



## Alabama Law Scholarly Commons

---

Working Papers

Faculty Scholarship

---

12-23-2015

### Religious Institutionalism – Why Now?

Nelson Tebbe

*Cornell University - Law School*, nt277@cornell.edu

Paul Horwitz

*University of Alabama - School of Law*, phorwitz@law.ua.edu

Follow this and additional works at: [https://scholarship.law.ua.edu/fac\\_working\\_papers](https://scholarship.law.ua.edu/fac_working_papers)

---

#### Recommended Citation

Nelson Tebbe & Paul Horwitz, *Religious Institutionalism – Why Now?*, (2015).

Available at: [https://scholarship.law.ua.edu/fac\\_working\\_papers/316](https://scholarship.law.ua.edu/fac_working_papers/316)

This Working Paper is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Working Papers by an authorized administrator of Alabama Law Scholarly Commons.



**Brooklyn Law School**  
ESTABLISHED 1901

**Brooklyn Law School Legal Studies**

**Research Papers**

**Accepted Paper Series**

**Research Paper No. 429**

**December 2015**

## **Religious Institutionalism—Why Now?**

**Nelson Tebbe**

**Paul Horwitz**

This paper can be downloaded without charge from the  
Social Science Research Network Electronic Paper Collection:  
<http://ssrn.com/abstract=2707198>

## 11

### Religious Institutionalism—Why Now?

Paul Horwitz\* and Nelson Tebbe\*\*

#### 1. INTRODUCTION

Recently, religious freedom claims by groups have attracted increased attention, at least among legal elites and perhaps more broadly.<sup>1</sup> Constitutional protection for groups such as congregations and religious nonprofits is far from new: These types of organizations have been bringing free exercise claims for decades. Yet focus on the phenomenon has intensified, aided by two recent Supreme Court decisions. In *Hosanna-Tabor*, a religious school was able to fend off an employment discrimination

\* Gordon Rosen Professor of Law, University of Alabama School of Law.

\*\* Professor of Law, Brooklyn Law School; Visiting Professor of Law, Cornell Law School. We thank participants at a workshop at DePaul University College of Law for initial conversations, and we thank Micah Schwartzman, Zoë Robinson, and Chad Flanders for terrific editing. Thanks also to Mark Chaves, Rick Garnett, John Inazu, Robert Putnam, and Richard Schragger for insightful comments on previous drafts.

<sup>1</sup> Compare Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008), and Richard W. Garnett, *The Freedom of the Church*, 4 J. CATHOLIC SOC. THOUGHT 59 (2007), and Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515 (2007), and Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009), and Paul Horwitz, *Defending (Religious) Institutionalism*, 99 VA. L. REV. 1049 (2013), and 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, 279–82 (Austin Sarat ed., 2012), with Richard

challenge by an ordained teacher.<sup>2</sup> And in *Hobby Lobby*, a business corporation was permitted to assert a challenge under the Religious Freedom Restoration Act (RFRA).<sup>3</sup> Both decisions featured religious freedom claims by organizations.

Whether the phenomenon of protection for groups as such is desirable is more controversial. Liberals in particular have criticized group guarantees of religious freedom as unattractive and incompatible with individual rights, at least in some contexts.<sup>4</sup> Also unsettled is how exactly the phenomenon should be understood. As a conceptual matter, it remains unclear whether the religious rights being asserted in these cases belong to the entities themselves, or whether they are derivative of the rights of individual officers or other constituents of these organizations.

Regardless of these normative and analytic disputes, the fact that groups can bring such claims is not in serious doubt. Neither is the sense that the phenomenon is newly prominent. The book in which this chapter appears is testament to the keen interest in group protection for religious freedom among judges, policymakers, and academics.

Although the phenomenon of religious freedom for groups is familiar and has long antecedents, the fact that it has attained such prominence *now* presents puzzles of its own. For many, this is not a moment in American religion that is closely associated with group life. To see why, consider the demographics. Doubtless the most dramatic finding of recent empirical work on American religiosity is that people are *disaffiliating* from religious traditions at a dramatic rate.<sup>5</sup> Although many other aspects of this demography have changed less or not at all, religious identification has declined rapidly and out of proportion to other indicators. Yet in law, this is precisely the cultural moment in which we see heightened attention to the claims of religious groups.

What explains this apparent tension between social developments and legal discourse? Are religious group rights drawing attention—and, in some circles, outrage—precisely *because* they go against the grain, or is their rise to prominence evidence of important changes in American law or society that complicate the now-standard picture of religious disaffiliation and individuation? Those are the questions we set out to address in this chapter.

Schrager & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013). See also Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH L. REV. 47, 47–49 (noting recent and recurring interest in group rights, especially for religious groups).

<sup>2</sup> Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 710 (2012).

<sup>3</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014).

<sup>4</sup> Schrager & Schwartzman, *supra* note 1, at 920.

<sup>5</sup> See *infra* Part 2. According to some, religious participation has declined too, but not as rapidly as religious affiliation or identification. See, e.g., MARK CHAVES, AMERICAN RELIGION: CONTEMPORARY TRENDS (2011). Membership in religious communities is still more complicated because of divergent methods for determining who counts as a member. What is clear is that religious identification has rapidly declined. And that itself is significant. “A society in which the least religious people still claim a religious identity is importantly different from a society in which such people admit to themselves, and even tell others, that they in fact have no religion.” David Voas & Mark Chaves, *Is the United States a Counterexample to the Secularization Thesis?* 8–9 (unpublished manuscript on file with authors and quoted with permission).

Our answer highlights the multiple factors that contribute in complex ways to the rise of group rights of religious freedom. But it also reveals an overarching theme. That theme concerns the so-called culture wars between traditionalists and progressives on social questions, including questions about the place of religion in American public life.<sup>6</sup>

It has become clear that the national conversation on religious freedom and social equality has been polarized along political lines.<sup>7</sup> Once it is appreciated that religious disaffiliation is primarily happening among those on the left of the political spectrum,<sup>8</sup> it becomes possible to hypothesize that lawyers' focus on groups and institutions may be part of a countervailing impulse among cultural traditionalists. In other words, the rise of group rights of religion is happening alongside, not despite, religious disaffiliation. The two developments are interrelated parts of the same general phenomenon.

We offer this hypothesis tentatively. But if it is correct, it may mean that the recent salience of groups in religious freedom discourse is not representative of a general shift among all actors, but instead reflects increasing bifurcation on these issues. Group theories, and theories and approaches that emphasize society's "little platoon[s]" rather than the state as a whole,<sup>9</sup> are currently associated most strongly with conservatives and traditionalists,<sup>10</sup> and these are the sorts of plaintiffs who are currently advancing such claims. Group rights of religious freedom are not so much new, on this general hypothesis, as they are newly deployed in a transformed political and legal context.

Yet this general idea alone cannot account for every aspect of the rise of group talk among lawyers working on religious freedom. For example, it only weakly explains the prominence of business corporations in cases like *Hobby Lobby*. Several more particular factors are in play as well, some of which are related to culture-war polarization in wider politics and society. A simple reason why religious groups are raising

<sup>6</sup> See generally JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

<sup>7</sup> See ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* 132 (2010).

<sup>8</sup> See *infra* Part 2 for citations.

<sup>9</sup> EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 135 (Conor C. O'Brien ed., 1982) ("To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections.").

<sup>10</sup> As we note below, however, this was not always the case; such claims have crossed the ideological spectrum before. See *infra* notes 49–53; DANIEL T. RODGERS, *THE AGE OF FRACTURE* 191 (2011) (noting the presence in the modern era of an interest in "reimagining [] society as a bundle of smaller, more intensely bound communities," and calling this theme a "political wild card" in which "political valences were never stable"). Similarly, once group claims are accepted by courts, they can then be deployed by egalitarians, liberals or progressives, and groups with still other diverse political orientations, creating a more complex political dynamic. For an example of collectivist argumentation among people on the left today, consider labor unions. See Marion Crain & John Inazu, *Re-Assembling Labor*, 2015 ILL. L. REV. (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2519813](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2519813).

such claims, after all, is that mobilized progressives have enacted laws like the Affordable Care Act, which was at issue in *Hobby Lobby*. But there is more to the story.

First, doctrinal developments have created openings for group rights. In turn, those opportunities have been strategically exploited by legal advocates and sympathetic judges. Advocates recognize that groups now enjoy *greater* protection than individuals in some areas of law, as we will explain.<sup>11</sup> Lawyers for religious groups exploit those advantages in a kind of doctrinal arbitrage.<sup>12</sup>

A related factor is the legal and scholarly salience of the argument that state authority coexists with other authorities that shape the legal order. Familiar from federalism, the argument for multiple and overlapping sovereignties has extended into religious freedom jurisprudence and more generally into First Amendment law.<sup>13</sup> Proponents of legal pluralism tend to emphasize groups or institutions, in addition to individual consciences.

Third, the academic zeitgeist includes a strong critique of the notion that religion ought to have a special status in constitutional law.<sup>14</sup> That critique has not convinced everyone in the academy,<sup>15</sup> and it was decisively rejected by a unanimous Court in *Hosanna-Tabor*.<sup>16</sup> Nevertheless, the notion that religion should not be special in constitutional law has received an increasing degree of respect. It is a species of a larger move in legal scholarship, and in some vocal sectors of public commentary, toward a strong vision of legal egalitarianism—one that emphasizes *equal* rights rather than rights *simpliciter*. These trends have put opposing views on the defensive (at least among legal elites). In that sort of climate, group autonomy provides an independent constitutional reason to protect religious associations. That corporations enjoy free speech rights after *Citizens United* surely helped the company prevail in *Hobby*

<sup>11</sup> For example, the Court in *Hosanna-Tabor* provided an exemption that applies to religious *employers*, such as congregations and religiously affiliated nonprofits, not to religious individuals. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012). Similarly in free speech law, expressive associations arguably receive greater protection from general laws under the *Boy Scouts* case than individuals do under the *O'Brien* test. *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000) (rejecting Dale's argument that the *O'Brien* balancing test should be applied once it was found that the public accommodations law significantly burdened the Boy Scouts' associational rights).

<sup>12</sup> This arbitrage opportunity is limited to federal constitutional law, as we explain below. See *infra* Part 3.B. Once statutory and state law is included, the difference between group and individual protection narrows considerably.

<sup>13</sup> See Paul Horwitz, *Permeable Sovereignty and Religious Liberty*, 49 TULSA L. REV. 235, 238 (2013); PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 175 (2013) (discussing "quasi-sovereignty"); ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* 32 (2012) (discussing "permeable sovereignty").

<sup>14</sup> Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012); BRIAN LEITER, *WHY TOLERATE RELIGION?* (2012); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 52 (2007).

<sup>15</sup> See, e.g., Andrew Koppelman, *Religion's Specialized Specialness*, 79 U. CHI. L. REV. Dialogue 71 (2013).

<sup>16</sup> *Hosanna-Tabor*, 132 S. Ct. at 706 ("We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.").

*Lobby*, even if Justice Alito did not cite free speech precedents.<sup>17</sup> Similarly, the fact that expressive associations can receive exemptions from employment laws under *Boy Scouts v. Dale* may have helped the organization in *Hosanna-Tabor*, even though the Court rejected free speech law as the basis for its decision. Organizations are making gains in other areas of the First Amendment, in short. That helps religious groups prevail even in the midst of arguments that religion ought not to enjoy special legal status.

Finally, religious organizations have the political and economic resources to bring legal challenges that many individuals lack. They also have the organizational or administrative wherewithal to coordinate such attacks across multiple jurisdictions. That alone makes them more likely to capture the attention of courts and other lawmakers. To the extent that the center of religious or social life has moved away from an attachment to group status, any successes these groups enjoy are all the more likely to draw public attention as well.

Part 2 of this chapter sets up the apparent paradox by examining the increasing disaffiliation of Americans from religious institutions. Part 3 offers explanations for the growing salience of groups and institutions in law, beginning with the general theme and continuing with more specific factors. Part 4 concludes by offering thoughts on the impact of ideological polarization on arguments for collective rights of religious freedom.

## 2. A PUZZLE

There is reason to wonder at the rising salience of group rights of religious freedom at this particular moment in American history. After all, the starkest finding of recent empirical studies is that Americans are disaffiliating from religious traditions at a rapid rate.<sup>18</sup> Why would we see increased legal emphasis on religious groups at precisely the point in time when Americans are distancing themselves from those organizations?

Consider the evidence. The Pew Research Center found that the portion of respondents who are not religiously affiliated rose from 15 percent to 20 percent over the five years from 2007 until 2012—probably the largest and most important change

<sup>17</sup> See *infra* section 3.D. for citations to lower courts that explicitly compared *Hobby Lobby* to *Citizens United*.

<sup>18</sup> Michael Hout, Claude S. Fischer & Mark A. Chaves, *More Americans Have No Religious Preference: Key Finding from the 2012 General Social Survey 2* (2013), available at [http://sociology.berkeley.edu/sites/default/files/faculty/fischer/Hout%20et%20al\\_No%20Relig%20Pref%202012\\_Release%20Mar%202013.pdf](http://sociology.berkeley.edu/sites/default/files/faculty/fischer/Hout%20et%20al_No%20Relig%20Pref%202012_Release%20Mar%202013.pdf) ("The American religious landscape is changing rapidly. Among the biggest changes is the retreat from identification with organized religions."); PUTNAM & CAMPBELL, *supra* note 7, at 3 ("Probably the most noticeable shift [in the past half century] is how Americans have become polarized among religious lines. . . . A growing number of Americans, especially young people, have come to disavow religion. For many, their aversion to religion is rooted in unease with the association between religion and conservative politics.").

in American religious demographics during that period.<sup>19</sup> Other surveys suggest that this change is part of a long term trend. The General Social Survey (GSS) found that the percentage of religiously unaffiliated Americans rose from below 10 percent during the 1970s and 1980s to about 20 percent in 2012.<sup>20</sup> The most recent GSS data, for 2014, shows that the unidentified have increased their numbers once again; they now represent 21 percent of the population.<sup>21</sup> People who are religiously unaffiliated—commonly called the “nones”<sup>22</sup>—appear to be growing in numbers over a relatively long period of time.<sup>23</sup>

Generational analysis supports the view that disaffiliation is a sustained trend rather than a momentary happening. Younger Americans definitely are less likely to identify with a religion. Fully a third of the youngest adults claim no religious affiliation, a proportion that falls steadily for older generations.<sup>24</sup> Nevertheless, what social scientists call generational replacement (also called generational succession) cannot fully explain disaffiliation, which has increased *within* age brackets as well over recent years.<sup>25</sup> Both Generation X members and baby boomers have become less religiously identified.<sup>26</sup> And a study by the Pew Foundation found no evidence that people affiliate with religious traditions at greater rates as they age.<sup>27</sup> Instead, each

<sup>19</sup> Pew researchers asked, “What is your present religion, if any? Are you Protestant, Roman Catholic, Mormon, Orthodox such as Greek or Russian Orthodox, Jewish, Muslim, Buddhist, Hindu, atheist, agnostic, something else, or nothing in particular?” They counted as disaffiliated those who answered atheist, agnostic, and nothing in particular. Pew Research Center’s Religion & Public Life Project, “*Nones*” on the Rise, PEW RESEARCH CTR. 13 (Oct. 9, 2012) <http://www.pewforum.org/files/2012/10/NonesOnTheRise-full.pdf>. Similarly, the GSS found that 20 percent of Americans were unaffiliated in 2012—a 12 percentage-point increase in just twenty-two years. Hout et al., *supra* note 18, at 2.

<sup>20</sup> Pew, *supra* note 19, at 14 (quoting the GSS); Hout et al., *supra* note 18, at 3 (using GSS data); PUTNAM & CAMPBELL, *supra* note 7, at 122 (using GSS data through 2010).

<sup>21</sup> Tobin Grant, *Analysis: 7.5 Million Americans Lost Their Religion Since 2012*, RELIGION NEWS SERVICE (Mar. 12, 2015), <http://www.religionnews.com/2015/03/12/analysis-7-5-million-americans-lost-religion-since-2012/> (“The 2014 GSS showed that nones are 21 percent of the population, up one point from 2012. How large is this group? There are nearly as many Americans who claim no religion as there are Catholics (24 percent). If this growth continues, in a few years the largest ‘religion’ in the U.S. may be no religion at all.”).

<sup>22</sup> Presumably, this moniker comes from the fact that when asked “what is your present religion?”, these people answer “none.”

<sup>23</sup> Moreover, unaffiliated people do not seem to be substituting New Age spirituality or other forms of unorthodox religion. They are no more likely to believe in spiritual energy, astrology, reincarnation, or yoga as a spiritual practice than the general population. Pew, *supra* note 19, at 24.

<sup>24</sup> Pew, *supra* note 19, at 16 (34% of 18- to 22-year-olds are unaffiliated); Hout et al., *supra* note 18, at 3–4 (32% of 18- to 24-year-olds are unaffiliated).

<sup>25</sup> Pew, *supra* note 19, at 16; Hout et al., *supra* note 18, at 4 (“We suspect that these age differences will not diminish as the people in them age. Instead we see them as persisting generational differences that are likely to characterize these collections of people throughout their life course.”).

<sup>26</sup> Pew, *supra* note 19, at 16.

<sup>27</sup> *Id.* at 30 & n.17; PUTNAM & CAMPBELL, *supra* note 7, at 123. Other measures of religious commitment do tend to strengthen with age. Pew, *supra* note 19, at 30 n.17; Pew Forum on Religion and Public Life, *Religion Among the Millennials: Less Religiously Active Than Older Americans, But Fairly Traditional In Other Ways*, PEW RESEARCH CTR. 2 (2010), <http://www.pewforum.org/files/2010/02/millennials-report.pdf>.



generation has remained about as identified with religion, or somewhat less, as it has aged.<sup>28</sup> Those findings provide reason to think that disaffiliation with religious traditions will continue and even strengthen further.<sup>29</sup>

Disaffiliation must be distinguished from unbelief. Casual observers often mistakenly equate the rise of the “nones” with an equivalent increase in atheism or agnosticism. In fact, the numbers of atheists and agnostics are small and have grown more modestly in recent years. Over the same period, the portion of those who describe their religious allegiance as “nothing in particular” or “none” is far larger and has grown much more quickly.<sup>30</sup> Moreover, a substantial portion of the unaffiliated still report a belief in God (68%), and many report that they engage in prayer, either daily or less often (41%).<sup>31</sup> Further, a majority of the unaffiliated say they think of themselves either as religious (18%) or as spiritual but not religious (37%).<sup>32</sup> So disaffiliation is not quite the same thing as growth in nonbelief or a decline in American religiosity overall, though these phenomena may be interrelated.<sup>33</sup>

Not only is disaffiliation distinct from unbelief, but also it is not quite the same thing as antipathy for organized religion, though again the two may well be related. Rather than lack of involvement or unwillingness to attend worship services, the category “unaffiliated” simply measures religious identity. Surveys typically ask, “[w]hat is your present religion, if any?”<sup>34</sup> or “[w]hat is your religious preference?”<sup>35</sup> They therefore elicit responses that measure belonging in the sense of identification, rather than attendance at meetings or worship services.

In fact, one possible way to explain disaffiliation is that people who previously considered themselves part of a particular religion, but seldom attended religious

<sup>28</sup> Pew, *supra* note 19, at 30.

<sup>29</sup> Hout et al., *supra* note 18, at 2 (“We find no evidence of a slowdown.”); *id.* at 3 (“There is no evidence here or elsewhere that the trend has slowed; nonetheless we offer no predictions about the likelihood of changes in the future.”); see also Voas & Chaves, *supra* note 5, at 26 (arguing that secularization has proceeded in the United States, and that it is due mostly if not exclusively to cohort replacement: “In any case, cohort replacement eroded religious affiliation throughout the past four decades. This is the key point.”).

<sup>30</sup> Pew, *supra* note 19, at 9–10; Hout et al., *supra* note 18, at 7 (“atheism is barely growing”); *id.* at 5 (“The decline in affiliation invites speculation that religious belief is also declining. The GSS data on religious beliefs suggests otherwise.”); PUTNAM & CAMPBELL, *supra* note 7, at 126 (“While the new nones are, by definition, less attached to organized religion than other Americans, they do not seem to have discarded all religious beliefs or predilections.”).

<sup>31</sup> Pew, *supra* note 19, at 22 (table).

<sup>32</sup> *Id.* That said, some evidence suggests that religiosity has indeed fallen among the general population. For example, the portion of respondents who never doubt the existence of God has decreased from 88 percent in 1987 to 80 percent in 2012. *Id.* at 18. And the percentage of Americans who say they seldom or never attend religious services increased from 25 percent in 2003 to 29 percent in 2012. *Id.* at 17.

<sup>33</sup> For a description and perspective on the debate over whether America is secularizing overall, see Voas & Chaves, *supra* note 5, at 1–8.

<sup>34</sup> Pew, *supra* note 19, at 13 (table).

<sup>35</sup> The GSS asks “What is your religious preference? Is it Protestant, Catholic, Jewish, some other religion, or no religion?” Hout et al., *supra* note 18, at 2.

services, now disavow any religious affiliation. On that reading, the rise of the nones has less to do with a weakening of religious activity and more to do with a change in affiliation itself. Pew researchers found that in 2007 people who seldom or never attended services said they were unaffiliated at a rate of 38 percent, while five years later fully 49 percent of this group was unaffiliated—a large increase.<sup>36</sup> Other measurements also indicate greater willingness to surrender religious identification among those with weak ties to organized religion. Among people who are unaffiliated, 68 percent said they seldom or never attended religious services in 2007, while 72 percent gave that answer in 2012.<sup>37</sup> So disaffiliation could be more about declining identification with religious traditions than it is about decreased involvement in religious institutions as such, though the two appear to be linked in interesting and important ways.

On the other hand, Putnam and Campbell found that disaffiliation occurred alongside decreased attendance at religious services.<sup>38</sup> Their understanding is that disaffiliation and decreased religious activity are progressing hand in hand. In any event, the distinction between disaffiliation and disbelief—which is a point of analytic agreement among researchers<sup>39</sup>—supports the basic conclusion that the growth in numbers of Americans with no religion has a dynamic that is distinct from, and stronger than, rejection of religious belief.<sup>40</sup>

Importantly for our purposes, unaffiliated Americans have complex views of religious groups and institutions rather than feeling simple hostility. Although they themselves are not drawn to religious traditions, they express some appreciation for such groups.

To be clear, Americans with *no* religion believe churches are “too concerned with money and power, too focused on rules and too involved in politics.”<sup>41</sup> This is not surprising. When it comes to religious organizations’ involvement in politics, studies show a widening gap between the “nones” and others. While the “nones” held steady in their low levels of support for church involvement in politics between 2010 and 2014, religiously identified Americans increased their support for religious activism across several measures.<sup>42</sup> In this respect, nones have distinctly poor views of religion.

<sup>36</sup> Pew, *supra* note 19, at 19.

<sup>37</sup> *Id.* at 20. Over the same period, Pew reports that the percentage of religiously identified people who seldom or never attend worship services declined, although modestly. *Id.*

<sup>38</sup> PUTNAM & CAMPBELL, *supra* note 7, at 122.

<sup>39</sup> *Id.* at 126 (describing the distinction between disaffiliation and disbelief as a point of “broad agreement”).

<sup>40</sup> Hout et al., *supra* note 18, at 7 (“More Americans than ever profess having no religious preference. Their quarrel appears to be with organized religion, because conventional religious belief, typified by belief in God, remains very widespread. . .”).

<sup>41</sup> Pew, *supra* note 19, at 10; PUTNAM & CAMPBELL, *supra* note 7, at 131 (reporting on the Pew data).

<sup>42</sup> Pew Forum on Religion and Public Life, *Public Sees Religion's Influence Waning*, PEW RESEARCH CTR. 1, 3 (2014), <http://www.pewforum.org/files/2014/09/Religion-Politics-09-24-PDF-for-web.pdf>.

On the other hand, the “nones” perceived a decline in public involvement by churches at roughly the same rates as others.<sup>43</sup> Of special note, more of those who describe their religion as “nothing in particular” are likely to see any decline of religious influence in American life as a “bad thing” than a “good thing.”<sup>44</sup> Approval of religion’s declining influence is prevalent only among atheists and agnostics, within the broad category of the unaffiliated.<sup>45</sup> Outside of politics, moreover, unaffiliated people report overwhelmingly that religious organizations benefit society by assisting the poor and strengthening community bonds (77% and 78%, respectively).<sup>46</sup> So disaffiliation does not necessarily entail unqualified condemnation of religious groups.

In some ways, disaffiliation is more widespread than commonly assumed. It is not limited to highly educated people, wealthy people, or people in the northeast, as some might imagine. In fact, religious belonging is declining among people without college degrees as well as among college graduates.<sup>47</sup> It is also affecting people who earn less than \$30,000 as well as those who earn more than \$75,000.<sup>48</sup> And people in every geographic region in the country are leaving religions, though at somewhat different rates.<sup>49</sup> Findings are slightly more complicated when it comes to race. While Pew found that whites are disaffiliating rapidly, while blacks and Hispanics have not changed their affiliations to a degree that is statistically significant from 2007 to 2012,<sup>50</sup> the GSS showed that disaffiliation progressed rapidly among all racial groups from 1990 to 2012.<sup>51</sup>

All social scientists seem to agree, though, that what best characterizes unaffiliated Americans is party politics, together with political ideology. Overwhelmingly, religiously unaligned Americans are Democrats who consider themselves to be political liberals.<sup>52</sup> A large majority of “nones” are Democrats or lean Democratic (63%), and

<sup>43</sup> Pew, *supra* note 19, at 23.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 10, 23.

<sup>47</sup> *Id.* at 12–21; PUTNAM & CAMPBELL, *supra* note 7, at 126 (listing this as one point of “broad agreement” among researchers). However, GSS data show that college graduates are somewhat more likely to have no religious preference than people without a high school diploma. Hout et al., *supra* note 18, at 4.

<sup>48</sup> Pew, *supra* note 19, at 21.

<sup>49</sup> *Id.*; Hout et al., *supra* note 18, at 4 (noting that “[r]egional variation in stating no religious preference is both large and growing,” with people in the Pacific, Mountain, and Northeastern regions more likely to be disaffiliated than people in the South, and concluding that “[t]he geographic spread of non-affiliation is little noted and not well understood in academic research on the issue.”); PUTNAM & CAMPBELL, *supra* note 7, at 126 (“Men, whites, and non-Southerners are modestly more likely to be nones.”).

<sup>50</sup> Pew, *supra* note 19, at 21.

<sup>51</sup> Hout et al., *supra* note 18, at 2, 12 (Table 1); PUTNAM & CAMPBELL, *supra* note 7, at 126 (“[I]t is not clear that these specific gender and racial imbalances are significant, beyond the fact that the new nones are drawn from groups traditionally less predisposed to religious commitment.”).

<sup>52</sup> PUTNAM & CAMPBELL, *supra* note 7, at 127 (“[T]he new nones are heavily drawn from the center and left of the political spectrum.”).

more than two-thirds consider themselves liberal or moderate in ideology (76%), a far greater portion than in the general population (57%).<sup>53</sup>

Moreover, the left-leaning political characteristics of the religiously unaffiliated appear to be strengthening over time. While 61 percent of “nones” voted Democratic in the 2000 presidential election, that portion grew to 67 percent in 2004 and fully 75 percent in 2008.<sup>54</sup> Strikingly, unaffiliated Americans make up a growing share of Democrats. Today, in fact, a larger share of Democrats are religiously unaffiliated (24%) than belong to any religious group except Protestants taken together.<sup>55</sup> Despite the clear political and ideological alignment of the unaffiliated with the left, the number of “nones” has grown among registered Republicans as well, although not at the same rate.<sup>56</sup>

In sum, disaffiliation is remarkably broad-based in American society, cutting across income and education and, to a lesser extent, race, geography, and age. What most clearly sets apart the nones is their political orientation. In the next Part, we will ask what the strong correlation between disaffiliation and left-leaning politics suggests about the growing prominence of group discourse in law. We will suggest that the salience of religious institutionalism in courtrooms is related in complex ways to political polarization on questions of religious freedom in American public life.

### 3. EXPLANATIONS

How can we reconcile the mounting evidence of rapid disaffiliation from religious organizations with the contemporary salience of those same groups in legal discourse? In this Part, we offer a tentative answer to that question. First, we sketch out an overarching theme: Disaffiliation and the rise of group rights may be related, rather than contradictory, insofar as they are both connected to political polarization around the so-called culture wars, and particularly bifurcation on questions of religious freedom in the contemporary political climate. In the rest of the Part, we detail specific contributing factors that relate to our general account in various ways and to various degrees.

#### *A. Religious Groups and the Culture Wars*

How does this social science research comport with law’s apparent newfound emphasis on group rights of religious freedom? There is, in fact, a complex interaction

<sup>53</sup> Pew, *supra* note 19, at 67, 25, 68 (table).

<sup>54</sup> *Id.* at 27 (table).

<sup>55</sup> *Id.* at 28 (table). Catholics, the second-largest group, made up only 21 percent of Democrats in 2012. *Id.* Protestants taken together comprise 45 percent of Democrats, but they are spread among evangelicals, mainline Protestants, members of black churches, and other groups. *Id.*

<sup>56</sup> *Id.* Hout et al., *supra* note 18, at 4 (“Political conservatives, on the other hand, have registered only the slightest drift away from organized religion, increasing from 5 percent to 9 percent preferring no religion.”).

between disaffiliation and group rights, insofar as both are connected to party politics and the shifting dynamics of the so-called culture wars. Social scientists are clear that disaffiliation from religions is concentrated among political liberals, although it is otherwise fairly broad-based demographically. Some of them have concluded that it is occurring partly in reaction to a perceived alliance between organized religion and conservative politics.<sup>57</sup>

As Putnam and Campbell put it, the culture wars have produced successive reactions and counter-reactions. This cycle of reactions has “gradually polarized the American religious scene, as people (especially young people) have increasingly sorted themselves out religiously according to their moral and political views, leaving both the liberal, secular pole and the conservative, evangelical pole strengthened and the moderate religious middle seriously weakened.”<sup>58</sup> In particular, views on religious affiliation have shifted at the same time, and among the very same young people, as American views on homosexuality and same-sex marriage have liberalized.<sup>59</sup> Unease with intermingling of religion and conservative politics was increasing over the same period, while leaders of the religious right were “put[ting] homosexuality and gay marriage at the top of their agenda.”<sup>60</sup> This is true even though young people remained comparatively conservative on abortion, a key culture war issue, during this time frame.<sup>61</sup> Even taking that exception into account, there remains a suggested relationship between polarization over religious belonging and political fights over social issues.

If social scientists are right about that, then it is reasonable to surmise that lawyers’ renewed attention to religious collectivities and institutions on the political right is related to disaffiliation on the political left, albeit in complicated ways. In other words, it can be argued that the cultural and political polarization that has become familiar on questions of religion<sup>62</sup> has encouraged political conservatives to emphasize religious communities and institutions in their litigation tactics, just as political liberals have followed the incentive to highlight individual rights in *their* legal strategies. Instead of presenting a paradox, the rise of group talk in religious freedom law can be understood as a development among religious traditionalists that has arisen *in relation to* disaffiliation among political progressives.

<sup>57</sup> Michael Hout & Claude S. Fischer, *Why More Americans Have No Religious Preference: Politics and Generations*, 67 AM. SOC. REV. 165, 188 (2002); PUTNAM & CAMPBELL, *supra* note 7, at 130–31.

<sup>58</sup> PUTNAM & CAMPBELL, *supra* note 7, at 132.

<sup>59</sup> *Id.* at 129. Views on marijuana, likewise, have liberalized at the same time and among the same people as religious disaffiliation. *Id.*

<sup>60</sup> *Id.* at 130.

<sup>61</sup> *Id.* at 128–29.

<sup>62</sup> See, e.g., Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 155 (2014) (describing “the polarized nature of the larger debate over religious accommodation”); *id.* at 185 (situating the debate over *Hobby Lobby* in the wider “culture wars”); STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* 10 (2014) (situating polarization over questions of religion freedom in the wider “culture wars”).

We are not ready to suggest that these mutual developments necessarily take the form of a particular causal pattern. Putnam and Campbell may be right that the rise of the religious right during the 1980s and 1990s engendered a reaction among political liberals that included disaffiliation. Perhaps lawyers' emphasis on group rights of religion was a counter-reaction to the counter-reaction. Yet causation may be too complex to map in such a simple way. Perhaps religious traditionalists are emphasizing community in opposition to individualization on the left, rather than vice versa. It is also possible that both are occurring because of some third factor that so far has gone unobserved. Our only hypothesis at this stage is simply that the two phenomena—disaffiliation on the left and emphasis on group rights among religious traditionalists—are capable of being understood as interrelated, rather than contradictory or paradoxical.

This thesis is compatible with the possibility that both disaffiliation *and* the recent spotlighting of group religious rights are narrower developments than many assume. Regarding disaffiliation, again, the Pew researchers suggested that many of the newly unaffiliated were only loosely identified with religious traditions in the first place.<sup>63</sup> On the other hand, Putnam and Campbell find that disaffiliation has progressed alongside a decline in religious attendance.<sup>64</sup> Whatever the truth on that point, social scientists agree that the “nones” continue to hold some religious beliefs—including beliefs in the existence of God—and that their prayer practices have declined more slowly than their religious identification.<sup>65</sup> Change of the most dramatic kind has come in religious identification itself, or in the public presentation of religious affiliation, rather than in beliefs and practices.

That is not to say that religious identity or presentation is not important. It surely impacts law, society, and politics. But it is not equivalent to the wholesale realignment of beliefs and practices that is sometimes reported.<sup>66</sup> Our thesis that disaffiliation participates in political polarization around questions of church and state at this historical moment comports with that more nuanced conception of the phenomenon.

Regarding group rights of religious freedom, moreover, it doubtless is the case that people who emphasize communities and institutions today have long valued those forms of belonging. Indeed, over the longer run, the emphasis on groups and communities that characterizes the present movement can be seen as part of a much broader-ranging phenomenon of skepticism toward the growth of the comprehensive state, with the encompassing, nationalizing tendencies that this has entailed.<sup>67</sup> This movement, which has

<sup>63</sup> See *supra* text accompanying notes 37–38.

<sup>64</sup> PUTNAM & CAMPBELL, *supra* note 7, at 124.

<sup>65</sup> *Id.* at 126.

<sup>66</sup> See, e.g., P. Z. Myers, *Even an Increasingly Godless America Doesn't Trust an Atheist to Run the Country*, TIME.COM (May 22, 2014), <http://time.com/109050/a-nation-of-growing-atheists-still-wouldnt-trust-one-to-run-the-country/> (reporting, misleadingly, a “rapid decline of religiosity in the U.S.” and asserting that “[a]theism is gaining, steadily and sometimes with remarkable rapidity.”).

<sup>67</sup> See, e.g., Michael S. Joyce & William Schambra, *A New Civic Life*, in TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY 11 (Michael Novak ed., 2d ed. 1996).

had champions at different times across the political spectrum, as well as left or liberal analogues like communitarianism,<sup>68</sup> has flowered more than once before.<sup>69</sup> Although these approaches have faded too,<sup>70</sup> it may be that the current state of social or legal play has brought such ideas back for yet another inning.

Thus, as the center of public conversation has shifted, traditionalists and conservatives may have been induced to highlight such concerns once again, without necessarily introducing fundamentally new ideas. Here too, the change is more one of public representations, and perhaps even self-conceptions, and less a paradigm shift in basic beliefs and practices. Even its legal manifestation in doctrines like the ministerial exception or the recognition of corporations' religious freedom claims is not wholly new. Here too, our hypothesis harmonizes with a measured appreciation for the scope of the shift in legal thinking.

We should add, as we did in the Introduction, above, that the polarization hypothesis is related to a cruder explanation. After all, culture war dynamics have made possible laws like the Affordable Care Act, which authorized the regulations at issue in *Hobby Lobby*, or strengthened enforcement of antidiscrimination measures like the one at issue in *Hosanna-Tabor*. Part of the story, then, is that religious groups were facing new forms of regulation and that they responded by emphasizing group rights among other legal strategies. We see this simple point as part of our polarization hypothesis. Emphasis on group rights has emerged as part of the division among Americans on cultural questions and the accompanying division in politics.

Even if the argument we have suggested in this section is correct, it cannot do all the explanatory work. Efforts to assert the free exercise rights of business corporations such as *Hobby Lobby*, for instance, seem only loosely related to the culture-war dynamics evidenced by social science studies. Furthermore, the mechanisms for translating cultural polarization into particular legal strategies are far from clear from what we have said so far. In the rest of this Part, we detail some more specific factors that may be driving the rise of group conceptions of religious freedom at this particular moment.

### B. Doctrinal Strategy

Legal doctrine on religious freedom has shifted over the same general period of time as polarization has separated Americans on questions of religion and politics. That doctrinal shift provides another factor that likely has contributed to the rise of arguments for group conceptions of religious freedom.

<sup>68</sup> See, e.g., *id.* at 20–21; RODGERS, *supra* note 10, at 191–94.

<sup>69</sup> See, e.g., RODGERS, *supra* note 10, at 194–98 (discussing previous conservative efforts to emphasize the importance of “the idea of society writ small”).

<sup>70</sup> See, e.g., James P. Pinkerton, *Mediating Structures, 1977–1995*, in Novak, *supra* note 67, at 51–57 (noting previous presidencies' flirtations with the importance of supporting “mediating structures” of society, and the political and bureaucratic pressures they faced, while insisting that the “basic proposition” that “mediating structures can be the agencies of a new empowerment” won the day intellectually).



Today, of course, free exercise law does not protect against general laws that burden religious actors only incidentally. Announcement of that constitutional rule in the 1990 decision *Employment Division v. Smith*<sup>71</sup> appeared to make it more difficult for religious actors to bring challenges to the vast majority of laws that actually impeded their practices as a practical matter.<sup>72</sup> Reception of the *Smith* rule has shifted over time as polarization over questions of religious freedom has advanced. At first, liberals greeted the decision with suspicion, mostly out of concern for religious minorities.<sup>73</sup> Over the course of the 1990s and 2000s, however, many on the left warmed to the decision. Chiefly, that seemed to be because they began to score gains in state and federal civil rights laws, chiefly on lesbian, gay, bisexual, and transgender (LGBT) issues, and they saw *Smith* as a bulwark against religious exceptions from those laws.<sup>74</sup>

Over the same time, while not all conservatives disagreed with *Smith* itself as a constitutional decision, many religious and political conservatives agreed on the importance of mitigating its consequences *politically*.<sup>75</sup> Thus, each for their own reasons perhaps, both political conservatives and political liberals joined the coalition that pressed for the passage of the Religious Freedom Restoration Act (RFRA) in 1993.

Meanwhile, in the rather specialized—but, to religious groups, crucial—area of church employment, lower courts had been consistently building a body of case law that seemed to conflict with the principal rule of *Smith*. The ministerial exception is a constitutional doctrine holding that congregations may choose their clerical leaders free of employment discrimination law and perhaps other regulations. For example, Roman Catholics may elect to hire only men as priests despite legal provisions that prohibit discrimination on the basis of gender. Over the course of three or four decades, every circuit court came to embrace the ministerial exception. Yet the ministerial exception, contrary to the general movement of *Smith*, provided relief from general laws such as employment discrimination statutes.

<sup>71</sup> *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

<sup>72</sup> That change may have been more theoretical than practical. See James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1412 (1992); Nelson Tebbe, *Smith in Theory and Practice*, 32 CARDOZO L. REV. 2055, 2056 (2011).

<sup>73</sup> See, e.g., Robin L. West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 53 (1990) (calling *Smith* “perhaps the most politically illiberal decision of the term”).

<sup>74</sup> Civil rights groups like the ACLU fell out of the RFRA coalition for that reason and did not support the attempt to repass the law after a portion of it was invalidated in *City of Boerne v. Flores*. See William P. Marshall, *Bad Statutes Make Bad Law: Burwell v. Hobby Lobby*, 2014 SUP. CT. REV. 71, 76–77; see also Press Release, Am. Civil Liberties Union, ACLU Urges Congress to Protect Civil Rights and Religious Freedom (July 15, 1999) (opposing a broad replacement for RFRA because of concerns for the civil rights of gay men and lesbians, among others), available at <https://www.aclu.org/religion-belief/aclu-urges-congress-protect-civil-rights-and-religious-freedom>.

<sup>75</sup> See, e.g., Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 CARDOZO L. REV. 1815, 1822 (2011); William K. Kelley, *The Primacy of Political Actors in Accommodation of Religion*, 22 U. HAW. L. REV. 403, 403 (2000).



Nevertheless, the Supreme Court embraced the ministerial exception in *Hosanna-Tabor*.<sup>76</sup> Moreover, it held unambiguously that the doctrine was grounded in the Free Exercise Clause as well as the Establishment Clause.<sup>77</sup> Tension with the rule of *Smith* was brushed aside in a hastily sketched distinction.<sup>78</sup> Perhaps more important still, the decision was unanimous, drawing even the support of the less conservative Justices.

Because the ministerial exception can only be claimed by groups, and because it affords greater free exercise protection than does the rule for individuals under *Smith*, the doctrine creates a strong incentive for religious actors to structure their arguments as group claims wherever possible. It opens up a kind of arbitrage opportunity for religious groups. Moreover, the *Hosanna-Tabor* Court cited—and thereby reaffirmed, if not reinvigorated—a body of “church autonomy” jurisprudence from other areas, including church property doctrine.<sup>79</sup> In that wider way, too, the rise of the ministerial exception has created a jurisprudential advantage for religious actors who can frame their arguments as group claims rather than individual challenges. In short, it is possible to argue that groups enjoy stronger free exercise rights than individuals do under contemporary doctrine. At the very least, as long as there is even a marginal incentive to connect a religious rights claim to the internal workings and doctrines of a church in its institutional capacity, plaintiffs who *can* do so likely will.

Consequently, we may see an increase in congregational free exercise claims across a wider spectrum of disputes in the coming years.<sup>80</sup> These could include contract and tort claims in addition to employment discrimination disputes. And this is true purely as a matter of legal development, independent of the cultural and political shifts described in the previous section, although possibly related to them.

<sup>76</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

<sup>77</sup> *Id.* (“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.”).

<sup>78</sup> *Id.* at 707 (distinguishing *Smith*, which concerned “outward physical acts” from the instant facts, which involve “government interference with an internal church decision that affects the faith and mission of the church itself”).

<sup>79</sup> *Id.* at 704–06 (discussing cases concerning church property and control, including *Watson v. Jones*, 13 Wall. 679, 727 (1872); *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952); and *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U.S. 696, 708 (1976)). Whether the Court’s decision in *Smith* undermined the church autonomy line of cases or not is a contested question. Compare, e.g., Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exception from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1987 (2007) (arguing that it did), with Horwitz, *supra* note 1, at 118 (arguing that it did not), and Perry Dane, “Omalous” Autonomy, 2004 BYU L. REV. 1715, 1743–44 (same). In any event, *Hosanna-Tabor* at least draws litigants’ attention back to these cases.

<sup>80</sup> Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183, 1183 (2014) (arguing that although “*Hosanna-Tabor* could end up an isolated anomaly,” it is also true that “the Court’s opinion speaks of a broader principle, a principle whose boundaries it consciously puts off defining” and arguing that the decision could have implications for employment discrimination, labor law, contract, and tort).

Of course, this arbitrage opportunity exists solely as a matter of federal constitutional law. Once we take into account federal statutes like RFRA and the Religious Land Use and Institutionalized Persons Act—increasingly prominent after *Hobby Lobby* and *Holt v. Hobbs*—as well as state analogues of those laws, the differences between religious freedom protection for groups and individuals diminish considerably. After all, as the result in *Holt v. Hobbs*, coming so swiftly after the more controversial opinion in *Hobby Lobby*, demonstrates, these provisions apply just as vigorously to individuals as they do to groups, at least as a matter of black letter law. The legal strategy factor that we have described in this section should not be overstated. Although both *Hosanna-Tabor* and *Hobby Lobby* involve claims by religious groups and both have been connected to each other in the popular imagination, the result in the latter case did not depend on the result in the former. Not all employers are church employers, and *Hosanna-Tabor*'s reach is hardly infinite. Nevertheless, we believe it has a significant impact on the margins.

### C. Multiple Sovereignties

In related areas of constitutional law, courts and scholars have been exploring the existence and scope of plural legal authorities. Probably the most familiar example is federalism—the conviction that states serve as significant sources of law in the U.S. system. Yet the idea of plural legal authorities extends further, to intrastate localities,<sup>81</sup> Native American communities,<sup>82</sup> expressive associations and assemblies,<sup>83</sup> and universities.<sup>84</sup> Commitment to multiple, overlapping sources of norms and laws has become a familiar position—if perhaps still a minority one—among legal thinkers.

Resonating with these arguments is the idea of “church autonomy” or “freedom of the church,” the notion that religious congregations have a claim to independent norm development and its necessary conditions. Some writers have advocated for church autonomy in a relatively specialized way, focusing on the particular history and principles of religious freedom.<sup>85</sup> Others, however, have drawn connections to institutional and organizational pluralism more generally within the First Amendment.<sup>86</sup> For them, religious freedom for groups can be defended with arguments that pertain to organizational independence more broadly. Groups can make arguments for religious freedom, on this line of argument, that lone individuals

<sup>81</sup> See Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 SUP. CT. REV. 135, 156 (2005); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1812 (2004).

<sup>82</sup> See Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 29 FLA. ST. U. L. REV. 189, 191–93 (2001) (exploring the historical origins of Native American legal pluralism).

<sup>83</sup> John Inazu, *The Four Freedoms and the Future of Religious Freedom*, 92 N.C. L. REV. 787, 790–91 (2014).

<sup>84</sup> See HORWITZ, *supra* note 13, at 107–43; Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1551–52 (2007).

<sup>85</sup> See, e.g., Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59, 69–71 (2007); Smith, *supra* note 1, at 249–50.

<sup>86</sup> See JOHN D. INAZU, *LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* 5–6 (2012).

cannot—not necessarily because they are better or more important, but simply because they are different.

Of course, many will draw a connection between this jurisprudential development and the cultural and political polarization that we hypothesized above.<sup>87</sup> Institutional pluralism is seen by many to be an antidote to the danger of overweening liberal orthodoxy on social questions including LGBT rights, gender equality, and reproductive freedom, among others. And federalism has a familiar (if not exclusive) resonance with conservative politics. Moreover, group sovereignty has drawn sharp critique from liberals and progressives who emphasize the priority of individual rights, not only conceptually but legally as well.<sup>88</sup> For them, church autonomy and other forms of legal pluralism can express the rights of individuals to form groups, but if they go further than that they carry a serious danger of harm to individual dissenters within the group, among other risks. So positions on the question of multiple sovereignties correlate with polarized positions on other cultural and legal questions.

Yet these correlations are not perfect. Self-avowed liberals have also emphasized the virtues of community differentiation.<sup>89</sup> And progressives have long championed local approaches to legal change in the area of LGBT rights and even the war on terror.<sup>90</sup> So resonance with group sovereignty generally is a legal development that is relatively autonomous from the wider political and social polarization tracked above.

#### D. Religion's Specialness

More tentatively, we suggest that a related factor may be the recent rise of arguments that religion ought not to enjoy special constitutional solicitude. As a matter of political morality, these authors argue, it is difficult to defend extraordinary protections for religious beliefs and practices, as compared to other deep and valuable commitments and customs.<sup>91</sup> Although this argument has not been adopted by the Supreme Court, the notion nevertheless is having a strong impact on legal academic discourse, and is spilling over, as these things tend to do, into arguments made by litigants in religious rights cases. Group rights grounded in general concerns for expressive autonomy and civic pluralism, like those noted in the previous section, may provide avenues for protecting religious actors that do not draw solely on religion-specific arguments.

<sup>87</sup> See *supra* Section 3.A.

<sup>88</sup> See, e.g., Schwartzman & Schragger, *supra* note 1, at 920; see generally BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* (2001).

<sup>89</sup> See, e.g., Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 1, 66–67 (1983); Douglas Laycock, *Observation: Tax Exemptions for Racially Discriminatory Religious Schools*, 60 TEX. L. REV. 259, 261 (1982) (critiquing the holding of *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983)); Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. CONTEMP. LEGAL ISSUES 279, 305–08 (2013).

<sup>90</sup> See Susan N. Herman, *Our New Federalism? National Authority and Local Autonomy in the War on Terror*, 69 BROOK. L. REV. 1201, 1204 (2004).

<sup>91</sup> See Schwartzman, *supra* note 14, at 1355; EISGRUBER & SAGER, *supra* note 14, at 5–6; LEITER, *supra* note 14, at 3–4.

For example, the Solicitor General of the United States argued that Hosanna-Tabor could prevail under a general theory of expressive association.<sup>92</sup> That would not have required any sense of religion's constitutional uniqueness. And the fact that the Solicitor General adopted the theory gave it substantial weight. As it happened, the Supreme Court sharply rejected the idea, in a statement that reaffirmed the special constitutional standing of religious freedom.<sup>93</sup> Again, no Justice dissented from that opinion. Still, the Solicitor General's move may have marked an important shift in legal discourse. If the courts have rejected this move, it has nevertheless proved attractive to many in legal academia.

A few important caveats temper this suggestion of ours. First, the defense of religion's place in constitutional law is not necessarily specific to group rights. Individual rights of speech and conscience may play an analogous role of reducing reliance on religion-specific arguments outside the context of group rights. Yet it does seem to us possible that the growing prevalence of organizational arguments outside the context of religion makes this move tempting within religious freedom law. That business corporations had been able to assert free speech rights in *Citizens United*<sup>94</sup> surely helped to pave the way for their successful assertion of religious freedom rights in *Hobby Lobby*,<sup>95</sup> even though the Court itself did not draw that parallel.<sup>96</sup> Moreover, the analogy between corporate rights of speech and religion may have helped to temper the complaint that religious corporations were being given legal rights that secular business corporations would not enjoy, even if the parallel could not squelch that complaint altogether.

<sup>92</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (describing the government's argument, which relied on *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

<sup>93</sup> *Id.* ("We find [the expressive association argument] untenable. The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the [government's] view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.") (citations omitted).

<sup>94</sup> *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 372 (2010).

<sup>95</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014); *but see id.* at 2794 (Ginsburg, J., dissenting) (citing *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part)).

<sup>96</sup> Judges in lower courts explicitly cited *Citizens United* as a reason to allow business corporations to bring religious freedom claims as well. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1135 (10th Cir. 2013) ("Because Hobby Lobby and Mardel express themselves for religious purposes, the First Amendment logic of *Citizens United*, where the Supreme Court has recognized a First Amendment right of for-profit corporations to express themselves for political purposes, applies as well. We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression."); *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 400 (3d Cir. 2013) (Jordan, J., dissenting) ("Religious opinions and faith are in this respect akin to political opinions and passions, which are held and exercised both individually and collectively. . . . [J]ust as the Supreme Court has described the free exercise of religion as an 'individual' right, it has previously said the same thing

In sum, the salience of collective claims to constitutional rights outside the religion clauses may be encouraging such claims within the field of religious freedom, partly as a way to disarm attacks on religion's specialness without lending them credence. Although this factor has limited explanatory power, since it works for individual claims as well as group claims, we believe it may be contributing somewhat to the phenomenon. So too are more practical considerations, however.

#### *E. Political and Litigation Practicalities*

Last but not least, religious freedom claims by institutions must be driven partly by organizational and economic advantages. It cannot be a complete coincidence, for example, that business corporations and nonprofit organizations are the employers who have litigated first and furthest against the Affordable Care Act's contraception mandate, even if an individual employer might have been a more natural vehicle for a religious freedom challenge. Corporations have resources for coordinating and funding litigation that sole proprietors do not, on average. Amassing capital that enables large-scale projects is one of the purposes of the corporate form, after all,<sup>97</sup> and that capacity likely makes corporations able to bring lawsuits more effectively, too.

Other types of corporations, like nonprofits, and other types of organizations, like partnerships, may bring similar sorts of advantages as well. The Roman Catholic Church and its many nonprofit affiliates, for instance, have also been active participants in the court cases challenging the contraception mandate.<sup>98</sup> So have other religious organizations.<sup>99</sup> Bureaucracies like these share a comparative advantage in coordinating complex litigation on such questions in a manner that would be difficult for individual employers. Here too, then—with respect to nonprofit corporations and organizations—it may not be a coincidence that we are seeing legal action by entities as entities.

Of course, when groups bring legal challenges as such, they are likely to take advantage of any legal arguments that can help them win their cases. So this factor may combine with doctrinal advantages to further promote the prominence of group claims for rights of religious freedom. And this is true even if religious traditions are suffering losses because of advancing disaffiliation, as a matter of demographics. Organizations like these will continue to press their claims, and they will continue to enjoy advantages over individuals, with their higher coordination costs.

---

of the freedom of speech, and still, notwithstanding that occasional characterization, there are a multitude of cases upholding the free speech rights of corporations. E.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342, 130 S.Ct. 876 (2010).”).

<sup>97</sup> See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990) (noting “the unique state-conferred corporate structure that facilitates the amassing of large treasuries”); *overruled on other grounds by Citizens United*, 558 U.S. at 365.

<sup>98</sup> See, e.g., *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 549 (7th Cir. 2014).

<sup>99</sup> See, e.g., *Wheaton Coll. v. Burwell*, 50 F. Supp. 3d 939, 943–44 (N.D. Ill. 2014) (identifying Wheaton College as an evangelical organization); see also 134 S. Ct. at 2806.

Not all of the factors we have outlined here are working in any particular case, and some of them may lack explanatory power across the board. Moreover, there almost certainly are contributors that we have overlooked. Yet these are likely to be the main drivers of recent reliance on group claims of religious freedom by lawyers and judges. Many of them are related to the overarching theme of religious and political polarization—which helps to show how collectivities' legal success are a feature, not a counterindicator, of rapid disaffiliation from religion in America today—but some of them are unrelated to that theme or only loosely related. Regardless, they go some distance toward explaining the apparent paradox of groups in legal discourse during this moment of marked separation of many citizens from religious groups.

#### 4. IMPLICATIONS

If we are right about the principal drivers of organizational claims in religious freedom litigation today, what are the likely implications for law and policy? We can think of several, though they may be modest.

First, the main story about the influence of political and social polarization on the salience of group rights in legal discourse may heighten awareness among lawyers in useful ways. If law is to remain at least relatively autonomous from party politics, it should evaluate the relevance of institutions and collectivities for constitutional law with some independence from any resonance with party politics or simple ideology. Groups may or may not matter for religious freedom law, independent of the rights of individuals who compose them. But that inquiry should take place without undue influence from culture-war dynamics. For example, the question of whether business corporations as such have religious freedom rights should be answered deliberately and not reflexively, even if those deliberations include considerations of the power of corporations in American economics and politics.<sup>100</sup>

Second, courts should pay attention to the doctrinal differences between group and individual rights of free exercise, and they should ask whether those differences can be supported by principles of law and politics. A danger of organizational activism through litigation is that judges may develop favorable rules that cannot easily be squared with comparable rules for religious individuals. Conversely—or so it is hoped by some who still question the rule in *Smith*—courts that find that individual religious rights claims have paled in success compared to those brought by groups may wish, not to cut down the favorable rules on the side of religious groups, but to reinvigorate the strength of free exercise claims brought by individuals.<sup>101</sup>

<sup>100</sup> Two Justices did not join the *Hobby Lobby* dissent on this question. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2806 (2014) (Justice Breyer and Justice Kagan, dissenting).

<sup>101</sup> Cf. Horwitz, *supra* note 1, at 125–27 (arguing that if the Supreme Court accepts a more institutionally oriented account of religious freedom based on the acknowledgment of religion as a separate and distinct source of authority, it also ought to reexamine its decision in *Smith*).

Finally, judges and scholars may want to pay greater attention to their conception of collective norm creation and will formation across the full range of collectivities and communities that play roles in constitutional jurisprudence. When should pluralism among groups be protected and when, by contrast, should government principles eliminate differences in the name of individual rights or other deep commitments of law and politics? Should group claims continue to claim an important role in constitutional thought, jurists will want to provide answers to these questions that can work not only for religious groups, but perhaps for civic organizations and collectivities more generally, and not only for this moment in constitutional history, but throughout future political and cultural oscillations.