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Article

More Is More: Strengthening Free Exercise, Speech, and Association

John D. Inazu[†]

INTRODUCTION

The contours of our expressive liberties are shaped not only by legal doctrine but also by cultural views about those liberties and the governmental interests with which they intersect. The relationship between doctrine and culture is complex and symbiotic, and we cannot neatly disentangle the two. As Vincent Blasi has noted, even the most well-reasoned doctrine may falter in the face of widespread and intense pressure, demanding that our liberties be sacrificed for the sake of real or imagined governmental interests.¹ In other words, cultural views matter.

Prominent scholars like Blasi, Kenneth Karst, and Philip Hamburger have suggested that one important means of strengthening cultural views about the First Amendment is by limiting its protections to “core” interests.² This intuition car-

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1. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 478 (1985).

2. See *id.* at 452; Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835, 885 (2004); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 654–55 (1980).

ries with it the corollary that stretching a right beyond its core may end up weakening that right. For example, in an important article on the right of intimate association, Karst expressed concern over an expansive interpretation of the right that could “be stretched to cover all our constitutional freedoms.”³ He warned in a footnote that “First Amendment doctrine would become encumbered with new limits and exceptions, because some claims inevitably would be rejected” and “[f]rom these decisions a doctrinal infection would spread, touching even traditional First Amendment concerns.”⁴ In a similar vein, Blasi’s seminal article on the “pathological perspective” of the First Amendment counseled that a broad reading of the text could undermine its core protections in times of crisis.⁵ In yet another example, referring specifically to the free exercise right, the editors of a leading casebook on law and religion posit that “[w]hen the protective sweep is [too] broad, the courts end up recognizing equally broad governmental discretion to regulate, and that regulatory discretion will apply across the board, to the core as well as the periphery of the right.”⁶ The casebook editors conclude that the “inverse relation between coverage and protection” is “like taffy” such that “[t]he wider we stretch the meaning of [a particular right], the thinner the barrier between us and the government.”⁷

Hamburger has asserted the argument most forcefully. His generalized worry is that expanding the coverage of First Amendment rights might shift absolute protection of a defined core to contingent “balancing” for all claims asserted under those rights.⁸ Although he is careful to note that this expansion

3. Karst, *supra* note 2, at 654 (1980). Karst’s article likely provided the intellectual framework for Justice Brennan’s opinion in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* 136–39 (2012) (discussing these connections).

4. Karst, *supra* note 2, at 654–55 n.140.

5. Blasi, *supra* note 1, at 478. For an early critique of Blasi’s focus on the “core” of the First Amendment, see George C. Christie, *Why the First Amendment Should Not Be Interpreted from the Pathological Perspective: A Response to Professor Blasi*, 1986 DUKE L.J. 683 (1986).

6. MICHAEL MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 782 (2011).

7. *Id.*

8. Hamburger has asserted this argument in a variety of contexts. See generally Philip Hamburger, *Getting Permission*, 101 NW. U. L. REV. 405 (2007) (speech and press rights); Hamburger, *supra* note 2 (religious liberty); Philip Hamburger, *The New Censorship: Institutional Review Boards*, 2004 SUP. CT. REV. 271 (speech and press rights). Hamburger has also made the argument outside of the First Amendment. See generally Philip Hamburger,

does not lead inexorably to diminished rights protection, he gestures toward this outcome and offers historical examples.⁹ In the context of the speech and press rights, Hamburger argues that scholars and judges who pushed to expand protection beyond the core prohibition on prepublication licensing “have ended up carving out government interests not only from the expanded periphery but also from the historic core.”¹⁰ In the context of religious liberty, he contends that “[t]he expansion of the First Amendment’s right of free exercise has undermined its core.”¹¹ In Hamburger’s words, “more is less.”¹² Like Blasi and Karst, he worries that expanding the scope or coverage of a right might undermine its core protections.¹³

We can think of these cautions as arguments for *rights confinement*. On this view, legal doctrine will be most resilient to cultural pressures when it is construed narrowly.¹⁴ But the interplay between doctrine and cultural views suggests that rights confinement is an unproven and, indeed, unprovable, theory; we simply do not know in advance whether rights confinement will strengthen or even maintain cultural views about our liberties. Moreover, it is difficult to think of many historical examples of an expanded right compromising the previously protected core of a right. That is not generally how precedent works.¹⁵

Beyond Protection, 109 COLUM. L. REV. 1823 (2009) (discussing the extension of constitutional rights to nonresident aliens).

9. Hamburger, *supra* note 2, at 837 (“If a right is defined with greater breadth, will this necessarily stimulate demands for a diminution of its availability? Surely not. Nonetheless, the danger may be inherent in every attempt to expand a right, for at some point, as the definition of a right is enlarged, there are likely to be reasons for qualifying access.”).

10. Hamburger, *Getting Permission*, *supra* note 8, at 414.

11. Hamburger, *supra* note 2, at 874.

12. Hamburger, *supra* note 2.

13. Outside of the First Amendment, some of the literature on social movements has expressed similar concerns. See, e.g., Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373 (2007) (“[P]rogressives have become fearful that an assertive judiciary can spark a political and cultural backlash that may hurt, more than help, progressive values.” (quotation marks omitted)).

14. See Blasi, *supra* note 1, at 453–54.

15. There are rare exceptions. The most prominent example is the extension of the Sixth Amendment jury right to defendants in state prosecutions. As Hamburger notes:

[B]ecause the notion of a jury cuts across the Sixth and Seventh Amendments, the Court altered the right in both criminal and civil cases. The right to a jury in both criminal and civil cases has traditionally and emphatically been a right to a trial by twelve persons.

On the other hand, we know that *rights expansion* sometimes increases the scope of rights protection. The free speech right provides the clearest illustration. Free speech advocates have repeatedly argued that courts should increase the scope of protection under that right from written and verbal speech to symbolic speech, from excluding commercial speech to including commercial speech, and from only the right to speak to including the right *not to speak*.¹⁶ In all of these cases, the scope of the right has expanded without any damage to its core.¹⁷ To borrow from Hamburger's terminology, more has meant more.¹⁸

The possibility of rights expansion might also exist for other rights. Consider the modern right of association.¹⁹ The right of association and its antecedent, the right of assembly, once offered fairly broad (though not absolute) protections to private, noncommercial groups.²⁰ But in 1984, the Supreme Court's decision in *Roberts v. United States Jaycees* split the right of association into component parts of "intimate" and "expressive" as-

Today, however, after access to the Sixth Amendment criminal jury right has been expanded, the right to a jury, whether in criminal cases under the Sixth Amendment or in civil cases under the Seventh Amendment, is merely a right to a trial by half a jury.

Hamburger, *Beyond Protection*, *supra* note 8, at 1966 n.459 (citation omitted).

16. See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (recognizing a right against compelled speech in the context of non-verbal flag salute); cf. John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093, 1123 (2013) (discussing how fundamental freedoms protected by the First Amendment have been extended, such as to "modes of communication that are not speech but that function in some ways like speech").

17. See *id.* at 1122.

18. I do not mean to claim that rights expansion has led to a *strengthening* of the core. Although that argument is conceptually possible, my claim here is more limited; rights expansion has led to some protection for an expanded periphery without damaging the core of the right. Cf. Frederick Schauer, *Codifying the First Amendment*: *New York v. Ferber*, 1982 SUP. CT. REV. 285, 315 ("A narrow but strong First Amendment, with its strong principle universally available for all speech covered by the First Amendment, has much to be said for it. First Amendment protection can be like an oil spill, thinning out as it broadens. But excess precautions against this danger might lead to a First Amendment that is so narrow as to thwart its major purposes.").

19. I focus in this Article on the judicially recognized right of association (now generally seen as derived from the First Amendment), but I have elsewhere questioned the theory and doctrine underlying this right. See generally INAZU, *supra* note 3; John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485 (2010); John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149 (2010).

20. See generally INAZU, *supra* note 3 (discussing historical protections of the right of assembly).

sociation.²¹ The Court granted heightened protection to intimate and (to a lesser degree) expressive associations, but only rational basis protection to non-intimate, non-expressive associations.²² As a result, some groups that might have received constitutional protection under the right of assembly, or even under the initial version of the right of association, are now no longer protected.²³

Suppose we sought to eliminate the threshold *Roberts* inquiries into intimacy and expressiveness. Would this kind of rights expansion lead to Hamburger's "more is less" concern by weakening the core of the right? Expanding the coverage of the right beyond its current baseline to include a larger number of groups (including non-intimate, non-expressive groups) would require more interest balancing for more groups.²⁴ But the current baseline *already* requires a balancing of interests for those groups that fall within the protections of the right.²⁵ Eliminating the intimate and expressive thresholds would mean that an expanded class of rights-holders could benefit from the protections of the right. Surely some groups unprotected under the *Roberts* baseline would benefit from heightened protection if we shifted the level of judicial review for restrictions affecting these groups from rational basis scrutiny to something like strict scrutiny.

Expanding the coverage of the right of association would also make the doctrinal test clearer and less subject to manipulation. The current intimacy and expressiveness determinations introduce countless subjective and ideologically charged judgments—the kinds of inquiries most suspect under the First

21. 468 U.S. 609, 617–22 (1984).

22. *Id.*

23. See INAZU, *supra* note 3, at 136. I have offered real and hypothetical examples of such groups in other writing. See *id.* at 3 (gay social club, prayer or meditation group, and college fraternity). See generally John D. Inazu, *supra* note 16 (hypothetical "St. Louis Beer Lovers" club, online forum for parents, motorcycle club, fight club, and nudist colony).

24. I assume that courts engage in "balancing" irrespective of the level of scrutiny employed. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 583 (1978) (strict scrutiny also involves a kind of balancing); Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 *UCLA L. REV.* 671 (1983).

25. See, e.g., *Roberts*, 468 U.S. at 628 (concluding that the state's interest in eradicating gender discrimination outweighs a private group's right to expressive association).

Amendment.²⁶ Rights expansion might lead to greater public confidence in the right of association. Or, at the very least, there is nothing to suggest that rights expansion is the wrong approach to strengthening that right.

This Article explores the choice between rights expansion and rights confinement and the significance of cultural views on that choice, focusing on the rights of free exercise, speech, and association.²⁷ Part I describes the preference for rights confinement in First Amendment scholarship. Part II critiques Hamburger's "more is less" claim in the free exercise context and suggests that although Hamburger correctly diagnoses a weakening of the free exercise right, he fails to establish rights expansion as its cause. Parts III and IV offer an alternative explanation for the weakened free exercise right: shifting cultural views about religious liberty and the government interests with which the free exercise right intersects. Part V discusses rights expansion for the rights of speech and association. Part VI considers the implications of rights expansion for a contemporary constitutional challenge: private, noncommercial groups that resist antidiscrimination norms.

I. RIGHTS CONFINEMENT

The intuition for rights confinement—the view that legal doctrine will be most resilient to cultural pressures when it is construed narrowly—is reflected in Vincent Blasi's argument that the "pathological" First Amendment "should be targeted for the worst of times."²⁸ Blasi sought "to equip the [F]irst [A]mendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically."²⁹ He believed that the best way—and perhaps the only way—to strengthen the First Amendment in anticipation of these pressure periods is to ensure that "the appeal to constitutionalism evokes genuine sentiments of long-term commitment or aspiration."³⁰ The challenge is all the more

26. Consider, for example, the fiercely contested arguments from the majority and the dissent in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), as to whether the Boy Scouts' policy on homosexuality was sufficiently tied to its expressive association.

27. Although it is possible to direct the inquiry beyond the First Amendment, I do not do so here.

28. Blasi, *supra* note 1, at 450.

29. *Id.* at 449–50.

30. *Id.* at 453.

important because “[t]he aggressive impulse to be intolerant of others resides within all of us.”³¹

Blasi developed his pathological perspective with an eye toward historical episodes like the Red Scare.³² His worries also encompass other forms of resistance to prevailing orthodoxies.³³ The pathologies that threaten the First Amendment need not manifest through intense or clearly defined instances of political hostility; just as often, political suppression unfolds through more sustained and less direct forms of intolerance.

Blasi briefly considered the possibility of rights expansion as a protection against the pathological First Amendment.³⁴ He noted the “intriguing and difficult question, well worth pausing over, whether adoption of the pathological perspective should lead courts to favor an expansive or a narrowly confined but heavily fortified set of [F]irst [A]mendment principles.”³⁵ But Blasi’s insights do not inevitably counsel against rights expansion because he writes at the level of cultural views, not legal

31. *Id.* at 457.

32. *Id.* at 456–58, 464–65; *see id.* at 462 (“My claim is that the most serious threats to the core commitments of the [F]irst [A]mendment tend to be concentrated in unusual, intense periods and tend to derive from certain powerful social dynamics.”).

33. *See generally* Blasi, *supra* note 1 (arguing that “the overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent”).

34. *Id.* at 477. The possibility of rights expansion can also be seen in Professor Karst’s article on the right of intimate association. *See* Karst, *supra* note 2. Karst warned in a footnote that “[t]he danger of [stretching the right of association] is that First Amendment doctrine would become encumbered with new limits and exceptions, because some claims inevitably would be rejected” and “[f]rom these decisions a doctrinal infection would spread, touching even traditional First Amendment concerns.” *Id.* at 654–55 n.140. Read in isolation, Karst’s footnote looks like a caution against rights expansion in the context of the right of intimate association. But Karst’s larger point was exactly the opposite; he wanted a flexible and capacious doctrine of intimate association that would extend beyond even expressive limits. *See id.* at 654. Karst’s capacious interpretation of intimate association is evident when he recognizes the need to protect casual as well as committed sexual relationships. *See id.* at 633, 688.

35. Blasi, *supra* note 1, at 477. Although Blasi recognized “certain advantages” to a rights-expansive approach, he ultimately decided against it. *Id.* Here, however, it is important to highlight that Blasi rejected rights expansion on the assumption that the First Amendment would “be construed expansively in normal times so as to provide judges with fodder for concessions that might be demanded by insistent political forces in pathological periods.” *Id.* at 478. In other words, Blasi shied away from an instrumental expansion of First Amendment coverage that would artificially inflate its reach only to be used as a bargaining chip against future challenges.

doctrine.³⁶ As he notes, “[t]he defining feature of a pathological period is a shift in basic attitudes, among certain influential actors if not the public at large, concerning the desirability of the central norms of the [F]irst [A]mendment.”³⁷ The key to guarding against a pathological shift is “to promote an attitude of respect, devotion, perhaps even reverence, regarding those [First Amendment] norms.”³⁸ Toward this end, “the bench can serve as a pulpit.”³⁹ These passages are not wooden doctrinal arguments. They are focused on cultural views about First Amendment norms.⁴⁰

Blasi also worried that “[t]he wider the reach of [F]irst [A]mendment coverage, the greater seems to be the judicial affinity for instrumental reasoning, balancing tests, differential levels of scrutiny, and pragmatic judgments.”⁴¹ Given that the current state of First Amendment jurisprudence *already* reflects this balancing malaise, Blasi’s normative prescriptions may no longer counsel against rights expansion. As he suggests, one of the key insights is that “simple precepts can have a strong intuitive appeal, and it is just that kind of emotional force that may be most effective in reversing or containing the dangerous attitude shifts that take place in pathological peri-

36. See *id.* at 466; see also *id.* at 482 (“Shifts in attitudes regarding the moral imperative of tolerance are especially important in times of pathology . . .”); *id.* at 483–84 (“Concern about the dynamics of legitimation in pathological periods also explains why the natural, and indeed often rational, social impulse to enforce canons of good taste must not be permitted to serve as a justification for speech regulation.”).

37. *Id.* at 467; see also Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 307 (1981) (“The risk of misapplication of a general category of coverage leads us to define the category of coverage as broadly as possible, indeed somewhat more broadly than any underlying theory of free speech would warrant.”).

38. Blasi, *supra* note 1, at 467.

39. *Id.*

40. In Blasi’s words, “[t]he wellsprings of political authority are culturally dependent and often mysterious.” *Id.* at 453. I have described a similar process in John D. Inazu, *The Freedom of the Church (New Revised Standard Version)*, 21 J. CONTEMP. LEGAL ISSUES 335 (2013). See also RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* 258 (1984) (“The legitimacy of law in a democratic society depends upon the popular recognition of the connections between law and what people think life is and ought to be.”); Douglas NeJaime, *Doctrine in Context*, 127 HARV. L. REV. F. 10, 18 (2013) (arguing, in the context of efforts to constitutionalize gay marriage, that “doctrinal concepts . . . serve as a mobilizing tool, channel political support, and furnish justifications for lower courts”).

41. Blasi, *supra* note 1, at 479.

ods.”⁴² It may be that rights expansion can lead to greater clarity and simplicity of doctrine. Part V of this Article suggests just that possibility; we may indeed strengthen doctrinal clarity by expanding the right of association. Before turning to the possibility of rights expansion, I explain in greater detail why its critics have overstated their case.

II. HAMBURGER’S “MORE IS LESS” ARGUMENT

Hamburger draws upon Blasi’s insights to caution against rights expansion.⁴³ Although Hamburger applies his “more is less” argument to a variety of contexts, I focus here on his example of the free exercise right.⁴⁴ Hamburger makes a baseline claim, a contemporary claim, and a causal claim.

Hamburger’s baseline claim reflects what he views as the “core” of the free exercise right. He argues that the core initially protected religious belief and conduct against all discriminatory laws that singled out religion for penalty.⁴⁵ These protections of the free exercise right were “unconditional” and “without qualification,” such that they *always* prevailed over discriminatory laws.⁴⁶ That baseline, embodied in the First Amendment, “provides a benchmark for observing how more became less.”⁴⁷

42. *Id.* at 472.

43. *See* Hamburger, *supra* note 2, at 837 (“Blasi observes that rights can become politically vulnerable when interpreted expansively.”); *id.* at 885–86 (“As Vincent Blasi points out, the freedom of speech and press has expanded far beyond its core, and this enlargement tends to undermine the capacity of the First Amendment to preserve the freedom of speech and press in the very situations in which the Amendment’s guarantees are most needed.”).

44. Hamburger’s free exercise claim marks the first application of the “more is less” thesis and forms the basis for expanding the thesis to later applications. *See id.* at 837 (“[T]he contingency of the free exercise of religion raises a more general question as to whether the definition of any right can be expanded without risking access to the right.”).

45. *See id.* at 853.

46. *See id.* at 853, 855; *see also id.* at 855 (comparing the “unconditional” free exercise right in the First Amendment to conditional free exercise protections in state constitutions); *id.* at 857 (“The First Amendment thus guaranteed a sort of religious liberty that did not seem to threaten government interests and that therefore could be unconditional—indeed, utterly unqualified. . . . Accordingly, [Americans] were able to protect religious liberty without qualification—without any condition, interpretation, or other measure in terms of government interests.”); *id.* at 860 (“[T]he free exercise of religion was the one freedom that supposedly could not in any way be sacrificed to the interests of civil society or government.”).

47. *Id.* at 849; *see also id.* at 853 (describing the First Amendment as “the foundation for observing how more became less”).

Hamburger's contemporary claim is that the free exercise right now protects religious belief and conduct only from *some* discriminatory laws that single out religion for penalty.⁴⁸ Instead of providing absolute protections from discriminatory laws, courts now subject all free exercise claims to a form of interest balancing that leads to weaker protections for the core of the right.⁴⁹

Hamburger's causal claim is that the weakening of the free exercise right occurred *as a result of* advocacy for rights expansion in the middle of the twentieth century.⁵⁰ By his account, proponents of religious liberty who sought to have the free exercise right cover religious exemptions from generally applicable laws also argued that religious liberty protections were contingent rather than absolute.⁵¹ The Supreme Court responded with interest balancing for the entire right; as Hamburger put it, "[t]he expansion of the First Amendment right of free exercise has undermined its core."⁵² Rights expansion backfired; "more is less" because the contemporary free exercise right is less protective than its historical baseline as a result of the advocacy for rights expansion.⁵³ In the following pages, I disagree with Hamburger's baseline and causal claims but agree with part of his contemporary claim. I begin with the baseline claim.

A. THE BASELINE CLAIM

Hamburger's baseline claim represents his view of the scope and strength of the free exercise right in the late eighteenth century. His claim is worth quoting at length:

Early Americans were able to adopt constitutions that guaranteed religious liberty without conditions or even other qualifications because they defined this freedom in ways compatible with government inter-

48. *See id.* at 876–77.

49. *See id.*

50. *See id.* at 875.

51. *Id.* at 869 ("For more than half a century, growing numbers of Americans have argued for religious exemptions from general laws, and in defense of their expanded conception of the free exercise of religion, they have argued that this liberty is contingent—that it is unavailable where it conflicts with compelling government interests."); *id.* at 875 ("[T]wentieth-century Americans redefined the free exercise of religion to include a right of exemption from general laws . . .").

52. *Id.* at 874.

53. *Cf. id.* at 882 ("Consequentially, as the First Amendment's right of free exercise has expanded to include a right of exemption, the central freedom from penalties has come to seem conditional upon governmental interests. The periphery has required a reconceptualization of the core.").

ests. Americans would later expand the definition of their religious liberty and would thereby render this freedom conditional. In the late eighteenth century, however, Americans had some definitions of religious liberty that did not threaten government interests, and on these foundations, in several of their constitutions, including the U.S. Constitution, they protected religious liberty without any qualification.⁵⁴

Hamburger relies heavily on James Madison's *Memorial and Remonstrance* to establish his baseline claim.⁵⁵ In that 1785 document, Madison famously asserted that free exercise was an "unalienable right" that may not be "abridged by the institution of Civil Society."⁵⁶ Hamburger uses this language to suggest that Madison understood the free exercise of religion to be "utterly unconditional."⁵⁷ But nine years earlier, during the debates of the Virginia Bill of Rights of 1776, Madison proposed limiting free exercise if "under color of religion the preservation of equal liberty and the existence of the State are manifestly endangered."⁵⁸ And in 1822, Madison wrote to Edward Livingston that free exercise should prevail "in every case where it does not trespass on private rights or the public peace."⁵⁹ A literal reading of Madison's political rhetoric in *Memorial and Remonstrance* is incompatible with the constitutional language that he proposed in Virginia in 1776 and the pragmatic reflections that he offered in 1822. Hamburger gives us little reason

54. *Id.* at 848.

55. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (June 20, 1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 295, 298 (Robert A. Rutland et al. eds., 1973). Hamburger's other sources are less influential than Madison. *See* Hamburger, *supra* note 2, at 841–42 (quoting the English dissenter Philip Furneaux); *id.* at 843–44 (quoting David Thomas); *id.* at 847 (quoting Theophilus Parsons); *id.* at 848 (quoting Samuel Stillman). By critiquing the weight of these sources, I do not mean to ascribe to Hamburger an originalist or "original public meaning" method of constitutional interpretation. But to the extent that Hamburger's interpretive argument rests on something akin to popular understandings at the Framing, the evidence that he musters is not persuasive.

56. MADISON, *supra* note 55, at 299.

57. Hamburger, *supra* note 2, at 835; *see also id.* at 844–45 (quoting and discussing Madison's understanding of the free exercise of religion); *id.* at 846 (quoting Madison).

58. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1463 (1990) (quoting S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 492 (1902)).

59. *Id.* at 1464 (quoting Letter from James Madison to Edward Livingston (July 10, 1822), *reprinted in* 8 THE WRITINGS OF JAMES MADISON 98, 100 (G. Hunt ed., 1901)). McConnell argues that "[t]his indicates that [Madison believed] a believer has no license to invade the private rights of others or to disturb public peace and order, no matter how conscientious the belief or how trivial the private right on the other side." *Id.*

to believe that Madison radically modified his views in the interim, only to revert back to his earlier position.⁶⁰

Even more problematic to Hamburger's story is that the little we do know of the early free exercise clause did not reflect absolute protection from discriminatory laws. Consider *Davis v. Beason*, an 1890 decision that arose well before the mid-twentieth century advocacy for exemptions that anchors Hamburger's causal claim.⁶¹ The blatantly anti-Mormon statute in *Davis* reached speech and association as well as "conduct."⁶² Its discriminatory restrictions included prohibitions against teaching, advising, counseling, or encouraging the practices of bigamy and polygamy, or being a member of any association that taught these practices. Far from being a neutral law of general applicability, the statute in *Davis* explicitly targeted, among other things, the Mormon practice of "celestial marriage."⁶³

The Supreme Court upheld the law in its entirety, concluding that "[h]owever free the exercise of religion may be, it must

60. Hamburger's interpretation of Madison's views on this point is particularly vulnerable. He explains Madison's qualifying language in the 1776 Virginia debates by suggesting that "[n]otwithstanding his willingness to compromise on conditions and even to manipulate them to his ends, it is probable on the basis of his slightly later writings that he ideally wanted no conditions." Hamburger, *supra* note 2, at 845 n.27. Then he threads the needle in the other direction by suggesting that the 1822 correspondence reveals that: "Madison seems to have commended governmental limits on religious liberty only in the nineteenth century, when he became increasingly suspicious of religious organizations, their power, and their hierarchies." *Id.* It may well be that Madison's tolerance for governmental limits grew over time, but Hamburger's thesis is that Madison embraced an absolute free exercise right as a matter of constitutional doctrine at the framing of the First Amendment. A more plausible argument is that Madison consistently recognized *some* qualifications for the free exercise right.

61. *Davis v. Beason*, 133 U.S. 333 (1890). See also *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890) (upholding the revocation of the church's corporate charter).

62. *Davis*, 133 U.S. at 133. The statute provided:

[N]o . . . person who is a bigamist or polygamist or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization or association which teaches, advises, counsels, or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this Territory.

Id. at 346–47 (quoting § 501 of the Revised Statutes of Idaho Territory).

63. *Id.*

be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.”⁶⁴ The Court elaborated, discussing prohibitions on certain forms of marriage and human sacrifice:

Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretence that, as religious beliefs, their supporters could be protected in their exercise by the Constitution of the United States.⁶⁵

Davis and its reasoning place considerable strain on Hamburger’s claim that the free exercise right provided an absolute protection against discriminatory laws prior to the mid-twentieth century.⁶⁶

The historical flaws with Hamburger’s account gesture toward a more fundamental problem with his baseline claim; the absolute and unconditional free exercise right never existed because the state is incapable of recognizing such a right. There will always be consensus norms that trump the exercise of any right. As Peter de Marneffe has observed:

Some may think of rights as “absolute,” believing that to say that there is a *right* to some liberty is to say that the government may not interfere with this liberty for *any* reason. But if this is how rights are understood, there are virtually no rights to liberty—because for vir-

64. *Id.* at 342–43.

65. *Id.* at 343. The Court continued:

Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.

Id.

66. There may also be normative problems with Hamburger’s characterization of the “unconditional” free exercise right as one that is “compatible with government interests” and which does “not threaten government interests.” Hamburger, *supra* note 2, at 848. As a threshold matter, it is not clear how this description makes the right unconditional. On Hamburger’s account, religious liberty’s compatibility with government interests was factored into “the justification and meta-analysis” of the First Amendment. *Id.* at 862. That merely shifts the conditioning of the free exercise right to an earlier stage of the analysis. It may be that this constitutional arrangement reflects an institutional preference for legislative rather than judicial balancing, but that does not make the free exercise right unconditional. Another normative problem is that it is not clear why we would care about a right, enforceable against the government, that was fully compatible with government interests and never threatened those interests. What would that right protect against?

tually every liberty there will be *some* morally sufficient reason for the government to interfere with it.⁶⁷

These realist insights have always provided practical limits to civil liberties, including the free exercise clause.⁶⁸

B. THE CONTEMPORARY CLAIM

Hamburger's contemporary claim is that the free exercise right has moved from "the most inalienable and unqualified of rights" to one that has "come to seem contingent on the concerns of government."⁶⁹ His particular worry is that today "government can 'burden' the free exercise of religion, if it does so on the basis of a compelling interest."⁷⁰ In other words, Hamburger views the move from absolute protection to strict scrutiny review as the key doctrinal disintegration of the free exercise right. He locates part of that change in the 1960s exemption cases,⁷¹ and sees the culmination in the Court's 1990 decision, *Employment Division v. Smith*.⁷²

Smith also introduced another significant doctrinal change in free exercise law: the move from strict scrutiny to rational basis scrutiny for claims challenging generally applicable

67. Peter de Marneffe, *Rights, Reasons, and Freedom of Association*, in FREEDOM OF ASSOCIATION 145, 146 (Amy Gutmann ed., 1998); cf. STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 104 (1994) ("Speech, in short, is never a value in and of itself but is always produced within the precincts of some assumed conception of the good to which it must yield in the event of conflict.").

68. The use of tiered scrutiny in First Amendment analysis offers a partial protection against state regulation for expressive activity that triggers strict scrutiny review. But even here, standards akin to strict scrutiny have failed to protect expressive activity. See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2723–24 (2010) (applying an elevated level of scrutiny to a freedom of association claim); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–29 (1984) (rejecting freedom of association claim under elevated scrutiny). The problems of "balancing" under strict scrutiny were perhaps most evident in cases that the Supreme Court decided in the waning years of the Second Red Scare. See, e.g., *Barenblatt v. United States*, 360 U.S. 109 (1959); *Dennis v. United States*, 341 U.S. 494 (1951).

69. Hamburger, *supra* note 2, at 858.

70. *Id.*

71. *Id.* at 858–59 (discussing *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Braunfeld v. Brown*, 366 U.S. 599 (1961)).

72. Hamburger, *supra* note 2, at 877 (asserting that *Emp't Div. v. Smith*, 494 U.S. 872 (1990), "took a further step toward imposing the compelling government interest test on the core freedom from discriminatory legal constraints").

laws.⁷³ That aspect of *Smith* is widely viewed as substantially weakening the protections of the free exercise right.⁷⁴ In fact, its doctrinal implications are so striking that the Supreme Court has subsequently sought to limit them.⁷⁵

Hamburger focuses on a narrower dimension of the decision: “[T]he Court in *Smith* took a further step toward imposing the compelling government interest test on the core freedom from discriminatory legal constraints.”⁷⁶ Even though “*Smith* largely rejected claims of exemption [reflected in its move from strict scrutiny to rational basis scrutiny], it left in place the conditions developed in exemption cases, and it thereby suggested that such conditions applied even in cases not involving exemptions.”⁷⁷ In other words, Hamburger’s concern in *Smith* is not about the move to rational basis scrutiny for nondiscriminatory laws but about the suggestion that claims against discriminatory laws would be subject to strict scrutiny instead of absolute protection: “*Smith* confirmed earlier hints of what would become an extraordinary irony. Compelling government interest had been introduced in exemption cases as a condition on claims against non-discriminatory laws. Now, however, such an interest became a condition on the most central free exercise

73. *Smith*, 494 U.S. at 882–91 (rejecting strict scrutiny review for free exercise challenge to neutral laws of general applicability). Compare *Sherbert*, 374 U.S. at 398 (applying strict scrutiny in free exercise claim), with *Wisconsin v. Yoder*, 406 U.S. 205, 219–29 (1972) (same). In response to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA). Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2010)). The RFRA ensured strict scrutiny review of laws or regulations that substantially burdened the free exercise of religion. *Id.* But as Adam Winkler has shown, strict scrutiny review brought under the RFRA has been far less likely to invalidate a law or regulation than constitutionally based strict scrutiny. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 858–62 (2006).

74. See, e.g., 42 U.S.C. § 2000bb(a)(4) (finding that *Smith* “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion”).

75. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp’t Opportunity Comm’n*, 132 S. Ct. 694, 701 (2012) (noting that *Smith* involved government regulation of “only outward physical acts” while church hiring decisions were “internal church decision[s]”); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532–46 (1993) (applying strict scrutiny because challenged ordinances were neither neutral nor generally applicable).

76. Hamburger, *supra* note 2, at 877.

77. *Id.*

claims—those against discriminatory legal constraints.”⁷⁸ Hamburger’s key example of the implications of *Smith* is *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.⁷⁹ In *Lukumi*, the Court distinguished discriminatory laws that targeted religion from generally applicable laws like the one in *Smith*.⁸⁰ The Court held that the former kinds of laws would be subject to strict scrutiny review rather than the rational basis review accorded neutral laws of general applicability.⁸¹ Some advocates of religious liberty view *Lukumi* as a partial mitigation of the damage done by *Smith*.⁸² Hamburger sees the case as symptomatic of a “more is less” concern: “[I]n *Lukumi*, the Court protected this ‘essential’ free exercise freedom from religious penalties only after weighing it against government interests. In this way, the compelling government interest condition, which once limited and justified claims of exemption against nondiscriminatory laws, now seemed to bar more fundamental claims against penalties.”⁸³ For this reason, “the conditional character of the right of exemption has spread to the more basic freedom from penalties on religion.”⁸⁴

There are two problems with Hamburger’s focus on *Lukumi*. The first problem, which I argued in the previous section, is that the free exercise right was never absolute in the way that Hamburger suggests; the government could always trump a free exercise claim with a sufficiently compelling interest. That is the lesson from *Davis v. Beason*.⁸⁵ The second

78. *Id.* at 878–79.

79. *Id.* At 879; see *Lukumi*, 508 U.S. 520.

80. *Lukumi*, 508 U.S. at 546 (“A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.”). *Lukumi* involved a Santerian church that was expanding into Hialeah, Florida. *Id.* at 525–26. The Church practiced animal sacrifice. *Id.* at 526. In response, the Hialeah city council called an “emergency” public meeting. *Id.* After this meeting, the council adopted a number of ordinances to prevent “ritual” sacrifices. *Id.* at 526–27.

81. *Id.* at 531.

82. See, e.g., Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850 (2001).

83. Hamburger, *supra* note 2, at 881.

84. *Id.* at 882.

85. *Davis v. Beason*, 133 U.S. 333, 342–43 (1890) (“With man’s relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to

problem is that the contemporary protections for the free exercise right are far weaker because of the move from strict scrutiny to rational basis review, than they are from the purported transition from absolute protection to strict scrutiny review. Put differently, even though Hamburger is right to suggest that strict scrutiny review provides less than absolute protection, strict scrutiny is still pretty good protection. Rational basis scrutiny is not.

C. THE CAUSAL CLAIM

In the previous section, I intimated some agreement with Hamburger's contemporary claim that there is "less" of a free exercise right today. But that descriptive claim leaves unaddressed the causal claim that lies at the heart of Hamburger's "more is less" thesis: whether arguments for "more" of the right led to "less" protection. Specifically, Hamburger argues that the free exercise right is weaker today than its baseline protections *because of advocacy* to expand the scope of the protections of the right.⁸⁶ He asserts that efforts to expand the free exercise right to include exemptions have meant that "the central freedom from penalties has come to seem conditional upon government interests."⁸⁷

It is important to emphasize that Hamburger's causal claim only holds true if rights expansion results in a *previously protected* core receiving less stringent protection. It is not enough to show that religious liberty at the outer boundaries of newly expanded coverage is insufficiently or minimally protected. That liberty is no worse off—and perhaps better off—when conditioned on government interests, than if the coverage of the free exercise clause had never encompassed it in the first place.

Hamburger claims that judicial review of free exercise arguments has shifted from absolute protection to interest balancing.⁸⁸ He acknowledges that "the costs of the expanded definition have been more conceptual than practical" but insists

the criminal laws of the country."). It is useful here to compare the anti-Mormon restriction in *Davis* to the anti-Santerian restriction in *Lukumi*. In neither case did the government explicitly single out a particular religion in the text of the law.

86. Hamburger, *supra* note 2, at 837 ("[T]he conditions imposed during the last half of the twentieth century suggest how well-intentioned efforts to enlarge a right can inflate it so far as to weaken it.").

87. *Id.* at 882.

88. *Id.* at 874.

that “the harms . . . are very real.”⁸⁹ But he offers no example of a court denying free exercise protection under interest balancing to a previously protected religious belief or conduct.⁹⁰ The closest he comes is to speculate that “it should come as no surprise if Americans one day assimilate [the assumption of the conditional nature of religious liberty] so far as to endorse laws penalizing religion.”⁹¹ This prediction offers no actual support for the “more is less” thesis or for an indictment of rights expansion.⁹²

The closest example of a “more is less” concern may be the *Smith* decision, but in a way that differs from Hamburger’s argument. Recall that Hamburger is chiefly concerned with the Court’s move from an absolute free exercise right toward the compelling interest test.⁹³ He speculates that introducing the compelling interest test to periphery cases has now spread to the core of the free exercise right.⁹⁴ This test weakens and diminishes the core of the right by allowing government interests to trump rights that were once absolute.

Justice Scalia’s *Smith* opinion expresses a parallel concern that leaving the compelling interest test intact would jeopardize the core. Scalia, however, worries about a compelling interest *baseline*:

If the “compelling interest” test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if “compelling interest” really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger

89. *Id.* at 882.

90. Hamburger suggests that *McDaniel v. Paty*, 435 U.S. 618 (1978), evidences “[t]he changing conception of even the core free exercise right” because the Court engaged in interest balancing. Hamburger, *supra* note 2, at 876–77. *McDaniel* invalidated a statute prohibiting “[M]inister[s] of the Gospel, or priest[s]” from participating in a state constitutional convention. *McDaniel*, 435 U.S. at 618 (alteration in original). Given that the Court sided with the free exercise claimant, it is difficult to construe the decision as supporting the “more is less” thesis.

91. Hamburger, *supra* note 2, at 883. This quote is an example of what appears to be a cultural rather than a doctrinal claim by Hamburger.

92. Indeed, our constitutional common law regime often reflects an institutional preference for protecting the previously established core of a right. Subsequent cases that would seem to jeopardize the core will most often be distinguished on other grounds. I thank Tom Berg for this observation.

93. Hamburger, *supra* note 2, at 858.

94. *Id.* at 858–59.

increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them.⁹⁵

Scalia's argument is that a broadly applicable compelling interest test would either leave judges in the untenable position of "evaluating the merits of different religious claims"⁹⁶ or "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."⁹⁷ He concludes that the shift to rational basis scrutiny avoids these two undesirable alternatives.⁹⁸

Although there is a sense in which Scalia's argument resembles Hamburger's "more is less" concern, Scalia relies on the rationale *prospectively*, to avoid what Justice O'Connor's concurrence referred to as an unsubstantiated "parade of horrors."⁹⁹ Thus, like Hamburger's speculative worry about the future, Scalia fails to establish an actual harm to the core of the free exercise right. Scalia's pragmatic concern is rooted in his observation that "we are a cosmopolitan nation made up of people of almost every conceivable religious preference."¹⁰⁰ Whatever dynamism underlies that sociological description is independent of Hamburger's causal claim. The litigants in *Smith* were not making a rights-expansive argument—they were relying on what they assumed was the governing compelling interest test.¹⁰¹

Hamburger's thesis might have the most salience for the doctrine emerging out of two important cases decided after he published his article. The first is the Court's 2012 decision in *Hosanna-Tabor v. EEOC*, which recognized a "ministerial exception" rooted in the First Amendment's free exercise and es-

95. *Emp't Div. v. Smith*, 494 U.S. 872, 888 (1990).

96. *Id.* at 887 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)).

97. *Id.* at 888.

98. *Id.* at 889–90.

99. *Id.* at 902 (O'Connor, J., concurring) ("The Court's parade of horrors not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests." (citation omitted)).

100. *Id.* at 888 (quoting *Braunfeld v. Brown*, 366 U. S. 599, 606 (1961)).

101. See Brief for Petitioners at 5, *Emp't Div. v. Smith*, 494 U.S. 872 (1990) (No. 88-1213), 1989 WL 1126846 ("Under settled free exercise principles, the [F]irst [A]mendment protects religious actions as well as religious beliefs. However, that protection is not absolute. When government has a compelling interest in regulating conduct, religious actions must give way unless government can accommodate the religious practice without compromising its interest.").

tablishment clauses.¹⁰² The unanimous decision made clear that the ministerial exception provided an absolute protection for churches to hire and fire ministers on whatever basis they would like.¹⁰³

The Court's decision in *Hosanna-Tabor* is deliberately narrow and leaves unresolved important definitional questions like what is a "church" and who is a "minister."¹⁰⁴ Some advocates of religious liberty have sought to extend those categories even to "parachurch groups only loosely connected to an ecclesiastical structure."¹⁰⁵ Carl Esbeck has warned that this litigation approach may backfire: "[T]hose who embrace [*Hosanna-Tabor*] eagerly and then proceed to apply it where not intended" may "yield a series of lower court opinions seeming to cut back on *Hosanna-Tabor*, with all the attendant rhetoric about a 'clear and present danger' of religion unregulated and out of

102. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 132 S. Ct. 694, 706 (2012).

103. *Id.* at 709 ("The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone." (citations omitted)); *see also id.* at 703 ("By forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices."); *id.* at 706 ("By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."); Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL'Y 821, 836–37 (2012) ("Most of the initial reaction to *Hosanna-Tabor* was confined to its immediate context: the hiring and firing of ministers. To extend constitutional protection to these quintessentially religious decisions seemed necessary, and obviously correct. . . . But looking forward, it may be the broader doctrinal implications of *Hosanna-Tabor* that have the most lasting significance. It is not too much to say that the decision augurs a 'new birth of freedom' for the religious communities of America.").

104. *Hosanna-Tabor*, 132 S. Ct. at 707 ("We are reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.").

105. MARK A. NOLL & CAROLYN NYSTROM, IS THE REFORMATION OVER? AN EVANGELICAL ASSESSMENT OF CONTEMPORARY ROMAN CATHOLICISM 85–86 (2005).

control.”¹⁰⁶ If Esbeck’s warning is correct—and it may well be—then we could see a concrete example of the “more is less” argument: a baseline absolute protection weakened at the core as a result of advocacy to expand the protection.

The second plausible example of a “more is less” phenomenon—albeit a prospective one—relates to the recent resurgence of interest in the Religious Freedom Restoration Act (RFRA) surrounding litigation against the contraceptive mandate under the Affordable Care Act.¹⁰⁷ Although Hamburger confines his “more is less” argument to constitutional rather than statutory expansions, the statutory example may pose a more striking possibility of “more is less.” That possibility might be set up by the Supreme Court’s 2014 decision in *Burwell v. Hobby Lobby Stores*, which held that RFRA protected closely held corporations from substantial burdens on religious exercise.¹⁰⁸ Writing for the majority of a sharply divided Court, Justice Alito argued that: (1) RFRA expanded the scope of religious liberty protections from the pre-*Smith* standard; and (2) an amendment to RFRA in the Religious Land Use and Institutionalized Persons Act (RLUIPA) either reinforced or expanded RFRA’s expansion.¹⁰⁹

If Justice Alito is correct, then either the original or amended versions of RFRA could satisfy the “more” predicate of Hamburger’s thesis. That, in turn, could lead to judicial or statutory retrenchment.¹¹⁰ If future litigants who would have

106. Carl H. Esbeck, *A Religious Organization’s Autonomy in Matters of Self-Governance: Hosanna-Tabor and the First Amendment*, 13 *ENGAGE* 114, 118 (2012).

107. The relevant issues and history are set forth in *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. June 30, 2014).

108. *Id.*, slip op. at 1–2.

109. *Id.*, slip op. at 25–26 (“[N]othing in the text of RFRA as originally enacted suggested that the statutory phrase ‘exercise of religion under the First Amendment’ was meant to be tied to this Court’s pre-*Smith* interpretation of that Amendment. When first enacted, RFRA defined the ‘exercise of religion’ to mean ‘the exercise of religion under the First Amendment’—not the exercise of religion as recognized only by then-existing Supreme Court precedents. . . . [I]f the original text of RFRA was not clear enough on this point—and we think it was—the amendment of RFRA through RLUIPA surely dispels any doubt. That amendment deleted the prior reference to the First Amendment . . .”). Justice Ginsburg’s dissent disagreed with both of these interpretations. *Id.*, slip op. at 10 (Ginsburg, J., dissenting).

110. See, e.g., Marci A. Hamilton, *Burwell v. Hobby Lobby Confirms That RFRA Is Extreme Religious Liberty*, *CAMBRIDGE BLOG* (June 30, 2014), <http://www.cambridgeblog.org/2014/06/burwell-v-hobby-lobby-confirms-that-rfra-is-extreme-religious-liberty> (“RFRA is an extreme standard that per-

been protected under the pre-*Smith* free exercise standard start to lose claims brought under the expanded RFRA standard, then we may have “less.” In both RFRA and the ministerial exception, more could be less.¹¹¹ But more is not necessarily less.

III. CULTURAL VIEWS ABOUT THE FREE EXERCISE RIGHT

The preceding section questioned Hamburger’s baseline and causal claims about the free exercise right. However, it asserted that a portion of the contemporary claim is correct—the free exercise right *has* weakened from an earlier era. I have argued that these changes are not attributable to rights expansion. Identifying an alternative explanation is a more difficult task. In this section, I suggest that one reason is attributable to shifting cultural views about the free exercise right. In the next section, I suggest a different reason rooted in the governmental interests with which the free exercise right intersects.

One partial explanation for the weakening of the free exercise right involves increased cultural opposition to religious liberty claims. Cultural resistance to a right can increase in at least two ways. First, fewer people may benefit from or see the value of the right. Second, the exercise of the right might implicate a broader (or different) class of government interests. These alternatives are seemingly at odds with one another; the former suggests a decline in the scope of the right, whereas the latter appears to enlarge the degree to which the right conflicts with government interests. But it is possible that both can occur at the same time, and the free exercise right may reflect this convergence. Cultural resistance to the free exercise right may have increased because fewer people today actively seek its protections.¹¹² At the same time, cultural resistance can in-

sueded a Congress in 1993 that did not do its homework to follow along. The time has come to repeal RFRA and to restore the country to common sense religious liberty under the First Amendment.”).

111. Even if more is less, the core of the ministerial exception set forth in *Hosanna-Tabor* is unlikely to be substantially eroded. Short of a wholesale rejection of the ministerial exception, the Court is unlikely to hold that the Catholic Church has to accept female priests, or that the state has a role to play in the selection of an imam at a mosque.

112. See, e.g., *Americans Concerned About Religious Freedom*, BARNAGROUP (Jan. 18, 2013), <https://www.barna.org/barna-update/culture/601-most-americans-are-concerned-about-restrictions-in-religious-freedom> (finding that younger Americans are “much less concerned about religious liberty issues”).

crease if the existing beneficiaries of the free exercise right attempt to expand its coverage into new areas. I turn first to the question of cultural resistance.

A. DIMINISHED SALIENCE OF THE FREE EXERCISE RIGHT

One potential explanation for diminished religious liberty protections is a decline in popular support for the underlying free exercise right. To be sure, most Americans continue to value religion and religious liberty in the most general sense.¹¹³ But there is also a sense in which fewer people today recognize the immediate and practical need of the free exercise right. The primary reason for this change is that many past challenges to religious liberty are no longer active threats.¹¹⁴ We do not enforce blasphemy laws.¹¹⁵ We do not force people to make compelled statements of belief.¹¹⁶ We do not impose taxes to support the training of ministers.¹¹⁷ These changes may mean that as a practical matter, many Americans no longer depend upon the free exercise right for their religious liberty. They are free to practice their religion without government constraints and are therefore *secure beneficiaries* of the right. The clearest example of a secure beneficiary—the least threatened religious believer in America today—is the progressively oriented Christian, who at once remains a part of the dominant historical and cultural faith in the United States but whose political views are aligned with contemporary liberal values.¹¹⁸ It is hard to think of many

113. See, e.g., *id.* (“Nine out of 10 Americans (90%) agreed with the statement, “True religious freedom means all citizens must have freedom of conscience, which means being able to believe and practice the core commitments and values of your faith.”); cf. Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 772 (2013) (“Religious freedom is one thing nearly all Americans, left and right, religious and secular, have been able to agree upon, perhaps because it protects all of us.”).

114. Professor Laycock makes a related observation that “religious liberty has led to such a reduction in the level of religious conflict, at least in the United States, that religious conflict no longer seems very fearsome.” See Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 424 (2011). For this reason, it might be that “religious liberty in America is a victim of its own success.” *Id.*

115. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 9–16 (1947) (discussing early colonial practices).

116. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

117. *Everson*, 330 U.S. at 16 (“No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”).

118. See STEVEN H. SHIFFRIN, *THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS* 1 (2009). Progressive Christians usually fall on the “left” side of

aspects of progressive Christian belief and practice that “threaten government interests” in a way that implicates religious liberty.¹¹⁹

In addition to secure beneficiaries, a growing number of Americans who are either actually or functionally non-religious may have no need for free exercise protections.¹²⁰ They are *non-beneficiaries* of the free exercise right. The number of non-beneficiaries in the United States is still relatively small, but it is not insignificant, and it is growing steadily.¹²¹ More importantly, the class of non-beneficiaries has moved from almost imperceptible (at the framing of the free exercise right) to sociologically significant;¹²² it is no longer possible to ignore nonbelievers in framing normative and legal religious liberty arguments, particularly in cases implicating the Establishment

the political spectrum, and representative issues may include abortion, gay marriage, and gender equality.

119. Hamburger, *supra* note 2, at 848. I do not mean by this claim to suggest that progressive Christians hold no views antithetical to government interests. For example, many elements of the “religious left” challenge American policy on war, criminal law, immigration, or the environment. *See, e.g.*, JASON C. BIVINS, *THE FRACTURE OF GOOD ORDER: CHRISTIAN ANTILIBERALISM AND THE CHALLENGE TO AMERICAN POLITICS* 2–3 (2003); SHIFFRIN, *supra* note 118, at 123. But most of these arguments pose few questions about the boundaries of free exercise—they are religiously informed policy arguments, not religious liberty arguments. Exceptions like peace activists arrested for civil disobedience prove the rule—the majority of progressive Christians do not fall into this category. *See* BIVINS, *supra*, at 30–31; *see also* Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. CONTEMP. LEGAL ISSUES 279, 306 (2013) (discussing free exercise arguments by progressive religious believers against “conceal-carry” laws and laws restricting assistance to illegal immigrants). In fact, it is difficult to think of actual circumstances in which secure beneficiaries of the free exercise right would need to enlist its protections, and the mostly likely circumstances would fall under strong statutory protections. *See* Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc (2000) (providing strict scrutiny protection for religious liberty claims pertaining to land use and prisons).

120. Laycock suggests that this change alters the “original commitment to religious liberty,” which was “a sort of mutual non-aggression pact” in which “[a] right to free exercise of religion was a promise to everyone.” Laycock, *supra* note 114, at 422.

121. Nelson Tebbe cites studies estimating that between four and five percent of the population now identify as either atheist or agnostic. Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1120 (2011); *see also* Laycock, *supra* note 114, at 420 (reporting that 12.3% of those polled in the American Religious Identification Survey answered “‘There is no such thing,’ ‘There is no way to know,’ or ‘I’m not sure’” when asked of the existence of God, and an additional 12.1% answered “‘There is a higher power but no personal God.’”).

122. *See* Laycock, *supra* note 114, at 419–20 (reporting the growth in the number of people that do not identify with any religion).

Clause. That reality is nowhere more evident than in the growing recognition that even “nonsectarian” prayers are incapable of accommodating atheists.¹²³

Non-beneficiaries and secure beneficiaries may be less inclined to worry about the contested boundaries of the free exercise right. They might view its outer limits as either unimportant or antithetical to other interests.¹²⁴ As a result, cultural views about the importance of the free exercise right might weaken even as support for more generalized and abstract notions of religious liberty remains high. Consider by way of analogy the Third Amendment.¹²⁵ The constitutional provision that prevents the government from quartering soldiers in private homes is an important and basic guarantee of our liberties. But hardly anyone cares much about the Third Amendment as a practical matter because few people worry about the government encroaching upon their freedom in this area.¹²⁶ Religious freedom operates in a similar way for many citizens who do not experience an actual threat to their religious liberty.

123. See, e.g., Mike Meno, ‘Nonsectarian’ Prayer Still Alienates Nontheists, SECULAR COALITION FOR AMERICA (Aug. 4, 2011), <http://www.secular.org/blogs/mike-meno/%E2%80%98nonsectarian%E2%80%99-prayer-still-alienates-nontheists>. A majority of the Supreme Court seems to disagree, however. See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1820 (2014).

124. Consider, for example, Eugene Volokh’s observation that the “key question of religious exemption law” is: “Why should *my* belief in what God commands me to do allow me to take something away from *you*, when you don’t share this belief?” Eugene Volokh, *The Priority of Law: A Response to Michael Stokes Paulsen*, 39 PEPP. L. REV. 1223, 1224 (2013); see also Laycock, *supra* note 114, at 422 (“Many believers share the view that nonbelievers are not protected by guarantees of religious liberty, or at least not by important elements of those guarantees. By claiming religious liberty as a right only for themselves, they help confirm the nonbelievers’ view of religious liberty as just another special interest demand.”).

125. U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”).

126. This point is aptly demonstrated in an “article” published on the parody website, *The Onion*. See *Third Amendment Rights Group Celebrates Another Successful Year*, THE ONION (Oct. 5, 2007), <http://www.theonion.com/articles/third-amendment-rights-group-celebrates-another-su,2296> (“The National Anti-Quartering Association, America’s foremost Third Amendment rights group, held its annual gala in Washington Monday to honor 191 consecutive years of advocating the protection of private homes and property against the unlawful boarding of military personnel. ‘This is a proud day for quarters-owners everywhere,’ said the organization’s president, Charles Davison, in his keynote address. ‘Year after year, we have sent a loud and clear message to the federal government and to anyone else who would attack our unassailable rights: Hands off our cottages, livery stables, and haylofts.’”).

They may support religious freedom in the abstract but care little about the disposition of actual free exercise claims.

Non-beneficiaries and secure beneficiaries can of course continue to support a constitutional right. For example, even though the right to counsel does not directly benefit a citizen who has never needed a lawyer in a criminal proceeding, many people who have never been subject to criminal prosecution likely recognize the possibility that they or someone they know may one day need the protections of the right to counsel. To be sure, some citizens who have never affirmed religious belief will endorse the free exercise right for similar reasons. But this kind of empathy may not be true to the same extent for the free exercise right as it is for the right to counsel. It is at least plausible to think that the potential need for the right to counsel is more appreciated by those who have never been arrested than the right to free exercise is by non-believers.¹²⁷

The growing number of non-beneficiaries and secure beneficiaries who see little practical need for the free exercise right may distinguish that right from other First Amendment rights.¹²⁸ Consider, by way of contrast, the free speech right. Most of us are quick to recognize robust speech protections because we think, almost intuitively, that we all benefit from speech protections. We may disagree over what counts as “speech” or whether certain forms of speech should be protected, but almost all of us believe that we are in some sense “speakers.” We all engage in the activity that the right protects. The free exercise right might be different. Even if we could agree about what counts as “religion” (or at least core instances of “religion”), a non-trivial number of Americans may claim

127. The salience of an “option” may not hold across all rights. For example, because characteristics like race and gender are generally immutable and equal protection rights are seemingly limited to “discrete and insular minorities,” white men may not perceive the need for the option of those rights. Cf. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 794 (2011) (“[E]qual protection claims tend to stress distinctions among us, even as they ask us to overcome those distinctions.”). On the other hand, the fact that white men have close relationships with citizens who are not white men might trigger a kind of empathy for those benefiting from the right. Of course, one could make a similar argument about the relationships that many nonreligious citizens have with religious citizens. These are empirical questions.

128. The one exception might be the press, depending upon how broadly or narrowly the scope of that right is construed today. See Paul Horwitz, *Or of the [Blog]*, 11 NEXUS 45, 57 (2006).

that they are not “exercising religion” in a way that requires the protections of the free exercise clause.¹²⁹

Another plausible distinction between the free exercise right and the free speech right is that cases brought under the latter remain ideologically cross-cutting. Free speech plaintiffs are all over the ideological map: video gamers,¹³⁰ anti-abortion counselors,¹³¹ labor unions,¹³² pornographers,¹³³ and funeral protesters¹³⁴ all appeal to the free speech right. Most of us also endorse Justice Black’s famous line that free speech protections “must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.”¹³⁵ In contrast, most of the well-known contemporary free exercise challenges involve conservative religious believers, and many of those challenges are to government restrictions informed by liberal values.¹³⁶ The ideological leaning of the bulk of today’s free exercise plaintiffs may lead to increased skepticism about the value of free exercise rights from those who most often encounter them in the form of legal challenges to laws that they value.

129. However, secure beneficiaries and non-beneficiaries of religious liberty protections may continue to derive meaningful structural protections from the establishment clause.

130. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2732–33 (2011).

131. *McCullen v. Coakley*, 571 F.3d 167, 172 (1st Cir. 2009).

132. *Harris v. Quinn*, 656 F.3d 692, 694 (7th Cir. 2011).

133. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 238 (2002); *Hamling v. United States*, 418 U.S. 87, 100–01 (1974).

134. *Snyder v. Phelps*, 131 S. Ct. 1207, 1214–15 (2011).

135. *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (Black, J., dissenting) (“[T]he freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.”). Note that Justice Black omits the free exercise of religion from his list of First Amendment rights.

136. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. June 30, 2014) (dealing with Christian store owners challenging the inclusion of certain contraceptives in the Affordable Care Act); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp’t Opportunity Comm’n*, 132 S. Ct. 694 (2012) (dealing with a Christian school that dismissed a minister after she was not reinstated to her old position following medical leave); *Order Denying in Part Defendants’ Motion To Dismiss and Denying Plaintiffs’ Motion for Preliminary Injunction*, *Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13-cv-2611-WJM-BNB, 2013 WL 6839900 (D. Colo. Dec. 27, 2013) (deciding proposed order of Catholic nuns challenging the inclusion of contraception under the Affordable Care Act); see also *Holt v. Hobbs*, 134 S. Ct. 1512 (2014) (memorandum granting certiorari to inmate challenging prison beard policy on religious grounds).

B. EXTENDED SCOPE OF THE FREE EXERCISE RIGHT

A second explanation for increased resistance to the free exercise right—and a potential limitation on rights expansion more generally—is the extension of the right to broader classes of rights-holders. The clearest historical example is the incorporation of the free exercise right against the states.¹³⁷ Hamburger attributes the shift from absolute to conditional protections in the middle of the twentieth century to “well-intentioned efforts to enlarge a right” that were rooted in arguments for religious exemptions.¹³⁸ But he neglects the incorporation of the free exercise right.¹³⁹ Prior to incorporation, “the occasions for conflict [under the federal free exercise clause] between church and state were few.”¹⁴⁰ Growing conflicts between religious liberty and state interests likely arose not from increased calls for religious exemptions but out of the post-incorporation applicability of the federal free exercise clause to state and local laws.¹⁴¹

The weakening of a right due to expansion of the class of rights holders may also occur in more discrete instances (which might provide an example of Hamburger’s “more is less” thesis). The Supreme Court alluded to this concern when it upheld a regulation that limited the scope of charitable solicitation by

137. It is even possible that incorporation represents a “more is less” phenomenon if increasing the scope of the federal Bill of Rights to cover state and local governmental action through the Fourteenth Amendment led to diminished protections of the core of those rights previously guaranteed against only the federal government. *See, e.g., Williams v. Florida*, 399 U.S. 78, 118 (1970) (Harlan, J., concurring) (“The necessary consequence of this decision [that Florida’s six-member jury statute satisfies the Sixth Amendment] is that 12-member juries are not *constitutionally* required in *federal* criminal trials either.”). But if “more is less” is an anti-incorporation argument, then Hamburger has a much bigger hurdle to overcome. *See, e.g., School District of Abington Twp. v. Schempp*, 374 U.S. 203, 257 (1963) (Brennan, J., dissenting) (“[T]he Fourteenth Amendment’s protection of the free exercise of religion can hardly be questioned. . .”).

138. *See Hamburger, supra* note 2, at 837 (“[T]he conditions imposed during the last half of the twentieth century suggest how well-intentioned efforts to enlarge a right can inflate it so far as to weaken it.”); *see also id., supra* note 2, at 835–36 (“In contrast, during the past forty years, the United States Supreme Court has repeatedly conditioned the right of free exercise on compelling government interests.”).

139. The free exercise clause was incorporated in *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940). Hamburger mentions *Cantwell* several times, but never addresses its incorporation holding. *See Hamburger, supra* note 2.

140. MCCONNELL, ET AL., *supra* note 6, at 76.

141. *See id.* (describing how the expanded scope of the free exercise clause after incorporation increased conflicts between church and state).

the International Society for Krishna Consciousness at Minnesota's annual state fair.¹⁴² The Court observed that while:

[S]ome disorder would inevitably result from exempting the Krishnas from the Rule . . . there would be a much larger threat to the State's interest in crowd control if all other religious, nonreligious, and non-commercial organizations could likewise move freely about the fair-grounds distributing and selling literature and soliciting funds at will.¹⁴³

In other words, the Court believed that Minnesota could reasonably accommodate a small number of exemptions but that a broader extension of those exemptions would undermine the state's interest in controlling crowds at the fair.

Although the Court analyzed the Krishna case solely on free speech grounds,¹⁴⁴ the religious nature of the Krishnas gestures toward concerns about expanding the class of rights-holders in the free exercise context. A state might grant a religious exemption from a generally applicable law if only a small number of religious adherents will make use of the exemption. The military could tolerate a small number of conscientious objectors. The tax system could absorb a few religious exemptions. But if massive numbers of citizens claimed a draft or tax exemption under a free exercise rationale, then the government's interest in maintaining military readiness or a reliable tax base could be jeopardized. Indeed, that principle seems to be operative in *United States v. Lee*, a case in which the Court denied to an Amish furniture maker an exemption from paying social security taxes.¹⁴⁵ Cases like *Lee* suggest that when faced

142. *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981).

143. *Id.* at 653.

144. *Id.* at 659 n.3 ("Respondents' complaint, based on 42 U.S.C. § 1983, alleges that Rule 6.05, on its face and as applied, violates both the Free Exercise and the Free Speech Clauses. In their brief and in oral argument, however, respondents emphasize that they do not claim any special treatment because of Sankirtan, but are willing to rest their challenge wholly upon their general right to free speech, which they concede is identical to the right enjoyed by every other religious, political, or charitable group.").

145. 455 U.S. 252 (1982). The Court observed:

[I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs. . . . The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

with the real or perceived threat of undermining widespread regulatory functions, the government will be less likely to honor the right for anyone.¹⁴⁶

IV. CULTURAL VIEWS ABOUT GOVERNMENT INTERESTS

The preceding section explored shifting views about the free exercise right. This section turns to shifting views about the nature of governmental interests. That focus calls to mind Frederick Schauer's suggestion that "constitutional salience" shapes the boundaries of the First Amendment.¹⁴⁷ Schauer defines constitutional salience as "the often mysterious political, social, cultural, historical, psychological, rhetorical, and economic forces that influence which policy questions surface as constitutional issues and which do not."¹⁴⁸ His description draws upon realist insights to highlight "a complex and seemingly serendipitous array of factors that cannot be (or at least have not been) reduced to or explained by legal doctrine or by

Id. at 259–60. *See also* *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354, slip op. at 47 (U.S. 2014) ("Because of the enormous variety of government expenditures funded by tax dollars, allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos.").

146. Concerns about expanding the class of rights holders may also underlie the majority's reasoning in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In recognizing a free exercise exemption for the Amish from Wisconsin's compulsory education laws, the Court went out of its way to emphasize the historical particularity of the Amish faith, noting "almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life." *Id.* at 219. The intuition underlying *Yoder* is that the Amish are peculiar enough to be given an exemption without significantly undermining the state's interest in public education. *See also* Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 130 (1989) ("*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."). Similar arguments underlie the Court's protection of closely held businesses under the Religious Freedom Restoration Act. *Cf. Hobby Lobby Stores, Inc.*, No. 13-354, slip op. at 29 ("HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring."); *id.* at 45 ("HHS and the principal dissent argue that a ruling in favor of the objecting parties in these cases will lead to a flood of religious objections . . . but HHS has made no effort to substantiate this prediction.").

147. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004).

148. *Id.*

the background philosophical ideas and ideals of the First Amendment.”¹⁴⁹

Schauer’s inquiry highlights expressive restrictions that usually pass unnoticed, like our outlawing of perjury, antitrust violations, or insider trading.¹⁵⁰ His doctrinal observations suggest two important corollaries. The first is that some governmental interests, unlike rights, are absolute at any given time—no right will prevail against them.¹⁵¹ The second is that the strength of some government interests changes over time.¹⁵² These two corollaries together suggest that there is a dynamic “tipping point” at which a government interest is so strong that rights expansion that would challenge the government interest becomes impossible, unless and until the cultural support for the interest diminishes.¹⁵³

149. *Id.* Constitutional salience serves as a proxy for “the outcome of a competitive struggle among numerous interests for constitutional attention.” *Id.* at 1788. *Cf.* FISH, *supra* note 67, at 102 (1994) (“Free speech, in short, is not an independent value but a political prize, and if that prize has been captured by a politics opposed to yours, it can no longer be invoked in ways that further your purposes, for it is now an obstacle to those purposes.”). For a realist approach to the First Amendment with some resemblance to Schauer’s constitutional salience, see J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 390 (1990), which describes the rhetorical shifts that accompanied “a loss of faith in the fundamental nature and coherence of an abstract liberty” with respect both to freedom of contract and freedom of speech. *See also* James Boyd White, *Law As Rhetoric, Rhetoric As Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 688–91 (1985) (proposing the law is best understood as a form of “constitutive rhetoric.”).

150. Schauer, *supra* note 147, at 1170–71.

151. *Cf.* Schauer, *supra* note 18, at 305 (“Even speech at the core of the First Amendment may be restricted if the state interest is sufficiently strong.”).

152. *Cf.* Schauer, *supra* note 18, at 315 (highlighting the diversity of state interests and the difficulties such variations present for strict categorical analysis).

153. The absolute nature of some governmental interests helps to explain why the impossibility of absolutely *protected* expression (recall that this impossibility underlies my critique of Hamburger’s baseline claim) does not negate the conceptual possibility of absolutely *unprotected* expression. Indeed, the Court has recognized such categories of unprotected speech since *Chaplinsky v. New Hampshire*, when it described “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” 315 U.S. 568, 571–72 (1942). The Court has since specified that these categories include obscenity, defamation, fraud, incitement, and “speech integral to criminal conduct.” *United States v. Stevens*, 559 U.S. 460, 468 (2010).

Some interests seem so strong, so widely endorsed, that we take them as obvious.¹⁵⁴ To take an easy example, our current cultural context does not hold open the possibility that even the most deeply held views about human sacrifice will permit voluntary (let alone involuntary) acts of human sacrifice.¹⁵⁵ Certain national security interests maintain a similar level of obviousness. Most of us are reasonably wary of people who conspire to overthrow our government, and we understand why prior restraints prevent disclosure of highly sensitive classified information.¹⁵⁶

Some seemingly “obvious” interests become less obvious over time. We can illustrate this dynamism (and its relationship to legal doctrine) by returning to the example of *Davis v. Beason*.¹⁵⁷ In 1890, few would have doubted that the government’s interest in restricting polygamy trumped the protections of the free exercise right (or any other right).¹⁵⁸ But as recent events have shown, that may not be true today.¹⁵⁹ The example

154. *Cf. Stevens*, 559 U.S. at 470 (“[T]he evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required. . . .” (quoting *New York v. Ferber*, 458 U.S. 747, 763–64 (1982))).

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

156. *See Near v. Minnesota*, 283 U.S. 697, 716 (1931) (“No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.”); *see also United States v. Reynolds*, 345 U.S. 1, 7–8 (1953) (recognizing the validity of the state secrets privilege).

157. 133 U.S. 333 (1890).

158. *See Davis*, 133 U.S. at 341–42 (“Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. . . . They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. . . . To extend exemption from punishment for such crimes would be to shock the moral judgment of the community.”).

159. *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1222 (D. Utah 2013) (striking down key provisions of Utah’s anti-polygamy law). Importantly, the government’s interest in restricting Mormon polygamy at the end of the nineteenth century likely went beyond enforcing consensus norms about sexual morality to concerns over social stability. *See Maura Strassberg, The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 363 (2003) (“[B]y the mid-nineteenth century, polygyny in general, and Mormon polygyny in particular, seemed to pose not a mere theoretical threat to the egalitarian and democratic government established in the United States. It had already produced a powerful theocracy that showed itself more than capable of quickly populating and controlling the political, economic and social structure of the Western Territories. Therefore, stopping polygyny was understood as the key to thwarting the

of polygamy highlights a broader trend in the diminished salience of the government's interest in maintaining public morality. In past times, and over First Amendment objections, the state has criminalized private behavior including obscenity,¹⁶⁰ nude dancing,¹⁶¹ and sodomy.¹⁶² Some of these restrictions are now seen as antiquated and paternalistic.¹⁶³ Others remain in force. Norms can shift, and those shifts can bring about changes in legal doctrine.¹⁶⁴

The shift in "public morality" reveals how some "obvious" governmental interests can lose their force over time. But cultural views about governmental interests can also intensify. The clearest example of this phenomenon in recent years is the antidiscrimination norm.

theocratic ambitions of the Mormon Church and establishing a secular rule of law in the West.").

160. *Roth v. United States*, 354 U.S. 476, 492 (1957).

161. *City of Erie v. Pap's A. M.*, 529 U.S. 277, 302 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571–72 (1991).

162. *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting); see also Karst, *supra* note 2, at 658 (reviewing motivations behind state anti-sodomy laws).

163. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting) (calling the restriction in *Lawrence* "uncommonly silly"), *overruling* *Bowers v. Hardwick*, 478 U.S. 186 (1986).

164. The doctrinal shift away from morality-based justifications is evident in two recent Supreme Court decisions: *United States v. Stevens*, 559 U.S. 460 (2010), and *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011). The decisions struck down regulations aimed at sexual fetishes involving the torture and killing of animals, *Stevens*, 559 U.S. at 481–82, and violent video games that included scenes of simulated rape and torture, *Brown*, 131 S. Ct. at 2742. In both cases, the challenged regulations were imprecise and overbroad. *Brown*, 131 S. Ct. at 2742 (describing the legislation as "seriously overinclusive"); *Stevens*, 559 U.S. at 460 ("[Section] 48 is . . . substantially overbroad, and therefore invalid under the First Amendment."). But what is interesting in the context of the present discussion is the relative inattention the Court gave to morality-based arguments. In *Stevens*, the Obama administration argued that the depictions of animal cruelty caused "injuries to human beings and the erosion of important public mores" and portrayed "patently offensive conduct that appeals only to the basest instincts." Brief for Petitioner at 8, 9, *Stevens*, 559 U.S. 460 (No. 08-769). Citing John Locke, the government argued that "debasement of individuals and society causes widespread, if sometimes inchoate, harm." *Id.* at 35 (citing JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION 91 (John William Adamson, ed., 2007)). These arguments were nowhere to be found in the *Stevens* opinion. The morality arguments in *Brown* were more complicated because they were directed at the nexus of parental autonomy and state responsibility. Brief for Petitioner at 39–41, *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729 (No. 08-1448). But even in *Brown*, California's arguments about "the societal interest in order and morality" were unpersuasive to the justices. *Id.* at 40.

Cultural support for the antidiscrimination norm has intensified since the end of the Second World War and the growth of the civil rights movement for African-Americans.¹⁶⁵ Scholars have attributed this growth to public recognition of the contributions of African-Americans who served in the war and to the democratic ideals trumpeted by America in opposition to the fascism abroad.¹⁶⁶ Changes in law and popular opinion embraced the antidiscrimination norm for race and gender through the passage of the Civil Rights Act of 1964 and other legislation.¹⁶⁷

Existing social realities belie the claim that the antidiscrimination norm has achieved unqualified success for African-Americans or that we have reached a “post-racial” society.¹⁶⁸

165. See Ilya Somin, *Public Opinion, Anti-Discrimination Law, and the Civil Rights Act of 1964*, THE VOLOKH CONSPIRACY (May 24, 2010, 4:30 PM), <http://www.volokh.com/2010/05/24/public-opinion-anti-discrimination-law-and-the-civil-rights-act-of-1964> (“By 1963, one year before the enactment of the Civil Rights Act, 85% of whites polled in a National Opinion Research Center survey endorsed the view that ‘Negroes should have as good a chance to get any kind of job’ and rejected the position that ‘white people should have the first chance at any kind of job’ (endorsed by only 15%). This contrasts with 55% who said that ‘white people should have the first chance’ on the same question in 1942 and 51% who said so in 1944.”); see also Paul Burstein, *Public Opinion, Demonstrations, and the Passage of Antidiscrimination Legislation*, 43 PUB. OPINION Q. 157, 162–62 (1979) (graphing the increased societal opposition to discrimination); cf. Somin, *supra* (“[D]emocratic government is unlikely to enact strong antidiscrimination laws to protect a group unless and until the majority of voters comes to oppose discrimination against it.”).

166. See, e.g., Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 130 (2013) (“The ideology of the war was antifascist and prodemocratic, and President Franklin D. Roosevelt urged Americans to ‘refut[e] at home the very theories we are fighting abroad.’”).

167. Burstein, *supra* note 165, at 163.

168. See Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 972 (2010) (suggesting that “the history, social reality, and life circumstances of people of color in this country do not support a broad adoption of the post-racial perspective within equal protection analysis”). Some scholars have even argued that the Court’s recent decision in *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013), which invalidated key parts of the Voting Rights Act, marks the end of the civil rights era. Adam Winkler, *The Supreme Court’s Ruling and the End of the Civil-Rights Era*, THE DAILY BEAST (June 25, 2013), <http://www.thedailybeast.com/articles/2013/06/25/the-supreme-court-s-ruling-and-the-end-of-the-civil-rights-era.html>; see also Gráinne De Búrca, *The Trajectories of European and American Antidiscrimination Law*, 60 AM. J. COMP. L. 1, 3 (2012) (“The socially transformative energy of the U.S. civil rights movement of the 1960s seems to have been drained and the powerful corpus of constitutional and federal antidiscrimination law that it brought with it has been significantly weakened following decades of political and legal backlash.”).

Similar hurdles remain for efforts toward gender equality.¹⁶⁹ Still, consensus norms about the government's antidiscrimination interest have generally intensified. Nowhere is this more evident than in the context of gay rights, a story that also illustrates the interplay between legal doctrine and cultural views.

Support for gay rights has been growing steadily since the early 1990s.¹⁷⁰ In 1996, the year that Congress enacted the Defense of Marriage Act, only 25% of Americans supported gay marriage.¹⁷¹ By 2010, polls began showing a national majority in favor of gay marriage.¹⁷² In fact, “[p]ublic support for gay marriage in the United States increased at an average rate of about 1% annually from approximately the early 1990s to 2004 and has increased at an average rate closer to 2% annually since then.”¹⁷³ Similarly, “[t]he number of Americans believing that homosexuals should have equal employment rights grew from 56% in 1977 to 80% in 1997, and the number believing that gays should be legally permitted to adopt children rose from 14% to 50% over roughly the same time period.”¹⁷⁴ These trends are likely to continue in light of strong support for gay rights among younger demographics.¹⁷⁵

As public opinion began to shift in the mid-1990s, the media began favorably depicting gay characters in popular television shows.¹⁷⁶ Support for gay rights also reached the worlds of

169. For accounts of persisting gender inequities, see, e.g., JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

170. Until the mid-1990s, same-sex marriage was not legal anywhere in the world. Klarman, *supra* note 166, at 130.

171. Andrew Gelman et al., *Over Time, a Gay Marriage Groundswell*, N.Y. TIMES, Aug. 22, 2010, at 3.

172. *Id.*

173. Klarman, *supra* note 166, at 155.

174. *Id.* at 133.

175. See *Growing Public Support for Same-Sex Marriage*, PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS (Feb. 16, 2012), <http://www.people-press.org/2012/02/07/growing-public-support-for-same-sex-marriage>.

176. Klarman, *supra* note 166, at 133 (“[S]ome of the nation’s most popular situation comedies, such as *Friends* and *Mad About You*, began dealing with gay marriage—a virtually inconceivable development even five years earlier. In 1997, Ellen DeGeneres famously came out in a special one-hour episode of her popular television show *Ellen*—the first time in television history that a leading prime-time character had come out as gay. Forty-six million Americans watched, and *Time* put her on its cover with the headline, ‘Yep, I’m Gay.’ A year and a half later, *Will and Grace*, which featured two openly gay men as major characters, launched its run as one of television’s most popular programs.”).

business and politics. By 2000, the number of Fortune 500 companies that extended benefits to same-sex partners had risen from zero to over a hundred, twelve states had extended their hate crime laws to cover sexual orientation, and eleven had forbidden workplace or public accommodation discrimination against gays.¹⁷⁷ In the past five years alone, we have seen the repeal of “Don’t Ask, Don’t Tell,” the passage of a federal hate crimes law and several state gay marriage laws, and the election of the first openly gay United States senator.¹⁷⁸

The Supreme Court’s treatment of gay rights has largely tracked these changes.¹⁷⁹ In 1986, the Court affirmed the constitutionality of Georgia’s sodomy laws in *Bowers v. Hardwick*.¹⁸⁰ The majority asserted that sexual orientation was not considered a protected class and that the justifications underlying Georgia’s law survived rational basis scrutiny, although sharp dissents from Justices Stevens and Blackmun suggested otherwise.¹⁸¹

The first significant Supreme Court opinion suggesting reception to gay rights came a decade later in *Romer v. Evans*.¹⁸² In that case, the Court overturned a voter-approved amendment to Colorado’s constitution that would have prohibited state or local government from passing antidiscrimination laws protecting gays and lesbians.¹⁸³ *Romer* cleared a path for the eventual overruling of *Bowers*, which came seven years later in

177. *Id.* at 133–34.

178. *Id.* at 134; Erik Eckholm, *As Victories Pile Up, Gay Rights Advocates Cheer ‘Milestone Year’*, N.Y. TIMES, Nov. 8, 2012, at P7.

179. Klarman, *supra* note 166, at 135 (“Sometimes in American history, social change occurs with extraordinary rapidity. Once that happens, Court decisions that were previously inconceivable become plausible.”); *see also* Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933, 936 (2001) (noting that judicial review “yields remarkably majoritarian results, and is a process that is different from majoritarian politics but nonetheless responsive to it. In short, whatever judicial review is about, describing its operation requires something far more nuanced than the counter-majoritarian explanation provides”).

180. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

181. *Id.*

182. 517 U.S. 620 (1996). The year before, the Court held that requiring private parade organizers to allow the participation of an LGBT group would alter the expressive content of the parade and therefore violate the First Amendment rights of the organizers. *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 559 (1995).

183. *Romer*, 517 U.S. at 623.

Lawrence v. Texas.¹⁸⁴ In that decision, a 5-4 majority invalidated a Texas law criminalizing same-sex sodomy.¹⁸⁵

In June of 2013, ten years after *Lawrence*, the Court handed down a landmark victory for gay rights in *United States v. Windsor*.¹⁸⁶ *Windsor* struck down a key provision of the federal Defense of Marriage Act, which defined marriage as between a man and a woman.¹⁸⁷ Legally married gay couples are now recognized as such for the purposes of over 1,000 federal benefits.¹⁸⁸ *Windsor* stopped short of asserting a constitutional right to gay marriage, but held that the Act was discriminatory in that its “demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law.”¹⁸⁹

Both the cultural and legal developments in the area of gay rights illustrate the strong and growing support for the antidiscrimination interest. The strength of that interest intersects in important ways with potentially weakened views about religious liberty. The convergence can be illustrated by the legislative responses to the Supreme Court’s 1990 *Smith* decision.¹⁹⁰ In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA) with overwhelming bipartisan support—the bill cleared the Senate with a vote of 97-3.¹⁹¹ After the Court invalidated key provisions of RFRA, congressional sponsors introduced the Religious Liberty Protection Act in 1998 and 1999, which included narrower protections than RFRA.¹⁹² The bill went nowhere.¹⁹³ The primary reason that the revised legisla-

184. *Lawrence*, 539 U.S. 558.

185. *Id.* at 578 (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

186. 133 S. Ct. 2675 (2013).

187. *Id.* at 2682.

188. Elizabeth B. Wydra, *Reading the Opinions—and the Tea Leaves—in United States v. Windsor*, 2012–13 CATO SUP. CT. REV. 95, 95; see also Amy Howe, *A Home Run but Not a Grand Slam for Gay-Marriage Advocates: In Plain English*, SCOTUSBLOG (June 26, 2013, 3:58 PM), <http://www.scotusblog.com/2013/06/a-home-run-but-not-a-grand-slam-for-gay-marriage-advocates-in-plain-english>.

189. *Windsor*, 133 S. Ct. at 2693–94. The *Windsor* Court concluded that “DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.” *Id.* at 2695.

190. *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

191. See 139 CONG. REC. 26,416 (1993).

192. S. 2081, 106th Cong. (2000); H.R. 1691, 106th Cong. (1999); S. 2148, 105th Cong. (1998); H.R. 4019, 105th Cong. (1998).

193. Laycock, *supra* note 114, at 412–13.

tion failed is that, between 1993 and 1998, people began to worry that strong protections for religious liberty could harm gays and lesbians.¹⁹⁴

More generally, the growing strength of the antidiscrimination norm may be placing increased pressure on the free exercise right. That pressure is not uniformly successful; the Court's recent decision in *Hosanna-Tabor* provides an example of a religious liberty claim (rooted at the intersection of the free exercise clause and the establishment clause) protecting churches against certain antidiscrimination laws.¹⁹⁵ But *Hosanna-Tabor* will not by itself weaken the broader trajectory of antidiscrimination norms, particularly outside the context of what might end up being a very narrow application to employment decisions pertaining to church leaders.¹⁹⁶ In other words, *Hosanna-Tabor* will not be likely to shift cultural views about antidiscrimination norms.

V. RIGHTS EXPANSION: WHEN MORE IS MORE

The previous two sections suggested that pressures on the free exercise right may be at least partially attributable to shifting cultural views about religious liberty and the government interests with which religious liberty claims intersect. At the very least, it suggests that diminished free exercise protections cannot be tied wholly or even largely to rights expansion, and that a blanket rejection of rights expansion is unwarranted. But the claim can be made even stronger; we know that rights expansion sometimes increases rights protection. This section considers two examples, one historical and one prospective.

A. THE HISTORICAL EXAMPLE OF THE FREE SPEECH RIGHT

We know that the scope of the speech right has often increased without compromising any of its core protections. In response to arguments to expand the coverage of the free speech

194. *Id.*

195. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 132 S. Ct. 694 (2012).

196. See John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 824 (2014) (“[G]iven that only four of the justices in *Hosanna-Tabor* supported the Christian Legal Society in [*Christian Legal Society v. Martinez*, 561 U.S. 661 (2010)], the reach of the ministerial exception may be significantly curtailed when religious liberty confronts sexual orientation discrimination beyond the narrow confines of ‘ministerial’ positions.”).

right, the Supreme Court has recognized the communicative potential in myriad acts that are not intuitively speech: burning a flag,¹⁹⁷ dancing naked,¹⁹⁸ and sleeping in a park,¹⁹⁹ to name just a few. Commercial speech, once “uncovered” by the First Amendment, is now a form of protected speech.²⁰⁰ The standards for “uncovered” obscene expression have shifted to such a degree that broad swaths of pornographic material that would have been criminalized in an earlier era are now safely within contemporary community standards of decency.²⁰¹ Animal crush videos,²⁰² violent video games,²⁰³ and lies about military service²⁰⁴ are now protected speech. The protections of the free speech right have expanded beyond its core, and the sky has not fallen.

The expansion of the free speech right is also demonstrated in the litigation strategy of the Jehovah’s Witnesses and their attorney, Hayden Covington.²⁰⁵ During an era in which the Witnesses confronted massive ridicule, marginalization, and violence, Covington focused on four of the First Amendment’s rights working together with one another: speech, press, reli-

197. See *Texas v. Johnson*, 491 U.S. 397 (1989).

198. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (“[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.”).

199. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293–95 (1984) (assuming that sleeping in the park might be expression covered by the First Amendment but upholding a National Park Service ban on overnight sleeping as a content-neutral restriction).

200. See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

201. In a 2002 dissent, Justice Stevens argued that “[t]he kind of hard-core pornography” at issue in *Hamling v. United States*, 418 U.S. 87 (1974), “would be obscene under any community’s standard” and “does not belong on the Internet.” *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 611 (2002) (Stevens, J., dissenting). The brochure at issue in *Hamling* included “pictures portraying heterosexual and homosexual intercourse, sodomy and a variety of deviate sexual acts” involving one or more people, and, in two instances, a woman and a horse. 418 U.S. at 92–93 (describing the material). The eleven years since Stevens’s dissent have cast even greater doubt on his claim.

202. See *United States v. Stevens*, 559 U.S. 460, 467 (2010).

203. See *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729 (2011).

204. See *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012).

205. For an overview of the Witnesses’ struggles with persecution, see SHAWN FRANCIS PETERS, *JUDGING JEHOVAH’S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION* 1–18 (2000).

gion, and assembly.²⁰⁶ Tapping into the cultural salience of these “Four Freedoms,” Covington appealed to the broad nature of the First Amendment’s protections, and his strategy led to scores of lower court victories and dozens of successful appeals to the Supreme Court.²⁰⁷ In some instances, these arguments led to stronger First Amendment protections than had previously been recognized. Consider, for example, the famous flag salute case, *West Virginia State Board of Education v. Barnette*,²⁰⁸ in which the Court addressed the question of compelled speech. As Joseph Blocher observes, *Barnette* “self-consciously created a new ‘right not to speak,’ rather than simply applying existing First Amendment doctrine.”²⁰⁹

B. THE PROSPECTIVE EXAMPLE OF THE RIGHT OF ASSOCIATION

The free speech right suggests that sometimes rights expansion can increase rights protection. By expanding the coverage of the right, a greater cross-section of citizens may come to recognize the importance of First Amendment protections to their own circumstances, thus strengthening the periphery of the right without compromising the core.²¹⁰ A similar possibility may exist with the right of association.

206. See generally Inazu, *supra* note 196.

207. See *id.* at 802 n.53. Covington did not always appeal to the Four Freedoms together, and sometimes courts took the initiative upon themselves. See, e.g., Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, in *FIRST AMENDMENT STORIES* 115 (Richard W. Garnett & Andrew Koppelman eds., 2012) (“In questioning the general power of government to compel participation in a flag salute, the Court transformed the case from a dispute over special religious exemptions to one that implicated the freedom of speech of all students This re-conception of the central constitutional issues at stake came largely at the Court’s own initiative. The briefs of the Witnesses and their amici had focused almost exclusively on freedom of religion . . .”).

208. 319 U.S. 624 (1943).

209. Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761, 789 (2012).

210. Kenji Yoshino has advanced a similar kind of salience argument in other contexts. See Yoshino, *supra* note 127, at 794 (“As the polity becomes more diverse . . . ‘rights talk’ can be a ground on which to create coalitions that embody broader, more inclusive forms of ‘we.’ For instance, movements for a ‘right to education,’ a ‘right to health care,’ a ‘right to welfare,’ or a ‘right to vote’ that cut across traditional identity politics groups might helpfully erode the traditional group-based distinctions among them.”). Yoshino also notes Theda Skocpol’s observation of the consequences of failing to appeal to broader salience with antipoverty efforts: “when U.S. antipoverty efforts have featured policies targeted on the poor alone, they have not been politically sustainable,

The constitutional right of association is a relative late-comer to our civil liberties.²¹¹ Its antecedent lies in the First Amendment's right of assembly.²¹² The right of assembly encompassed groups of all kinds and imposed only one constraint—groups had to be peaceable.²¹³ That broad understanding narrowed when the Supreme Court shifted its gaze away from peaceability and recognized the right of association in *NAACP v. Alabama ex rel. Patterson*.²¹⁴ Justice Harlan's opinion focused instead on "freedom to engage in association for the advancement of beliefs and ideas."²¹⁵

The right of association itself underwent a significant transformation in the Court's 1984 decision in *Roberts v. United States Jaycees*.²¹⁶ Justice Brennan's majority opinion recognized two different kinds of association in the Court's previous cases.²¹⁷ One line of decisions protected "intimate association" as "a fundamental element of personal liberty."²¹⁸ Another set of decisions guarded "expressive association," which was "a right to associate for the purpose of engaging in those activities pro-

and they have stigmatized and demeaned the poor." *Id.* at 795 (quoting Theda Skocpol, *Targeting Within Universalism: Politically Viable Policies to Combat Poverty in the United States*, in *THE URBAN UNDERCLASS* 411, 414 (Christopher Jencks & Paul E. Peterson eds., 1991)).

211. See generally INAZU, *supra* note 3, at 63–117 (tracing the origins of the right of association).

212. *Id.* at 20–62 (describing the origins of the right of assembly).

213. *Id.* at 21–25. The right of assembly is a stand-alone right not wedded to the separate petition right. See *id.* (discussing textual history). See also Ashutosh Bhagwat, *Associational Speech*, 120 *YALE L.J.* 978 (2011) (making similar observations).

214. 357 U.S. 449 (1958). The case arose after the State of Alabama sought to compel the NAACP to disclose its membership list. Alabama's Attorney General John Patterson initiated an action to enjoin the NAACP from operating within the state, arguing that the group was a "business" that had failed to register under applicable state law. *Id.* at 452. The state court trial judge issued the injunction *ex parte*, explaining that he intended "to deal the NAACP a mortal blow from which they shall never recover." LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 165 (2000) (internal quotation marks omitted). The judge also ordered the NAACP to produce its membership list, which Patterson had requested as part of a records review. *Id.* When the NAACP refused to comply, the judge responded with a \$10,000 contempt fine, which he increased to \$100,000 five days later. *Id.* at 166. After the Alabama Supreme Court rejected the NAACP's appeal of the judge's order through a series of disingenuous procedural rulings, the NAACP appealed to the United States Supreme Court. *Id.*

215. *Patterson*, 357 U.S. at 460.

216. 468 U.S. 609 (1984).

217. *Id.* at 617–18.

218. *Id.*

tected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”²¹⁹ These categories of intimate and expressive association jettisoned constitutional protection for a vast array of civil society groups that fell short of the requisite threshold of intimacy or expressiveness: social clubs, fraternities, sororities, gardening groups, book clubs, dinner groups—even bowling leagues.²²⁰ In other words, the shift from assembly to association and the further bifurcation of association may represent a third alternative to rights expansion and rights confinement—*rights contraction*.

Neither of the associational categories in the *Roberts* baseline withstands close scrutiny. The expressive distinction implies that some groups are “nonexpressive,” but it becomes very difficult, if not impossible, to police this line apart from the expressive intent of the members of the group. Many groups that might seem to be “nonexpressive” could in fact articulate an expressive intent.²²¹ The right of intimate association encounters similar line-drawing problems. All of the values, benefits, and attributes that courts assign to intimate associations are equally applicable to many, if not most, non-intimate associations.²²²

The problems with intimate and expressive association can be seen in the 1989 case of *Dallas v. Stanglin*.²²³ The Supreme Court reviewed a city ordinance that restricted the age of admission to certain dance halls in order “to provide a place where teenagers could socialize with each other, but not be subject to the potentially detrimental influences of older teenagers and young adults.”²²⁴ The Twilight Skating Rink in Dallas had

219. *Id.* at 618.

220. The last example gestures toward Robert Putnam’s seminal study on the decline of civil society. See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

221. The “expressive” versus “nonexpressive” distinction is also complicated because its meaning is dynamic and subject to more than one interpretive gloss. See generally INAZU, *supra* note 3, at 160–62.

222. The *Roberts* opinion singled out intimate associations for heightened constitutional protection because they are capable of “cultivating and transmitting shared ideals and beliefs,” they can “foster diversity and act as critical buffers between the individual and the power of the State,” they provide “emotional enrichment from close ties with others,” and they help “safeguard[] the ability independently to define one’s identity that is central to any concept of liberty.” *Roberts*, 468 U.S. at 618–19. Many non-intimate associations perform some or all of these functions. For a more extensive critique, see INAZU, *supra* note 3, at 136–41.

223. *City of Dallas v. Stanglin*, 490 U.S. 19 (1989).

224. *Id.* at 21.

sued to enjoin city officials from enforcing the ordinance, asserting that it infringed upon the right of teenagers to associate with others outside of their age bracket.²²⁵

The Court took pains to depict the skating rink as neither an intimate nor an expressive association. It first asserted that dance hall patrons “are not engaged in the sort of ‘intimate human relationships’” that give rise to the protections of intimate association.²²⁶ It then claimed that the potential associations between teenagers and adults restricted by the ordinance “simply do not involve the sort of expressive association that the First Amendment has been held to protect” because “[t]he hundreds of teenagers who congregate each night at this particular dance hall are not members of any organized association; they are patrons of the same business establishment.”²²⁷ The Court concluded that “the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment.”²²⁸

The Court’s analysis follows the logic of the categories of intimate and expressive association, but it reveals the arbitrariness of the doctrinal line-drawing. Surely the patrons of a skating rink can form intimate bonds; for example, the “regulars” of many service providers often form a kind of community.²²⁹ Similarly, the activity of skating and the act of gathering to skate can be expressive in myriad ways. Even “recreational dancing” can foster social meaning.²³⁰

225. *Id.* at 22.

226. *Id.* at 24 (quoting *Roberts*). This claim is particularly odd for an opinion written only two years after the blockbuster movie *Dirty Dancing* (Great American Films Limited Partnership 1987).

227. *Stanglin*, 490 U.S. at 24.

228. *Id.* at 25.

229. One fictional example is the Boston bar in the 1980s television series, *Cheers* (NBC television broadcast 1982–93) (the place “where everybody knows your name”). Closer to home, I can think of a number of conversations and even friendships that emerged for me while writing articles in the Mad Hatter coffee shop in Durham, North Carolina.

230. In 1885, an Illinois court reviewed a village ordinance that restricted as nuisances “all public picnics and open air dances within the limits of [the] village.” *Poyer v. Village of Des Plaines*, 18 Ill. App. 225, 225 (1885). Rejecting the ordinance, the court reasoned:

The framers of the constitution inserted in that instrument a clause making inviolate the right of the people to assemble in a peaceable manner to consult for the common good, to make known their opinions to their representatives, and to apply for redress of their grievances. And it may well be supposed they would have added the right to assemble for open air amusements had any one imagined that the power to deny the exercise of such right would ever be asserted.

The problems with intimate and expressive association can be illustrated by another case involving the right of association, the Third Circuit's decision in *Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh*.²³¹ The plaintiff fraternity engaged in a laundry list of illicit activity—a raid of their house by Pittsburgh police found “various drugs and drug paraphernalia, including heroin, cocaine, opium, and Rohypnol (the ‘date rape’ drug).”²³² Following the drug raid and subsequent criminal and civil sanctions against four of the brothers, the University of Pittsburgh decertified Pi Lambda Phi as a recognized student organization. The fraternity brought a Section 1983 claim, alleging violations of the right of association. The district court concluded that the fraternity was “primarily engaged in social activities” and did not qualify as an intimate or expressive association.²³³

On appeal, the Third Circuit dutifully applied the *Roberts* framework. It found that the fraternity lacked any characteristics of an intimate association.²³⁴ It then concluded that the fraternity failed to establish any threshold characteristics of an expressive association. Finally, it held that even if the fraternity were to have met the expressive threshold, the state's denial of official recognition would only have had an “incidental” effect on the expressive nature of the fraternity.²³⁵

Id. at 229–30.

231. 229 F.3d 435, 442 (3d Cir. 2000). *See also* Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 147 (2d Cir. 2007) (concluding that a college fraternity was neither an intimate nor an expressive association). For a thoughtful consideration of the applicability of intimate association to fraternities, see Joshua P. Roling, *Functional Intimate Association Analysis: A Doctrinal Shift To Save the Roberts Framework*, 61 DUKE L.J. 903 (2012).

232. *Pi Lambda Phi*, 229 F.3d at 439. It would take a lot of service projects and Santa breakfasts to offset the harm that the brothers of Pi Lambda Phi brought to the surrounding community. *See id.* at 444 (noting that Pi Lambda “once helped run a Halloween haunted house for the Pittsburgh School for the Blind, raised \$350 through selling raffle tickets for a charity called the Genesis House, and ran a ‘Breakfast with Santa’ to raise money for Genesis House”).

233. *Id.* at 441.

234. *Id.* at 441–42. The court based its determination on the fraternity's size of between twenty and eighty members, the fact that the fraternity “actively recruits new members from the University population at large and it is not particularly selective in whom it admits,” and the fact that the group “invites members of the public into its house for social activities and participates in many public University events.” *Id.* at 442.

235. *Id.* at 446–47.

This analysis has troubling implications, and it is entirely unnecessary. *Pi Lambda Phi* is an easy case. The fraternity should lose because the state has a compelling interest in regulating and punishing the use of illegal drugs almost universally acknowledged as harmful. Almost nobody would question that holding or analysis.²³⁶ Instead, the court places the categories of intimate and expressive association just out of reach of the fraternity and then concludes that the denial of official recognition would in any event not affect the group's expression. That argument makes little sense in the context of a tight-knit social group like a fraternity.²³⁷ And while the brothers of Pi Lambda Phi may not appeal to our best visions of civil society, we need not look far to find more sympathetic examples, like the brothers of the historically black fraternity, Omega Psi Phi.²³⁸

Expanding the right of association beyond its current doctrinal contours might mean arguing for dispensing with the threshold inquiries into expressiveness and intimacy. It would extend constitutional protection to private social groups like fraternities and sororities from *unwarranted* government interference.²³⁹ That would not mean an absolute right to engage in any illegal conduct. It would require the state to justify specific applications of its compelling interest in the face of a stronger constitutional right to associational protection. And it would do nothing to impinge the "core" of the current right of association; intimate and expressive groups would still fall within an expanded conception of the right without any diminishing of their constitutional protections.²⁴⁰

VI. A (PROSPECTIVE) CASE STUDY

The preceding section suggested the possibility of rights expansion for the right of association. Increasing the scope of

236. These would be more contested if, for example, the illegal drug were something like peyote.

237. See Roling, *supra* note 231, at 923–28 (describing intimate characteristics of some fraternities and other social groups).

238. See, e.g., *AFRICAN AMERICAN FRATERNITIES AND SORORITIES: THE LEGACY AND THE VISION* (Tamara L. Brown et al. eds., 2012).

239. The kind of strategic expansion I have suggested would conceptually cover the Twilight Skating Rink. But I suggest in Part VI a different reason for limiting the application of the right of association to that particular plaintiff: the political compromise between commercial and non-commercial groups.

240. In fact, as I have argued elsewhere, the right of intimate association has very little practical value: any circumstance to which it conceptually applies is already protected under other rights frameworks. See INAZU, *supra* note 3, at 138–39.

protections under the right of association from the current baseline of intimate and expressive association might strengthen cultural views more effectively than rights confinement. Importantly, this possibility is not just a theoretical inquiry—it has implications for ongoing controversies. One of the most significant examples pertains to the intersection of antidiscrimination law and First Amendment freedoms on the question of gay rights: To what extent must private groups yield to antidiscrimination norms when it comes to the inclusion of gay and lesbian members in their services, activities, and membership?

Cultural views are particularly relevant to this question because opposition to gay and lesbian inclusion is quickly becoming a minority view. As laws recognizing same-sex marriage continue to unfold, it will soon be the case that only certain religious groups will impose sexual conduct distinctions that require celibacy outside of heterosexual marriage.²⁴¹ That development places these exclusions in a different category than gender-based exclusions. A large number of non-religious groups make gender-based exclusions and will continue to do so for the foreseeable future.²⁴² Almost no non-religious groups exclude based on conduct restrictions requiring celibacy outside of heterosexual marriage.²⁴³ Significantly, these changes unfold in a cultural context that reflects growing support for the government's antidiscrimination interest.

241. I use the term “sexual conduct” rather than “sexual orientation” because most religiously based exclusions today are based on conduct rather than orientation. *See, e.g.*, Brief of Amici Curiae Evangelical Scholars, in Support of Petitioner at 9, *Christian Legal Soc’y v. Martinez*, 561 U.S. 661 (No. 08-1371) (“[A] distinction between inward desires and outward conduct is a common one in evangelical thinking and would apply in many areas of moral conduct.”). The Supreme Court rejected the distinction in the context of the membership restrictions of a private group in *Christian Legal Society v. Martinez*, 561 U.S. 661, 688–89 (2010). For a critique of the Court’s reasoning, see John D. Inazu, *Justice Ginsburg and Religious Liberty*, 63 HASTINGS L.J. 1213, 1233–36 (2012). *Cf.* ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? 81–104 (2009) (distinguishing gay status from gay conduct). *But see* Inazu, *supra* note 196 (describing a similar distinction raised in the context of racial discrimination in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), and noting that many proponents of the antidiscrimination norm may simply not care whether exclusions are status-based or conduct-based).

242. Some examples include fraternities, sororities, fitness clubs, shelters, sports teams, and sexually themed businesses.

243. These trends for nonreligious groups have accelerated in both public and private contexts, including the United States military (following the repeal of “Don’t Ask, Don’t Tell”) and the Boy Scouts of America (who recently decided to accept gay scouts but not gay leaders).

Religious groups seeking to limit the reach of antidiscrimination law confront a choice of right (free exercise or association) and a choice of advocacy (rights expansion or rights constraint). Consider first the choice of right. The First Amendment conceivably protects religious groups that exclude based on sexual conduct under either the free exercise right or the right of association. It may be that arguing for protection of religious groups under either of these rights risks a “more is less” phenomenon in which judicial and political backlash would leave a previously protected “core” of the right with less stringent protections. But as I argued earlier in this Article, that worry is speculative at best.

A number of scholars have argued that the protections for religious groups against antidiscrimination norms properly reside in the free exercise right (or related concepts like “religious conscience” or the “freedom of the church”).²⁴⁴ I am skeptical of these approaches for reasons that I explained in Part II of this Article; claims for religious exceptionalism are unlikely to prevail against growing cultural resistance to the free exercise right.

Because there may be less cultural resistance to the right of association, it is at least possible that this right may provide more protection even against the same government interest.²⁴⁵

244. See, e.g., MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* (2013); Patrick McKinley Brennan, *The Liberty of the Church: Source, Scope, and Scandal*, 21 J. CONTEMP. LEGAL ISSUES (2013); Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008); Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515 (2007); Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59 (2007); Richard W. Garnett, “*The Freedom of the Church*”: (Towards) An Exposition, Translation, and Defense, 21 J. CONTEMP. LEGAL ISSUES 33 (2013); Paul Horwitz, *Churches As First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009); Steven D. Smith, *Freedom of Religion or Freedom of the Church?*, in LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS 249 (Austin Sarat ed., 2012).

245. But see Marc DeGirolami, “Is More Less? Or is More More?”, *Mirror of Justice* (July 24, 2014), available at <http://mirrorofjustice.blogs.com/mirrorofjustice/2014/07/is-more-less-or-is-more-more.html>. DeGirolami suggests that “the crux of the more/less debate [is] in changing societal perspectives on the fundamental nature of government and its role in the lives of the citizen.” *Id.* He continues:

If that is true, let me offer a point of agreement with [Inazu], and then perhaps a point of difference. The point of agreement is that in a society in which the government takes on more and more of a place and a role in the life of the citizenry, the protection of rights becomes

The associational right draws from a history with greater cultural appeal to the secure beneficiaries and non-beneficiaries of the free exercise right. In fact, the consistent protections provided by the right of association (and its antecedent, the right of assembly) for progressive movements reinforce its cultural salience. Many of the social activities that fostered the most significant political movements in our nation's history would fail to qualify for heightened protection under the right of association—they would fall outside of the Court's categories of expressiveness and intimacy.²⁴⁶ Of particular relevance, gay social clubs, important to the early gay rights movement, would fail to qualify for the protections of the current right of association.²⁴⁷

There is also reason to think that rights expansion for the right of association could work similarly to rights expansion for the free speech right. With enough reflection, many people recognize the limitations inherent in their capacity to make and sustain moral judgments about the value of associational activities. Consider the Girl Scouts. An outside observer unfamiliar with this group might find himself somewhere between perplexed and amused by the merit badges, silly songs, and wildly successful cookie operation. But for the group's members, these

a zero sum game. More is more, because every inch gained is a gain for the right, and every inch lost is a gain for the state. The point of difference is that if this is so, then one should expect that with time it will begin to affect all rights, very much including the right of free speech. That is, the particular explanations for the more is more thesis that affect religious freedom (loss of the right's prestige in popular sentiment) will eventually hit other freedoms too. That is because the key issue is not evolving cultural perceptions of the right's strength and ambit, but evolving cultural perceptions of the strength and ambit of the state's proper power.

Id.

246. See, e.g., JOHN HOPE FRANKLIN & ALFRED A. MOSS JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 376–77 (1994) (describing “moments of informality” spread across clubs, literary parties, and other events that created “a cohesive force” among the leaders of the Harlem Renaissance); LINDA J. LUMSDEN, RAMPANT WOMEN: SUFFRAGISTS AND THE RIGHT OF ASSEMBLY 17–19 (1997) (describing suffragist gatherings organized around banner meetings, balls, swimming races, potato sack races, baby shows, meals, pageants, and teatimes).

247. See *Gay Students Org. of the Univ. of N.H. v. Bonner*, 509 F.2d 652, 659–61 (1st Cir. 1974) (upholding associational rights of a gay student group); see also Brief of Gays & Lesbians for Individual Liberty as Amicus Curiae in Support of Petitioner at 11, *Christian Legal Soc’y v. Martinez*, 561 U.S. 661 (2010) (No. 08-1371), 2010 WL 530513 (noting that gay organizations “have relied on exclusively gay environments in which to feel safe, to build relationships, and to develop political strategy,” including “many exclusively gay social and activity clubs, retreats, vacations, and professional organizations”).

activities take on a different kind of meaning. That meaning shapes the identities of the individual members of the group and imbues on the group an identity of its own. These attachments may well be temporally and contextually bound—most Girl Scouts likely do not experience the same intensity of belonging and connectedness to the group for the rest of their lives. But the meaning in the moment cannot be fully captured or understood from the outside. Understanding the practices of the Girl Scouts in some ways requires participation in the group.

The Girl Scouts are an easy example because their liturgy is fairly rudimentary. What about the celebration of the Eucharist in a Catholic church, the temple marriage in a Mormon tabernacle, or the Passover Seder in a Jewish synagogue? There should be little doubt that outsiders to these kinds of practices are unable to understand the significance, meaning, or value that they convey to participants, or whether they are sufficiently intimate or expressive. Recognizing these epistemic limits is also important in the context of the right of association. Understanding our own interpretive limits and our vulnerability to the interpretive limits of others might persuade us of the value of extending broad protections to those activities that we hate—or that we do not understand—in the hope that others will do likewise with the activities that we cherish.²⁴⁸ In the free speech context, we are quick to invoke Justice Harlan's observation that "one man's vulgarity is another's lyric."²⁴⁹ We

248. The difficulty of these epistemic limitations is underscored by Alasdair MacIntyre's well-known discussion of a practice. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 175 (1981). MacIntyre defines a practice as:

any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realised in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.

Id. Internal goods on MacIntyre's account can only be specified in terms of a practice and by means of examples from that practice. *Id.* at 176. Put more strongly, internal goods are sometimes only comprehensible within the context of a particular practice. In at least some cases, internal goods "can only be identified and recognised by the experience of participating in the practice in question" and "[t]hose who lack the relevant experience are incompetent thereby as judges of internal goods." *Id.*

249. *Cohen v. California*, 403 U.S. 15, 25 (1971). Mr. Cohen's lyric was the word "Fuck." *Id.* at 16.

might well adopt a similar posture toward the associational activities of private groups.

A second and distinct question from the *choice* of the right is the *scope* of the right. If I am correct in my prediction that only certain religious groups will maintain sexual conduct distinctions that exclude gays and lesbians, then the worry about increasing the burden on the government will be somewhat mitigated by social realities. But the scope concern remains relevant to another sharply contested question: Should these protections extend to commercial groups? This question has arisen in several challenges to antidiscrimination law by commercial businesses.²⁵⁰ Its significance—and the influence of cultural views—is also illustrated by challenges to the requirement of contraception coverage under the Affordable Care Act.²⁵¹ It is possible that a form of rights expansion to commercial groups may push too far and trigger backlash.

CONCLUSION

Strengthening constitutional rights against governmental interests often involves a choice between rights confinement and rights expansion. Failing to make an informed wager about that choice risks distorting doctrine and missing opportunities. This Article has suggested that the best approach requires a careful consideration of history, culture, and law, which holds open the possibility that more is not always less, and indeed, at least some of the time, that more might be more. We will not know in advance whether rights confinement or rights expansion charts the most effective course. But we can be certain of a related observation, illustrated by the Court's narrowing of the right of association in *Roberts v. United States Jaycees*—less is always less.

250. See Robert K. Vischer, *How Necessary Is the Right of Assembly?*, 89 WASH. U. L. REV. 1403 (2012) (discussing examples of wedding photographers, pharmacists, and online dating services).

251. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. 2014).