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Freedom of the Church and our Endangered Civil Rights: Exiting the Social Contract

Robin West

Chief Justice Roberts, speaking for the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*,¹ along with several of the contributors to this volume,² celebrate a re-found “Freedom of the Church,” by which is meant a right of churches and church-affiliated institutions, not just individuals, to be exempt on grounds of institutional religious liberty from some otherwise binding legal obligations, including the obligations to comply with the antidiscrimination mandate of our various Civil Rights Acts when hiring, promoting, or firing those of their employees who qualify as “ministers.”³ If a church or church-affiliated school-employer is hiring a “minister,” which includes not only ministers per se but any employee, such as a teacher or counselor, with some ministerial functions, that church or church-affiliated employer, by virtue of the “ministerial exception,” need not abstain from discrimination on the basis of race, sex, disability, ethnicity, or age in filling that position.⁴ Similarly, if the Church-employer seeks to fire such an employee, it need not abstain from discrimination when doing so. The exempt employer need not, that is, comply with a host of legal obligations, imposed on every other sizeable employer in the country, to consider candidates who seek to obtain or to retain a position as a minister or as a ministerial teacher or counselor

¹ 132 S. Ct. 694 (2012).

² See, e.g., Steve Smith, *The Jurisdictional Conception of Church Autonomy*, (this volume); Richard Garnett, *The Freedom of the Church: Towards An Exposition, Translation and Defense* (this volume).

³ *Hosanna-Tabor*, 132 S. Ct. at 705–06.

⁴ *Id.* at 707 (The Court held that “the ministerial exception is not limited to the head of a religious congregation” but stopped short of “adopt[ing] a rigid formula for deciding when an employee qualifies as a minister.” Instead, the Court found Cheryl Perich to be a “minister,” “given all the circumstances of her employment.”).

without regard to these suspect characteristics. It may, if it wishes, take all or any of these attributes into account when making decisions regarding the composition of its ministerial staff.

Those general obligations of nondiscrimination, whether grounded in the Americans with Disabilities Act,⁵ the Age Discrimination in Employment Act,⁶ or Title VII of the Civil Rights Act⁷ itself, and from which church-affiliated employers are now exempt, at least when hiring ministerial staff, are no small thing. They do not simply, as Justice Roberts put it in the one sentence he devoted in his eleven-page *Hosanna-Tabor* opinion to an explication of the point of those laws, “authorize [some] employees who have been wrongfully terminated to sue their employers for reinstatement and damages.”⁸ Rather, those Civil Rights Acts collectively constitute, rhetorically, our shared societal commitment to rid our workforce and our schools, and therefore our larger social world as well, of discriminatory animus and the effects of that animus. They are a public declaration of our collective promise to become a less insulting, less hurtful, more inclusive, more fully participatory, more generous, and fairer society. As such, they articulate the interwoven civic and moral obligations of several generations of Americans and particularly of America’s employers and educators. They express a shared, intergenerational commitment to ensure equal opportunities in employment and education to all of our citizens, rather than just white and able-bodied men. They also, as

⁵ 42 U.S.C. §§ 12111–12117 (2009).

⁶ 29 U.S.C. §§ 621–624 (1967).

⁷ 42 U.S.C. § 2000e (1964).

⁸ 132 S. Ct. at 699. Roberts devotes one sentence to explaining the point of the Civil Rights Acts of 1964 and three pages to the history of the Freedom of the Church and the Ministerial Exemption, starting with the Magna Carta.

Hanoch Dagan and Avihay Dorfman have recently reminded us,⁹ express a public understanding of the individual moral, not just legal, obligations of individual employers to treat their employees and their candidates for employment fairly. To discriminate in employment in violation of those laws, then, is not simply an act that may give rise to a cause of action for reinstatement or damages, as per Justice Roberts's suggestion.¹⁰ It is also to break faith with and to undermine the shared national project of creating a world of equal opportunity and full participation that is free of racism and sexism and their related effects, and it is to perform an individual moral wrong in one's personal contractual relations with one's employees or with those who seek one's employment. It is, in other words, both a civic and political breach as well as a moral and contractual wrong.

Again, this is no trifling matter. The obligations of nondiscrimination grounded in the Civil Rights Acts that are set aside by virtue of the ministerial exemption in order to make room for religious autonomy are themselves exemplary of both shared communal obligations to integrate previously excluded outsiders in our workforces and schools *and* of individual obligations of contractors—in this case employers—to act in accordance with some minimal level of fairness in their individual employment-related contractual relations. To exempt an entire and sizeable class of employers—churches, mosques, temples, and church-, mosque- and temple-affiliated schools, and presumably hospitals as well—when making a sizable number of employment-related decisions from the reach of those laws is therefore no small thing either. These employers in particular,

⁹ See Hanoch Dagan & Avihay Dorfman, *The Justice of Private Law* (Nov. 18, 2014) (on file with author), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2527970; see also Hanoch Dagan, *The Utopian Promise* (The Berkeley Electronic Press, Working Paper No. 182, 2014), available at <http://law.bepress.com/taulwps/art182>.

¹⁰ *Hosanna-Tabor*, 132 S. Ct. 694.

one might think, precisely because of their institutional role as moral leaders in civil society, should abide by public and private obligations of fairness when staffing their ministerial ranks.

Put differently, it is not at all clear *why* our nation's ministers, rabbis, and imams, whether they are ministering or teaching, should not be drawn from the full and diverse American public rather than one racially or sexually determined segment of it, no less than are our nation's public and private school teachers, police forces, firefighters, professors, health care professionals, service providers, and retail, factory, and construction forces. It is even less clear why the churches, synagogues, and mosques that hire and fire them should be explicitly permitted to do so partly on the basis of their race, sex, age, ethnicity, or able-bodied-ness. Church-affiliated employers, no less than, and perhaps quite a bit more than, police departments, firefighters, public and private universities, hospitals, hotels, restaurants, retail outlets, service providers, construction firms, and factories, one would think, should be fully committed to those ideals and required to abide by their commitments.

Nevertheless, some of the contributors to this volume and now a number of First Amendment scholars as well see a paramount need for religious employers to enjoy institutional independence from these obligations, and the Supreme Court has now held, in *Hosanna-Tabor*, that in a broad swath of cases they are right to prioritize that need.¹¹ Churches and church-affiliated institutions must be free of these obligations of nondiscrimination, at least when hiring ministers, all the better to carry out their religious mission, according to the Court's opinion in *Hosanna-Tabor*.¹² More broadly, the

¹¹ 132 S. Ct. at 706.

¹² 132 S. Ct. at 706; Garnett, *supra* note 2, at 29–32.

Church must, in effect, maintain some degree of independent sovereignty over its ministerial workforce, and hence must be free of invasive governmental regulations, to be worthy of the obedience it asks of its congregants.¹³ And the state, if it is to be true to the pluralist ambitions obliquely referenced in the American Constitution, at least according to Richard Garnett's contribution to this volume, must, in turn, recognize the Church's right to do so.¹⁴ The Lutheran Church-affiliated school in *Hosanna-Tabor* must, therefore, be free of the obligations imposed on employers generally to not engage in discriminatory conduct when filling its ministerial staff. Our constitutional order itself, no less than the religious practices it promises to protect, apparently requires as much.¹⁵

In this brief comment I want to suggest that the "Freedom of the Church" to ignore the dictates of our various Civil Rights Acts, whether in the ministerial context or more broadly, created or at least newly discovered by the Court in *Hosanna-Tabor*, is a vivid example of a newly emerging and deeply troubling family of rights, which I have called elsewhere "exit rights"¹⁶ and which collectively constitute a new paradigm of both institutional and individual rights in constitutional law quite generally. The Church's right to the ministerial exception might be understood as one of this new generation of

¹³ *Hosanna-Tabor*, 132 S. Ct. at 702–05 (chronicling the history of the Church's relation to the State).

¹⁴ Garnett, *supra* note 2, at 10–12.

¹⁵ See William A. Galston, *The Idea of Political Pluralism*, in MORAL UNIVERSALISM AND PLURALISM: NOMOS XLIX 95 (Henry S. Richardson & Melissa S. Williams eds., 2008) for a similar argument regarding the pluralist nature of liberalism. For a critical response to Galston, see Robin West, *The Limits of Liberal Pluralism: A Comment on William Galston*, in MORAL UNIVERSALISM AND PLURALISM: NOMOS XLIX 149 (Henry S. Richardson & Melissa S. Williams eds., 2008) [hereinafter *The Limits of Liberal Pluralism*].

¹⁶ Robin West, *Tale of Two Rights*, 94 B.U. L. REV. 893 (2014) [hereinafter *Tale of Two Rights*]; Robin West, *Toward a Jurisprudence of the Civil Rights Acts*, in A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT FIFTY (Samuel Bagenstos & Ellen Katz eds., 2014) [hereinafter *Jurisprudence of the Civil Rights Act*]; Robin West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713 (2011).

rights, including some newly recognized by the Court over the last two decades,¹⁷ some with a slightly older lineage,¹⁸ and some sought after but not yet won by litigants¹⁹—the point of which is to exempt their holders from legal obligations which are themselves constitutive of some significant part of civil society and to thereby create, in effect, separate spheres of individual or group sovereignty into which otherwise binding legal norms and obligations do not reach. They are “rights to exit” civil society and the social compact at its core, or at least, rights to exit some substantial part of it.

As I have discussed elsewhere, and as others have argued as well (although using different language), those separate sovereignties sometimes come with profound costs to the weaker members within them, who no longer enjoy the protection of the law against the possibly abusive practices of the stronger members of their separate sovereign community.²⁰ Thus, for example, by virtue of various newly discovered exit rights,

¹⁷ *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *aff’d sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Hosanna-Tabor*, 132 S. Ct. at 710; *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585–91 (2012); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹⁸ *Cruzan v. Dir. Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990) (substantive due process right to terminate life support); *Roe v. Wade*, 410 U.S. 113, 164 (1973) (substantive due process right to obtain an abortion in the first trimester of a pregnancy); *Wisconsin v. Yoder*, 406 U.S. 205, 215–19 (1972) (combined First and Fourteenth Amendment rights to avoid schooling one’s teenagers past the eighth grade); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (substantive due process right to use and prescribe birth control pills); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–36 (1925) (substantive due process right to educate one’s children as one sees fit).

¹⁹ The Home Schooling Legal Defense Foundation is aggressively seeking a constitutional right to homeschool one’s children, on behalf of parents, and on either First or Fourteenth Amendment grounds. They have had considerable success with state legislators, who have made homeschooling, often without any regulation or supervision by states whatsoever, fully legal over the last twenty years. Somewhere between 1.5 and 2 million children are now homeschooled. For a general discussion, see Kimberly A. Yuracko, *Off The Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123 (2008). See also *Yoder*, 406 U.S. 205; *Jonathan L. v. Super. Ct.*, 81 Cal. Rptr. 3d 571 (Cal. Ct. App. 2008).

²⁰ See Marsha Freeman, *What’s Religion Got to Do With It? Virtually Nothing: Hosanna-Tabor and the Unbridled Power of the Ministerial Exception*, 16 U. PA. J.L. & SOC. CHANGE 133 (2013); Mark Strasser, *Innocents Beware: On Religion Clause Jurisprudence and the Negligent Retention or Hiring of Clergy*, 22 WM. & MARY BILL OF RTS. J. 177 (2013); *The Limits of Liberal Pluralism*, *supra* note 15; Yuracko, *supra* note 19. See also Brief for American Humanist Association & American Atheists, Inc. et al. as Amici Curiae Supporting Respondents, *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694 (2012); *Yoder*, 406 U.S. at 244–46 (Douglas, J., dissenting) (discussing the possibility that some of the children might have wanted to become professionals, which requires more than the eighth grade education the elders in Amish communities permit their children to obtain).

employees may not have enforceable labor or contract rights against their employers if they have waived them in mandatory arbitration agreements, which give their employers the right to exit their obligations to litigate breaches of those rights in courts of law. Children may not have the right to an education or protection of education law if their parents have fought for and obtained a right to exit participation in the public or private school system. Women may not have the protection of the Affordable Care Act if their employers have exited their obligations under that Act to provide broad insurance coverage by way of the quasi-constitutional Religious Freedom Restoration Act. Members of households, or even would-be intruders, may not have the protection of the state against excessive violence if the intruded-upon homeowner has exited the social contract that generally delegates the authority to protect citizens from violence to the police and instead exercised his Second Amendment right to take up arms and defend his house and home himself. In *Hosanna-Tabor*, by virtue of the ministerial exception to the Civil Rights Acts, Ms. Perich has lost the protection of the Equal Employment Opportunity Commission and the federal government against the wrongful loss of her job—a loss she may have suffered because of a discriminatory and retaliatory decision by her employer, which would have been in violation of the Americans With Disabilities Act but for *Hosanna-Tabor*’s right to exit its obligations under that law. Exit rights thus burden weaker members of the sovereign communities they create by stripping those members of otherwise available legal protections.

What I wish to stress here, however, is that exit rights also come with costs to our national community, not the least of which is that they undermine the aspirations of the civil society from which exit is sought. Those aspirations include, in this case, the

communitarian ideals of inclusiveness, participation, and integration that are imperfectly embodied in the civil rights laws themselves. For that reason alone, these “exit” or “opt-out” rights, including the ministerial exemption recognized and then broadened in *Hosanna-Tabor*, are profoundly troubling.

The first part of this comment quickly sketches the logical structure and the anti-communitarian significance of exit rights generally, using *Hosanna-Tabor* as an example. The second part contrasts the separatist and pluralist ideals motivating exit rights with those that animate what I hope is at least an equally familiar, and arguably older, paradigm of rights. Our civil rights, I will suggest, beginning with the original 1860s Civil Rights Acts themselves, and then extending through to the 1960s Civil Rights Acts of a half century back, and now including as well the various civil rights and civil rights movements of contemporary life—the Violence Against Women Act, the Family and Medical Leave Act, the Affordable Health Care Act, the Equal Marriage campaign, and the panoply of movements for civil rights for immigrants—that have all generally aimed to guarantee participation and inclusion in the larger national community rather than rights to opt out of that community. Civil rights are, I will suggest, *rights to enter*, rather than *rights to exit*. Their goal is not to permit the flowering of separate sovereign communities, but rather, to create a national community of broad based participation and civic equality. They are not just different in that respect from exit rights; they are often oppositional: “civil rights” and “exit rights” are very often in tension. The second part briefly explores that tension.

The conclusion suggests that exit rights, including the “Freedom of the Church” articulated and defended in *Hosanna-Tabor*, are a threat to not only the specific civil

rights with which they conflict but also to the ideals of community and full inclusion which our various civil rights traditions only imperfectly represent, but to an unappreciated degree, also constitute. We should therefore recognize as one cost of the “Freedom of the Church” the tragic consequences of expanding the list of various rights of exit and exemption that we grant individuals and institutions both. I don’t see that recognition in the essays in this collection that celebrate the “Freedom of the Church.” It is absolutely nowhere in the Court’s decision that recognized or created it.

The Freedom of the Church as a Right to Exit

Exit rights generally give their holders rights to exit from societal and civic obligations that would be otherwise imposed upon them by the state and to retreat instead into miniaturized sub-cultural worlds, in which the authority of the federal or state governments is set aside, so as to permit the flowering of a different and more private sovereign authority. Alternately, depending on the right, the authority of the church over its congregants, or of God over believers, or of parents over their children, or of doctors over patients, or of homeowners against possible intruders, or, in cases involving individual conscientious objection or individual consumer preferences, the sovereignty of an individual’s conscience, political beliefs, or consumptive choices over his or her own actions or inactions that would otherwise be prescribed by a general law of the state.

Exit rights, wherever they are recognized, don’t seek to enhance individual liberty within civil society by expanding or deepening the rights of individuals to *participate* in that society, as do, for example and by contrast, voting rights, some First Amendment rights, some Equal Protection Rights, and, as I will argue below, virtually all of our civil

rights under the various Civil Rights Acts. Rather, they seek to enhance individual liberty by expanding the right of the rights-holder to *exit* civil society and the complex of laws, tradeoffs, and reciprocal rights and obligations that in turn constitute some aspect of our society's legally constructed social contract. In each case in which an exit right is recognized, the individual or corporate entity is given a right to *refuse* to participate, rather than rights *to* participate, in some legally constructed and shared project of civil society.

Exit rights are grounded in various legal or constitutional texts, and as such, their legal authorization differs, but they share a common and two-pronged moral justification. First, an exit right, virtually regardless of its textual foundation, is justified by the purported importance—moral, political, or otherwise—of the non-governmental sovereign to which allegiance of the sub-community that will be covered by the exit right is owed.²¹ Second, the recognition by the state of the separate sovereignty the exit right creates is then justified, in turn, by a pluralist understanding of our foundational constitutional principles: according to the exit right holder—or his, her, or its advocate—respect must be owed the integrity and insularity of those separate sovereign spaces and the separate set of authorities and reciprocal obligations of obedience that are found within them, in substantial part so as to maximize individual liberty.²² As such, exit rights, according to their defenders, both expand our liberties and also sensibly recognize the splintered nature of our loyalties.

Hosanna-Tabor is one clear, perhaps even paradigmatic, example of the creation and then the enforcement of an exit right. The church-employer in *Hosanna-Tabor*

²¹ See *Hosanna-Tabor*, 132 S. Ct. at 705–06 (explaining the rationale for the ministerial exception); *Yoder*, 406 U.S. at 209–12 (discussing the reason Amish do not educate their children beyond the eighth grade).

²² See Garnett, *supra* note 2, at 16–18; Galston, *supra* note 15.

sought, and obtained, an exemption from otherwise binding law so that it could exercise its independent authority, free of those civic obligations, when firing a disabled ministerial employee who might otherwise have been protected against her wrongful discharge by the Americans with Disabilities Act.²³ The exit right in *Hosanna-Tabor* was grounded in an expansive reading of precedential authority under the First Amendment, but its moral and political justification, offered by commentators as well as the Court, is the argument briefly sketched above and common to all exit rights: the Church is a separate sovereign authority which *should* enjoy institutional freedom from state control, the state's deferential respect for which is broadly consistent with a pluralist understanding of our Constitutional structure. Thus, like all exit rights, the right to the ministerial exception created in *Hosanna-Tabor* establishes a separate sovereignty, the justification for which lies first in the value of the Church's institutional authority, and second in the merits of a pluralist understanding of our constitutional traditions.

Exit rights, so understood, have been proliferating over the last couple of decades. Let me point to just a few additional examples. The right of some for-profit corporations to be exempt from obligations otherwise imposed by the Affordable Care Act (ACA) recognized in *Burwell v. Hobby Lobby Stores, Inc.*²⁴ from the Court's term the year following *Hosanna-Tabor*, although not decided directly under the Constitution, is nevertheless a strikingly similar example of an exit right, as is the twenty year old Religious Freedom Restoration Act (RFRA)²⁵ which grounds it. RFRA generally provides a statutory exit right for religious believers to be exempt from the legal obligations that might follow from civic projects, which might be at odds with their faith-

²³ 132 S. Ct. 694.

²⁴ 134 S. Ct. 2751 (2014).

²⁵ Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (1993)).

based commitments. In *Hobby Lobby*, a sharply divided Court read RFRA expansively and ultimately found that a for-profit corporation closely held by a devoutly religious family had an exit right to be exempt from obligations otherwise imposed upon most employers by the ACA to supply insurance to their employees that would cover effective birth control.²⁶ The corporate employers in *Hobby Lobby* objected to the “contraception mandate” on religious grounds and were accordingly granted a right, under RFRA, to exit the obligations of the relevant portions of the ACA,²⁷ just as the Church-School in *Hosanna-Tabor* was granted a right under the First Amendment to exit the web of obligations and responsibilities of the Americans with Disabilities Act.²⁸ And, in *Hobby Lobby* as in *Hosanna-Tabor*, the exit right—meaning both the particular right recognized in that case and the general exit rights defined by the RFRA more broadly—was justified on the two grounds identified above. First, the legitimacy and value of the separate sovereign authority of the rights holder’s religious beliefs, and second, by a conception of constitutionalism that commits the state to a plural rather than unified political community. In both *Hobby Lobby* and *Hosanna-Tabor*, the Court created rights of religious believers to exit our civic society, rather than expand or recognize rights to participate in it.

²⁶ 134 S. Ct. 2751. The employer in *Hobby Lobby* had a religious objection to some of the covered forms of birth control, such that its participation in the dispensation of insurance that would cover the offending medical technologies, it believed, would implicate it in a grave wrong and thus burden its religious practices and beliefs. The Court held that that the corporation was protected by the RFRA, that the contraception mandate burdened the corporation’s religious beliefs, and that while the state had a compelling interest in the dispensation of birth control through the employer-provided plans required by the ACA, it had not used the least restrictive means of furthering that interest, which might have better accommodated the corporate employer’s religious beliefs and practices. The employer was therefore found exempt, under the auspices of the RFRA, from the obligations imposed by the ACA on all other employers to provide insurance with the full range of contractive options.

²⁷ *Id.* at 2759.

²⁸ 132 S. Ct. at 707.

Exit rights are not, however, limited to religious believers or to rights to religious belief and practice under either the First Amendment, as in *Hosanna-Tabor*, or the RFRA, as in *Hobby Lobby*. Exit rights, rather, are proliferating across the tapestry of constitutional law, impacting sizeable areas of law since at least the beginning of the last quarter of the last century. The Second Amendment right to own and use a gun in an expanded conception of self-defense, for example, recognized in 2008 by the Court in *District of Columbia v. Heller*²⁹ can be understood as a core exit right, in which the home is conceptualized as the separate sovereign sphere, over which the homeowner has the right to exercise sovereign authority with the kind of force that is more typically, in liberal democracies, monopolized by the state.

Generally, an exchange of some measure of our natural rights of self-help for both a right to the protection of the state against private violence and an obligation of the state to provide it is a key part of any liberal society's social contract and at least arguably has been a key part of ours: the Reconstruction Amendments and the nineteenth century Civil Rights Acts both recognize the rights of all citizens, including black citizens, to the "equal protection" of the state against violent private assaults.³⁰ Social contract-minded liberal theorists from John Locke and Thomas Hobbes to Robert Nozick and John Rawls have all concurred that a liberal state is obligated to provide a police force, and the

²⁹ 554 U.S. 570 (2008).

³⁰ Equal Protection Clause, U.S. CONST. amend. XIV, §1; Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985, 1986 (1996) which is sometimes called the Ku Klux Klan Act (the purpose of which was to provide a cause of action that would hold states' responsible for the failure to protect black citizens against lynching). See generally Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111 (1991); Joseph Tussman & Jacobus tenBroek, *Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

individual is in turn obligated to relinquish some of his natural rights to self-help beyond the minimum he retains as recognized by legally circumscribed rights of self-defense.³¹

According to the Court's interpretation of the Second Amendment in *Heller*, however, what our Constitution requires, by contrast, is *not* that the state has a community- and social-contract-based obligation to protect the individual against violence, and the individual has both a right to expect that protection and a duty to delegate responsibility for it to the state. Instead, the individual has the power to exit that social contract, eschew reliance on any police force, arm himself, and use those arms to exercise broadly drawn rights of self-help³²—a right which now includes, in about half the states, the right to use deadly force so as to stand one's ground in circumstances that go well beyond the circumscribed rights of self-defense defined by an earlier and displaced common law of self-defense.³³ Rather than a right to the protection of the police against violence, the individual, in effect, per the Second Amendment as interpreted in *Heller*, has the right to exit that part of the social contract by which we delegate to the state the obligation to protect us and to assume instead both the responsibility and the force required to protect himself and his home—his own separate sovereign space. And again, in *Heller* as in *Hosanna-Tabor* and *Hobby Lobby*, the exit right is justified broadly by the claimed legitimacy of the separate authority (the homeowner) over his sovereign space (his home) and a conception of our pluralist constitutional commitments: the state must, to be true to its foundational pluralism,

³¹ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 23 (1974); JOHN RAWLS, A THEORY OF JUSTICE 5 (1971); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 70–71 (Thomas P. Peardon ed., MacMillan & Co. 1952) (1690); THOMAS HOBBS, LEVIATHAN 92 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

³² 554 U.S. 570 (2008).

³³ See, e.g., MICH. COMP. LAWS § 780.972(a) (2006); IOWA CODE § 704.1 (1976).

recognize the rights of homeowners to protect themselves and their property. By the force of that reasoning and the text of the Second Amendment, the individual now has a right to exit the social contract that delegates these duties of protection to the state, rather than a right to enforce its terms.³⁴

The right of a healthy individual not to buy health insurance, insisted upon by Justice Roberts in dicta in *National Federation of Independent Business v. Sebelius*,³⁵ can also be understood as an exit right, created or re-discovered by expansive judicial interpretation of constitutional guarantees of individual liberty and coupled with a narrow interpretation of the grant of power under the Commerce Clause. What was at least partially recognized in Justice Roberts's discussion in that case of the limits of the Commerce Clause was basically a right to *not* purchase health insurance in spite of the "individual mandate" contained in the ACA to do just that.³⁶ Put differently, what was recognized, albeit obliquely, was an individual right to exit that part of the social compact by which, by virtue of the passage of the ACA, we all share and spread the costs of health care through a scheme contemplating mutually mandated insurance.

The Commerce Clause, the Court held, cannot authorize the federal government to require individuals to affirmatively make private purchases, no matter how compelling the case for the social necessity of doing so. It can forbid us from doing things that might affect commerce and adversely affect some public interest, but it can't require us to act in such a way as to further social ends. Again, Roberts's argument regarding the limits of the Commerce Clause authority of the federal government fits the logic of exit rights.

³⁴ For a general argument to this affect, see *Tale of Two Rights*, *supra* note 16.

³⁵ 132 S. Ct. 2566 (2012).

³⁶ *Id.* at 2584–91.

Rather than a right *to* insurance, or a right to affordable health care, or more generally a right to health, what was sought in that case and recognized by the Court (albeit arguably in dicta), was an individual sovereign right to be free of obligations to participate in any social project where the obligation from which exit is sought is an obligation to make a consumer purchase. And here as well, the right to exit was justified loosely by the twin pillars of the value of consumer sovereignty on the one hand and foundational commitments of constitutional pluralism on the other. Thus, as in *Heller*, in *Hobby Lobby*, and in *Hosanna-Tabor*, rather than a right to participate in some aspect of our social contract, the individual in *Sebelius* was given instead the right to exit it.

Nor are exit rights, whether a function of the First Amendment, the RFRA, the Second Amendment, or the limits of the Commerce Clause, limited to the protection of libertarian or socially conservative interests. In fact, it is quite the contrary. The logic of modern exit rights in the constitutional canon runs throughout our substantive due process jurisprudence, beginning in the parental rights cases from the 1920s,³⁷ but eventually culminating in the individual privacy enhancing cases from the 1960s and 1970s³⁸—rights both sought and lauded by political and legal liberals alike. Thus, the right granted by the Supreme Court in 1972 in *Wisconsin v Yoder*³⁹—the right of Amish parents to educate or not educate their children as they see fit, free of the overbearing obligations owed the state to send their children to public school—is a classic exit right, perhaps the classic exit right, with a solidly liberal pedigree. The Amish parents in *Yoder* were given the right to exit their otherwise binding and civic obligations to send their

³⁷ See, e.g., *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).

³⁸ See, e.g., *Roe v. Wade*, 410 US 113 (1973); *Wisconsin v Yoder*, 406 U.S. 205 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³⁹ 406 U.S. 205.

children to public high schools—the very institution widely recognized as the heart of an inclusive and fully participatory civil society—as well as the right to exit any implied obligation to immerse themselves or their children in the mores of the dominant secular culture.⁴⁰ They were given that right, quite explicitly, in order to allow them to maintain the cultural insularity, authority, and in effect and intent both, the separate sovereignty of the Amish community.⁴¹ Again the right, however textually authorized, was premised on the defining justification of exit rights generally: the value of the Amish community and a pluralist understanding of our constitutional traditions.

And finally, the “right to privacy” itself—a highly treasured victory of political liberals—first recognized by the Court in *Griswold v. Connecticut*⁴² and then significantly expanded in *Roe v. Wade*⁴³ fits the logic of exit rights. The right to use and prescribe birth control granted in *Griswold* was based squarely and quite explicitly on the separate sovereign authority of a marriage. A married couple, the Court more-or-less held, must have the “right to exit” the presumed social and civic obligations to participate in the conception, bearing, birthing, and raising of a society’s next generation that otherwise, at least according to the state legislators who drafted Connecticut’s anti-contraception laws, implicitly comes on the heels of married sexual life.⁴⁴ The right to procure a first semester abortion created or recognized in *Roe v. Wade*,⁴⁵ as countless

⁴⁰ The right recognized in *Yoder* is now a linchpin in a host of arguments being pressed today by fundamentalist parents for a much broader or more general “right to homeschool.” See Jonathan L. v. Super. Ct., 81 Cal. Rptr. 3d 571 (Cal. Ct. App. 2008); Michael E. Hersher, “Home Schooling” in *California*, 118 YALE L.J. 27 (2008); Rob Reich, *On Regulating Homeschooling: A Reply to Glazer*, 58 EDUC. THEORY 17 (2008); Yuracko, *supra* note 19; Rob Reich, *Why Homeschooling Should Be Regulated*, in *HOMESCHOOLING IN FULL VIEW: A READER* 109 (Bruce S. Cooper ed., 2005).

⁴¹ *Yoder*, 406 U.S. at 210–12.

⁴² 381 U.S. 479.

⁴³ 410 US 113.

⁴⁴ *Griswold*, 381 U.S. at 485–86, 495–96.

⁴⁵ 410 U.S. at 163.

commentators have noted, was also based in part on the need to protect a separate sovereign authority—that of the doctor-patient relationship. Although, as it has matured over time, this right has come to represent instead the right of a pregnant woman to exercise sovereign authority over her own body and thus over the fetus within her, free of the state’s attempt to impose care-giving obligations on her by virtue of that biological connection.⁴⁶

All of these privacy enhancing cases, from *Pierce v. Society of Sisters* from the 1920s, to *Yoder*, *Griswold*, and *Roe* in the sixties and seventies, grant rights to exit social obligations of civic society imposed by democratically derived law, rather than rights to participate in those projects. They all create separate sovereignties by so doing—the sovereignty of the Amish community over their children’s education, of the married couple over their procreative decisions, and of the pregnant woman over her body and the fetal life she supports. And all are justified by their celebrants by reference to the legitimacy of those separate sovereign authorities—that of the Amish elders over their children, of medical authorities over patients’ interests, of the married partners themselves over their reproductive decision-making, and of the pregnant woman over her body—and a pluralist understanding of our constitutional tradition, and specifically, a pluralist understanding of the substantive Due Process Clause of the Fourteenth Amendment. The liberal privacy cases from the last century, in other words, do not simply protect individual rights to be free of pernicious state intrusion. They also are seminal exit rights, protecting the rights of some to exercise authority over the interests and rights of others, free of state dictates to the contrary.

⁴⁶ For a full explication of this interpretation of *Roe v. Wade*, see EILEEN L. McDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* (Oxford University Press, 1996). See also Robin West, *Liberalism and Abortion*, 87 GEO. L.J. 2117 (1999).

At least some of these exit rights may seem wise, at least to some of us and at least some of the time. The parts of the social contract from which exit is sought and sometimes granted often appear to be, and may in fact be, foolish, draconian, or just witlessly intrusive. Or the state may simply be incompetent in its performance of its end of the social contract, and exit may be sought for precisely that reason: the police may in fact do a very poor job of protecting the homeowner against intruders; the state may do a poor job of educating children, particularly children from minority cultures and with minority sensibilities; and the community may do a poor job of helping pregnant women, particularly poor women, to properly nurture fetal life or raise children. If so, the homeowner's sovereign rights over those who would intrude his home, and the parents' sovereign rights over their children's education, and the woman's rights over her body and pregnancy all may seem not just imminently fair but also quite sensible. If the state can't do what it has promised to do, surely the individual—whether as parents, as would-be parents, or as homeowners—should have the right to fill the breach. When the community is bent on idiotic or pernicious ends, such as when it seeks to criminalize birth control, censor erotic texts, or assert control over a woman's own body, exit rights might seem all the better. They may well be a core commitment of liberalism, for example, and for very good reasons, for each individual to have sovereign rights over his or her own physical body, including whatever fetal life might be within it. In some or all of these cases, exit rights quite vividly share in some of the virtues of individual rights. The essential anti-communitarianism of exit rights, in other words, like the anti-communitarianism of individual rights more generally, can look quite attractive when a community's ends are repugnant.

The effect of exit rights, however, is not only to empower individuals to buck the dictates of an oppressive majority or an intrusive state. Exit rights come with two distinctive costs not shared by individual rights more broadly defined. Both are rarely noted, much less reckoned by their defenders, including the defenders of the institutional “Freedom of the Church.” First, the liberty created by exit rights—either for individuals or institutions—comes at the cost of equality for others. Exit rights quite explicitly allow some parts of the community to exercise dominion over other parts of the community—parts of the community which would otherwise be equal by virtue of the operation of the exited law. Thus, it is by virtue of exit rights that a state cannot “force” Church-affiliated employers to abide by otherwise agreed-upon antidiscrimination policies when hiring ministers, or some religious parents to send their children to public schools or even to publicly-regulated private ones, or a homeowner to put down his weaponry and rely on the police to protect his safety, or a woman to carry a fetus to term, or an individual to “buy into” a social scheme where the purpose is to spread the cost of health care for all. All of this may look like, and might be, a gain in either individual or institutional freedom for those freed from those obligations. But it is also by virtue of those rights, and their sovereign-creating logic, that the state cannot protect the applicant of those ministerial positions from the Church-affiliated employer’s willful power to discriminate, or the children of those religious parents from those parents’ decision to inflict upon them a poor or non-existent education, or the fetus from the pregnant woman’s choice to abort, or the intruder of the home of the armed homeowner from that homeowner’s excessive use of lethal force, or the sick and impoverished health care seeker from inferior or non-existent health insurance, which is in part a product of the healthy individual’s refusal to

participate in the cooperative scheme that would pay for it. By exempting some of us, but not others, and by protecting some of us, but not others, whatever else they do, exit rights thereby breed inequalities by depriving weaker parties of the protection of the law, leaving them to the discretionary authority of various private sovereigns.

Second, and virtually by definition, exit rights splinter our communities. They divide us up every which way. They divide us between those who are and those who aren't obligated; those who are and those who aren't exempt; those who are and those who aren't subject to the authority of the state; and, of course, those who are and those who aren't in turn protected by the state against the privately inflicted wrongs and harms which all of those separate sovereign authorities might inflict and for which, because of their exit rights, they are exempt from duties of recompense. And by virtue of these divisions, they move us, inexorably, as a rights-regarding national community, from an aspirational ideal of *e pluribus unum*, to that of *e pluribus pluribus*. From many, by the logic of exit rights, comes not one, but many. The pluralism so lauded by exit right celebrants—and on the political left and the political right—is a pluralism of profoundly hierarchic communities, in which authorities are all the more authoritative precisely because they are freed from obligations to the state and in which those from whom obedience is expected are all the more obedient, precisely because they are in turn stripped of the state's legal protections. But beyond the hierarchies, that pluralism is also simply a pluralism of separate communities. Exit rights come at a cost to our shared, national, communitarian aspirations. They come with a cost to civil society.

Is the gain in liberty of the individuals or institutions empowered by exit rights worth the sacrifice of either the equality or the communitarianism, or both, that is

otherwise promised by the Rule of Law? It depends, of course, as suggested above, in part, on the wisdom or foolishness of the law from which exit is granted. It also depends, however, on the worthiness of the separate sovereign sphere, which the exit right creates. A pluralist constitutional federation, after all, is only as good as the plural communities that constitute it. It is worth noting that slaveholders in the pre-bellum south also enjoyed what were in effect exit rights from the criminal law that otherwise forbade assaults, batteries, and false imprisonments in order to exercise the freedom to punish their slaves in the separate sovereignty of the master-slave relation.⁴⁷ Patriarchal husbands' nineteenth century rights to "chastise" their errant wives were also exit rights from those same obligations.⁴⁸ In both cases, the sovereign in those private sovereign spheres exercised authority freed of the rules of criminal law that otherwise required all citizens to abstain from assaulting and battering or wrongfully imprisoning others. The pluralism that demanded respect for the independence of these separate sovereign spheres of slavery and patriarchy was not a pluralism we now nostalgically admire or wish to emulate.

We have, of course, rejected the legitimacy of the particular "separate sovereignties" of slaveholders over slaves and of husbands over wives. We no longer constitutionally recognize the "institutional freedoms" of slavery and patriarchy. I am not equating the moral value of the church, or the home, or the pregnant woman, or the sovereign consumer with those institutions, or implying that the Court or other exit right celebrants are doing so. I do though want to insist that the logic of the rights by which

⁴⁷ See generally Mark Tushnet, *Slave Law in the American South: State v Mann in History and Literature* (University Press of Kansas 2003).

⁴⁸ See generally Reva Siegal, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 Yale L. J. 2117 (1996)

slaveholders and patriarchs exercised their morally repugnant power is shared by contemporary exit rights, whether sought by social conservatives on behalf of churches or by liberals on behalf of individuals. Exit rights, by definition, create separate sovereignties which themselves are breaches of the legal and social fabric that would otherwise unite us and would to some degree equalize us by so doing. Whether for good or ill, they create separate spheres of loyalty, of authority, and of obligation, which in turn splinter the larger civil and legal community from which exit is sought. They tear the national community apart. We should recognize this for the tragedy that it is.

Civil Rights as Rights to Enter

Exit rights contrast, sharply, with a quite different cluster, and perhaps a different generation, of rights that also have a distinguished pedigree, some overlap with our cherished “individual rights,” and at least some grounding in our constitutional traditions: the very civil rights that are the origin of the reciprocal obligations from which the contemporary exit-right holder often seeks exit. Civil rights are exemplary of what Professor Rebecca Zietlow has called “rights of belonging” or “rights of inclusion” in a slightly different context⁴⁹ and what I have elsewhere called “rights to enter,” so as to sharpen their contrast with exit rights.⁵⁰ The original founding-era understanding of the phrase “civil rights,” in Tom Paine’s influential language, was that they were that subset of the larger class of “natural rights,” all of which enhance individual wellbeing but which do so by guaranteeing participation in those institutions of civil society that are a

⁴⁹ Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 946 (2005).

⁵⁰ *Toward a Jurisprudence of the Civil Rights Acts*, *supra* note 16.

creation of law itself and that a “man cannot perfect on his own.”⁵¹ “Civil rights,” by contrast to rights of conscience and speech, owe their very existence to law. They are a product of the social cooperation law represents, rather than a limit upon law’s reach.

The original Civil Rights Act of 1866⁵² quite perfectly reflected this Painean understanding. That Act protected against discrimination on the basis of race or prior condition of servitude the “civil rights” to contract, to write a will, to buy, possess, and transfer property, to sue for privately inflicted injuries in a court of law, to use public transportation, houses of hospitality, and public facilities, and perhaps quintessentially, to have the protection of the police force against private acts of violence⁵³—all rights which owe their existence to law and legal institutions. Thus, that first generation of our civil rights—our “rights of belonging” or “rights of inclusion”—guaranteed that the right holder could participate in or could enter those civil institutions, such as contract, property, commerce, police protection, the courts of law, and the public square, all of which were themselves creations of law, rather than exclusively creations of nature, and would do so regardless of race. They were “civil” rights, meaning rights to enter civil

⁵¹ THOMAS PAINE, RIGHTS OF MAN 68–69 (Penguin Books 1984) (Part One first published 1791, Part Two first published 1792).

⁵² Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–1982 (1978)), which is also called the Act of April 9, 1866.

⁵³ *Id.* (emphasis added):

[A]nd such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, *and to full and equal benefit of all laws and proceedings for the security of person* [execution, imprisonment] and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

See also the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985, 1986, also called the Ku Klux Klan Act of 1871 or the Force Act of 1871, which was intended in part to secure for African Americans the protection of the criminal law against private violence.

space. They guaranteed the right to participate in civil life and the legal institutions that defined it.

Twentieth and twenty-first century civil rights, including New Deal-era rights from the 1930s of laborers to minimum wages, safe workplaces, maximum hours, and the right to unionize,⁵⁴ as well as New Society 1960s-era rights of racial minorities and women to nondiscrimination from employers, schools, and sellers of real property,⁵⁵ late twentieth century rights of women to freedom from intimate violence⁵⁶ and of parents to medical leave for parental exigencies,⁵⁷ and twenty-first century rights of all citizens to affordable health care,⁵⁸ the still sought after rights of immigrants to fair treatment,⁵⁹ and rights of gays and lesbians to marry⁶⁰ *all* share this Paineian structure and even aspirational goal. For all their differences, all of these civil rights seek to ensure full participation, belonging, or entrance into those social and civil institutions that are created by law and that enhance individual welfare or individual flourishing. Thus, the early twentieth century civil rights to minimum wages, maximum hour regulations, safe working environments, and the protections of unions all sought to guarantee the rights of workers to enter those legally-created institutions of dignified wage labor—a legal institution that (presumably) improves individual welfare over what man could achieve in nature, but which he cannot possibly “perfect on his own.”

⁵⁴ On the early characterization of labor rights as civil rights, see William E. Forbath, *The Distributive Constitution and Workers' Rights*, 72 OHIO ST. L.J. 1115 (2011); Risa Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609 (2001).

⁵⁵ Title IX of Education Amendments Act of 1972, 20 U.S.C. § 1681 (1972); Fair Housing Act of 1968 (Title VIII of the Civil Rights Act of 1968), 42 U.S.C. § 3601 (1968); Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964).

⁵⁶ Violence Against Women Act, 42 U.S.C. § 13981 (1994).

⁵⁷ Family and Medical Leave Act, 29 U.S.C. § 2601–2654 (1993).

⁵⁸ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

⁵⁹ See, e.g., Allegra McLeod, *The U.S. Criminal Immigration Convergence and its Possible Undoing*, 49 Am. Crim. L. Rev. 105-178 (2012).

⁶⁰ For an early argument, see William Eskridge, *Case for Same Sex Marriage: From Sexual Liberty to Civilized Commitment*, (Free Press 1996).

Mid-twentieth century civil rights to nondiscrimination can likewise be understood as Painean “rights to enter.” Antidiscrimination rights guarantee entrance to workplaces, housing markets, commerce, public accommodations, and schools regardless of race or gender, ethnicity, or disability. Again, these are institutions which enhance individual wellbeing and which are unimaginable without both substantial civil cooperation and the machinations of law.

Similarly, late twentieth century civil rights such as the Violence Against Women Act ⁶¹ and the Family and Medical Leave Act ⁶² seek to protect safe and secure participation in the legally structured institutions of workplace and family life. The same is true of our youngest and still not completely secured early twenty-first century rights, sought on behalf of immigrants, gay and lesbian couples, and impoverished people lacking insurance. Rights to affordable health insurance under the ACA guarantee the right to enter the profoundly legally constructed world of insurance, again a social institution entirely indebted to social cooperation—the pooling of risk – and law—the creation of mandatory obligations of participation—and all toward the end of enhancement of individual health. Rights to marry and rights to immigrate similarly guarantee rights to enter social institutions created or facilitated by law—the institution of marriage and family, on the one hand, and citizenship on the other—that immeasurably enhance individual life beyond the riches obtainable through individual natural effort.

All of these civil rights, from the nineteenth century rights to contract, own, and sell property, sue and testify in court, and have protection against violence to twentieth and twenty-first century rights to nondiscrimination, to affordable health care, to marry,

⁶¹ 42 U.S.C. § 13981.

⁶² 29 U.S.C. § 2601–2654.

to vote, to immigrate, to have children without fearing the loss of one's job, and to enjoy intimacy without fearing violence are all rights to *enter* something. They are rights to enter the worlds of commerce, property, places of accommodation, the public square, the court house, sites of employment, schools, the voting booth, the protection of the Rule of Law, and the institutions of marriage and family, health care, and citizenship. All of them are rights to enter civil society. They are rights to be included as participants in the social spaces that constitute it and that are constructed by law, that press toward the end of individual wellbeing, but that are constitutive of our very precious and always fragile civil society.

Conclusion

Exit rights often, although not invariably, are in conflict with civil rights of inclusion for a very specific reason: they undermine the civil institutions from which exit is sought in material as well as symbolic ways. The rights of religious fundamentalist parents to homeschool their children or of the Amish to end their children's education at the eighth grade don't simply exist side by side with a civil right to a public education. Rather, exercise of the first right undermines the ideals of the second. The twenty-first century homeschooling parents, like the late twentieth century Amish, remove not only their children but their support from the civil society, the social community, and the social norms that are represented and constituted by our commitment to public schooling. The individual choice not to buy health insurance likewise doesn't just exist side by side with the right to health care obliquely recognized by the ACA. Rather, the former exit right undermines the web of quasi-contractual coordination among those who are sick

and those who are well—the legally coordinated purchases of insurance by all of us, by which the health care needs of the weakest among us are covered. The decision to purchase and use a gun for self-defense undermines the rights created by a social contract according to which we jointly delegate that work of protection against violence to a publicly funded police force. Police work is made considerably more difficult when the citizenry is fully armed and legally empowered to use those arms. The decision of a church-affiliated school or hospital not to abide by the strictures of Title VII or Title IX in staffing one’s ministry similarly undermines the shared commitment to full participation and equal community embodied in those Civil Rights Acts, and the decision not to abide by a mandate to provide access to affordable birth control for one’s employees undermines our commitment to the health, equalitarian, and libertarian goals of that aspect of the law.

Moreover, the jurisprudential and constitutional drift we’re now undergoing toward not just particular rights to exit, but also toward the very *idea* of a right as being, in essence, a right to exit some aspect of civil society, is worrisome. It represents a tragic turn in our understanding of the value and nature of individual rights themselves. Our newly discovered exit rights from the last two terms—the ministerial exemption recognized and broadened in *Hosanna-Tabor* and the exemption created by RFRA and recognized in *Hobby Lobby* to avoid the obligations of cooperation required by the ACA—much like the earlier generation of privacy rights from the last quarter of the twentieth century, with which they share a strikingly common logic, give their holders rights to live separately, and differently, from the rest of us, freed from the obligations of otherwise shared norms of general applicability. They *may* thereby create separate

communities of equals, within which individuals live free lives of brotherhood or sisterhood united by a common spiritual bond, or they may create separate sovereign spaces, within which powerful leaders wreck their wont, and submissive followers go along to get along and do what must be done. But whatever the quality of life or whatever the nature of the hierarchy within the sovereign spheres they create, exit rights quite explicitly, and with the Court's acquiescence, undermine webs of civic obligations that are otherwise owed by all and to all. They thereby undermine the basic communitarian assumption that underlies our democratic process—the assumption that we are engaged in a project of shared governance, according to which we all abide by the outcomes of democratically agreed upon solutions to common problems.

The vision of democracy these rights presuppose is profoundly less communitarian, and more fractured, than that. They bolster, at best, a pluralist rather than a unified conception of our polity—an aspiration of *e pluribus pluribus* rather than *e pluribus unum*—and at worst a balkanized federation of separate sovereignties, within which the powerful are unchecked by law and oftentimes even shielded from social or political critique. As such, exit rights seem perfectly designed to undergird the “cultural war” metaphor for our current politics. They validate a vision of social life in which the sides to the various disputes that divide us are committed to either the destruction or marginality of the other, rather than to an engagement with it, through dialogue, debate, and ultimately through compromise and cooperation on tentatively shared goals embodied in decently passed legislation of general applicability. That rending of a unified social fabric is the hidden but substantial cost of all exit rights, including, perhaps

quintessentially, the institutional “Freedom of the Church” articulated in *Hosanna-Tabor*, and defended and celebrated in this volume of essays.

The core of my objection that freedom, then, is just this: we should remember that what is jettisoned when we enshrine the “Freedom of the Church” in the constitutional canon is not, per Justice Roberts, just the occasional right of employees in ministerial positions in church-affiliated places of employment to a remedy for their wrongful discharge. What is jettisoned, rather, is the aspiration of a civil rights society in a much larger sense. It is the aspiration for an understanding of rights as being rights *to enter* rather than rights to exit—rights to be included, and to participate in all aspects of our social, civic, and constitutional identity. When we set aside our civil rights to enter in order to make room for a Church’s freedom to exit, we are setting aside not only a particular litigant’s right to relief for a wrongful discharge, but also a particular conception of our rights tradition. We are setting aside an understanding of rights and a history of rights that seeks to secure, on behalf of every one of us, entry into the socially and legally constructed civic worlds of work, school, commerce, family, the public square, the courthouse, and neighborhood.

We jettison, when we set that aspiration aside, a conception of rights that says to the rights holder, by virtue of your rights, you *can* do this job. You *can* acquire this education. You *can* enjoy this public accommodation. You *can* marry whom you love. You *can* cast your vote. You *can* be treated when you’re sick. You *can* enter the courthouse and seek recompense when you’ve suffered a private wrong. You *can*, in short, participate as an equal in our shared public life. When we set those commitments aside, we say instead: You *can’t* participate. You *can’t* enter. You *can’t* expect fair

treatment as an equal. You *can't* vote. You *can't* enjoy our public accommodations. You *can't* be a minister. You are barred. And you are barred, because of the constitutional, constitutive, identity-forming rights of exit that we have granted some of the most important actors in our civil society to construct sovereign spaces that keep you out and keep you down.

This shutting down of the civil rights aspiration—an aspiration of inclusion and belonging, particularly in those spheres of life which contribute so mightily to the enjoyment of our individual capabilities for living a good life, as guaranteed by laws which have been dearly fought for, won, and treasured—is a profound, misguided, and I believe, a tragic compromise of the promise of our civil society. An awareness of the magnitude of that tragedy, I believe, is disappointingly missing from both the Court's opinion in *Hosanna-Tabor*, as well as from a number of the essays in this worthy collection that celebrate that decision.