Thoughts on *Smith* and Religious-Group Autonomy

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I. INTRODUCTION

Reconciling the federal constitutional guarantee of religious free exercise[1] with the collective interests of civil society has long been a difficult problem for First Amendment jurisprudence. For many years, the United States Supreme Court protected claimed religious exercise if it was required by a central religious belief, was substantially burdened by government action, and was not outweighed by a compelling state interest.[2] The last prong of this test, in particular, afforded substantial protection to claimed religious exercise when pitted against state laws.[3]

In *Employment Division v. Smith*,[4] decided little more than a decade ago, the Court abruptly shifted course. Citing the dangers posed to societal norms by claimed religious exemptions, the Court held that the government need only show that a challenged law has no "antireligious bias," that is, that religious and nonreligious individuals and actions are treated equally in intention and effect. If a law is "neutral" in this sense, the fact that it incidentally burdens religious conduct presents no First Amendment problem.[5]

The holding in *Smith*—essentially, that religious exercise has no special rights or immunity from "neutral, generally applicable law[s]"[6]—sits uneasily with another longstanding doctrinal fixture,

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

2. *See, e.g.*, Hernandez v. Comm'r, 490 U.S. 680, 699 (1989); Thomas v. Review Bd., 450 U.S. 707, 717–19 (1981).

3. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that religious beliefs requiring the discontinuance of a child's education after the eighth grade of elementary school must be given precedence over the state's competing interest in universal childhood education).

4. 494 U.S. 872 (1990).

5. *See Smith*, 494 U.S. at 878–90; Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 449–52 (1988).

6. *Smith*, 494 U.S. at 881.

namely, that of "religious-group autonomy." This doctrine, which has developed in a piecemeal fashion over the years, generally holds that religious groups and institutions are exempt from secular state interference in their selection of clergy, internal doctrinal and property disputes, and other matters that affect their internal organization and internal relations.[7] As Professor Perry Dane states in his contribution to this Conference, areas of claimed autonomous exercise "rang[e] from classic church property disputes to more recently developing questions over the extent to which various regulatory regimes, including labor law, civil rights law, and even malpractice, defamation, and contract law, should be permitted to intervene in the internal relations of religious institutions and communities."[8]

Thus, the question that immediately arises is this: If religious *individuals* are precluded by *Smith* from claiming broad immunity from civil laws and civil courts, can religious *groups and institutions* continue to claim that immunity, under the doctrine of religious-group autonomy?

The theoretical grounding for the doctrine of religious-group autonomy in Supreme Court jurisprudence is far from clear. Although the Court has often discussed religious-group autonomy in terms that echo First Amendment values,[9] the Court has never

7. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976) (stating that civil courts must defer to church tribunals on matters of purely ecclesiastical concern, such as disputes over church discipline, choice of clergy, and diocesan reorganization); Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 116 (1952) (stating that in the context of a church property dispute, religious organizations are entitled to "a spirit of freedom . . . , an independence from secular control and manipulation . . . , [and] power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"); Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1872) (stating that in the context of a church property dispute, courts must defer to religious tribunals on "questions of discipline, or of faith, or ecclesiastical rule, custom, or law").

8. Perry Dane, *"Omalous" Autonomy*, 2004 BYU L. REV. 1715, 1733–34 (footnotes omitted). For examples of more far-flung claims, see Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986) (claimed exemption from state civil rights laws); Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999) (claimed exemption from the Americans with Disabilities Act); Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990) (claimed exemption from the Fair Labor Standards Act); St. Elizabeth Cmty. Hosp. v. NLRB, 708 F.2d 1436 (9th Cir. 1983) (claimed exemption from the National Labor Relations Act).

9. *See, e.g.*, *Kedroff*, 344 U.S. at 110 (the idea of church autonomy is grounded in a "rule of separation between church and state"); *Watson*, 80 U.S. at 730 ("'The structure of our government has . . . rescued . . . temporal institutions from religious interference . . . [and]

directly addressed the scope of free exercise protections when government interferes with religious-group affairs.[10] It is therefore difficult to deduce, as a matter of doctrinal logic, the extent to which the *Smith* decision undermines the foundations of the doctrine of religious-group autonomy. To the extent that religious-group autonomy is intended to prevent secular meddling in religious doctrines, ecclesiastical disputes, and other strictly internal affairs—questions in which the secular state has no stake—the logic of *Smith* may well leave the doctrine of religious-group autonomy untouched. If, however, religious-group autonomy is extended to include immunity from secular laws and secular policies, then its claims, and *Smith*'s seeming subordination of religious exercise to "neutral laws," appear to be on a collision course.[11]

In their very interesting and provocative contributions to this Conference, Professors Perry Dane and Kathleen Brady attempt an answer to this question that refutes the simple assertion of *Smith*'s supremacy in cases involving conflicts between group free exercise claims and "neutral, generally applicable laws." In different ways, they attempt to establish why the *Smith* rule—which cuts far back on the idea of religious-*individual* autonomy—does not necessarily have the same impact on the claims of religious groups. Under Professor Dane's approach, *Smith* should be seen as primarily concerned with the problem of the "subjective" and "idiosyncratic" nature of individual free exercise exemptions—a problem that, he argues, religious-group autonomy does not involve.[12] Under Professor Brady's approach, religious-group autonomy survives *Smith* because of its particular value for free religious exercise, which *Smith* explicitly upholds.[13]

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secured religious liberty from the invasion of civil authority.'" (quoting Harmon v. Dreher, 17 S.C. Eq. (Speers Eq.) 87, 120 (1843))).

10. *See* Kathleen A. Brady, *Religious Organizations and Free Exercise*, 2004 BYU L. REV. 1633, 1635.

11. Professor Dane argues that because *Smith* cites certain religious-group autonomy cases approvingly, the survival of this doctrine post-*Smith* is indicated. *See* Dane, *supra* note 8, at 1716–17. However, all of the cases cited in *Smith* dealt with the government's need to refrain from involvement in internal religious disputes over ecclesiastical powers or dogma. *See Smith*, 494 U.S. at 877 (citing *Serbian E. Orthodox Diocese*, 426 U.S. at 696; Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969); *Kedroff*, 344 U.S. at 94). In such cases, the secular state has little interest. None dealt with the central question in *Smith*, that is, religious exemptions from "otherwise neutral" state laws.

12. *See* Dane, *supra* note 8, at 1722–32.

13. *See* Brady, *supra* note 10, at 1677–79.

Although their efforts are quite heroic and attractive in many ways, I shall argue that they are, in the end, unconvincing. Whether *Smith*'s core concern is believed to be the problem of individual, nonreviewable, legal-definitional power, or the erosion of civil norms, there is no convincing basis for distinguishing individual religious exemptions, struck down in *Smith*, from aggressive forms of religious-group autonomy. Nor is the ideal of individual religious freedom necessarily furthered by the broad immunity of religious groups from civil laws. While religious groups may be places that nurture and sustain individual religious belief, they may also be hostile, bitter places, which wield coercive and oppressive power.

I have never been a fan of the *Smith* opinion. It is my view that freedom of religion—or freedom of conscience, as I have defined it—has very distinct value, which is recognized in our constitutional scheme.[14] By affording individual religious exercise no special protection, *Smith* denies this principle. However, frustration with *Smith* should not blind us to the deep problems that an aggressive vision of religious-group autonomy presents. The prospect of religious groups with broad, autonomous power poses special dangers, both to dissenting individuals and to the goals of government, which should impel us to view it cautiously. Indeed, our reservations about the supremacy of religious claims should, if anything, be *stronger* when we consider the claims of religious groups.

II. *SMITH* AND RELIGIOUS-GROUP EXEMPTIONS FROM "OTHERWISE NEUTRAL" LAWS

In his article, *"Omalous" Autonomy*, Professor Dane argues that religious-group autonomy—or a special, constitutionally required, protective regime for religious institutions—survives *Smith*'s rejection of just such a regime for individual assertions of free religious exercise. *Smith* is not, in his view, the devastating case for the idea of religious-group autonomy that one might believe. Rather, Professor Dane sees "institutional autonomy [as] . . .

14. *See, e.g.*, Laura S. Underkuffler-Freund, *Religious Guarantees in a Pluralistic Society: Values, Problems, and Limits*, 12 SA PUBLIEKREG 32, 46–47 (1997); Laura S. Underkuffler-Freund, Yoder *and the Question of Equality*, 25 CAP. U. L. REV. 789, 800–02 (1996); Laura S. Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 965–68 (1995).

consistent with *Smith*, not only in a narrow, technical sense, but also with respect to the bedrock principle for which *Smith* stands."[15]

Professor Dane builds his argument in the following way. The Court's real concern in *Smith*, he argues, was not that religious believers might be immune from civil law. Rather, the concern was about *how* that immunity would be established.[16] Under pre-*Smith* free exercise jurisprudence, religious believers were granted immunity from civil law based on their own determinations of their religious beliefs. This system of "exemptions" troubled the Court. Because judges are unable to disagree with the sincerity or substantive truth of individual assertions of free religious exercise,[17] the pre-*Smith* rule effectively conferred a "private right to ignore generally applicable laws."[18] It permitted "every citizen to become a law unto himself."[19] It violated an "essentially *jurisprudential* concern" about what the rule of law should mean.[20]

A *system* of religious-group autonomy, on the other hand, does not involve this objectionable feature. In this framework, general categories of activities are established by law as those in which religious groups may act autonomously. These categories are "discrete, defined, . . . predictable," and applicable to all.[21] They are not *exemptions from* law; they are *provisions of* law. They are grounded in "objective, if contingent and contextual, social fact and not merely in the subjective, idiosyncratic, claims of individuals."[22] Thus, the problem of "individual religious prerogative," which drove the Court's decision in *Smith*, is not present in this context.

This is an argument that deserves careful evaluation. Of course, the assertion that *Smith* is more concerned about *the way* in which individual religious exemptions are established than about *the effect*

15. Dane, *supra* note 8, at 1721.

16. *See id.* at 1722–24.

17. *See, e.g.*, Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular [religious] beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds"); Thomas v. Review Bd., 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

18. Employment Div. v. Smith, 494 U.S. 872, 886 (1990).

19. *Id.* at 879 (internal quotation marks omitted) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

20. Dane, *supra* note 8, at 1722.

21. *Id.* at 1735.

22. *Id.* at 1727.

of religiously based exemptions on "otherwise neutral laws" is, in itself, a controversial one. Let us assume, however, that the placement of legal-definitional power in individual hands is, in fact, the core concern of the *Smith* opinion. Is this problem avoided by the doctrine of religious-group autonomy? Are the areas of autonomy that this doctrine creates "discrete, defined, and predictable" applications of law—applicable, even-handedly, to people whom the law objectively specifies?

As Professor Brady points out, religious-group autonomy is understood by courts and commentators in different ways. For instance, under one understanding, religious organizations are entitled only to exemptions from secular laws that actually burden religious practice.[23] Under a broader understanding, government may not interfere with internal church affairs, regardless of whether the activities affected are religious in nature or more mundane administrative matters.[24]

If religious-group autonomy is understood in the first sense—if it is understood to confer exemption from secular laws that actually burden religious practice—then it is no more immune from subjective, idiosyncratic, nonreviewable decisionmaking than are the individual religious exemptions condemned in *Smith*. Consider, for instance, claimed religious-group exemptions from labor laws, tort laws, civil rights laws, and so on. The fact that we might specify the particular areas of autonomy permitted (for example, freedom from these laws in employee relations, if required by religious dictates) does not eliminate the definitional power that religious groups enjoy. *What are* the beliefs of this religious group? *Why does* the law in question burden religious practice? Under this formulation, the problem of "individual religious prerogative," argued to be the core of *Smith*, is simply traded for "group religious prerogative." There is no substantive difference, in this context, between:

- I am exempt because my religious beliefs conflict with "law X,"

  and

- we are exempt because our religious beliefs conflict with "law X."

23. Brady, *supra* note 10, at 1635.

24. *Id.*

In both cases, the existence or nonexistence of the legally recognized exemption depends upon a subjective, idiosyncratic, nonreviewable decision: the religious beliefs that the individual—or individuals—assert.

Suppose, however, that we understand religious-group autonomy differently. Suppose that we understand it in the second way described above: that government may not interfere with internal church affairs, regardless of whether the activities are religious in nature or mundane administrative matters. For instance, we could recognize areas of religious-group autonomy as follows:

- The decisions of religious organizations about the selection and retention of employees shall be beyond the reach of civil rights laws and other civil laws,

  or

- secular courts will not become involved in religious organizations' internal affairs.

Would an understanding of spheres of autonomy along these lines avoid the problem of idiosyncratic, subjective, nonreviewable decisionmaking?

One could certainly apply such laws without probing the particular religious beliefs of the claiming groups, since *any* religious organization that makes the claim would presumably be entitled to the exemptions. The exemptions are indeed universal, in that sense.

Here one must pause. What we have effectively done is to substitute *status* (as a "religious group") for *beliefs* as the critical, qualifying issue. If individuals have the requisite status as a religious group or organization, then the exemption is granted. If they do not have that status, then the exemption is denied.

Religious-group status may seem, at first blush, to be a more objectively defined qualification than individually held religious beliefs. However, religious-group status is *itself* a function of individuals' asserted understandings of their own (religious) organizations, and thus—derivatively—of their own religious beliefs. If five people declare themselves to be the New Assembly of God, and thus a religious group entitled to autonomy, can the secular authority challenge that assertion? If three business partners assert themselves to be devoutly religious individuals, and their sports and

health club business to be their "ministry,"[25] can the secular authority deny their sincerity? In fact, by choosing to be—or not to be—a "religious group" or "organization," as the exemption demands, individuals retain the same idiosyncratic, subjective, nonreviewable power that they enjoyed under the pre-*Smith* system of individual religious exemptions. In neither case can the state second-guess what is, or is not, a religiously based imperative. In neither case can the state second-guess the sincerity of individual religious beliefs.

Thus, the employment of a broad understanding of religious-group autonomy—one that simply denies government the right to interfere with a religious group's internal affairs, regardless of their (religious or nonreligious) nature—does not avoid the problem of individual, idiosyncratic, nonreviewable decisionmaking: that power remains an inherent part of religious-group status, on which this understanding of autonomy depends. In addition, the claim that giving *carte blanche*, unqualified exemptions to religious organizations will eliminate individually discretionary elements can only hope to be true if the exempted activity itself is framed in very narrow and concrete terms. Grants of religious-group autonomy that are very limited in nature—for instance, autonomy in "hiring" or "property disputes"—may avoid discretionary elements. But grants of autonomy that are broad in any way—for instance, "freedom from secular state interference in internal religious affairs"—simply retain, in another guise, the same discretionary elements, and the same exemptions regime.

In sum, granting religious groups autonomy for religious and nonreligious activities of a particular kind might obscure the problem of individual, religious-definitional authority, when the religious organization's claim to existence is a noncontroversial one, and when the particular autonomy granted is narrowly defined. It does not, however, *eliminate* these issues, in either a theoretical or practical sense.

Moreover, we remain, in the end, with a nagging awareness of the assumption with which this discussion began. Was it, in fact, the problem of individuals' legal-definitional power that primarily

25. *See, e.g.*, State *ex rel.* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844 (Minn. 1985), *appeal dismissed*, 478 U.S. 1015 (1986) (claim by profitmaking corporation run by religiously oriented individuals for exemption from civil-rights laws).

troubled the *Smith* court? Or was it a deeper concern about the subjugation of civil laws and civil government to nonreviewable religious norms?

If *Smith*'s concern was, instead, with the effect of religious exemptions on secular laws, then the idea of religious-group autonomy is seemingly in serious trouble. Whether exemptions are claimed by religious individuals or religious groups, their effects on the principle of uniform applicability of "neutral" laws are apparently identical. Although claims of religious-group autonomy might (under some formulations) be limited to particular settings or laws, at the end of the day the fact remains: the religious group is, because of its religious nature, exempt from laws that are clearly applicable to others.

Perhaps the real question concerns the *value* of religious group autonomy—a question that Professor Dane's article does not explicitly address. Is there, in fact, some particular characteristic of religious-group autonomy that makes it particularly compelling? Is there some reason to justify its retention, despite what *Smith* may seem to say?

III. RELIGIOUS-GROUP AUTONOMY: MORE VALUABLE, OR MORE DANGEROUS?

In her contribution to this Conference, Professor Brady argues that the doctrine of religious-group autonomy survives *Smith* because it furthers one of the very important principles that *Smith* upholds. Professor Brady begins with the observation that the Supreme Court has long upheld the value of religious belief and its protection by the First Amendment.[26] *Smith*, she argues, continues this important recognition. "According to *Smith*, the 'free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.'"[27] Although religiously based action may be curtailed by government, "[i]n the realm of ideas, *Smith* envisions unrestricted freedom."[28]

26. *See, e.g.*, United States v. Ballard, 322 U.S. 78, 86 (1944) ("Freedom of thought, which includes freedom of religious belief, is basic in a society of free men.").

27. Brady, *supra* note 10, at 1673 (quoting Employment Div. v. Smith, 494 U.S. 872, 877 (1990)).

28. *Id.* at 1674.

In Professor Brady's view, *Smith*'s unquestioned endorsement of the value and constitutional protection of religious belief has profound implications for the survival of religious-group autonomy in the post-*Smith* world. Numerous scholars have observed the intimate connection between religious groups and religious belief. "Individuals express and exercise their beliefs in religious communities, and religious organizations also play an essential role in shaping the beliefs that individuals hold."[29] Religious groups are, in many ways, more than simple aggregations of the beliefs or actions of their members. Religious groups create tradition; they "are part of an ongoing conversation which both shapes individuals and is shaped by them."[30] It is through living beliefs in a religious community that beliefs are exercised, refined, and reformed.[31]

Furthermore, Professor Brady argues:

> If religious groups play an essential role in shaping individual religious belief and indeed in the very formulation of religious ideas, [then] the freedom of belief that *Smith* envisions requires protections for religious organizations. . . . Full freedom of belief is not possible without a corresponding right of religious groups to teach, develop, and practice their doctrines and ideas.[32]

It is the doctrine of religious-group autonomy that affords religious groups this freedom. And because of the inherent difficulties involved in any secular inquiry into what religious beliefs are, or the extent to which they are sustained by groups, the "only effective and workable" solution is to grant a broad right of autonomy to religious groups that extends to all aspects of their affairs.[33]

Professor Brady candidly acknowledges that this approach will have costs.[34] Granting religious groups autonomy will have costs in terms of the other, contrasting values and actions that the wider community wishes to promote. However, she argues that the opposition between religious-group autonomy and the implementation of democratic government is overdrawn. Religious groups, like all citizens' groups, are important "for sustaining a well-

29. *Id.* at 1675 (footnotes omitted).
30. *Id.* at 1676.
31. *See id.*
32. *Id.* at 1677.
33. *Id.* at 1698.
34. *Id.* at 1699.

functioning democratic order."[35] They are sources for moral values and recognition of responsibilities. They may act "[a]s training grounds for the exercise of democratic skills."[36]

It is undoubtedly true that religious groups and institutions are important expressions of religious belief, and that they may add to the vibrancy of a liberal democratic society. However, in the particular context that we are considering, there are other, darker realities with which we must reckon.

First, let us consider Professor Brady's foundational assumption that religious groups "nurture and sustain" individual religious belief, making these groups deserving of protection from civil law. This case for religious-group autonomy is grounded in the idea that such groups are supportive and positive places for the expression and growth of individuals' religious faith.

Invoking this model, in this context, raises an immediate objection. The cases in which religious groups seek freedom from secular norms—for instance, the employment and labor relations cases that are Professor Brady's focus[37]—involve not support, but conflict. In these cases, the religious group is not experienced by the aggrieved person as a warm, positive, nurturing place; it is experienced as a negative, hostile place, in which the religious group attempts to exert, on the individual, oppressive and coercive power. These situations involve disputes—bitter disputes; so bitter, in fact, that individuals seek recourse in civil laws and civil courts. In these situations, it is difficult to say that "vindicating individual religious beliefs" is obviously achieved by granting the religious groups complete, autonomous, and despotic power. What we have here is the *clash* of individual religious beliefs, the *clash* of individual religious values.

We might well believe that when the "nurturing" model applies, our commitment to religious-group autonomy is justified. However, when this model does *not* apply, should we continue, blindly, to grant religious groups that status? Put another way, if nurturing individual religious belief is our goal, is there a reason why the religious beliefs and values of the *many* should necessarily prevail (in effect) over the religious beliefs and values of *dissenters*? There is a

35. *Id.* at 1700.

36. *Id.* at 1700–01.

37. *See, e.g.*, *id.* at 1645.

tendency, by those who advocate religious-group autonomy, to focus on the needs of the target group and its members. What about the needs of the complainants?

There are certain situations, of course, when an aggrieved individual's recourse to civil laws and civil courts might—for other reasons—quite reasonably be denied. For instance, if the individual has voluntarily adopted the religious group's understandings, values, and authority, it is reasonable to expect that those understandings, values, and authority will govern the dispute, to the exclusion of the civil courts. As the Supreme Court has stated, "decisions of proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise."[38] This is no different from the effect given by civil courts to the determinations made by judicatory bodies established by clubs, civic associations, and other private consensual agreements.[39] Indeed, this "contractarian" understanding of religious-group autonomy explains judicial deference in many intragroup disputes, such as those involving "ministerial," "church property," and other purely ecclesiastical matters. However, neither this contractarian theory nor the ideal of the "nurturing" group supports a broad, across-the-board presumption of religious-group autonomy in individual-recourse cases.

Thus, the idea of individual benefit as the reason for an aggressive vision of religious-group autonomy is questionable at best. In addition, religious-group autonomy involves obvious costs for societal goals and values. We must remember the range of situations in which claims of religious-group autonomy can arise, even under more conservative formulations. For instance, it is often suggested that religious-group autonomy should be granted for the groups' "internal operations." Although this might seem like a limited grant, it could include fund-raising activities, the treatment of employees or prospective employees, the operation of religious schools, and more. Such "internal operations" of religious groups have frequent, serious, external effects on critically important societal goals and values. With the enforceability of civil rights laws, education standards, workplace safety rules, and other laws at issue, it is difficult to maintain that the

38. Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929).

39. *See id.* at 16–17.

secular state has no vital interests at stake, or that religious groups should, in their internal operations, be "islands of autonomy."

For those who would go farther—and grant religious groups autonomy for *all* operations and *all* affairs—the list is even more daunting. For instance, a religious group could claim autonomy for its land-use decisions, or conflicts with zoning, environmental, and historic preservation laws; its commercial dealings with outside parties (for example, contractual disputes and antifraud laws); its political/lobbying activities, and conflicts with election laws and anticorruption laws; and more. The list is endless. It is *particularly* endless because we have not yet determined what those "religious groups," entitled to autonomy, will be. As observed above, claims for exemption from civil laws on constitutional grounds have been asserted by religious groups as diverse as a religious foundation involved in commercial activities and a profitmaking enterprise run by religiously oriented individuals.[40] Should all of them be autonomous in their operations, policies, and practices?

Indeed, when we think positively of the prospect of religious groups as exempt from civil laws, we tend to imagine this power as exercised by traditional religious groups, whose activities we admire. What of the harder cases? What of groups who espouse and implement religious hatred, racial hatred, the subordination of women, the persecution of gay men and lesbians, or other beliefs abhorrent to civil society? If autonomy is given to some religious groups, it must, perforce, be given to all.[41] Yet, we would hardly want the activities of all such groups to be protected, untouchable, "islands of autonomy."

Professor Brady acknowledges that even the "internal affairs" of religious groups can have substantial impacts upon the larger society—some quite negative—giving the state important regulatory interests.[42] She argues, however, that "[f]ull freedom of belief, even

40. *See, e.g.*, Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985); State *ex rel.* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844 (Minn. 1985), *appeal dismissed*, 478 U.S. 1015 (1986). *See generally*, Laura S. Underkuffler, *"Discrimination" on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment*, 30 WM. & MARY L. REV. 581, 597–99 (1989).

41. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 658 (1943) (Frankfurter, J., dissenting) (stating that conferral of government benefits on particular religious groups would "resurrect the very discriminatory treatment of religion which the Constitution sought forever to forbid").

42. *See* Brady, *supra* note 10, at 1699.

unpopular and unorthodox belief, is essential to the health of democratic society[,] as are the groups that make such beliefs possible."[43] If—by this—she means freedom of belief, and the right to associate with like believers, I concur wholeheartedly. In those limited areas, the democratic value of religious freedom clearly outweighs the discomfort experienced by others, which the existence of those beliefs may engender. Indeed, even when we consider exemptions for *individual* free exercise claims, under pre-*Smith* law, my sympathy with her position (on balance) continues. However, when we consider the question of religiously motivated conduct by religious *groups*, the stakes are much higher. With the religious strife and oppression that currently engulfs vast parts of the world, the view that religious groups should simply be left alone to do good works seems alarmingly inadequate.

As I have stated elsewhere, I do not believe that religion is simply another philosophical or personal belief system that should, as a constitutional matter, be treated "equally" in the name of "equality."[44] I believe that religion is different, both in its unique power and value to individual lives and in its special dangers, when mixed with government. Those of us who believe in religion's special value might not like *Smith* and thus be tempted to view any broadening of religious freedom, for individuals or groups, as some kind of victory. However, individual religious freedom under pre-*Smith* doctrine was a far more limited and benign construct than a sweeping idea of religious-group autonomy. Religion, when "combined" in groups and institutions, wields tremendous social, economic, and political power. It carries far more dangers of oppression, coercion, and the assumption of governmental power than does individual free exercise. This does not mean that government should have the power to crush religious groups, or to dictate their truly internal affairs. But neither does it mean that we should grant these groups *carte blanche*, as societal actors, by granting them sweeping autonomy.

43. *Id.* at 1703.

44. *See, e.g.*, Laura S. Underkuffler, *Public Funding for Religious Schools: Difficulties and Dangers in a Pluralistic Society*, 27 OXFORD REV. EDUC. 577, 583–88 (2001); Laura S. Underkuffler, *The Price of Vouchers for Religious Freedom*, 78 U. DET. MERCY L. REV. 463, 476–77 (2001).

IV. CONCLUSION

In summary, whether one believes *Smith*'s core concern is the problem of individual, nonreviewable, legal-definitional power, or the problem of the erosion of civil norms, there is no convincing basis for distinguishing individual religious exemptions, struck down in *Smith*, from aggressive forms of religious-group autonomy. "Religious groups" are constituted by the subjective beliefs and assertions of individuals, in a way that is no different from claims of individual religious exercise. And if we are concerned with the impotence of civil norms, in settings beyond those involving strictly internal and ecclesiastical questions, there is no difference if those norms are ignored by groups or if they are ignored by individuals.

To sustain broad visions of religious-group autonomy in the shadow of *Smith*, we must find a positive reason for granting to religious groups what the Court denied, in *Smith*, to individuals. When considering a doctrinal development as radical as this, we must carefully consider its consequences. Religious groups, with autonomous power, pose far more dangers of individual oppression, governmental interference, and undermining of societal norms than autonomously acting individuals. In my view, granting religious groups sweeping freedom from civil laws carries with it far more costs than benefits.