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# TOWARD A CONSTITUTIONAL JURISPRUDENCE OF RELIGIOUS GROUP RIGHTS

FREDERICK MARK GEDICKS\*

In this Article, Professor Gedicks advocates strong constitutional protection of the right of religious groups to discriminate in membership decisions. The author draws from two employment discrimination cases recently decided by the Supreme Court, *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.* and *Corporation of Presiding Bishop v. Amos*. Using these cases, the author illustrates the tension that presently exists between religious group claims to autonomy, on the one hand, and individual rights and government interests, on the other hand.

The author admits that granting stronger constitutional protection to the right of religious groups to discriminate in membership decisions will result in the protection of beliefs and practices which will be inconsistent with and even repugnant to the majority. This is the paradox of groups—while subverting individual autonomy, groups nevertheless enhance individual autonomy by challenging the liberal power of the sovereign state. The author concludes that if one is genuinely concerned about threats to individual freedom, one has more to fear from unlimited governmental power than from a strong right of religious group autonomy; it is the latter that will serve as a check on the former.

## I. INTRODUCTION

Few aspects of life in the United States are more celebrated than the religious diversity of American society.<sup>1</sup> Americans usually attrib-

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\* Associate Professor, Mercer University School of Law. B.A., Brigham Young University, 1977; J.D., University of Southern California, 1980. I presented an earlier version of Parts III and IV-A at a meeting of the Religious Institutions Section of the National Association of College and University Attorneys in Baltimore, Maryland, in June 1986, and an earlier version of Part IV-B at a workshop co-sponsored by the Center for Constitutional Studies of Mercer University and the National Association of Independent Colleges and Universities in Washington, D.C., in February 1988. I benefited from comments by Bruce Hafen, William Marshall, Michael Perry, Jefferson Powell, Ivan Rutledge, Jack Sammons, Rodney Smith, Steven Smith, and, in particular, my good friend and colleague Ted Blumoff. Larry Stewart provided excellent research assistance. All errors that remain are mine.

1. The YEARBOOK OF AMERICAN AND CANADIAN CHURCHES 1987 (C. Jacquet, Jr. ed. 1987) lists 218 distinct religious bodies and 345,961 churches in the United States. *Id.* at 252; see also *id.* at 21-122 (listing and describing each religious body). The table of contents of F. MEAD, HANDBOOK OF DENOMINATIONS IN THE UNITED STATES (6th ed. 1975) lists 103 separate religious denominations in the United States, with 156 additional subgroups. See also T. CAPLOW, H. BAHR & B. CHADWICK, ALL FAITHFUL PEOPLE: CHANGE AND CONTINUITY IN MIDDLETOWN'S RELIGION 310 (1983) [hereinafter ALL FAITHFUL PEOPLE] (finding 160 different denominations represented in a city of 79,932); A. REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 8 (1985) (listing mainline Protestants, Roman Catholics, white evangelical Protestants, black Protestants, Jews, Mormons, Orthodox Christians, Christian Scientists, Adventists, and Black Muslims as the "significant" American religious groups). Relative to the rest of the Western world, the United States has been

ute this diversity to the principles of religious freedom and of separation of church and state that are embodied in the religion clauses of the United States Constitution.<sup>2</sup> Nevertheless, our self-congratulation on this attribute disguises a deep and fundamental contradiction between vigorous religious pluralism and the modern liberal state. This contradiction, if left unresolved, will threaten meaningful religious freedom.

American liberalism, with its uncompromising focus on state and individual, often overlooks institutions like religious groups that are neither governmental nor individualistic. Moreover, American public culture has grown increasingly secular in the twentieth century. Both liberalism and secularization suggest a society that is not hospitable to religious groups. Although Americans remain actively and profoundly religious in their private lives,<sup>3</sup> little evidence of this religiosity leaks

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exceptionally pluralist in matters of religion from its earliest political origins. *See generally* T. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* chs. 1-3 (1986); A. REICHLEY, *supra*, at 170-77.

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

3. Empirical studies have consistently demonstrated a high level of commitment among contemporary Americans to traditional religious beliefs, practices, and institutions. For example, recent polls have reported that 91% of Americans state a religious preference, 71% claim membership in a church or a synagogue, 58% to 61% believe that religion can solve all or most of today's problems, 57% have high levels of confidence in organized religion, 55% to 56% state that religion is very important and 31% that religion is fairly important in their lives, and 40% to 42% attend a church or a synagogue during a typical week. G. GALLUP, JR., *THE GALLUP POLL: PUBLIC OPINION* 1986, at 6, 9-10, 15, 127, 272-73, 280 (1987); G. GALLUP, JR., *THE GALLUP POLL: PUBLIC OPINION* 1985, at 120-21, 162, 291 (1986) [hereinafter *THE GALLUP POLL* 1985]. *THE CONNECTICUT MUTUAL LIFE REPORT ON AMERICAN VALUES IN THE '80S: THE IMPACT OF BELIEF* (1981), found that 74% of Americans consider themselves religious, and 49% can identify a specific time in their adult lives when they made "a personal commitment to Christ" that changed their lives. *Id.* at 41, 42. It also found that 73% of Americans frequently feel that God loves them, 57% frequently engage in prayer, 44% frequently attend religious services, 28% frequently read the Bible, 25% frequently participate in church socials, 23% frequently encourage others to be religious, 21% frequently listen to religious broadcasts, and 26% frequently engage in or experience at least five of these activities and feelings. *Id.* at 42, 43. *ALL FAITHFUL PEOPLE*, *supra* note 1, an in-depth sociological study of religious belief and practice in Muncie, Indiana, from 1924 to 1978, found that among married couples, rates of activity and membership in churches are higher than those of any other social organization. *Id.* at 84, 309 (74% of married women and 61% of married men belong to a church, and 59% and 43%, respectively, actively participate in a church). The study also found that charitable contributions to churches were more than four times greater than those to secular charities. *Id.* at 84-86, 309 (3.3% of family income versus 0.8%). In a recent survey of average weekly church attendance conducted in 24 countries worldwide, the United States, with a 43% attendance rate, trailed only Malta (91%), the Republic of Ireland (72%), Mexico (54%), Northern Ireland (52%), and white South Africa (50%). *YEARBOOK OF AMERICAN AND CANADIAN CHURCHES* 1987, *supra* note 1, at 286.

The religious devotion of post-World War II America reached its peak in the 1950s, declined during the 1960s and early 1970s, and recovered during the late 1970s and the 1980s, although it has not returned to 1950s levels. *THE GALLUP POLL* 1985, *supra*, at vii, ix, 121, 292; R. FLOWERS, *RELIGION IN STRANGE TIMES: THE 1960s AND 1970s* 36-43 (1984); Gallup, *50 Years of Gallup Surveys on Religion*, *THE GALLUP REP.*, May 1985, at 4-5 [hereinafter *Gallup, 50 Years*]. *ALL FAITHFUL PEOPLE*, *supra* note 1, argues that there is no empirical support for the ubiquitous hypothesis that increasing secularization is an inevitable and irreversible long-term trend and as-

into the public sphere of law and politics. Similarly, although the United States is undoubtedly among the most religiously plural of contemporary democracies, the inexorable expansion of modern American government at every level places increasing pressure on religious groups to compromise their beliefs and values to conform to government policies.<sup>4</sup> The continuing difficulty is defining the point at which further government encroachment upon religious group interests should be constitutionally prohibited in order to preserve freedom and diversity.

Two employment discrimination cases recently decided by the United States Supreme Court, *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*<sup>5</sup> and *Corporation of the Presiding Bishop v. Amos*,<sup>6</sup> illustrate the contradiction between religious pluralism and modern liberalism. Both cases were the result of legal action by former employees of religious institutions who had been dismissed for failing to adhere to religious standards of conduct imposed by the institutions as a condition of continued employment.

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serts that the American tendency in the twentieth century has been toward more, rather than less, religious activity and devotion. *Id.* at 26-30, 33-38, 294-300; see also *id.* at 80-81, 84-86, 308-09. According to Gallup:

Perhaps the most appropriate word to use to describe the religious character of the nation as a whole over the last half century is "stability." Basic religious beliefs, and even religious practice, differ relatively little from the levels recorded 50 years ago. In fact, the nation has in some respects remained remarkably orthodox—even fundamentalist—in its beliefs.

Gallup, *50 Years*, *supra*, at 5.

ALL FAITHFUL PEOPLE, *supra* note 1, attributes the persistence of the secularization hypothesis to the paucity and unreliability of pre-World War II data, the anti- or areligious bias of those scholars—Spencer, Marx, Durkheim, Weber, and Simmel—who had the greatest influence on the development of modern sociology, and the habitual reconstruction of a nonexistent American past in which "everyone went to church and the rules of morality were universally respected." *Id.* at 5, 20-26, 30-32.

4. See, e.g., *United States v. Lee*, 455 U.S. 252 (1982); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); Civil Rights Restoration Act, 102 Stat. 28 (1987) (to be codified at 20 U.S.C. §§ 1687, 1688; 29 U.S.C. §§ 709, 794; 42 U.S.C. §§ 2000d-4a, 6107). See also *Grove City College v. Bell*, 465 U.S. 555 (1984); and *infra* text accompanying notes 200-02. This pressure can take the form of direct regulation, as when the government seeks to prohibit or to require certain conduct by religious groups, or indirect regulation, as when the government provides incentives or disincentives to certain conduct by religious groups by specifying prerequisites to receipt of federal benefits or to avoidance of federal regulation. Compare *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (reviewing state compulsory school attendance law) with *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (reviewing revocation of tax-exempt status). This Article deals only with direct regulation of religious groups. For an overview of indirect governmental regulation by attaching conditions to receipt of government funds, see Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987).

5. 477 U.S. 619 (1986), *rev'g* 766 F.2d 932 (6th Cir. 1985), *rev'g* 578 F. Supp. 1004 (S.D. Ohio 1984).

6. 483 U.S. 327 (1987), *rev'g* 618 F. Supp. 1013 (D. Utah 1985) and 594 F. Supp. 791 (D. Utah 1984).

In *Dayton Christian Schools*, the Court reviewed an action for a declaratory judgment that Ohio's Civil Rights Act<sup>7</sup> could not constitutionally be applied to the decision of a private fundamentalist Christian school not to renew the contract of a pregnant, married teacher. The school had taken this action because of its religious belief that mothers with preschool children should not work outside their homes.<sup>8</sup> Under the authority of the Act, the Ohio Civil Rights Commission investigated a complaint by the teacher, found probable cause to conclude that the school had violated the Act, and proposed a consent order to be entered into by the school in lieu of prosecution. Among other remedies, the order required full reinstatement of the teacher with back pay.<sup>9</sup>

The facts of *Dayton Christian Schools* posed a dilemma. On the one hand, the teacher suffered a loss of employment because of action that the legislature had declared unlawful through the Act. Exempting the school from the Act, and thereby upholding the school's refusal to reinstate the teacher, would have significantly injured the teacher. On the other hand, those who make up the community of Dayton Christian Schools—the people who work there, who send their children there, who attend school there, who teach there, who set the policy of the school and manage its assets—had created a unique form of education.<sup>10</sup> Indeed, all associated with the school, including the complaining teacher, highly valued the distinctive religious beliefs reflected in its educational philosophy.<sup>11</sup> Requiring the reinstatement of the teacher would force the school to accommodate a course of conduct that it believed was wrong and would prevent the school from effectively teaching one aspect of its distinctive religious philosophy.<sup>12</sup> This disposition would implicate the constitutional free exercise and associational rights of those connected with the school. It also would dilute religious pluralism, by forcing upon the school conformity to majoritarian values and practices relating to gender discrimination.<sup>13</sup>

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7. OHIO REV. CODE ANN. §§ 4112.01-.11, 4112.99 (Page 1980 & Supp. 1986).

8. *Dayton Christian Schools*, 477 U.S. at 623; 766 F.2d at 934 & n.2.

9. *Id.*, 477 U.S. at 624.

10. See *Dayton Christian Schools*, 766 F.2d at 936-38 & nn. 7-10.

11. See *id.* at 947, 949 nn. 28-29.

12. See *id.* at 949, 950, 951-52; and *infra* text accompanying notes 59-60.

13. *Dayton Christian Schools* typifies situations in which the government interest in eliminating religious discrimination does not coincide with the individual complainant's interest in associating with a particular kind of religious group while being free from one form of such discrimination. In these cases, the complainant wishes to be personally free from discrimination, but otherwise wishes the group preserved intact. Governmental anti-discrimination remedies, however, can change the fundamental character of the group in ways that would be objectionable even to the complainant. See *infra* text accompanying notes 57-78. Often, however, government and individual anti-discrimination interests coincide. See, e.g., *Amos*, 483 U.S. at 327; see *infra* text accompanying notes 244-65.

The Supreme Court has been unclear in explaining why and to what extent assertions of religious belief and exercise should insulate one from the effects of generally applicable law.<sup>14</sup> Thus, it came as no surprise when the Court chose federal abstention as the better part of doctrinal valor in disposing of *Dayton Christian Schools*.<sup>15</sup> By invoking abstention doctrine, the Court avoided the need to explain when and why a religious exemption from generally applicable law is constitutionally required by the free exercise clause. However, in the very next term, the Court was confronted with *Corporation of Presiding Bishop v. Amos*,<sup>16</sup> which presented the converse issue: whether a religious exemption that is not constitutionally required by the free exercise clause is constitutionally prohibited by the establishment clause?

In *Amos*, the Church of Jesus Christ of Latter-Day Saints, more commonly known as the Mormon church, had terminated a longtime custodial employee of the church-owned and church-operated Deseret Gym because of his failure to obtain a "temple recommend"—an ecclesiastical certification that the holder subscribes to certain important Mormon beliefs and practices and is thereby eligible to worship in Mormon temples.<sup>17</sup> The employee challenged his termination under Title VII of the Civil Rights Act of 1964.<sup>18</sup> He argued that Congress' exemption of all activities of religious institutions—the secular as well as the religious—from compliance with Title VII<sup>19</sup> constituted a religious preference in violation of the establishment clause.<sup>20</sup>

The Supreme Court did not decide whether the religious exemption of Title VII was required by the free exercise clause.<sup>21</sup> Observing that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the

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14. Compare *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) and *United States v. Lee*, 455 U.S. 252 (1982) and *Braunfeld v. Brown*, 366 U.S. 599 (1961) with *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) and *Thomas v. Review Bd.*, 450 U.S. 707 (1981) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963). See generally Kelley, *Introduction*, in *GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS* 3, 4-7 (D. Kelley ed. 1982) [hereinafter *GOVERNMENT INTERVENTION*].

15. The Court held that the district court should have abstained from adjudicating the case under the principle enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. *Dayton Christian Schools*, 477 U.S. at 625. The Court has recently begun to rely on the "passive virtues" in disposing of religion clause cases. In addition to *Dayton Christian Schools*, see *Karcher v. May*, 108 S. Ct. 388 (1987) (lack of standing); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986) (lack of standing).

16. 483 U.S. 327 (1987).

17. 483 U.S. at 330 & n.4.

18. 42 U.S.C. §§ 2000e-1 to -17 (1982).

19. § 702, 42 U.S.C. § 2000e-2 (1982).

20. *Amos*, 483 U.S. at 331 (discussing § 702).

21. See *id.* at 339 n.17.

Free Exercise Clause,"<sup>22</sup> the Court held that under the *Lemon* test<sup>23</sup> the religious exemption did not violate the establishment clause.<sup>24</sup> *Amos* clarified for the moment that religious exemptions from generally applicable law are permitted by the establishment clause even when not mandated by the free exercise clause.

However, the majority opinion largely ignored the constitutional tension between individual, government, and group that was as clearly present in *Amos* as it was in *Dayton Christian Schools*.<sup>25</sup> The *Amos* employee suffered significant harm because of religious discrimination made possible by the exemption to Title VII. Notwithstanding the religious exemption, permitting such individual harm in the face of the general anti-discrimination purpose of Title VII seems contradictory to the goal of the Civil Rights Act of which Title VII is a part, as well as to the spirit of both religion clauses. Yet, if the exemption had been struck down as unconstitutional, the Mormon church would be forced to accept as employees people who do not subscribe to the highest behavioral and ethical standards of Mormonism.

The Court has yet to articulate a theory explaining how this tension among individual, government, and religious group should be resolved. The questions remain how and to what extent individual rights and government interests should be vindicated at the expense of the claims of religious groups, and when these rights and interests should be subordinated to religious group claims. These questions dog the Court's religion clause cases and are at the heart of the doctrinal confusion that characterizes the Court's decisions in this area.<sup>26</sup>

22. *Id.* at 334 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970)).

23. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court synthesized 25 years of establishment clause analysis into the well-known three-pronged test. To escape constitutional invalidation, government action challenged under the clause must be shown to have "a secular legislative purpose," *id.* at 612, to have "[a] principal or primary effect [which] neither advances nor inhibits religion," *id.*, and not to "foster 'an excessive government entanglement with religion,'" *id.* at 613 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

24. *Amos*, 483 U.S. at 338.

We find unpersuasive . . . that [the exemption] singles out religious entities for a benefit. Although the Court has given weight to this consideration in its past decisions, . . . it has never indicated that statutes that give special consideration to religious groups are *per se* invalid. . . . Where, 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 comes packaged with benefits to secular entities.

*Id.* The Court also held that the religious exemption had a secular purpose, *id.* at 335-36, and did not impermissibly entangle church and state, *id.* at 339.

25. *But cf. id.* at 337 ("The case before us . . . involves a nonprofit activity instituted over 75 years ago in the hope that 'all who assemble here, and who come for the benefit of their health and for physical blessing, [may] feel that they are in a house dedicated to the Lord.'") (quoting Dedicatory Prayer for Gymnasium). Throughout this Article, when discussing religious groups, I presuppose that they have a nonprofit status.

26. See Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 373 (1984); see *supra* note 14 and accompanying text.

Both *Dayton Christian Schools* and *Amos* involved a religious group membership decision—whether to associate with an individual in such a way that the individual will be considered part of the group.<sup>27</sup> Drawing in part from a concurring opinion by Justice Brennan in *Amos*,<sup>28</sup> I will argue that in such cases the individual-government-religious group tension should be resolved by deferring to the group, even at the cost of infringing upon important individual and government anti-discrimination interests. By discriminating in decisions about whom they admit and retain as members, religious groups define and communicate their fundamental concerns. Despite the prejudice and mean-spiritedness sometimes implicit in such discrimination, it is necessary if meaningful religious pluralism is to survive and individuals and society are to enjoy religious pluralism's considerable benefits.<sup>29</sup> Unfortunately, these benefits are not always recognized in contemporary society. This Article challenges the bias of liberal theory in favor of government power and individual rights and the modern trend toward secularization in public life. Both liberal bias and secularization suggest that in constitutional confrontations between individual, government, and religious group, the religious group's interest in self-definition often will be overshadowed by individual and government interests in non-discrimination.<sup>30</sup> Not unexpectedly, then, current theories of constitutional law afford incomplete protection to the interest of religious groups in self-definition.<sup>31</sup> Nevertheless, constitutional recognition of a strong right of religious group autonomy in making membership deci-

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See also Tribe, *Church and State in the Constitution*, in GOVERNMENT INTERVENTION, *supra* note 14, at 31, 32:

[T]he point at which the two [religion] clauses most powerfully reinforce each other is the very point at which the conflict between them is most profound. That is the point . . . at which religious passion and the expression of religious conviction and conduct emerge from the crucible of faith as theological community: the congregational or hierarchical collectivity that interposes itself as an autonomous group between the individual and the state. It is at this point that all of the tensions [and paradoxes] of the religion clauses come into focus.

27. The question whether someone "belongs" to a group cannot be answered merely by looking at an official membership list. Religious groups associate with individuals in a variety of ways beyond formal membership that nevertheless result in such individuals being considered part of the group. Employees are often seen as part of the religious group that employs them regardless of formal church affiliation or activity, as both *Dayton Christian Schools* and *Amos* illustrate. See *infra* note 71. In contrast, many of those who appear on a religious group's membership list may have so little current contact or activity with the group that they should not be considered part of it, formal membership notwithstanding.

28. *Amos*, 483 U.S. at 340-46. I discuss Justice Brennan's concurring opinion in detail *infra* at text accompanying notes 195-97.

29. See *infra* Part II.

30. See *infra* Part III.

31. See *infra* Part IV.



sions is necessary to preserve religious pluralism and the individual autonomy that is at the heart of liberalism.<sup>32</sup>

## II. SELF-DEFINITION AND THE EVOLUTION OF MEANING IN RELIGIOUS GROUPS

Liberal political theory has long treated groups as aggregations of individuals bound together by some a priori set of self-conscious individual decisions, such as those implicit in contractual or quasi-contractual relations.<sup>33</sup> Under liberal presuppositions, societies are formed and maintained principally by individuals. Individuals do not merely belong to groups, they create them.<sup>34</sup>

Certainly, the identity of any group qua group must derive to some extent from its members. If the group members have nothing in common in any significant aspect of their existence, it makes no conceptual sense to think of them as an entity. The collective description of the group members implied by treating them as an aggregation presumes the existence of generally shared characteristics or agreements.<sup>35</sup> Almost by definition, the members of any group will share a commitment to one or more concerns, whose validity and importance to these members are not questioned.<sup>36</sup> A "group," then, is a collectivity or commu-

32. See *infra* Part V. My use of the terms "liberal" and "liberalism" refers to the political tradition based on the philosophy of Hobbes, Locke, Kant, and others that posits a morally neutral, impartial, and objective state whose primary purpose is to maintain social order and stability among the individuals whom it governs so that each of them may otherwise exercise free choice.

33. See A. MACINTYRE, *AFTER VIRTUE* 220-21 (2d ed. 1984). See generally Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1089 (1980) (analogizing the tension between medieval towns and their inhabitants to that between corporate entities and their individual members). In discussing how constitutional law relates to religious groups, some commentators seem not to have considered the possibility that groups are formed and maintained on noncontractual bases. See, e.g., Ellman, *Driven From the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378 (1981); Adams & Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291 (1980).

34. See, e.g., *Jones v. Wolf*, 443 U.S. 595, 606 (1979) (discussing ways group factions in church property dispute could alter outcome by modifying founding charter).

35. See W. McDUGALL, *THE GROUP MIND* 25 (1920); Frug, *supra* note 33, at 1147 (quoting L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 979 (1978)); Marshall, *Discrimination and the Right of Association*, 81 NW. U.L. REV. 68, 89-90 (1986).

36. See D. FUNK, *GROUP DYNAMIC LAW: INTEGRATING CONSTITUTIVE CONTRACT INSTITUTIONS* 7, 34, 90 n.11 (1982); Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551, 558 (1985) [hereinafter Perry, *Constitutional Interpretation*]; see, e.g., S. HAUSER, *A COMMUNITY OF CHARACTER* 36-37, 66 (1981). See generally J. ORTEGA, *THE REVOLT OF THE MASSES* 6 (A. Kerrigan trans. 1985); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 929 (1963); Ortega y Gasset, *Concord and Liberty*, in J. ORTEGA Y GASSET, *CONCORD AND LIBERTY* 9, 16-19 (H. Weyl trans. 1963). I do not mean here that the group necessarily believes these concerns to be objectively true or real, although many groups, especially religious ones, do indeed hold such beliefs about their core concerns. Often, the concern that binds the group together is a provisional belief that members understand can be changed over time. The shared concern may be as narrow as a consensus about the

nity of individuals who hold in common a set of foundational beliefs and experiences, the relevance and significance of which are generally thought beyond challenge. These core group concerns delineate the boundaries of group membership by embodying the essential defining characteristics of the group.<sup>37</sup>

Although accurate in some respects, this model of groups is simplistic and incomplete. Groups are often so large and complex that they are significantly shaped by the actions of individuals only in the grossest sense. In fact, the dynamic is commonly the opposite. Groups are ongoing and independent entities that influence in their own right how individuals think, express themselves, and act.<sup>38</sup> Although in some respects groups are aggregations of their individual members, in other respects groups are prior to and independent of their members.<sup>39</sup>

Groups do not spring forth unbidden from a social vacuum, fully mature and complete with charter, by-laws, and mission. The process of group formation is long and subtle. It often is impossible to pinpoint the discrete time and place at which a particular group came into being. Over time, individuals are attracted or become acclimated to particular beliefs and experiences that are made relatively more powerful and appealing by the social context in which they appear. Eventually, the common lives of these individuals will have sufficiently coalesced to enable identification of a community centered on these individuals' beliefs and experiences as core group concerns.<sup>40</sup>

The "social contract" model of group formation, then, is often irrelevant in contemporary life. The vast majority of modern humanity does not consciously engage in any process of group creation.<sup>41</sup> Many of the significant groups in contemporary society<sup>42</sup> claim pedigrees that

relevance of a particular text, such as the New Testament, even though agreement about its meaning is not forthcoming. See S. HAUERWAS, *supra*, at 60; White, *The Text, Interpretation, and Critical Standards*, 60 TEX. L. REV. 569, 573, 579 (1982) [hereinafter White, *Critical Standards*].

37. See Marshall, *supra* note 35, at 91. See also White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 416 (1982) [hereinafter White, *Law as Language*].

38. Note, *Reinterpreting the Religious Clauses: Constitutional Construction and Conceptions of the Self*, 97 HARV. L. REV. 1468, 1473 (1984) [hereinafter Note, *Reinterpreting the Religious Clauses*]; see also E. ERIKSON, *CHILDHOOD AND SOCIETY* 36 (2d ed. 1963); W. McDOUGALL, *supra* note 35, at 7, 9.

39. W. McDOUGALL, *supra* note 35, at 7, 9, 21-22; Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1052 (1983); Note, *Reinterpreting the Religious Clauses*, *supra* note 38, at 1471; *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1749 (1987) [hereinafter *Religion and the State*].

40. See Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 14 (1983).

41. See Garet, *supra* note 39, at 1043.

42. Examples of such groups, in addition to churches and religious groups, include families, political parties and activist groups, cities and other local government units, labor unions, corporations, and educational, charitable and other not-for-profit institutions.

stretch far back in time.<sup>43</sup> Members of such groups do not view their continued attraction to the group's core concerns as creating the group. In most cases, the group is "already there."<sup>44</sup> Rather, members approach the group's core concerns in terms of maintenance rather than creation. The question is whether a group's historical core concerns should continue to be those characteristics that define the group. As society evolves and the social context that made particular core concerns initial magnets for community formation and maintenance disappears, members of communities centered around those concerns are challenged to decide to what extent the concerns remain relevant to their individual and group lives.<sup>45</sup> Core concerns that have become socially or otherwise problematic may be reinterpreted or discarded by a group in order to reduce the discontinuity between the group's core concerns and the norms and values of the larger society from which most groups must draw their members.<sup>46</sup>

The constant and continual reexaminations and reinterpretations by a group of its core concerns build a narrative consisting of the intentions, commitments, beliefs, settings, images, and stories relating to the group.<sup>47</sup> Narrative is particularly important for religious groups. A group's narrative is its vision of itself, of what its members aspire to be both individually and communally.<sup>48</sup> Shared by all of a religious group's members to some extent, the narrative constitutes the interpretive structure against which those members assess the meaning of their lives.<sup>49</sup> Because core concerns are the definitive referent for determining who is and who is not a member of the group, the group's narrative exerts considerable force on those who value group membership. Again, this is especially true of religious groups, for a religious narrative is a source of moral authority in the lives of those who wish to become or to remain members of the religious group to which the nar-

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43. See Garet, *supra* note 39, at 1045, 1046. See also Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 671-72 (1987).

44. Garet, *supra* note 39, at 1052; accord A. MACINTYRE, *supra* note 33, at 220, 221; W. McDougall, *supra* note 35, at 10-11.

45. See A. MACINTYRE, *supra* note 33, at 222; Perry, *Constitutional Interpretation*, *supra* note 36, at 560-61; White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 CHI. L. REV. 684, 693 (1985) [hereinafter White, *Law as Rhetoric*]. See also White, *Law as Language*, *supra* note 37, at 427.

46. W. McDougall, *supra* note 35, at 49, 62-63. See generally A. MACINTYRE, *supra* note 33, at 206-07.

47. S. HAUERWAS, *supra* note 36, at 60; A. MACINTYRE, *supra* note 33, at 206; Cover, *supra* note 40, at 46.

48. See A. MACINTYRE, *supra* note 33, at 206, 208, 216; S. HAUERWAS, *supra* note 36, at 59, 60, 61; see generally Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 378 n.18 (1982).

49. See A. MACINTYRE, *supra* note 33, at 215; Cover, *supra* note 40, at 9, 10; Perry, *Constitutional Interpretation*, *supra* note 36, at 558, 560.

rative pertains. It is, therefore, an arbiter of disputes among members of the group, as well as an authoritative normative guide for personal decisions.

The manner in which a religious group interprets its narrative in applying it to group disputes and decisions constitutes the internal law by which the group governs and defines itself.<sup>50</sup> Thus, such disputes and decisions are political in a deeper sense than that term sometimes suggests. Such conflicts are not just about power, but also about meaning.<sup>51</sup> Narrative interpretations are the principal means by which a religious group communicates its core concerns to itself and to others.<sup>52</sup>

Narrative interpretation, however, cannot generate precise and singular articulations of core religious group concerns. There usually exists considerable uncertainty among the members of any group about the defining characteristics of group membership. In particular, members of religious groups often will disagree among themselves on their group's core concerns. Many of the internal disputes that arise in religious groups can be characterized as disputes over narrative meaning: whether or not a particular belief, experience, practice, or other characteristic should or should not, might or must, be included as a core concern of the group. One group faction may argue that a person must believe or act in a particular way in order to become or to remain a "real" or "true" member and to partake of the benefits of group membership. Another faction will respond that such beliefs and behavior are unrelated or marginally related to the core concerns of the group. The faction with the more potent narrative interpretation will have greater internal power and therefore will eventually win the definitional struggle.<sup>53</sup> The losers in the group power struggle are then left with a narrow choice. They must either reconcile themselves to the prevailing view or withdraw voluntarily. Remaining in a religious group without reconciling will likely lead to excommunication.<sup>54</sup>

In many cases, once a group becomes a distinct and discernable community, the relationship between core concerns and group members is symbiotic. A group's core concerns largely determine who is ad-

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50. See Anastaplo, *Church and State: Explorations*, 19 LOY. U. CHI. L. REV. 61, 120-21 (1987); Cover, *supra* note 40, at 4-5, 32; cf. S. HAUERWAS, *supra* note 36, at 56 ("for Christian ethics, the Bible is not just a collection of texts but scripture that makes normative claims on a community").

51. S. HAUERWAS, *supra* note 36, at 61, 62; Cover, *supra* note 40, at 16-18.

52. See generally W. MCDUGALL, *supra* note 35, at 60.

53. See S. HAUERWAS, *supra* note 36, at 60-62. See generally White, *Law as Rhetoric*, *supra* note 45, at 700-01 (discussing rhetoric as shared group language allowing debate and definition of core questions in community existence).

54. Cover, *supra* note 40, at 15-16. See generally R. NIEBUHR, *CHRISTIAN REALISM AND POLITICAL PROBLEMS* 125 (1953) (historically, formation of political communities has required the imposition of political power even when strong magnets for community formation existed).

mitted and retained as a member.<sup>55</sup> In turn, those who are admitted and retained have a dynamic influence on the substantive content of the group's core concerns.<sup>56</sup> Once a group is established, neither the members' personal values nor the core concerns of a group are prior to the other.

Therefore, government action that purports to dictate whom a group must accept as a member and whom it may reject is a significant intrusion on the group. When government is permitted to pass on the permissibility of using particular beliefs, experiences, or practices as indicia for group membership, government possesses the power to designate the legitimate bases upon which groups may exist.<sup>57</sup> Therefore, government regulation of internal group conflicts may threaten a group's existence.

For example, if the preliminary findings of the Ohio Civil Rights Commission had been finalized and upheld in *Dayton Christian Schools*,<sup>58</sup> the state would have determined that no school can exist within its jurisdiction to the extent that one of its core concerns entails gender discrimination. If it had wished to continue its existence as a private religious school, Dayton Christian Schools, Inc. would have been forced to place in question, if not totally abandon, its core belief that women with preschool children should remain at home.

Paradoxically, a decision to conform to majoritarian values in such a situation in order to ensure the survival of the community would itself be a threat to such survival. Admittedly, the community of Dayton Christian Schools, Inc. could have continued to believe that women with preschool children should stay home, even though the community could not fully act on that belief. As the Supreme Court periodically intones, freedom of belief is absolute, though freedom of action is not.<sup>59</sup> Nevertheless, the powerlessness of the school community to act on its belief would have seriously undermined its efforts to teach the

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55. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (regulations requiring Jaycees to admit women "may impair the ability of the original members to express only those views that brought them together" [that is, core concerns]).

56. See P. TILlich, LOVE, POWER, AND JUSTICE 92-93 (1960); Perry, *Constitutional Interpretation*, *supra* note 36, at 560.

57. See *Religion and the State*, *supra* note 39, at 1761:

[C]urrent judicial inquiries into the nature and existence of organizational belief threaten organizational interests in autonomy. Regardless of whether an organization's claim is based on the right of conscientious objection or on the right to autonomy, courts effectively strip the church of its power to define group belief, and hence the church's ability to determine its own development and membership.

See also Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1399 (1981).

58. See *supra* text accompanying notes 8-9.

59. See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion). See also *Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

importance of the belief to fundamentalist Christian living.<sup>60</sup> If the belief is not effectively transmitted to future generations, it will fade as a core concern of the community. The community that remains after government intervention will eventually differ materially from the community that predates the intervention. Although the earlier community remains physically intact, in a very real sense it will have ceased to exist.

An example of this paradox is found in the federal government's efforts to stamp out polygamy among the Mormons during the last century.<sup>61</sup> Nineteenth-century Mormonism was one of the many innovative and creative American religions that emerged from the second Great Awakening. Federal persecution of the Mormons began in the 1850s and focused on the practice of Mormon men marrying and living with two or more women at the same time. Polygamy had deep theological roots in Mormon beliefs about the after-life.<sup>62</sup> Belief in, and support of, the practice was perhaps the single most reliable indicator of the faithfulness of nineteenth-century Mormons.

Attempting to coerce the Mormons into abandoning polygamy, various Presidents dispatched federal troops to occupy the Utah Territory. Congress passed legislation which suspended civil and common law rights of Mormons, including the spousal privilege against testimony and the rights to vote and to serve on juries. Congress provided for the prosecution, conviction, and imprisonment of hundreds of Mormon men. Congress also refused to admit Utah into the Union as a state.<sup>63</sup> Finally, in 1890, the Supreme Court upheld earlier legislation which revoked the legal charter of the Mormon church and provided for the forfeiture of virtually all of its property to the federal government.<sup>64</sup> One year later, on the brink of financial ruin and legal oblivion, the Mormons capitulated and renounced polygamy. The Mormons then undertook to convince Congress that they were enough like other Americans that Utah could safely be admitted as a state.<sup>65</sup> Thus, Mormonism abandoned a central tenet of its faith and reoriented itself to

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60. See, e.g., *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 319 (5th Cir. 1977) (en banc) (concurring opinion), cert. denied, 434 U.S. 1063 (1978).

61. See generally L. ARRINGTON & D. BITTON, *THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS* 185-240 (1979).

62. See, e.g., *DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* § 132:28-39 (1981) [hereinafter *DOCTRINE AND COVENANTS*].

63. See, e.g., Morrill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862); Poland Act, ch. 469, 18 Stat. pt. 3 at 253 (1874); Edmunds Act, ch. 47, 22 Stat. 30 (1882). See also *Davis v. Beason*, 133 U.S. 333 (1890) (upholding Idaho territorial law prohibiting Mormons from voting, serving as jurors, or holding public office). See generally Driggs, *The Mormon Church-State Confrontation in Nineteenth-Century America*, J. CHURCH & ST. 273 (1988); Driggs, *The Prosecutions Begin: Defining Cohabitation in 1885*, 21 *DIALOGUE: A JOURNAL OF MORMON THOUGHT* 109 (Spring 1988).

64. *The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890) (upholding Morrill Anti-Bigamy Act).

65. See generally L. ARRINGTON & D. BITTON, *supra* note 61, at 230, 244-46.

conventional morality as the price of survival. A century later, Mormonism is known for its deference to secular authority, while its origins in theological experimentation have faded. In many respects, contemporary Mormonism bears little resemblance to the independent pioneer society from which it descended.<sup>66</sup>

Thus, there are two dimensions to the threat to group existence that inheres in government regulation of group membership: Whether the group will remain physically intact and, if so, what kind of group it will be. The group that refuses to change a core concern to comply with valid regulation may be liquidated and cease physically and legally to exist. The group that chooses to abandon a core concern in order to comply with regulation alters its definitional boundaries, thereby transforming itself into a different group.<sup>67</sup> In either event, the group has ceased to be, having been extinguished by the government's regulatory intervention.<sup>68</sup>

This problem was present in *Amos*, as well as in *Dayton Christian Schools*, though in subtler form, because *Amos* did not entail employment in an activity as obviously religious as that of the teacher in *Dayton Christian Schools*. The district court in *Amos* found that the Deseret Gym where the plaintiff worked was indistinguishable from health clubs and similar facilities operated by secular individuals and entities for profit, and that the plaintiff's specific duties at the gym were unquestionably secular.<sup>69</sup> Thus, in the court's view, core religious group concerns were not even implicated in the question whether the plaintiff should continue to work at the gym.

The district court opinion ignored the wide variety of ways in which the Mormon church's actions in dismissing the employee fit within the narratives and theology of the Mormon religion.<sup>70</sup> The church articulated a variety of reasons why it found it theologically im-

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66. For another example, see Ball, *Constitution, Court, Indian Tribes*, 1987 AM. BAR FOUND. RES. J. 1, which chronicles the use of American law and legal institutions as tools of cultural oppression against Native Americans. See generally Mauss, *Assimilation and Ambivalence: The Mormon Reaction to Americanization*, 22 DIALOGUE: A JOURNAL OF MORMON THOUGHT 30 (Spring 1989).

67. Cf. Perry, *Moral Knowledge, Moral Reasoning, Moral Relativism: A "Naturalist" Perspective*, 20 GA. L. REV. 995, 1034 (1986) [hereinafter Perry, *A Naturalist Perspective*] ("the identity of a tradition is . . . largely constituted by its fundamental beliefs. To revise any of those beliefs is, to that extent, to revise the tradition.").

68. See Cover, *supra* note 40, at 40-44; *Religion and the State*, *supra* note 39, at 1753.

69. *Amos*, 594 F. Supp. at 802.

70. For example, the gym represents a tangible expression by the church, backed by a significant commitment of resources, that proper physical health and exercise are integrally bound up with the ideal Mormon lifestyle. See *Amos*, 483 U.S. at 336 n.14; 594 F. Supp. at 800-01 n.15. Therefore, by refusing to allow the church to employ only firmly committed Mormons to operate the gym, the district court significantly interfered in the church's mode of expressing one aspect of the Mormon faith. Cf. Braiterman & Kelley, *When is Government Intervention Legitimate?*, in GOVERNMENT INTERVENTION, *supra* note 14, at 170, 190 ("How a religious body raises, invests and

portant to employ only committed members in its nonprofit activities.<sup>71</sup> Perhaps the most telling point involved the source of the funds that were used to pay the *Amos* employee's salary.

[S]ome of the money used to pay the salaries of [the Deseret Gym] employees comes directly from contributions by members of the Mormon Church. In spite of church policy, the district court has ordered the church to use its monies to pay salaries of *those who do not meet its standards*.<sup>72</sup>

Mormons understand and interpret the story of their founding as one of extraordinary personal sacrifice by early members in the face of violent persecution. Contemporary Mormons see the founding generations as having been willing to sacrifice their material possessions, their families, and even their lives, because of their belief that by doing so they were serving their church and their God.<sup>73</sup>

Contemporary Mormons continue to see their religion as a demanding one. One belief that is perceived as particularly difficult is the payment of tithing. This requires Mormons to donate ten percent of their annual income to the church in order to become and to remain temple-worthy. In the eyes of the church, to use tithing donations to support the economic livelihood of an unfaithful Mormon would dishonor both the sacrifice of those who pay tithing and the memory of the sacrifices of their pioneer forebears.<sup>74</sup>

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expends its funds cannot be divorced from its religious purpose, ministry and mission, and government cannot intervene in one without affecting the other.").

71. In its brief, the church stated:

First, the Church believes that people judge it by the actions and attitudes of its employees. The "fact that an individual is employed by the Church signifies to others that his actions are condoned by the Church." The Church also believes that "[a]ctive members of the Church . . . better understand and are more effective in carrying out the programs and purposes of the Church." Moreover, salaries paid to Church employees are obtained primarily from contributions from members of the Church donated to support Church activities. The Church believes that it should benefit members with employment possibilities in which these contributed funds are expended.

[E]mployment of the Church's own members is also consistent with the Church's doctrine of individual self-sufficiency.

Brief for Appellants at 4-5, *Amos*, 483 U.S. 327 (1987) (quoting district court record) (citations omitted).

72. *Id.* at 19 (emphasis added). See also *id.* at 4.

73. Because the importance of the pioneer experience is more religious than historical, Mormons tend to describe the accomplishments of the pioneers in uncritical, laudatory language. See, e.g., 7 HISTORY OF THE CHURCH 250-51 (Intro. by B. Roberts, 1974); *True to the Faith*, in HYMNS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 254 (1st ed. 1985). For critical examinations of the Mormon pioneer experience, see L. ARRINGTON, GREAT BASIN KINGDOM: AN ECONOMIC HISTORY OF THE LATTER-DAY SAINTS 1830-1900 (1958); L. ARRINGTON & D. BITTON, *supra* note 61; W. STEGNER, THE GATHERING OF ZION: THE STORY OF THE MORMON TRAIL (1981).

74. The payment of tithing is typically invoked by Mormon leaders as a litmus test of faithfulness to the church. See, e.g., JOSEPH F. SMITH, GOSPEL DOCTRINE 315-16, 324-27 (1938); Ballard, *Sacrifice and Self-Sufficiency*, THE ENSIGN, Nov. 1987, at 78; Kimball, *The Law of Tithing*,



Forcing the Mormon church to retain an unfaithful employee and to pay his salary with tithing funds would have undermined the sacrifice narrative that is so prominent both in Mormon history and in contemporary Mormon life. If the church community sought to reinterpret this narrative to accommodate the use of tithing to benefit the unfaithful, it would be forced to dilute and perhaps even to abandon the powerful concept that tithing is the sacred means by which Mormons build the Kingdom of God. The church's vision of itself as a people of sacrifice would fade into one of a people of prudence.

That the Mormon church might itself choose prudence over sacrifice is not constitutionally significant. That it should be forced to do so by the government is theological violence.<sup>75</sup> A religious group values not only its narratives and theology, but also the authority to interpret and to change its narratives and theology. Without this authority, a religious tradition stagnates into irrelevance. The narratives of a religious group demonstrate that the group has a past, but it is the group's institutional authority to interpret and reinterpret its past that gives the group a future.

When the government coerces a group to accept or to retain as a member a person whom the group would otherwise reject or expel, it blindly enters the religious domain. It arrogates to itself the power to define the boundaries of group membership—the greatest intrusion that the government can perpetrate against a group.<sup>76</sup> The group loses the authority to define and to control the terms of its own existence. In a very real sense, the group ceases to exist. The group's vision of itself, its ability freely to tell and retell its narrative story, is destroyed by the insistence on conformity to majoritarian values.<sup>77</sup>

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THE ENSIGN, Nov. 1980, at 77. Mormon theology ties the payment of tithing by Mormons directly to the sacrifices of the pioneers. See, e.g., DOCTRINE AND COVENANTS, *supra* note 62, § 119: 5-6:

Verily I say unto you, it shall come to pass that all those who gather unto the land of Zion shall be tithed of their surplus properties, and shall observe this law, or they shall not be found worthy to abide among you.

And I say unto you, if my people observe not this law, to keep it holy, and by this law sanctify the land of Zion unto me, that my statutes and my judgments may be kept thereon, that it may be most holy, behold, verily I say unto you, it shall not be a land of Zion unto you.

75. See Cover, *supra* note 40, at 44.

76. Roberts v. United States Jaycees, 468 U.S. 609, 622-23 (1984); Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878, 1881, 1902 (1984).

77. See R. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 142 (1984) ("When an institution that is voluntary in membership cannot define the conditions of belonging, that institution in fact ceases to exist."); Laycock, *supra* note 57, at 1391 ("[W]hen the state interferes with the autonomy of a church, and particularly when it interferes with the allocation of authority and influence within a church, it interferes with the very process of forming the religion as it will exist in the future."). See generally Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 339 (1986) [hereinafter Karst, *Cultural Identity*] ("Some constitutional recognition is also given to a cultural group's right to exclude

Accordingly, government intervention in religious group conflicts about membership threatens a vigorous and meaningful religious pluralism by restricting the number and diversity of groups. If carried to its ultimate conclusion, such intervention permits only religious groups whose core concerns do not differ materially from values held by the majority.<sup>78</sup> The social and individual values to be derived from pluralism are lost.

### III. THE PARADOX OF RELIGIOUS GROUPS IN MODERN AMERICA

Groups are important to individuals and to society for a variety of reasons. They protect individual freedom, they provide supportive contexts for the development of individuality, and they are a source of values for self-government. In the United States, religious groups have historically performed each of these functions, and are especially important because of the continuing commitment of large numbers of Americans to religious traditions.<sup>79</sup> Yet, the contributions of groups to society and to individuality entail their own costs. When these costs are considered in light of the theoretical and sociological biases against religion that inhere in liberal political theory and in contemporary public life, the positive contributions of religious groups to society and to individuals often are overlooked.

#### A. Groups and the Liberal State

The pluralism thesis prevalent in American political thought posits a large and diverse number of non-governmental groups interposed between the government and the individual as the best means of preserving individual autonomy.<sup>80</sup> According to conventional pluralist wisdom, these groups serve to insulate the otherwise powerless individual against the bureaucracy and coercion of the powerful modern state.<sup>81</sup>

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outsiders in order to maintain its own integrity."); Perry, *Constitutional Interpretation*, *supra* note 36, at 560 (describing how a community creates its traditions by interpreting its authoritative texts according to the demands of its own experiences).

78. Cf. *Bob Jones Univ. v. United States*, 461 U.S. 574, 609 (1983) (Powell, J., concurring):

[T]roubling to me is the element of conformity that appears to inform the Court's analysis. The Court asserts that an exempt organization must "demonstrably serve and be in harmony with the public interest," must have a purpose that comports with "the common community conscience," and must not act in a manner "affirmatively at odds with [the] declared position of the whole Government."

79. See *supra* notes 1 & 3 and accompanying text.

80. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 619, 622 (1984); Marshall, *supra* note 35, at 87-88.

81. See Frug, *supra* note 33, at 1121-22; e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1297 (2d ed. 1988) [hereinafter TRIBE, *CONSTITUTIONAL LAW*].

For example, the political role played by the Roman Catholic church in the Philippines and Poland dramatically demonstrates the extent to which a strong and assertive group can protect individual autonomy and identity from the repression of authoritarian and even totalitarian regimes.<sup>82</sup>

Groups also provide contexts for personal expression, development, and fulfillment.<sup>83</sup> An individual's definition and sense of self depends to a significant extent on the character of the recognition granted by others.<sup>84</sup> Thus, the groups to which an individual belongs are a significant influence on the development of personality, as well as a source of loyalty and solidarity.<sup>85</sup>

Finally, groups are sources of moral values and as such make a critical contribution to the democratic process. In liberal society, the government has no competence to determine moral ends.<sup>86</sup> In theory, at least, the goals of liberal democratic government must depend on the moral values held by those that it governs—values that originate outside of government in churches, families, political parties, trade unions, private schools, and other voluntary associations.<sup>87</sup> In the absence of these groups, government and society would be deprived of the enriching moral world-views that these groups contribute to American culture and politics.<sup>88</sup>

The existence of groups, however, is not an unqualified benefit to individuals or to society. Socially deviant group behavior threatens po-

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82. It is widely recognized that the institutional support and protection offered by the Catholic church to political dissenters in these countries have shielded them from much state retaliation. See, e.g., R. NEUHAUS, *supra* note 77, at 88; Diehl, *Church Schools Thrive in Poland: Children and Adults Learn How to Challenge Party Line*, Wash. Post, Nov. 13, 1986, at A1, col. 1; Moody, *God and Man in Manila*, TIME, Feb. 24, 1986, at 31; Zelenko, *The Catholic Church Is in the Middle*, 18 NAT'L J. 2889 (1986). See also Hughes, *Poland's Upheaval*, Christian Sci. Monitor, May 4, 1988, at 14; Mydans, *Bacolod Journal: Priests Are Targets As They Stand Up for Change*, N.Y. Times, May 23, 1987, § 1, at 4, col. 1.

83. R. NEUHAUS, *supra* note 77, at 92; Linder, *supra* note 76, at 1901; Note, *Reinterpreting the Religious Clauses*, *supra* note 38, at 1473. See also A. MACINTYRE, *supra* note 33, at 218; R. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 46-49 (1985).

84. H. GUNTRIP, *PSYCHOANALYTIC THEORY, THERAPY, AND THE SELF* 39-49, 95-109 (1971); A. MACINTYRE, *supra* note 33, at 33, 58; Karst, *Cultural Identity*, *supra* note 77, at 307-09.

85. E.g., R. NEUHAUS, *supra* note 77, at 55-56; see E. ERIKSON, *supra* note 38, at 277-78; Note, *Reinterpreting the Religious Clauses*, *supra* note 38, at 1473. For a general discussion of the influence of groups on the development of personality, see Gedicks & Hendrix, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579, 1600-02 (1987).

86. See generally R. BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL* 152 (1975); and *infra* text accompanying notes 261-64.

87. R. NEUHAUS, *supra* note 77, at 21, 60, 136; see *infra* notes 292-95 and accompanying text.

88. R. NEUHAUS, *supra* note 77, at 157; TRIBE, *CONSTITUTIONAL LAW*, *supra* note 81, at 1418-19.

litical and social stability.<sup>89</sup> Group solidarity may encourage individual defiance of law.<sup>90</sup> Moreover, the government may amend or repeal a disputed law when confronted with significant civil defiance, even if most citizens obey the law. Thus, when a group challenges governmental power to regulate its actions, it sows the seeds of lawlessness and instability. This is particularly troubling when the source of the government's power is majoritarian consensus. The group challenge may amount to the dictation or repeal of general law by a numerical minority.

Groups, moreover, are capable of imposing their own forms of repression on individuals. Though groups protect individual autonomy by challenging otherwise unmitigated governmental power, they also erode such autonomy by the manner in which they admit, control, and expel their members.<sup>91</sup> The core concerns that delineate the boundaries of group membership exclude from the benefits of group membership those who do not conform. Even those who consider themselves members of a group may find themselves expelled or ostracized because of failure to adhere to the group orthodoxy of beliefs and practices. The very church that champions individual freedom in the Philippines and Poland also is criticized for the unmodern restrictions that it imposes on its members with respect to abortion, birth control, divorce, pre-marital sex, and other aspects of contemporary life.<sup>92</sup> Because a significant portion of an individual's personality and identity often is tied to identification and interaction with a group, the threat of expulsion or disapproval from the group understandably exerts significant coercive pressure on individual choice.<sup>93</sup>

Thus, the individual autonomy that is enhanced by a vigorous group pluralism comes at the cost of threats to governmental stability and to the autonomy of those who do not conform to the norms of politically and socially important groups.<sup>94</sup> Accordingly, individuals experience increased freedom in a pluralistic society only to the extent

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89. See *TRIBE, CONSTITUTIONAL LAW*, *supra* note 81, at 1297 (noting that some take the position that "intermediate associations . . . weaken public authority. . ."); *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 *HARV. L. REV.* 983, 986 (1963) [hereinafter *Judicial Control of Private Associations*] ("private associations . . . compet[e] with the state and other groups for individual loyalties. . ."). See also Cover, *supra* note 40, at 46; Howe, *The Supreme Court, 1952 Term—Foreword: Political Theory and the Nature of Liberty*, 67 *HARV. L. REV.* 91, 91 (1953); Garet, *supra* note 39, at 1010.

90. See generally R. SMITH, *supra* note 83, at 188 (quoting & paraphrasing J. RAWLS, *A THEORY OF JUSTICE* 441-42, 450, 536, 544 (1971)).

91. Garet, *supra* note 39, at 1010, 1022, 1030-31, 1046-47. See generally *TRIBE, CONSTITUTIONAL LAW*, *supra* note 81, at 1297; Emerson, *supra* note 36, at 950-52.

92. See generally R. NEUHAUS, *supra* note 77, at 45.

93. See Note, *Reinterpreting the Religious Clauses*, *supra* note 38, at 1474.

94. Frug, *supra* note 33, at 1122; Garet, *supra* note 39, at 1052; Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFFALO L. REV.* 205, 211-12 (1979).

that their individuality is consistent with the behavioral norms dictated by the group or groups to which they belong or with which they otherwise identify themselves.

Despite their negative attributes, groups are a social necessity.<sup>95</sup> Some of our most cherished individual rights have their roots in group action.<sup>96</sup> Even group restrictions on individual freedom in the short run may be designed to enhance freedom in the long run. Many religious groups believe that the achievement of genuine human happiness lies in a life lived in conformity to certain demanding standards of personal belief and conduct. Thus, what may appear to be group coercion of individual choice may in actuality be the choice to find personal fulfillment in the manner that seems best to the individual. An individual's right to do this, of course, lies at the very heart of liberalism. For these reasons, even liberals agree that the continued existence of a large number of diverse and vigorous non-governmental groups in American society is valuable for safeguarding and enhancing individual autonomy.<sup>97</sup>

Consistent vindication of individual rights or government interests against group claims would eventually end in the elimination of socially idiosyncratic groups. The only groups left would be those that espouse beliefs and standards of conduct consistent with the individual rights and societal interests established by the majority. Obviously, individual autonomy is neither protected nor enhanced by a "pluralism" that only parrots the party line. In those cases in which the vindication of an individual right or societal interest would threaten the integrity, and thus the continued existence, of a group, the appropriate constitutional result is not self-evident.<sup>98</sup> The critical issue will always be how to pro-

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95. Some have described this as the fundamental contradiction of modern life. *E.g.*, Kennedy, *supra* note 94, at 211-12. See also Frug, *supra* note 33, at 1145; Macneil, *Bureaucracy, Liberalism, and Community—American Style*, 79 NW. U. L. REV. 900, 900 n.5 (1985). For a creative exploration of this contradiction in the context of a religious group, see Pepper, *The Case of the Human Sacrifice*, 23 ARIZ. L. REV. 897 (1981).

96. See *supra* text accompanying notes 81-88. See, *e.g.*, Linder, *supra* note 76, at 1887 ("[N]either political parties nor organized religion could flourish without association."). See generally *Judicial Control of Private Associations*, *supra* note 89, at 987-90.

97. See Macneil, *supra* note 95, at 945:

While in liberal *theory* the community value is anti-individualistic, it has always been recognized in liberal *practice* that protection of individualistic rights, whether against other individuals acting alone or in collectivities up to and including the state, can often be achieved only through communities other than the state itself.

(emphasis in original).

98. See Garet, *supra* note 39, at 1052-53:

If it happens that the granting of the group claim also satisfies the claims of individuality or personhood, this is not due to the production of individuality by groups, but to the ultimate common grounding of both individuality and groupness (and sociality) in the structure of the human. If it happens instead that the granting of the group claim obstructs the claims of individuality, then the tragedy is not a choice between immediate

tect important governmental interests and individual rights while still permitting a meaningful plurality of groups.

Unfortunately, liberalism generally ignores the social role of groups, and many of its theoretical variations simply leave groups unaccounted for.<sup>99</sup> The uncompromising duality of individual and state that is embodied in liberal political theory presupposes that these are the only relevant actors on the social and political stage.<sup>100</sup> In the American legal system, then, lawmakers, judges, and litigants are driven to characterize the claims of groups in terms of either individual rights or government interests.<sup>101</sup> Group claims are transformed into aggregations of individual rights or embodiments of government interests.<sup>102</sup>

However, many groups reject the more widely accepted and protected of individual rights and government interests, such as racial and sexual equality and procreational freedom. Many more groups that accept the legitimacy of such rights and interests nevertheless differ on their precise meaning, content, and importance.<sup>103</sup> If, as is often the case, the different values and interests reflected in group claims cannot be captured fully by a translation into the language of individual rights or government interests, those values and interests will be overlooked and even threatened by constitutional law.<sup>104</sup>

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and deferred (or specific and general) individuality, but rather a choice between distinct elements of the human good.

99. R. SMITH, *supra* note 83, at 46-49; see, e.g., Fiss, *Groups and the Equal Protection Clause*, 5 J. PHIL. & PUB. AFFAIRS 107, 171-72 (individual rights theories cannot account for the constitutional imperative of affirmative action).

100. A. MACINTYRE, *supra* note 33, at 34, 35; Garet, *supra* note 39, at 1013-14; see Kennedy, *supra* note 94, at 217; Linder, *supra* note 76, at 1881-82.

101. See, e.g., Macneil, *supra* note 95, at 946 ("the community value [currently is] disguised in such individualistic forms as individual liberty, the right of privacy, and property rights").

102. See *id.* at 913.

103. See generally Hafen, *Institutional Autonomy in Public, Private, and Church-Related Schools*, 3 NOTRE DAME J.L., ETHICS & PUB. POL'Y 405, 417, 419-22 (1988).

104. Garet, *supra* note 39, at 1012:

[T]he jurisprudence of constitutional rights [presupposes] that those rights must be individual rights, not group rights. . . . [I]ndividual and social values [are] the norms that animate constitutional rights . . . . [G]roups [are] outside of the ambit of those values. Rights are concerns for individuals and for society, rather than concerns for groups. . . . [I]ndividual and social values [also] account for governmental power to regulate and control groups. Thus, groups are doubly vulnerable; they are especially important targets of governmental regulation, and they are conspicuously missing from the coverage of fundamental rights.

See also *id.* at 1015, 1049.

*B. Religion, Liberalism, and Modernism*

The rather uncertain protection accorded to groups by the liberal state becomes more precarious when the groups are religious. This is partly the legacy of the early liberal theorists. The early liberals were highly suspicious of collective action in general.<sup>105</sup> Having been traumatized by the religious violence of the post-Reformation wars, they remained deeply suspicious of the politically destabilizing potential of collective religious action in particular.<sup>106</sup> Locke, for example, sought to make religious values purely private matters of conscience. He further argued that reason alone was the measure of the validity of religious revelation.<sup>107</sup> This suspicion of the religious collective was shared by many of the American founders, in particular Madison and Jefferson, who exhibited a persistent concern with the problem of religious strife.<sup>108</sup>

As American society modernized and became technologically sophisticated, the influence of religious institutions and organizations in American public culture declined, turning the American cultural elite away from religious ways of understanding reality.<sup>109</sup> Currently, some of our most powerful and influential cultural organs, such as public education, the national print, and the electronic media, often fail to acknowledge the considerable social and cultural relevance of religious institutions and religious individuals.<sup>110</sup> The resurgence of both liberal and conservative religion into politics during the last generation continues to be the subject of heated and polemical debate.<sup>111</sup> Many believe that religion is only the private concern of individuals and is dangerous and threatening when manifested in public life.<sup>112</sup>

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105. *Id.* at 1010, 1062; Howe, *supra* note 89, at 91-92.

106. R. NEUHAUS, *supra* note 77, at 8, 156; R. SMITH, *supra* note 83, at 3, 18 *passim*.

107. R. SMITH, *supra* note 83, at 20-21, 38 (discussing J. LOCKE, *ESSAY CONCERNING HUMAN UNDERSTANDING* 43, 45, 688-96 (P. Nidditch ed. 1975)).

108. R. SMITH, *supra* note 83, at 19. See also Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 B.Y.U. L. REV. 371, 383, 386-87.

109. Roger Hendrix and I have discussed and criticized this phenomenon at length in Gedicks & Hendrix, *supra* note 85, at 1582-94, 1603-10. See also Anastaplo, *supra* note 50, at 111-12.

110. Gedicks & Hendrix, *supra* note 85, at 1580-82 & nn. 7-10 & 13-14.

111. See, e.g., F. CONWAY & J. SIEGELMAN, *HOLY TERROR: THE FUNDAMENTALIST WAR ON AMERICA'S FREEDOMS IN RELIGION, POLITICS AND OUR PRIVATE LIVES* (1982); G. EVANS & C. SINGER, *THE CHURCH AND THE SWORD: HOW THE CHURCHES AND PEACE MOVEMENT ARE STORMING AMERICA—AND WHAT YOU CAN DO ABOUT IT* (rev. ed. 1983).

112. See Kelley, *supra* note 14, at 3:

There was a time not long ago when many people used the phrase "Separation of Church and State" to mean "Stop the Catholic Church." Some still use the phrase to mean "Keep (all) the churches in their place," and that "place" is thought by them to be the sanctuary, the cloister, and the sacristy.

See also Anastaplo, *supra* note 50, at 106-07; Braiterman & Kelley, *supra* note 70, at 189.

These attributes of American history and culture have had their effect on the Supreme Court's attitude toward religious groups. The constitutional law of religious freedom usually focuses on religious beliefs as private matters of conscience.<sup>113</sup> Analysis of religion clause issues against the backdrop of contemporary individual-rights-oriented constitutional jurisprudence understandably sharpens the focus on religion as an aspect of personal privacy rather than public community.<sup>114</sup>

Accordingly, when the Court acts under the first amendment to protect the private religious conduct of individuals, it refers explicitly to freedom of religious conscience as a justification.<sup>115</sup> In contrast, when the Court passes on manifestations of public religion, it often protects religion by reference to a non-religious justification.<sup>116</sup> In other words, religion in this latter context is not protected as religion, but as more generalized speech and expression. At times, the Court is at pains to persuade that what clearly seems to be religion is really not religion at all or, at least, is barely so.<sup>117</sup> Religion is consistently protected under

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113. See, e.g., *Aguilar v. Felton*, 473 U.S. 402, 414 (1985); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 382-83 (1985); *Lemon v. Kurtzman*, 403 U.S. 602, 622-23 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664, 694-95 (1970) (Harlan, J., concurring). See generally Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777, 789 (1986).

114. See Kelley, *supra* note 14, at 9:

[T]he civil libertarian's solicitude for religious liberty is made uneasy if two or more persons gathered together seek to exercise their religious liberty in concert, and if they do so as a church, the civil libertarian becomes positively apprehensive and his or her solicitation for the "free exercise of religion" tends to be replaced by intense anxieties about "establishment." Thus the collective free exercise of religion by believers joined together in organization has enjoyed a somewhat more limited recognition in American church and state law and a distinctly suspicious reception in less reflective circles.

(emphasis in original).

See also Hafen, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 701-04 (discussing historical trend in Western culture away from communitarian norms and toward individual norms).

115. See, e.g., *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1966). But see *Braunfeld v. Brown*, 366 U.S. 599 (1961).

116. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). See generally Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983).

117. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983). See also R. NEUHAUS, *supra* note 77, at 80:

[T]he [Supreme] Court's references to religion [have] had less and less to do with what is usually meant by religion. That is, religion no longer refers to those communal traditions of ultimate beliefs and practices ordinarily called religion. Religion, in the court's meaning, became radically individualized and privatized. . . . Thus religion is no longer a matter of content but of sincerity. It is no longer a matter of communal values but of individual conviction. In short, it is no longer a public reality and therefore cannot interfere with public business.

See generally Bradley, *Dogmatomachy—A Privatization Theory of the Religion Clause Cases*, 30 ST. LOUIS U. L.J. 275 (1986); Lupu, *Keeping the Faith: Religion, Equality, and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739 (1986); Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83.



the first amendment *as religion* only when it is private. Public religion is also protected, but to a lesser degree and often only when it can be characterized as something else.

In sum, religious groups suffer from a dual disability when they seek constitutional protection from regulation by the modern liberal state. First, groups in general threaten governmental stability and exert coercive pressure on the autonomy of members whose individuality is not fully consistent with group norms. The threat to both stability and autonomy strikes at the foundation of liberal political theory. Second, religious groups seek this protection in the context of a modern scientific society that generally does not value the transcendent world views and intuitive knowledge of reality that are offered by religion.<sup>118</sup> This dual disability exerts pressure in the direction of less constitutional protection for the interests of religious groups than for those of individuals or government.

#### IV. RELIGIOUS GROUP PROTECTION IN CONSTITUTIONAL LAW

Despite the dominance of individual rights theories in American constitutional law, the first amendment freedom of association affords some protection against government intrusion on the membership decisions of religious groups. Certain Supreme Court decisions under the religion clauses have also granted a measure of constitutional protection to religious groups. However, neither associational freedom nor free exercise currently offer religious groups a constitutional shelter that is sufficiently broad to cover the religious group's interest in self-definition.

##### *A. Freedom of Association and Freedom of Expression*

###### 1. INSTRUMENTAL ASSOCIATION

The constitutional freedom of association was originally conceived of instrumentally, as an ancillary right necessary to make the dominant first amendment guarantees of freedom of speech and of the press both possible and meaningful.<sup>119</sup> The right to associate for political advocacy, litigation, or religious proselytizing is constitutionally protected

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118. This second disability is exacerbated by the establishment clause, which generally prohibits government from advocating or promoting religious beliefs or experiences. Strict interpretations of the clause suggest that government should be prohibited from being associated or identified with even generalized religious beliefs or experiences. *See generally* Gedicks, *Motivation, Rationality, and Secular Purpose in Establishment Clause Review*, 1985 ARIZ. ST. L.J. 677.

119. *See* NAACP v. Alabama, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces

because group action is necessary in order to make one's views heard in the mythical marketplace of ideas.<sup>120</sup>

Freedom of association has been held to encompass the right of group members to define the criteria of group membership, because the selection of members will influence the content of the expression advanced by the group.<sup>121</sup> Thus, freedom of association also must imply a freedom of disassociation, which grants to individuals not only the right to engage in group action to advance particular ideas, but also the right to disassociate themselves and the group from ideas that they find repugnant.<sup>122</sup>

Those religious groups for whom advocacy of certain religious ideals or ways of life is a defining characteristic of membership are well protected by instrumental freedom of association. Dayton Christian Schools, Inc., for example, exists to provide primary and secondary education in a fundamentalist Christian context.<sup>123</sup> More specifically, those associated with the school intend that it act as a powerful vehicle for transferring and inculcating fundamentalist values to and in the children who attend the school.<sup>124</sup> For precisely that reason, the school employs teachers who are capable not only of effectively teaching secular subjects, but who also can integrate the teaching of those subjects with fundamentalist values.<sup>125</sup> It follows that teachers at the school must themselves exemplify the fundamentalist lifestyle. Because one of the values espoused by the school is that women with young children should not work outside their homes, instrumental freedom of association provides a powerful justification, apart from free exercise of religion, for permitting the school to discriminate against working women with small children. Forcing the school to hire such women, or to retain them as employees, drastically interferes with the school's advocacy function; it prevents the school from disassociating itself from a social practice that it finds worldly and sinful, and from effectively conveying the fundamentalist alternative as a realistic way of life.

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freedom of speech."); *see also* *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984); *TRIBE, CONSTITUTIONAL LAW*, *supra* note 81, at 1013-14; *Marshall, supra* note 35, at 80.

120. *E.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); *see, e.g.*, *NAACP v. Button*, 371 U.S. 415, 429-31 (1963); *Buckley v. Valeo*, 424 U.S. 1, 21 (1976).

121. *Roberts*, 468 U.S. at 623; *see, e.g.*, *Button*, 371 U.S. at 420 (upholding NAACP rule that members of its legal staff must agree to abide by policies that delineate the kinds of litigation the NAACP will assist).

122. *Roberts*, 468 U.S. at 623; *Abood*, 431 U.S. at 234-35; *see West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634, 642; *id.* at 645 (Murphy, J., concurring).

123. *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 766 F.2d 932, 936 (6th Cir. 1985).

124. *Id.* at 936-37.

125. *Id.*

In *Amos*, on the other hand, although the Deseret Gym can be described as an aspirational expression of the importance of physical health and exercise to the Mormon faith,<sup>126</sup> it nevertheless is a considerable stretch to argue that the gym's principal purpose is to "advocate" physical health and well-being in the first amendment sense. The gym does not have a political, proselytizing, or teaching function, and it is not connected in any way to expressive litigation. Even if one is persuaded that the gym does constitute first amendment advocacy, it is difficult to discern how that advocacy is disrupted when the custodial supervisor is not a temple-worthy Mormon. Almost none of the ethical and behavioral standards that a Mormon must adhere to in order to participate in temple worship have anything to do with physical health.<sup>127</sup> So long as an employee's religious and other beliefs and conduct are not obviously inconsistent with good health and proper exercise, it would seem that advocacy of such goals is unaffected even if the employee is not a Mormon at all.

The difficulty in *Amos* is that a religious group advocates its historical and theological narratives, if at all, only in its proselytizing mode. Clearly, if the plaintiff had been a missionary or an employee directly involved in the Church's missionary effort, instrumental association would have provided a constitutional justification for termination. Without such a connection to proselytizing, however, instrumental association generally has no protection to offer religious groups. The facts of *Amos*, therefore, illustrate how the spiritual beliefs of a religious community may be seriously disrupted without triggering the constitutional protections of instrumental association.<sup>128</sup>

Under this instrumental analysis, a religious group right to autonomy in choosing members is not an independent constitutional good. The group interest in self-definition is protected by the instrumental mode of freedom of association only to the extent that a governmentally coerced change would alter ideas that the group advocates in the first amendment marketplace.<sup>129</sup> Thus, religious groups that are not centrally concerned with advocacy, or whose advocacy is not obviously

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126. See *supra* note 70 and accompanying text.

127. The only health-related standard is compliance with the "Word of Wisdom," which Mormons narrowly interpret in this context as requiring abstention from the consumption or use of coffee, tea, alcohol, tobacco, or illicit drugs. See, e.g., B. McCONKIE, MORMON DOCTRINE 845 (2d ed. 1966) (interpreting DOCTRINE AND COVENANTS, *supra* note 62, § 89).

128. See *supra* text accompanying notes 70-78.

129. For this reason the Jaycees group in *Roberts* tried to portray itself as significantly involved in first amendment advocacy based on its filing of amicus briefs and otherwise participating in litigation that it deemed important. The Court, however, found that this expression was only peripheral to the core concerns of the Jaycees and therefore held that the group was not an expressive association entitled to constitutional protection. *Roberts*, 468 U.S. at 626-27.

affected by government regulation, are not protected.<sup>130</sup> As Professor Tribe has suggested, one should not look to instrumental association for substantial protection of the self-definitional interest of religious groups.<sup>131</sup>

## 2. INTIMATE ASSOCIATION AND THE RIGHT OF PRIVACY

Not long after its initial explication of the freedom of association doctrine, the Supreme Court discovered the constitutional right of privacy in the shadows of the Bill of Rights.<sup>132</sup> This right has come to mean that certain decisions and actions relating to one's sexual and family relationships are insulated from governmental scrutiny unless exceptional circumstances exist. Thus, the government cannot interfere in a woman's right to choose abortion over childbirth until the fetus reaches viability.<sup>133</sup> Likewise, the government cannot interfere in one's decisions about whom to marry,<sup>134</sup> whether to use contraceptives,<sup>135</sup> whether to live as an extended family,<sup>136</sup> or how to educate one's children,<sup>137</sup> unless some extraordinarily important government goal that otherwise could not be effectuated is demonstrated.

The idea that animates the privacy cases is not one of instrumentalism, by which privacy would be only a right ancillary to the exercise of other constitutional rights. Rather, the idea animating the privacy cases is respect for the right to privacy as an end in itself.<sup>138</sup> Privacy is a

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130. Although the cases rarely speak in terms of associational freedom, lower courts generally have assumed that religious groups are not constitutionally entitled to relief from generally applicable law unless the law adversely impacts their religious teaching or proselytizing functions. See, e.g., *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 386-87 (1st Cir. 1985), *vacated on reh'g en banc*, 793 F.2d 398, 398-99 (1st Cir. 1986) (denying by equally divided court enforcement of NLRB order), *incorporated by reference into dissent from denial of enforcement*, 793 F.2d 403, 403 (1st Cir. 1986); *NLRB v. Salvation Army of Mass. Dorchester Day Care*, 763 F.2d 1, 6 (1st Cir. 1985); *King's Garden, Inc. v. FCC*, 498 F.2d 51, 55 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974).

131. TRIBE, *CONSTITUTIONAL LAW*, *supra* note 81, at 701, observes that believers in the pluralistic thesis "will find little comfort in the freedom of association as it has evolved under the umbrella of the First Amendment." *Amos* illustrates that freedom of association in its instrumental mode protects religious groups from government intrusion into their membership decisions only when the group members plausibly can be characterized as exercising independently protected constitutional rights of speech and expression.

132. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

133. *Roe v. Wade*, 410 U.S. 113 (1973).

134. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

135. See, e.g., *Griswold*, 381 U.S. at 479; *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

136. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

137. See, e.g., *Yoder v. Wisconsin*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

138. Kenneth Karst and others see the right to privacy as a commitment by the Supreme Court to the sanctity of individual autonomy and personhood as a general principle of constitutional law. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980) [hereinafter Karst,

constitutional right, not because the exercise of other constitutional rights is impossible or meaningless without it, but rather because autonomy and kinship are impossible or meaningless without it.<sup>139</sup> The privacy cases recognize that there are certain foundational human relationships that are irreducible structures of existence.<sup>140</sup> Modern life without these relationships would be unimaginable,<sup>141</sup> and the relationships themselves cannot coherently be subdivided into constituent parts any more than one could subdivide a human being.<sup>142</sup> It follows that participants in these foundational relationships are generally entitled to order the relationships as they see fit without governmental intrusion, even when the choices made or conditions imposed on each

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*Intimate Association*]; see also *Bowers v. Hardwick*, 478 U.S. 186, 204-05 (1986) (Blackmun, J., dissenting); *Griswold*, 381 U.S. at 486; Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1 (1980). Others, however, see privacy as equally concerned with protecting marriage and kinship as indispensable structures of Western society. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983) [hereinafter Hafen, *Marriage, Kinship, and Privacy*]. Bruce Hafen, for example, puts privacy among the liberties protected by the due process clauses of the fifth and fourteenth amendments, rather than as an independent source of constitutional protection. *Id.* at 520. The former commentators look to Justice Douglas's opinion in *Griswold* for inspiration; the latter to Justice Harlan's concurrence. Compare *Griswold*, 381 U.S. at 479 (opinion by Douglas, J.) with *id.* at 500 (Harlan, J., concurring), incorporating by reference *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting).

139. See *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984); *Thornburgh v. American Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 771-72 (1986).

140. See, e.g., *Moore*, 431 U.S. at 503-04 (plurality opinion) ("the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in our nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888) ("[Marriage] is the foundation of the family and of society, without which there could be neither civilization nor progress."). See also Hafen, *Marriage, Kinship, and Privacy*, *supra* note 138, at 569-72; Karst, *Intimate Association*, *supra* note 138, at 640.

141. The unthinkable prospect of life without protection from government intrusion into marital sex is the source of much of the rhetorical force of the *Griswold* opinions. The majority argued: "Would we allow the police to search the sacred precincts of marital bedrooms for tell tale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." *Griswold*, 381 U.S. at 485-86. Justice Goldberg in concurrence stated:

Although the Constitution does not speak in so many words of the right to privacy in marriage, I cannot believe that it offers those fundamental rights no protection. . . . While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include [such] protection. . . .

*Id.* at 495-97; see also *Ullman*, 367 U.S. at 552 (Harlan, J., dissenting) ("Of this whole 'private realm of family life' [that is constitutionally protected] it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations.").

142. Karst, *Intimate Association*, *supra* note 138, at 635, 640; cf. Hafen, *Marriage, Kinship, and Privacy*, *supra* note 138, at 569 (quoting H. MAINE, *ANCIENT LAW* 163 (1st Am. ed. 1870) ("the unit of an ancient society was the Family. . . .")).

other are inconsistent and even repugnant to conventional morality.<sup>143</sup> Privacy in such relationships is a foundational constituent of both personhood and society, and thus protected by the Constitution.<sup>144</sup>

Of course, one can argue with some force that association with others is also a primal element of human existence. This was not, however, the rationale of the early association cases. Those cases saw freedom of association as a second order constitutional right, one dimension removed from existential questions of personhood. Though freedom of association is necessary for full realization of freedom of expression, it is expression, not association, that is presumed to be the constitutive element of human existence.<sup>145</sup>

In *Roberts v. United States Jaycees*,<sup>146</sup> the Supreme Court unified the theoretical underpinnings of association and privacy. In addition to reaffirming freedom of association in its traditional instrumental mode, labeled "extrinsic association" in *Roberts*, the Court also identified privacy as a non-instrumental dimension to associational freedom.

[B]ecause the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the state. . . .

[C]ertain 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.<sup>147</sup>

Freedom of association in this mode, "intrinsic association," is a constitutional good in and of itself, irrespective of whether it promotes or protects the exercise of other constitutional rights.<sup>148</sup> Although the Court cited almost exclusively to the constitutional privacy cases in sketching the contours of intrinsic association,<sup>149</sup> perhaps the most significant aspect of *Roberts* is its clear signal that more than sexual and

143. See *Bowers*, 478 U.S. at 206, 210-11 (Blackmun, J., dissenting); Karst, *Intimate Association*, *supra* note 138, at 627, 635. Bruce Hafen takes issue with such a broad articulation of the right to privacy, arguing that many of the Supreme Court's privacy opinions actually protect conventional morality, contrary appearances notwithstanding. Hafen, *Marriage, Kinship, and Privacy*, *supra* note 138, at 519-24. Similarly, William Marshall suggests that *Bowers*, which held that homosexual relationships are not constitutionally protected, renders the existence of a broad right to intimate association problematic. Marshall, *supra* note 35, at 81.

144. Numerous commentators have suggested that groups are a constitutive element of human existence. See, e.g., Garet, *supra* note 39, at 1070; Macneil, *supra* note 95, at 934, 937; Marshall, *supra* note 35, at 86. See also Cover, *supra* note 40, at 32 n.94.

145. See *supra* text accompanying notes 119-30. One commentator has argued that expression is itself only an instrumental freedom. See Emerson, *supra* note 36, at 907.

146. 468 U.S. 609 (1984).

147. *Id.* at 618-19 (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

148. See *Roberts*, 468 U.S. at 617-18.

149. See *id.* at 618-19.

family relationships may be constitutionally protected as intrinsic associations.<sup>150</sup> After *Roberts*, groups constitutionally unprotected under the instrumental association cases might now be protected as intrinsic associations.

The determination whether a religious group constitutes extrinsic or intrinsic association is critical, for it controls the extent to which the group's self-definitional interest is protected. The core group concerns of extrinsic associations are insulated from government attack only to the extent that their alteration materially changes the character of any expression that the group advocates in the marketplace of ideas. Groups whose core concerns do not include the advocacy of ideas are not constitutionally protected as extrinsic associations. Accordingly, only expressive religious groups such as parochial schools and lobbying groups are likely to be protected as extrinsic associations. By contrast, the core group concerns of intrinsic associations are always protected because of the existential, as opposed to instrumental, justification for intrinsic association.

The *Roberts* Court articulated three factors that guide the determination whether a relationship is constitutionally protected as an intrinsic association: (1) a relatively small number of parties to the relationship; (2) a high degree of selectivity in the organization and maintenance of the relationship; and (3) the seclusion of the relationship from others.<sup>151</sup> The Court went on to hold that the Jaycees was not an intrinsic association because its local chapters are relatively large, the benefits offered by membership are generally applicable business skills, and membership criteria are unselective.<sup>152</sup>

In light of *Roberts*, religious groups will probably not receive significant protection as intrinsic associations. Although denominational American churches, for example, exercise religious selectivity in organizing and maintaining themselves, as well as in accepting and retaining members, they are generally rather large, even at the grassroots parish or congregational level. With isolated exceptions, these churches do not exclude interested nonmembers from their worship services or most other activities. Likewise, religious schools and colleges, though sometimes religiously selective in administration, admissions, and faculty, are relatively large and very public in what they do. Indeed, one of the ironies of *Roberts* is that the more open, flexible, and accepting a religious group is about the participation of nonmembers in its activities,

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150. *Id.* at 620 (dictum). See also Marshall, *supra* note 35, at 80-81.

151. *Roberts*, 468 U.S. at 620.

152. *Id.* at 621. See also Linder, *supra* note 76, at 1882, 1885, 1901.

the less selective and secluded it becomes and the less likely it is to receive protection as an intrinsic association.<sup>153</sup>

Given the precedential roots of intrinsic association in cases involving attempted government regulation of sexual and family relationships, it would seem that *religious* groups of any size are simply not what the *Roberts* Court had in mind.<sup>154</sup> Accordingly, only those isolated sub-relationships within religious groups that involve few people and are both highly selective and generally private are likely to receive any protection under the right of intrinsic association.

In sum, religious groups often will find themselves completely outside the protection afforded by freedom of association because they are neither extrinsic associations whose expressive concerns are threatened by governmental regulation, nor intrinsic associations whose intimacy is protected by the right to privacy. Indeed, one of the unsettling lessons of *Roberts* is that a non-advocacy group that is private in the sense that it is not a governmental actor and receives no government funds or other assistance may nevertheless find itself unprotected from government regulatory intrusion if it appeals to a public constituency.

### *B. Free Exercise of Religion*

Government and the courts are aware, and to some extent are even sensitive, to the threats to religious pluralism that inhere in governmental regulation of religious groups. This is evident in both the nature of that regulation and the development of constitutional protection for religion under the free exercise clause. Legislative and judicial exemp-

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153. *E.g.*, *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 386 (1st Cir. 1985) (university owned, controlled, and operated by Dominican order held not to be a religious operation because it imposed few religious standards on faculty, students, or administrators), *vacated by equally divided court on reh'g en banc*, 793 F.2d 398, 398-99 (1st Cir. 1985); *NLRB v. Salvation Army of Mass.*, 763 F.2d 1, 2, 5 (1st Cir. 1985) (church-owned preschool that admitted children and hired staff without regard to creed, gave no religious instruction, and imposed no religious conditions to employment, held not to be a religious operation despite church's belief that providing such services was a religious imperative); *Denver Post of the Nat'l Soc'y of the Volunteers of Am. v. NLRB*, 732 F.2d 769, 773 (10th Cir. 1984) (religious group's programs not entitled to constitutional protection even though programs have religious objectives, because programs are not "pervasively religious"). See *Linder*, *supra* note 76, at 1886; *cf.* *Runyon v. McCrary*, 427 U.S. 160 (1976) (private school that appealed to a public constituency in commercial advertising properly subject to federal anti-discrimination laws).

154. See, *e.g.*, *Roberts*, 468 U.S. at 619-20 ("Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctive personal aspects of one's life."); *cf.* *Runyon*, 427 U.S. at 189 (Powell, J., concurring) ("choices . . . that are 'private' in the sense that they are not part of a commercial relationship offered generally or widely, and that reflect the selectivity exercised by an individual entering into a personal relationship, certainly were never intended to be restricted by the 19th century Civil Rights Acts"). See generally *Marshall*, *supra* note 35, at 82.



tion of certain kinds of religious conduct from generally applicable legislation is common.<sup>155</sup> Moreover, the Supreme Court's decisions under the free exercise clause often find such exemptions to be constitutionally required, since under its holdings government may prohibit or burden religiously based action only when the prohibition or burden is "necessary" to vindicate a "compelling" state interest.<sup>156</sup> The overwhelming majority of these cases, however, have involved individual conduct; only a few have dealt with religious groups that sought relief as groups from generally applicable government action.

In *Wisconsin v. Yoder*,<sup>157</sup> the Court held that the Old Order Amish were constitutionally entitled to an exemption from certain compulsory schooling laws. The rationale articulated by the Court was that the Amish provided their children with the functional equivalent of a vocational education in agriculture, and failure to exempt the Amish would result in the eventual destruction of their culture. Thus, the state's admittedly compelling interest in providing for the education of its citizens apparently was outweighed in the constitutional balance by the claim of the Amish to the preservation and integrity of their religious culture.

Chief Justice Burger's opinion exudes an unmistakable admiration for the Amish lifestyle, praising their industry and self-reliance as being in the best traditions of American capitalism and the Protestant ethic.<sup>158</sup> Accordingly, *Yoder*, although an interesting case, is not thought to be doctrinally significant, especially since the Amish are a numerically insignificant group in relation to almost every aspect of American life. At most, the case means that socially marginal religious groups whose practices are not fundamentally inconsistent with those of the majority are constitutionally entitled to exemptions from burdensome legislation.<sup>159</sup>

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155. See, e.g., *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); Civil Rights Act of 1964, § 702, 42 U.S.C. § 2000e-1 (1982).

156. See, e.g., *United States v. Lee*, 455 U.S. 252, 257-58 (1982); *Yoder*, 406 U.S. at 221; *Sherbert*, 374 U.S. at 403-04, 407; *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 304, 306 (1940). See generally *TRIBE, CONSTITUTIONAL LAW*, *supra* note 81, at 1252-53.

157. 406 U.S. 205 (1972).

158. *Id.* at 222, 224-26.

159. See *Bradley*, *supra* note 117, at 292. See also *Lee*, 455 U.S. at 252. *Yoder* is consistent with Donald Gianella's observation that, in evaluating free exercise problems, the Court "has followed a course that ultimately intimates a judicial approval of established orthodox values." Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part I: The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1385 (1967). See also R. SMITH, *supra* note 83, at 88 (the due process clause protects only "conventional" behavior and "reasonable" expectations).

A decade later in *Bob Jones University v. United States*,<sup>160</sup> the Court held by an eight-to-one margin that certain racially discriminatory practices by a fundamentalist Protestant bible college justified revocation of its federal tax exemption by the Internal Revenue Service, notwithstanding district court findings that the school's commitment to the practices was both sincere and religiously based.<sup>161</sup> In the words of the Court, "the Government has a fundamental, overriding interest in eradicating racial discrimination [that] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."<sup>162</sup>

After a civil war, three constitutional amendments, and persistent racial tension and strife, the elimination of racial discrimination surely counts as a compelling government interest in constitutional law. Perhaps even preferred rights like the free exercise of religion should be overridden by the objective of eliminating race discrimination, at least when, as in *Bob Jones*, the government action does not prohibit outright the exercise of a religious belief, but only makes it more expensive.<sup>163</sup> Yet the *Bob Jones* Court did not explain the apparently contrary result in *Yoder*, in which the state's compelling interest in compulsory education was held not to override the free exercise rights of the Amish. *Bob Jones* thus confirmed the marginality of the *Yoder* decision. A free exercise decision protecting Bob Jones University's tax exemption despite that institution's discriminatory practices would have had a far broader reach than did the exemption granted the Amish in *Yoder*. The political and social cost of such a holding in *Bob Jones* was just too high.

After *Yoder* and *Bob Jones*, it was not clear that the free exercise clause afforded religious groups any significant constitutional protection from burdensome governmental action. The protection that might have been rooted in a broad reading of *Yoder* was cut short by the apparent message of *Bob Jones* that religious group autonomy interests do not outweigh the government's interest in implementing important social goals that affect wide segments of society.

Another line of religion clause cases has involved disputes among members of religious congregations and hierarchies. Although at the level of the Supreme Court, these cases have most often involved con-

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160. 461 U.S. 574 (1983).

161. *Id.* at 580-81, 584, 595, 602 n.28.

162. *Id.* at 604.

163. See *supra* note 4 and text accompanying note 156.

troversies over title to church property,<sup>164</sup> they also have included disputes over ecclesiastical office and church hiring decisions.<sup>165</sup>

In the typical fact scenario of these cases, a church divides itself into two or more theologically inconsistent factions over a doctrinal or other disagreement. At some point it becomes clear that the factions cannot or will not reconcile within the boundaries of existing church beliefs and practices, and that the dispute must resolve itself by the creation of a separate church for each faction. A new dispute then arises over which faction is entitled to the property and offices of the pre-existing church. Both factions, of course, claim to be the "true" church and, therefore, the rightful custodians. The faction that does not possess or otherwise control the property or the offices generally brings suit requesting judicial determination of their legal status.<sup>166</sup>

The Court has developed a religion clause analogue to the political question doctrine that disposes of many of these cases. To the extent that the resolution of this kind of litigation depends upon interpretation of religious doctrine, the Court defers to the interpretation advanced by the church's internal governing structure.<sup>167</sup> If no such interpretation is forthcoming, the Court generally must abstain from adjudicating the case rather than rendering the interpretation itself, because theological and ecclesiastical questions are not justiciable.<sup>168</sup> However, there is an important exception to this doctrine. If the Court determines that it can resolve the case according to "neutral legal principles" without resort to interpretation of religious doctrine, it need not pay any attention to the church's interpretation of relevant religious doctrine or other theological commands.<sup>169</sup>

The rationale for the church property cases is that judicial resolution of theological or ecclesiastical disputes, even when necessary to resolve litigation, would impermissibly entangle the government in the affairs of religion.<sup>170</sup> Because the prohibition on church-state entanglement is thought to protect religion from the state,<sup>171</sup> as well as the state from religion, the cases are filled with language about the constitutional

164. See *Jones v. Wolf*, 443 U.S. 595 (1979); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

165. See *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Gonzalez v. Archbishop*, 280 U.S. 1 (1929).

166. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 1089 (3d ed. 1986) [hereinafter NOWAK, ROTUNDA & YOUNG].

167. *Presbyterian Church*, 393 U.S. at 450-51; *Serbian Eastern Orthodox Diocese*, 426 U.S. at 713, 720-21, 724-25; *Gonzalez*, 280 U.S. at 18; *Watson*, 80 U.S. at 725, 727, 730.

168. See generally *TRIBE*, *CONSTITUTIONAL LAW*, *supra* note 81, at 1231.

169. *Wolf*, 443 U.S. at 601. See generally NOWAK, ROTUNDA & YOUNG, *supra* note 166, at 1089, 1092.

170. *Wolf*, 443 U.S. at 603, 604.

171. See generally *TRIBE*, *CONSTITUTIONAL LAW*, *supra* note 81, at 1226-37 *passim*.

value of church autonomy.<sup>172</sup> However, this line of cases has at least as much to do with judicial competence as church autonomy.<sup>173</sup> After all, when religiously neutral legal doctrine suggests a resolution, church autonomy is irrelevant, and the Court may resolve the dispute in a way that ignores and even contradicts the result that would have been indicated by deference to church polity.<sup>174</sup>

Nevertheless, the autonomy rhetoric of these cases is not empty. For example, in *Kedroff v. Saint Nicholas Cathedral*,<sup>175</sup> the Court faced a dispute over control of valuable real estate owned by the Russian Orthodox church in New York City. Following the October Revolution of 1917, the Soviet government had obtained effective control over the governing hierarchy of the central church administration, which is located in Moscow. Understandably upset that their church and its property were now controlled by "godless communists," the members of the North American diocese of the church prevailed upon the New York legislature to enact a law vesting title to the church-owned property in the diocese rather than in the Moscow hierarchy. The Court held the law unconstitutional as an infringement of the free exercise clause.<sup>176</sup>

From one standpoint, *Kedroff* is a straightforward application of the "religious question" doctrine elaborated by the later church property decisions. Because there was no evidence of ownership or control of the disputed property that would have permitted a decision for either party on neutral legal principles, the Court had no choice but to defer to the decision dictated by church ecclesiology, which clearly vested title and control in the central church hierarchy.<sup>177</sup> *Kedroff* is startling because it was handed down, not in an era of *glasnost* or even *detente*, but in 1952, in the midst of post-war American fear of Soviet world domination and communist conspiracies. The Court's holding left religious property that was located in the United States and that served the spiritual needs of its citizens, under the effective control of the Soviet Union at the very time that Joseph McCarthy was traversing the country ruining reputations and careers with the mere accusation of Soviet complicity.<sup>178</sup> That the Court was willing to swim against the strong, even par-

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172. See, e.g., *Presbyterian Church*, 393 U.S. at 449; *Kedroff*, 344 U.S. at 115-16, 119; *Watson*, 80 U.S. at 733. See generally TRIBE, CONSTITUTIONAL LAW, *supra* note 81, at 1236; Howe, *supra* note 89, at 92, 94.

173. See *Judicial Control of Private Associations*, *supra* note 89, at 1010.

174. See *Wolf*, 443 U.S. at 613 & n.2 (Powell, J., dissenting).

175. 344 U.S. 94 (1952).

176. *Id.* at 97-99, 101-03, 121.

177. See *supra* text accompanying notes 167-69.

178. For accounts of the mood of the government and the country generally during this period, see D. HALBERSTAM, *THE POWERS THAT BE* 140-45, 190-200 (1979); T. WHITE, *IN SEARCH OF HISTORY* 355-56, 374-82 *passim*, 383-96 (1978).

anoiniac, anti-communist currents of the period to uphold the principle of church autonomy bespeaks more than mere lip service to the principle.

The suggestion of a right of religious group autonomy in *Kedroff* lay dormant for some time, but it did not die. In *Serbian Eastern Orthodox Diocese v. Milivojevich*,<sup>179</sup> decided more than twenty years after *Kedroff*, the Court turned the suggestion of religious group autonomy rights into substantive constitutional doctrine. *Serbian Eastern Orthodox* was a civil action by the former bishop and certain members of the North American diocese of the Serbian Eastern Orthodox church, who claimed that the central church hierarchy located in Belgrade, Yugoslavia, had taken actions against the bishop and the diocese in violation of hierarchical and diocesan law. As in *Kedroff*, the action appeared to be at least partially motivated by fear of Communist control of the church hierarchy.<sup>180</sup> The court below had essentially sided with the plaintiffs, holding that proceedings that resulted in certain of the actions complained of were not conducted according to the central church's constitution and penal code, and that the remaining action was invalid as beyond the central church's authority to effectuate under its governance documents without diocesan approval.<sup>181</sup> Despite ample evidence in the record supporting the lower court holding, the Supreme Court reversed:

[W]here resolution of [intra-church] disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastic tribunal within a church of hierarchical polity, but must accept such decisions as binding on them in their application to the religious issues of doctrine or polity before them.<sup>182</sup>

In the Court's view, judicial review is inappropriate even when, as in *Serbian Eastern Orthodox*, a church appears to have acted arbitrarily by violating its own laws.<sup>183</sup> Although it did not decide whether the central church hierarchy in *Serbian Eastern Orthodox* in fact had acted arbitrarily, as the plaintiffs claimed, the Supreme Court nevertheless strongly criticized the state court for having rejected the hierarchy's

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179. 426 U.S. 696 (1976).

180. *Id.* at 704, 706.

181. *Id.* at 708.

182. *Id.* at 709.

183. *Id.* at 711-14 (rejecting an "arbitrariness" exception to the general rule of deference to the decisions of hierarchical church authorities).

plausible and well-supported interpretations of church law and practice, in favor of the court's own interpretations.<sup>184</sup>

In *Serbian Eastern Orthodox*, then, the Court began to push against the weight of some individualistic assumptions that underlie the law of voluntary associations. Constitutions, bylaws, charters, and other such documents of voluntary associations are often viewed not only as instruments of self-government, but also as sources of legal protection for the individual association members.<sup>185</sup> Under this view, a voluntary association's violation of one of its internal governing laws contradicts the legitimate expectations of members who are assumed to have relied on the association's continued adherence to its laws.<sup>186</sup> After *Serbian Eastern Orthodox*, however, a claim by a religious group member to contractual due process or other contract-based protections against group action is overridden by the group's interest in interpreting its own laws and practices without government interference, even if under neutral legal principles the claim would appear to be valid and the group's interpretation erroneous. The apparent judgment of the Court is that the importance of religious group autonomy in self-government is such that it constitutionally outweighs even individual rights of contract.

In the subsequent case of *National Labor Relations Board v. Catholic Bishop*,<sup>187</sup> the Court held that the National Labor Relations Act did not confer jurisdiction on the NLRB to regulate the employee relations of religious institutions. The Court reasoned that permitting such employees to unionize would result in significant loss of control by religious employers over their religious programs. NLRB jurisdiction could have placed a religious institution in the position of being forced to hire and to retain employees with beliefs that are inconsistent with, or even antithetical to, those of the employer. In the Court's view, Congress did not intend any such result.<sup>188</sup>

But what if Congress had intended NLRB jurisdiction? Because the Court decided *Catholic Bishop* on statutory interpretation grounds, it did not reach the constitutional issue, although free exercise concerns clearly animate the opinion.<sup>189</sup> In the wake of *Bob Jones*, one might well have predicted that the strong and pervasive social policy favoring

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184. *Id.* at 717-20.

185. *See, e.g.,* Ellman, *supra* note 33, at 1383-85.

186. For example, this is Justice Rehnquist's implicit interpretation of the pre-*Kedroff* cases cited by the majority (*see, e.g.,* *Gonzalez v. Archbishop*, 280 U.S. 1 (1929); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871)), which were decided under federal common law rather than on constitutional grounds. *See Serbian Eastern Orthodox*, 426 U.S. at 727-30 (Rehnquist, J., dissenting).

187. 440 U.S. 490 (1979).

188. *Id.* at 497-99, 501-07.

189. *See id.* at 499-501.

collective bargaining, together with the individual teachers' constitutional rights to associate in labor unions, would outweigh any religious group autonomy interest in the constitutional balance. Moreover, the Court's apparent commitment to church autonomy as a principle, evidenced by *Kedroff* and *Serbian Eastern Orthodox*, may have been called into question by its subsequent holding in *Jones v. Wolf* that a court need not defer to the decisions of church polity when the court believes itself capable of resolving the dispute under religiously neutral principles.

Hence, the stage was set for *Amos*. By upholding, under the establishment clause, broad exemptions from the requirements of generally applicable legislation for churches and other religious organizations, the Court reaffirmed a commitment to religious group autonomy. Of equal significance is the *Amos* Court's step toward the demarginalization of *Yoder*. Although exempting all activities of religious organizations from the requirements of Title VII subjects the employee labor market to religious discrimination by all religious employers, the Court upheld the exemption. *Yoder* might now be characterized more broadly: whenever government action so severely pressures a religious group's concept of itself that its very existence is threatened, the first amendment generally commands that the government, not the group, be the one that yields, even if the resulting anti-social consequences are not narrowly confined, as they were in *Yoder*.

*Bob Jones* can be distinguished by the uniquely weighty government interest present in that case. Given the tortured history of the United States in mistreating racial minorities, the elimination of racial discrimination is perhaps the most compelling governmental interest in American constitutional law, short of the government's interest in its own preservation. Accordingly, government action in service to this particular interest is upheld even when such action pressures a religious group's core values, so long as the action does not by its terms require the group physically to disband. The *Bob Jones* opinion clearly assumes that the physical existence of Bob Jones University is not seriously implicated by the decision to revoke its federal tax exemption on race discrimination grounds, even though it may be economically coerced to abandon a core concern.<sup>190</sup> Other government action that pressures

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190. See *Bob Jones*, 461 U.S. at 603-04 ("Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets"). See also *TRIBE*, *CONSTITUTIONAL LAW*, *supra* note 81, at 1246-47.

The Court significantly liberalized this analysis recently in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 108 S.Ct. 1319 (1988). In *Lyng*, the Court rejected a free exercise challenge to a Forest Service road construction plan to facilitate timber harvests on federally owned land which included a traditional native American burial site. *Id.* at 1321-23. Although it acknowledged that implementation of the plan "could have devastating effects on traditional Indian religious prac-

religious group existence, however, would yield to the group's interest in its own autonomy.

Nevertheless, the protection afforded religious groups under the institutional free exercise cases remains incomplete even after *Amos*. Under the Court's interpretations of both *Catholic Bishop* and *Amos*, it was congressional dispensation which saved religious groups from government intervention into religious group membership decisions. The Court did not decide in either case what the Constitution required, but only what it permitted.<sup>191</sup> Accordingly, the question that the Court avoided in *Dayton Christian Schools* remains open: When does the free exercise clause demand that religious groups be exempted from compliance with generally applicable legislation? Until the Court addresses this issue, it remains unclear whether and to what extent the Court is prepared to extend constitutional protection to religious groups.

#### V. PROTECTING THE RELIGIOUS GROUP INTEREST IN SELF-DEFINITION

The Supreme Court's freedom of association decisions provide little protection for the religious group interest in self-definition. Several of the Court's free exercise decisions suggest the existence of a constitutionally based religious group right to self-definition, but this suggestion is undercut by other precedents, and the Court has never squarely addressed the issue. *Dayton Christian Schools*, for example, does not speak to the issue of religious group self-definition, except to the extent

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tices . . . intimately and inextricably bound up with the unique features" of the land subject to the plan, the Court nevertheless held that since the plan did not actually "coerce individuals into acting contrary to their beliefs," the government was under no obligation to present a compelling justification for the plan. *Id.* at 1326; *see also id.* at 1324, 1325. Thus, the Court treats *Lyng* as if it were about indirect regulation of religious exercise, a subject beyond the scope of this Article. *See supra* note 4. However, *Lyng* can be read as holding that when government acts in its land-owning rather than its regulatory capacity, a relatively unimportant government goal will sustain government action that indirectly burdens free exercise rights even when the burden threatens to destroy a religious community. Because the *Lyng* Court's analysis relies so heavily on the fact that the government owned the land subject to the plan, *see, e.g., id.* at 1327, 1328, it is unclear what effect, if any, *Lyng* might have on group free exercise rights directly burdened by generally applicable law, such as the state and federal anti-discrimination statutes at issue in *Dayton Christian Schools* and *Amos*. *Cf. South-Central Timber Dev., Inc. v. Winnicke*, 467 U.S. 82 (1984) (reaffirming Supreme Court precedent that holds dormant commerce clause inapplicable to states acting in their capacity as market participants rather than market regulators).

191. It is not a sufficient explanation of *Catholic Bishop*, *Bob Jones*, or *Amos* simply to argue that the Supreme Court deferred to congressional judgments. Significant constitutional issues always stand behind such deference. In *Catholic Bishop*, "deference" took the form of a strained interpretation of congressional intent in order to avoid a conflict between the National Labor Relations Act and the religion clauses. In *Bob Jones*, the Court deferred to administrative actions of the IRS which Congress had not acted to modify or reverse, and in the process, the Court ignored infringement of free exercise values. Finally, in *Amos*, deference to a legislative exemption that clearly was overbroad under the establishment clause was driven by recognition of the importance of religious group autonomy to individuals and to society, at least in the view of two members of the Court.



that it implicitly holds that the bare assertion by a state agency of regulatory jurisdiction over a religious group's membership decision does not violate the free exercise clause.<sup>192</sup> The *Amos* majority, committed to a narrow establishment clause analysis,<sup>193</sup> is likewise not very helpful.<sup>194</sup>

However, in his insightful concurring opinion in *Amos*, Justice Brennan discusses what both *Dayton Christian Schools* and the *Amos* majority ignore—the tri-cornered confrontation between individuals, government, and religious groups.<sup>195</sup> Justice Brennan notes that constitutional protection of individual free exercise rights through invalidation of religious exemptions from anti-discrimination laws is inconsistent with the constitutional protection of religious groups. Loss by religious groups of the right to discriminate on the basis of religion in admission and expulsion of their members would unavoidably entail loss of the capacity to define and to communicate the nature and content of their religious beliefs and practices.<sup>196</sup>

In theory, this analysis suggests that only the religious activities of religious organizations should be insulated from governmental action, for it is only those activities which contribute to the identity of the organization as religious. However, the determination whether a particular activity is religious or secular is difficult and elusive, and can be made only after a long and searching factual inquiry that would entangle the government in religion and chill religious organizations in the exercise of their rights. Because nonprofit religious organizations may infuse even apparently secular activity with a plausible religious purpose, Justice Brennan finds that a broad exemption relating to both the secular and the religious activities of such a group is constitutionally preferred to the church-state entanglement and chilling of free exercise rights that may result from ad hoc division of nonprofit activities into religious and secular categories. He thereby concurs in the constitutionality of the religious exemption to Title VII as applied to the activities of nonprofit religious groups like the Mormon church:

Sensitivity to individual religious freedom dictates that religious discrimination be permitted only with respect to employment in religious activities. Concern for the autonomy of religious organizations demands that we avoid the entanglement and the chill on religious expression that a case-by-case determination would produce. We cannot escape the fact that

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192. See *supra* text accompanying notes 7-9.

193. See *supra* text accompanying notes 17-25.

194. But see *infra* note 220.

195. *Amos*, 483 U.S. at 340-42 & n.2, 345-46 (Brennan, J., concurring).

196. *Id.* at 342-43.

these aims are in tension. Because of the nature of nonprofit activities, I believe that a categorical exemption for such enterprises appropriately balances these competing concerns.<sup>197</sup>

Justice Brennan explicitly rejects ad hoc balancing. He might be read as advocating instead a definitional balance to resolve conflicts of individual, government, and religious group interests. Alternatively, he may be suggesting a categorical right for religious groups that would enable the social and individual value of such groups to be realized fully in the United States.

I discuss each of these aspects of Justice Brennan's opinion in the context of how they might contribute to a constitutional theory that justifies protection of a religious group's right to self-definition. However, I do not attempt to articulate and defend a full-blown theory of religious group rights. My goal in the following subsections is to explore these theoretical possibilities for a jurisprudence of religious group rights by focusing on the protection of religious group autonomy in membership decisions, with a view to identifying the approach that seems most preferable. I argue that categorical rights analysis is preferable to both ad hoc balancing and definitional balancing. I conclude with some observations on the potential and legitimacy of a rights-based jurisprudence in light of the critique of rights that is increasingly asserted in contemporary legal scholarship.

### A. *Ad Hoc Balancing*

The problem posed by *Amos* and *Dayton Christian Schools*—when should religious group claims to self-definition be vindicated against individual rights and societal interests—seems to arise on a continuum between absolute religious group freedom and pervasive state intrusion into membership decisions. There is a temptation to condemn both poles as unacceptably extreme. Absolute religious group freedom subverts state sovereignty by placing membership decisions beyond the reach of state power, and it erodes individual autonomy by leaving the group with substantial control over the lives of those who wish to belong.<sup>198</sup> However, absolute state sovereignty ultimately must result in the demise of religious groups whose core concerns are inconsistent with the majority's normative conceptions of individual rights and soci-

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197. *Id.* at 345-46. The limitation of the analysis to nonprofit religious groups reflects Justice Brennan's perception that nonprofit status is sufficiently disadvantageous relative to for-profit status that one would not likely adopt the former merely to escape government regulation. See *id.* at 344 n.4.

198. See *supra* text accompanying notes 89-94.

etal interests.<sup>199</sup> Just as the grant of absolute religious group freedom would seem unacceptable to a society that values individual autonomy and effective government, so also the plenary regulation of membership decisions should seem unacceptable to a society that values religious pluralism and the individual freedom that accompanies it.

Not surprisingly, then, courts and commentators have proposed a variety of ad hoc balancing tests to deal with individual-government-religious group conflicts. These tests require courts to decide cases based upon the presence or absence of specified characteristics. For example, many commentators have argued that constitutional protection of religious groups from government regulation should extend only to those practices that are genuinely significant to the group's religiosity. Bruce Bagni would balance the strength of the governmental regulatory interest in a particular case against the centrality of the burdened practice to the religious group.<sup>200</sup> As a religious practice becomes more distant from the "purely spiritual life" of the religious community, it is less deserving of constitutional protection and more susceptible to being overridden by regulatory interests that are not compelling.<sup>201</sup> Similarly, William Marshall and Douglas Blomgren would confine constitutional protection of religious group activity to "religious exercise," which they understand to mean identifiable tenets or practices.<sup>202</sup> Aspects of communal religious life that do not come within this category are protected only to the extent that they fall under the shadow of other constitutional umbrellas, such as freedom of association.<sup>203</sup> Douglas Laycock would consider, in addition to Bagni's notion of centrality, whether the burdened practice impacts outsiders or is confined only to group members. He argues that greater protection should extend to practices of the latter description.<sup>204</sup> Laycock also would have courts consider the extent to which the regulation at issue intrudes upon inter-

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199. See *supra* text accompanying notes 97-98. This has not deterred some commentators from advocating virtually plenary judicial intervention into religious group affairs. See, e.g., Ellman, *supra* note 33, at 1400-05, 1421-44; Adams & Hanlon, *supra* note 33, at 1332-39.

200. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1539-49 (1979). Carl Esbeck would also focus on a notion of religious centrality, although he locates this right in the establishment clause rather than the free exercise clause. Esbeck, *supra* note 26, at 376-78. See also Note, *Reinterpreting the Religious Clauses*, *supra* note 38, at 1774-75.

201. Bagni, *supra* note 200, at 1539-40.

202. Marshall & Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L.J. 293, 327-28 (1986).

203. *Id.* at 328. Professor Marshall has argued elsewhere that the free exercise clause has no substantive content independent of freedom of expression generally. See Marshall, *supra* note 116.

204. Laycock, *supra* note 57, at 1403-12. See also *Judicial Control of Private Associations*, *supra* note 89, at 1047.

nal group affairs, with substantial intrusions weighing on the side of greater protection from regulation.<sup>205</sup>

In one sense, these various tests are all theoretically impeccable. They are all directed at discovering and protecting the "core concerns" of religious groups—an idea central to the protection of religious group autonomy in making membership decisions. Nevertheless, in practice these tests are all unlikely to be effective in protecting a religious group's interest in self-definition. As I have argued, the incompatibility of religious groups with liberal political theory and with the secularism of public culture tends to push political decisionmaking away from protection of religious group interests when such protection would be at the expense of either individual rights or government interests.<sup>206</sup> A decision in favor of religious group self-definition requires that a judge labor against the combined forces of a political system in which government regulation and individual rights talk are both commonplace, and a culture that generally values rationalism over the nonrational ways of knowing, understanding, and living that characterize much of religious life. Although some judges succeed in looking beyond this political and cultural bias, the broad discretion that inevitably must be exercised by legal decisionmakers under an ad hoc balancing scheme is not likely to give significant weight to religious group self-definition.

Lower court decisions bear this out. Notwithstanding the important social and individual values served by a strong right of religious group autonomy, these cases generally subordinate such autonomy to interests served by regulatory intervention or control.<sup>207</sup> Religious significance is discounted,<sup>208</sup> burdens on religious exercise are mini-

205. Laycock, *supra* note 57, at 1403-12. See also Esbeck, *supra* note 26, at 367-68.

206. See *supra* Part III.

207. Of course, not all of the decisions are unfavorable to religious groups. See, e.g., *NLRB v. Central Cath. High School*, 623 F.2d 818 (2d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981); *Larsen v. Kirkham*, 499 F. Supp. 960 (D. Utah 1980), *cert. denied*, 464 U.S. 849 (1983). See also *Pime v. Loyola Univ. of Chicago*, 585 F. Supp. 435, 441-43 (N.D. Ill. 1984) (requirement that theology teachers at traditionally Jesuit university be Jesuits held to be a bona fide occupational qualification).

208. For example, in *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), the court held that only the hiring of ministerial employees by the seminary is exempt from Title VII under § 702, because "the tasks [nonministerial employees] perform are not of an ecclesiastical or religious nature," notwithstanding the fact that nonministerial employees clearly contributed to the seminary's identity as a religious group. *Id.* at 284-85. For the same reasons, the court further held that a free exercise exemption for nonministerial employees was not constitutionally compelled. *Id.* at 287. Similarly, the court in *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981), held that a religious college's faculty hiring procedures were not exempt from Title VII under § 702 because

[t]he College is not a church. The College's faculty and staff do not function as ministers.

The faculty members are not intermediaries between a church and its congregation. They neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine. That faculty members are expected to serve as exemplars of practicing

mized,<sup>209</sup> and Supreme Court precedent is narrowly distinguished.<sup>210</sup> As a group, the lower court decisions in this area seem remarkably free of the influence of *Kedroff*, *Serbian Eastern Orthodox*, and *Catholic Bishop*.<sup>211</sup>

Perhaps the greatest flaw of these various tests is that they presuppose a judicially identifiable religious practice as a necessary predicate

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Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern.

*Id.* at 485. See also *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 386-87 (1st Cir. 1985) (because Dominicans imposed few religious qualifications on faculty, students, or administrators, the principal mission of a university owned, controlled, and operated by the Dominican Order was determined to be the provision of secular education), *vacated on reh'g en banc*, 793 F.2d 398, 398-99 (1st Cir. 1986) (denying, by an equally divided court, enforcement of NLRB order), *incorporated by reference into dissent from denial of enforcement*, *id.* at 403; *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 312-13, 314 (5th Cir. 1977) (*en banc*) (religious school engaging in racial discrimination found to be "avowedly secular" despite fact that its segregationist beliefs were derived from the Bible), *cert. denied*, 434 U.S. 1063 (1978); *Pime v. Loyola Univ. of Chicago*, 585 F. Supp. 435, 439-40 (N.D. Ill. 1984) (university held not to be an institution "controlled in whole or in substantial part" by a religious group despite long and close association with Jesuits, because Jesuits comprised only a small minority of the faculty, did not contribute substantial amounts of money to the operating budget, and did not attempt to direct Jesuit trustees and administrators on university matters). Lurking behind many of these decisions is the notion that what is "religious" is bounded by what the world at large finds to be of general, secular interest. *But cf.* *Feldstein v. Christian Sci. Monitor*, 555 F. Supp. 974, 978 (D. Mass. 1983) ("a religious activity of a religious organization does not lose that special status merely because it holds some interest for persons not members of the faith, or occupies a position of respect in the secular world at large"); *R. NEUHAUS*, *supra* note 77, at 173 ("the distinction between sacred and secular is somewhat artificial. It does not accord with the church's comprehensive definition of its mission.").

209. For example, in *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986), the court reviewed under Title VII and the Equal Pay Act a church-owned school's practice of funding health insurance only for single employees and married male employees. *Id.* at 1364. Based on scripture, the church believed that "in any marriage, the husband is the head of the household and is required to provide for that household." *Id.* The court determined that funding health insurance for all employees would have "no significant impact" on this belief, *id.* at 1368, thereby ignoring the difficulty of preaching a belief without being permitted to practice it even at a symbolic level. See *supra* text accompanying notes 59-60. See also *Universidad Central*, 793 F.2d 389, 390 (arguing that NLRB jurisdiction imposed no burden on a Catholic university because the university is free to appeal NLRB orders to the court of appeals, and any burden is outweighed by compelling interest in avoiding labor unrest); *EEOC v. Pacific Press Publ. Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982) (a church doctrine prohibiting lawsuits between church members was overridden by the government interest in eradicating all forms of discrimination); *Mississippi College*, 626 F.2d at 487-88 & nn.12-13 (characterizing the Title VII compliance burden on a private religious college as "hypothetical" despite EEOC's declared intention to investigate the college's religiously based preference for males); *Donovan v. Shenendoah Baptist Church*, 573 F. Supp. 320, 325 (W.D. Va. 1983) (religious school lacks standing to assert rights of employees, students, and parents associated with school).

210. *E.g.*, *Universidad Central*, 793 F.2d at 386-88, 404-06; *Salvation Army of Massachusetts*, 763 F.2d at 5-6; *Denver Post*, 732 F.2d at 772-73; *Pacific Press*, 676 F.2d at 1272; see *Dade Christian Schools*, 556 F.2d at 325, 326 (dissenting opinion).

211. Perhaps this is not altogether surprising since, as Steven Smith has observed, constitutional law casebook editors have largely ignored these cases as well. See S. Smith, *Of Separation and Secularism: Reconstructing the Disestablishment Decision* 136 (forthcoming in 66 *Tex. L. Rev.* (1989)) (manuscript in author's possession).

to constitutional relief from government regulation. The district court decision in *Amos* exemplifies this approach. That court determined that there must exist two of three enumerated relationships in order for religious group activity to be "religious": (1) a close and substantial relationship between the religious organization and the activity at issue in the ordinary course of engaging in the activity; (2) a substantial connection between "the primary function of the activity in question" or "the nature of the job the employee is performing," and "the religious tenets or rituals of the religion or matters of church administration"; and (3) a substantial relationship between "the employee's job and church administration or the religious organization's rituals or tenets."<sup>212</sup>

The second and third elements of this test require the identification of a tenet or practice of the religious group that is burdened or otherwise implicated by the challenged regulation. Only if the court identifies such a tenet or practice, does it then decide whether this is closely related to the disputed employment position under the court's test. Accordingly, the district court in *Amos* looked for some authoritative command of Mormonism to which the plaintiff's job or the Deseret Gym as a whole was integrally related. After considering a variety of possibilities, it concluded that nothing in the church's operation of the gym was "even tangentially related to any conceivable religious belief or ritual of the Mormon church or church administration."<sup>213</sup>

Admittedly, the policy of requiring that all Mormon church employees be temple-worthy is not a tenet or practice of the Mormon faith. Certainly there is no identifiable commandment, or even a consistently applied policy, that bars non-tithe payers from church employment, even when their salaries are supplied from tithing funds.<sup>214</sup>

The imperative of the church's sacrifice narrative, to which tithing is integrally related, does not stem from an easily identified article of Mormon faith. It comes more from the church's intuition of religious propriety than it does from a discrete belief or doctrine. Respect for the sacrifice offered by those faithful Mormons who built and continue to build their religious community makes it unseemly to use those sacri-

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212. *Amos*, 594 F. Supp. at 799.

213. *Id.* at 802. *See also id.* at 801 ("plaintiffs do not contend and there is no evidence that it is a fundamental tenet of the Mormon Church that its members must engage in physical exercise and activity and must do so in a gymnasium owned and operated by the Mormon Church and in which all employees are practicing members of the Mormon Church").

214. For example, an attempt to enforce tithe-paying by the faculty of the church-owned Brigham Young University in the late 1950s and early 1960s was perceived as intruding upon academic freedom even by some members of the Mormon hierarchy and ultimately was abandoned. G. BERGER & R. PRIDDIS, *BRIGHAM YOUNG UNIVERSITY: A HOUSE OF FAITH* 68-70 (1985). Imposition of the temple-worthiness requirement for employees at church-owned operations like the Deseret Gym itself reflected a relatively recent change in church policy. *See Amos*, 618 F. Supp. at 1019-21.

fices to benefit unfaithful Mormons. This sense of propriety is closely related both to the Mormon doctrine of tithing and to the Mormon community's sense of what it means to be Mormon.<sup>215</sup>

The district court was guilty of overstatement when it declared that neither the gym nor the plaintiff's job were related to the beliefs, rituals, or administration of the Mormon church.<sup>216</sup> The opinion illustrates that narrow categories like doctrine, practice, or administration do not capture all or even most of the essential intentions, commitments, beliefs, settings, and stories that create the narratives of a religious group, that is, those very things that bind individuals together into a community of belief.<sup>217</sup> State intervention into the affairs of a religious community frequently destroys the daily development of the group's historical and theological narratives. Accordingly, government regulation may seriously disrupt and distort the spiritual life of that community even when the state's demands would not violate clearly identifiable doctrines, beliefs, or practices. Such intervention breaks the link between evolution of group meaning and group authority and thus reinterprets and recasts such meaning.<sup>218</sup> Historical and theological narratives often exist as unconscious or subconscious phenomena in the lives of individual members. Thus, focusing attention on an aspect of religious group life that otherwise would be perceived by the group as unremarkable may interfere with the normal development of the community's spiritual life and may channel that development in new directions which otherwise would not have been taken.<sup>219</sup>

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215. The fact that the church has not always formulated its employment policies with this sense of narrative propriety in mind should not bar it from recognizing the narrative's significance now. Religious groups are not ruled by the dead hand of past generations, and they sometimes change the interpretation and meaning of their history and traditions. Evolution of belief and practice is a central aspect of most religious groups and is necessary for their survival. *See supra* text accompanying notes 41-56, 75-77. Nevertheless, one court has held that the power of church members to change a belief or practice is evidence that the belief or practice is not religious. *Dade Christian Schools*, 556 F.2d at 312-13.

216. *See supra* notes 70-77 and accompanying text.

217. *See Laycock, supra* note 57, at 1390-91:

Many activities that obviously are exercises of religion are not required by conscience or doctrine [e.g., singing in the church choir or saying the rosary]. Any activity engaged in by a church as a body is an exercise of religion. . . . It is not dispositive that an activity is not compelled by the official doctrine of a church or the religious conscience of an individual believer.

*Compare Dade Christian School*, 556 F.2d at 312-13 (school's belief in segregation held not religious despite biblical origins because sponsoring church had no written tenets requiring segregation, because no references to segregation were present in church literature, and because the belief was characterized by the church as a "policy" subject to change by its members, rather than as "doctrine" or "tenet"); *see supra* text accompanying notes 46-48.

218. *See supra* text accompanying notes 75-77.

219. *See Jones v. Wolf*, 443 U.S. 595, 613 n.2 (1979) (Powell, J., dissenting) ("The neutral principles approach . . . imposes on the organization of churches additional legal requirements which in some cases might inhibit their formation by forcing the organizers to confront issues that

Notably, the possibility of such disruption is ignored by the Supreme Court in *Dayton Christian Schools*. The Court's decision assumes that any necessary constitutional relief can be granted after the Ohio Civil Rights Commission has completed its investigation and imposed a remedy upon the school. However, as the Court recognized in *Amos*, the distortion of a religious group's narrative stems from the possibility of government jurisdiction, not merely from its pronouncement and enforcement of a remedy unacceptable to the group.<sup>220</sup> By the time a court reviews the merits of regulatory intervention under the rule of *Dayton Christian Schools*, the damage to the religious group is already done.

Ad hoc balancing requires that the judge accurately perceive and characterize the aspects of communal religious life that are burdened by the challenged government action. Yet, the religious experience does not easily translate into the rational language required by the legal system.<sup>221</sup> As a result, aspects of any religious community may be undervalued because of an inability to adequately or accurately describe their nature, meaning, or significance in rational terms. Moreover, the judge will bring to this inquiry his or her own perceptions of what constitu-

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otherwise might never arise."); *Judicial Control of Private Associations*, *supra* note 89, at 991 ("The more extensively courts supervise the internal affairs of associations, the more likely it is that they will require strict adherence to purpose and doctrines without allowing for a group's natural evolution."). Curiously, Marshall and Blomgren recognize this problem, yet find it constitutionally insignificant. *Compare* Marshall & Blomgren, *supra* note 202, at 308 ("regulatory programs are often burdensome and the natural inclination of any regulated entity is often to adjust voluntarily the way it operates in order to promote its own ease of compliance. At times, the effect may be totally subconscious.") *with id.* at 309 ("theological development is not itself theology, or, even if it is . . . , ephemeral development of doctrine cannot properly be held to be within the ambit of First Amendment protection").

220. See *Amos*, 483 U.S. at 336:

[I]t 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. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

See also *id.* at 343-44 (Brennan, J., concurring):

While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation.

*Cf.* Frantz, *The First Amendment in the Balance*, 71 *YALE L.J.* 1424, 1443 (1962) ("Under [ad hoc balancing], the right to speak and publish is never clear, since it is never defined. Whether one had a right to speak or publish cannot be known until after the event and depends on the unpredictable weight which a court may someday give to 'competing interests'.")

221. Gedicks & Hendrix, *supra* note 85, at 1603-09.



tionally protected interests look like<sup>222</sup> and will usually possess religious sensibilities informed primarily by majoritarian beliefs and practices. In the case of idiosyncratic or obscure religious groups, then, the court's general unfamiliarity with such groups could easily lead to misconceptions.<sup>223</sup>

Finally, religious groups are dynamic. Beliefs and doctrines change. "At their most vital, traditions are always growing at the edge, and sometimes taking the edge into the center."<sup>224</sup> To an outsider, such changes may seem arbitrary, and thus undeserving of constitutional protection, particularly when the changes negatively affect important individual and government interests. Accordingly, there is a risk that important aspects of group religiosity will be overlooked or misunderstood in the process of balancing competing interests. Only the religious group itself is capable of accurately assessing the significance of government burdens on its religiosity, because only the group can accurately identify and interpret the relevant historical and theological narratives.

Any ad hoc balancing test is unlikely to account for two important aspects of religious group self-definition—the ability of the group freely to interpret, and its ability to change the interpretation of, its own texts, traditions, and narratives, and to abide by those interpretations in deciding who shall and shall not associate with the group.<sup>225</sup> Even the multi-dimensional tests advocated by Professor Laycock and the *Amos* district court do not protect a religious group's interest in self-definition. Neither centrality, internality, nor regulatory intrusiveness can explain why the Mormon church should prevail in *Amos*, any more than doctrine, belief, practice, or administration explains why it should not. Only when the church's own interpretation of the demands of its history and beliefs is taken seriously, can one appreciate the magnitude of the intrusion that would have been visited upon the church in the absence of an exemption from the requirements of Title VII.

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222. See, e.g., S. HAUERWAS, *supra* note 36, at 57: "[A]ttempts to explicate the 'ethics' of scripture have tended to concentrate on those aspects . . . that fit our intuitive assumptions about what an 'ethic' should look like. [T]his . . . has the unfortunate effect of separating and abstracting the ethics from the religious (and narrative) contexts that make them intelligible."

Ball, *Government as Big Brother to Religious Bodies*, in GOVERNMENT INTERVENTION, *supra* note 14, at 20, 25:

[T]he prosecution is . . . prone . . . to demand . . . to know "just what tenet" of the defendant's religion is violated by regulation. If the witness can't come up with a "tenet" (such as the dogma of transubstantiation) and then show that the government wants specifically to eradicate that tenet (for example, "It is hereby decreed that no act of transubstantiation shall be performed") his religious liberty claim is said to lack substance.

223. See Garet, *supra* note 39, at 1033; *Judicial Control of Private Associations*, *supra* note 89, at 991, 1010, 1016. See also Laycock, *supra* note 57, at 1388-90.

224. Perry, *A Naturalist Perspective*, *supra* note 67, at 1036.

225. See *supra* Part II.

For better or for worse, a modern, liberal society is not generally disposed to understand, let alone to sympathize with, a religious group's insistence that the integrity of its community of belief requires discrimination that is repugnant to the majority. As Justice Brennan suggests, if the individual and social values of religious pluralism are to be preserved, one must look beyond ad hoc balancing for protection of the religious group interest in self-definition.<sup>226</sup>

### *B. Definitional Balancing*

A commonplace of constitutional law is the Supreme Court judgment that a certain constitutional principle is so important that society should be willing to undergo considerable dislocation to protect it. For example, a part of our national mythology is that the American criminal justice system protects the innocent, even if it also lets some of the guilty escape unpunished. Also, we believe that even the guilty are entitled to a measure of dignity and respect from government. This service to justice and freedom is not without social cost. Many accused criminals go unpunished despite their guilt, and many more are probably not apprehended at all, because of the Court's insistence upon broad protection for the constitutional interests that underlie the Bill of Rights.<sup>227</sup> The cost of protecting justice and freedom in this manner is sobering, paid daily in the currency of physical and psychological violence inflicted upon the innocent victims of crime. To date, the Court remains committed to pay the cost in order to preserve the integrity of the Bill of Rights, although there are occasional indications that the strength of this commitment may be eroding.<sup>228</sup>

This approach is regularly used in other areas of constitutional law. Our commitment to freedom of the press and its institutional role in representative government is so strong that we endure misleading and distorted reporting by a media largely immune to liability for libelous statements about government officials and public figures.<sup>229</sup> So highly do we value political speech that we do not permit police to silence inflammatory speakers until criminal violence is imminent.<sup>230</sup> We suffer the dehumanizing and chauvinistic effects of pornography because of our belief in freedom of artistic expression and our fear of

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226. Abandoning ad hoc balancing does not, however, mean that religious group rights need be absolute. *See infra* text accompanying notes 283-95.

227. *See, e.g.,* *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

228. *See, e.g.,* *New York v. Quarles*, 467 U.S. 649 (1984).

229. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

230. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

government censorship.<sup>231</sup> In general, individual rights and government interests that otherwise would be vigorously pursued are left with significantly less protection when they are perceived to conflict with broader and weightier constitutional principles.

Such generalized or "definitional" balancing differs from ad-hoc balancing. It is employed external to and independent of the context of a particular case. The facts, circumstances, and competing interests of particular litigants are not weighed, but rather the relative social and political importance of certain individual rights, government interests, and constitutional principles as general propositions.<sup>232</sup>

Because the factors of a definitional balance are considered in the abstract and are not tied to the circumstances of a particular case, definitional balancing generates rules that can be applied in subsequent cases without any further weighing of interests.<sup>233</sup> Therefore, it is more efficient than ad hoc balancing. This efficiency, however, comes at the cost of foregoing the more precise calibrations of competing rights and interests that are theoretically possible under ad hoc balancing.<sup>234</sup> When the Court uses definitional balancing, the injustice that might be imposed on individual litigants, and any depressing effect on society in general, are simply outweighed by the constitutional principles that are protected.

In *Amos*, Justice Brennan appears to have made this judgment about religious groups. The considerable value of religious groups to individuals and to society is sufficiently evident to him that he is willing to permit substantial infringements on individual religious autonomy and governmental regulatory interests in order to preserve the institutional integrity and autonomy of religious groups.<sup>235</sup> This may be the implicit judgment of the *Amos* majority as well. By definition, then, the individual's right to be free from discrimination and the government's interests in promoting a discrimination-free society are collectively outweighed by the right of religious groups to discriminate in the process of defining themselves.

I have already discussed at length the strength and scope of the religious group's interest in self-definition.<sup>236</sup> I now turn to a consideration of the related individual and government interests.

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231. *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957). See also *New York v. Ferber*, 458 U.S. 747 (1982). But see *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

232. M. NIMMER, *NIMMER ON FREEDOM OF SPEECH* § 2.03, at 2-17 (1984).

233. *Id.*

234. *Id.* at 2-18 to -19; see Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 962 (1987).

235. See *supra* text accompanying notes 195-97.

236. See *supra* Part II.

## 1. INDIVIDUAL INTERESTS

It is deeply rooted in modern American constitutional law that the relative worth of individuals in society should be judged on the basis of their social contributions and intrinsic worth as individuals, rather than on the basis of irrelevant characteristics such as race, gender, ethnicity, religious affiliation, and the like.<sup>237</sup> Anti-discrimination represents a strong commitment to the autonomy of individuals, to their right freely to make choices and to develop themselves as they see fit, rather than resigning themselves to a station dictated by others.

When an individual is expelled from or denied admission to a religious group for failure to adhere to belief or behavioral standards that the group deems essential for membership, autonomy is diminished. The threat of expulsion or denial pressures the affected individual's religious conscience by creating an incentive for that individual to alter beliefs and behavior to conform to religious group norms.

Nonmembers and nonconforming members of religious groups are not the only individuals with autonomy interests at stake in individual-government-religious group conflicts. Conforming group members have a strong interest in maintaining the integrity of the group's relationships and evolving structures of belief and practice. Many individuals have developed a sense of personal identity and self-worth from interactions with others in religious communities. Those who are satisfied with the character and value of these interactions have a strong interest in seeing that such interactions are preserved. Such preservation may require discrimination.<sup>238</sup> To the extent that the state intervenes and disrupts or distorts such interactions in defense of the autonomy interests of nonmembers or nonconforming members, the individual autonomy of conforming members is likewise disrupted and distorted.<sup>239</sup>

There are, then, always at least two distinct individual interests at stake in individual-government-religious group conflicts: the interest of a nonmember or nonconforming member in being free from religious discrimination by the group, and the interest of group members in maintaining the integrity of their existing relationships with and within the group. Nonmembers or nonconforming members of a religious group who insist on the right to belong to the group without conforming to beliefs or practices considered important by the group, insist upon the right to belong to the group on their own terms, rather than those of the group itself.<sup>240</sup>

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237. See generally Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Anti-Discrimination Principle*, 90 HARV. L. REV. 1 (1976).

238. This recalls the right to disassociation. See *supra* text accompanying notes 121-22.

239. Cf. *Religion and the State*, *supra* note 39, at 1748-49.

240. See Perry, *A Naturalist Perspective*, *supra* note 67, at 1037.

It is unclear why the autonomy of the nonmember or the nonconforming member should prevail over that of the conforming member in such situations; at most, they cancel each other out.<sup>241</sup> In fact, individual interests may well weigh more heavily on the side of religious group self-definition than on that of government intervention in any definitional balance. When the government intervenes in religious group membership decisions on behalf of nonmembers or nonconforming members, it "kills" the group, causing it to change a fundamental aspect of its character or even physically to disband.<sup>242</sup> Religious pluralism, and the choices of those individuals whose personal identity and life are tied to the group, are reduced because the group that stands behind the personal identity of conforming members no longer exists.<sup>243</sup> On the other hand, when the government refrains from intervening in membership decisions, religious pluralism and individual choice are maximized. The religious group remains intact and undistorted for all those members who reference their personal growth and identity to it, while nonconforming members and nonmembers are still free to join other groups whose core concerns more closely match the self-concepts and aspirations of such persons. Thus, in considering the interests of conforming members versus those of nonmembers and nonconforming members, any weight to be applied to the definitional balance of individual, government, and religious group interests should fall on the side of protecting religious group self-definition.

## 2. GOVERNMENT INTERESTS

The strongest government interest implicated in an individual-government-religious group conflict is that of protecting individuals from unlawful religious discrimination.<sup>244</sup> For example, in *Dayton Christian Schools*, the Ohio Civil Rights Commission intervened to remedy the religious discrimination inflicted upon the fired teacher. Likewise, in the

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[B]asic moral beliefs are less the property of individuals than of communities. That is, they are less the property of human beings qua particular individuals than of human beings qua members of particular communities. And, relatedly, the true test or measure of such beliefs is not the experience of just one person. It is, rather, in some large degree, the experience of the community, that is, the experience of the community *not just at a given moment*, but over time.

(emphasis in original).

241. Cf. Frantz, *supra* note 220, at 1439 ("We cannot balance freedom against security [in First Amendment cases] if they both belong on the same side of the scales.").

242. See *supra* text accompanying notes 59-68.

243. See Note, *Reinterpreting the Religious Clauses*, *supra* note 38, at 1474 ("Defined functionally, a religion is a system of belief that is essential to the self-definition of the believer. Thus, a society that failed to protect religion would foreclose the individual's choice of the most fundamental part of his identity.").

244. See Aleinikoff, *supra* note 234, at 981.

absence of the exemption for religious organizations, the federal government would have a strong interest in intervening against religious groups on behalf of employees like the *Amos* plaintiff to vindicate anti-discrimination rights under Title VII.

Notwithstanding the pressure that is put on individual autonomy by religious discrimination, the need for government intervention to safeguard such autonomy is substantially diminished in religiously plural societies. There is a limit, after all, to the coercion that groups can impose upon individuals. All groups, including the political community that underlies the liberal state, are empowered to make law. Consciously or unconsciously, groups generate, adopt, and maintain traditions by which their members will be bound; they then interpret the components of those traditions as they are applied to concrete situations.<sup>245</sup> However, nongovernmental groups can apply their law only to their own members, and group members who object to and defy group law are always free to leave the group.<sup>246</sup> Thus, the ultimate sanction imposed by a nongovernmental group is merely the withdrawal of fellowship.

This is not so with the law of the state. Though one may object to it, that person cannot consistently defy it or withdraw from its reach. Withdrawal from the interpretive community of the state to form a competing interpretive community is an act of political revolution that cannot be permitted if the state is to survive. Moreover, those who defy the government are most assuredly not free to leave the political community. On the contrary, the government hunts them down for trial, conviction, and punishment. The government thus holds a peculiar interpretive monopoly: its myriad enforcement mechanisms give it the exclusive capability to insist upon the preeminence of its law and interpretations over all those who reside within its borders, whether they conscientiously object or not.<sup>247</sup>

This difference between the coercion implicit in the law of the group and that implied by the law of the state suggests a useful analytic touchstone—the extent to which the group's power over nonmembers and disaffected members approximates the government's power to punish those who defy its laws.<sup>248</sup> Under this analysis, the coercive pressure on religious conscience that might be imposed by the membership

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245. See Cover, *supra* note 40, at 45.

246. See *Judicial Control of Private Associations*, *supra* note 89, at 993 ("a significant limitation on the power of the group to harm individuals lies in the ability of members to resign").

247. Cover, *supra* note 40, at 40-44; Levinson, *supra* note 48, at 386.

248. Cf. Howe, *supra* note 89, at 95 ("the price which [private] groups must pay for their [constitutional] advantages is responsibility. When they exercise power in matters which directly concern the state they lose their privacy and, claiming the prerogatives of sovereignty, may not object if their action is treated as that of the state itself."). See also *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 122 (1952) (Frankfurter, J., concurring) ("In [decreeing that one party to

requirements of a religious group should be constitutionally significant if, and only if, withdrawal from the group is not possible.<sup>249</sup>

The most obvious example of this is when the religious group uses physical coercion to maintain control over its members, such as threatening physical harm to a group member if that member does not conform to group beliefs and practices or attempts to leave the group. Although from time to time such religious groups have existed in the United States, the use of physical violence to maintain membership control is not common. Where it does exist, the government is free to stop it.

Other, more problematic forms of coercion exist. Economic coercion may exist when the religious group so dominates the local community that a rejection of the group's beliefs or practices is tantamount to renouncing employment in the community. A member is genuinely free to leave a group only when economically viable alternatives are available. If reasonable alternative employment elsewhere is unobtainable, then one really is not free to leave the group.<sup>250</sup>

There was no evidence that either the teacher in *Dayton Christian Schools* or the custodial supervisor in *Amos* were unable to find employment elsewhere in their respective communities. Dayton Christian Schools was not the only school in Dayton, nor was the Deseret Gym the only entity in Salt Lake City with a staff of custodians in need of supervision. Even when comparable employment is lacking within the same city, other employment for which the disaffected employee is qualified will usually be available.<sup>251</sup> In both *Dayton Christian Schools* and *Amos*, the terminated employees were still left with a wide range of viable employment options.

Contrast this with the situation in which Dayton Christian Schools, Inc. or the Mormon church were the only employers within a city or other geographic region. In such a circumstance, the disaffected employee would be unable to choose to leave the religious group. The power of the religious group to impose its law on its members begins to approximate the power of the state to insist on obedience to its law. The

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the dispute should control the cathedral], the legislature effectively authorized one party to give religious direction not only to its adherents but also to its opponents.'").

249. See Note, *Reinterpreting the Religious Clauses*, *supra* note 38, at 1474:

In order for choice to be effective . . . , background social institutions must allow for the formation of both [communal and individual] aspects of the self. Each community must be free to create a collective identity, but no community should be so overpowering that it threatens the individual's ability to define himself in opposition to it.

See also *Judicial Control of Private Associations*, *supra* note 89, at 993-94.

250. Frug, *supra* note 33, at 1133-34.

251. See Note, *Religious Discrimination and the Title VII Exemption for Religious Organizations: A Basic Values Analysis for the Proper Allocation of Conflicting Rights*, 60 S. CAL. L. REV. 1375, 1420 (1987). Admittedly, the cost of changing jobs may be significant, as when one must forfeit vested retirement benefits.

disaffected member would be locked into group membership because he or she would have no other employment options.<sup>252</sup>

Of course, such situations rarely occur in contemporary America. The comparison of religious group power to government power thus is less useful as a doctrinal test than as an illustration of the extent to which government intervention into religious group membership decisions is not necessary to protect individual autonomy. In a religiously plural society like the United States, it is rare that a single religious group, or any collection of religious groups, holds monopoly power over employment, education, politics, or other such sources of contemporary social and economic advancement or fulfillment.<sup>253</sup> In most instances, the individual who is expelled from or denied admission to a religious group has a range of economic and social alternatives to membership in that particular group.

Thus, when religious group membership is genuinely voluntary, the need for government intervention to protect individual autonomy upon an individual's rejection or expulsion from membership is substantially diminished. Individual autonomy is adequately protected by religious pluralism. The remedy for religious group infringement upon individual autonomy by discriminatory membership decisions is not government intervention, but withdrawal from the discriminatory group and subsequent association with other groups or individuals whose beliefs and behavior are more congenial.<sup>254</sup>

Thus, the external harm imposed by discriminatory membership decisions is typically marginal. The harm is usually confined to those nonmembers who have attempted to join or to members who refuse to leave despite rejection of core group values.<sup>255</sup> Although it is common

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252. Even here, the disaffected person arguably can relocate. Given the geographic mobility of contemporary Americans, the intrusion stemming from the relocation may well be outweighed by the intrusion on religious group autonomy.

253. Cf. *Judicial Control of Private Associations*, *supra* note 89, at 993-94.

254. Laycock, *supra* note 57, at 1403, 1409; cf. Karst, *Intimate Association*, *supra* note 138, at 640 ("There are sound reasons for the state to leave members of an ongoing intimate association [to] carry on their relations with a minimum of state intervention. If they cannot work out their differences, the exits are clearly marked."). See generally *TRIBE, CONSTITUTIONAL LAW*, *supra* note 81, at 1420.

Of course, government has a legitimate interest in regulating religious groups even when individual rights are not at stake. Health and safety standards, building codes, business and other licensing requirements, and the like, are all formulated with the goal of protecting the members of society from certain identifiable harms that manifest themselves in the absence of governmental regulation. The free market rarely operates so as to make it economically advantageous for groups to eradicate these harms voluntarily. Regulating groups and situations that present the potential for widespread social harm is thus one way in which government protects individuals from the consequences of market failure. Most religious group membership decisions do not provoke this regulatory government interest in intervention.

255. Some exclusion is undoubtedly attributable to racial, gender, or other forms of discrimination that are in fact unrelated to core concerns. Portions of the group are likely to argue,



for critics of religious group power to quote statistics designed to show the surprisingly large economic resources of religious groups,<sup>256</sup> in fact religious groups are not very important inputs for employment or capital in American markets.<sup>257</sup> Relative to other concentrations of economic resources, such as those in public corporations, small businesses, and labor unions, the resources of American religious groups are insignificant. The person who cannot get a job with a religious group retains a multitude of other employment options. In contrast, the person who cannot get a job with any public corporation or small business, or who is denied membership in a labor union, has a far more serious problem. When social and individual harm is as narrowly focused as it usually is in religious group membership decisions, and the harm to religious autonomy potentially so severe, the obvious balance for a court to strike is exemption of the group from government regulation.<sup>258</sup>

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however, that such discrimination is related to core concerns, so that in many cases it will be unclear whether the discrimination is necessary to preservation of core concerns or not. See *supra* text accompanying notes 50-53. Accordingly, if the values of religious pluralism are to be safeguarded to the greatest extent possible, it may be advisable to leave such discrimination unpunished. See *infra* text accompanying notes 296-309.

256. See, e.g., Marshall & Blomgren, *supra* note 202, at 316-20.

257. Reliable statistics on this point are difficult to find. One source estimates that about 5% of the work force is employed by religious and nonreligious nonprofit organizations. Olcock, Religious Nonprofit Organizations' Problems 1981 (Outline), in Course Materials for Registrants: Religious Nonprofit Organizations' Legal Problems 1981 at 27 (seminar held March 13-14, 1981 at Stetson University College of Law) (citing C. BAKAL, CHARITY U.S.A. (1979)). The same source reports that in 1979, nonprofit religious groups received about 46% of total charitable contributions or \$20.1 billion. *Id.* at 28-30 (citing U.S. NEWS & WORLD REP., Apr. 28, 1980, at 14). Assuming that nonprofit employment is divided between religious and nonreligious in the same proportion, one may estimate that about 2.3% of the national work force is employed by religious groups. Moreover, although \$20.1 billion is clearly a great deal of money, the sum is nevertheless relatively insignificant on a national scale—less than 3% of the total national income in 1979.

The Department of Labor employment statistics, although they do not report religious employment separately, suggest a similarly small estimate of national religious group employment. Total employment in the United States in 1986 was approximately 100 million persons. Total employment in service industries, where one would expect the bulk of nonprofit religious employment to be concentrated, was approximately 23 million persons. Total employment in those particular service industries in which religious groups have historically concentrated their efforts and resources—hospital and outpatient care, education, social and family services, and membership organizations—was approximately 7.6 million persons. If one assumes that about one half of these employers are religious, then total nonprofit religious employment in the United States is approximately 3.8% of the national workforce. See U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS, Apr. 1987, at 75-76, 85-86.

258. Stephen Pepper has extensively developed this point. Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 310-11 [hereinafter Pepper, *The Free Exercise Clause*]; Pepper, *The Conundrum of the Free Exercise Clause—Some Reflections on Recent Cases*, 9 N. KY. L. REV. 265, 282-84 (1982); Pepper, *Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309, 341-44 [hereinafter Pepper, *Reynolds, Yoder, and Beyond*]. However, Pepper would not grant the institutional exemption when there is direct, identifiable harm to individuals, as opposed to mere frustration of government regulatory interests. See Pepper, *Reynolds, Yoder, and Beyond*, *supra*, at 333. As the text makes clear, I believe, exemption is

If the individual autonomy of disaffected members or nonmembers of particular religious groups is adequately protected by the association options supplied by a religiously plural society, then the government interest in intervening in religious group membership decisions is substantially less weighty than it would be in a nonplural society. The government is reduced to protecting society's self-concept.<sup>259</sup> The government interest in intervention is actually a claim that the mere existence of religious groups that do not conform to certain majoritarian norms and values threatens or harms society. Alternatively, the interest in regulation might simply be paternalistic. The government regulates and even outlaws those religious groups that it believes are not good for their members, even though the members themselves think differently.<sup>260</sup>

However, the government's paternalistic interest is remarkably weak in a liberal society, and by itself is probably insufficient to justify government intervention.<sup>261</sup> First, one may legitimately question the factual premise of paternalistic intervention—that the government truly knows better than individuals what is good or bad for them. As I discussed earlier, what may look to the government like a “bad” restriction of individual autonomy may actually enhance autonomy in the long run.<sup>262</sup> Moreover, a theoretical premise of liberalism is that government generally must be neutral with respect to all conceptions of what is “good.” The vision of the good life is pursued voluntarily by individuals and cannot be imposed by the government.<sup>263</sup> The govern-

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appropriate even in this situation, so long as the social impact of the harm is not substantial and the individuals harmed have other options, including avoidance of membership in any group.

For comparable analyses in which the legitimacy of local prohibition of certain kinds of activities or relationships is held to depend on whether one can legally engage in the activity or relationship in another nearby locale, see *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981) (reviewing city prohibition on all live entertainment) and *Burt, The Constitution of the Family*, 1979 SUP. CT. REV. 329, 388-91 (criticizing *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), which held unconstitutional a city zoning ordinance prohibiting certain kinds of extended families from living together).

259. See Laycock, *supra* note 57, at 1403. See also *Elrod v. Burns*, 427 U.S. 347, 355-56 (1976).

260. Cf. S. Smith, *supra* note 211, at 121, 185 n.111 (criticizing tendency of liberal theorists to build political theories based on beliefs, values, and reasons which, in the theorists' view, citizens *should* understand and use, but which in fact they do not).

261. See, e.g., *TRIBE, CONSTITUTIONAL LAW*, *supra* note 81, at 1258:

[T]he state cannot impose its ideal of the “best possible life” as a way of justifying intrusion upon the religious autonomy of a citizen. The diffuse harm of depriving someone of more advanced education and the best life the governing majority can imagine is not enough to justify impinging upon the autonomy of a religious community.

(footnote omitted). See also *id.* at 1414-15.

262. See *supra* text accompanying note 97.

263. For descriptions of theoretical efforts to justify and achieve liberal neutrality, and arguments that such efforts fail, see M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982) (discussing Rawls); Perry, *A Critique of the “Liberal” Political-Philosophical Project*, 28 WM. &

ment abandons this premise whenever it prohibits individuals, based on its conception of the good, from voluntarily pursuing alternative visions of the good that do not significantly threaten either society or other individuals. Accordingly, serious constitutional issues are implicated whenever the government engages in value-creating enterprises, or functions in a non-neutral fashion.<sup>264</sup> The Court itself has expressly recognized the legitimacy of regulating to achieve a moral conception of the good only in the context of state efforts to regulate pornographic materials.<sup>265</sup>

In a definitional balance of interests, the religious group's interest in self-definition is counter-weighted only by the weak and illiberal government interest in maintaining societal norms. Moreover, although individual interests are weighted on both sides of the scale, individual choice is maximized by protecting religious group self-definition. Definitional balancing, then, would suggest that the balance of individual, government, and religious group interests implicated by religious group discrimination in membership decisions generally should be struck in favor of religious group autonomy.<sup>266</sup>

### 3. THE LIMITS OF DEFINITIONAL BALANCING

In a recent critique of balancing as an analytic tool of constitutional adjudication, Alexander Aleinikoff has argued that definitional balancing provides certainty in the protection of important constitutional interests only at the cost of reduced theoretical coherence.<sup>267</sup> The value of definitional balancing is that it defines how the balance of competing interests should be struck in every case, once and for all, so that

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MARY L. REV. 205 (1987) (discussing Rawls, Ackerman, and Dworkin). See generally R. SMITH, *supra* note 83 (arguing that the liberalism implicit in American constitutional law prefers certain substantive values over others); *supra* note 260.

264. See, e.g., Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979); Ziegler, *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C.L. REV. 578 (1980). See generally M. YUDOF, *WHEN GOVERNMENT SPEAKS* (1983).

265. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-60 & n.10 (1973); *City of Renton v. Playtime Theatres*, 475 U.S. 41, 50 (1986). Within the limits of its assumption that pornography has a "depressing" effect on society, the Court has sought to enhance individual choice by cultivating rather than reducing pluralism. It has avoided the imposition of a nationwide decency standard in favor of locally determined standards. See, e.g., *Miller v. California*, 413 U.S. 15, 30, 32-33 & n.13 (1973). These pornography cases suggest that the paternalistic regulatory interest is legitimate in American constitutional law only when used to enhance pluralism and individual choice.

266. But see Marshall, *supra* note 35, at 100-01 (discussing *Bowers v. Hardwick*, 478 U.S. 186 (1986)) ("If the state can go into the bedroom to enforce morality in the absence of a recognized countervailing constitutional interest, there would seem little to stop it from" intruding upon virtually any organization.).

267. Aleinikoff, *supra* note 234, at 979.

application of the rule of decision in subsequent cases yields a clear resolution.<sup>268</sup> However, the claim that definitional balancing provides a certainty of protection that overrides the cost that an individual case's balance will not match the definitional balance is itself merely a "meta-balance" that is empirically unproved, and probably unprovable.<sup>269</sup> Moreover, definitional balances are often undermined by courts when the equities of a particular case cut against the definitional balance. "New situations present new interests and different weights for old interests. If these are allowed to re-open the balancing process, then every case becomes one of an 'ad hoc' balance. . . . Balances are 'definitional' only if the Court wants to stop thinking about the question."<sup>270</sup>

This critique of definitional balancing is applicable to discriminatory religious group membership decisions. There is no clear distinction between the declining gradations of pressure on individual choice that make withdrawal from religious group membership possible or not. Inevitably there will come the case of religious group discrimination, not amounting to physical or economic coercion, that nevertheless cries out for government intervention.<sup>271</sup> In analogous situations involving other areas of constitutional law, the Court has found the temptation to redefine the definitional balance irresistible, notwithstanding the importance of the constitutional values that the balance was defined to protect in the first place.<sup>272</sup> Given the relatively precarious place of religious groups in modern politics and society, there seems to be an especially high risk that any definitional balance drawn to protect the religious group interest in self-definition might eventually slide back into ad hoc balancing. Thus, although definitional balancing appears to be a clear improvement on ad hoc balancing, it may in the long run offer only marginally more protection for the religious group self-definitional interest. One must look elsewhere for significant protection of the self-definitional interest.<sup>273</sup>

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268. See *supra* text accompanying notes 232-34.

269. Aleinikoff, *supra* note 234, at 979.

270. *Id.* at 980-81 (footnote omitted). See also *id.* at 962, 977.

271. For example, a religious or fraternal organization such as a Masonic lodge, where membership is helpful for professional advancement in a small community, but is not necessary for economic survival. Cf. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

272. See, e.g., *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985) (libel); *New York v. Quarles*, 467 U.S. 649 (1984) (*Miranda* warnings).

273. However, the refusal to strike a general balance between the self-definitional interest of religious groups against the interest of individuals and government need not result in absolute protection for self-definition. See *infra* text accompanying notes 283-95.

### *C. Beyond Balancing*

#### 1. A CATEGORICAL RIGHT TO SELF-DEFINITION

Justice Brennan may not be advocating a definitional balance to resolve conflicts of individual, government, and religious group interests. As I have discussed, religious groups are valuable to society and to individuals for at least three reasons. First, they protect the individual freedom of their members against government encroachment by providing an effective vehicle for challenging governmental power.<sup>274</sup> Second, religious groups provide a context for the development of individual personality and identity that is considered important by the substantial number of Americans who remain significantly committed to religion and religious groups.<sup>275</sup> Finally, because liberal democratic government is in theory severely constrained from both creating and advocating particular conceptions of morality, religious groups are part of a larger collection of necessary social institutions that create and maintain the values by which Americans choose to live their lives.<sup>276</sup>

One may properly describe religious groups, then, as indeed Justice Brennan seems to,<sup>277</sup> as an indispensable part of individual and social life in the United States. Given the persistent and pervasive religiosity of Americans,<sup>278</sup> religious groups may be as important as family and sexual relationships. As such, the interest of religious groups in defining themselves by controlling membership decisions merits strong constitutional protection. Protection is warranted not because this interest outweighs competing individual and governmental interests, but because religious groups are a locus for certain of the constitutive, foundational activities by which Americans define and determine who and what they are, both individually and communally.<sup>279</sup> Just as autonomy and soci-

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274. See *supra* text accompanying notes 80-82, 96.

275. See *supra* text accompanying notes 83-85, 99.

276. See *supra* text accompanying notes 86-88.

277. See *Amos*, 483 U.S. at 342:

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 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. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.

*Id.* at 342 (Brennan, J., concurring).

278. See *supra* notes 1, 3.

279. Cf. R. SMITH, *supra* note 83, at 46 ("liberalism is said to be wrong not only in seeing people as fundamentally isolated individuals but also in failing to recognize that true human happiness comes only in man's common life"); Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency*, 98 HARV. L. REV. 592, 618 (1985) [hereinafter Tribe, *Constitutional Calculus*];

ety in general are inconceivable in the United States without familial autonomy, procreational choice, and (hetero)sexual privacy,<sup>280</sup> so also one cannot conceive of meaningful individual religious freedom unless religious institutions are protected from government encroachment.<sup>281</sup> Indeed, the idea that the free exercise clause protects not only the freedom of individuals to believe, but also their freedom to constitute and to preserve a community of belief, clearly underlies the institutional free exercise cases.<sup>282</sup>

## 2. CATEGORICAL BOUNDARIES OF SELF DEFINITION: THEORY

The scholarly and judicial reflexes to constitutional balancing tests in individual-government-religious group conflicts comes from the understandable inclination to avoid the tyranny and injustice that an absolute rule of deference to religious group membership decisions seems to entail. There is a sense, particularly among individuals who do not consider themselves religious or who do not consider organized or public religion a useful aspect of American life, that the right of religious groups to autonomy in making membership decisions will result in an overwhelming number of antisocial and otherwise self-interested acts by such groups.<sup>283</sup> For example, the Internal Revenue Service seems to have an undifferentiated fear that, in the absence of a narrow and restrictive definition of a religious—and therefore tax-exempt—organization, large numbers of Americans will organize into bogus churches or communes to evade the payment of federal income taxes. Yet, the possibility that such a phenomenon could evolve into a serious tax enforcement problem is remote. Most of us do not want to be ministers, much less found our own churches, and the thought that Americans will flock to share their net worths with others in communal living situations so

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Speech must be "free" if there is to be a meeting ground for individuals, a place where they can come together to work out the shared values—including the value of self-government itself—that will direct and enrich their lives. . . . [T]he first amendment protects our autonomy from the state precisely because speaking and choosing—rather than having words uttered and choices made for us—are critical to the never-ending task of reconstituting ourselves and our society.

See generally Frug, *supra* note 33, at 1125-26.

280. See *supra* text accompanying notes 138-44.

281. P. BERGER & R. NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* 26, 30-33 (1977); R. NEUHAUS, *supra* note 77, at 180; Howe, *supra* note 89, at 94; cf. M. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR AND THEOLOGY* 186-87 n.32 (1985) ("If individuals are to act or to be served effectively, account must be taken of the institutions that shape our lives and our thinking.").

282. See *supra* text accompanying notes 175-91. See also Karst, *Cultural Identity*, *supra* note 77, at 339.

283. Cf. Marshall & Blomgren, *supra* note 202, at 314 (religious exemptions from generally applicable legislation suggest "that a ready-made loophole exists for those who wish to describe themselves as religious adherents").

as to reduce their tax bills is ridiculous.<sup>284</sup> In other regulatory contexts, courts often react with suspicion and even hostility to religious involvement in traditionally secular activities.<sup>285</sup> To allow such fears to influence general law and social policy is to govern at the margin by permitting fears of the catastrophic to overwhelm the legal analysis.<sup>286</sup> The majority of nonprofit religious institutions in America exist and operate not out of a desire for pecuniary or personal gain, but out of dedication to the possibility of realizing a particular religious vision.<sup>287</sup> It is both cynical and naive to think that any appreciable number of Americans would reorder their living and thinking in accordance with the generally restrictive and unmodern belief structures of many contemporary American religious traditions solely for commercial or profit-making advantage. For most Americans, religious and non-religious alike, religious community and belief are serious commitments, and a person is unlikely to subject oneself to their continuing influence without a sincere and solid determination that this is required by one's personal conscience.

Certainly, religious groups may engage in conduct that ought to be outlawed or regulated, and the argument that follows takes adequate account of the possibility of such conduct. Nevertheless, the constitutional validity or utility of a right of religious group autonomy should not depend to a significant extent on the fact that the right might be abused by a small minority of religious groups. Most religious groups in the United States contribute much of value to society as well as to their individual members. Unless and until religious communities and individuals that abuse civil liberties become numerous and commonplace, they should not be the measure of the legitimacy and viability of any religious group right.

An absolute rule of deference need not lead to religious tyranny or injustice so long as the boundaries of the right to religious group self-definition are clearly marked. The rule remains absolute, but only within those spheres in which it applies. Such a rule is thus categorical as well as absolute.<sup>288</sup> The exceptions do not result from a balance of interests, but from "a principle internal to the constitutional provision."<sup>289</sup>

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284. See generally Weithorn & Turkel, *Frontier Issues of Tax Exemption for Religious Organizations*, in *GOVERNMENT INTERVENTION*, *supra* note 14, at 64.

285. See, e.g., *NLRB v. Salvation Army of Mass. Dorchester Day Care*, 763 F.2d 1, 7 (1st Cir. 1985); *King's Garden, Inc. v. FCC*, 498 F.2d 51, 54-55 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974). See also *supra* text accompanying notes 207-10.

286. C. FRIED, *RIGHT AND WRONG* 10 (1978); accord Aleinikoff, *supra* note 234, at 1000.

287. Cf. *Amos*, 483 U.S. at 344 & n.4 (Brennan, J., concurring).

288. C. FRIED, *supra* note 286, at 10.

289. Aleinikoff, *supra* note 234, at 1080; accord Frantz, *supra* note 220, at 1434-36.

Two concepts, voluntarism and value-creation, are useful in articulating the boundaries within which a right to religious group self-definition should operate absolutely. The importance of religious groups to individual and social life, which gives the groups their strong claim to constitutional protection, is intertwined with the assumption that the creation or maintenance of an individual's membership in such groups is voluntary.<sup>290</sup> The protection against governmental tyranny that is offered by a religious group to its members is of little personal value to one who is being coerced to join or to stay within the group. People in such situations need government intervention and protection.<sup>291</sup> Similarly, it makes little sense to speak of the contribution of religious groups to personality development when the group is forcing its norm of individual identity on a member who does not wish to stay within the group. Accordingly, deference to a religious group's membership decisions is not appropriate in any situation in which group members are not free to leave the group. The social and individual values that give religious groups a claim to a right to autonomy in such decisions cannot be realized in the absence of voluntary association by group members.

Value-creation is a second concept useful in charting the limits of religious autonomy in membership decisions. Much of the argument in this Article in support of a religious group right to self-definition could apply to nonreligious groups. Yet, many such groups do not protect the individual from government tyranny, or provide referents for personality development, or contribute to moral pluralism. Although useful social and individual tasks are often facilitated by such groups, in only the rarest of circumstances do they form the foundation of an individual's self-concept or provide a significant check on state power. Indeed, such organizations are usually parasitic with respect to their group values. They do not originate or create values, but only reflect values that have their origin in more foundational groups.<sup>292</sup> Thus, they are carriers rather than creators of meaning.

The moral values that inhere in the communal life of religious groups are the result of the fact that such groups normally create rather

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290. Of course, many important relationships in American society are not voluntary in the sense that the individuals who are parties to these relationships have made a free and conscious decision to enter into them. Kinship relationships and membership in churches that practice infant or youth baptism are both examples of groups whose members did not make an initial voluntary decision to join the group. Yet membership in such groups is voluntary in the sense that their members can choose whether to continue their membership in the group, and they have the power to sever their relationship if they so wish.

291. See Laycock, *supra* note 57, at 1405; Pepper, *supra* note 95, at 933; cf. Karst, *Intimate Association*, *supra* note 138, at 637 ("It is the *choice* to form and maintain an intimate association that permits full realization of the associational values we cherish most. . . . [I]ntimacy implies the choice *not* to associate oneself in intimate ways with the world at large.") (emphasis in original).

292. See generally P. BERGER & R. NEUHAUS, *supra* note 281, at 34 (defining voluntary associations as groups formed to pursue specific goals "for some collective purpose").



than merely reflect values. Religious groups are among those institutions in American society that teach people to find and to nurture personal meaning and value in their individual lives.<sup>293</sup> Indeed, given the continuing and pervasive influence of religious traditions in the lives of many Americans, religious groups must be considered to be among the most significant sources of American values.<sup>294</sup> Accordingly, the principle of religious group autonomy in membership decisions should be extended to other groups only to the extent that they create values that significantly and positively affect individuals and society.<sup>295</sup> Also, to the extent that one can identify a religious group as parasitic upon rather than creative of values, deference to the membership decisions of such a group may not be appropriate.

### 3. CATEGORICAL BOUNDARIES OF SELF-DEFINITION: PRACTICE

However valid and useful voluntarism, value-creation, or other concepts may prove to be in defining the theoretical limits of absolute deference to religious group membership decisions, substantial difficulty in translating the theoretical concepts into judicially manageable standards remains. This is a problem common to all subjects of constitutional theory,<sup>296</sup> although the Court has not always admitted it.<sup>297</sup>

Because of this difficulty, Lawrence Sager argues that the rules of decision formulated by the Supreme Court to protect constitutional norms need not coincide with the theoretical limits of such norms.<sup>298</sup> In Sager's view, it is often necessary that certain constitutional norms be

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293. Peter Berger and Richard Neuhaus have labeled such institutions "mediating structures" because they are interposed between the individual and the giant bureaucracies that dominate modern society. *Id.* at 2-3. They identify neighborhoods, families, and certain voluntary associations, as well as religious groups, as mediating structures. *Id.* at 8-40. For an argument that public schools are mediating structures, see Hafen, *supra* note 43.

294. *Cf. supra* text accompanying notes 274-82. Religious groups are not the only groups in the United States capable of creating and maintaining values. *See, e.g.,* Lynd, *Communal Rights*, 62 TEX. L. REV. 1417, 1423 (1984) (describing feelings of brotherhood and solidarity shared among members of trade union locals). Certainly, however, there are not many secular groups in the United States that can claim as strong an influence on the lives of their members as American religious groups have on their members. *See generally* Gedicks & Hendrix, *supra* note 85, at 1591-94.

295. *See generally* TRIBE, *CONSTITUTIONAL LAW*, *supra* note 81, at 1420.

296. *See* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978) [hereinafter Sager, *Fair Measure*] (distinguishing a statement "which attempts to describe an ideal which is embodied in the Constitution" from one "which attempts to translate such an ideal into a workable standard for the decision of concrete issues").

297. *See, e.g.,* Cooper v. Aaron, 358 U.S. 1, 18 (1958).

298. Sager, *State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 962-63 (1985) [hereinafter Sager, *Norms and Rules*]. *See also* Sager, *Fair Measure*, *supra* note 296.

“overenforced” by the Court.<sup>299</sup> In such cases, the Court should make a conscious, strategic decision to ensure that there is no impediment to full exercise of the constitutional norm to its conceptual limits; this is implemented by extending protection to activities that in fact lie outside the norm’s theoretical boundaries.<sup>300</sup>

Justice Brennan articulates similar strategic concerns in his *Amos* concurrence. He would allow Congress to extend statutory protection to *all* of the activities of religious groups even though conceptually his norm of religious group autonomy in self-definition justifies only protection of the group’s religious activities.<sup>301</sup> Because of the difficulty of distinguishing the religious from the secular on a case-by-case basis, Justice Brennan would protect all activities of such groups to ensure that the religious group autonomy norm is fully realized to its theoretical limits.<sup>302</sup>

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299. Sager, *Norms and Rules*, *supra* note 298, at 963-71 (discussing doctrines of equal protection, first amendment overbreadth, establishment clause standing, and constitutional criminal procedure).

300. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 271-72 (1964) (to survive, freedoms of expression must have “breathing space” that can be purchased only by allowing some defamatory falsehoods to go unpunished). See also Sager, *Norms and Rules*, *supra* note 298, at 964. Similarly, Kenneth Karst has concluded that complete and meaningful protection of the caring, love, and fulfillment values inherent in intimate associations necessitates the extension of constitutional protection to casual, as well as enduring sexual relationships, even though the former exhibit none of these intimate associational values.

[T]he value of commitment is fully realizable only in an atmosphere of freedom to choose whether a particular association will be fleeting or enduring. A doctrinal system extending the freedom of intimate association only to cases of enduring commitment would require intolerable inquiries into subjects that should be kept private, including states of mind.

Karst, *Intimate Association*, *supra* note 138, at 633 & n.45.

301.

We are willing to countenance [religious discrimination] because we deem it vital that, if certain activities constitute part of a religious community’s practice, then a religious organization should be able to require that only members of its community perform those activities.

This rationale suggests that, ideally, religious organizations should be able to discriminate on the basis of religion *only* with respect to religious activities. . . . This is because the infringement on religious liberty that results from conditioning performance of *secular* activity upon religious belief cannot be defended as necessary for the community’s self-definition. Furthermore, . . . it puts at the disposal of religion the added advantages of economic leverage in the secular realm.

*Amos*, 483 U.S. at 342-43 (Brennan, J., concurring) (emphasis in original).

302.

Nonprofit activities . . . are most likely to present cases in which characterization of the activity as religious or secular will be a close question. If there is a danger that a religious organization will be deterred from classifying as religious those activities it actually regards as religious, it is likely to be in this domain. This substantial potential for chilling religious activity . . . justifies a categorical exemption for nonprofit activities. Such an exemption . . . permits infringement on employee Free Exercise rights in those instances in which discrimination is most likely to reflect a religious community’s self-definition. While every nonprofit activity may not be operated for religious purposes, the

Strategic analysis is very close to definitional balancing.<sup>303</sup> It differs, however, in at least one significant respect. In strategic analysis, the Court's attention is focused on the theoretical limits of the constitutional norm, whereas in definitional balancing, the Court is looking to other interests that may compete with those advanced by the norm. The goal of strategic analysis is not to reach correct balances of constitutional interests, but rather to attempt to discern where a constitutional right ends and to take account of the limitations of the judicial office in protecting and enforcing the right to the point of theoretical exhaustion.<sup>304</sup> In doing so, the Court must decide how important the right is in a more absolute sense than is required in definitional balancing. In definitional balancing, the Court must decide which of several competing interests is most important relative to the others; in strategic analysis, the Court must decide whether and why the right is so critical that it cannot be left underenforced, or even threatened with under-enforcement.<sup>305</sup>

Categorical rights and strategic analysis are preferable to definitional balancing, then, in one important respect: By forcing the Court to articulate expressly why a general rule does not apply to a particular situation, the Court avoids the temptation to backslide into ad hoc balancing that is constantly present in a definitional balance.<sup>306</sup> When the Court "recalculates" a definitional balance, the factors driving the recalculation are obscured by the posture of weighing competing interests. If the right is categorical, those factors must be laid bare.

Categorical rights and strategic analysis thus preserve the "voice" of constitutional adjudication. In a phrase often repeated but little un-

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likelihood that many are makes a categorical rule a suitable means to avoid chilling the exercise of religion.

*Id.* at 345 (Brennan, J., concurring).

303. Compare *TRIBE*, *CONSTITUTIONAL LAW*, *supra* note 81, at 887 & n.7 (describing individual and government interests that conflict with first amendment interests in constitutional libel litigation) with *Aleinikoff*, *supra* note 234, at 1001 & n.322 (*New York Times v. Sullivan* does not balance competing interests in arriving at the standard of "actual malice"); also compare *TRIBE*, *CONSTITUTIONAL LAW*, *supra* note 81, at 1038 (overbreadth doctrine reflects a definitional balance) with *Sager*, *Norms and Rules*, *supra* note 298, at 968 ("A substantially overbroad statute is thought to 'chill' exercise of the rights of free expression to such an extent that killing it off at the earliest moment of judicial recognition becomes highly desirable. The Court thus extends a strategic right to the overbreadth claimant, in service of the true rights of third parties."). The argument that strategic analysis is only balancing in disguise is not very helpful, because at some level of abstraction the very act of lawmaking always entails an implicit balance of interests. See, e.g., *Tribe*, *Constitutional Calculus*, *supra* note 279, at 608 ("any means of enforcing the fourth amendment will necessarily lead to the capture and punishment of fewer criminals") (emphasis in original).

304. *Aleinikoff*, *supra* note 234, at 1000 n.314; see *C. FRIED*, *supra* note 286, at 9-10.

305. See *Tribe*, *Constitutional Calculus*, *supra* note 279, at 596 (arguing that utilitarianism is flawed because it focuses on cost efficiency while failing to take account of personal, cultural and historical imperatives). See generally *Frantz*, *supra* note 220, at 1435.

306. See *supra* text accompanying notes 267-73.

derstood, Chief Justice Marshall reminded those of his era of the special character of constitutional adjudication.<sup>307</sup> Constitutional adjudication seeks to identify and articulate the principles upon which our political community is and continues to be constituted. It is not a search for rational accommodations, nor one for efficient solutions to public policy dilemmas. It is instead a search for individual and communal identity, because the principles upon which individuals constitute and reconstitute themselves and the community to which they belong reveal who and what they and the community are.<sup>308</sup>

In its constitutional mode, then, the Supreme Court is prophetic in the Old Testament sense, calling us to examine and reexamine our political premises.<sup>309</sup> This is a valuable attribute of constitutional adjudication that is worth preserving. However much strategic analysis of categorical rights may look like definitional balancing, the former preserves the constitutional voice of the Court. This is one difference which strongly recommends strategic analysis over definitional balancing.

#### D. Beyond Rights?

Balancing and rights hardly exhaust the possibilities for protecting religious group autonomy. Some commentators have criticized the mindset of traditional legal scholarship that has become unwilling or unable to conceive of political community and legal relationships without the language of rights. More fruitful ways to think about community and relationships might be opened by focusing, for example, on

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307. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 415, 422 (1819) ("we must never forget, that it is a constitution we are expounding").

308. Aleinikoff, *supra* note 234, at 993, 1002; Tribe, *Constitutional Calculus*, *supra* note 279, at 618. See also Frantz, *supra* note 220, at 1440.

309. A leading proponent of such a role for the Supreme Court is Michael Perry, who has argued that non-interpretive, counter-majoritarian review by the Court is functionally justified in human rights cases. See M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* ch. 4 (1982). Because it is insulated from the day-to-day political pressures that beset the other branches of government, the Court is institutionally suited to force us to consider carefully the resolution of "fundamental political-moral problems," whereas the executive and congressional branches, dominated by a concern for incumbency, reflexively invoke "established moral conventions" when dealing with such problems. *Id.* at 100-02. The Court's function in human rights cases is to provide the possibility for moral growth in the American political community, thereby enabling us "to maintain a tolerable accommodation between . . . our democratic commitment and . . . the possibility that there may indeed be right answers—discoverable right answers—to fundamental political-moral problems." *Id.* at 102 (emphasis in original). By requiring the majority to "think twice" before taking action that negatively affects human rights, the Court enhances the chances that the majority will indeed make the morally correct choice. *Id.* at 111-14. Judicial review is thus the "institutionalization of prophecy." *Id.* at 98. See also *id.* at 101. But see also *id.* at 125 (discussing limitations of the biblical metaphor). Professor Perry has further developed this idea in his recent book, M. PERRY, *MORALITY, POLITICS AND LAW* ch. 6 (1988) (arguing that the Court should act to facilitate moral dialogue).

individual responsibility, social solidarity, or civic virtue.<sup>310</sup> Even the most strongly worded judicial language cannot defend constitutional rights against a culture that does not value them.<sup>311</sup>

Even if this "rights critique"<sup>312</sup> is valid, it does not follow that the development of a jurisprudence of religious group rights is pointless. The creation of a viable society premised on its members' performance of legally unenforceable obligations will require a dramatic change in the way we habitually think about ourselves and act toward others.<sup>313</sup> Proponents of the rights critique have generally been much clearer about the vices of rights talk than they have about how we might get along without it.<sup>314</sup>

More importantly, rights currently make up a significant part of the American political reality. Because there is a reciprocal relationship between our constituted realities and our beliefs,<sup>315</sup> a strong right of

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310. See, e.g., Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987); Macneil, *Exchange Revisited: Individual Utility and Social Solidarity*, 96 ETHICS 567 (1986); Oaks, *Rights and Responsibilities*, 36 MERCER L. REV. 427 (1985). See generally *A Critique of Rights*, 62 TEX. L. REV. 1363 (1984). See also R. NIEBUHR, *supra* note 54, at 171 ("the law . . . does not command that we seek our neighbor's good but that we respect his rights").

311. Lynd, *supra* note 294, at 1434. For example, although *Brown v. Board of Educ.*, 347 U.S. 483 (1954), was a rallying point for civil rights groups, genuine recognition of civil rights for blacks was gained only after the mobilization of black political power in the 1960s and the emergence of a political consensus outside the South that segregation was wrong. See Bachman, *Lawyers, Law and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1, 17-21 (1985).

312. Those who criticize rights differ considerably among themselves on what the criticism is. The critique of rights encompasses at least the observation that the conceptual structure of rights theory is limited and imperfect in protecting human freedom. Often this point is pressed further with the argument that rights are fatally misleading and destructive of freedom because they mask social conflict and provide a vehicle for those in power to perpetuate their domination of others. In its most extreme form, the rights critique holds that rights unavoidably alienate the rights holder from others, and thus cannot be used to create and preserve meaningful human freedom. For examples of rights criticism, see Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984) [hereinafter Tushnet, *Essay on Rights*]; Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984). For a summary of the approaches of various scholars to the critique of rights, see Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 516-22 (1984).

313. See, e.g., Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 736-38 (1986) (suggesting that potential religious clause litigants, including the government, defer to the beliefs and actions of those with whom they disagree, even to the point of foregoing a legal challenge or defense to which they would otherwise be entitled). See also R. NIEBUHR, *supra* note 54, at 30 ("If community in basic terms is established by various organic forces of history, it must finally be preserved by mutual forbearance and forgiveness.").

314. Professor Tushnet responds to this criticism by arguing that one cannot predict what a "right-less" society will be like before it arrives and that, in any event, our current rights-dominated society is so bad that pulling it down and starting over without a clear alternative in mind is not likely to create anything much worse. Tushnet, *Essay on Rights*, *supra* note 312, at 1363, 1398-1402.

315. Lynd, *supra* note 294, at 1434; Hutchinson, *Indiana Dworkin and Law's Empire* (Book Review), 96 YALE L.J. 637, 664 & n.153 (1987).

religious group autonomy in membership decisions may result in more widespread recognition in the United States of the social and individual value of religious groups.

Under current religion clause jurisprudence, adjudication of religion clause disputes between the government and religious groups is often perceived by the groups as a zero-sum game. The vindication of interests asserted by the government results in an immediate and reciprocal intrusion on the interests asserted by the group. The sensitivity of religious groups in this area is not totally unfounded. From their perspective, the twentieth century has been one long march of ever-increasing government hostility and intrusion. The application of the religion clauses to the states in the 1940s and the Supreme Court's subsequent development of their doctrinal underpinnings quickened the pace, heightening the awareness of many religious groups of the damaging potential of government pressure on core religious group concerns.

Accordingly, the response of many religious groups to any government regulation is often automatic intransigence. This response only highlights the dark side of religious group action and confirms the views of those who have little use for religion in the modern world. For the government's part, consistent assertion by some religious groups of idiosyncratic or anti-social behavior that threatens the power and effectiveness of government suggests that the government ought to exercise its enforcement power to nip in the bud even the faintest suggestions of religious anarchy.

The creation of a categorical right of self-definition for religious groups would force upon the government the recognition that religious groups are a foundational unit of American society.<sup>316</sup> Eventually, this recognition would be reflected in American political culture. With religious group freedom thus protected, perhaps the reflexive and self-interested response of religious groups to state regulatory initiatives would diminish and be replaced by a less self-centered and more politically mature understanding of government regulatory needs and interests.<sup>317</sup> This, in turn, might abate the widespread suspicion that the absence of regulation perpetuates antisocial behavior under the guise of religious group freedom. Certainly a mutual respect by church and state

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316. Cf. Gedicks & Hendrix, *supra* note 85, at 1617:

A judiciary that is compelled even formally to confront religion qua religion—that is, not as the negation of reason, or a purely subjective preference, but as a spiritual and transcendent vision as compelling to its adherents as the empirical proofs of modern science—must eventually come to acknowledge the functional reality of religion in the lives of most Americans and, therefore, its social relevance.

317. Cf. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 636-37 (1943) (“Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support.”).

for the indispensable role filled by each would protect religious group freedom far better than the most forcefully articulated legal right.

In sum, ad hoc balancing provides no protection for the religious group interest in self-definition. Definitional balancing seems to provide some protection, but carries with it the constant danger of sliding back into ad hoc balancing. Moreover, balancing of any sort obscures the crucial issues at stake with the pretense of weighing the unweighable. Defining the religious group interest in self-definition by means of a categorical right delineated by voluntarism and value-creation best protects that interest, by focusing judicial attention on the values contributed by religious groups to society and to individuals, and on how these values shape the contours of the right.

## VI. CONCLUSION

There can be no doubt that allowing religious groups an absolute freedom to set the terms of membership, looking only to assure that the autonomy of disaffected members and nonmembers can meaningfully be exercised through withdrawal and alternative group affiliations, will result in the protection of beliefs and practices that will be inconsistent with and even repugnant to the majority.<sup>318</sup> This is the paradox of groups. They both enhance and subvert individual autonomy by challenging the sovereign power of the liberal state. Permitting the government to force fundamental change upon or to prohibit altogether certain kinds of groups because, in its judgment, such groups spawn a diffuse social harm or threaten the implementation of majoritarian social policy, is a subversion of the pluralist thesis. If the government can act to eliminate groups that it believes threaten majoritarian social policies and values merely because such groups are anti-majoritarian, then the power of the government over groups and individuals is unlimited.

If one is genuinely concerned about threats to individual freedom, the pertinent question is whether individuals have more to fear from governmental power than they do from religious group autonomy.<sup>319</sup> Some of the framers of the Constitution and their contemporaries feared collective religious action as much as the power of centralized

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318. The perception of the frequency with which this actually occurs, however, may be exaggerated by a tendency to "catastrophize" potential abuses of religious group power. *See supra* text accompanying notes 283-87.

319. *Cf. Frug, supra* note 33, at 1123:

[O]ne should not make the mistake of denying the force of the liberal attack against [decentralized power]. Independent corporate power of any kind does threaten individuals. . . .

Our only option is to choose which danger to liberty [that is, the elimination of groups or their infringement on individuals] seems more tolerable, more controllable, or more worth defending.

government.<sup>320</sup> Many of the framers were particularly concerned about the unification of religion and centralized government.<sup>321</sup> Having emerged from the political and social debris of the post-Reformation wars, the framers should be applauded for heeding the lessons of their own history while eschewing attempts to predict the cultural and political future. However, in the two centuries since the Convention of 1787, national power has grown far beyond the wildest imaginations of even the most ardent Federalists, while the feared unification of church and national state has never come to pass. Even at the state and local level, church-state contacts have substantially decreased since the ratification of the Bill of Rights.<sup>322</sup> This decrease has been accelerated by the Supreme Court's activism in establishment clause jurisprudence since World War II.

Whatever the dangers to individual freedom presented by religious groups, they are substantially less threatening than those currently posed by the inexorable expansion of the modern American liberal state. The individual autonomy and freedom that are at the heart of liberalism would be well served by strong constitutional protection of religious group autonomy in membership decisions.

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320. *E.g.*, THE FEDERALIST Nos. 10 & 51 (J. Madison); see L. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 107-08 (1986) (describing state ratification debates); *id.* at 101-02 (describing Madison's and Jefferson's anti-establishment activities in Virginia); and *supra* text accompanying notes 105-08. Jefferson, although strictly speaking not a framer of the Constitution, had a deep fear of the influence that institutional religion could exercise on government at all levels. See M. HOWE, THE GARDEN AND THE WILDERNESS 8 *passim* (1965); TRIBE, CONSTITUTIONAL LAW, *supra* note 81, at 1159; Pepper, *Free Exercise Clause*, *supra* note 258, at 301.

Certainly, morality without religion was foreign to the world of the framers. See R. SMITH, *supra* note 83, at 209; S. Smith, *supra* note 211, at 18-19. But the religion of that world was individual and private, not collective and public. See Pepper, *The Free Exercise Clause*, *supra* note 258, at 304-06; and *supra* text accompanying notes 105-08. See also U.S. CONST. art. VI (prohibiting religious tests for federal office). Accordingly, the views of those who lived during this period can be cited as persuasive authority by both sides in religion clause litigation. See Van Patten, *Standing in the Need of Prayer? The Supreme Court on James Madison and Religious Liberty*, 3 BENCHMARK 59, 59-60 (1987) (discussing *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Engel v. Vitale*, 370 U.S. 421 (1962); *Everson v. Board of Educ.*, 330 U.S. 1 (1947)).

321. L. LEVY, *supra* note 320, at 63-89 *passim*.

322. See generally E. SMITH, RELIGIOUS LIBERTY IN THE UNITED STATES: THE DEVELOPMENT OF CHURCH-STATE THOUGHT SINCE THE REVOLUTIONARY ERA (1972); Hitchcock, *The Supreme Court and Religion: Historical Overview and Future Prognosis*, 24 ST. LOUIS U.L.J. 183 (1980). Contemporary legal scholarship generally accepts that the now-familiar concept of church-state separation did not emerge in religion clause jurisprudence until long after the founding era. See, e.g., Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 B.Y.U. L. REV. 371, 375 n.8, 397-98 & n.90; Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 851-54 (1986); Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 894-902 (1986); McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 939-40 (1986).



