 U. S. 384 (1993) at 392-93; *Perry Ed. Assn. v. Perry Local Educators' A*ssn., 460 U. S. 37 (1983) at 46.

under its "limited public forum" caselaw only. The Court reasons that, in this case, association is the "functional equivalent of speech itself," and that therefore it makes "little sense" to treat the two claims separately.[17] The Court then holds that the university's position that the "educational experience is best promoted when all participants in the forum must provide equal access to all students"[18] is "reasonable and viewpoint neutral." Unlike previous cases dealing with access restrictions to university forums, the Court emphasizes, Hastings did not specifically target any groups or viewpoints for exclusion.[19] The justices also rejected CLS' free exercise of religion claim because the policy did not target any religious groups specifically but only burdened them by its effects.[20]

The university setting played a key factor in the outcome of this case. The CLS was not merely a private organization seeking to express its ideas in the public square, but a student group functioning under the auspices of a state university. The Court emphasizes the importance of having some deference to universities in their vision of education and explains that "extracurricular programs are, today, an essential part of the educational process."[21] It is therefore necessary to approach this case with "special

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[17] *Martinez* at 680.

[18] *Martinez* at 688.

[19] *Healy v. James*, 408 U.S. 169 (1972); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Rosenberger v. Rector*, 515 U.S. 819 (1995).

[20] As we saw in the previous chapter, under the precedent of *Employment Division v. Smith*, the Free Exercise Clause is not violated when a regulation of general applicability "incidentally burdens" religious conduct. The Religious Freedom Restoration Act could not be implicated here as this case involves action by a state, not the federal government. As mentioned above, the Supreme Court rendered RFRA inapplicable to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[21] *Martinez* at 686.

caution."[22] University of Alabama law professor Paul Horwitz defends the outcome of the case on the grounds that a university, whether public or private, should be treated by the Court as a self-regulating autonomous institution rather than a "public forum." Hence, according to Horwitz, the case represents a clash between the institutional autonomy of the university and the institutional autonomy of the group "nested" within the university, and the Court rightly upheld the university's freedom to determine its own vision for education.[23]

The fact that the Hastings' policy involved the denial of a government benefit, as opposed to an outright prohibition of CLS' presence on campus, was another essential factor in the Court's decision. The Court contends that CLS faces only an "indirect pressure" to modify its policies.[24] Unlike the groups that received the Court's favor in previous freedom of association cases,[25] CLS is not being *forced* to admit any members that they do not want. As Justice Ginsburg states in her majority opinion, "Hastings, through its RSO program, is dangling the carrot of subsidy, not wielding the stick of prohibition."[26] CLS will simply not receive the same benefits as other groups who choose to adhere to the policy. This unequal treatment is permissible because the RSO status is a privilege, not a right.

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[22] *Martinez* at 687, citing *Healy v. James*, 408 U.S. 169 (1972) at 171.

[23] "As First Amendment institutions, universities, consistent with their own sense of what their mission demands, should have the choice to be 'politically correct' or 'politically incorrect'— provided they do so as universities. The university's right to sponsor groups like the CLS, or to exclude them altogether, trumps the nested rights of the associations in question." Horwitz, *First Amendment Institutions*, 237-238.

[24] *Martinez* at 663.

[25] *Hurley*, 515 U.S. 557 (1995); *Dale*, 530 U.S. 640 (2000).

[26] *Martinez* at 683.

While the Court seemingly depends only on legal doctrines and a concern for institutional deference in arriving at its conclusion, it is important to recognize the philosophic principles that guide the Court's reasoning. At its core, the *Martinez* decision is dedicated to a particular, individualistic vision of human beings. In finding the policy to be "reasonable," the Court affirmed the university's concern for the interest of the excluded individual, even if protecting this interest comes at a great cost to campus groups and their missions. As Justice Ginsburg states in her majority opinion, "[T]he all-comers policy ensures that no Hastings student is forced to fund a group that would reject her as a member."[27] When a student contributes to the public forum through paying the activity fee, she should face no limitations within the forum; essentially, the all-comers policy is reasonable because it protects the student's autonomy and prevents groups from harming her by exclusion. Of course, one could make Ginsburg's argument on behalf of CLS: the members of CLS should not be forced to fund the student activity forum when their group is excluded from its benefits.[28] Here we see that, when the autonomy of individuals who form a group clashes with the autonomy of a lone individual, the Court favors the latter. In his concurrence, Justice Kennedy explains that, under a regime that would allow CLS to enforce its membership requirements, "[s]tudents whose views are in the minority at the school would likely fare worse…"[29] The Court seems to favor individuals over groups on the assumption that groups can cause harm to individuals,

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[27] *Martinez* at 664.

[28] Richard Epstein makes this argument. "This supposed subsidy is not manna from heaven, courtesy of an anonymous Hastings alumnus who is antagonistic to CLS. It is collected by taxes on all students, including members of CLS…CLS' members must put money into a pot from which they are not allowed to withdraw cash." Richard Epstein, "Church and State at the Crossroads: *Christian Legal Society v. Martinez*," *2009-2010 Cato Supreme Court Review*, 105 (2010): 134.

[29] *Martinez* at 705 (Kennedy, J., concurring).

ostracizing them and drowning out their voices.[30] Hence, such antidiscrimination policies that afford the highest protection to individuals take priority over the associational freedom of the group.

Scholars who defend the *Martinez* majority think that the deeper concern behind the case is not just the prevention of discrimination amongst the students at Hastings, but the assurance of the progress of equality and individual freedom throughout the whole society. Corey Brettschneider, professor of political science at Brown University, argues that, in order to ensure such progress, hateful or discriminatory viewpoints should not be treated as equal for purposes of government benefits such as the RSO status at issue in this case.[31] The justices seem to affirm this connection between the university's policy and the broader societal interest in antidiscrimination. The Court explains that Hastings' policy, which "incorporates…state-law proscriptions on discrimination, conveys the Law School's decision 'to decline to subsidize with public monies and benefits conduct of which the people of California disapprove.'"[32] As long as Hastings, as a public university, does not "contravene constitutional limits," it may certainly choose to advance

[30] Stephen L. Carter explains this phenomenon: "The lone critic is no danger, because he can do nothing alone. But the group, because it is better able to act, becomes a threat. That is why those in power have always sought legal means to thwart organizations that are preaching dissent, while leaving ineffective individuals largely alone." Stephen L. Carter, *The Dissent of the Governed*: *A Meditation on Law, Religion, and Morality*, (Cambridge: Harvard University Press, 2009), Kindle locations 676-679.

[31] While Brettschneider agrees with the Court's outcome in this case, he disagrees with its reasoning. He contests the Court's "viewpoint-neutral" requirement altogether. Providing government benefits, such as university funds, to hateful or discriminatory groups threatens "free and equal citizenship," which is the most basic principle that upholds liberal society. While the government must certainly protect the rights of private groups to express such viewpoints, it can—and indeed should—take active measures to criticize those viewpoints. Corey Brettschneider, "How Should Liberal Democracies Respond to Faith-Based Groups that Advocate Discrimination? State Funding and Nonprofit Status," in *Legal Responses to Religious Practices in the United States: Accommodation and Its Limits*, ed. Austin Sarat (Cambridge: Cambridge University Press, 2012), 72.

[32] *Martinez* at 689-90.

state-law goals through its educational endeavors, including the goal of protecting individuals from discrimination by student associations.[33]

Section 2: The Court's Impoverished View of Association

The problem with the majority's position is that the University of Hastings' accept-all-comers policy did indeed contravene constitutional limits. The Court departs from its long tradition of treating association as a distinct constitutional right by "merging" it with the free speech right under the public forum doctrine. In so doing, the Court undermines the formative role of associations and their importance to the freedom of expression. This section will explore these problems, paying special attention to Justice Kennedy's concurrence, which epitomizes the Court's individualistic tendency and reveals skepticism of associations *per se*.

The Court's reluctance to review CLS' claim independently as a freedom of association claim reveals the current Court's impoverished view of associational freedom. The Court states that "expressive association in this case is 'the functional equivalent of speech itself,'"[34] and therefore CLS' claim can simply be treated as a speech claim. But the Court is incorrect in simply *reducing* association to speech through this "merger." In his dissent, Justice Alito argues that the accept-all-comers policy is unconstitutional because a group's First Amendment right of expressive association is burdened when the group is forced to admit members whose presence would "affect[t] in a significant way the group's ability to advocate public or private viewpoints."[35] The

[33] *Martinez* at 690.

[34] *Martinez* at 680.

[35] *Martinez* at 724 (Alito, J., dissenting), citing *Dale* at 648.

presence of these members affects the ideas being communicated, and therefore the right to associate is not only distinct from but precedes and makes possible the speech right. Association is thus more than mere speech, the verbal declaration of a particular idea. The mere *act* of associating is itself expressive and worthy of its own unique constitutional protection.

The Court's dismissal of this point allowed it to review Hastings' policy according to a more lenient standard than what the association claim would have required. Under the Court's freedom of association precedents the Court would have been required to review the policy according to the judicial standard of "strict scrutiny." Under this standard, restrictions on freedom of association are permitted only if they serve "compelling state interests" that are "unrelated to the suppression of ideas." The university would have had to prove that its compelling interest could not have been reached through "significantly less restrictive means." Since the Court avoided the associational claim, the justices simply had to determine whether the policy was "reasonable and viewpoint neutral," a far less rigorous standard used in the Court's "limited public forum" cases.

As a constitutional matter, the Court's conclusion is problematic because it allows a state law school to violate the doctrine of "unconstitutional conditions," whereby the government may not condition a benefit on the beneficiary's forfeiture of a constitutional right, even if the government may withhold that benefit altogether.[36] In this particular case, what is being conditioned is not actually a mere benefit but a constitutional right, which makes the case even more problematic. As University of St. Thomas law professor

[36] *See* Kathleen M. Sullivan, "Unconstitutional Conditions," *Harvard Law Review*, 102 (1989): 1415.

Michael Stokes Paulsen explains, "Simply put, one constitutional right (here, a student religious group's First Amendment right…to equal access) cannot be conditioned on forfeiture of another constitutional right (a group's First Amendment right to expressive association…)."[37] In other words, under the Hastings policy, members of CLS could exercise their right to free speech through access to the forum only if they are willing to give up their right to associate. The majority's rejection of speech and association as two distinct constitutional claims clearly contributes to their reluctance to see the problem that Paulsen points out. Without understanding them as two separate rights, the judges will inevitably fail to see that one is being offered on condition of abandoning the other.

Justice Kennedy's concurrence reveals with more clarity this diminution of association. Kennedy's decisive vote with the majority was surprising, given that he supported robust associational freedom in a landmark case protecting the Boy Scouts of America from an antidiscrimination law, and also wrote the majority opinion in *Rosenberger, v. UVA,* which affirmed the right of a Christian publication to be included in a state university's student publication forum. *Dale* and *Rosenberger*, read together, would seem to dictate a win for CLS. Hence, Kennedy's concurring opinion in this case should be examined carefully.

While the majority opinion emphasizes the need for deference to the university, Kennedy's rhetoric implies a more normative defense of the university's policy, contending that its goal of diversity is simply incompatible with the ability of groups to freely determine their respective membership and leadership. He states that CLS' membership requirements would "contradict" the legitimate purpose for which the

[37] Michael Stokes Paulsen, "Disaster: The Worst Religious Freedom Case in Fifty Years," *Regent University Law Review,* 24 (2011): 297.

school's forum was created.[38] He explains that student activity forums "facilitate interactions between students, enabling them to explore new points of view, to develop interests and talents, and to nurture a growing sense of self."[39] In particular, the Hastings forum was meant to "allow students to interact with their colleagues across a broad, seemingly unlimited range of ideas, views, and activities."[40] These two statements highlight Kennedy's particular concern for the fostering of healthy "interaction" between the students. This interaction is what introduces them to new ideas and helps them to develop personally. He explains that law students come from all backgrounds and are taught to craft arguments in a rational and respectful manner, and to express disagreement in a professional way. These objectives are furthered by "allowing broad diversity in registered student organizations," but they may be "better achieved" if diversity could occur within groups themselves so that "students can act cooperatively to learn from and teach each other through interactions in social and intellectual contexts."[41] Hence, Kennedy recognizes that the diversity among groups will be limited as a result of this policy,[42] but the cooperative attitude that students will learn through closer interaction with one another is worth this cost. The implication is that CLS' desire to freely control its leadership is tantamount to a refusal to cooperate with others. Kennedy explains why

[38] *Martinez* at 704 (Kennedy, J., concurring).

[39] *Martinez* at 704 (Kennedy, J., concurring).

[40] *Martinez* at 705 (Kennedy, J., concurring).

[41] It is somewhat unclear whether Kennedy thinks the objective of the forum is diversity of persons, diversity of viewpoints, or crafting arguments in a respectful manner. The law school defends its policy by saying that it encourages toleration, cooperation, and learning among students, but this is a defense of the specific antidiscrimination policy, not a statement about the *purpose* of the forum itself.

[42] Kennedy's opinion therefore does not give sufficient weight to something he himself acknowledges—that a "group that can limit membership to those who agree in full with its aims and purposes may be more effective in delivering its message or furthering its expressive objectives." *Martinez* at 704 (Kennedy, J., concurring).

such a lack of cooperation would undermine the exchange of ideas that these forums are meant to foster: "A vibrant dialogue is not possible if students wall themselves off from opposing points of view."[43] By refusing to allow non-adherents to join, CLS not only forfeits a lesson in cooperation, but its members also isolate themselves from challenges to their arguments, both of which will undermine the self-development in students that the law school seeks to promote.

Hence, Kennedy thinks CLS' membership requirements will undermine both the cooperative interaction between students and the healthy dialogue that should take place as a result of such cooperation. A closer consideration of the nature of association—and the activities of CLS specifically—will demonstrate that Kennedy goes too far with these claims. First, forced inclusion of a non-adherent into a group is arguably not required to teach students "cooperation." Students will need to interact with each other—and thus learn to cooperate (if they, adults with undergraduate degrees, do not already know how to do so)—in many other ways.[44] Further, when it comes to expressive associations—organizations aimed at forming and promoting ideas—rejecting a person as a member does not reveal a reluctance to cooperate with that person. As Justice Alito points out in his dissent, traditional Orthodox Jewish institutions distinguish between Jews and non-Jews, and this distinction does not reveal contempt for non-Jews.[45] The Court, especially Kennedy in his concurrence, essentially infuses association itself with a deleterious

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[43] *Martinez* at 705 (Kennedy, J., concurring).

[44] First Amendment scholar Richard Epstein proposes a reasonable alternative to Kennedy's understanding of the term: "Cooperation…requires only that a group be prepared to work with other groups on common issues. It does not require that any group sacrifice its core identity or admit members of other groups, whose principles it does not accept, into its own ranks." Richard Epstein, "Church and State at the Crossroads," 132.

[45] *Martinez* at 733 (Alito, J., dissenting).

meaning: a group that associates and thus excludes non-adherents rejects the value of outsiders and childishly refuses to cooperate with them.

Second, Kennedy's statement that CLS members seek to "wall themselves off from opposing points of view" also brings confusion to the concept of association. It is a *non sequitur* to assert that CLS, by limiting its leadership and voting membership to those who share its views, seeks to isolate itself from opposing ideas. The desire to control the composition of the group simply allows it to control the content of its message; it reflects on what its members want to say, but says nothing about what they do not want to hear. Far from "walling themselves off" from objections, the CLS members at Hastings invited all students to attend their meetings regardless of "race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation."[46] Such attendees were welcome to actively participate in the meetings; they were forbidden only from controlling the official message of CLS through voting or seeking office. Further, even if it were to be discovered that all members of CLS wanted only to promote their own ideas rather than hearing the ideas of others, this would not undermine their right to associate. Open-mindedness is not a condition for the protection of one's constitutional rights.

Regardless of how open-minded the members of CLS may be, the broader point is that Kennedy errs in assuming that diversity is incompatible with robust protection for associations. Tolerance and diversity "among" groups rather than "within" groups, to use Justice Alito's formulation, is much more conducive to the forum's aim of promoting an exchange of diverse ideas.[47] As First Amendment scholar Michael McConnell adeptly

[46] Brief for Petitioner, *Christian Legal Society v. Martinez* (2010), 5.

[47] *Martinez* at 735 (Alito, J., dissenting).

explains, "If every group is internally diverse and pluralistic, reflecting the population as a whole, every group will be the same. If groups are required to accept members and appoint leaders who do not share their distinctive beliefs, their distinctive voice will be silenced."[48] While Hastings wants its students to have personal encounters with diverse individuals within the group, CLS wants the whole student body to encounter diverse viewpoints through discussions and events presented by the groups in the forum. Given the "public" nature of the public forum, the latter seems more consistent with its purpose. Hence, contrary to the Court's vision of groups as posing a threat to minority voices and stifling diversity, protection for all groups, regardless of their composition, is the best means for assuring that all viewpoints are heard. Without allowing groups to freely determine the criteria for membership, no association can have a substantive mission other than the very tolerance and cooperation the law school seeks to promote. The sole distinguishing feature of one group from another group would be its name.

Kennedy's concurrence also displays the individualistic tendency of the Court in a more direct manner than does the majority opinion. He expresses a deep concern for individual autonomy, which he elevates over the interest of the group. In the following passage, he reveals what troubles him about CLS' specific membership requirements:

> The school's objectives thus might not be well served if, as a condition to membership or participation in a group, students were required *to avow particular personal beliefs* or to *disclose private, off-campus behavior*… Indeed, were those sorts of requirements to become prevalent, it might undermine the principle that in a university community… speech is deemed persuasive based on its substance, not the identity of the speaker (emphasis added).[49]

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[48] Michael W. McConnell, "The New Establishmentarianism," *Chicago-Kent Law Review*, 75 (2000): 466.

[49] *Martinez* at 705-06 (Kennedy, J., concurring).

Kennedy is clearly concerned that CLS' membership requirements attempt too much control over prospective members, undermining their autonomy and violating their privacy. With his suggestion that CLS should have no interest in the "private, off-campus behavior" of potential leaders, he creates a false dichotomy between speech and conduct, suggesting that a person's actions are wholly irrelevant to the ideas he wishes to convey. This is inconsistent with the general recognition, affirmed in Supreme Court free speech jurisprudence, that people communicate ideas not just with their words, but with their actions.[50] In the context of associations, this principle arguably applies even to actions that take place outside of group meetings. For example, if the president of a group that promotes vegetarianism were found to be unashamedly eating steaks off campus, few people would question the group's decision to remove him from leadership. This is because his conduct suggests that he is not fully committed to the ideas that he endorses with his speech, and this will undermine the group's ability to communicate those ideas. So long as an individual joins a group voluntarily, requiring member conduct to be consistent with the teachings of the group precisely because it has an effect on the group's message is not unreasonable.

In the passage above, Kennedy also argues that the "identity of the speaker" is irrelevant to whether his particular speech is persuasive. Hence, he is suggesting that CLS is going beyond conduct-based discrimination to status-based discrimination. But even the "status" of persons, characteristics they hold which may be beyond their control, can contribute to the message of an association. Washington University law professor John Inazu gives several examples: a women's college, a black fraternity, or a Jewish day

[50] *See e.g. Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Cohen v. California*, 403 U.S. 15 (1971); *Texas v. Johnson*, 491 U.S. 397 (1989).

school.[51] The fact that the individual members' actions and "status" affect the message sent by the entire group is part of what makes association a unique form of expression deserving of the distinct constitutional protection our nation's traditions have afforded it.

Kennedy's concern that CLS is undermining individual autonomy is not solely related to the group's personal conduct requirements; he is troubled by the very idea of a group requiring its members to "avow particular personal beliefs" through a signed statement of faith. Drawing the reader's mind to thoughts of the Red Scare, he states: "The era of loyalty oaths is behind us."[52] But it is quite a stretch to equate a religious statement of faith, required by many religious organizations that have long existed in the United States, with McCarthyism. CLS is not a government entity requiring a signed statement as a condition for receiving certain benefits.[53] The statement of faith it requires helps to ensure that only those who truly share its beliefs will join the group. An individual who truly agrees with and wishes to promote CLS' message will not be harmed by being asked to affirm his commitment in writing. So long as the right of exit is maintained, the freedom of the individual and the group are both preserved.

Overall, Kennedy presents a thin view of association that elevates the university's goals of cooperation and tolerance over the constitutional rights of students. Rather than being concerned with protecting public debate, he is more concerned with making sure the students get along: "A school quite properly may conclude that allowing an oath or belief-affirming requirement, or an outside conduct requirement, could be divisive for

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[51] Inazu, "The First Amendment's Public Forum," 1179.

[52] *Martinez* at 706 (Kennedy, J., concurring).

[53] *See Speiser v. Randall*, 357 U.S. 513 (1958) (declaring unconstitutional a California provision requiring a loyalty oath as a condition for a tax exemption).

student relations and inconsistent with the basic concept that a view's validity should be tested through free and open discussion."[54] But free and open discussion can take place only if students are trusted to form their own groups without interference by university administrators who fear that some students may be offended if they are excluded from a particular group.[55] True tolerance would require students to withstand such offense and engage their colleagues through public discussion within the forum rather than permitting them to force themselves into a group that does not wish to promote their views.

Section 3: The Court's Past Treatment of Conflicts Between Associations and Individuals

Martinez is not the first case in which the Court misunderstood associations and the freedom guaranteed to them in the Constitution. The Supreme Court's attempts at treating the rights of groups have been confused and inconsistent, in part because the Court often embodies the individualistic tendency seen in the *Martinez* case.[56] In its freedom of association cases, the Court has lacked a clear standard by which to treat

[54] *Martinez*, 561 U.S. 661, 706 (2010) (Kennedy, J., concurring).

[55] Justice Ginsburg is dissatisfied with CLS' claim that it allows students who are non-members to attend and participate in its meetings. In footnote 18 of her majority opinion, she states, "Welcoming all comers as guests or auditors, however, is hardly equivalent to accepting all comers as full-fledged participants." Ginsburg gives no reason why the vibrant dialogue Hastings seeks within the forum requires full membership rather than the participation at events that CLS offers to everyone. The insistence on full membership without connecting it to dialogue suggests that the Court's approval of the Hastings policy has more to do with ensuring individual inclusion and autonomy than any benefit to free and open debate.

[56] Many scholars have addressed the Court's difficulty with treating group rights. Paul Horwitz, *First Amendment Institutions*, 27, 41 (Most legal scholars "focus primarily on the classic model of a lone speaker arrayed against the terrible power of the state."); Richard W. Garnett, "Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?" *St. John's Journal of Legal Commentary*, 22 (2007): 516 ("The special place, role, and freedoms of groups, associations, and institutions are often overlooked."); Frederick Schauer, "Institutions as Legal and Constitutional Categories." *UCLA Law Review*, 54 (2007): 1749 (First Amendment jurisprudence tends to treat all speakers as "lone dissenters," thus ignoring important First Amendment values that are served by different types of institutions in the context of both speech and religion.); Frederick Mark Gedicks, "The Recurring Paradox of Groups in the Liberal State," *Utah Law Review* 2010 (2010): 58 (American constitutional rights doctrine is "relentlessly individualistic."); Gerard V. Bradley, "Forum Juridicum: Church Autonomy in the Constitutional Order," *Louisiana Law Review*, 49 (1987): 1064 (Speaking of liberal political theory more generally: "Liberalism adeptly reasons about the individual and the state, but cannot fathom groups.").

associations.[57] This section will analyze some of the Court's past treatment of groups in freedom of association cases. It will explore two different approaches taken by the Court when the rights of a group conflict with the interests of an individual.

As other scholars have noted, the confusion within freedom of association jurisprudence began with the 1984 case of *Roberts v. United States Jaycees*, which established the Court's current framework for adjudicating freedom of association claims.[58] Like most association cases in recent decades, this case addresses the tension between the autonomy of a private organization and a state's interest in anti-discrimination.[59] It involved the associational rights of the United States Jaycees, a non-profit national educational and charitable corporation that seeks to foster the growth and development of young men's civic organizations in America. The Jaycees sought to provide opportunities for young men to participate in their local communities as well as to "develop true friendship and understanding among young men of all nations."[60] Women and older men were permitted to be "associate members," who paid lower dues and could not vote, hold office, or participate in certain programs. The question at issue was whether the Jaycees' denial of full membership to women violated the Minnesota Human Rights Act, which states that it is unlawful to deny any person the full enjoyment

[57] Paul Horwitz argues the Court's current approach to association is "riddled with inconsistency." Horwitz *First Amendment Institutions*, 212.

[58] See Horwitz, *First Amendment Institutions*, 215. The most thorough treatment of this case and the problems it presents for future cases has been provided by John Inazu. *See* John D. Inazu, "The Unsettling 'Well-Settled' Law of Freedom of Association," *Connecticut Law Review*, 43 (2010); John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (Yale University Press, 2012), 132.

[59] *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988).

[60] *Roberts* at 613.

of a public accommodation because of race, color, creed religion, disability, national origin, or sex.[61] The Court ruled in the affirmative and concluded that any infringement on the Jaycees' constitutional rights was outweighed by the state's compelling interest in eradicating invidious discrimination.

In his majority opinion, Justice Brennan explained that the Constitution protects two types of associations: "intimate associations" and "expressive associations." These categories represent, respectively, the "intrinsic and instrumental features of constitutionally protected association."[62] Intimate association is a "fundamental" element of "personal liberty" because it protects the right of the individual to be secure against undue intrusion into intimate relationships.[63] The Court's protection of these relationships reflects the idea that "individuals draw much of their emotional enrichment from close ties with others," and that these relationships are necessary for a person's ability to define his "identity," which is essential to liberty. Expressive association protects the right of the individual to engage in activities enumerated in the First Amendment, including speech, assembly, free exercise of religion, and petition for the redress of grievances. The Court argues that "the nature and degree of constitutional protection afforded by freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given

[61] *Roberts* at 615. The Act defines a "place of public accommodation" as a "business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public."

[62] *Roberts* at 618.

[63] The Court cites the following cases that protect such intimate relationships: *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Zablocki* v. *Redhail*, 434 U.S. 374 (1978); *Moore* v. *East Cleveland*, 431 U.S. 494 (1977) (plurality opinion); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479, 482-485 (1965).

case."[64] Accordingly, associations that are both "expressive" and "intimate" are the strongest candidates for the First Amendment's protection. Associations that possess neither of these qualities are presumably unprotected altogether.

When explaining the importance of "intimate associations," the Court emphasizes the role that associations play in shaping the culture:

> [W]e have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.[65]

Here, Brennan presents associations as a critical element in the preservation of freedom. They "foster diversity" by "transmitting shared ideals and beliefs." They secure the preservation of varying opinions by serving as vehicles through which these opinions are passed down from one generation to the next. Hence, when Brennan refers to "shared opinions," he likely does not mean only those opinions that are shared by the whole community. With his reference to "diversity" in the next sentence, it can be deduced that the phrase "culture and traditions of the Nation" refers to the *variety* of traditions within the nation. Diversity necessarily entails the presence of various opinions, including opinions that may be quite unpopular. It is only by securing such opinions that associations act as "buffers" between the individual and the state. By protecting traditions that would otherwise be snuffed out by the current public opinion, associations prevent the intellectual and moral hegemony that could undermine freedom.

With this articulation of the goods provided to society by associations, the reader might expect the Court to rule in favor of the Jaycees, but the Court does not. The

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[64] *Roberts* at 618.

[65] *Roberts* at 618.

Court's emphasis on "intimate" associations leads it to provide diminished protection to "expressive associations" that are not "intimate." The Court suggests a spectrum of associations, with families, the most intimate, on one end, and large business enterprises, such as the Jaycees, on the other. Because of the Jaycees' large size and lack of selectivity, the Court is less sympathetic to its claims, even though the group clearly engages in expression through, among other things, taking positions on a number of public issues. The Court's conclusion serves to highlight the inconsistency between the rationale described above for why associations must be protected in a free society and the Court's framework of intimate versus expressive associations. The ends are not properly served by the means devised by the Court. Associations do not need to be "intimate" in order to fulfill the role of transmitting ideas, fostering diversity, and protecting individuals from the state. In fact, as John Inazu rightly asks, "[D]on't some of the largest—and least intimate—groups have the greatest capacity to resist the state?"[66]

The over-emphasis on intimate associations is not the only problem with the *Roberts* majority opinion. Just as in the *Martinez* case, here the Court fails to see the connection between the group's message and its composition. The Court states: "The [Antidiscrimination] Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members."[67] But forced removal of gender qualifications for membership renders meaningless the group's creed of promoting the interests and friendship of "young men"

[66] Inazu, "The Unsettling 'Well-Settled' Law of Freedom of Association," 166.

[67] *Roberts* at 627.

in particular. The Court asserts that the Jaycees rely on "unsupported generalizations" about differences in the perspectives and interests of men and women.[68] The Court declares that it refuses to "indulge in the sexual stereotyping that underlies [the Jaycees'] contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization's speech." But the Jaycees should arguably be left to determine on their own whether such generalizations, unsupported or not, are relevant for the purpose of their mission. In fact, by uniting as a distinctly men's group, they are able to contribute to public debate on this very question, just as women's groups can contribute to the question of whether any, and what, differences exist between the interests and perspectives of men and women, even if they are not directly engaging in research on the topic. By declaring a verdict on the substance of the Jaycees' message, the Court undermines the basic expressive purpose of associations.

While some scholars focus on the Jaycees' status as a quasi-business organization, the commercial factor played only a small part in the Court's reasoning.[69] It was not specifically the corporate nature of the Jaycees that caused it to lose the Court's favor,

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[68] *Roberts* at 628.

[69] Michael Stokes Paulsen: "The opinion can be read, without much straining, as limited to commercial contexts, where a private organization cannot plausibly point to any serious, nonpretextual, expressive interests that would be impaired by the government action in question; the result might not extend to clubs that make out a stronger claim of some genuine expressive motivation." Michael Stokes Paulsen, "Scouts, Families, and Schools," *Minnesota Law Review*, 85 (2001): 1925. Michael McConnell has stated, "The Jaycees case itself might be an exception; as essentially a business networking organization, the state may have a stronger than usual interest in regulating the Jaycees in order to ensure equal access to economic opportunity." McConnell, "The Problem of Singling out Religion," 46. I think the Court would have been more persuasive had they focused on demonstrating more thoroughly the compelling interest in ensuring that women had access to the commercial benefits offered by groups such as the Jaycees, and also that requiring such groups to offer full membership rather than associate membership was indeed the least restrictive, or, in the Court's words "significantly less restrictive means" to accomplishing this end. Indeed, this is what O'Connor did in her concurrence, erecting a dichotomy between "commercial" associations and "expressive" associations. Yet this dichotomy is problematic because some commercial associations are expressive, as O'Connor herself notes. (The rights of commercial organizations will be addressed in chapter five.)

but, more broadly, its nature as "non-intimate," and this reveals the Court's individualistic propensity. Brennan's elevation of "intimate" associations over large, expressive associations seems to be derived from a concern for individual privacy and fulfillment. When defending intimate association as a class, he cites *Griswold v. Connecticut*, the landmark right to privacy case. Paul Horwitz explains: "Brennan treated intimate association as part of the right to privacy shoehorned into the Due Process Clause of the Fourteenth Amendment."[70] While the Court is correct that small, intimate groups do shape culture by helping to form the ideas of individuals within the group, this can certainly occur in large, non-selective associations that may not involve intimate bonds between those individuals. Ultimately, the Court ruled in favor of the individual's statutory right to avoid discrimination even at the expense of the group, in part because the Court's individualism-informed framework led it to fail to recognize the liberty-enhancing significance of groups.

In *Martinez* and *Roberts*, the Court favored the individual at the expense of the constitutional rights of the association. But this is not the only approach the Court has taken when adjudicating such conflicts. In other cases the Court has recognized that large associations have constitutional rights that must be protected even if an individual may claim to be disadvantaged by exclusion from the group. In the 2000 case of *Boy Scouts of America v. Dale*, the Court addressed whether the Boy Scouts, a private, non-profit national organization that teaches boys and young men self-sufficiency and responsible citizenship, had the right to revoke membership from James Dale, an Eagle Scout and assistant scoutmaster, for being homosexual and a gay rights activist. Dale

[70] Horwitz, *First Amendment Institutions*, 215.

contended that the BSA's actions violated a New Jersey statute prohibiting discrimination on the basis of sexual orientation in places of public accommodation.

In a 5-4 decision by Chief Justice Rehnquist, the Court concludes that the forced inclusion of Dale into the Boy Scouts did impair the BSA's freedom of expressive association. One of the arguments against the BSA was that it did not have explicit teachings against homosexuality prior to revoking Dale's membership. The BSA had argued that the promise to be "morally straight" and "clean" in the Boy Scout Oath implied that members would not engage in homosexual conduct.[71] Rather than contesting the meaning of the group's own code, the Court defers to the organization to determine the content of its own message. Further, the Court stresses the importance of allowing the BSA to determine what would undermine its message: "As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."[72] If the Court had followed this principle in *Roberts*, it would not have questioned the Jaycees' assertion that the forced inclusion of women would impair the group's ability to spread its message.[73] Of course, while the Court in *Dale* emphasizes deference to the

[71] Rather than arguing that an antidiscrimination law could constitutionally render this oath impermissible, the Court implicitly accepts the requirement of an oath to be a legitimate part of the right to associate. Hence, Kennedy's comparison of CLS' statement of faith to a Cold War-era "loyalty oath" seems in tension with Supreme Court precedent.

[72] *Dale* at 653.

[73] While the Court in *Dale* does attempt to distinguish this case from *Roberts*, the distinction seems shaky. The *Dale* Court states that the *Roberts* case was different because there the Court concluded that the antidiscrimination statute "would not materially interfere with the ideas that the organization sought to express," yet here they defer to the Boy Scouts' own understanding of what would impair the group's expression. It is not clear why the Jaycees did not receive that deference, and the *Dale* Court does not explain it by stating that commercial entities deserve less deference, as one might assume. Indeed, *Dale* and *Roberts* seem to be inconsistent in several ways. As another example, Richard Epstein notes that the New Jersey Supreme Court had ruled against the Boy Scouts in part because the BSA did not constitute an "intimate association" as described in *Roberts*. Epstein, "Church and State at the Crossroads," 119. Hence,

group in the determination of what will undermine its expression, it is also clear that the majority finds the group's claim to be reasonable: "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[74] *Dale* is an important case because it demonstrates why freedom of association is a right distinct from the right of free speech, which the Court of course failed to see in *Martinez*: determinations of who may lead or join the group have a serious impact on the ideas expressed by the group.

Another significant point demonstrated by the Court in *Dale* is that freedom of association also entails the right of associations to play a role in forming the character and beliefs of their members. The Court states: "The First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private."[75] In other words, the constitutional protection for associations involves not just the messages they present to the public, but the messages presented to their respective group members. Private speech involves the communication of ideas within a group, in this case from leaders to younger members. The Boy Scout mission statement describes the nature of this private speech: the mission of the Scouts is to "serve others by helping to instill

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while the Court tries to present *Roberts* and *Dale* as consistent, they do seem to represent two conflicting approaches to the nature and rights of groups.

[74] *Dale* at 653. Michael Stokes Paulsen explains the reasoning of the case in clear terms. Dale suggests that the First Amendment "permits groups to exclude persons and views especially when their compelled inclusion would undermine a particular message of the group, but that the freedom of disassociation also extends to a right to exclude views that may compete for attention, prominence, or dominance with a group, even if they do not conflict with an extant message of the group." Michael Stokes Paulsen, "Scouts, Families, and Schools," *Minnesota Law Review*, 85 (2001): 1932.

[75] *Dale* at 648.

values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential."[76] The transmission of values is expected to shape the individuals within the organization, leaving a lifelong impact. Notably, the Court explains that the values are transmitted from scoutmasters to scouts both expressly and "by example;" the private expression does not always take the form of direct verbal pedagogy. The leaders spend time with the scouts, mentoring them and teaching them outdoor skills such as camping and fishing and virtues such as alertness, preparation, and teamwork. "It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity."[77]

This point sheds light on a significant problem with the *Martinez* decision: the Court in *Martinez* allows Hastings to usurp the formative role of the student associations. Rather than allowing each group to communicate its own view of good character to its members, the university attempts to form the members of each group by enforcing specific conceptions of cooperation and tolerance. Hence, the university's policy is problematic because it undermines the formative as well as the expressive element of associations, the former being necessary for the latter. Overall, a more consistent line of freedom of association precedents that demonstrate why association is a distinct form of expression and that provide a clearer understanding of how antidiscrimination regulations interfere with that expression might have led to a better outcome in *Martinez*.

[76] *Dale* at 649.

[77] *Dale* at 650.

Section 4: The University as a Fundamental Public Forum

As explained in section 1, the public university setting played a significant role in the outcome of *Martinez*. The CLS chapter at Hastings is not a purely private group like the Boy Scouts. The university was enforcing policies on student groups only. This is how Kennedy would presumably distinguish his vote in *Martinez* from his vote in *BSA v. Dale*. He is particularly concerned about the interaction between students and how this interaction will shape them as citizens and lawyers, and he thinks the university has the authority to guide this formative process within its limited public forum. But a number of Supreme Court precedents demonstrate that even the university's legitimate claim to guide the education of its students does not allow such a pervasive regulation of a student forum.

When Kennedy defends the desire of Hastings to ensure that students interact with people from diverse backgrounds, he quotes the Court's 1978 case of the *University of California v. Bakke*:

> [A] great deal of learning . . . occurs through interactions among students . . . who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world.[78]

In that case, the Court reviewed an affirmative action program in the public university's medical school. While the Court rejected the particular program at issue as unconstitutional, it affirmed the university's compelling interest in securing the

[78] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), footnote 8, quoting the President of Princeton University: William G. Bowen, "Admissions and the Relevance of Race," *Princeton Alumni Weekly* 7 (Sept. 26, 1977): 9.

educational benefits that flow from a diverse student body through affirmative action programs.

Kennedy's citation of *Bakke* highlights a flaw in the *Martinez* Court's reasoning: there is a crucial distinction between the university and the public forum that exists *within* the university. *Bakke* solely addressed whether a school could use certain affirmative action programs in order to create a diverse *student body*; it did not address whether a university can enforce this diversity within student groups by regulating the groups' ability to control their leadership or membership. The majority opinion in *Martinez* also blurs this distinction. Ginsburg compares the idea of groups excluding certain individuals to the idea of professors excluding certain students from their classes because of statuses or beliefs.[79] But the classroom is not a group within a public forum that exists to express a particular idea. The student forum is a distinct, constitutionally protected entity that must be distinguished from both the classroom and the university itself.

Several Supreme Court cases demonstrate the distinction between the university and the forum that exists within it, in part by highlighting the private nature of student groups' speech. The 1995 case of *Rosenberger v. Rector*, for example, makes the distinction between the university and the forum very clear. *Rosenberger* addressed whether the University of Virginia, a public university, violated the Establishment Clause by using student fees to fund the printing of a Christian group's publication. The Court answered in the negative by explaining that it is not the university speaking through the religious group's publication; it is the private speech of the group. So long as the government is not favoring a particular religious group, this cannot be viewed as an

[79] *Martinez* at 688.

establishment of religion. By denying the Christian group the same resources provided to other groups, the university engaged in viewpoint discrimination and denied the free speech rights of the Christian group.[80]

This distinction between university speech and the speech of the students has been affirmed in other cases.[81] In the 2000 case of *University of Wisconsin v. Southworth*, the unanimous Court, in an opinion by Kennedy himself, affirmed the authority of a public university to impose a mandatory student fee for funding the speech of the groups in the student forum and emphasized that the viewpoints being expressed in the forum were not those of the university: "The University's whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors."[82]

Clarifying the distinction between the university and the public forum within it is essential in responding to the arguments of Corey Brettschneider and Paul Horwitz explained in section 1 of this chapter. Brettschneider argues that Hastings' use of funds should be seen as an example of "state speech that rightly pursued the goal of promoting nondiscrimination and the ideal of free and equal citizenship."[83] Also defending the Court's decision in *Martinez,* but taking a different approach, Horwitz goes so far as to

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[80] The Court has repeatedly affirmed that religious groups have a constitutional right to access a university's public forum: *See Good News Club v. Milford Cent. Sch*., 533 U.S. 98, (2001); *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384 (1993).

[81] There is a logical problem with the argument that any speech the government subsidizes may be viewed as government speech: given the wide variety of viewpoints the government funds, it would then appear that the government constantly contradicts itself. A reasonable observer would thus not conclude that the government speaks every time it subsidizes a public forum.

[82] *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 229 (2000).

[83] Brettschneider, "How Should Liberal Democracies Respond to Faith-Based Groups that Advocate Discrimination?," 91.

reject the Court's continued categorization of a university as a "public forum" and argues that the university should have the authority to exclude groups that do not fit within its educational vision.[84] Horwitz is indeed correct that the university is not a public forum, but the Court has never treated it as such. Like the *Martinez* majority, Horwitz fails to see the university and the forum within it as distinct constitutional entities. While his concern for preserving the autonomy of the university is valid, maintaining the distinction described here preserves the autonomy of both the university and the student groups within the forum. This is because the state university is free to promote its own views outside of the forum. It may, for example, host an LGBT pride parade or bring in a speaker to discuss the nature of tolerance. It simply may not interfere with the expression of the student groups once it opens up a forum for student expression. The freedom of the university and the freedom of the groups in the forum are not mutually exclusive.

Failing to distinguish between the university and the forum and allowing government interference in the latter would allow the university to give the false appearance that the views of the entire student body are coterminous with the views of the government-run university. In other words, the university would be able to speak on its own and also foster its views through a "student forum" that promotes only the views of the university, thus presenting the perception that no student group at the university differs from the given orthodoxy. In his dissent from the denial of certiorari in a school free speech case, Justice Alito demonstrates the importance of this point:

> When a public school administration speaks for itself and takes public responsibility for its speech, it may say what it wishes without violating the First Amendment 's guarantee of freedom of speech… But when a public school purports to allow students to express themselves, it must

[84] Horwitz, *First Amendment Institutions*, 236.

> respect the students' free speech rights. School administrators may not behave like puppet masters who create the illusion that students are engaging in personal expression when in fact the school administration is pulling the strings.[85]

The university must be free to speak, but it is not free to manipulate the marketplace of ideas within its walls, to give the impression that its own views are favored by all. In order to fulfill the purpose of a forum intended to foster student expression, the university's public forum must be treated as analogous to the civil society outside the university wherein citizens and private groups are free to express their own views regardless of whether they are in line with those of the university. As CLS notes in its reply brief: "[T]o university students, the campus is their world. The right to meet on campus and use campus channels of communication is at least as important to university students as the right to gather on the town square and use local communication forums is to the citizen."[86] Just as the written message of a given student group should not be regulated by the university, neither should the composition of the group. As we have seen, they are both forms of expression and should thus be left to the students.

But Hastings would argue that universities have the freedom to enforce certain policies even on the groups within the forum. Indeed, the 1972 case of *Healy v. James* affirms this point. In that case, the Court held that a public university clearly discriminated against a chapter of Students for a Democratic Society on the basis of viewpoint. Finding the organization's mission to be "violent and disruptive" and its philosophy "repugnant," the public college banned the group from campus. In that case, the Supreme Court concluded that a university cannot restrict speech or associations

[85] *Nurre v. Whitehead* 559 U.S. __ (2010) (Alito, J., dissenting from denial of certiorari)

[86] Reply Brief for Petitioner, *Christian Legal Society v. Martinez* (2010), 13.

simply because "it finds the viewpoints expressed by [a] group to be abhorrent, " but it can require organizations to affirm in advance their willingness to obey campus law, including reasonable conduct standards. "Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."[87] Hastings argues that they were not discriminating based on viewpoint, but simply enforcing reasonable conduct standards.

The problem with this argument is that the "conduct" being regulated is the very act of associating, and, as we have seen, the Supreme Court has held that the right to associate necessarily includes the right to exclude.[88] Further, in *Healy*, the Court explicitly rejects the idea that the First Amendments protection applies "with less force on college campuses than in the community at large."[89] Hence, not only are college associations protected, but they are protected to the same degree as private associations

[87] *Healy* at 189.

[88] This reveals the troubling nature of the Court's statement that Hastings' policy, which "incorporates…state-law proscriptions on discrimination, conveys the Law School's decision 'to decline to subsidize with public monies and benefits conduct of which the people of California disapprove.'" Despite the fact that constitutional provisions exist to protect rights even in the face of majority disapproval, the Court suggests that the university may subsume the people of California's desire not to tolerate associations that exclude individuals. Richard Garnett aptly demonstrates the Court's flawed reasoning here: he argues that it has indeed not been established that the people of California disapprove of "the practice of limiting the membership of private associations to those who embrace those associations' mission and values. The people of California do disapprove of discrimination by 'governments, commercial entities, public accommodations, and so on, when that discrimination involves the unwarranted use of certain suspect criteria, but the Court assumed without argument or even discussion that the distinctions the CLS wanted to draw, for its own purposes, should be treated the same as the superficially similar distinctions." Garnett, "Religious Freedom and the Nondiscrimination Norm," in *Legal Responses*, 219-220. Justice Alito makes a similar point: "[T]he accept-all-comers policy…goes far beyond any California antidiscrimination law. Neither Hastings nor the Court claims that California law demands that state entities must accept all comers. Hastings itself certainly does not follow this policy in hiring or student admissions." *Martinez* at 734 (Alito, J., dissenting).

[89] *Healy* at 180.

such as the Boy Scouts. [90] University regulations that interfere with these constitutional rights in a more subtle way are not to be tolerated either. The *Healy* Court explains, "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."[91] Under the standards described in *Healy*, the Hastings accept-all-comers policy certainly falls short.

Of course, the Court concluded that the regulation at issue in *Martinez* was reasonable and viewpoint-neutral. This is questionable given that the regulation *ipso facto* excludes groups that hold a viewpoint contrary to the university's particular view of toleration. The fact that the university found such a regulation to be reasonable, even though it undermines association itself, and viewpoint-neutral, even though it necessarily excludes groups with certain viewpoints, demonstrates the deep roots of the Court's indivudalistic jurisprudence. The Court's favoring of the excluded individual undermines basic constitutional principles that the Court has reaffirmed for decades. [92]

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[90] *Healy v. James* is an example of the Court treating the student groups within the forum as analogous to private groups within the broader civil society. In determining which principles universities may use to protect the campus from potential violence from student groups, the Court stated that they should use the "imminent lawless action" test developed in the free speech case of *Brandenburg v. Ohio*. Quoting this case, the *Healy* Court stated that a permissible regulation is one that prohibits advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969) at 447. Universities can best protect the constitutional rights of student groups by protecting them to the same degree that private groups within society are protected.

[91] Quoting *Bates v. City of Little Rock*, 361 U.S. 516 (1960) at 523.

[92] Further, there is evidence the policy was designed to target religious groups. Hastings' policy changed throughout the course of the litigation, a fact which led Justice Alito in his dissent to argue that Hastings' "all-comers policy" was mere subterfuge used to cover up their discrimination against CLS. Alito points out that, at the time CLS was denied RSO status, the university had a "Nondiscrimination Policy," which more overtly targeted religious groups than the broad accept-all-comers policy. The university admitted that the original Nondiscrimination Policy "permit[ted] political, social, and cultural organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." *Martinez* at 711 (Alito J., dissenting), internal quotations omitted. This policy would not survive First Amendment scrutiny, the dissent argued, because religious groups were singled out: "[o]nly religious groups were required to admit students who did not share their views." *Martinez* at 724 (Alito, J., dissenting). Supreme Court precedent makes clear that a policy which treats secular speech more favorably than religious speech discriminates on the basis of viewpoint (*see Rosenberger* at 831 and *Good News Club* at 112). It was only when CLS brought suit that Hastings changed its policy to an "accept-all-comers" policy, attempting to

The Court was correct to see that the university setting makes *Martinez* a uniquely important case, but it is not the need to respect the authority of university administrators that makes it so. Rather, it is the crucial role of the university in shaping the ideas that permeate the whole society. Universities that decide to sponsor student forums allow students to play an indispensable role in the marketplace of ideas. In his analysis of the history of public forums in America, John Inazu explains that by the 1990s the nature of the public forum had shifted. He quotes Justice Kennedy's concurrence in the 1996 case of *Denver Area Educational Telecommunications Consortium, Inc. v. FCC,*, stating that, "Minds are not changed in streets and parks as they once were." Rather, minds are now being changed in public educational institutions.[93] This cultural shift highlights the importance of ensuring that freedom of association is protected just as much in universities as in the public square.

Section 5: Conclusion

While the case of *Christian Legal Society v. Martinez* did not receive as much public attention as other landmark Supreme Court cases, its significance must not be understated. The Court's mishandling of association in this case will have an impact far greater than stifling the expression of the CLS chapter at Hastings. Justice Alito laments that the Court in this case "arms public educational institutions with a handy weapon for

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avoid any semblance of viewpoint discrimination. Alito states, "CLS was denied recognition under the Nondiscrimination Policy because of the viewpoint that CLS sought to express through its membership requirements…And there is strong evidence that Hastings abruptly shifted from the Nondiscrimination Policy to the accept-all-comers policy as a pretext for viewpoint discrimination." *Martinez* (Alito, J., dissenting, footnote 2 (2010). The Court did not address the constitutionality of such a non-discrimination policy, but ruled only on the accept-all-comers policy.

[93] Inazu, "Four Freedoms," 821.

suppressing the speech of unpopular groups…"[94] He argues that Hastings' policy will affect minority groups disproportionately, since they may more easily be subjected to takeovers by members of the majority who wish to silence their dissenting voices.

But he emphasizes that the potential of hostile takeovers is not the only problem with the Court's decision. Raising the rejected religious liberty claim, he points out that the very act of agreeing to an accept-all-comers policy would violate the conscience rights of some groups because they could not agree to admit members who did not share their faith. Such religious groups will then be marginalized at American universities.[95] Interestingly, none of the justices raise the point made in Smith that religious liberty claims, when combined with another right such as association, should have triggered the Sherbert standard of review.

Not only has the decision caused difficulties for student groups at other universities,[96] but the legal reasoning has the potential to undermine the freedom of private religious schools and universities as well. As Michael Stokes Paulsen explains, "If the reasoning of *Christian Legal Society* stands, a religious private school that accepts students who use state-funded vouchers for his or her education or even tax benefits, under a state's or community's 'school choice' program, could be required to secularize itself as a condition of participation."[97] This is because the Court in *Martinez* has

[94] *Martinez* at 708 (Alito, J., dissenting).

[95] *Martinez* at 741 (Alito, J., dissenting).

[96] The entire California State University system has recently embraced accept-all-comers policies. Inazu, "Four Freedoms," 826.

[97] Paulsen, "Disaster," 306. An example of this can be seen in the recent controversy over the state of California's proposed legislation requiring religious universities, on pain of losing state scholarships for their students, to embrace practices regarding marriage and gender identity that violate their deeply-held beliefs. *See* "California bill targeting faith-based universities draws Christian, Hispanic

chipped away at the "unconstitutional conditions" doctrine, now allowing governments to offer benefits on the condition that constitutional rights are forfeited. Given that religious associations have played a crucial role in advancing liberty in our society, this marginalization should not be a concern solely of religious individuals.[98] Indeed, as Justice Alito stated in his concurrence in a recent religious freedom case, "Throughout our Nation's history, religious bodies have been the preeminent example of private associations that have 'act[ed] as critical buffers between the individual and the power of the State.'"[99] In this case, *Hosanna-Tabor v. EEOC*, the Court affirmed the right of churches to select their own ministers without government interference. The questions considered by the Court include whether the freedom of association is a suitable grounding for this right. The following chapter will address this question and others related to the institutional rights of churches.

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ire," *The Washington Times*, July 19, 2016, accessed June 28, 2017, http://www.washingtontimes.com/news/2016/jul/19/california-bill-targeting-faith-based-universities/.

[98] Stephen L. Carter explains that religious organizations played a key role in both the abolition of slavery and the civil rights movement. Carter, *Dissent of the Governed*, Kindle location 323.

[99] *Hosanna-Tabor* at 712 (Alito, J., concurring).

CHAPTER FOUR

Hosanna-Tabor v. EEOC and the Institutional Rights of Churches

In his partial dissent in *Wisconsin v. Yoder*, Justice Douglas contends that the Supreme Court neglected to consider a very important factor in determining whether Amish families must be exempt from Wisconsin's compulsory education law: the religious rights of the Amish children. "If the parents in this case are allowed a religious exemption," Douglas explains, "the inevitable effect is to impose the parents' notions of religious duty upon their children."[1] Given that high school age children are mature enough to make their own decisions, the state should be able to override the parents' refusal to allow these children to attend high school.

Douglas' concern over the deference to parents relies in large measure on his understanding of the nature of religion. Religion, he explains, "is an individual experience."[2] This understanding of religion is pervasive in American society, but our legal tradition has always acknowledged the existence and importance of religion as practiced within a community. The most prominent example of this is our recognition of the autonomy of churches and other religious institutions that have a role in forming the beliefs of individuals, whether they be children or adults. The Court has consistently protected this autonomy, and the relevant cases are based on the theory that, contrary to what Douglas suggests, religion is not solely or even primarily an individual experience.

[1] *Yoder* at 242 (Douglas, J., dissenting).

[2] *Yoder* at 243 (Douglas, J., dissenting).

In the 2012 case of *Hosanna-Tabor v. EEOC*, which will be explored in this chapter, all nine Supreme Court justices agreed that churches should be exempt from employment discrimination laws when hiring and firing ministers. Such an exemption is necessary in order to protect the autonomy of churches. But this case has by no means received universal approval within the legal academy. Some scholars are skeptical that churches should receive any special protections, viewing such special protection as antidemocratic.

In this chapter, I argue that the First Amendment undoubtedly provides special protection for religious institutions, and that this freedom amounts to more than an aggregation of the rights of the institution's individual members. While institutions ultimately serve to shape and protect individual consciences, they have "personalities" of their own.[3] Hence, they possess their own distinct claim to the free exercise of religion. Churches claim a higher standard of protection than individuals or even other associations because the unhindered development of church doctrine and tradition is the most crucial element of the free exercise of religion. The First Amendment, and the Court's church autonomy caselaw, recognizes a sphere in which this development takes place that must be free from government interference. I argue that protecting the free exercise of religious institutions requires broad deference to the institution's claims concerning what is necessary for its freedom, but that reasonable limitations can be imposed in order to protect individuals from serious harm. Contrary to what its critics claim, the freedom of religious institutions need not amount to churches living outside the law.

[3] Harold J. Laski, "The Personality of Associations," *Harvard Law Review*, 29 (1916).

This chapter is divided into six sections. In section 1, I lay out the scholarly debate concerning freedom of the church. In section 2, I provide an overview of *Hosanna-Tabor*. In section 3, I address two key objections to freedom of the church. The first is the argument that religious institutions should receive no greater protection than other voluntary associations. The second is the claim that institutions *qua* institutions cannot possibly have rights, since only individual human beings can possess rights. [4] Hence, any autonomy a church may claim must be derived from and reducible to the rights of individuals. In section 4, I address the difficult question of whether and to what extent courts should determine who qualifies as a minister under the ministerial exception. This is the issue in *Hosanna-Tabor* and it illustrates the possibility of a dangerous entanglement between government and religion. In section 5, I consider the breadth and scope of freedom of the church, which is a concern for all who are opposed to church autonomy in a liberal democracy. Lastly, in section 6, I explore whether the conclusion in *Hosanna-Tabor* can be reconciled with the Court's recent freedom of religion jurisprudence, which permits infringement upon religious freedom by neutral laws of general applicability.

Section 1. The Scholarly Debate

In their Virginia Law Review article, "Against Religious Institutionalism," Richard Schragger and Micah Schwartzman argue that treating institutions as rights-bearing entities is unnecessary, anti-republican, and "unthinkable in a post-Enlightenment

[4] Leslie Griffin, in arguing against the Court's conclusion in Hosanna-Tabor, argued that the Court "has lost sight of individual religious freedom." Leslie C. Griffin, "The Sins of *Hosanna-Tabor*," *Indiana Law Journal*, 88 (2013): 982.

world of rights-bearing individuals;"[5] and that churches and other religious organizations can receive sufficient protection through individual rights of conscience, privacy, and association. Embracing the Equal Liberty principle articulated by Eisgruber and Sager, they contend that religious organizations should receive no more special protection than other private associations. To be clear, Schragger and Schwartzman do think that churches should possess a certain degree of freedom, but their point concerns the source of the freedom. They think that institutions *qua* institutions possess no rights—that any autonomy they have is derived from the individual rights of their members: "Institutional rights are inevitable, but their rights are derivative."[6]

In presenting these arguments, Schragger and Schwartzman contest the doctrine of "freedom of the church," which they carefully distinguish from church autonomy. The former doctrine holds that religious institutions are sovereign entities, akin to foreign embassies, that can assert jurisdictional limits against the state.[7] First Amendment scholar Steven Smith, perhaps the foremost defender of "freedom of the church" explains: "The commitment to special legal treatment for religion derives from a two-realm world view in which religion—meaning the church and later the conscience—was understood to inhabit a separate jurisdiction that was in some respects outside the

[5] Schragger and Schwartzman, "Against Religious Institutionalism," 921.

[6] Schragger and Schwartzman, "Against Religious Institutionalism," 921.

[7] Paul Horwitz, who Schragger and Schwartzman place in the "freedom of the church" camp explains: "The two kingdoms of temporal and spiritual authority, of church and state, constitute two separate sovereigns. The state can no more intervene in the sovereign affairs of churches than it can in the sovereign affairs of Mexico or Canada." Paul Horwitz, "Act III of the Ministerial Exception," Northwestern University Law Review, 106 (2012): 161. This may seem radical, Horwitz admits, but it "lies at the heart of the Western church-state settlement."

governance of the state."[8] The claim is that churches inhabit a realm in which the civil government simply has no place. Church autonomy, according to Schragger and Schwartzman, is the more modest concept that churches need to possess a certain amount of freedom in order for individuals to fully exercise their rights. The institution has rights only because the individual does, not because it inhabits a special government-free jurisdiction. This distinction leads to a critical difference in how courts must review disputes involving religious bodies: if the jurisdictional claim is true, churches must possess immunity from (at least certain types of) lawsuits altogether rather than having their freedom weighed against other government interests, which would be permissible under Schragger and Schwartzman's idea of church autonomy.

Schragger and Schwartzman identify two categories of scholars who argue in favor of the broader concept of institutional religious freedom. First are the "corporatists." This includes legal scholars such as Frederick Schauer and Paul Horwitz, who argue that the Supreme Court should consider institutional context in all First Amendment cases.[9] Corporatism, according to Schragger and Schwartzman, presupposes an "organic social order" wherein society is composed of naturally-formed, pre-legal entities that each possess sovereignty. Churches are one example of such entities and should possess a degree of freedom proper to their institutional nature. While Schragger and Schwartzman classify Horwitz as a "corporatist," Horwitz himself insists that his theory does not actually require that such institutions be "organic", "God-given," or

[8] Steven D. Smith, "Discourse in the Dusk: The Twilight of Religious Freedom?," review of *Religion and the Constitution – Volume 2: Establishment and Fairness* by Kent Greenawalt, *Harvard Law Review*, 122 (2009): 1883.

[9] Horwitz, *First Amendment Institutions;* Frederick Schauer, "Institutions as Legal and Constitutional Categories." *UCLA Law Review*, 54 (2007).

"natural;" he simply states that these institutions are a "constitutionally significant element of our infrastructure of public discourse."[10] Further, he clarifies, his view does not suggest that churches should receive "more" protection than other institutions, but simply the type of protection that is proper to them: "They perform a distinctive function, and the deference they receive should reflect that function."[11]

Second are the "neo-medievalists." The most prominent is Steven Smith, who argues that the First Amendment codifies the Medieval concept of "freedom of the church," or *libertas ecclesiae*, rather than codifying a simply individualistic notion of religious freedom. The Investiture Controversy led to church and state separating into two separate spheres, and these spheres were defined and defended with the use of distinctly theological language and concepts. Michael McConnell explains:

> After the collapse of imperial Rome, from at least the time of Pope Gelasius, standard legal thinking in Western Europe was based on the theory of Two Kingdoms - the idea that God created two different forms of authority, two swords that were clearly distinguished: spiritual and temporal, sacred and secular, church and state. These spheres were undeniably separate, and not because the state chose to make them so. [12]

As a result of the Protestant Reformation, the sphere that entailed the church expanded to include the individual conscience as well. As Smith explains, the institutional church still

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[10] Horwitz, "Defending Religious Institutionalism," 1053. He explains: "These institutions developed alongside, and in some cases preexisted, the liberal state itself, and have long been coordinate parts of our broader social structure. The state—and its limits—formed with these institutions in mind. No mysticism is required to suggest that this might be constitutionally relevant." Horwitz, "Defending Religious Institutionalism," 1053.

[11] Horwitz, "Defending Religious Institutionalism," 1053. Horwitz denies Schragger and Schwartzman's claim that he is supports any heightened protection for religious institutions, but his claim is somewhat difficult to follow. He supports the ministerial exception, which undoubtedly provides more protection to churches than ordinary associations possess. Even if he supports it on the ground that ministers provide a "distinctive function" that other associational leaders do not provide, this seems like a clear defense of heightened protection.

[12] Michael W. McConnell, "Non-State Governance," *Utah Law Review*, 2010 (2010): 8.

remained important for Protestants, but "the spiritual center of gravity had shifted, as the position and functions formerly controlled by the church came to be transferred to the individual and his or her conscience."[13] Hence, the Medieval slogan "freedom of the church" begat "freedom of conscience." Rather than being a radical break from the past, Smith argues, the American Founding rested upon this centuries-long development. This is evident in the manifestly theological language that Jefferson and Madison used in their arguments for the disestablishment of the Anglican Church in Virginia, as we saw in chapter 2. While Schragger and Schwartzman argue that such a view is "anachronistic" and "nostalgic," Richard Garnett, also categorized by them as a neo-medievalist, contends that the claim of those who defend "freedom of the church" is much more modest: it is simply that the genealogy of religious liberty "under and through law in the United States is more than, and more interesting than, Hobbes-to-Locke-to-Madison-to-Rawls."[14]

While it is often difficult to see where the two camps differ, it appears that the neo-medievalists rely more on the "naturalness" of religious institutions than do the corporatists, who prefer to focus on the more practical claim that institutions have been allotted a meaningful place in society through our nation's legal history. Regardless of their differences, both camps make the claim that religious associations possess a degree of sovereignty that is recognized under the U.S. Constitution. As Garnett argues, the freedom of the church is a "pluralistic claim" that views non-state associations as possessing authority, and that refuses

[13] Smith, "Discourse in the Dusk," 1878.

[14] Garnett, "Freedom of the Church," 48.

to see this authority as "existing and exercised only by state concession."[15] Most scholars who advocate for freedom of the church, including Smith, Horwitz, and McConnell, argue that James Madison's language in the Memorial and Remonstrance made a jurisdictional claim that supports their views. [16] Madison explains that a man is a "subject of the Governor of the Universe" before he is a member of civil society; hence, his duties to God take precedence "both in order of time and degree of obligation, to the claims of Civil Society." Clearly Madison did not see the state as the only source of authority.

Schragger and Schwartzman present four different arguments against the broad "freedom of the church" position. First, the position is based on historical inaccuracy: responding to Smith's claim, they argue that the Church did not actually separate itself from the political sphere. Bishops and priests possessed civil power, assisting the Pope's attempt to maintain Church power over the state.[17] Second, granting "jurisdictional sovereignty" to religious groups is both anti-republican and undemocratic: "Liberalism was thoroughgoing: it sought to undermine the power of all monopolistic hierarchical, anti-democratic corporate entities, replacing them instead with the twin concepts of individual liberty and the democratically-controlled state."[18] Third, such church autonomy claims may lack any limitations. Churches are often "totalizing" and exercise control over almost every aspect of their members' lives. Some religious institutions,

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[15] Garnett, "Freedom of the Church," 42.

[16] Smith, "Discourse in the Dusk," 1880; Horwitz, "Act III of the Ministerial Exception," 160; Michael McConnell, "The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural Political Conflict in the Early Republic," *Tulsa Law Review*, 37 (2001).

[17] Schragger and Schwartzman, "Against Religious Institutionalism," 928.

[18] Schragger and Schwartzman, "Against Religious Institutionalism," 941.

Schragger and Schwartzman claim, even believe that their jurisdiction extends to non-members. Fourth, there is no defensible reason why churches should receive more autonomy than other mediating associations. I will address these claims throughout the chapter, especially the latter three, which are more conceptual in nature and therefore more relevant to my overall project.

Section 2. Overview of Hosanna-Tabor v. EEOC

The most recent church autonomy case is the 2012 landmark case of *Hosanna-Tabor v. EEOC*, which confirmed that the concept of the "ministerial exception" is enshrined in the Constitution. The ministerial exception is the legal principle that religious organizations should not be subject to antidiscrimination laws when it comes to the hiring and firing of ministers. Hence, if an employee of a church attempts to bring a lawsuit against the church over an employment dispute, the courts simply cannot hear the case. Unlike the varying levels of scrutiny used by the courts in the other cases we have addressed thus far, the ministerial exception does not allow for the weighing of different interests. It amounts to an absolute bar on such lawsuits altogether.

Although the ministerial exception had been recognized in lower federal court jurisprudence for years, it was not firmly established until *Hosanna-Tabor*. Given the Court's wavering approach to free exercise jurisprudence, coupled with the obvious importance of the issue, legal scholars and commentators were eager to see if and how the Court would ground such a protection for ministers. Federal law, and many state laws, did not provide such a protection. Even Title VII, which prohibits public and private sector employers from discriminating based on race, color, religion, national origin, or sex, exempts religious employers only from the prohibition on discrimination

based on religion. There is no clear statutory exemption concerning any of the other categories.[19] Schragger and Schwartzman argue that *Hosanna-Tabor* actually demonstrates how the Court can uphold church autonomy without recourse to the anachronistic "freedom of the church" doctrine.

The *Hosanna-Tabor* case involved the Hosanna-Tabor Evangelical Lutheran Church and School, which is located in Redford, Michigan and is a member congregation of the Lutheran Church-Missouri Synod. The school offers a "Christ-centered" education to children from kindergarten to 8th grade. The Court needed to address whether a certain teacher constituted a "minister" and therefore could not sue the school for employment discrimination. It may seem curious that the first ministerial exception case addressed by the Court involves not a pastor who preaches before a congregation every Sunday, but a schoolteacher. Yet the lower courts have recognized a variety of positions under the exemption, including a church music director,[20] a school principal,[21] an elementary school teacher,[22] a Kosher supervisor at a Jewish nursing home,[23] and a communications manager at a Catholic church.[24] One of the critical questions in *Hosanna-Tabor* is how courts should determine who constitutes a minister. The Missouri synod classifies

[19] Michael McConnell explains that Title VII permits sex discrimination if "sex is a bona fide occupational qualification (BFOQ)." He describes this as an "onerous" standard which places the burden of proof on the employer. Under such a standard, the Catholic Church would have to convince the secular authorities of their complex idea that the nature of priesthood makes a "female priest" an impossibility. McConnell, "Reflections on *Hosanna-Tabor*, " footnote 4.

[20] *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006).

[21] *Pardue v. Center City of Consortium Schools*, 875 A.2d 669 (DC Cir. 2005).

[22] *Clapper v. Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208 (4th Cir. 1998).

[23] *Shaliehsabou v. Hebrew Home of Greater Washington*, 363 F.3d 299 (4th Cir. 2004).

[24] *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003).

teachers into "called" and "lay" categories.[25] Called teachers are believed to be called by God through their congregation, and they must meet certain academic requirements, including theological ones. When a teacher is called, he receives the title of "Minister of Religion, Commissioned." Lay teachers, in contrast, do not need to participate in such training and do not even need to be Lutheran.

In 1999 Cheryl Perich began teaching as a lay teacher at Hosanna-Tabor, but after completing the required coursework, was commissioned as a called teacher. In addition to teaching secular courses such as math and science, she taught a religion class, led the students in prayer and devotionals, and attended the school-wide chapel service, which she herself led about twice a year.[26] Perich became ill with narcolepsy in 2004 and began the year on disability leave. In January 2005, she notified the school principal that she would be ready to return the following month, but the school had already filled her position. Later that month, the school administrators, concerned that she would not actually be able to continue fulfilling her position that year or the next, informed the congregation of their concerns. The congregation voted to offer her a "peaceful release" from her call, which would involve covering part of her health insurance premiums in exchange for her resignation. Perich refused the offer and returned to school on February 22 when her doctor said she was able to work again. The principal asked her to leave and later informed her that she would likely be fired, at which point Perich threatened to take legal action against the school.[27]

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[25] *Hosanna-Tabor* at 177.

[26] *Hosanna-Tabor* at 178.

[27] *Hosanna-Tabor* at 179.

Ultimately, the congregation viewed her behavior on February 22nd as "insubordination." Because of this and her threat of a lawsuit, they voted to revoke her status as a called teacher and informed her of her termination the following day. Perich filed a complaint with the Equal Employment Opportunity Commission, alleging that her termination violated the Americans with Disabilities Act. In their defense, the school invoked the "ministerial exception." They claimed that the lawsuit interfered with the relationship between a church and one of its ministers and that Perich's termination was based on the religious doctrine that Christians should resolve their differences internally rather than using the civil courts as Perich intended to do.

Chief Justice Roberts wrote an opinion for the unanimous Court, but two justices wrote separate concurring opinions explaining their own views of the sources and scope of the ministerial exception (Thomas and Alito wrote separate opinions. Alito was joined by Kagan in his.) The Court ruled in favor of the school, declaring that Perich was indeed a minister, and thus the government could not interfere with the school's decision to fire her, regardless of whether the reason for the firing was related to religious doctrine. In answering the question before it, the Court provides a tour of church-state history in England and America, explaining that the freedom of the English church was expressed in the very first clause of the Magna Carta. King John had agreed to protect the rights and liberties of the church, which included the "freedom of elections," a right "thought to be of the greatest necessity and importance to the English church."[28] In practice, the protection of this freedom was rather incomplete and was eventually fully eroded by King Henry VIII, under whose reign the English Monarch became the head of

[28] *Hosanna-Tabor* at 182, citing Magna Carta App. IV, 317, cl. 1 (1965).

the Church and assumed authority to appoint the Church's high officials. The Puritans came to New England in order to gain the full freedom to select ministers that was forbidden to them under the English Crown. "It was against this backdrop that the First Amendment was adopted," the Court concluded.[29]

The justices connect the ministerial exception with both Religion Clauses: "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[30] They explain that the ministerial exception can be seen throughout our nation's historical practice. The Court gives two important examples. In 1806 John Carroll, the first Catholic bishop in the United States, sought the advice of the president in determining who should oversee the Catholic Church in the new territory acquired by the Louisiana Purchase. Jefferson's Secretary of State, James Madison, wrote to Carroll that this matter was entirely ecclesiastical and must be left to the Church to decide.[31] He explained that the "scrupulous policy of the Constitution in guarding against a political interference with religious affairs," prevented the Government from opining on the "selection of ecclesiastical individuals."

Second, when Madison was president, he vetoed a congressional bill incorporating the Protestant Episcopal Church in Alexandria, Virginia, which was then part of the District of Columbia. The Court in *Hosanna-Tabor* quotes Madison as stating in objection to the bill:

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[29] *Hosanna-Tabor* at 183.

[30] *Hosanna-Tabor* at 184.

[31] *Hosanna-Tabor* at 184, citing Letter from James Madison to Bishop Carroll (Nov. 20, 1806), reprinted in 20 Records of the American Catholic Historical Society 63 (1909).

> The bill enacts into, and establishes by law, sundry rules and proceedings relative purely to the organization and polity of the church incorporated, *and comprehending even the election and removal of the Minister of the same*; so that no change could be made therein by the particular society, or by the general church of which it is a member, and whose authority it recognises.[32]

This principle of staying out of the selection of ministers has been put into practice past the Founding era, even when the expanding government has been involved in employment decisions through antidiscrimination laws. The Court explains that ever since title VII of the Civil Rights Act of 1964 was passed, the Courts of Appeals have uniformly affirmed the ministerial exception, "grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers."[33] The two previously described examples from the Founding certainly address more *direct* instances of the government attempting to select ministers, but the principle remains the same: government involvement in a church's decision of either hiring or firing ministers involves government intrusion into a realm that is purely the business of the church. Hence, Hosanna-Tabor must be immune from lawsuits by Perich and other ministers.

Perich and the EEOC encouraged the Court to treat this case under its freedom of association precedents instead of its religious freedom precedents. Under the association precedents, they argued, certain religious claims requesting exemptions to antidiscrimination laws would prevail, such as the Catholic Church's right not to ordain female clergy, but in cases such as Perich's the employee would receive the victory. This is because freedom of association jurisprudence, rather than requiring the government to

[32] *Hosanna-Tabor* at 185, citing 22 Annals of Congress 983 (1811), emphasis added.

[33] *Hosanna-Tabor* at 188.

stay out of leadership decisions altogether, holds the government to the standard of strict scrutiny, which can allow for some government interference. Roberts, speaking for the Court, rejected this argument, stating that it amounts to the position that churches should be treated the same as labor unions and social clubs. "That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers."[34] The Court here affirms the position that the presence of the Religion Clauses, regardless of whether some may think it is fair, does offer heightened protection to religious organizations precisely because they are religious.

While the Court concluded that Perich does qualify as a minister, it did not articulate a framework for how to determine who is a minister and who is not: "We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister."[35] Nonetheless, in this particular case, "all the circumstances of her employment" make it clear that she is a minister, including "the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church."[36]

Section 3. Freedom of Association, Freedom of Conscience, and the Distinctiveness of Freedom of the Church

Though the controlling opinion rejected the freedom of association position, Schragger and Schwarzman state that Alito, in his concurrence, classifies the ministerial

[34] *Hosanna-Tabor* at 189.

[35] *Hosanna-Tabor* at 190.

[36] *Hosanna-Tabor* at 192.

exception as a "sub-set of a general right of expressive association."[37] They point to Alito's reference to the landmark freedom of association case *Boy Scouts of America v. Dale,* which we explored in the previous chapter, and suggest that the framework in that case can be used for cases dealing with churches as well. Indeed, they argue, *Hosanna-Tabor* and *BSA v. Dale* "appear to be justified by a similar set of arguments and are grounded in a similar concern for freedom of conscience."[38] Treating this case under the freedom of association framework would require the Court to use a more lenient standard (strict scrutiny) than immunity, hence allowing for greater restrictions on churches.

It is certainly true that Alito expresses the idea that religious organizations are a type of association. In fact, he describes them as the "archetype of associations formed for expressive purposes."[39] He cites *BSA v. Dale* in explaining the principle that forcing a group to accept unwanted members may impair the group's ability to express its own views. But he clearly states that the Constitution requires even more vigilance when applying this principle to religious associations: "That principle applies with special force with respect to religious groups, whose very existence is dedicated to the collective expression and propagation of shared religious ideals."[40] Here, he cites *Employment Division v. Smith*, which states that freedom of association may be "reinforced by" free exercise concerns. Hence, he echoes the Court's view that the First Amendment gives "special solicitude" to the rights of religious organizations. For Alito, freedom of association jurisprudence plays a specific, limited role in cases dealing with religious

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[37] Schragger and Schwartzman, "Against Religious Institutionalism," 977.

[38] Schragger and Schwartzman, "Against Religious Institutionalism," 977.

[39] *Hosanna-Tabor* at 200 (Alito, J., concurring).

[40] *Hosanna-Tabor* at 200 (Alito, J., concurring).

bodies. He states that expressive-association cases are useful in pointing out what the "essential rights" of religious organizations are. These essential rights, he argues, certainly include the choice of who serves as the organization's "voice." Because it also involves the nature of group rights, freedom of association jurisprudence can be helpful, but it alone cannot provide the protection that churches are guaranteed by the Constitution.

If Alito had seen churches as merely equivalent to other associations, presumably he would have argued that this case should have been decided under strict scrutiny, the Court's standard of review for association cases, and the standard advocated by Perich and the EEOC. Yet according to Alito the "reinforcement" provided by the Constitution to religious associations amounts to greater deference to churches through complete immunity rather than strict scrutiny. Freedom of association jurisprudence may be helpful in determining which rights churches have, but it does not determine which standard should be used to evaluate those rights. The choice of standard may appear as a mere technical matter, but the distinction reflects the special status of religion in American society. As we saw in the previous chapter, freedom of association jurisprudence with its standard of strict scrutiny allows judges to decipher, to a certain degree, whether a group's rejection of a leader is related to the group's expressive purpose. This would be a troubling line of inquiry in religious freedom cases. As Michael McConnell explains, "This requirement opens the door for plaintiffs to engage in wide-ranging discovery regarding the church's beliefs and practices, and for the courts to second-guess the

church's decisions."[41] Further, strict scrutiny would allow compelling government interests to outweigh the church's freedom to direct its internal affairs.

But what constitutional reason does Alito have for thinking that churches should receive a higher level of protection than non-church associations? Why doesn't *BSA v. Dale* provide complete guidance for this case, as Schragger and Schwartzman think it should? Ultimately, Alito, and Kagan, who joins him in his concurring opinion, make the jurisdictional argument embraced by those who advocate the "freedom of the church" position: "To safeguard this crucial autonomy, we have long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs."[42] The First Amendment, in other words, recognizes that churches have their own sovereign sphere that government must respect.[43] Other associations are critical for the full exercise of rights, but they do not inhabit a sphere that is off-limits to the government.

Alito also makes a conscience-based argument for the ministerial exception: "The Constitution leaves it to the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher or messenger of its faith."[44] Alito's reference to the idea of "collective conscience" raises a critical question: is church autonomy simply derived from the aggregation of the individual consciences of the members, or is

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[41] McConnell, "Singling out Religion," 826.

[42] *Hosanna-Tabor* at 199 (Alito, J., concurring).

[43] The breadth of this jurisdiction is not clear. We know only that, at minimum, it involves the church's freedom to select its ministers: "Religious autonomy means that religious authorities must be free to determine who is qualified to serve in positions of substantial religious importance." *Hosanna-Tabor* at 200 (Alito, J., concurring). As he was addressing only the controversy before him, Alito did not express whether church autonomy requires other freedoms besides the selection of ministers.

[44] *Hosanna-Tabor* at 202 (Alito, J., concurring).

it something greater? If it is simply an aggregation of their conscience rights, Schragger and Schwartzman raise a valid point when they state that it would be strange for institutions to receive greater protection than individual consciences, which, even pre-*Smith*, are protected only by strict scrutiny. Under the Court's framework, the government may have interests that override conscience claims, but religious institutions are immune from such balancing of interests, at least in the employment discrimination context. The Court, by relying on both the Establishment and Free Exercise Clauses rather than solely the Free Exercise Clause, seems to be making more than a conscience claim.[45] Examining the Court's previous church autonomy cases can help to clarify how the Court has traditionally understood the source of the church's claims to freedom.

The 1871 Supreme Court case of *Watson v. Jones* is noteworthy for being the first case to articulate the doctrine of church autonomy. Long after the Civil War had ended, the Court addressed a dispute between antislavery and proslavery factions over who controlled the property of the Walnut Street Presbyterian Church in Louisville, Kentucky. The General Assembly of the Presbyterian Church had declared loyalty to the federal government and its antislavery position, and hence declared that new members who supported slavery could not be admitted into the church. The proslavery faction of the church, though they had once accepted the authority of the General Assembly, "now deny

[45] As we saw in chapter one, Douglas Laycock helpfully explains the distinction between a conscience claim and a church autonomy claim (Laycock does not use this phrase in the narrow sense of Eisgruber and Sager.): "The most important thing my earlier article did was to distinguish between conscientious objection claims and church autonomy claims. A conscientious objection claim says that for religious reasons, I cannot do what the government demands. A church autonomy claim is a claim to autonomous management of a religious organization's internal affairs. The essence of church autonomy is that the Catholic Church should be run by duly constituted Catholic authorities and not by legislators, administrative agencies, labor unions, disgruntled lay people, or other actors lacking authority under church law." Laycock, "Church Autonomy Revisited," 254.

its authority, denounce its action, and refuse to abide by its judgments."[46] They then joined the Presbyterian Church of the Confederate States, and the two parties began to dispute over the Walnut Street Church property. The question was which church was the "true" Walnut Presbyterian Church.[47]

Given that the General Assembly was the highest church tribunal, the Court, in an opinion by Justice Miller, deferred to its judgment. At this time, the First Amendment was not incorporated, so the Court was not yet applying it to the states. Hence, the Court did not come to their conclusion according to what the Constitution demanded, but according to a "broad and sound view of the relations of church and state under our system of laws."[48] In other words, the Court arrived at its ruling through common law principles.

The Court delineates three different kinds of church property: property provided by a donor with a specific vision of what should be taught, purely congregational churches independent of any outside authority, and hierarchical churches. As to the first, so long as there are persons qualified within the original meaning of the dedication who can execute the trust, they should be able to prevent the property from being used to teach something different, regardless of whether a majority of the congregation wish to do so.[49] For example, if a man builds and dedicates a building strictly for use by a Trinitarian Congregation, that building cannot be taken over by a Unitarian congregation. But the Court makes clear that this principle is not solely related to churches. "This is the general

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[46] *Watson v. Jones*, 80 U.S. 679 (1871), at 734.

[47] *Watson* at 717.

[48] *Watson* at 727.

[49] *Watson* at 723.

doctrine of courts of equity as to charities, and it seems equally applicable to ecclesiastical matters."[50]

When it comes to hierarchical churches, such as the Presbyterian Church in Kentucky, courts must accept the judgment of the highest tribunal. This is required by the view of the relation between church and state under our laws, "and supported by a preponderating weight of judicial authority."[51] The highest church judicatory has the authority to decide questions of discipline, faith, ecclesiastical rule, custom, and church law, and secular tribunals must accept these decisions as binding on the case before them.

When churches that are purely congregational or independent face schism, the answer as to which body gets to use the property should be determined by "the ordinary principles which govern voluntary associations."[52] If the church government is one in which the majority rules, then the majority must take control of the property.[53] Here, the Court first articulated the doctrine of "implied consent," stating that "[a]ll who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it." As such, it would be a "vain consent" and would lead to the "total subversion of such religious bodies" if an aggrieved member could appeal to the secular courts to have one of the church's decisions reversed.[54]

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[50] *Watson* at 723. Perhaps this is a way in which a church cannot have immunity from civil procedures; unlike employees who have ministerial status, a donor can sue a church that has strayed from the mission he supported.

[51] *Watson* at 727.

[52] *Watson* at 725.

[53] *Watson* at 726.

[54] *Watson* at 729.

This is partly because judges are simply incapable of deciphering church doctrine:

> Each of these large and influential bodies…has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own."[55]

The Court makes clear that this separate body of laws is legitimate, for it states that these religious organizations have a "right to establish tribunals for the decision of questions arising amongst themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."[56] Hence, secular courts simply have no role in second-guessing the decisions of churches.

The argument about the inability of judges to decipher church doctrine can be used to support those contesting church autonomy because it allows them to point out that judges are indeed competent to review many of the issues addressed in these cases, since many of the disputes do not appear to be theological in nature. Yet, as a conceptual matter, doctrinal incompetence alone is certainly not sufficient to defend church autonomy. Suppose the Supreme Court were composed of nine Presbyterian justices who were well-versed in the doctrines of the church. Under this reasoning, it would seem appropriate for these judges to delve into the theological debate. But doctrinal incompetence is not the totality of the *Watson* Court's argument. While the justices

[55] *Watson* at 729.

[56] *Watson* at 729.

referred to the fact that secular tribunals are lacking in the requisite knowledge of church doctrine, they also suggested that secular courts simply lack jurisdiction over church questions. In other words, even a judge very familiar with a particular religion has no authority to decide such questions. Quoting a South Carolina Court of Appeals case, the Court stated:

> The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. The judgments, therefore, of religious associations, bearing on their own members, are not examinable here…[57]

Here we see clear jurisdictional language. The Court refers to "temporal" civil institutions, distinguishing them from religious institutions, which deal with the eternal. Indeed, the relation to the eternal is what makes these institutions so critical. They guide individuals in their understanding of those "duties to the Creator" that Madison describes as prior to one's duties to society. In this way, they are unlike all other associations.

The Court explains this division of jurisdictions, stating that the church of course cannot convict a man for murder or attempt to adjudicate a dispute between two members over individual property rights. But the church has jurisdiction over subject matters that are strictly ecclesiastical: these include "theological controversy, church discipline, ecclesiastical government, or the conformity of members of the church to the standard of morals required of them." The civil courts exercise "no jurisdiction" over these matters.[58]

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[57] *Harmon v. Dreher*. 17 S.C.Eq. (Speers Eq.) 87 (1843), at 730.

[58] *Watson* at 733. Concerning these early church property cases that are cited in defense of freedom of the church, Corbin argues that the "actual holdings stand for a much more limited proposition, namely, that the state should not decide doctrinal disputes." Corbin, "Above the Law," 1985. None of them involve a church's objection to complying with a neutral government law, she points out. In other words, the disputes in these cases "pitted sect against sect – not church against state." Corbin, "Above the Law,"

In this case, the Court articulated a vision of religious freedom that defends the rights of churches, but also contains some limitations:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.[59]

Any religion can be practiced and preached so long as it does not violate "the laws of morality and property" or the rights of others. While violations of property and other rights may be easy to identify, the Court's idea of morality-based limits is not entirely clear in substance or scope and seems to offer broad grounds for intrusion, which is in serious tension with the rest of the opinion. What is clear about this passage—what is "unquestioned" according to the Court—is that religious people are free to organize in order to promote "any" religious doctrine, and they must be free to rely on their own tribunals and governments for deciding questions of faith.

1985. But the principles laid down in *Watson* are certainly broad enough to cover the latter. If courts have "no jurisdiction" over church discipline or ecclesiastical government, which was declared in *Watson*, the Court's decision in *Hosanna-Tabor* seems to follow naturally from *Watson*. Even Watson's curious invocation of the "laws of morality" does not exclude religious accommodations to civil laws. Its meaning is not entirely clear, but it most likely refers to acts that would have been seen as morally egregious at the time. This case was decided seven years prior to *Reynolds v. United States*, which denied the Mormon Church a religious exemption to a federal anti-polygamy law, and the Court's position was arguably based on morality. It is likely that the *Watson* Court refers to acts such as these when it claims that a line must be drawn concerning the "laws of morality." Again, this language is vague and in tension with the Watson Court's broader claims about the freedom of churches, but it does not amount to Corbin's claim that church autonomy is limited to the ability to deal with internal matters.

[59] *Watson* at 728-29.

One may deny that *Watson* is a case specifically about church autonomy, arguing instead that Justice White speaks of voluntary associations more generally. Indeed, he does argue: "Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints."[60] Yet Justice White uses the comparison to associations to establish a minimum standard for the rights of churches, not a maximum standard. The language clarifying that the property rights of churches are "equally under the protection of the law" suggests that he is on the defensive against those who would argue that churches have *less* protection than other voluntary associations. He is clarifying that they have the same *basic* rights as all other groups, but the rest of the opinion makes clear that he is referring to the distinct rights of religious free exercise, not merely association.

In the 1952 case of *Kedroff v. St. Nicholas Cathedral*, the Court raised the principles laid out in *Watson* to a constitutional status. In this case, the Court struck down a New York law that established the administrative autonomy of Russian Orthodox Churches in North America from control by the Russian Orthodox Church in Moscow.[61] The law would have allowed the American Church to seize a cathedral owned by the Russian Church. The American Church had split from the church authority in Moscow "out of concern that the Authority had become a tool of the Soviet

[60] *Watson* at 714.

[61] *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952).

Government."[62] By passing this law, the Court concluded, the government had attempted to transfer church property from one religious authority to another. Applying their principle of deference to hierarchy, the Court ruled in favor of the Russian church. The Court relied on the Free Exercise Clause for its conclusion, but the reasoning in the case invokes more than a concern for individual rights.

The Court cites the Court of Appeals' view that the legislature gave the churches to the Russian Church in America because this church would be most faithful to the purposes of the religious trust and therefore minimize the "dangers of political use of church pulpits."[63] The Court, however, emphasizes that the legislature is free to punish "subversive action," and that a cleric's religious position cannot protect him from such punishment, but that is irrelevant to this case since no law had actually been violated. Hence, "[t]his violates our rule of separation between church and state."

The justices acknowledge that *Watson* was decided prior to incorporation, but conclude that it is still applicable in this case. "The [*Watson*] opinion radiates…a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[64] In *Kedroff*, freedom to select clergy was declared to have federal constitutional protection as part of the free exercise of religion.

The Court thus declared that the New York law "passes the control of matters strictly ecclesiastical from one church authority to another. It thus intrudes for the benefit

[62] *Hosanna-Tabor* at 186.

[63] *Kedroff* at 109.

[64] *Kedroff* at 116.

of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment." Hence, as in *Watson*, religious freedom is not treated as a grant from the state, but an arena into which the state is simply not permitted to reach. This supports the jurisdictional claim made by those who defend "freedom of the church." At first glance *Kedroff* may seem to be a dry church property case, but it demonstrates an almost radical commitment to church autonomy: even a church that may be teaching political doctrines contrary to the U.S. interest should not have its institutional freedom curtailed.

Still, as Schragger and Schartzman ask, why would this lead us to give more protection to institutions than individual consciences? The actions of individuals are subject to strict scrutiny only, while the government must stay out of church governance altogether. Corbin shares their concern: "Allowing institutions but not individuals to violate the law in the name of religious belief amounts to privileging the derivative right over the primary one."[65] The next case helps to shed light on why institutions *qua* institutions must be so carefully guarded.

The 1987 case of *Corp. of the Presiding Bishop v. Amos* also addressed religious institutions, but this time the Court was considering whether a special benefit provided for such institutions by statute violated the Establishment Clause. While the Court was not addressing whether the Free Exercise Clause *demanded* such an exemption, but rather whether the Establishment Clause prevented it, this case is still significant to the question of the freedom of religious institutions because it contains insights on what types of action would burden such institutions.

[65] Corbin, "Above the Law," 1988-89.

Section 702 of the Civil Rights Act of 1964 exempts religious organizations from Title VII's prohibition against employment discrimination on the basis of religion. In this case, the Court is addressing whether applying that exemption to the secular non-profit activities of such organizations violates the Establishment Clause.[66] The case addresses a gymnasium run by two religious entities associated with the Mormon Church. The building engineer for the gym was discharged because he was not a member of the church, and the church contended that this action is permissible under the section 702 exemption.

In an opinion by Justice White, the Court used the *Lemon* test[67] to determine that applying the 702 exemption to the secular non-profit activities of religious organizations does not violate the Establishment Clause. In fact, demanding the distinction between secular and religious activities would potentially harm the religious organization. The Court argues that it is a "significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious."[68] This fear would affect the way an organization carries out its religious mission. Essentially, the Court is concerned that requiring such a distinction would have a "chilling effect" on religious activity. The justices also rejected the argument that 702 is unconstitutional because it singles out religious entities for a special benefit. "Where,

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[66] Prior to an amendment in 1972, section 702 only exempted the religious activities of employers from the statutory ban on religious discrimination. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) at 2335-336.

[67] The *Lemon* test was established by the Court in the 1971 case of *Lemon v. Kurtzman*, and the Court often uses it to determine whether a statute constitutes an establishment of religion. In order to pass the test, the legislation in question must fulfill three prongs. 1. It must have a secular legislative purpose. 2. Its principal or primary effect must neither advance nor inhibit religion. 3. It must not cause "an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 612 (1971).

[68] *Amos* at 336.

as here government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities."[69]

In a concurrence, Brennan, joined by Blackmun and O'Connor, argues that the nature of non-profit activity renders inappropriate a case-by-case determination of whether an activity is religious or secular. They classify this case as one of a clash between the rights of religious organizations and those of individuals. They state that "any" exemption from Title VII's proscription of religious discrimination has the effect of burdening the consciences of current and potential employees. It forces an employee to choose between embracing certain religious tenets or losing his job. "The potential for coercion created by such a provision is in serious tension with our commitment to individual freedom of conscience in matters of religious belief."[70] Yet, the Court argues, churches also have an "interest in autonomy in ordering their internal affairs." Quoting an article from First Amendment scholar Douglass Laycock, the Court emphasizes that "[r]eligion includes important communal elements for most believers," and these organizations through which they exercise their religion must be protected by the Free Exercise Clause.[71]

Brennan issued the following statement about the freedom of religious institutions:

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. *Such a community represents an ongoing tradition of shared beliefs, an organic entity not*

[69] *Amos* at 338.

[70] *Amos* at 341.

[71] *Amos* at 341.

> *reducible to a mere aggregation of individuals*. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself.[72]

This passage offers insights that point to why it is so critical to protect religious institutions, and why their freedom cannot simply be treated as a conscience right. A religious body is not simply an aggregation of the currently living individuals. The whole is larger than the sum of its parts, and the whole plays a critical role in forming the parts. The religious traditions themselves merit protection, even though they were formed by individuals from times past who can no longer claim the rights of conscience. Institutions help individuals to exercise their consciences, but they do so in part by forming those consciences through this "organic entity." Presumably this is why the Court stated that protecting the church's ability to define itself "often furthers individual religious freedom as well." But institutions cannot perform their proper function of forming consciences if they do not possess a particular type of freedom, a type that is different from and possibly broader than the rights of conscience.

Indeed, according to Brennan, the institutional right is so critical that it may even trump individual conscience rights. Echoing the majority, Brennan argues that the character of an activity—whether it is religious or secular—is "not self-evident." Hence, many judges will opt for a case-by-case analysis to determine whether an activity is secular or religious, but this will result only in "ongoing government entanglement in religious affairs."[73] Brennan is concerned with the effect that this would have on the church's ability to define itself. Given that a judge may perceive a certain activity as

[72] *Amos* at 342 (emphasis added).

[73] *Amos* at 343.

secular even if the religious group deems it religious, the group will likely "characterize as religious only those activities about which there likely would be no dispute," even if it does genuinely view other tasks as religious. The result is that the formative aspect of the religious community will be undermined: "As a result, the community's process of self-definition would be shaped in part by the prospects of litigation."[74] The concern here is not simply with individuals' needs, but with the community's ability to form and define itself. Hence, Brennan argues, there would be a deleterious twofold effect of case-by-case analysis: both excessive government entanglement and the danger of chilling of religious activity. Instead, these concurring justices support a categorical exemption for all nonprofit activities.

The potential chilling effect makes permissible the infringement of the free exercise rights of an employee "in those instances in which discrimination is most likely to reflect a religious community's self-definition."[75] In other words, when the rights of a non-conforming individual conflict with the rights of the group, the latter must win because the entire ability of the group to form its identity and help its members to exercise their religion requires allowing the group to discriminate.[76] We saw this principle in the *CLS v. Martinez* chapter pertaining to all associations, and it lies behind the ministerial exception as well. Indeed, the core of Alito's *Hosanna-Tabor* position seems to be a concern with what will disrupt the organic formation of doctrine and

[74] *Amos* at 343-44.

[75] *Amos* at 345.

[76] What this analysis is missing is the point that no individual is promised the protection of his free exercise rights by private entities. It is not the state that is discriminating against the employee based on his religious beliefs, but a private organization, a discrimination that the Constitution does not forbid. As the majority opinion noted in a footnote, Amos's freedom of religion was impinged upon by the Church, not the government. His discharge was not required by statute. *Amos* at footnote 15. I will explore this problem more in the *Hobby Lobby* chapter, which follows.

teaching, "both to the members and to the outside world." It is not just the particular teachings of the minister that will affect this message, he suggests, but also his character and conduct:

> When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters. Religious teachings cover the gamut from moral conduct to metaphysical truth, and both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers. A religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses.[77]

In order to maintain this freedom to teach and practice as they wish, according to Alito, the selection of their leaders must be free from any government interference: Hence, he points out, a purely secular teacher does not qualify for the ministerial exception, presumably because such a teacher would not undermine that formation.

Watson, *Kedroff*, and *Amos* all shed light on why religious institutions receive such heightened protection under the American legal tradition. Institutions facilitate and protect the formation of doctrine, which is at the foundation of almost every religious denomination. It would be impossible for an individual to practice his religion if the authority that he looks to for instruction is not free to teach him. As Richard Garnett explains, "The freedom of religion is not only lived and experienced through institutions, it is also protected, nourished, and facilitated by them."[78] In this sense, the institution does indeed come before the individual, but at the same time serves the individual in his free exercise of religion. While the state may sometimes have a compelling interest in

[77] *Hosanna-Tabor* at 201 (Alito, J., concurring). This point about content and credibility should have been applied in the *Martinez* case.

[78] Garnett, "Freedom of the Church," 41.

interfering with particular practices, the ability of religious bodies to shape and teach doctrine must be left alone to the greatest extent possible.

Section 4. Classifying a Minister and the Issue of Entanglement

In the cases addressed above, including *Hosanna-T*abor, the Court emphasized the importance of protecting religious institutions from government interference. Yet Caroline Corbin argues that the ministerial exception actually causes the very entanglement it seeks to avoid:

> [A]pplication of the ministerial exemption can entangle a court in religious doctrine more than application of Title VII. In determining whether a plaintiff counts as a "minister" who triggers the ministerial exemption, courts must decide whether the plaintiff plays an important religious role.[79]

Further, she notes, most ministerial exception cases have actually involved disputes that clearly have nothing to do with religious doctrine. In this section, I turn to the ideas conveyed in Thomas' concurrence, and argue that his concurrence would protect the ministerial exception without the government interference that worries Corbin.

Although the Court in *Hosanna-Tabor* declined to provide guidelines for who constitutes a minister, several justices provided their own ideas in concurring opinions. Justice Thomas, for example, advised broad deference to the church and its own good-faith understanding. The Religion Clauses, he explains, guarantee religious organizations "autonomy in matters of internal governance," including the selection of ministers, but this right would be "hollow" if secular courts could second-guess the organization's belief concerning who constitutes a minister.

[79] Corbin, "Above the Law," 2026.

> The question whether an employee is a minister is itself religious in nature, and the answer will vary widely. Judicial attempts to fashion a civil definition of 'minister' through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'Mainstream' or unpalatable to some.[80]

Thomas' point is twofold. First, as a matter of principle, courts must abstain from making determinations concerning questions that are inherently religious, so they must not weigh in on the question of who qualifies as a minister. Second, this unprincipled practice will also have bad effects, since the guidelines contrived by any court will undoubtedly favor majority religions' understanding of what a minister is. Moreover, he argues, such guidelines may cause religious groups to conform their practices regarding ministers to those guidelines, even if they conflict with their actual beliefs, in order to avoid potential liability (the same argument we saw in *Amos*). He argues that this is the very type of situation the First Amendment was designed to prevent. Ultimately, the fact that Hosanna-Tabor considered Perich to be a minister was sufficient for Thomas.

The other concurring opinion was written by Justice Alito, joined by Justice Kagan. Unlike Justice Thomas, Alito did not hesitate to formulate a broad framework for who constitutes a minister. He began by stating that the First Amendment "protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith."[81] Accordingly, he argues, religious groups must be "free to choose the personnel who are essential to the performance of these functions." The ministerial exception should therefore apply to any employee who "leads

[80] *Hosanna-Tabor* at 197 (Thomas, J., concurring).

[81] *Hosanna-Tabor* at 199 (Alito, J., concurring).

a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith."[82] Though different religions may have different views on exactly what counts as an important religious position, "it is nonetheless possible to identify a general category of 'employees' whose functions are essential to the independence of practically all religious groups."[83] In other words, the three categories of job duties articulated above—leadership of the organization, leadership of worship, and conveyance of the faith—are necessary for the organization's autonomy.[84] They would, however, limit the scope of what a particular religion defines as its minister.

Given the religious diversity in this country, Alito and Kagan found it necessary to focus on the substantive function of the employee rather than more formal characteristics such as title or ordination. They explain that most faiths do not actually use the term "minister" and many of them do not require formal ordination, as the Lutheran school did in this case. Perhaps, Alito explains, this is why no circuit court has made ordination or a formal title a necessary condition for the ministerial exception. At the other extreme, some faiths consider all or most of their members to be ministers. In a footnote, he notes that Jehovah's Witnesses consider all baptized disciples to be ministers.[85] Hence, "while a ministerial title is undoubtedly relevant in applying the First

[82] *Hosanna-Tabor* at 199 (Alito, J., concurring).

[83] *Hosanna-Tabor* at 200 (Alito, J., concurring).

[84] A minister does not need to be involved solely in religious activities in order to be a minister. Alito explains that Perich's ministerial nature is not diminished by her role of teaching secular subjects. "What matters is that respondent played an important role as an instrument of her church's religious message and as a leader of its worship activities." *Hosanna-Tabor* at 204 (Alito, J., concurring).

[85] *Hosanna-Tabor* at 202, footnote 4 (Alito, J., concurring).

Amendment rule at issue, such a title is neither necessary nor sufficient."[86] Given that he states that the designation of "minister" is not "sufficient" for the exemption, one wonders whether his ministerial framework would exclude the understanding held by the Jehovah's Witnesses.

Alito's position is potentially problematic because it may open the door for courts to determine what constitutes worship and teaching, and what constitutes secular versus religious teaching. For example, would a science teacher at a Christian school who teaches Creationism count as a secular or a religious teacher? The secular and the sacred are not always neatly divided. Further, certain denominations may be excluded from the exception, such as Jehovah's Witnesses, who view every church member as a minister. This seems to raise a tension within Alito's reasoning. He states that ministers are those who are in charge of teaching the faith, but Jehovah's Witnesses would argue that every one of their members is in charge of teaching the faith. Indeed, one could argue that the standard Alito describes, quoted above, that the "messenger matters" could apply to all members of a particular faith. For example, the math teacher at a church-run school may engage in practices that are contrary to the moral teachings of the school's faith. The school may wish to fire her because it believes that she is misrepresenting the faith to her students through her actions.

Thomas' view, which provides complete deference to the religious organization's understanding of what constitutes a minister, would presumably allow all members of the Jehovah's Witnesses to qualify for the ministerial exception. Yet, if complete deference is allowed, can a church argue that a janitor qualifies as one of its ministers? Thomas'

[86] *Hosanna-Tabor* at 202 (Alito, J., concurring).

conclusion essentially rests on faith that religious institutions are being sincere in their claims, which seems more reasonable than assessing claims based on a Court-created test of who constitutes a minister. Thomas' position certainly risks less government entanglement with religion than Alito's, and given the critical importance of the church's freedom to guide the formation and teaching of doctrine, it seems that the least possible interference should be preferred. Hence, Corbin's concern about the government weighing in on who constitutes a minister is addressed, and the risk that comes with her own position—that the government may interfere with religious institutional freedom by weighing in on whether an employee's termination implicates religious doctrine—is avoided.[87]

The ministerial exception also raises problems for theories attempting to reject the special status of religion in our constitutional republic. Eisgruber and Sager (addressed in chapter 2) do concede that the concept of church autonomy, which has been recognized by American courts throughout our history, presents a significant stumbling block to their theory that religious institutions must not receive any special protection for being religious. They hold that offering such special protection violates the principle of equality enshrined in the Constitution. Along with Perich and the EEOC, they argue that freedom of association is enough to protect religious leaders. They contend that priests

[87] Corbin's position would necessarily entail such entanglement because, without complete immunity, courts would have to quibble with religious organizations about whether the lawsuit in question actually addressed church doctrine. The lower courts have explained this problem clearly. For example, using clear jurisdictional language: *Werft v. Desert Southwest Annual Conference*, 377 F.3d 1099 (9th Cir. 2004) at 1103 ("If [the plaintiff is] allowed to proceed, the Church would necessarily be required to provide a religious justification for its [employment action] and this is an area into which the First Amendment forbids us to tread.") Another circuit court explained: "It would offend the Free Exercise Clause simply to require the church to articulate a religious justification for its personnel decisions." *Bollard v. the California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999) at 946.

and pastors have mentoring roles very similar to those held in non-religious private associations:

> If the state told its citizens whom to turn to as mentors, as best friends, as role models, as moral advisors, as sources of consolation in times of need-for example, by requiring that we make such choices without regard to gender or race-we would easily conclude that the state had overstepped the boundaries of its authority and entered a domain the Constitution preserves for private choice. Ordinarily, we do not confront problems of autonomy of this sort because the state has neither the inclination nor the capacity to intrude into the lives of its citizens in this way. But organized religions like the Catholic Church are structural anomalies in this regard. Priests and their counterparts play an amalgam of these relational and guidance roles: They act as moral advisors, as sources of consolation, as role models, best friends, and mentors.[88]

While it is certainly true that ministers often serve in these roles, this is a very narrow and watered down view of what ministers do. Such "relational and guidance roles" are arguably less significant, at least in some religions, than the role ministers play in handing down the faith. For example, in the Catholic Church, the priest's most significant role is administering the sacraments, a role that has no place—and would make little sense—in secular associations. Indeed, sacraments are believed to bring human beings into the presence of the eternal—the element that most clearly separates religious and secular associations and is at the heart of what distinguishes religion from other associations.

Additionally, some religions include the offices of monks and cloistered nuns who have very little of a relational or teaching role, yet they dedicate their lives fully to their religion. These religions maintain that the constant prayer and meditation provided by such persons, even when they have little contact with the lay members of the community, is central to the religion—a concept that secular courts may not understand. It would be

[88] Eisgruber and Sager, "Religious Freedom and the Constitution," Kindle locations 697-702.

curious for such people not to fall under the ministerial exception, yet they would not under Eisgruber and Sager's view. Overall, their view of ministers is neglectful of the religious autonomy and diversity the Court seeks to protect. Ministers cannot simply be reduced to mentors.

The topic of nuns being subject to the ministerial exception merits further exploration. University of Nevada, Las Vegas Professor of Law Leslie Griffin is concerned about churches abusing the exemption to claim ministerial status for people who cannot actually be ministers under their own tradition, and she argues that protecting nuns under the ministerial exception amounts to an absurdity:

> Although some Roman Catholic, Muslim, and Orthodox Jewish women may not become priests, imams, or rabbis and perform their jobs with the full understanding that they cannot be ministers, the courts and churches confer ministerial status upon them just long enough to keep their lawsuits out of court. This situation is the clearest proof that the ministerial exception unfairly overprotects the rights of institutions at the expense of individuals.[89]

But this only serves to demonstrate the problem of judges attempting to decipher who is and who is not a minister. While some denominations only consider the formal minister to have authority in the church, the Catholic Church—and many other religions—have a more complex view of church authority. In the Catholic Church, nuns, monks, and deacons all hold a type of spiritual authority without being priests. Hence, they have a ministerial role even though they do not occupy the Catholic position that is equivalent to the Protestant position of "minister."

Overall, it seems that any other view besides' Thomas' invites improper invasion by the courts into theological questions. Justice O'Connor's concurrence in *Smith*

[89] Griffin, "The Sins of *Hosanna-Tabor*," 1008.

displays the sort of deference that Thomas recommends. She explains the Court's long-held principle that it would be improper for the courts to question the centrality of a certain practice to a religion. The Court's determination of the constitutionality of Oregon's criminal prohibition, she explains, cannot and should not turn on the centrality of the use of peyote to the Native American Church.

> This does not mean, of course, that courts may not make factual findings as to whether a claimant holds a sincerely held religious belief that conflicts with, and thus is burdened by, the challenged law. The distinction between questions of centrality and questions of sincerity and burden is admittedly fine, but it is one that is an established part of our free exercise doctrine, and one that courts are capable of making.[90]

Questioning the centrality of a belief to a particular religion is comparable to questioning whether a particular person counts as a minister according to that religion. The determination of sincerity, Thomas' recommendation, is a more fitting and less dangerous line of inquiry.[91]

Section 5. The Scope of Freedom of the Church

The obvious concern over recognizing a jurisdictional sphere for churches unregulated by antidiscrimination laws is the vulnerability of their employees to abuse. Leslie Griffin has argued that the ministerial exception has subjected such employees to, among a long list of harms, sexual harassment; age, gender, disability, race, and national origin discrimination; unequal pay; breach of contract; and even assault.[92] "Instead of

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[90] *Smith*, at 907 (O'Connor, J., concurring).

[91] While inquiries into sincerity certainly bring some risk, the burden of proof should be on the court to demonstrate that the religious view is not sincerely held. For example, few people question that the owners of Hobby Lobby hold their beliefs sincerely, since they are and have always been articulated in the store's mission statement. Of course, in other cases the evidence will not always be as clear as it was in this case, and such cases will necessarily depend upon careful judgment by the courts.

[92] Griffin, "The Sins of *Hosanna-Tabor*," 983.

having a day in court to win or lose their cases, they have been barred from litigation by the ministerial exception, a rule that always grants victory to the employer."[93] The ministerial exception, she argues, amounts to lawlessness, a "special freedom to disobey the law."[94] Schragger and Schwartzman are also concerned about the limits of freedom of the church and the negative effects of unfettered religious institutional freedom. The concept of religious group rights may entail "isolation, enforced separatism, and the rejection of integration."[95]

To demonstrate her point, Griffin considers the extreme hypothetical of a case in which religious employers hire and fire their ministers through Russian roulette. While she is confident that the courts would not allow this, she states that it is not clear what the Court's reasoning would be: "The courts will have to make a determination that some religious beliefs are worse than others, thereby undermining the neutrality among religions that the First Amendment should protect."[96] But the Court has never suggested that neutrality requires no limits on what sorts of religious practice can take place in America. The Free Exercise cases make this clear. Hence, while less interference is certainly required in institutional matters versus matters of individual practice, the government may interfere in order to protect the lives of a church's members. While this involves the task of declaring that a certain religious practice, even if performed by an institution, is a violation of basic rights, such a task need not be difficult, as it should be reserved for extreme cases that involve obvious violations of basic rights. For example,

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[93] Griffin, "The Sins of *Hosanna-Tabor*," 983.

[94] Griffin, "The Sins of *Hosanna-Tabor*," 983-84.

[95] Schragger and Schwarzman, "Against Religious Institutionalism," 966.

[96] Griffin, "The Sins of *Hosanna-Tabor*," 998.

physical abuse, whether or not it is connected to a religious belief, cannot be shielded by the ministerial exception. Ministers are not immune from the civil laws when it comes to abuse, theft, etc, even if they claim this is necessary for their religious practice. The *Watson* case explained this well; ministers are still subject to temporal laws, and the rights of others, such as property rights, must still be respected. Religious freedom is not limitless.

This idea that physical harm is beyond the scope of church autonomy is not unprecedented. During the *Hosanna-Tabor* oral argument, Justice Sotomayor asked Douglas Laycock to address a hypothetical in which a teacher was fired for reporting the sexual abuse of a child. Laycock made the distinction between a government interest in fighting discrimination, which falls "squarely within the heart of the ministerial exception" protected by law, and a government interest in "something quite different from that, like protecting the children." Once such an interest is raised, courts can assess whether it is "sufficiently compelling to justify interfering with the relationship between the church and its minsters."[97] The government's interest is "at its nadir when the claim is: We want to protect these ministers as such." The example given by Laycock is not merely hypothetical: Corbin notes that some of the lower courts have allowed clergy to bring sexual harassment claims, even though these courts had acknowledged the existence of the ministerial exception.[98]

Some may argue that the line should not simply be drawn at physical harm. Schragger and Schwartzman, for example, seem to open the door for state intervention

[97] Supreme Court of the United States, "*Hosanna-Tabor v. EEOC* Oral Argument Transcript," 6-7, accessed June 29, 2017, https://www.supremecourt.gov/oral_arguments/argument_transcripts/10-553.pdf/.

[98] Corbin, "Above the Law," endnote 69, citing Janet S. Belcove-Shalin, "Ministerial Exception and Title VII Claims: Case Law Grid Analysis," *Nevada Law Journal*, 2 (2002): 123-25

with regard to parental rights over the religious upbringing of children. They support church autonomy so long as members consent to association with the church, but their vision of consent excludes children: "What follows from this is that the state will take special care of those whose consent is suspect (such as children)" and adults who have not consented.[99] Their claim is consistent with the principles of John Locke, whom they cite throughout the article. Locke did not think that children could be real members of a church. In his *Letter Concerning Toleration*, he states that a church is "a voluntary Society of Men, joining themselves together of their own accord, in order to the publick worshipping of God." It is unclear at what point Schragger and Schwartzman think the government can intervene to defend the welfare of children. May they require mandatory schooling for Amish children because, as Douglas notes, those children may not wish to continue in the Amish form of education?

While it is certainly legitimate to think that the state can interfere if a child's life or health is at risk, the position taken by Schragger and Schwartzman poses a serious threat to religious freedom and demonstrates the problem with viewing institutional rights as simply derivative of individual rights. Many religious denominations do not view children as autonomous individuals who are full members of the church only when they become consenting adults. When Catholics and Orthodox Christians baptize infants, their view is that those infants are now Christian babies, not potential future Christians. Presbyterians and other Reformed denominations view their children as "children of the Covenant," heirs to promises made by God even before they are old enough to understand. If institutional rights are simply the aggregate of individual rights, it is

[99] Schragger and Schwartzman, "Against Religious Institutionalism," 962.

difficult to see how these children would factor into such an aggregation. Hence, under this view, only a few, very individualistic religions would possess full religious freedom in America.

In addition to physical harm, many would argue that discrimination is a clear harm that should not be permitted even if it is a part of church doctrine. After all, antidiscrimination laws such as the Americans with Disabilities Act were enacted because such discrimination is indeed thought to be truly harmful. Yet understanding the importance of allowing churches to discriminate is crucial because discrimination is literally what churches, and all other groups, are doing when they select their leaders. Merriam-Webster defines discrimination as "the act of making or perceiving a difference."[100] While the term is often used to suggest a deleterious motive, as we saw in the Court's understanding of it in *CLS v. Martinez,* it simply means to exercise discernment, which is necessary for the preservation of doctrine. While it is certainly possible that religious organizations will abuse the immunity guaranteed by the ministerial exception in order to engage in the former kind of discrimination, this possibility must not undermine the freedom that is so crucial to the full exercise of religion and guaranteed by the Constitution.

Section 6. Doctrinal Inconsistency? Freedom of the Church and Employment Division v. Smith

Schragger and Schwartzman argue that *Hosanna-Tabor* is incongruent with the Court's free exercise jurisprudence as seen in the case of *Employment Division v. Smith* (addressed in chapter 2), which states that the Court will use the

[100] *Merriam-Webster*, s.v. "discrimination," accessed June 29, 2017, https://www.merriam-webster.com/dictionary/discrimination

rational basis test when a neutral, generally applicable law incidentally burdens religious practice: "The civil rights laws certainly are such laws, and the Court's perfunctory argument that those laws do not apply to the hiring of ministers is a significant (and mostly unexplained) exception to the *Smith* principle."[101] Corbin agrees: "Under *Smith*, then, the free exercise clause should not shield religious practices from Title VII."[102]

Schragger and Schwartzman are correct that Roberts' attempt at distinguishing *Hosanna-Tabor* from *Smith* was not entirely persuasive. He argued that *Smith* had involved government regulation of "outward physical acts," but that *Hosanna-Tabor* concerned "an internal church decision that affects the faith and mission of the church itself."[103] Describing the Native Americans' act as "outward" and contrasting it with the "internal" decision of the church may give the impression that they were ingesting peyote publicly, which was not so. Further, given that the use of peyote was a sacrament that was central to the Native American Church's form of worship, the church's members would presumably argue that peyote use does indeed "affect the faith and mission of the church itself." Both peyote use and decisions concerning clergy take place within the church walls and have both physical and spiritual elements.

While Roberts' exact language lacks lucidity, his point seems to be that a distinction can be made between the institutional freedom to create and teach doctrine, which needs to be preserved to the highest degree possible, and religious

[101] Schragger and Schwartzman, "Against Religious Institutionalism," 975.

[102] Corbin, "Above the Law," 1983.

[103] *Hosanna-Tabor* at 173.

practices. Certain practices can be trumped by government interests, but there is no justification for the government interfering with the jurisdictional rights of the church to form its own doctrine through selection of its own ministers. This distinction would explain why, even if the *Smith* Court had not abandoned the *Sherbert* test (strict scrutiny review), it still would have involved a lower standard of review than the one embraced in *Hosanna-Tabor*.

Yet *Smith*'s diminution of the standard of review in free exercise cases from the *Sherbert* test to rational basis undoubtedly creates a serious problem for churches. The *Smith* rational basis rule makes it much easier for the government to ban sacraments so long as the law is neutral, generally applicable, and not clearly motivated by animus towards a religion. But sacraments are an example of what makes houses of worship different from other kinds of associations. As explained earlier, religious people view sacraments as a bridge to the eternal, and often believe that their salvation depends upon access to them. It seems inconsistent to say that the Native American Church may freely select their ministers, who presumably have an important role in administering sacraments, but that the church may not actually have an accommodation from the law that prevents them from using those sacraments. This is not to say that any sacrament should be permitted (e.g. human sacrifice as a sacrament), but it is problematic that *Smith* secures them almost no protection under the Constitution while the institutions that administer them receive a great degree of protection.

Rather than concluding that the ministerial exception should be denied because of *Smith,* the Court should reconsider the problems that *Smith* creates for church

autonomy.[104] While the logic of *Smith* does not undermine the ministerial exception, since our tradition does articulate a distinct jurisdiction-based freedom for churches, the low standard of rational basis in *Smith* makes it difficult for ministers to fulfill their most important duties. Strict scrutiny for religious practices would shrink the gap in protection that causes such a problem.

Section 7: Conclusion

According to Alito, not only are religious organizations the predominant example of associations that are expressive: history demonstrates that they are the prime example of the liberty-enforcing role of associations: "Throughout our Nation's history, religious bodies have been the preeminent example of private associations that have 'act[ed] as critical buffers between the individual and the power of the state.'"[105] Alito's point is worth noting because, while the majority focuses exclusively on the good of the church, Alito is arguing that protecting churches' ability to determine their own leadership is beneficial to the good of the whole society, not just to the church's members. He explains that, especially when considering the laudable goal of ending discrimination against people with disabilities, "it is easy to forget that the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive

[104] John Inazu points out that the Court's doctrine in *Martinez* is actually on a collision course with the Court's conclusion in *Hosanna-Tabor*. "Consider, for example, a Baptist campus ministry run out of a Baptist church at a public university that adopts an all-comers policy. Suppose this particular Baptist church believes that every member is a minister of the gospel, and while anyone is welcome to attend the group, only those who adhere to the church's creeds and ministerial requirements can join. How does that case come out under *Hosanna-Tabor* and *Martinez*? It is not clear that both lines of analysis can hold." Inazu, "Four Freedoms," footnote 20. This demonstrates the breadth of the problems created by the Court's conclusion in *Martinez*.

[105] *Hosanna-Tabor* at 199 (Alito, J., concurring).

civil laws."[106] In other words, the autonomy of churches and individual liberties are not mutually exclusive; in fact, churches are often on the forefront of the battle for those very liberties. In order to serve that role, they must maintain their own freedom.

Nonetheless, while the argument concerning religion's contribution to liberty is important and worth discussing, it is not the primary reason for protection of religious institutions. The point is that religion is one of the most important human experiences, perhaps even the most important, inasmuch as it involves eternity and duties to one's God. Interfering with a religious institution undermines the ability of all individuals in that particular denomination to exercise their religion. Intellectual diversity is a positive effect of protecting such institutions, but it is not the primary reason for doing so. If religious institutions made no contribution to diversity, they would still be deserving of protection under our laws.

The Supreme Court's jurisprudence in the context of church autonomy undoubtedly demonstrates that the American tradition views churches as possessing their own jurisdiction over issues proper to the church, a jurisdiction that should not be infringed upon. While the scope of that jurisdiction is not entirely clear,[107] it is clear that it includes the freedom from interference in doctrine, teaching, ecclesiastical structure, and the selection of clergy. The Founders recognized the idea that religion is not a purely individual endeavor, that religious organizations have a special role in not only

[106] *Hosanna-Tabor* at 199 (Alito, J., concurring).

[107] "We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise." *Hosanna-Tabor* at 193.

representing but forming the beliefs of their members. All of these cases acknowledge the serious danger that government interference poses to this role.

CHAPTER FIVE

Corporations as Religious Associations?: The Challenge of *Burwell v. Hobby Lobby*

While many agree that civil society associations, including churches, should have the right to define themselves and express their views to the public, there is much more debate concerning whether business corporations properly constitute rights-bearing associations. As we saw in the *CLS v. Martinez* chapter, the Court has largely held that corporations are excluded from freedom of association protections, yet the Court has been more favorable to businesses in free speech and freedom of religion cases. For example, in the 2010 case of *Citizens United v. FE*C, the Court held that corporate spending is an act of speech protected by the First Amendment. Similarly, in the 2014 case of *Burwell v. Hobby Lobby*, the Court held that a for-profit corporation may claim the protection of a federal religious freedom law. In these cases, the Court implied that, just as with other associations, individuals form businesses for a variety of ends, which may include exercising their rights to speech and religious free exercise in a more efficacious manner.

Yet the issues concerning the rights of for-profit corporations are arguably more complex than non-profit corporations, churches, or student groups at universities. The most obvious difference is that the former type of organization seeks to gain a financial profit from their endeavors, not simply to spread a message. Further, the impact of corporate freedom is arguably broader—or at least more tangible—than that of private social clubs. For example, in contrast to the Christian Legal Society's exclusive

membership at issue in *Martinez*, a business's exercise of religion may affect the personal lives of its employees—employees who decided to work there not in order to express a message but in order to make a living.

This chapter will assess the Court's conclusion in *Hobby Lobby* that corporations are rights-bearing "persons" capable of exercising religion. I begin by providing a brief summary of the *Hobby Lobby* case in section 1. In sections 2, 3, and 4, I analyze three key issues addressed in or raised by the case. First, I will explore the question of whether a corporation can be a rights-holding "person" under the law. In doing so, I assess our legal tradition formed by thinkers such as William Blackstone, Chief Justice John Marshall, and Justice Joseph Story. Second, assuming that some corporations can indeed exercise rights, I evaluate whether for-profit corporations in particular should be excluded from this exercise. In other words, does the profit-gaining venture undermine or diminish any claimed religious goal of a corporation? Lastly, I address the claim that corporations exercising rights presents a threat to society because of the power that corporations, especially large ones with thousands of employees, possess. Throughout these three sections, I address the implications that each issue has for the *Hobby Lobby* case in particular. Ultimately, I argue that both reason and tradition support the idea of corporate personhood and corporate rights, and that refusing to allow for-profit corporations to exercise religion simply because they are powerful and have caused harm in the past only reinforces this problem by forbidding them from being forces for good. In order to contribute to the protection of liberty, equality, and justice, closely-held corporations must be permitted to profess and exercise moral and religious convictions.

Section 1: Review of Burwell v. Hobby Lobby

Three corporations, Hobby Lobby, Conestoga Wood Specialties, and Mardel, objected to certain requirements of the Obama administration's contraception mandate, also known as the "HHS mandate." The HHS mandate was first created in 2011 during the implementation of the Patient Protection and Affordable Care Act (ACA) of 2010, colloquially referred to as Obamacare. The ACA requires that employers with 50 or more full-time employees provide group health insurance coverage for them that includes "minimum essential coverage."[1] Critically for this case, this minimum coverage includes women's preventive services. Congress did not specify what these services would entail but instead instructed a department within the HHS, the Health Resources and Services Administration (HRSA) to make that determination. HRSA then consulted a non-profit organization called the Institute of Medicine, which concluded that these services should include all FDA-approved "contraceptive methods, sterilization procedures, and patient education and counseling."[2] HHS decided that these services must be provided by the employer without cost-sharing. Failure to comply with this requirement would result in heavy fines, which may amount to $100 per day, per employee.[3] In August 2011, the HHS began to promulgate these requirements.

HHS exempted certain religious organizations from the contraception mandate, including "churches, their integrated auxiliaries, and conventions or associations of

[1] *Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. __ (2014) at 2762.

[2] *Hobby Lobby* at 2762.

[3] Dropping insurance altogether would lead to larger fines: "And if the employer decides to stop providing health insurance altogether and at least one full-time employee enrolls in a health plan and qualifies for a subsidy on one of the government-run ACA exchanges, the employer must pay $2,000 per year for each of its full-time employees." *Hobby Lobby* at 2762.

churches," as well as the "exclusively religious activities of any religious order,"[4] as defined by the Internal Revenue Code. To qualify for the exemption, an organization must have the purpose of inculcating religious values and must primarily employ and serve people who share the organization's religious tenets.[5] Thus, for-profit businesses as well as non-profits that employ and serve members outside of their own faith community, such as universities, hospitals, soup kitchens, and other religious charities, were required to comply with the mandate. HHS also exempted secular organizations with "grandfathered" health care plans. These religious organizations, each of which objected to facilitating various forms of contraception and sterilization for their employees, argued that they were being compelled to choose between their beliefs and their livelihood. Yet HHS maintained that it had a compelling interest in "public health" and "general equality,"[6] as well as assuring that all women have access to FDA-approved contraceptives without cost-sharing. In its brief, HHS explained that "[s]tudies have demonstrated that even moderate copayments for preventive services can deter patients from receiving those services."[7]

Hobby Lobby, a nationwide chain of 500 craft stores with more than 13,000 employees, is owned and operated by David and Barbara Green and their three children, all of whom are Christians. They also own Mardel, a Christian bookstore and one of the

[4] *Hobby Lobby* at 2763.

[5] Pew Forum, "The Contraception Mandate and Religious Liberty," accessed May 4, 2017: http://www.pewforum.org/2013/02/01/the-contraception-mandate-and-religious-liberty/

[6] Ginsburg notes in her dissent that women pay significantly more than men for preventive healthcare: She quotes a statement from Senator Feinstein explaining, "Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men." *Hobby Lobby* at 2788 (Ginsburg, J., dissenting).

[7] Brief for Department of Health and Human Services in No. 13-354, at 50 (internal quotation marks omitted).

other businesses suing in this case. Hobby Lobby's mission is to "[h]onor[] the Lord in all [they] do by operating the company in a manner consistent with Biblical principles."[8] Each family member has signed a pledge committing to run the company in a manner consistent with the family's religious beliefs and to support Christian ministries.[9] The company manifests their faith by closing on Sunday, which, they report, causes them to lose millions of dollars in sales every year; selling religious merchandise; and buying hundreds of newspaper ads inviting people to know Jesus as their Lord.[10] While offering health insurance is essential to their faith, they object, on religious grounds, to providing four of the contraceptives required by the HHS mandate. Though most contraceptives merely prevent an egg from being fertilized, these four prevent an already-fertilized egg from attaching to the woman's uterus.[11] The Greens believe human life begins at conception, and that it would be a sin for them to facilitate the act of abortion by providing these abortion-inducing contraceptives.

The Court ruled in favor of Hobby Lobby and the two other businesses by a 5-4 vote. Since the case involved an action of the federal government, it was litigated under the federal Religious Freedom Restoration Act, which required the Court to evaluate the mandate under the *Sherbert* test. In an opinion by Justice Alito, the Court concluded that RFRA protects the religious free exercise rights of closely held for-profit corporations, and that the government's actions failed the *Sherbert* test. In his majority opinion, Justice

[8] *Hobby Lobby* at 2766.

[9] *Hobby Lobby* at 2766.

[10] *Hobby Lobby* at 2766.

[11] *Hobby Lobby* at 2763.

Alito made clear that this was a narrow holding and did not necessarily extend RFRA's protection to publicly-held corporations.

As we have seen, the *Sherbert* test, required by RFRA, demands the Court to evaluate whether a neutral and generally applicable law "substantially burdens" religious free exercise of a claimant, whether the law's applicability to that claimant meets a compelling interest of the government, and whether the action is the least restrictive means available to meet that interest. The Court determined that the mandate did impose a substantial burden on the businesses. It is clear that the business owners' beliefs are sincere, and that they will face a severe penalty for following them. If they do not comply with the mandate, they will face a penalty of up to $1.3 million per day or about $475 million per year.[12] The Court concluded: "If these consequences do not amount to a substantial burden, it is hard to see what would."[13]

The Court then "assumed" that the government satisfied the "compelling interest" prong of RFRA, but concluded that it "plainly fails" the "least restrictive means" prong.[14] There are other ways that the government can ensure women's access to cost-free contraceptives, the Court argued. This is evident from the fact that HHS has already provided an accommodation for religious non-profits. The insurance issuer for these non-profits is required to exclude contraception coverage from the employer's plan and "provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan,

[12] Conestoga could be required to pay $90,000 per day or $33 million per year, and Mardel could be required to pay $40,000 per day or about $15 million per year. *Hobby Lobby* at 2776.

[13] *Hobby Lobby* at 2759.

[14] *Hobby Lobby* at 2759.

or its employee beneficiaries."[15] There is no reason, the Court concludes, that HHS could not do the same thing for corporations such as Hobby Lobby. But the most "straightforward" way of accommodating the religious groups would be for the government to pay for these four contraceptives. The government's case was weakened by the fact that large numbers of businesses were exempt altogether, including those with "grandfathered plans." Overall, the mandate did not apply to "tens of millions of people."[16]

Some of the *amici* in favor of HHS argued that the cost to the Greens of dropping coverage altogether would actually be less than paying for insurance for their employees. Yet the Court points out that the Greens offer insurance out of their sincere religious beliefs, but also that this argument is unpersuasive. "Health insurance is a benefit that employees value. If the companies simply eliminated that benefit and forced employees to purchase their own insurance on the exchanges, without offering additional compensation, it is predictable that the companies would face a serious competitive disadvantage in retaining and attracting skilled workers."[17] This would put the companies in the position of choosing between abandoning their beliefs or forcing their employees to lose their existing healthcare plans.

Alito makes clear that the Court's conclusion should not be read as a blanket exemption for any corporation that wishes to get out of a government regulation because of its religious beliefs. Other services, such as vaccines, may be "supported by different interests" and would require a different analysis of whether the means used were the least

[15] *Hobby Lobby* at 2763.

[16] *Hobby Lobby* at 2764.

[17] *Hobby Lobby* at 2776-2777.

restrictive.[18] In other words, strict scrutiny requires a case-by-case analysis. He contends that the position taken by HHS would actually entail much more sweeping results:

> Under HHS's view, RFRA would permit the Government to require all employers to provide coverage for any medical procedure allowed by law in the jurisdiction in question—for instance, third-trimester abortions or assisted suicide. The owners of many closely held corporations could not in good conscience provide such coverage, and thus HHS would effectively exclude these people from full participation in the economic life of the Nation.[19]

Such exclusion, he contends, is what RFRA was designed to prevent. This argument, along with Alito's point that dropping health insurance altogether would risk severe – competitive disadvantage, reveals the breadth of RFRA religious liberty implied by the *Hobby Lobby* Court. While HHS focused on protecting the freedom of churches and religious organizations that serve only their own members, the Court interprets RFRA to protect a much broader understanding of religious freedom. Not only does it protect the freedom to worship and to serve within one's own religious community, but it also includes the freedom to choose a profession without sacrificing one's religious beliefs. A person should not be excluded from the "economic life of the Nation" because of what his conscience dictates in matters of religion.

The principal dissent was written by Justice Ginsburg and joined by Justices Sotomayor, Breyer, and Kagan. Despite Alito's claim that the holding is narrow, Ginsburg describes the Court's decision as one of "startling breadth," contending that it allows commercial enterprises to "opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs."[20] Even though the Court claims

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[18] *Hobby Lobby* at 2783.

[19] *Hobby Lobby* at 2783.

[20] She comes to this conclusion by contending that the Court essentially held that the least restrictive means prong is met whenever it is possible for the government to "pick up the tab."

that the holding only applies to closely-held corporations, "its logic extends to corporations of any size, public or private."[21] She argues that nothing in the text or tradition of RFRA suggested that it protects for-profit corporations, and that it actually served a "far less radical purpose."[22]

Ginsburg's argument is not merely about text and tradition, however. She also provides a normative defense of this tradition by arguing 1. Corporations cannot be rights-bearing entities that exercise religion, 2. Even if some non-profit corporations are rights-bearing entities, the profit-making element of for-profit corporations excludes them from this category, and 3. Treating for-profit corporations as rights-bearing entities that exercise religion presents a serious threat to the well-being of their employees. In the following sections, I analyze the dispute between the majority and the dissent over these three claims. I argue that, while Ginsburg's arguments are challenging, both reason and the legal tradition support the majority's conclusions.

Section 2: Corporate Personhood

What makes this case so controversial is the fact that Hobby Lobby is a for-profit corporation, not a church or a non-profit with a primarily altruistic purpose, such as caring for the elderly or feeding the poor. Yet the Court concluded that RFRA's protection was broad enough to include for-profit corporations. Justice Alito begins with the text of the statute: "The plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs."

[21] *Hobby Lobby* at 2797 (Ginsburg, J., dissenting).

[22] *Hobby Lobby* at 2787 (Ginsburg, J., dissenting).

In order to understand how to interpret RFRA, it is necessary to examine the text of RLUIPA, a statute that was passed after the Court struck down RFRA's applicability to the states in *Boerne v. Flores*. RLUIPA specifically protects religious free exercise in the context of land use and prisons.[23] Nonetheless the text of RLUIPA sheds light on the meaning of RFRA. As the Court explains, RLUIPA amended RFRA's definition of the "exercise of religion." While RFRA made reference to "the exercise of religion under the First Amendment," the RLUIPA Congress omitted any reference to the First Amendment and stated that "free exercise of religion" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[24] Yet this should not be taken to mean that the RLUIPA Congress thought the First Amendment protected only belief that is compelled by, or central to, a system of religious belief. As Justice Alito notes, the alteration in language was "an obvious effort to effect a complete separation from First Amendment case law."[25] In other words, Congress sought to distance RLUIPA from *Smith* as much as possible, and to infuse RFRA with this distance.[26] This concept of free exercise must be, according to Congress, "construed in favor of a broad

[23] See *Cutter v. Wilkinson*, 544 U. S. 709 (2005) and *Holt v. Hobbs*, 574 U.S. __ (2015).

[24] Ginsburg disputes this interpretation in her dissent. "RLUIPA's alteration clarifies that courts should not question the centrality of a particular religious exercise. But the amendment in no way suggests that Congress meant to expand the class of entities qualified to mount religious accommodation claims, nor does it relieve courts of the obligation to inquire whether a government action substantially burdens a religious exercise." *Hobby Lobby* at 2792 (Ginsburg, J., dissenting). While Ginsburg is correct that the language emphasizes deference to religious persons concerning centrality of the belief, it cannot be denied that the language protects a very broad understanding of religious free exercise. The terms "broad" and "maximum extent permitted" leave little doubt of that.

[25] *Hobby Lobby* at 2762.

[26] RFRA, of course, was intended to overturn *Smith* by resurrecting the *Sherbert* test, but the new language makes clear that RFRA and RLUIPA do not embrace the same narrow definition of religious free exercise that we saw in *Smith*.

protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[27]

Hence, according to Alito, there is nothing in the text of the law that suggests businesses were excluded, and the idea of corporations being rights-bearing persons under the law is nothing novel. Alito explains that corporate personhood is a "familiar legal fiction."[28] But the purpose of this "fiction" is to protect human beings: "A corporation is simply a form of organization used by human beings to achieve desired ends."[29] Without the protection of this form, the individuals would not be secure in their rights. This is why, for example, the Fourth Amendment protects corporations: "Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being."[30] Likewise, protecting the religious liberty of these corporations protects the religious liberty of the people who own them.

Alito supports his conclusion by turning to the Dictionary Act, which is found in Chapter 1 of Title I of the United States Code and dictates how certain words used in congressional acts are to be interpreted "unless the context [of the act] indicates otherwise."[31] The Dictionary Act states, ""the wor[d] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock

[27] Religious Land Use and Institutionalized Persons Act § 2000cc-3(g).

[28] *Hobby Lobby* at 2768.

[29] *Hobby Lobby* at 2768.

[30] *Hobby Lobby* at 2768.

[31] *Hobby Lobby* at 2768.

companies, as well as individuals."[32] Justice Ginsburg disputes this use of the Dictionary Act, arguing that the context of RFRA does indeed "indicate otherwise." The context is provided by the pre-*Smith* case law, and nothing in that case law suggests that a corporation can be a person for religious freedom purposes. No decision of the Court, she asserts, has ever recognized a religious exemption for a for-profit corporation under either the Free Exercise Clause or RFRA.

This absence makes sense, she argues, because corporations cannot exercise religion. Here, Ginsburg's argument becomes philosophical. "The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities."[33] She quotes Chief Justice Marshall in *Trustees of Darmouth College v. Woodward* stating that corporations are artificial, intangible, and existing only in "contemplation of law."[34] They are not real entities as people are. She then cites Justice Stevens' contention in his *Citizens United* dissent that corporations "have no consciences, no beliefs, no feelings, no thoughts, no desires."[35] These faculties are necessary for the exercise of religion. Ginsburg's position is essentially the position held by the Third Circuit in their review of *Hobby Lobby*: that business corporations "do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion."[36]

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[32] *Hobby Lobby* at 2768.

[33] *Hobby Lobby* at 2794 (Ginsburg, J., dissenting).

[34] *Trustees of Dartmouth College v. Woodward* 17 U.S. 518 (1819) at 636.

[35] *Citizens United v. FEC* 558 U.S. 310 (2010) at 466 (Stevens, J., concurring in part and dissenting in part).

[36] *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health & Human Services*, 724 F.3d 377 at 385 (3rd Cir. 2013).

Alito does not dispute this argument about the inability of corporations to possess and exercise human faculties, but rather views it as irrelevant. "All of this is true—but quite beside the point. Corporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all."[37] In other words, no one is arguing that a corporation is an autonomous entity capable of having its own feelings and beliefs. This is why Alito describes corporations as a "legal fiction." A corporation is "fiction" because it is the mere creation of human beings unable to subsist on its own, not, as the term may otherwise suggest, because it has no value at all. The corporation is the form, while the human beings give it substance. Ginsburg and Breyer have simply demonstrated that the form alone cannot exercise religion, but the question is whether the form, along with the people who provide its substance, together represent a person with free exercise rights under the law. Ginsburg does not demonstrate why this cannot be the case.

Citing *Hosanna-Tabor v. EEOC*, the Court's unanimous decision exempting churches from employment antidiscrimination laws, which we explored in the previous chapter, Ginsburg emphasizes the special solicitude traditionally offered to houses of worship by the Court, reiterating that no such solicitude has been offered to for-profit businesses. But, according to her previously stated argument, only natural persons with real human faculties can exercise religion. Churches are not natural persons; they too are artificial and intangible, dependent upon a corporate form. This raises an important question: according to Ginsburg, why do churches as corporate bodies possess the ability to exercise religion when other corporate bodies do not?

[37] *Hobby Lobby* at 2768.

The answer she offers is that a church is comprised of people who share the same beliefs, whereas a corporation includes employees who do not necessarily share the business owners' beliefs. "The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs, clear as it is, constantly escapes the Court's attention."[38] In other words, religious bodies can exercise a sort of collective conscience because of the shared beliefs of their members. Of course, it is clear from the many litigated disputes over church property—most of which stem from doctrinal disagreements—that not everyone who joins a church necessarily agrees with all of the church's beliefs and practices. Nonetheless, as we saw in the last chapter, the Court has established the doctrine of "implied consent" when it comes to churches: by joining the church, one implicitly consents to its government. Ginsburg's argument relies on this very reasonable principle. Still, one may ask why the same concept cannot be applied to other types of organizations, including businesses.

University of Miami School of Law Professor Caroline Mala Corbin provides an argument for the special treatment of churches that includes but goes beyond Ginsburg's "implied consent" argument. In her article "Corporate Religious Liberty," she presents a careful comparison between businesses and various types of associations, ultimately arguing that businesses cannot be classified as any type of association. Echoing Ginsburg's emphasis on natural persons, she argues that corporations lack the "inherently human characteristics that justify religious exemptions for individuals," such as "inherent dignity" or a "relationship with God."[39] Corbin provides an interesting argument for why

[38] *Hobby Lobby* at 2796 (Ginsburg, J., dissenting).

[39] Caroline Mala Corbin, "Corporate Religious Liberty," *Constitutional Commentary*, 30 (2015): 280.

churches can possess religious freedom while for-profit corporations cannot. "Unlike churches, for-profit corporations are not sacred, primarily religious, or the source of theological truth."[40] Further, ministers possess a special protected status because of their role in administering the faith, but there is "no logical counterpart to the minister in corporations because corporations simply do not play the same role as churches."[41] Hence, rather than focusing solely on the shared beliefs of the members as Ginsburg did, she focuses on the spiritual nature of churches in particular. They are protected because religious people tend to believe that they are sacred and sanctioned by God Himself.

The distinctions that Ginsburg and Corbin draw between churches and for-profit businesses are all valid, but the Court never equated the two types of organizations or argued that they should receive the same level of protection. Rather, the comparisons made by Justice Alito were between for-profit corporations and non-profit corporations more generally. The Court's precedents have treated non-profit corporations as "persons" under the law for free exercise purposes, a point which HHS conceded, and Alito argues that there is no reason to treat for-profit corporations differently:

> No known understanding of the term "person" includes some but not all corporations. The term "person" sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations.[42]

But Corbin argues that even comparisons to non-church corporations are problematic because for-profit corporations are not voluntary associations, as churches and other non-profits are. The principle of "implied consent" discussed above makes exemptions

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[40] Corbin, "Corporate Religious Liberty," 280.

[41] Corbin, "Corporate Religious Liberty," 293.

[42] *Hobby Lobby* at 2769.

understandable only in the case of voluntary associations: "The association is exempt because all who are affected by the exemption—everyone who will be subject to the rules of the religious association rather than the rules of civil society—have consented to it."[43]

Yet when for-profit corporations receive exemptions, many people will be affected who did not consent to its teachings, and, unlike with churches, the principle of voluntariness is not present, according to Corbin. The employees cannot be said to be voluntary when they work for the corporation only because they are in need of a job. If a member of a voluntary association, such as a church or a club, begins to disagree with the group, he may feel free to leave, but it is much more difficult to leave one's job. Corbin notes: "Laws that protect employees, including workplace anti-discrimination laws and minimum wage laws, are so strong precisely because of the essential nature of employment."[44] The idea that an employee can simply leave if he disagrees with the owners' religious views relies on "a *Lochner*-era view of employment opportunities."[45] Hence, according to Corbin, churches are treated as special because they are both sacred and voluntary, non-profits are protected because they are voluntary, and for-profit corporations are neither sacred nor voluntary and therefore undeserving of special solicitude.

Perhaps Corbin's most fundamental contention against those who support corporate religious liberty is their view that only the owners of a corporation comprise the corporate body. Her view is that the corporate form, the claimed association, is not simply the aggregation of shareholders, but also the employees, just as the corporate body

[43] Corbin, "Corporate Religious Liberty," 295.

[44] Corbin, "Corporate Religious Liberty," 301.

[45] Corbin, "Corporate Religious Liberty," 303.

of a church includes both leaders and members. Employees must be included as part of the association because a corporation "could not function without its employees."[46] Ginsburg makes a similar point in her dissent: "Workers who sustain the operations of those corporations commonly are not drawn from one religious community."[47] In other words, the organization functions at all because the Greens decided to---and presumably needed to—hire outside of their faith. Indeed, federal law forbids them from using religion as a criterion in hiring employees. Title VII of the Civil Rights Act of 1964 "prohibits employers with at least 15 employees, as well as employment agencies and unions, from discriminating in employment based on race, color, religion, sex, and national origin."[48] Hence, rather than being a community united by shared beliefs, the ostensible association is a hodgepodge of diverse people, some of whom are there only because they could not find work anywhere else.

This is why, according to Corbin, corporations cannot properly be called associations at all. Associations are an aggregate of their individual members, and corporations are clearly not. She admits that the first Supreme Court cases that extended personhood to corporations, such as the case protecting corporations under the Equal Protection Clause, were based on an "associational theory of corporations."[49] In that

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[46] Corbin, "Corporate Religious Liberty," 300.

[47] *Hobby Lobby* at 2795 (Ginsburg, J., dissenting).

[48] "Questions and Answers: Religious Discrimination in the Workplace," The U.S. Employment Equal Opportunity Commission, accessed June 29, 2017, https://www.eeoc.gov/policy/docs/qanda_religion.html/.

[49] Corbin, "Corporate Religious Liberty," 297. The Equal Protection Clause case is *Santa Clara v. Southern Pacific Railroad Co*., 118 U.S. 394 (1886) at 394. Notably, prior to the opinion by Justice Harlan, the record includes a note from Justice Waite stating: "The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does. " *Santa Clara* at 396.

Equal Protection case, the Court affirmed the lower court, which contended that protecting corporations is necessary to protect persons: "Private corporations consist of an association of individuals united for some lawful purpose...But the members do not, because of such association, lose their right to protection and equality of protection."[50] But, Corbin argues, the key features of modern corporations—limited liability for shareholders, perpetual life for the corporation, and separation of owners and managers—undermine this associational understanding. The most pertinent of these features to this discussion is limited liability, the idea that a shareholder's financial liability is limited to the amount he has invested in the company so that investors are not responsible for the corporation's debt if the company gets sued. This reveals that "one of the main purposes of the corporate form is to create an entity that is distinct from its owners."[51] Ginsburg also raises this point about limited liability. She explains how the nature of incorporation actually undermines Alito's argument that the corporate form serves to help the owner exercise his rights:

> In a sole proprietorship, the business and its owner are one and the same. By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation.[52]

This is what leads Corbin ultimately to conclude that "even closely-held corporations where the shareholders are also the managers cannot qualify as associations."[53]

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[50] *Santa Clara v. Southern Pacific Railroad Company*, 18 F. 385 (C.C.D. Cal. 1883) at 402-03.

[51] Corbin, "Corporate Religious Liberty," 298.

[52] *Hobby Lobby* at 2797 (Ginsburg, J., dissenting).

[53] Corbin, "Corporate Religious Liberty," 299.

Corbin and Ginsburg independently raise several critical objections to the Court's conclusion. But it can be argued that some of the objections they raise reflect a confused view of association. They assume that those who defend corporate personhood think that businesses are perfectly comparable to either human persons or churches. For example, Corbin states: "Moreover, to argue that the two (non-profit churches and for-profit corporations) are indistinguishable tends to negate the reasons to treat churches as entitled to special autonomy in the first place."[54] This is certainly true, but the justices in the *Hobby Lobby* majority never argued that they are "indistinguishable" and Corbin does not cite any scholars who have taken this position. Further, when comparing corporations to human beings, she states, "Dissolving or selling a corporation does not raise the same moral qualms as killing or selling a human being."[55] This is also true, but the same can be said about churches, and yet Corbin provided a defense of churches as rights-holding entities.[56] The fact that corporations do not share every quality with churches or natural persons does not mean that they cannot receive certain protections as artificial persons under the law. The question to be asked is whether corporations, as the unique entity that they are, can possess some form of personhood.

Corbin answers in the negative partly because corporations are not interchangeable with their members. This view can be seen in her argument that the "perpetual life" of corporations undermines their equation with their owners because

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[54] Corbin, "Corporate Religious Liberty," 292.

[55] Corbin, "Corporate Religious Liberty," 287.

[56] Further, this does not mean that there are no moral qualms with dissolving or selling corporations. For example, in the Dartmouth College case, the Court addressed the legal issues with the state of New Hampshire claiming ownership over the college. In addition the legal issue, one could argue that this usurpation also raises moral issues, precisely because human beings are involved in the ownership of the corporation.

people cannot live forever as the corporation can.[57] Again, this reflects the idea that in order for corporations to have rights, they must be directly comparable with human beings. But the point of the corporate form is to create an entity greater than the sum of its individual members.[58] William Blackstone, whose writings on the laws of England shaped the common law in America, and who Ginsburg cited in her dissent, can be instructive on the nature of corporations.

In Chapter 18 of his *Commentaries on the Laws of England*, titled "Of Corporations," Blackstone discusses the nature and purpose of corporations. As Dr. Carson Holloway has noted, Blackstone's understanding of corporations as persons can be seen in his inclusion of this chapter in a section of the work called, "Book the First: The Rights of Persons."[59] Blackstone explains that the corporate form is necessary in order for individuals to exercise their rights more fully:

> But, as all personal rights die with the person; and, as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impracticable; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.[60]

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[57] Corbin, "Corporate Religious Liberty," 298.

[58] To be sure, there are some theories of corporations that do view them as a mere aggregation of members. Ronald Colombo explains that the "aggregation theory" of corporations was prevalent in the latter half of the 19th century in America. "Under the aggregation theory, the corporation is neither a state concession or a separate entity—rather, it is simply 'an association of individuals contracting with each other' in order to do business together." Ronald J. Colombo, "The Corporation as a Tocquevillian Association," *Temple Law Review*, 85 (2012): 13.

[59] Carson Holloway, "Are Corporations People?" *National Affairs* 25 (2015), accessed June 29, 2017: http://www.nationalaffairs.com/publications/detail/are-corporations-people/.

[60] William Blackstone, *Commentaries on the Laws of England: All Books* (Waxkeep Publishing, 2013), Kindle edition, Kindle locations 7197-7200.

As Blackstone shows, the very purpose of a corporation is to form an entity that can outlive its individual members, so the corporation cannot simply be equated with its individual owners. But this does not mean that the entity is entirely separated from them either, as Corbin and Ginsburg suggest when they raise the issue of limited liability. The reason for the corporation's existence is to better protect the rights and aims of those individuals, so they must be able to maintain control over the aims of the corporation. Blackstone states that corporations exist for the "advancement of religion, of learning, and of commerce," and their purpose is to "preserve entire and for ever those rights and immunities" which would be "utterly lost and extinct" if they were only granted to the group's individual members.[61] Incorporation, while creating a distinct entity, does not separate the owners from the entity so completely that they no longer have control over its ends, for it is because of those ends that incorporation was necessary.

This idea can also be found in the Court's opinion in *Darmouth College v. Woodward* (1819). *Dartmouth College* found unconstitutional the New Hampshire legislature's attempt to transform a private university into a state university. Chief Justice John Marshall provides a definition of corporations, which Justice Ginsburg quoted in defense of her position that corporations cannot be said to exercise religion: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation

[61] Blackstone, *Commentaries*, Kindle location 7201. Blackstone does present the distinction, cited by Ginsburg, between lay and ecclesiastical corporations. He explains that an ecclesiastical corporation is one in which "the members that compose it are entirely spiritual persons; such as bishops; certain deans, and prebendaries; all archdeacons, parsons, and vicars; which are sole corporations." They are established for "the furtherance of religion, and the perpetuating the rights of the church." Clearly Ginsburg is correct that Blackstone singles out the church for special protection, but, as we see in the quote above, Blackstone includes commercial corporations in his discussion of rights-holding persons.

of law."[62] The key word in this statement is "artificial," suggesting that a corporation is not something that arises naturally but through artifice, or creation by the owners. Contra Ginsburg, this does not mean that the corporation lacks rights, but only that its existence is dependent upon the law's cognizance of its corporate form. Hence, Marshall describes a corporation as the "mere creature of law." [63] According to Marshall, the point of corporate "immortality" is to allow the past, present and future members of the corporation to "act as a single individual."[64] Echoing Blackstone, he explains: "By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being."[65] Justice Joseph Story's concurrence also provides a clear statement of this idea: "An aggregate corporation at common law is a collection of individuals united into one collective body, under a special name, *and possessing certain immunities, privileges, and capacities in its collective character, which do not belong to the natural persons composing it.*" (emphasis added).[66] In other

[62] *Dartmouth College* at 636.

[63] There is a deeper theoretical meaning behind this language. The idea that a corporation is a "creature of the law" reflects "concession theory," the common understanding of associations at the time. Concession theory entails the idea that the state was the creator and master of the corporation. Though nowadays almost anyone can incorporate a business, prior to the 1800s more scrutiny was given to requests for incorporation, and any rights granted to the corporation were essentially viewed as a gift from the state. This idea, dating back to the Middle Ages, prevailed in America from the colonial era to the mid 19th century. Colombo explains that this idea was eventually eclipsed by the aforementioned "aggregation theory." Colombo, "The Corporation as a Tocquevillian Association," 15-16. Interestingly, though Marshall seems to embrace concession theory with his "creature of the law" language, the outcome and reasoning of the decision clearly depart from it. The law may have assisted in the creation of the corporation by granting its corporate status, but it is the owners who have control over its end and purpose. The state has limited power over it. Colombo explains the reasons for the demise of the concession theory. These include: "the growing demand to conduct business in the corporate form, concerns over corruption associated with the charter-granting process, and the democratic zeitgeist of the Jacksonian Era, which pushed for greater and more equal access to the benefits of incorporation." Colombo, "The Corporation as a Tocquevillian Association," 16.

[64] *Dartmouth College* at 636.

[65] *Dartmouth College* at 636.

[66] *Dartmouth College* at 667 (Story, J., concurring).

words, the point of the corporation is not simply to mimic a human being, but to allow human beings to achieve something greater than they would be able to as mere individuals.[67] Story uses the word "aggregate," but his language makes clear that he sees a corporation as something greater than the sum of its parts.

Ultimately, the most fundamental disagreement between those who support the outcome in *Hobby Lobby* and those who do not seems to be what constitutes the claimed association. Are Hobby Lobby's employees actually a part of the association, or are they to be treated as outsiders simply providing necessary labor? Further, if they are in fact members of the association, would the association be unable to claim its religious purpose because it employs members who do not share in its religious views? Corbin and Ginsburg clearly think that the employees are a part of the claimed association because they are affected by it and integral to its operation. Hobby Lobby thus cannot properly claim the rights of an association while also ignoring the wishes of their employees, members of the association, who do not share their beliefs.

Blackstone, Marshall, and Story can be instructive on this question. Chief Justice Marshall explained that a corporation possesses "only those properties which the charter

[67] We have already seen "aggregate" and "concession" theory. The third corporate theory developed in legal literature is the "natural entity theory," the idea that a corporation is not a mere aggregation of individuals, but a whole entity that is the "natural outgrowth of human conduct," possessing qualities that its individual members do not possess. Colombo, "The Corporation as a Tocquevillian Association," 11. Justice Story seems to embrace this view, and it is arguably more consistent with how groups actually work. For example, Colombo notes that, through the process of internal decision-making, "the corporation can come to a decision that no particular person would subscribe to individually." Colombo, "The Corporation as a Tocquevillian Association," 12. Colombo notes that natural entity theory prevailed in America from the late 1800s to the early 1900s. "Aggregation theory" served as a "transitional movement" from concession theory to natural entity theory. But the pragmatism of the 1920s essentially ended discussion of any corporate theory in the American academy. Colombo, "The Corporation as a Tocquevillian Association," 13. To be clear, the concepts of corporate personhood and constitutional rights for corporations, as seen in Supreme Court jurisprudence, are not linked to the development of any particular corporate theory; these two concepts followed an independent trajectory, according to Colombo. Colombo, "The Corporation as a Tocquevillian Association," 22. In other words, the Court's treatment of corporations did not trail understandings of corporations in academia. Nonetheless, these theories can help us consider the nature of corporations.

of its creation confers upon it… These are such as are supposed best calculated to effect the object for which it was created."[68] It can be argued then, that the true members of the corporation, the beings made "immortal" by its creation under the law, are those who provide it with its object. Yet, Corbin would argue, the corporation could not persist in reaching this end without the labor of the employees. This is true, and it does provide them with a critical role in it, but the essence of the corporation is its ends, and these are provided by the founders, not the employees. Justice Story explains that the personhood of the corporation makes it possible for it to sue and be sued by, and contract with, its own members. Story's distinction here not only reveals the idea of a corporation as a distinct entity, but it also reveals the different levels of membership within the association. Hobby Lobby, an entity established by the Greens for their commercial and religious purposes, has the ability to contract with its employees. These employees are therefore a part of the association, but not so much that their desires can undermine its original purpose. They contract with Hobby Lobby and attain a certain membership therein, on the condition that they will respect its purpose.

Blackstone shows that, in order for an entity to be an association, every member need not have an equal role in it. As an example of corporations, he considers the colleges that comprise the universities in England, which were founded "for the encouragement and support of religion and learning."[69] He explains that a college is not a "mere voluntary association." Rather, it possesses an authority structure, for which a corporate form is necessary.

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[68] *Dartmouth College* at 636.

[69] Blackstone, *Commentaries*, Kindle location 7203.

> If this was a mere voluntary assembly, the individuals which compose it might indeed read, pray, study, and perform scholastic exercises together, so long as they could agree to do so: but they could neither frame, nor receive, any laws or rules of their conduct; none at least, which would have any binding force, for want of a coercive power to create a sufficient obligation. Neither could they be capable so retaining any privileges or immunities: for, if such privileges be attacked, which of all this unconnected assembly has the right, or ability, to defend them?[70]

The students place themselves under the "laws and rules" of the university, which impose certain obligations on them. The corporate form also helps these students to protect their rights, which they would not be able to defend on their own. Blackstone describes the corporation as a "little republic" with "rules and orders for the regulation of the whole."[71] Either a majority decides what these rules will be, or such rules will be "prescribed to it at its creation."[72] In other words, even if the employees are members of the association, it does not follow that they must be free to contradict the will of its founders. If the rules prescribed at its creation give more weight to shareholders, this is accepted by all members when they contract with it.[73] While the idea of the corporation has certainly evolved since the days of Blackstone and even Marshall and Story, the core principles that they articulate concerning its purpose and structure should be taken seriously.

Hence, it can be argued that, while the employees of Hobby Lobby do possess a type of membership in the organization, their disagreement with the business' beliefs does not undermine the Greens' ability to form policies consistent with those beliefs. By

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[70] Blackstone, *Commentaries*, Kindle location 7205-7210.

[71] Blackstone, *Commentaries*, Kindle locations 7212-7217.

[72] Blackstone, *Commentaries*, Kindle locations 7212-7217.

[73] Corporate law scholar Brett McDonnell gives a clear explanation of this view: "In determining what the purposes of an organization are, we do not simply add up the individual preferences of those human beings involved in the organization; we look to the defining rules of the organization to ask what its purposes are, and who has the authority to define them." Brett H. McDonnell, "The Liberal Case for Hobby Lobby," *Arizona Law Review*, 57 (2015): 807.

agreeing to work there, they consent to the clearly stated religious objective of the organization and whatever policies flow from it. Yet Corbin contends that they do not do so voluntarily because they may have no other choice but to work at Hobby Lobby. Indeed, working at Hobby Lobby may not have been their first choice, but this does not negate the free consent that was involved in accepting employment with the store. One need not support a *Lochner*-style libertarianism to agree with this point. It is possible to support regulations that protect the welfare of workers, [74] such as restrictions on hours, without concluding that workers have no agency concerning their place of employment. In fact, such regulations have arguably served to provide workers with more choices by protecting them from the oppression that many experienced during the industrial revolution. Hence, Corbin is correct that a person's circumstances limit his degree of choice when it comes to employment, and for this reason these regulations exist to protect the welfare of the worker, but this is far from coercion, the complete absence of choice. Those who are strongly opposed to Hobby Lobby's religious mission and its policies may indeed choose not to work there.

Undoubtedly, our legal tradition does contain somewhat of a mixed record concerning corporate personhood.[75] Columbo notes that, with a "brief detour" in 1839,

[74] One may argue that the HHS mandate is such a regulation, but it must be remembered that the question is whether the government can reach this end by a means other than violating the religious freedom of Hobby Lobby.

[75] Corbin explains that the Court has treated corporations as persons in the contexts of Fourth Amendment rights against unreasonable searches and seizures, Fifth Amendment rights against double jeopardy, Fifth Amendment Takings, and the Fourteenth Amendment's guarantee of equal protection and procedural due process. The Court has not granted corporations full protection in the context of Fourth Amendment privacy rights, Fifth Amendment right against self-incrimination, Fourteenth Amendment Privileges and Immunities, and most importantly according to Corbin, Fourteenth Amendment due process liberty. If corporations are not entitled to this protection, she argues, then it must follow that they are not entitled to religious liberty protections either. This is a compelling argument. Of course, the Court did rule that corporations are persons for purposes of the Free Speech Clause, which was arguably an act of

the concept of corporate personhood, and concomitant corporate rights, developed steadily within Supreme Court jurisprudence. Even the language in *Hobby Lobby* echoes a variety of corporate theories and does not necessarily present a clear picture of the nature of corporations and what rights they possess[76]. But the few principles laid down by the Court are consistent with the purpose of incorporation presented throughout our legal tradition. Granted, corporations cannot be treated as natural persons in every respect (for example, they cannot be said to have the right to vote). [77] But when an endeavor entails collective action for its execution, in such a case corporate bodies can be said to have rights.

Even if a corporation possesses personhood, one can still contend that only certain forms of corporations can exercise religion. If the corporate form *per se* does not exclude Hobby Lobby from inclusion under RFRA, then perhaps its status as a for-profit corporation does. Indeed, this is the strongest objection to Hobby Lobby's position. One can argue that for-profit corporations should not be included because the combination of their desire for profit and the power they accumulate may cause them to be a danger to society. Certainly potentially dangerous institutions should not receive exemptions from

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chipping away at the precedents she cites. For a full list of cases, see Corbin, "Corporate Religious Liberty," endnotes 33 and 34.

[76] It can be argued that the phrase "legal fiction" reflects the concession theory of corporations, while other statements suggest aggregate or real-entity theory. The *Hobby Lobby* Court's theory of corporations is inconsistent.

[77] In 1839, the Court argued that a corporation was not a "citizen" within the meaning of Article IV. *Bank of Augusta v. Earle*, 38 U.S. 519 (1839) at 520. The Court's reasoning was that the corporation, which is an "artificial person," is indeed a distinct entity from the persons who comprise it. "Whenever a corporation makes a contract, it is the contract of the legal entity, of the artificial being created by the charter, and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state." *Bank of Augusta* at 519.

government regulations. Indeed, many government regulations have been enacted precisely for the purpose of preventing the risks businesses pose. Further, even if they are not dangerous, their profit-making nature negates any religious objective that they may claim. The next section addresses these positions.

Section 3: Profit-Making and Religious Practice: Mutually Exclusive?

In addressing this issue, it is important to have a clear understanding of the distinction between for-profit and non-profit organizations. Contrary to what the term may suggest, it is not the case that non-profits do not receive any profit from their business. Rather, the difference is that profits earned by non-profits must be put back into the institution itself, whereas profits earned by for-profits can be claimed by individuals within the institution. Hence, for-profits are not the only corporations with wealth and power; a non-profit organization can accumulate great wealth and influence. As Colombo explains, "When one gets specific, there are certainly nonprofit institutions (such as Harvard University, for example) that dwarf the vast majority of for-profit commercial enterprises in terms of wealth and resources."[78]

Nonetheless, one can argue that the purpose of a for-profit corporation is certainly different from the purpose of a non-profit, and that this distinction should be reflected in the distribution of accommodations under the law. Along these lines, Corbin argues that while the overriding purpose of a church is religious practice and promulgation of doctrine, this is not the "principal goal" of a business, even if that business is capable of exercising religion. "By definition for-profit corporations exist to make money; otherwise they would be non-profit…The difference is not that for-profit corporations

[78] Colombo, "The Corporation as a Tocquevillian Association," 36.

have monetary goals, the difference is that for-profit corporations do not have predominantly religious goals."[79] In other words, an organization should be understood according to its primary purpose, even if it has other ostensible purposes.

Justice Alito thinks this position ignores the reality that corporations can have multiple ends acknowledged by the law: "While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so."[80] Many corporations support charitable causes and take measures to protect the environment through their practices. "If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well."[81] Further, not all corporations that organize as for-profit do so for the purpose of maximizing profit:

> For example, organizations with religious and charitable aims might organize as for-profit corporations because of the potential advantages of that corporate form, such as the freedom to participate in lobbying for legislation or campaigning for political candidates who promote their religious or charitable goals.[82]

In other words, the for-profit corporate form can actually allow more expression than the non-profit form, so Corbin's assumption that profit is always the primary purpose or motivation may be false.

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[79] Corbin, "Corporate Religious Liberty," 293.

[80] *Hobby Lobby* at 2711.

[81] *Hobby Lobby* at 2771.

[82] *Hobby Lobby* at 2771. "In any event, the objectives that may properly be pursued by the companies in these cases are governed by the laws of the States in which they were incorporated—Pennsylvania and Oklahoma—and the laws of those States permit for-profit corporations to pursue 'any lawful purpose' or 'act,' including the pursuit of profit in conformity with the owners' religious principles." *Hobby Lobby* at 2771.

Ultimately, the question is whether profit and the exercise of religion must be mutually exclusive under the law. The Supreme Court has addressed multiple cases dealing with for-profit businesses attempting to exercise religion. One of the most relevant precedents to *Hobby Lobby* is the 1982 case of *United States v. Lee*, where the Court denied the request of an Amish business owner to be exempt from paying Social Security taxes for his employees. The Amish are religiously opposed to the social security system because they believe it would be sinful to fail to care for their own elderly. The Court concluded that while participating in the social security system does indeed violate their free exercise rights, the state may "justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."[83] Though the Court did not claim to be using the *Sherbert* test, the use of the word "essential" does suggest that the state must use the least restrictive means. In this case, that standard is met because the success of the national social security system depends upon mandatory participation.[84] It would be "difficult to accommodate the

[83] *United States v. Lee*, 455 U.S. 252 (1982) at 257.

[84] In an interesting concurrence, Justice Stevens disagrees with the Court's reasoning. While he does not think the government should shoulder the burden of demonstrating that denying the exemption is essential to accomplishing its interest, he thinks the government failed to meet this burden:

> As a matter of administration, it would be a relatively simple matter to extend the exemption to the taxes involved in this case. As a matter of fiscal policy, an enlarged exemption probably would benefit the social security system because the nonpayment of these taxes by the Amish would be more than offset by the elimination of their right to collect benefits. In view of the fact that the Amish have demonstrated their capacity to care for their own, the social cost of eliminating this relatively small group of dedicated believers would be minimal. *Lee* at 262 (Stevens, J., concurring).

Further, he challenges the Court's comparison of exemptions from Social Security to exemptions from general tax obligations because those who object to paying taxes cannot supply the government with a substitute. Amish who seek to be exempt from social security taxes also wish to not collect the benefits from them. Nonetheless, Stevens concurred with the Court's conclusion because he thinks the government (whether legislatures or courts) should stay out of "evaluating the relative merits of differing religious claims." Though Stevens would therefore likely object to the premise of RFRA, his points weigh heavily in favor of overturning *Lee* under RFRA's standard.

comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs."[85]

Close to the end of Justice Burger's majority opinion, he reflects on the nature of religious accommodations in commercial activity. In a passage that Justice Ginsburg quoted in her *Hobby Lobby* dissent, he states:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.[86]

Ginsburg applies this principle to *Hobby Lobby*: while the Greens may feel free to refuse to acquire the contraceptives to which they object, that choice cannot be imposed on their employees. Justice Jackson also raises this concern in his concurrence in *Prince v. Massachusetts*. This 1944 case addressed whether the application of a child labor law infringed upon the free exercise rights of Jehovah's Witnesses who wished to include their children in distribution of religious literature on the street. The Court concluded that the law was constitutional and granted no exemption on religious grounds. Justice Jackson explains that many religious denominations:

> engage in collateral and secular activities intended to obtain means from unbelievers to sustain the worshippers and their leaders. They raise money, not merely by passing the plate to those who voluntarily attend services or by contributions by their own people, but by solicitations and drives addressed to the public by holding public dinners and entertainments, by various kinds of sales and Bingo games and lotteries. All such money-raising activities on a public scale are, I think, Caesar's affairs and may be regulated by the state so long as it does not discriminate against one because he is doing them for a religious purpose, and

[85] *Lee* at 260.

[86] *Lee* at 261

> the regulation is not arbitrary and capricious, in violation of other provisions of the Constitution.[87]

By engaging in commercial activity, they have left the purely religious realm. This is because they are now depending on the money of non-believers to spread their religious message. Hence, Burger's opinion in *Lee* makes the point that religious businesses depend on the labor of non-believers, and Jackson's opinion raises the point that such businesses depend upon the patronage of non-believers. Overall, their point is that when a religious organization cannot be sustained by its own believers, it can no longer be considered a solely religious organization.

Another significantly relevant case is *Braunfeld v. Brown* (1961). In this case, five Orthodox Jewish merchants challenged a Pennsylvania Sunday closing law. They close their shops on Saturday because of their religious beliefs, and they argued that closing on Sunday as well would cause them "substantial economic loss, to the benefit of their non-Sabbatarian competitors."[88] The Court addressed whether the Free Exercise Clause required an accommodation for them, and it answered in the negative. This case was decided prior to *Sherbert*, and the justices embraced an arguably narrow reading of the Free Exercise Clause, suggesting that it only prohibits coercion in the formation and profession of beliefs. The Pennsylvania statute was found constitutional, In a plurality opinion by Justice Warren, the Court pointed out that the statute "does not make criminal the holding of any religious belief or opinion nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets."[89]

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[87] *Prince v. Massachusetts*, 321 U.S. 158 (1944) at 177-178 (Jackson, J., concurring).

[88] *Braunfeld v. Brown*, 366 U.S. 599 (1961), at 602.

[89] *Braunfeld* at 603.

Rather, it "regulates a secular activity" and "operates so as to make the practice of their religious beliefs more expensive."[90] Justice Warren's statement sidesteps a problem that his language reveals: while describing the commercial activity of the Jewish merchants as "secular," in the same sentence he acknowledges that the law's restriction has a negative impact in the "practice of their religious beliefs."

Justice Brennan dissented. As we saw in chapter 3, Brennan authored an opinion in *Roberts v. U.S. Jaycees* that articulated a strong defense of freedom of association, though he ultimately ruled against the Jaycees because of their large size and lack of selectivity, and he also authored *Sherbert v. Verner*. Brennan stated that he would have approached this case with a view toward the "values of the First Amendment, " which "look primarily towards the preservation of personal liberty, rather than towards the fulfillment of collective goals."[91] By "collective goals" he is presumably referring to the state's goal in maintaining a uniform day of rest for all citizens free from the noise of commerce, which he refers to later as a "mere convenience."[92] Brennan accuses the Court of evaluating this case with the rational basis test, even though "freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds." They can be restricted "only to prevent grave and immediate danger to interests which the State may lawfully protect."[93] Brennan's position on the Free

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[90] *Braunfeld* at 607.

[91] *Braunfeld* at 610 (Brennan, J., dissenting).

[92] *Braunfeld* at 614 (Brennan, J., dissenting).

[93] Here, Brennan seems to incorporate the "clear and present danger" test from Free Speech doctrine into the religious realm as well. Justice Murphy also used this principle in his dissent in *Prince v. Massachusetts*: "If the right of a child to practice its religion in that manner is to be forbidden by constitutional means, there must be convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals or welfare of the child." *Prince* at 174 (Murphy, J., dissenting).

Exercise Clause is clear: it prohibits not only direct and obvious infringements on religious freedom, but also government acts that infringe upon religious freedom in their *effects*. He admits that the law does not require Orthodox Jews to work on Saturday, but the "effect is that no one may at one and the same time be an orthodox Jew and compete effectively with his Sunday-observing fellow tradesmen." This "clog upon the exercise of religion," he argues, has the same effect as a license tax on the sale of religious literature, which the Court has held unconstitutional.[94] This limitation on religious free exercise may be indirect, but it is "substantial" nonetheless, and he is not convinced that the state's interest is compelling.

Both *Lee* and *Braunfeld* were cited by the majority and the dissent in *Hobby Lobby* to support their positions. Ginsburg quotes Justice Burger's majority opinion in *Lee*, which stated that when religious people enter into commercial activity, they are not free to be exempt from government regulations and to impose their beliefs on others. Alito addresses this quote in a footnote, stating that *Lee* was decided under the Court's free exercise jurisprudence whereas *Hobby Lobby* is being decided under RFRA's more stringent protections. Given that the idea of RFRA was to clarify the meaning of free exercise, Alito would have been better served by arguing that RFRA relied on a sounder interpretation of constitutional meaning and that Brennan was correct in his dissent.

Even so, Alito thinks that the substance of *Lee* supports his position. He points to *Lee*'s recognition that the Amish plaintiff's free exercise rights were indeed violated by the Social Security requirement; hence, profit-making businesses were not exempt from

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[94] *Braunfeld* at 613 (Brennan, J., dissenting), citing *Follett v. Town of McCormick*, 321 U.S. 573 (1944).

free exercise protection. The Court admittedly ruled against the Amish, but Alito contends that this does not undermine his point. The Court ruled the way it did not because religion cannot be exercised within a business venture, but because an accommodation was not possible. The Court concluded that the tax system "could not function" if different religious denominations were permitted to opt out because certain uses of the tax dollars violated their religious beliefs. He argues that if *Lee* were to be analyzed under the RFRA framework, the law would likely still pass the *Sherbert* test because there is no "less restrictive" alternative to requiring the Amish to pay taxes. "Because of the enormous variety of government expenditures funded by tax dollars, allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos."[95] The ACA, however, deals not with a large tax pool, but a requirement that employers directly purchase healthcare for their employees.

Both the majority and the dissent in *Hobby Lobby* also think *Braunfeld* supports their side. Alito quotes *Braunfeld*'s admission that a law that "operates so as to make the practice of… religious beliefs more expensive" in business activities burdens the exercise of religion.[96] He cites *Braunfeld* as favoring his position, noting that the merchants were making a profit, and yet it was never questioned by the Court that they were exercising their religion. "According to HHS, however, if these merchants chose to incorporate their businesses—without in any way changing the size or nature of their businesses—they would forfeit all RFRA (and free-exercise) rights."[97] But Ginsburg's point, which supports the HHS position described in this quote, is that incorporation makes a

[95] *Hobby Lobby* at 2784.

[96] *Hobby Lobby* at 2770, citing *Braunfeld* at 605.

[97] *Hobby Lobby* at 2767.

significant difference. Both *Lee* and *Braunfeld* dealt with a sole proprietorship, where the business and the owner are "one and the same," whereas incorporated businesses are separated from their owners through incorporation.[98] Hence, "*Braunfeld* is hardly impressive authority for the entitlement Hobby Lobby and Conestoga seek. The free exercise claim asserted there was promptly rejected on the merits."[99]

After analyzing the precedents, we can see that Ginsburg is correct in her claim that no for-profit corporation had ever won on the merits in the context of free exercise protection under the Constitution or RFRA. Yet it is also true that the Court has never rejected a corporation's free exercise claim simply because it is a corporation or makes a financial profit. Some of the cases the *Hobby Lobby* dissent cites in favor of restricting religious freedom to non-profit corporations contained reasoning unrelated to the making of profit. The majority in *Braunfeld*, for example, was clearly skeptical of the broader principle that the Free Exercise Clause requires accommodations to neutral, generally-applicable laws. Justice Warren states: "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature."[100] As we saw, the majority focused on the *indirect* nature of the effect on the merchants' free exercise, whereas Brennan in his dissent focused on the point that it was *substantial*.

Overall, the fact that the businesses in both cases clearly had standing suggests that profit alone does not undermine their claim to free exercise, and, as Alito notes, U.S.

[98] *Braunfeld* at 2797.

[99] *Braunfeld* at 2797.

[100] *Braunfeld* at 606.

law has recognized that corporations can have a variety of ends.[101] Nonetheless, Ginsburg raises a valid distinction between sole proprietorships and corporations, which she argues distinguishes these two cases from *Hobby Lobby*. Incorporation does create a separate entity. Relatedly, she raises an important objection in the topic of limited liability: if the corporation is so closely linked to the individual's exercise of religion, why is it separate from him when it comes to liability? Her objection brings to light a weakness in Alito's argument. Alito repeatedly ties the corporation to the rights of the owners, but the corporation is a whole entity not simply reducible to the owners' consciences.

Hence, both Ginsburg and Alito make the same error: they both focus too much on individual rights. Ginsburg does so in denying rights to Hobby Lobby because it is not an individual person, and Alito does so by classifying a corporation as a "legal fiction" existing to further the rights of individual persons. Alito's argument would have been stronger had he explained the corporation as a separate entity with its own right to the exercise of religion. In other words, free exercise rights applies to corporations not just because they protect individuals with consciences, but because associations themselves have a status as a form of protected religious expression. As we saw in the churches chapter, the free exercise of religion is broader than individual conscience rights. While corporations should certainly not receive the same level of protection as churches, ones that do embrace a religious purpose should receive some protection. [102]

[101] Aside from the examples that Alito gives, there is also the example of for-profit schools and universities. Their for-profit nature does not undermine their goal of educating children and young adults.

[102] Determining whether a corporation truly has a religious purpose can be a difficult task. University of Minnesota Law School professor Brett McDonnell devised a compelling set of factors to determine how strong a case for standing a corporation may have in a religious freedom case. He proposes that the corporations with the strongest case have both a "strong organizational commitment to religion"

Recognizing corporations as associations, not simply vehicles for exercising a person's conscience, answers Ginsburg's objection concerning limited liability. The corporation is indeed a distinct entity from the individual, and hence the owner is not liable for every action committed by the company and its members. But, as explained in the last section, the law should not function to undermine the very aim that animates that entity, an aim dictated by the human beings who own and run it. The corporate entity is indeed separate from them, but it is neither independent, nor simply subject only to government regulation. It is an entity greater than the individual, but the individual is still a part of it. Justice Story is helpful in describing this relationship: A corporation "is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage."[103] The individuals give the corporation its mission and purpose, and then provide a critical role in helping the corporation reach that purpose, but the corporation is still a distinct entity.

(e.g. religious purpose mentioned in the mission statement, giving to religious charities, etc.) and "concentrated religious ownership." McDonnell, "The Liberal Case for Hobby Lobby," 799. Corporations that meet one of these factors but not the other may still have standing, but they may have a weaker case for it. For example, consider a business founded by religious people that manifests a clear organizational commitment to religion through its products and policies, but the owners forfeited their controlling share position, and the new controlling shareholders are not interested in the religious message. McDonnell argues that such a corporation should still have standing: "Even if the shareholders are not religious, the directors, officers, employees, and customers are, so the religious values of many individuals are still being pursued through this corporation." He posits that an organization owned by religious people that does not manifest an organizational commitment to religion is a much more difficult case, which seems reasonable. Corporations do exist to protect individuals, as Alito stated, but if the individual did not infuse a religious purpose in the corporate entity, it seems problematic to claim free exercise protection.

[103] *Dartmouth College* at 667 (Story, J., concurring).

Section 4: Corporations as a Threat to Individual Rights

The *Hobby Lobby* case is an example of one of the ostensible threats posed by associations, including and especially corporations: that they threaten individual rights. Corbin argues that granting religious exemptions to corporations will only "exacerbate the power imbalance between corporate employers and their employees."[104] Claiming an accommodation based on religion would allow employers to use this power to the detriment of their employees' rights, even if their religious beliefs are sincere. Hence, many, including Justice Ginsburg, embrace Justice Jackson's conclusion in his *Prince* concurrence: "I think the limits [on religious freedom] begin to operate whenever activities begin to affect or collide with liberties of others or of the public."[105]

In particular, some argue that a religious corporation violates the right of its employees by imposing its religion on them. Justice Burger raised this issue in *Lee*, and Ginsburg raised it in *Hobby Lobby*. While this may be true in some situations,[106] it is not the case in *Hobby Lobby* and only reflects a misunderstanding of the Greens' particular religious views. The Greens are not actually forbidding their employees from purchasing these particular contraceptives; rather, they are controlling their own involvement in the purchase. It is not simply that the Greens believe that taking these particular contraceptives is wrong; they also believe that it is wrong to provide them through

[104] Corbin, "Corporate Religious Liberty," 306.

[105] *Prince* at 177 (Jackson, J., concurring).

[106] It could be argued that Burger was right in this particular case. The religious belief at issue in *Lee* was the belief that the Amish community must take care of its own elderly; hence, refusing to pay into Social Security for employees presumes that they are a part of the Amish community and will be taken care of by that community in old age.

insurance, and by doing so they would be complicit in the act.[107] The religious belief at issue therefore does not simply concern the actions of others, but the believer's own involvement in those actions. Hence, Ginsburg's implicit suggestion that the Greens resolve their problem by abstaining from taking the drugs themselves misses the point.[108] Rather than allowing the Greens to impose their religious views on their employees, accommodating Hobby Lobby would allow the corporation to fulfill its religious mission while also allowing its employees to live according to their own views on health and reproduction.

Regardless of whether it can be said that Hobby Lobby's policies amount to an *imposition* of the owners' religious views, perhaps their actions still harm their employees. Ginsburg is particularly troubled by the impact that religious accommodations have on third party employees who do not share the religious beliefs of the business owners—"in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ."[109] Quoting *Planned Parenthood v. Casey*, Ginsburg highlights the seriousness of what HHS was trying to accomplish through its mandate: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their

[107] While the Court should not be in the business of evaluating the reasonableness of religious beliefs, it is worth noting that this concept of moral complicity is comparable to our legal system's view of complicity in criminal law. A person who assists another in a criminal act by providing the materials can be punished under the law for his involvement in the act. The general idea is that a person shares some of the responsibility when he assists in another's actions.

[108] Ginsburg thinks that the connection between the Greens and the employees' contraception is "too attenuated" for them to be complicit in the actions of their employees, but it is not up to the Court to assess the reasonableness of the beliefs in question. *Hobby Lobby* at 2777 (Ginsburg, J., dissenting).

[109] *Hobby Lobby* at 2787 (Ginsburg, J., dissenting).

reproductive lives."[110] Hobby Lobby's refusal to comply with the mandate undermines this control. Our legal tradition supports her position, she contends: "No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect."[111] Title VII, she notes, requires a "reasonable accommodation" for religious employees, but not at the expense of other employees who do not share those beliefs.

Alito disputes the claim that Hobby Lobby employees are being undermined by the accommodation: "The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing."[112] The point of the least restrictive means prong is to determine whether other means are available to supply these contraceptives, and the Court concluded that there are.

Justice Ginsburg's claim that our legal tradition supports Justice Jackson's principle merits close examination. Several religious freedom cases have indeed dealt with two parties contending that their rights are conflicting, and in several key cases the Court sided with the religious freedom claimant. The most obvious example is *Hosanna-Tabor v. EE*OC. As we saw in chapter 4, the Lutheran school in that case was shielded against the teacher's lawsuit because of the "ministerial exception," the doctrine that

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[110] *Hobby Lobby* at 2787 (Ginsburg, J., dissenting). Quoting *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833 (1992).

[111] *Hobby Lobby* at 2801 (Ginsburg, J., dissenting).

[112] *Hobby Lobby* at 2760.

employment discrimination laws cannot apply to the ministerial positions in religious organizations. The Lutheran teacher in that case arguably had a stronger claim that her rights were being violated than the employees of Hobby Lobby. She sued under the Americans with Disabilities Act, a federal law that creates statutory rights for persons with disabilities. This was clearly a case about two conflicting rights. But the Hobby Lobby case, contrary to popular belief, was not actually about a contest between the rights of the employers and the rights of the employees. Rather, it was about means: is provision of contraceptives by religious businesses the most narrowly tailored way for the government to accomplish its interest in providing these drugs? Further, it is important to note that the 1965 case of *Griswold v. Connecticut,* cited by the government in *Hobby Lobby*, only guarantees that the *government* cannot interfere with a person's attempt to attain contraceptives; it says nothing of a right to have contraceptives supplied by private groups.

Admittedly, *Hosanna-Tabo*r is a special kind of case. In its unanimous opinion, the Court emphasized that houses of worship and ministers receive protections under our Constitution available to no one else, so one can argue that it cannot be compared to Hobby Lobby. Despite this distinction, *Hosanna-Tabor* still demonstrates that sometimes the protection of constitutional rights may take precedence over the rights or interests of others. The ministerial exception should not apply to Hobby Lobby, of course, and its case is being litigated under a statute, RFRA, not the Constitution. But regardless of the source, the case still emphasize the special status of religious free exercise in our legal tradition. In the case of organizations such as Hobby Lobby that do not qualify for the ministerial exception, strict scrutiny can require the accommodation of religion even if

others may be inconvenienced,[113] so long as the government is able to reach its compelling interest by some other means. Further, it is important to keep in mind that a law may indeed pass the strict scrutiny standard of review; the religiously-motivated business may not always win. Alito explains this when addressing Ginsburg's concern for employees:

> The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.[114]

Strict scrutiny need not always be fatal.

In her dissent, Ginsburg quotes the Court's opinion in *Corp. of the Presiding Bishop v. Amos,* which we reviewed in the previous chapter: "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community." Ginsburg's citation of *Amos* is interesting because there are several parallels between *Hobby Lobby* and *Amos* that are relevant to this section in particular. *Amos* involved a Mormon-run gym—a religiously-motivated business open to the general public—and it also dealt with the effect that a group's free exercise would have on a third party.

Amos was an Establishment Clause case, but the question of the free exercise rights of employees was raised in the oft-quoted concurrence by Justices Brennan, Blackmun, and O'Connor. Section 702 of the Civil Rights Act of 1964 exempts religious

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[113] In this case, it is a matter of the administrative inconvenience caused by acquiring contraceptives through another means. Ginsburg objects to the Court's suggestion that the government can pick up the tab because it would require "logistical and administrative obstacles" for women seeking these four contraceptives. *Hobby Lobby* at 2802 (Ginsburg, J., dissenting).

[114] *Hobby Lobby* at 2783.

organizations from Title VII's prohibition against employment discrimination on the basis of religion. In this case, the Court addressed whether applying that exemption to the secular non-profit activities of such organizations violates the Establishment Clause.[115] Applying the *Lemon* test, the Court held that it does not. Hence, the Mormon church that owned the gym was free to discharge the building engineer because he was not Mormon.

In their concurrence, Brennan, Blackmum, and O'Connor classify this case as one of a clash between the rights of religious organizations and those of individuals. They state that "any" exemption from Title VII's proscription on religious discrimination has the effect of burdening the consciences of current and potential employees. It forces an employee to choose between embracing certain religious tenets or losing his job. "The potential for coercion created by such a provision is in serious tension with our commitment to individual freedom of conscience in matters of religious belief."[116] Yet, the Court argues, churches also have an "interest in autonomy in ordering their internal affairs."[117] Inviting the courts to dispute which activities are religious and which are secular would potentially undermine this autonomy. Hence, when the rights of an employee conflict with the rights of the organization, the latter must win because the entire ability of the group to form its identity requires allowing the group to discriminate. While the gym in this case was a non-profit organization, it still demonstrates the principle that the religious mission of an organization may trump the rights of an

[115] Prior to an amendment in 1972, section 702 only exempted the religious activities of employers from the statutory ban on religious discrimination. *Amos* at 335-336.

[116] *Amos* at 341.

[117] *Amos* at 341.

individual. Yet it is worth noting again that the Court's balancing of these two sets of rights was puzzling given that the Constitution only guarantees that the government will not interfere with free exercise; it says nothing about private employers. Neither *Hobby Lobby* nor *Amos* dealt with an actual conflict between two sets of constitutional rights.

The emphasis on the threat posed by corporations overshadows the good that they can and do provide. Hobby Lobby undoubtedly provides services to the community through its charitable actions, and it treats its employees well, paying them well above minimum wage. Corporations can also have a voice in debates about public policy, presenting their own views of justice. Last year several corporations threatened to leave the state of North Carolina in order to protest the state's recently passed law regarding the access of transgender individuals to the bathrooms of their choice. Those corporations were certainly exercising power, but in doing so they were sending a loud message, one that they would not have been able to send so clearly had their corporate form prevented them from making moral claims. Like these businesses, many corporations express their views through their actions. Alito gives several examples:

> So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits.

He then rightly points out: "If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well." And if they can pursue religious objectives, then it follows that they may claim accommodations available for other religious organizations.

Ironically, Ginsburg's position only invites exacerbation of the danger posed by corporations. If corporations are denied conscience rights, the only corporations able to

enter the market will be ones motivated solely by profit-making. Many religious businesses that wish to contribute to the common good by charitable giving or more than fair treatment of their employees will not be permitted to enter the market at all if their religious beliefs place them outside of the government's views on cultural issues. In "The Liberal Case for Hobby Lobby," Brett McDonnell argues that the Court's conclusion in *Hobby Lobby* is consistent with the liberal principle of corporate social responsibility: "Many corporations are indeed profit-obsessed organizations that trample on other values, but many are not, and nothing in the law requires that they be that way."[118] Corporations can also be a force for good in combatting the tyranny of the state or the majority. Colombo explains, "to the extent that commercial/for-profit corporations enjoy an advantage in terms of wealth and power, this suggests that they are excellent candidates when it comes to serving as a check on government…"[119]

Section 5: Conclusion

Regardless of what clear benefits corporations may or may not bring to society, the larger point is that protecting corporations is important in itself. They allow human beings to accomplish goods that they would not be able to accomplish without the corporate form. Questions concerning the nature of corporations are certainly complicated, but our legal tradition has provided protections that make sense of a corporation's purpose as articulated by Blackstone, Marshall, and Story. Alito was right in stating that corporations exist to allow individuals to better exercise their rights, but his

[118] McDonnell, "The Liberal Case for Hobby Lobby," 809.

[119] Colombo, "Corporations as Tocquevillian Associations," 36-37.

opinion could have been strengthened by recognizing religious businesses as a distinct form of association not simply reducible to the conscience rights of the owners.

As we have seen, Caroline Mala Corbin supplements Ginsburg's dissent by providing a detailed comparison of corporations and churches as well as corporations and non-profit associations. The distinctions she makes are important and valid. However, these distinctions only suggest that a corporation should not be treated the same way under the law as a church or a non-profit corporation. They do not suggest that corporations are not rights-bearing entities. In other words, different standards of protection can and should apply to different types of organizations. A church may receive the "ministerial exception," meaning that the church is exempt from employment lawsuits from its ministers. A corporation should not be entitled to such a vast exemption, but it does not follow that the corporation should receive no protection at all. The caselaw offers gradations of protection for different types of religious entities. In other words, heightened solicitude for one type of organization does not necessarily entail no special solicitude for another kind.

CHAPTER SIX

Conclusion

The Supreme Court has never articulated a clear, comprehensive theory of group rights, as many scholars have noted.[1] This absence is somewhat understandable given that different types of groups receive protection under different constitutional clauses. The constitutional grounding for church autonomy, for example, is different from that which supports the rights of the Boy Scouts. Any articulation of group rights must take these distinctions into careful consideration. Nonetheless, a clear theory of group rights is vital to the protection of liberty, because, as we have seen, human beings exercise their freedom not solely as individuals, but united in a variety of associations.

While the exact constitutional grounding for various types of groups may differ, they are supported by certain shared legal and philosophical principles concerning the nature of groups and their function in liberal society. For example, as we have seen, a group, regardless of what kind, is greater than the sum of its individual members and allows those members to exercise their rights in a manner that would be impossible without the structure of the group to which they belong. Further, the composition of a

[1] *See* Frederick Mark Gedicks, "The Recurring Paradox of Groups in the Liberal State," *Utah Law Review*, 2010 (2010): 47 ("Since *Kedroff*, every time some unguarded Supreme Court language has hinted at the existence of group rights, academics have responded with law review articles arguing that the Court could, or should, or might, or must confirm such rights in doctrine.") In a recent *amicus curiae* brief, The Becket Fund for Religious Liberty argued that, while the Court has upheld collective and institutional rights in various cases, such rights have not been sufficiently grounded in the text and history of the First Amendment, leaving lower courts confused as to how to apply such doctrines: "Courts often don't know what to do about collective rights because they lack the proper tools to address such claims" *Amicus Curiae* Brief of the Becket Fund for Religious Liberty in Support of Petitioner, *Heffernan v. City of Paterson* 578 U.S. __ (2016) 2. With reference to the work of John Inazu, the Becket Fund argues that the Court needs to ground such rights in the long-neglected Freedom of Assembly Clause.

group has a significant impact on its message. Such principles should undergird the Court's approach to protecting First Amendment institutions regardless of what particular constitutional clause is at issue.

Given the expanding role of the national government and the increase in state and federal antidiscrimination statutes, the need for an exposition of the nature, place, and rights of groups in our constitutional republic is especially great.[2] As we have seen in the cases addressed here, antidiscrimination laws and regulatory schemes such as the Affordable Care Act's HHS mandate often threaten the sovereignty of associations by imposing requirements that prevent them from freely choosing their own members and leaders or requirements that conflict with their beliefs. While such statutes may be well-intentioned, their effect is often to undermine the dialogue and dissent that are necessary to preserving freedom in liberal, democratic society.

In conclusion, Alexis de Tocqueville provides some useful insights on the importance of associational rights in a liberal democracy. Tocqueville's thoughts are relevant for two reasons. First, Tocqueville has indeed been influential in our legal tradition. The Supreme Court has cited Tocqueville 35 times, and lower federal and state courts have cited him hundreds of times.[3] Second, the pluralistic America that Tocqueville observed was shaped by a constitutional tradition that gave associations a

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[2] *See* Michael W. McConnell, John H. Garvey, & Thomas C. Berg, *Religion and the Constitution*, 3d ed. (New York: Wolters Kluwer Law & Business, 2002), 101 ("In the modern world the government plays a more active role in our everyday lives than it did a century or two ago... . In a society that is pervasively regulated, as ours now is, there are many more occasions for conflict between the government and religious actors.").

[3] Colombo, "Corporations as Tocquevilleian Associations," 30. John McGinnis has argued that the Rehnquist Court embraced a Tocquevillian view of associations. John McGinnis, "Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery" *California Law Review*, 90 (2002).

preferred role. While the Court has often displayed an understanding of associational freedom, as we have seen, it has often been incomplete and inconsistent, and Tocqueville's insights can provide a fuller development of the Court's understanding of associations and why they are so critical in our society. In other words, Tocqueville's insights not only help us to understand associations and what is necessary for their protection, but they also help us to see what is at stake in the debate over associational rights.

Tocqueville wrote specifically on the inevitable yet manageable problems engendered by democratic societies, the most significant of which is "majority tyranny." Tocqueville observes that traditional forms of authority are dissolved in democratic societies:

> Amidst the continual movement that reigns in the heart of a democratic society, the bond that unites generations is relaxed or broken; each man easily loses track of the ideas of his ancestors or scarcely worries about them. Men who live in such a society can no longer draw their beliefs from the opinions of the class to which they belong, for there are, so to speak, no longer any classes, and those that still exist are composed of elements that move so much that the body can never exert a genuine power over its members. [4]

Because of this loss of authority, it is the "very essence" of democratic government that the majority voice becomes authoritative. According to Tocqueville, the empire of the majority becomes "absolute," and Tocqueville sees this as the "greatest danger" to the American republic.[5]

For Tocqueville, this is dangerous in part because the majority will wield the most political power, leaving minorities without a refuge when they are oppressed. But

[4] Tocqueville, *Democracy in America*, 403-404.

[5] Tocqueville, *Democracy in America*, 248.

another, subtler, problem that he sees is the power the majority has over thought. While a monarch can control a man's body, the despotic majority "goes straight for the soul." The king only has a material power, but the majority has a moral power. In America, "as long as the majority is doubtful, one speaks; but when it has irrevocably pronounced, everyone becomes silent and friends and enemies alike then seem to hitch themselves together to its wagon."[6] Once the majority has come to a conclusion, Americans abandon whatever reservations they once had about it.

Americans, according to Tocqueville, are deeply unaware of the power the majority has over their ideas. He explains that, while Americans believe that they act entirely according to their own individual faculties, they are indeed persuaded by the majority. He describes America as "the one country in the world where the precepts of Descartes are least studied and best followed."[7] Men, perceiving no one around them as greater than anyone else, do not seek wisdom from their neighbors and instead view their own reason as the only source of truth. Yet, due to the limit of our minds and our short life span, we cannot possibly arrive at all of our conclusions entirely on our own.[8] "There is no philosopher in the world so great that he does not believe a million things on faith in others or does not suppose many more truths than he establishes."[9] Hence, our Cartesian philosophic method is a delusion; all men rely on intellectual authority whether they acknowledge it or not. In democratic societies, this authority lies with the majority:

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[6] Tocqueville, *Democracy in America*, 243.

[7] Tocqueville, *Democracy in America*, 403.

[8] Tocqueville, *Democracy in America*, 407.

[9] Tocqueville, *Democracy in America*, 408.

the similarity between men "gives them an almost unlimited trust in the judgment of the public; for it does not seem plausible to them that when all have the same enlightenment, truth is not found on the side of the greatest number."[10] Hence, while we may believe we are thinking freely, we have simply submitted to a different, subtler, authority.

While he points out that the power of the majority is a danger to society, Tocqueville does not despair. His work contains within it the solution to the problem: associations.

> In America, citizens who form the minority associate at first to establish their number and thus to weaken the moral empire of the majority; the second object of those associating is to set up a competition and in this manner to discover the most appropriate arguments with which to make an impression on the majority; for they always have the hope of attracting the latter to them and afterwards of disposing of power in its name.[11]

Tocqueville sees a necessary relationship between democratic equality and associations: "In democratic peoples…all citizens are independent and weak; they can do almost nothing by themselves, and none of them can oblige those like themselves to lend them their cooperation. They therefore all fall into impotence if they do not learn to aid each other freely."[12] This is why, if citizens do not associate, "tyranny will necessarily grow with equality."[13] Paul Horwitz aptly explains this relationship: "Modern writers view freedom of association as being in conflict with equality. But for Tocqueville, associations were both a product of American equality and a necessary counterpart to it.

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[10] Tocqueville, *Democracy in America*, 409.

[11] Tocqueville, *Democracy in America*, 184-185.

[12] Tocqueville, *Democracy in America*, 490.

[13] Tocqueville, *Democracy in America*, 489.

In the absence of an aristocratic caste, associations were necessary 'to prevent the despotism of faction or the arbitrary power of a prince.'"[14]

Yet associations face some difficulty in democratic societies. Associations in aristocratic societies can be very powerful even if they have only a few members because those members will be powerful on their own. Yet, as stated above, individuals are weaker in democratic societies. Hence, "[t]he same facility is not found in democratic nations, where it is always necessary that those associating be very numerous in order that the association have some power."[15] Tocqueville is affirming the point, made by John Inazu in his critique of *Roberts v. U.S. Jaycees*, that large associations can often have the greatest success in protecting democratic societies in particular from tyranny.

Tocqueville also offers insights on the expressive nature of associations. He explains that Americans use associations to give parties, found seminaries, distribute books, to establish churches, and to create hospitals, prisons, and schools. "Finally, if it is a question of bringing to light a truth or developing a sentiment with the support of a great example, they associate."[16] In other words, Tocqueville affirms the idea that the association itself communicates something outside of the particular verbal message being sent. Associations allow individuals to express truth and form sentiments by "a great example." This is why it is problematic to allow government or state university regulations that interfere with associations' ability to determine their leadership and membership, as the Court did in *Martinez*.

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[14] Horwitz, *First Amendment Institutions*, 213-214.

[15] Tocqueville, *Democracy in America*, 490.

[16] Tocqueville, *Democracy in America*, 489.

In his discussion of associations in democracies, Tocqueville demonstrates that the effects of policies that interfere with associational freedom may affect not only the individuals attempting to join those groups, but the whole society. When courts elevate individual interest over associational rights, they ignore the fact that individuals greatly benefit from the debate put forth by groups, even groups to which they were not admitted, and hence undermining the group may ultimately undermine the individual's freedom as well. The individual's views will not be challenged, and he will remain under the moral authority of the majority.

Tocqueville's vision of a vibrant civil society filled with free associations that challenge the majority secures the best means to the diversity of viewpoints that will ultimately secure freedom. Associations challenge the majority by passing down traditions and forming the moral and intellectual life of their members. Religious associations, even and especially when their traditions are far from the mainstream, have played this role throughout history. The Supreme Court recognized this point, referring to religious organizations in particular, in *Wisconsin v. Yoder*: "We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles."[17] Yet the most critical reason to protect religious and other associations is not simply their instrumental role in preserving freedom, but their essential role in human life. Our constitutional structure, with its enumeration of limited governmental powers, recognizes that human beings do not fulfill their social and political nature solely through membership in a political body, but also as members of

[17] *Yoder* at 223.

families, schools, associations, and religious societies. Thus, the Constitution shows that, in order to promote the fullness of human flourishing, it is incumbent upon government to protect associations.

BIBLIOGRAPHY

Blackstone, William. *Commentaries on the Laws of England: All Books*. William Draper Lewis, ed. Waxkeep Publishing, 2013. Kindle Edition.

Bradley, Gerard V. "*Forum Juridicum*: Church Autonomy in the Constitutional Order." *Louisiana Law Review, 49* (1987): 1057-1087.

Bradley, Gerard, ed. *Challenges to Religious Liberty in the Twenty-First Century.* Cambridge: Cambridge University Press, 2012.

Carter, Stephen L. *The Dissent of the Governed: A Meditation on Law, Religion, and Loyalty*. Harvard University Press, 2009.

Colombo, Ronald J. "The Corporation As a Tocquevillian Association." *Temple Law Review*, 85 (2012): 1.

Corbin, Caroline Mala. "Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law." *Fordham Law Review*, *75* (2007): 1965.

Corbin, Caroline Mala. "Corporate Religious Liberty," *Constitutional Commentary*, 30 (2015): 280.

Currie, David P. "Subsidiarity," *Green Bag* 1, No. 2 (1998): 359.

Duncan, Kyle. "Subsidiarity and Religious Establishments in the United States Constitution." *Villanova Law Review*, 52 (2007): 67.

Drakeman, Donald L. *Church, State, and Original Intent*. Cambridge: Cambridge University Press, 2010.

Eisgruber, Christopher L. & Lawrence G. Sager. *Religious Freedom and the Constitution*. Cambridge, Harvard University Press: 2007.

Epstein, Richard. "Church and State at the Crossroads: *Christian Legal Society v. Martinez*." *Cato Supreme Court Review*, 105 (2010).

Garnett, Richard W. "The Story of Henry Adams' Soul: Education and the Expression of Associations." *Minnesota Law Review*, 85 (2001): 1841.

Garnett, Richard W. “Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?” *St. John’s Journal of Legal Commentary*, 22 (2007): 515.

Garnett, Richard. “‘The Freedom of the Church’: (Towards) an Exposition, Translation, and Defense.” *Journal of Contemporary Legal Issues*, 21 (2013): 33.

Gedicks, Frederick Mark. “The Recurring Paradox of Groups in the Liberal State.” *Utah Law Review*, 2010 (2010): 47.

Gey, Stephen. “Why Is Religion Special?: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment.” *University of Pittsburgh Law Review*, 52 (1990): 75.

Griffin, Leslie. “The Sins of Hosanna-Tabor,” *Indiana Law Journal*, 88 (2013): 981.

Hamilton, Marci A. *God vs. the Gavel: The Perils of Extreme Religious Liberty*. New York: Cambridge University Press, 2014.

Holloway, Carson. “Are Corporations People?” *National Affairs*, 25 (2015).

Horwitz, Paul. “Act III of the Ministerial Exception.” *Northwestern University Law Review*, 106 (2012): 973.

Horwitz, Paul. *First Amendment Institutions*. Harvard University Press, 2013.

Horwitz, Paul. “Defending (Religious) Institutionalism.” *Virginia Law Review*, 99 (2013): 1049.

Horwitz, Paul. “Freedom of the Church Without Romance.” *Journal of Contemporary Legal Issues*, 21 (2013): 59.

Inazu, John D. *Liberty’s Refuge: The Forgotten Freedom of Assembly*. Yale University Press, 2012.

Inazu, John D. “The Unsettling ‘Well-Settled’ Law of Freedom of Association.” *Connecticut Law Review*, 43 (2010): 149.

Inazu, John D. “The Four Freedoms and the Future of Religious Liberty.” *North Carolina Law Review*, 92 (2014): 787.

Inazu, John D. “A Confident Pluralism.” *Southern California Law Review*, 88 (2015): 587.

Inazu, John D. “The First Amendment’s Public Forum.” *William and Mary Law Review*, 56 (2015): 1159.

Kurland, Philip B. and Ralph Lerner, eds. *The Founders' Constitution*. Chicago: University of Chicago Press, 1987).

Kramnick, Issac and R. Laurence Moore. *The Godless Constitution: The Case Against Religious Correctness*. New York: Norton & Company, Inc., 1996.

Laski, Harold J. "The Personality of Associations." *Harvard Law Review, 29* (1916): 404.

Laycock, Douglas. "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy." *Columbia Law Review*, 81 (1981), 1373.

Laycock, Douglas. "Church Autonomy Revisited." *Georgetown Journal of Law and Public Policy*, 7 (2009): 253.

Laycock, Douglas. "Hosanna-Tabor and the Ministerial Exception." *Harvard Journal of Law and Public Policy*, 35 (2012): 839.

Lund, Christopher C. "In Defense of the Ministerial Exception," *North Carolina Law Review*, 90 (2011): 1.

Marshall, William P. "In Defense of *Smith* and Free Exercise Revisionism." *University of Chicago Law Review*, 58 (1991).

McConnell, Michael W. "The New Establishmentariansim." *Chicago-Kent Law Review*, 75 (1999): 453.

McConnell, Michael W. "Non-State Governance," *Utah Law Review*, 2010 (2010): 8.

McConnell, Michael W. "The Problem of Singling out Religion." *DePaul Law Review*, 50 (2000): 1.

McConnell, Michael W., John H. Garvey, & Thomas C. Berg, *Religion and the Constitution*, 3d ed. New York: Wolters Kluwer Law & Business, 2002.

McConnell, Michael W., "Reflections on Hosanna-Tabor." *Harvard Journal of Law & Public Policy*, 35 (2012): 821.

McConnell, Michael W. "The Origins and Historical Understanding of Free Exercise of Religion." *Harvard Law Review*, 103 (1990): 1409.

McConnell, Michael W, John H. Garvey, and Thomas C. Berg, *Religion and the Constitution*, 3d ed. .New York: Wolters Kluwer Law & Business, 2002).

Michael McConnell, "The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural Political Conflict in the Early Republic," *Tulsa Law Review*, 37 (2001).

McDonnell, Brett. "The Liberal Case for Hobby Lobby," *Arizona Law Review* 57 (2015): 777.

McGinnis, John O. "Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery." *California Law Review*, 90 (2002): 485.

Paulsen, Michael Stokes. "Disaster: The Worst Religious Freedom Case in Fifty Years." *Regent University Law Review*, 24 (2011): 283.

Paulsen, Michael Stokes. "Scouts, Families, and Schools." *Minnesota Law Review*, 85 (2001): 1917.

Paulsen, Michael Stokes. "A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on 'Equal Access' for Religious Speakers and Groups," *University of California, Davis Law Review*, 29 653 (1996): 653.

Robinson, Zoe. "What is a 'Religious Institution'?" *Boston College Law Review*, 55 (2014): 181.

Sarat, Austin, ed. *Legal Responses to Religious Practices in the United States: Accommodation and Its Limits*. Cambridge: Cambridge University Press, 2012.

Schauer, Frederick. "Institutions as Legal and Constitutional Categories." *UCLA Law Review* 54 (2007): 1747.

Schragger, Richard and Micah Schwartzman. "Against Religious Institutionalism." *Virginia Law Review*, 99 (2013): 917.

Schwartzman, Micah. "What if Religion Is Not Special?" *University of Chicago Law Review*, 79 (2012): 1351.

Sheldon, Garrett Ward and Daniel L. Dreisbach. *Religion and Political Culture in Jefferson's Virginia*, eds. MD: Rowman & Littlefield Publishers, 2000.

Smith, Steven D. "Discourse in the Dusk: The Twilight of Religious Freedom?," Review of *Religion and the Constitution – Volume 2: Establishment and Fairness* by Kent Greenawalt." *Harvard Law Review*, 122 (2009): 1883.

Smith, Steven. *The Rise and Decline of American Religious Freedom*. Cambridge: Harvard University Press, 2014.

Sullivan, Kathleen M. “Unconstitutional Conditions.” *Harvard Law Review* 102 (1989): 1415.

de Tocqueville, Alexis. *Democracy in America*. Harvey Mansfield and Delba Winthrop, trans. First edition. University of Chicago Press, 2012).

Waltman, Jerold. *Congress, the Supreme Court, and Religious Liberty: The Case of City of Boerne v. Flores*. New York: Palgrave, 2013.

Witte, John Jr. and Joel A. Nichols, *Religion and the American Constitutional Experiment, Fourth Edition*. New York: Oxford University Press, 2016).

Legal Cases Cited

Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698 (7th Cir. 2003).

Arver v. United States, 245 U.S. 366 (1918).

Baird v. *State Bar of Arizona*, 401 U.S. 1 (1971).

Bank of Augusta v. Earle, 38 U.S. 519 (1839) at 520.

Bates v. City of Little Rock, 361 U.S. 516 (1960).

Board of Directors of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537 (1987).

Board of Regents, University of Wisconsin System v. Southworth, 529 U.S. 217 (2000).

*Bollard v. the California Province of the Society of Jesu*s, 196 F.3d 940 (9th Cir. 1999) at 946.

Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

Brandenburg v. *Ohio*, 395 U.S. 444 (1969).

Braunfeld v. Brown, 366 U.S. 599 (1961).

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. _, 723 (2014).

Cantwell v. Connecticut, 310 U.S. 296 (1940).

California Democratic Party v. Jones, 530 U.S. 567 (2000).

Christian Legal Society Chapter v. Martinez, 561 U.S. 661 (2010).

City of Boerne v. Flores, 521 U.S. 507 (1997).

Citizens United v. Federal Election Commission, 558 U.S. _ (2010).

Clay v. United States, 403 U.S. 698 (1971).

Cohen v. California, 403 U.S. 15 (1971).

Clapper v. Chesapeake Conference of Seventh-Day Adventists, 166 F.3d 1208 (4th Cir. 1998).

Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health & Human Services, 724 F.3d 377 at 385 (3rd Cir. 2013).

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987).

Cutter v. Wilkinson, 544 U. S. 709 (2005).

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

Gillette v. United States, 401 U.S. 437 (1971).

Girouard v. United States, 328 U.S. 61 (1946).

Good News Club v. Milford Central School, 533 U.S. 98 (2001).

Griswold v. *Connecticut*, 381 U.S. 479 (1965).

Hamilton v. Regents of the Univ. of Ca., 293 U.S. 245 (1934).

Harmon v. Dreher. 17 S.C.Eq. (Speers Eq.) 87 (1843).

Healy v. James, 408 U.S. 169 (1972).

Holt v. Hobbs, 574 U.S. __ (2015).

Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, et al., 565 U.S. _ (2012).

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995).

Jamison v. *Texas*, 318 U.S. 413 (1943) at 416.

*Lamb's Chapel v. Center Moriches Union Free School D*ist., 508 U. S. 384 (1993).

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

Louisiana ex rel. Gremillion v. *NAACP*, 366 U.S. 293 (1961).

Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

Keyishian v. Board of Regents, 385 U.S. 589 (1967).

Mitchell v. Helms, 530 U.S. 793 (2000).

Moore v. *East Cleveland*, 431 U.S. 494 (1977).

NAACP v. *Button*, 371 U.S. 415 (1963).

National Association for the Advancement of Colored People v. Patterson, 357 U.S. 449 (1958).

National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988).

Nurre v. Whitehead 559 U.S. __ (2010).

Pardue v. Center City of Consortium Schools, 875 A.2d 669 (DC Cir. 2005).

*Perry Ed. Assn. v. Perry Local Educators' A*ssn., 460 U. S. 37 (1983).

Pierce v. Society of Sisters, 268 U.S. 510 (1925).

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

Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

Roberts v. United States Jaycees, 468 U.S. 609 (1984).

Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819 (1995).

Santa Clara v. Southern Pacific Railroad Co., 118 U.S. 394 (1886) at 394.

Shaliehsabou v. Hebrew Home of Greater Washington, 363 F.3d 299 (4th Cir. 2004).

Sherbert v. Verner, 374 U.S. 398 (1963).

Speiser v. Randall, 357 U.S. 513 (1958).

Texas v. Johnson, 491 U.S. 397 (1989).

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).
Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir. 2006).

Troxel v. Granville, 530 U.S. 57 (2000).

Trustees of Darmouth College v. Woodward, 17 U.S. 518 (1819).

United States v. Bland, 283 U.S. 636 (1931).

United States v. Lee, 455 U.S. 252 (1982).

United States v. Macintosh, 283 U.S. 605 (1931).

United States v. Schwimmer, 279 U.S. 644 (1929).

Watson v. Jones, 80 U.S. 679 (1871).

Werft v. Desert Southwest Annual Conference, 377 F.3d 1099 (9th Cir. 2004).

Widmar v. Vincent, 454 U.S. 263 (1981).

Wisconsin v. Yoder, 406 U.S. 205 (1972).

Zablocki v. *Redhail*, 434 U.S. 374 (1978).