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VOLUME 49             NUMBER 1

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The Impact of Religion and Religious Organizations

Elizabeth A. Clark*

Legal scholars often see religion as a mere private preference, choice, value, or identity with no more meaning or positive social impact than any other preference, choice, value, or identity. If anything, religion’s negative impacts are often highlighted. For example, a focus on the harms of religion often underlies contemporary legal debates about religious exemptions and tensions between religious rights and LGBTQ rights or reproductive rights. Conversely, scholars in other fields have documented religion’s distinctive pro-social features, proposing mechanisms by which religion has unique positive impacts on individuals, families, and society. While recognizing that, for its practitioners, religion has its own internal logic and rationales, this Article seeks to brings together broad empirical research and sociological and political theory on the social goods and pro-social values that religious belief, practice, and communities foster as well as to examine approaches to address the harms religion causes. The Article proposes religious freedom as a key mechanism to ensure maximal social benefit of religion. Religious freedom also underscores the value of the choice and experience of belief and unbelief.

INTRODUCTION

Religious affiliation has been dropping significantly in recent years. The social goods religion brings to individuals and society are no longer taken for granted. This challenge brings with it an often-overlooked benefit: the chance to reflect on and articulate the social goods religion and religious organizations bring to society. Legal scholars often see religion as a mere private preference, choice, value, or an identity with no more meaning or social impact than any other preference, choice, value, or identity. For example,


assumptions about the harms of religion often undergird contemporary legal debates over conflicts between religious and LGBTQ rights, reproductive rights, or religious exemptions generally. Conversely, scholars in other fields have documented religion’s distinctive features, proposing mechanisms by which religion has unique impacts on society.

This Article is an initial effort to bring together recent, wide-ranging empirical research along with sociological and political theory concerning the social goods and prosocial values that religious belief, practice, and community foster. For its practitioners, religion has its own internal logic and rationales. But I hope to re-energize a discussion in the legal world about the social benefits of religion and account for some of religion’s most significant contributions to the stability, peace, and justice of a society.

Knowledge and documentation regarding the value of civil society have grown extensively over the last three to four decades. Although a few attempts have already been made on the religious front to understand the often-parallel, positive role of religion in society, in this Article, I bring together more recent work and explore questions of political and sociological theory that suggest explanations for how religion brings about these prosocial benefits of a society.


4. Research has recognized the important contributions civil society institutions bring to communities and countries. While bracketing the question of whether religion can or should be identified as part of civil society, I would argue that empirical research and contemporary theory suggest that, like civil society, religious belief and organizations serve crucial prosocial functions. For a discussion of the value of civil society see, for example, JEFFREY C. ALEXANDER, THE CIVIL SPHERE (2006); RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE (1984); ADAM SELIGMAN, THE IDEA OF CIVIL SOCIETY (1995).
outcomes. Additionally, I address the negative impacts of religion and the value of religious freedom as a method of limiting potential negative effects. This holistic and updated view of the contribution of religion and religious organizations to society can provide important background to legal discussions of the significance of religious freedom, the role of religion in public life, and the value or harms of religion.

In this Article I document how religious belief, values, practice, and membership improve individual and family well-being. The impact of religion also extends more broadly to society as a whole by developing social capital, engaging in charitable and social justice work, establishing social norms that support liberal democracy, and serving peacebuilding functions. I also suggest mechanisms proposed by various theorists and social scientists that explain why religion has such a powerful influence. Evidence for the value of religion can be found across a range of fields of study, such as evolutionary biology, political philosophy, sociology, psychology, political science, economics, and history.

Religion has the power to be an enormous force for individual and societal good. I recognize, however, that religion is inherently ambivalent and carries the potential for harm as well as good. The increased social solidarity that religion brings can be used by individuals or groups to facilitate or ignore injustice. The social power of norms taught by religious organizations can be used to justify or persuade individuals to engage in discrimination or violence. The research cited throughout the paper indicates that these negative outcomes are not typical of the religious experience in the United States—religion is overwhelmingly associated with individual well-being and flourishing families and communities.

Research shows that the potential negative impact of religion is particularly accentuated in regimes that foster religious

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5. Rodney Stark has amassed a significant set of very valuable research on the positive social goods of religion to individuals and families. RODNEY STARK, AMERICA’S BLESSINGS: HOW RELIGION BENEFITS EVERYONE, INCLUDING ATHEISTS (2012). Putnam and Campbell’s AMERICANS’ GRACE and Robert Wuthnow’s WHY RELIGION IS GOOD FOR AMERICAN DEMOCRACY also add thoughtful and important research as to the positive social goods religion provides in America and for American democracy. ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US (2010); ROBERT WUTHNOW, WHY RELIGION IS GOOD FOR AMERICAN DEMOCRACY (2021).

persecution, suggesting the importance of religious freedom and pluralism. The absence of religious freedom is also highly correlated with war, terrorism, lack of democracy, and repression of heterodox beliefs. Nevertheless, I recognize that tragic uses of religion are found even in liberal democratic systems. In my conclusion, I argue that religious freedom, which always includes outside limits on religious behavior, is a crucial element in tapping religion’s potential for good while limiting the possibilities of harm.

Evolutionary biologist Jonathan Haidt argues that religion’s ability to bind people together can make it an accessory to atrocities but also argues that our moralistic minds that make religion possible are a key part of our evolutionary success. In this Article, I identify how religion contributes to this success in individuals, families, and societies. In Part I, I examine religion’s impact on individual well-being, physical and mental health, and life satisfaction as well as its impact on criminality, rehabilitation, adolescent behavior, and family life. In Part II, I address the impact of religion and religious organizations at the societal level, exploring how religion builds social capital, creates communal obligations, bolsters joint charitable and social justice projects, establishes social norms, compensates for liberal democracy’s limitations, and fosters peacebuilding. In Part III, I turn to the question of negative and anti-social potential of religion and the value of religious freedom in limiting this potential harm. I conclude in Part IV and return to the question of religion’s internal value.

I. POSITIVE SOCIAL NORMS AND INDIVIDUAL AND FAMILY WELL-BEING

Religion is extensively documented to have a positive effect on individuals’ well-being and health. This includes a sense of well-being, life satisfaction, mental health, and physical health levels, including lowered suicide rates and deaths of despair. Scholars propose multiple alternate explanations for this tied to the value of the beliefs themselves, the influence of regularly meeting with others and intra-religious support, the power of joint ritual activity, the role of a strong religious identity, and the impact of charitable giving.

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Religion’s impact on individuals goes beyond health and well-being, however. Religiosity is correlated with reduced criminality and appears to compensate for factors that normally correlate with illegal behavior. Religion also is correlated with lower recidivism rates and fewer disciplinary problems in prison. Religion-based programs in prison have been shown to reduce recidivism and attract more participants than other personal enhancement programs in prisons.

The impact of religion in individuals is particularly noticeable in adolescents. Positive correlations with religiosity include physical and mental health, academic achievements, and community involvement. Frequent attenders at religious services engage in fewer risky behaviors such as illegal drug and alcohol use. The impact on youth is especially notable in working-class families—one study found that those who were involved in their religion and strongly believed in God were twice as likely to go on to earn bachelor’s degrees.

Sociologists explain the impact on individuals as going beyond stigmatizing negative behaviors. Instead, many point to the value of self-control, accountability, role models, establishing moral norms, developing leadership and coping skills, and building social ties, to name only a few.

Religion benefits not only individuals, but also family life. Religion leads to lower divorce rates, higher satisfaction in marriage, more satisfying sexual relationships, and less marital conflict. Religious views of parenting lead to less self-reported verbal aggression with children and higher quality relationships between mothers and children.

A. Well-Being, Health, and Life Satisfaction

of rubrics, but all correlate positively with religious belief and practice. The Pew Research Center, for example, in a 2019 study of twenty-five countries found that actively religious individuals are more likely to describe themselves as very happy, even controlling for age, gender, education, and marital status.\(^9\) The current edge of research is to break down these general findings to see what aspects of religion are key to influencing life satisfaction. Some scholars look at the value of the beliefs themselves. They suggest that religion provides “psychological insurance”\(^10\) for individuals or a “stress buffering”\(^11\) to help in coping with adverse circumstances.\(^12\)

Other scholars cast their nets more broadly. Ferris, for example, suggests a few reasons that religiosity may be connected with quality of life because

> our conception of the “good life” rests heavily upon Judeo-Christian ideals; religious organizations contribute to the integration of the community, hence enhancing the [quality of life]; since frequency of attendance is imperfectly associated with the [quality of life], other influences are at work; the doctrine of the religion may attract persons of happy dispositions; religion may explain a purpose in life that fosters well-being; and others.\(^13\)

Haller and Hadler suggest four reasons why religiosity may affect happiness: (1) religion provides explanations for hardship; (2) there are significant, communal rituals associated with life events and transitions, giving them more meaning; (3) a religious social safety net provides support in tough times; and (4) assurance through belief in God that man’s existence and destiny depend on

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12. See also Harold G. Koenig, Dana E. King & Verna Benner Carson, Handbook of Religion and Health (2d ed. 2012).

a god.\textsuperscript{14} Citing Durkheim, they also argue that religion fosters altruism and combats “excessive individualism.”\textsuperscript{15}

Another approach explores religion’s connection with creating meaning and improving mental health. Recent research demonstrates that those having a stronger sense of meaning in life experience greater life satisfaction, self-esteem, positive emotion, and optimism.\textsuperscript{16} Individuals who report more experiences with the sacred also have increased levels of mental health.\textsuperscript{17} Building on these links between religious experiences and well-being, a 2020 study found that individuals who participate in individual and home-based religious practices experience greater meaningfulness in life and are more likely to enjoy an “extremely happy” level of overall life happiness and “feel God’s love for [them]” on a daily basis.\textsuperscript{18}

Recently however, the majority of researchers have focused on the value provided by gathering in faith communities, whether just being together or specifically participating in ritual behavior. Khushbeen Kaur Sohi looked at Sikh communities, for example, and found that the ability to practice rituals and the frequency of ritual participation were positively correlated to social well-being and sense of community.\textsuperscript{19} Christos Makridis, Byron Johnson, and Harold Koenig studied life satisfaction and local employment trends and found that active Christians’ life satisfaction ratings were countercyclical (positive even during times of local unemployment), unlike that of theists with some religious affiliation.\textsuperscript{20}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 179.
\item Michael F. Steger, \textit{Meaning in Life and Wellbeing}, in \textit{WELLBEING, RECOVERY AND MENTAL HEALTH} 75 (Slade et al. eds., 2017).
\item Christos Makridis, Byron Johnson & Harold Koenig, \textit{Does Religious Affiliation Protect People’s Well-Being? Evidence from the Great Recession After Correcting for Selection Effects}
\end{enumerate}
\end{footnotesize}
and Robert Putnam in 2010 similarly documented the power of religious engagement and identity combined. They identified worship service attendance and congregational friendship as the driving factor of life satisfaction for those with strong religious identities. “Among respondents with large numbers of congregational friends, those with strong religious identities are almost twice as likely to say that they are ‘extremely’ satisfied than are individuals without a strong religious identity.”

Religious attitudes, practices, and membership are not just correlated with life satisfaction. They are also tied to overall physical and mental health. Regular attenders have thirty-three percent reduced risk of death, eighty-four percent reduced risk of suicide, twenty-nine percent reduced risk of depression, sixty-eight percent reduced risks of “deaths of despair” for women, and thirty-three percent reduced risks of “deaths of despair” for men. It has been argued that this is the case because religious attendance provides a network of social support, offers clear moral guidance, and creates relationships of accountability to reinforce positive behavior. Frequent attendance at religious services’ correlation with lower mortality rates has also been explained as reflecting improved health practices, increased social contacts, and more stable marriages. Research on specific health outcomes beyond those mentioned, like obesity or exercise, however, has been mixed on results.


22. Id. at 923.


24. Id.


Religious involvement can also help address the epidemic of loneliness.28 Confirming four other studies about faith community involvement, Gabrielle Nicole Pfund studied college students and found that “faith community involvement, life purpose, and well-being [are] positively correlated with each other and negatively correlated with loneliness.”29 Her 2019 work zeroed in on the importance of faith community harmony: “Faith community harmony, but not faith community interaction, was a significant predictor of well-being, suggesting the importance that a sense of belongingness has within a faith community for well-being, rather than participation in a faith community more generally.”30

Beyond direct relationships between life satisfaction and faith and participation in faith communities, scholars have also seen positive effects in life success from specific religious beliefs, practices, and membership. People who frequently attend church meetings are more likely to achieve academically, attend college, maintain a job that is considered prestigious, and own a home. They are less likely to experience economic hardship.31

Arthur Brooks notes the ties with charitable giving. He explains that “[p]eople who give to charity are 43 percent more likely than people who don’t give to say they’re very happy people.” He then cites the following figures:

The number-one characteristic of those who give in this country is that they practice a faith. Of people who practice their faith regularly—which is to say, they attend worship services every

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28. See infra text accompanying notes 161–63.
31. STARK, supra note 5, at 133–46.
week—91 percent give to charity each year. Of people who don’t attend every week, 66 percent do.\textsuperscript{32}

Krause instead focuses on the religious practices of humility and the social relationships arising from religious institutions.\textsuperscript{33} He argues that increased participation in worship service is positively correlated to spiritual support, which in turn promotes humility, forgiveness, greater sense of meaning in life, and subsequently better self-rated health. Krause asserts that informal channels, such as spiritual support, play a larger role than formal channels alone like worship service attendance, and notes that people who are “more forgiving and who are more humble tend to rate their health in a more favorable manner.”\textsuperscript{34}

The breadth of research on religion and health, well-being, and life satisfaction is quite amazing. Whether these benefits stem from the beliefs themselves, the social aspects of gathering together, faith community harmony, or from the generosity and humility generated by all of these, the extensively researched data that religious belief and action are so deeply tied to health and happiness are remarkable. The image of religion as “the haunting fear that someone, somewhere may be happy,”\textsuperscript{35} while pithy and humorous, seems little based in reality.

\textbf{B. Criminality and Rehabilitation}

Religious behavior has also been tied to decreases in a variety of criminal acts.\textsuperscript{36} For example, regular religious attendance is

\begin{itemize}
\item \textsuperscript{34} Id. at 45.
\item \textsuperscript{35} H.L. Mencken & George Jean Nathan, Clinical Notes, 4 AM. MERCURY Jan. 1925, at 56, 59 (describing Puritanism).
\end{itemize}
inversely correlated with domestic abuse. Religiosity appears to protect individuals from the negative effects of living in underprivileged areas and other factors that are correlated with illegal behavior. Byron R. Johnson and Curtis S. Schroeder argue that “[t]he beneficial relationship between religion and crime reduction is not simply a function of religion’s constraining function or what it discourages (e.g., opposing drug use or delinquent behavior) but also a matter of what it encourages (e.g., promoting prosocial behaviors).” Religion can build positive social linkages, spirituality, service, honesty, and the identity transformation sought after in “positive criminology.” An in-depth study of 2,200 inmates at the Angola prison in Louisiana—known as the “bloodiest prison in America”—described an initiative to establish a Bible College and train prisoners, many serving life without parole, to serve as inmate ministers. The study documented the process of identity transformation and “found significant linkages between participation in the prison seminary and inmate-led churches [and fewer] disciplinary convictions, crime desistance, rehabilitation, and prosocial behavior within the prison environment.”

Religion is also associated with lower rates of recidivism, a metric that is notoriously stubborn. Research shows that

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participation in a Minnesota faith-based prisoner reentry program lowered recidivism and assisted with post-release employment, saving the government $3 million or nearly $8,300 per participant over six years. Duwe and Johnson document how community visits to incarcerated people reduce recidivism as measured by rearrest, reconviction, and new offense reincarceration, and note that “faith-based communities tend to provide the bulk of community volunteers.” Their study found that visits from community volunteers—namely clergy and mentors—“reduced the risk of recidivism by twenty-five percent for rearrest, twenty-percent for reconviction, and thirty-one percent for new offense reincarceration.” The decreased risk of recidivism associated with visits from community volunteers was significantly higher relative to all visits. They explain the enormous impact of faith-based engagement with inmates:

It may be easy to understand why family members and friends might take the time to visit incarcerated loved ones. It is less obvious, however, why people choose to voluntarily spend time in prison working with convicted offenders they do not know, that is, until one considers the faith factor. The pervasiveness of religious programs within correctional institutions is undeniable. For example, beyond work, education, or vocational training, religious activities attract more participants than any other personal enhancement program offered inside a prison (Bureau of Justice Statistics, 1993).

Religion-based programs for prison inmates also reduce recidivism. In one long-term study, the time to rearrest was extended seventeen to eighteen months longer among individuals who significantly engaged in a Bible study group in prison, or 3.8 years versus 2.3 years. Strong engagement in the volunteer-led Bible study group affected recidivism more than four important risk factors for rearrest, including prior adult convictions, felony

46. Id. at 296–97.
47. Id. at 298.
48. Id. at 299.
offender status, and age, but had a diminished effect after two to three years.\(^{50}\) An in-depth faith-based prison program, the Texas “InnerChange Freedom Initiative” that engaged prisoners in sixteen to twenty-four months of in-prison biblical programs and six to twelve months of follow-up programs while on parole, had even more impact: individuals completing the program had an eight percent chance of being rearrested within two years of release, as compared to a 36.3% chance for a matched group that did not participate in the program.\(^{51}\) They also had only an eight percent chance of re-incarceration within two years, compared to the matched group at 20.3%.\(^{52}\)

Criminality and recidivism are deeply intractable problems that often appear to have no significant solutions. Religion’s impact on reduction in criminality, inmate behavior, and recidivism is remarkable and provides a space for hope in an otherwise discouraging picture.

**C. Adolescent Behavior**

Religion is also repeatedly correlated with a variety of positive outcomes for adolescents.\(^ {53}\) Several measures of religiosity have shown positive correlations with adolescent physical and emotional health (dietary habits, seat belt use, exercise, sleep), educational accomplishments (particularly for the best and worst performers), social and community involvement, and family well-being.\(^ {54}\) Frequent church attendance is negatively correlated with adolescent participation in risk-taking behavior like drugs and alcohol,\(^ {55}\) with frequent attenders being thirty-three percent less likely to engage in illegal drug use.\(^ {56}\) Religiosity and creating religious networks lower the likelihood of engaging in premarital

\(^{50}\) *Id.* at 351.

\(^{51}\) BYRON R. JOHNSON, MORE GOD, LESS CRIME: WHY FAITH MATTERS AND HOW IT COULD MATTER MORE 108 (2011) [hereinafter MORE GOD, LESS CRIME].

\(^{52}\) *Id.* at 110.


\(^{54}\) *Id.* at 396–97.

\(^{55}\) MORE GOD, LESS CRIME, *supra* note 51, at ch. 9.

\(^{56}\) VanderWeele & Case, *supra* note 23.
sex. For those who do engage in premarital sex, religious factors lower the frequency of sexual activity before marriage.

The advantage that religion gives youth is particularly marked among working-class families: boys in working-class families who were regularly involved in their church and strongly believed in God were twice as likely to earn bachelor’s degrees as moderately religious or non-religious boys. In that study, most non-religious working-class kids dropped out of the educational system by their mid-twenties.

Building on Putnam, Krohn, and Thornberry, Johnson suggests that the overlap of social and religious networks both constrain behavior and serve to protect youth from the effects of living in a high crime community. Pirutinsky finds a causal relationship between religiosity and reduced criminality among adolescents and identifies increased self-control as one of multiple mediating processes. Self-control, referred to as a “master virtue” because of its ability to forestall many vices, has been tied to religion through a number of studies. These suggest that religion supports self-control through fostering clarity of and accountability to moral standards, facilitating monitoring of one’s behavior, developing self-control through fasting and charitable giving, encouraging avoidance of control-depleting situations, and imbuing behavior with sanctifying significance.

Christian Smith breaks down religion’s positive influence on youth into nine mechanisms (moral directives, spiritual experiences, role models, community and leadership skills, coping skills, cultural capital, social capital, network closure, and extra-community

57. STARK, supra note 5, at 86.
58. Id.
60. Id.
61. MORE GOD, LESS CRIME, supra note 51, at 177.
skills), which he groups under the broader headings of moral order, learned competencies, and social/organizational ties.64

Adolescent years are deeply formative. Religion’s impact on young adults, especially those in high-crime areas or working-class families, suggests a way to break cycles of lack of education or criminal behavior. Religion, through a broad range of positive influences, helps youth to develop the skills needed to flourish and avoid harmful and risk-taking behaviors.

D. Family Life

Religiosity has also been correlated with happier and more stable family life.65 Married couples who attend religious services, for example, are about thirty to fifty percent less likely to divorce than those who do not.66 Mahoney et al. break down some of these correlations, looking specifically at attitudes imbuing family life with spiritual character and significance. Higher scores on two different measures of “sanctification” of family ties predicted more marital satisfaction, increased investment in marriage, less frequent marital conflict, and greater collaboration to resolve disagreements. Husbands and wives expressed a forty-two percent higher rating of marital satisfaction when the marital relationship was seen as sacred.67 Higher sanctification of parenting led to mothers of four- to six-year-olds reporting less verbal aggression with their children.68 A similar study over twenty-six years found that the more important religious beliefs are to a mother, the more likely

66. Tyler J. VanderWeele, Religious Service Attendance, Marriage, and Health, INST. FOR FAM. STUD. (Nov. 29, 2016), https://ifstudies.org/blog/religious-service-attendance-marriage-and-health; see also Edna Brown, Religiosity and Marital Stability Among Black American and White American Couples, 57 J. FAM. REL. 186, 194 (2008) (explaining that religiosity was predictive of marital stability over time but only when assessed by organizational religious participation and only as reported by wives).
68. Id.
The Impact of Religion

both she and her child were to report a higher quality relationship. Christians are more sexually active, find higher satisfaction in their sexual relationships, and are less likely to be involved in extramarital relationships. One explanation of the association between religiosity and sexual satisfaction is mediating factors such as marital commitment, relationship maintenance behaviors, and averaged spousal times.

Additional recent research focuses on home-based religious practices and finds that individuals who not only attend religious services weekly, but also pray on a daily basis and engage at least two to three times a week in the home worship practices of praying as a family, reading scriptures, or having religious conversations score markedly higher on a number of measures of life happiness and relationship quality, even after numerous controls such as gender, age, education, immigration status, whether they had lived with both parents at age sixteen, whether they had been divorced, financial status, marital status, presence of children under eighteen, etc. The study found that couples in which both partners worshipped regularly together and engaged in home-based practices regularly experienced significantly higher levels of relationship quality and emotional closeness, higher sexual satisfaction, higher levels of shared decision-making, fewer money problems, and report more frequent patterns of loving behaviors such as forgiveness, commitment, and kindness than those who did not have regular in-home religious practices. These benefits are not merely the result of both partners holding the same beliefs; according to the study, in the United States, couples who engage in at-home worship are twice as likely to report a high-quality marriage than couples who share secular beliefs.

The role of religion in family life, while widely recognized as generally positive, exhibits some of the nuances, complexities, and ambivalence that exist in looking at the social value of religion more broadly. While many behaviors are clearly prosocial, other

70. STARK, supra note 5, at 77–91.
72. CARROLL ET AL., supra note 18, at 8–9.
73. Id. at 21.
74. CARROLL ET AL., supra note 18, at 23.
religious beliefs and practices are less so or are controversial. In this paper I attempt to rely on benefits that are widely accepted as prosocial, such as relationship satisfaction and individual well-being. I recognize that some aspects of religious marriage and family life in some communities are not normally considered prosocial, such as polygamy or child marriage, and that religion can be a tool used by abusers. I believe that the data presented above suggests that, while real, harm in religious relationships is not representative of religious relationships as a whole. I return to this question of harmful aspects of religion in Part III and suggest ways that deleterious aspects can be mitigated or opposed while retaining the value religion can bring.

Some prosocial behaviors and attitudes vary not just based on religiosity but also on the specific beliefs in question. One study, for example, found that priming different aspects of religion positively influences prosocial behavior at different rates.\textsuperscript{75} Mahoney et al., for example, found that greater association of parenting with sacredness led to a reduction in corporal punishment, but only for those with a more liberal Christian orientation.\textsuperscript{76} Mothers who saw parenting as sacred but who held socially conservative beliefs about the Bible showed no less likelihood of corporal punishment than those who did not view parenting as sacred.\textsuperscript{77} In an interesting reversal, however, it is socially conservative women along with secular feminists who report the highest levels of marital satisfaction. In a study that came out in early 2022, seventy-three percent of married religiously conservative women report high-quality marriages, as opposed to fifty-five percent of secular progressive married women, forty-six percent of those in the religious middle, and thirty-three percent of secular conservative wives.\textsuperscript{78} Other studies corroborate this, showing that “[r]eligious practice seems to effectively connect men to families by encouraging marriage, discouraging divorce, and promoting norms of involved

\begin{footnotes}
\item[75.] Tom Lane, \textit{The Effects of Jesus and God on Pro-sociality and Discrimination}, 90 J. BEHAV. & EXPERIMENTAL ECON. 1, 5 (2021).
\item[76.] Mahoney et al., supra note 67, at 228.
\item[77.] Id. at 229.
\end{footnotes}
husbands and fathers.”


81. Id. at 45.

82. PUTNAM & CAMPBELL, supra note 5, at 454–55.


84. RELIGION’S RELATIONSHIP TO HAPPINESS, supra note 9, at 10.

85. Id. at 8–9; PUTNAM & CAMPBELL, supra note 5.
on juries, talk to neighbors, and give to charity. These illustrations of the social capital that religious individuals and organizations contribute to their communities gives a sense of the power of religious belief and activity to influence communities for good.

The power of religion and religious communities to influence society for good appears to stem from several aspects. Religious organizations serve as mediating structures that can create a space for meaningful involvement and avoid the atomization of liberal societies. They can counter what Sandel describes as the self-undermining aspects of liberal democracies, inspiring the sense of community and commitment to liberal democracy that its neutrality cannot. Religious beliefs can anchor and inspire communities, promote intergenerational norm transfer, and develop democratic values such as tolerance, reflective thinking, generosity, altruism, and law-abidingness. Religion and religious organizations also promote peacemaking through non-violent democratic movements, mediation of peace agreements, and shaping of transitional justice by religious actors. Faith-based associations also provide enormous support for humanitarian, educational, and medical care. Their ties locally and in many cases globally allow for tailored social assistance measures sensitive to local needs while tapping into global resources.

A. Social Capital

Putnam and others have elaborated on the idea of “social capital,” or the contributions to society that come from the associational networks of middle layers of society between individuals and the state. These contributions include the reciprocity, trust, and trustworthiness that permit trade, community life, support, and

86. Putnam & Campbell, supra note 5, at 82.
ideas to move more freely. Civil society organizations “serve as important ‘schools of democracy,’ as participation in them may serve to enhance an individual’s ‘sense of efficacy or political agency, information, political skills, capacities for deliberative judgments, and civic virtues.’” Organizations that promote these benefits of associational life are often referred to as “mediating institutions,” “intermediate associations,” and civil society.

These benefits have been identified in a host of institutions, but within this group, religious associations are particularly significant. Robert Putnam asserts that

[faith] communities in which people worship together are arguably the single most important repository of social capital in America. . . . As a rough rule of thumb, our evidence shows, nearly half of all associational memberships in America are church related, half of all personal philanthropy is religious in character, and half of all volunteering occurs in a religious context.

In addition to religious philanthropy and volunteering, religious people are twenty-five percent more likely than secular people to donate money and thirty-three percent more likely to volunteer time across the board. Members of religious organizations are more than twice as likely as non-members to participate in non-religious civil society organizations. Religious participants exceed non-religious participants in every category of civil society organizations: educational, ethnic, fraternal, hobby/sport, literature/arts, professional/business, political, self-help, service, union, veterans, and youth.


94 PUTNAM, BOWLING ALONE, supra note 90, at 66.

95 Peter Dobkin Hall, supra note 32, at 160.

96 SMIDT ET AL., supra note 92, at 78.

97 Id. at 79–80.
Religious institutions also help build democratic structures and engaged citizens. Wuthnow argues that institutionalized conflicts among religious groups serve an “integrative” role, where groups have institutionalized channels to provide differing views, giving diverse groups a sense of inclusion. As the groups follow social and legal rules, they give these structures legitimacy. Religious differences educate religious individuals in how to handle conflict and disagreement. Many religious traditions involve lay members in various forms of leadership or social activities, helping individuals develop skills that can transfer to the political sphere. Religious diversity teaches individuals to explain their views, dissent, and peacefully attempt to persuade others, skills that form a rich reservoir for political life. Verba, Schlozman, and Brady explain that “religious congregations rather than education, occupation, or social privilege [are] the most important venues for acquiring the values and skills needed for effective political participation.”

Similarly, religious institutions play a positive role in increasing economic mobility. Economists have found that the primary determinant of economic mobility is the level of economic connectedness experienced by an individual. Unfortunately, even when people are exposed to others of different financial situations, “friending bias” can inhibit the kind of connections necessary to overcome poverty. When measuring the friending bias among people of low socioeconomic status within a variety of common social settings, such as schools, the workplace, and recreational groups, it is only in religious groups that there are negative levels of friending bias. In religious settings, economically diverse

98. See WUTHNOW, supra note 5, at 9.
99. Id. at 8.
100. See id. at 7–8.
103. Id.
105. Id. at 124.
friendships are formed at a rate three percent higher than expected. In every other setting, including universities and recreational groups, friendships between low-income people and high-income people are formed at a rate 2.5% to 16.6% lower than expected. Though religious groups show high levels of income segregation, they show consistently low levels of friending bias in all levels of exposure. Furthermore, people who may show friending bias in other settings, exhibit low levels of friending bias in religious groups, emphasizing the unique nature of a religious setting. By successfully fostering economically diverse relationships, religious settings increase rates of upward mobility.

A congressional report on social capital also explains how religious organizations have “powerful community-promoting advantages” as compared to secular associations: they “provide a vehicle for like-minded people to associate” regularly, have enforcement and intergenerational transfer of social norms, promote pro-social and other-regarding norms, encourage investment in social ties outside of religions, and encourage altruism and volunteering. The practical value of religious organizations to provide social support has been particularly pronounced in the Black community.

Evolutionary biologist Jonathan Haidt suggests a mechanism for this creation of social capital among religions. Haidt argues that human nature has an ability to transcend self-interest and permit us to lose ourselves in something larger than ourselves. He argues that this ability to cooperate, or “hive switch,” can be turned on and then works to ensure natural selection at a group level by increasing social bonding and social capital such as trust. Haidt argues that religious norms, relationships, and institutions bind
people into groups that form moral communities to reinforce individual behavior and result in an ability to cooperate, an increase in selflessness, and a demonstrated increase in happiness and decrease in suicide.\footnote{114}

\textbf{B. Communal Obligations, Charitable Giving, and Social Justice}

The social capital that religion creates is seen perhaps most dramatically in the impact religious organizations have had in the charitable sector and in promoting social justice. For example, the largest percentage of volunteers and programs in prisons that work with restorative approaches are faith motivated.\footnote{115} Almost sixty percent of the emergency shelter beds for homeless individuals are provided through faith-based organizations, and over $119 million is saved through faith-based residential recovery and job readiness programs for the homeless during the three years after they left the program.\footnote{116} Numerous studies have shown that religiously active individuals give financially more, and more often, to both religious and secular causes.\footnote{117} Seventy-three percent of all charitable giving in the U.S. goes to organizations that are explicitly religious and forty out of fifty of America’s top charities are faith based.\footnote{118} Members of U.S. religious organizations spend four and a half times as much money to help the economically disadvantaged abroad than the Gates Foundation.\footnote{119} Religious schools educate more than three million children a year, and religious hospitals care for twenty percent of U.S. hospital patients.\footnote{120} Religious families adopt children at more than twice the rate of non-religious ones.\footnote{121} Research indicates that religious institutions play a key role in

\begin{footnotesize}
\begin{enumerate}
\item Id. at 265–73.
\item Duwe & Johnson, supra note 44, at 227–39.
\item Id. at 265–73.
\item Id.
\item Id.
\item Id.
\item 5 Things You Need to Know About Adoption, BARNA (Nov. 4, 2013), https://www.barna.com/research/5-things-you-need-to-know-about-adoption.
\end{enumerate}
\end{footnotesize}
addressing the well-being of underserved communities in the United States, through programs confronting food insecurity, substance use, mental health, obesity, and HIV prevention and care. Rodney Stark details social benefits and estimated savings to the state that religion provides in the areas of crime reduction, home and religious schooling, mental health, physical health, charitable contributions, volunteering, unemployment reduction, and reduced use of state welfare benefits and argues “[w]hatever else can be said about American religion, it provides a great many tangible benefits to all of us—having an annual cash value of more than $2.6 trillion.”

The social benefits of religion can also be seen in volunteering rates worldwide. One study analyzing the effects of religiosity on volunteering across 113 countries, found that the religiously affiliated, especially those with high levels of religious service attendance, are more likely to volunteer than the religiously unaffiliated. This study also found that “[b]elonging to a religious minority group in a country was associated with a greater likelihood of volunteering” and evidence suggesting that “increased religious diversity in a society is associated with higher levels of volunteering.” A 2021 SEIROS report studying the volunteer and donation behavior of religious persons in Australia estimated that persons who remain

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123. STARK, supra note 5, at 168.


125. Id. at 91.
religious from childhood to adult life are “74% more likely to volunteer than persons who have never been religious,” while ‘converts’ to religion, “are estimated to be 122% more likely to volunteer than persons who have never been religious.”\textsuperscript{126} “[E]xcluding volunteering to religious causes,” the hours volunteered by religious people contribute $9–20 billion to Australian society annually.\textsuperscript{127} Additionally, the study concluded that religious persons are much more likely to make financial and in-kind contributions to both religious and non-religious causes than non-religious persons;\textsuperscript{128} in fact, the SEIROS report established that the high level of volunteering and donations of religious people benefits not just religious causes, but the public good, citing religiosity as “the greatest influence on volunteering for non-religious causes.”\textsuperscript{129}

Christian Smith explains that although religion may legitimize and preserve “the world as it is,”\textsuperscript{130} it also challenges and overturns economic, political, and social systems.\textsuperscript{131} Religion has been associated with social change and social movements from abolitionism to civil rights to Polish anti-communist workers’ movements. Smith claims religion is often overlooked as a force for social change and that “[w]e would be foolish . . . not to recognize that religious worldviews, interests, traditions, structures, and practices themselves really do matter in shaping the mobilization, struggles, and outcomes of a multitude of social movements.”\textsuperscript{132}

Wuthnow documents historically the “important and perhaps underappreciated contribution of . . . filtering, digesting, and in many instances countering the dominant national rhetoric—doing

\textsuperscript{127} Id. at 4.
\textsuperscript{128} Id. at 4. By including those who had always been religious in addition to the ‘converted,’ this study added to the results of the 2017 report by Deloitte Access Economics (DAE), thus better capturing the impact of religion on society overall. SEIROS & AGAPE ECONOMICS, EXECUTIVE SUMMARY: THE IMPACT OF RELIGIOSITY ON THE VOLUNTEERING AND DONATION BEHAVIOUR OF RELIGIOUS PERSONS (2021).
\textsuperscript{129} Id. at 7.
\textsuperscript{131} Id. at 1.
\textsuperscript{132} Id. at 9.
so through local networks and by focusing on practical concerns inadequately addressed through electoral politics.”¹³³

One sector in which religious organizations are calling for social change is in the confrontation of climate change in the United States. According to a 2021 poll conducted by Morning Consult and Politico, sixty percent of Christians and seventy-three percent of non-Protestant/Catholic religious people believe that “passing a bill to address climate change and its effects” should be a top or important priority.¹³⁴ A poll conducted by Climate Nexus found similar results.¹³⁵ Various religious organizations have addressed climate change and environmental issues using the language of their specific faith traditions, and promoting local faith-based activism.¹³⁶ One-third of the 1,200 institutions that by 2021 had committed to divest a total of 14.5 trillion U.S. dollars from fossil-fuel companies were faith-based organizations.¹³⁷ In June of 2021, over 3,400 faith leaders signed a letter to the United States Congress, urging them to “support historic levels of investment that will safeguard Creation, address the impacts of climate change and pollution from fossil fuel extraction and related industries, and fulfill our moral obligation to leave a habitable world for future generations.”¹³⁸ In this letter, they spoke of their work against climate change as their “sacred task as people of faith.”¹³⁹ This is one example of the many calls for environmental care across the nation, including the Pope’s request for leaders to “take charge of the care of nature.”¹⁴⁰

¹³³. WUTHNOW, supra note 5, at 253.
¹³⁷. Tobias Müller, People of Faith Are Allies to Stall Climate Change, 592 NATURE 9, 9 (2021).
¹³⁹. Id.
Religious organizations bring numerous strengths to charitable and social justice work. Christian Smith suggests that they have (1) transcendent motivation (such as legitimization for protest rooted in the ultimate or sacred; moral imperatives for love, justice, peace, freedom, equity; powerfully motivating icons, rituals, songs, testimonies, oratory; ideologies demanding self-discipline, sacrifice, and altruism; legitimization of organizational and strategic-tactical flexibility based in flexible readings of scripture); (2) organizational resources (trained and experienced leadership resources, financial resources, congregated participants and solidarity incentives, pre-existing communication channels, equipment and facilities, and “Movement midwives”—organizations that help “birth” movements without becoming a part of them); (3) shared identity (common identification among gathered strangers, shared super-identities nationally and cross-nationally, a unifying identity against outside threats); (4) social and geographic positioning (geographical dispersion of membership that extends political influence, recruitment efforts, etc.; social diffusion and cross-cutting associations; transnational organizational linkages); (5) privileged legitimacy, including political legitimacy in public opinion and the protection of religion as a last “open space” in authoritarian contexts; and (6) institutional self-interest, including institutional resistance to state encroachment.141

Conceptually, religious organizations are also able to tackle the challenges of justifying and implementing social justice claims. One objection raised to social justice movements is that it is not usually clear who is obligated by social and economic rights. Robert Cover explains that the “jurisprudence of rights has proved singularly weak in providing for the material guarantees of life and dignity flowing from the community to the individual.”142 Others, including MaryAnn Glendon,143 Michael Novak,144 and Mohammad

141. Smith, supra note 130, at 9–22.
Saeed Bahmanpour and Heiner Bielefeldt, have commented on the challenges and limitations of “rights talk.” The sense of obligation to care for one another, however, resonates deeply in religious traditions. Cover describes this in the Jewish tradition: a framing myth of all law coming from Sinai, which centers social obligations in mitzvah, or obligation. These come to us as a community: “Sinai is a collective — indeed, a corporate, experience.”

In the Christian tradition, joint action and obligation are seen through prophetic, priestly, and pastoral roles, all of which are significant parts of religious institutions’ ability to promote social justice. In their prophetic roles, religious leaders and institutions speak truth to power and issue inspired and inspiring calls to justice. In their priestly functions, they teach doctrine and perform rituals that bind the community to each other and to their divine obligations, and in their pastoral functions, they provide a mechanism for unified community action to those locally and globally most in need.

As these examples suggest, the power of religious coordinated action comes not merely from social capital alone. Religious leaders are most able to have a galvanizing, motivating, and transforming effect when they speak with institutional integrity. Secular appeals or efforts that are forced by the state do not draw on the internal reasons or deep faith commitments of members. Al Hibri explains this well in the Muslim context, arguing that well-meaning efforts from outsiders to increase the pace of change on Muslim women’s rights “without full understanding of its complex topology, and the deep-rooted commitment by most Muslim women to spiritual and cultural authenticity, could halt or even reverse this process . . . .”

C. Social Norms and Liberal Democracy’s Limitations

As the prior section suggests, another important social function that religious organizations distinctively provide is a reservoir of

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146. Cover, supra note 142, at 66.
147. Id.
social norms. These are not uncontroversial—socially conservative religious norms, particularly on sexuality and gender issues, have often been criticized—but what is striking is how many of the social norms religion provides are not controversial and are widely accepted as important. Religious traditions not only teach valuable norms but are also able to instill deep commitment to them and play an important role in intergenerational norm transfer.

The civic norms religion instills are crucial for a healthy democracy. Virtue ethics philosopher Peter Berkowitz argues that religion is essential to the development of democratic values such as tolerance, reflective thinking, generosity, altruism, and law-abidingness. Wuthnow argues that religions and religious diversity bring “into the public arena valuable perspectives about freedom, values, and moral responsibility.” He argues that religious disagreements on core values also strengthen democracy: “[D]emocracy does not necessitate everyone believing the same thing. Democracy is strengthened more by citizens acknowledging and accepting diversity—and willingly contending for differing beliefs.” In this sense, religious freedom and pluralism themselves strengthen democracy by creating a model of how protecting deeply differing beliefs can strengthen society. Other virtue ethics philosophers draw on Paul Woodruff’s elaboration of the value of reverence, or “the virtuous capacity for awe, respect, and shame” in the face of what “cannot be changed or controlled by human means.” This is a “habit[] of feeling” that helps prevent leaders from trying to act like gods and also helps people to have a sense of belonging in society. For example, Lincoln’s Second Inaugural Address, laden with religious invocations, invokes a sense of reverence that underscores human humility in the face of tragedy.

152. WUTHNOW, supra note 5, at 12.
153. Id. at 250.
154. Frank C. Richardson, Virtue Ethics, Dialogue, and Reverence, 43 AM. BEHAV. SCI. 442, 452 (2003) (quoting Paul Woodruff, Reverence, Respect, and Dependence, 7 (2001) (unpublished manuscript) (on file with the University of Texas at Austin)).
155. Id.
Even without accepting religious truth claims, atheist Alain de Botton recognizes the powerful and important role religions can play through their presentation of social values. He proposes modifying Hegel’s definition of art to reflect “[c]hristianity’s insights: good art is the sensuous presentation of those ideas which matter most to the proper functioning of our souls—and yet which we are most inclined to forget, even though they are the basis for our capacity for contentment and virtue.” 157 He underscores religion’s emphasis on “our need to impose greater discipline on our inner lives.” 158 “So opposed have many atheists been to the content of religious belief,” he claims, “that they have omitted to appreciate its inspiring and still valid overall object: to provide us with well-structured advice on how to lead our lives.” 159

Political philosophers have also identified religious values’ role in compensating for the limitations inherent in a liberal democracy. Modern liberalism relies on a neutrality toward all notions of the good life, but this can progressively undermine even its own core values of liberty, tolerance, and human rights in theory and in practice. 160 The current trend for democratic systems to be gliding toward populism and authoritarianism worldwide suggests that commitment to liberal values is not entrenched in liberal democracy.

Michael Sandel argues, for example, that modern liberalism can be self-undermining. It “cannot secure the liberty it promises,” because it “cannot inspire the sense of community and civic engagement that liberty requires.” 161 Michael Novak explains in other words:

In modern political thought, two terms have until recently tended to dominate discourse: the individual and the nation state. This can hardly be surprising, since both these terms (and their underlying realities) are modern arrivals on the stage of history. But these two terms apply, as it were, only to the two extremes of

158. Id. at 158.
159. Id. at 111.
160. Frank C. Richardson & Timothy J. Zeddies, Individualism and Modern Psychotherapy, in CRITICAL ISSUES IN PSYCHOTHERAPY: TRANSLATING NEW IDEAS INTO PRACTICE 147 (Brent D. Slife et al. eds., 2001).
161. SANDEL, supra note 88, at 6.
social life, excluding the “thickest” parts of social living in between.\textsuperscript{162}

The “thickest” parts of living that inspire a sense of community and civic engagement are where religion and religious communities excel. The costs of atomization from the liberal state, with its emphasis on autonomy and individual life, is also documented in a very practical way: the current epidemic of loneliness, where forty percent of American adults say they are lonely, has doubled since the 1980s.\textsuperscript{163} Loneliness has been found to have a significant impact on health outcomes and is as much a risk factor for early death as obesity or smoking.\textsuperscript{164} As mentioned above, religious activity provides an important antidote to loneliness.\textsuperscript{165}

\textbf{D. Peacebuilding}

In addition to being a source of norms and helping to compensate for the limitations of liberal democracy, religion can also serve as a crucial source of social stability and peace. As a mediating institution, religion can serve as a check on state power, helping prevent a concentration and centralization of power,\textsuperscript{166} enhancing “[r]esistance to domination and anti-government power,”\textsuperscript{167} and be a voice to challenge the powerful. It can, of course, entrench power and abet repression of the marginalized, which I discuss in more detail in Part III, but significantly has the “capacity to perform a range of positive functions in society.”\textsuperscript{168} Toft, Philpott, and Shah argue that these include promoting democracy, mediating an end to violent conflicts, providing increased social services, catering to diverse religious preferences of society, and

\begin{footnotes}
\item[164.] Khullar, \textit{supra} note 163.
\item[165.] See Pfund & Miller-Perrin \textit{supra} note 29, at 248.
\item[166.] SMIDT ET AL., \textit{supra} note 92, at 71 (citing ARNOLD ROSE, \textit{THEORY AND METHOD IN THE SOCIAL SCIENCE} 50 (1954)).
\item[168.] MONICA DUFFY TOFT, DANIEL PHILPOTT & TIMOTHY SAMUEL SHAH, \textit{GOD'S CENTURY: RESURGENT RELIGION IN GLOBAL POLITICS} 217 (2011).
\end{footnotes}
encouraging political moderation. In a later piece, Daniel Philpott also adds the capacity to shape transitional justice by religious actors and prevent religious violence that comes as a result of the denial of religious freedom.

Research and experience have demonstrated the power of religion in all these areas. Non-violent political movements, for example, are more likely than not to be associated with religion: “[o]f more than 180 nonviolent campaigns for major political change since World War II, a majority have involved religion in some way.” Demonstrators use religion to advance peace and nonviolence through “ideas, people, institutions, symbols, spirituality, and external support.” Religion has repeatedly played a role in promoting democracy. In a study of seventy-eight democratic movements, forty-eight involved religious leaders and organizations exercising important influence. In thirty of these, religious actors played a leading role, while in eighteen, religious actors played a supporting role. Religiosity of a country, in and of itself, however, is not as predictive of the level of peace in a country, which is accounted for more by political and regional similarities.

Religions are often particularly well placed to mediate an end to violent conflicts, with the resources Christian Smith identified mentioned earlier, such as (1) transcendent motivation; (2) organizational resources; (3) shared identity; (4) social and geographic positioning; (5) privileged legitimacy, including political legitimacy in public opinion and the protection of religion as a last “open space” in authoritarian contexts; and (6) institutional self-interest, including institutional resistance to state encroachment. Religion has also contributed to transitional justice, or the attempt to move from an illegitimate or repressive regime to one with more

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169. Id.
170. Philpott, supra note 89, at 34.
172. Id.
173. Philpott, supra note 89, at 33 (citing TOFT ET AL., supra note 168, at 92, 96).
175. See Smith, supra note 130, at 9-22.
176. Id. at 9-22.
legitimacy, particularly through paradigms of reconciliation. In a study of nineteen cases of transitional regimes over thirty years, eight cases involved religious influence on the transitional regime, such as helping establish truth and reconciliation commissions. One study, specifically looking at ten truth commissions, has shown that religious actors were involved in eight out of ten of these truth commissions.

Although religion is often associated in the popular mind with violence and war, a study from the Institute for Economics and Peace revealed that religion was not a main cause of conflict in any of the thirty-five conflicts taking place in 2013, and religion played no role at all in forty percent of them. Religious beliefs face the “ambivalence of the sacred,” in Scott Appleby’s terms, and religion has been used by all denominations to promote peace as well as hostility. The question of religion’s role in social hostilities is closely connected to the levels of religious freedom in a country, however, as Part III documents.

Religious disengagement in the U.S. and elsewhere has been generally correlated with greater racial intolerance. A Swedish study shows that voters for far-right parties were less likely to attend church, and a United States study shows that Evangelicals who frequently attend church services may be less tolerant of LGBTQ individuals but are more tolerant of Blacks, Muslims, and Latinos than those who do not frequently attend. Anti-immigration stances are also more common among Catholics, mainline Protestants, and born-again Protestants the less they attend church.

177. DANIEL PHILPOTT, WHAT RELIGION OFFERS FOR THE POLITICS OF TRANSITIONAL JUSTICE, IN RETHINKING RELIGION AND WORLD AFFAIRS 149 (TIMOTHY SAMUEL SHAH ET AL. EDS., 2012).
178. Philpott, supra note 89, at 34.
179. THOMAS BRUDHOLM & THOMAS CUSHMAN, THE RELIGIOUS IN RESPONSES TO MASS ATROCITIES (2009).
181. INSTITUTE FOR ECON. & PEACE, supra note 174.
182. APPLEBY, supra note 6; MARK JURGENSMeyer, TERROR IN THE MIND OF GOD (2001).
Democrats also move further from the political middle the less they attend church. Commentators Peter Beinart and Shadi Hamid both note that ideological intensities flare as individuals transfer the passion felt for religion to politics.

Religion’s impact for good on contemporary society, much like its impact on the health and well-being of individuals and families, is reflected in a stunningly wide range of theories and evidence. Religion brings social capital to a society by engendering trust, reciprocity, and trustworthiness. Religion helps build democratic structures, political participation skills, and engaged citizens. Religious pluralism helps model the healthy disagreements intrinsic to democratic societies that is so lacking in contemporary culture.

Religion also promotes economic equality and stimulates philanthropy and volunteerism. Religion reduces friending bias that inhibits economic mobility. Religious groups are heavily involved in caring for the homeless, providing international aid, running restorative justice programs, health care, and education. Religious individuals are more likely to volunteer and donate, including to non-religious causes. Tangible results of religious contributions to communities have been estimated at $2.6 trillion in the United States and $9-20 billion in Australia. Religious organizations provide a moral and conceptual basis for caring for others and numerous practical strengths in charitable and social justice work.

Religion also provides a way to bring needed values into the neutral liberal state. Religion brings “thick” living as an antidote to the atomization of the modern life and modern states’ emphasis on autonomy and individuality.

Finally, religion contributes to social life through serving as a source of social stability and peace. Religious communities have been deeply involved in mediating ends to violent conflicts, supporting non-violent political movements, and encouraging increased tolerance.

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185. Id. (citing an April 2016 PRRI survey that white Democrats who went to religious services at least once a week backed Clinton by 26 points, while white Democrats who rarely attended services backed Sanders by 13 points).

At times, religion seems invisible in secular societies, many of which privatize religion. Religion becomes reduced in the public mind to worship and religious buildings. As this section has shown, however, religious belief and activity have a wide scope and bring enormous value in underpinning modern liberal democracies, including bringing social capital and values, caring for the disadvantaged, and building peace. Even in secular societies—perhaps especially in secular societies—religion plays a key role in binding communities together and is an indispensable part of social flourishing.

III. BAD RELIGION AND RELIGIOUS FREEDOM

While the positive impact of religion for individuals, families, and communities is extensively documented, it is also important to recognize the negative impact that religious individuals and faith communities have had. As suggested in the previous sections, religion’s power has been wielded for good and ill.

Religion is a paradox. Many of the social norms that some see as positive and pro-social, have led to discrimination and hostility to those seen as deviating from the social norms, particularly in the sphere of gender and sexual identity, orientation, and expression. Religion can be a force for peace, yet the religiosity of a country alone does not affect the level of peace in countries worldwide, which is accounted for more by political and regional similarities.\textsuperscript{187} Religion promotes values needed in liberal democracies yet for thousands of years has also been used to prop up monarchies and repressive governments. Some believers can promote liberal democracy or pro-social behaviors, while other members of the same faith oppose them.

This problem of paradox is not exclusive to religion but also faces those advocating the value of other thick communitarian approaches. Talisse argues that

\[\text{[c]ommunitarians needed to devise a way in which essentially social and ‘encumbered’ selves could adopt a self-critical stance that could weed out and correct the oppressive, intolerant, and homogenizing tendencies of community without evoking liberal notions of civil liberties and individual rights. In other words,}\]

\textsuperscript{187}. \textsc{Institute for Econ. \\& Peace, supra note 174.}
they needed a conception of community that was at once binding and plastic, a politics that was both formative and fluid.\textsuperscript{188}

For religion, this self-critical stance that can weed out oppressive and intolerant features of the community is only possible with religious freedom. When situated in a legal regime that ensures exit rights and minimizes restrictions on religious freedom, religion, with its unifying power, can be at once binding and plastic, formative and fluid.

While this paper is not primarily focused on religious freedom, I think a focus on religious freedom is a crucial conclusion to the points offered. If religion can have powerful, positive impacts on individuals, families, and societies, as studies repeatedly demonstrate, then there is a significant justification for protecting it. In fact, if some versions of religion are extremely helpful while others are deleterious,\textsuperscript{189} religious freedom becomes even more important. Religious freedom can be interpreted broadly or narrowly, but all forms have limits to religiously motivated behavior.\textsuperscript{190} Religious freedom allows religious flourishing but is not a blank check. The vibrant religious scene it provides allows for self-regulation and competition.\textsuperscript{191} To paraphrase the principle underlying protection of free speech in the United States—the answer to bad religion is more religion, not less. And religious freedom is key to ensuring more religious choices and voices.

Research underlines the power of religious freedom to facilitate freely chosen and pro-social religion and the harmful effects of governments that do not protect religious freedom. Authoritarian

\textsuperscript{188} Robert B. Talisse, \textit{Introduction: Pragmatism and Deliberative Politics}, 18 \textit{J. Speculative Phil.}, 1, 2 (2004).

\textsuperscript{189} See, e.g., David H. Rosmarin & Bethany Leidl, \textit{Spirituality, Religion, and Anxiety Disorders}, in \textit{Handbook of Spirituality, Religion, and Mental Health} 42 (2020) ("Generally speaking, positive cognitive or emotional aspects of [spirituality/religion,] like faith/trust in God, "are consistently associated with less anxiety, whereas negative internal facets of [spirituality/religion,] like appraisals of God as punitive or unfair, “are associated with more anxiety.”).


leaders, for example, can exploit and capture religious majorities because they keep their countries religiously unfree.\textsuperscript{192} Religion-related terrorists also thrive in unfree countries. A 2005 study of ninety-five religious terrorist groups showed that only thirty-one of them (thirty-two percent) operate in “Free” countries, while most of the rest operate in “Partly Free” or “Not Free” countries.\textsuperscript{193} Toft, Philpott, and Shah explain that “religious communities are most likely to support democracy and least likely to take up the gun or form dictatorships, when governments allow them freedom to worship, practice, and express their faith freely and when religious communities in turn renounce their claims to permanent offices or positions of policy-making authority.”\textsuperscript{194}

Philpott argues that religious freedom promotes peace because of institutional independence and what he calls “political theology,” or beliefs promoting religious freedom. Comparing countries on whether religion has exercised a force for good in establishing democratic regimes, he argues that “the more strongly that religious and political leaders or organizations hold a political theology of religious freedom, the more they are likely to further peace,” and “[t]he most effective democratizers among religious actors were also those who, through struggle and resistance, had secured a degree of institutional independence from the dictators who wanted to suppress them.”\textsuperscript{195} Philpott suggests that this limited de facto religious freedom “served as a sphere of ‘moral extraterritoriality,’ to use the phrase of George Weigel, from which religious actors could conduct opposition to dictatorships with the aim of securing or increasing actual, \textit{de jure} religious freedom.”\textsuperscript{196} Wuthnow argues that the “deep and persistent clashes about basic values and epistemic principles” that religious diversity and freedom affords, in what he calls “agonistic pluralism[,]” models a framework of civility and mutual respect for democracies to likewise handle clashing views and principles.\textsuperscript{197}

\begin{itemize}
\item \textsuperscript{192} Ana Sarkissian, The Varieties of Religious Repression (2015).
\item \textsuperscript{193} Philpott, Religious Freedom and Peacebuilding, supra note 89, at 35.
\item \textsuperscript{194} Toft et al., supra note 166, at 18.
\item \textsuperscript{195} Philpott, Religious Freedom and Peacebuilding, supra note 89, at 33–34.
\item \textsuperscript{196} Id. at 34 (citing George Weigel, The Final Revolution: The Resistance Church and the Collapse of Communism (1992)).
\item \textsuperscript{197} Wuthnow, supra note 5, at 252–56.
\end{itemize}
A commitment to religious freedom also helps resolve specific conflicts. Philpott suggests that a theological commitment to religious freedom and institutional independence contributes to success in mediating peace agreements. In a survey of twenty-six cases of religious actors mediating (or failing to mediate) peace agreements to civil wars, twenty-five of which took place between 1989 and 2005, eleven cases featured strong religious mediation efforts. These “were conducted by religious actors who enjoyed religious freedom—a position of independence from the state that allowed them to earn the trust of both sides of the negotiation. The same religious mediators typically included religious freedom in their political theology—the set of doctrines that motivated them to serve as mediator.”

Sociologists Brian Grim and Roger Finke have also studied religious freedom’s connection with political stability. After tracking religious restrictions in 143 countries, they found that social and governmental restrictions on religious freedom are associated with increased violence and conflict. Their analysis shows what they call the “religious violence cycle:” social hostility towards religions increases calls on governments to restrict religious freedom, which in turn increases violence related to religion, prompting increasing social hostilities and starting the cycle again. The connection between social hostilities and government restrictions is not always obvious to legislators, who see restrictions on religion as preventing religious violence. Grim and Finke’s extensive research, however, demonstrates that one of the strongest predictors of violent religious persecution is government restrictions on religion. Religious freedom, or the reduction of government restrictions on religion, thus reduces social hostilities based on religion in a virtuous circle antidote to the religious violence cycle.

From a historical perspective, religious historian Philip Jenkins has also explained why religious freedom is so crucial to preserving security and stable societies. He documents how persecuted religions go underground, often adopt active and effective military

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200. Id. at 637.
traditions, cultivate violent and apocalyptic ideologies that make sense of their suffering, encourage withdrawal from a perceived hostile outside world, and can provide justification or support for attacks from co-religionists elsewhere.\footnote{Jenkins argues that “[r]eligious persecution can thus provide massive obstacles to nation-building, and to creating a stable, just, and secure international order. It also produces a vicious cycle, in which violence itself breeds theories and structures conducive to violence.”\footnote{Id. at 34.}}

The reverse virtuous cycle is also true—religious freedom reduces conflict and increases security by, among other things, removing grievances religious groups have toward governments and their fellow citizens.\footnote{Other research in the United States supports this as well—minorities, even unreligious ones, report greater happiness and feelings of safety in their communities when they feel free to practice their religion.\footnote{Stephen Wu, Religion and Refugee Well-Being: The Importance of Inclusive Community, 60 J. FOR SCL STUDY RELIGION 1 (2020).} Even after accounting for community-related characteristics that might influence personal well-being, such as discrimination and perceived safety, ease to practice one’s religion remained the most prominent predictor of happiness in the community.\footnote{Id. at 12.}} Other research in the United States supports this as well—minorities, even unreligious ones, report greater happiness and feelings of safety in their communities when they feel free to practice their religion.\footnote{See BRIAN GRIM & ROGER FINKE, supra note 199.}

Religious flourishing also stems from religious freedom’s correlation with individual well-being. A study of more than 150 countries found a positive causal relationship between religious liberty and well-being. Makridis argues that this is the case for three reasons: (1) the seeds of democracy are sown in a place where opinion and social discourse is free and open, (2) religion has positive effects on educational attainment, and (3) religious freedom promotes respect for differing opinions.\footnote{Christos Andreas Makridis, Human Flourishing and Religious Liberty: Evidence from over 150 Countries, 15 PLOS ONE, Oct. 1, 2020, at 18–19.}

Religious freedom not only has individual benefits of well-being but is also bundled with other rights and freedoms. Grim and Finke demonstrate that religious freedom is correlated with and part of the “bundled commodity” of human freedoms that energize
broader productive participation in civil society by all religious
groups, which is conducive to the consolidation of democracy and
to socio-economic progress.207 These rights include political
freedom, freedom of the press, and gender empowerment.208

Religion, particularly socially conservative versions of religion,
is often associated with discrimination based on gender, gender
identity, and sexual orientation. Despite some very real tensions
between nondiscrimination rights and religious freedom, I find it
interesting that religious freedom is highly correlated with the
economic and educational status of women209 and that the average
level of support for LGBT rights is thirty-eight percent higher in
countries with higher levels of religious freedom than in countries
with low levels of religious freedom.210 These are issues that should
be explored further, but in this context it is also important to note
that the “simple view of religious freedom and women’s rights [or,
I would suggest, LGBTQ rights] being in eternal and inevitable
conflict is a simplistic one.”211 For many, religion is one of multiple
overlapping identities, albeit a powerful and uniquely formative
one.212 Religious freedom allows for choice and voice in religious life.

IV. CONCLUSION: THE EXTRINSIC AND NON-EXTRINSIC

207. GRIM & FINKE, supra note 199, at 640.
208. Id.
209. Id.; see also Pazit Ben-Nun Bloom, State-Level Restriction of Religious Freedom and
Women’s Rights: A Global Analysis, 64 POL. STUD. 832, 842 (2016) (“In nations where the rights
and freedoms of minority religions are less respected, a lower score on the gender equality
scale is observed, representing lower economic, social and political rights for women”).
210. Brian J. Grim, New Global Study: Do Religious Freedom and LGBT Rights Have
Common Ground?, RELIGIOUS FREEDOM & BUS. FOUND. (Aug. 17, 2019),
https://religiousfreedomandbusiness.org/2/post/2019/08/new-global-study-do-
religious-freedom-and-lgbt-rights-have-common-ground.html.
211. Carolyn Evans, Anna Hood & Jessica Moir, From Local to Global and Back Again:
Religious Freedom and Women’s Rights, 25 L. CONTEXT: SOCIO-LEGAL J. 112, 113 (2007); see also
Bloom, supra note 207, at 834 (warning against a simplistic view of secularism as inherently
promoting gender equality); Nazila Ghanea, Piecing the Puzzle—Women and Freedom of
212. For example, Pew reports that seventy-seven percent of lesbian and gay
individuals in America believe in God. Philip Schwadel & Aleksandra Sandstrom, Lesbian,
Gay and Bisexual Americans Are Less Religious by Traditional Measures, PEP CTR. RES. (May
24, 2019), https://www.pewresearch.org/fact-tank/2019/05/24/lesbian-gay-and-bisexual-
americans-are-less-religious-than-straight-adults-by-traditional-measures.
VALUE OF RELIGION

So often in contemporary discourse, unnecessary tensions between religious freedom and nondiscrimination can obscure the value of religion and religious freedom. As the studies and theories presented in this Article overwhelmingly demonstrate, religious practice, belief, and membership are linked to a host of individual, familial, and societal benefits.

For individuals, active religious attendance and the experience of harmony within a faith community contribute to greater well-being and life satisfaction and are correlated with increased physical and mental health. Religiosity blunts the negative effects of living in underprivileged areas and reduces criminality. Religion and the work of religious institutions are linked to rehabilitation, pro-social behavior in prisons, and reduced recidivism. Religiosity in youth is positively correlated with physical and emotional health and negatively correlated with risk-taking behaviors and illegal drug use. Active religious participation and religious beliefs about family ties are associated with improved marital stability, increased levels of marital satisfaction, reduced verbal aggression toward children, and self-reported improvement in parent-child relationships.

Scholars suggest a range of reasons for the power of religious belief, participation, and communities to help bring these benefits to individuals and families. Religion brings “psychological insurance” and stress buffering to help with adverse circumstances. Religion provides explanations for hardships, communal rituals for important life events, a social safety net, and combats excessive individualism through a sense of belonging and a network of support. Religious norms not only discourage anti-social behavior but actively promote pro-social behavior. Religious norms offer clear moral guidance, encourage good health practices, increase social contacts and charitable giving, and help inculcate a more sacred view of the family. Religions create relationships of accountability that reinforce positive behavior. The reduction in criminality and recidivism mentioned above has been explained as resulting from the positive social linkages, spirituality, service, honesty, and identity transformation that religions create.

The positive outcomes stated for youth, come through religion’s establishment of a moral order and provision of spiritual experiences, coping skills, and role models. It provides community and
leadership skills and other cultural and social capital. Religion can imbue family life with spiritual character and significance.

Religion’s benefits also accrue to society as a whole. Religiously active citizens are more civically active and express more positivity about their communities. They are more likely to vote, volunteer (including in non-religious causes), talk to neighbors, and give to charity. They build social capital, acting in ways that foster reciprocity, trust, and trustworthiness, facilitating trade and community life. Putnam argues that “[f]aith communities in which people worship together are arguably the single most important repository of social capital in America” and comprise half of all personal philanthropy and volunteering.\textsuperscript{213} Religious communities help individuals develop values and acquire skills that contribute to effective political participation. They provide an important vehicle for the intergenerational transfer of social norms.

Faith-based associations have an outsized portion of charitable giving. In the United States, they provide almost sixty percent of shelter beds for homeless individuals, educate more than three million children a year, provide twenty percent of hospital care, and are the majority of volunteers in restorative programs in prisons. Religious individuals adopt children at more than twice the rate of non-religious individuals and send four and a half times as much money in international aid as the Gates Foundation. Rodney Stark estimates that the benefit of religious charity in America carries an annual cash value of over $2.6 trillion.

Religious organizations provide a reservoir of social norms and deep commitment. These norms include democratic values such as tolerance, reflective thinking, generosity, altruism, law-abiding behavior, and reverence. Religious pluralism provides a model of civil disagreement for citizens in a democracy. Religious belief can compensate for modern liberalism’s neutrality toward notions of the good life and can help societies retain the commitment to values, sense of community, and civic engagement that liberty requires to flourish. Religious norms can provide a thick component to social life and combat the atomization of the modern liberal state and the epidemic of loneliness.

Religion can also be a source of social justice and peace. As mediating institutions, religions can check state power and provide

\begin{itemize}
\item \textsuperscript{213} Putnam, Bowling Alone, supra note 89, at 66.
\end{itemize}
a voice to challenge reigning social norms. Studies show that religion is associated with a majority of nonviolent campaigns for political change and plays a role in over half of democratic movements. Religious individuals and organizations play a role in mediating an end to violent conflicts, contribute to transitional justice, and were involved in eight out of ten truth commissions. Religious disengagement is correlated with increased racial and ethnic intolerance and political polarization.

Where do all these social benefits come from? Sociologists, philosophers, and others suggest that the social benefits of religion flow from the values religion instills, religious practices and habits, and the web of trusting relationships that religion creates. Religious interactions provide training for social and civic life and tap into the human ability to cooperate and work as a group. Although religions may legitimize and preserve social order, they also challenge society and government. As Christian Smith argues, religions have enormous power in fostering charitable and social justice work through providing transcendent motivations and moral imperatives, organizational resources, shared identities, local and transnational social and geographic positioning, privileged legitimacy, and institutional resistance to state encroachment.214 Religions can justify and implement social justice claims in ways that states are not able to. Religious rituals, mandates, and faith-based organizations with institutional integrity are uniquely positioned to bind the community together and promote social justice. Social movements and transitional justice are benefited by the power of religious symbols and spiritual credibility.

Religion and religious organizations, which bring all these personal, familial, and societal goods, thus become a benefit for society as a whole and not merely a private value for believers. Atheist Alain de Botton, for example, recognizes religion’s ability to meet

central needs which continue to this day and which secular society has not been able to solve with any particular skill: first, the need to live together in communities in harmony, despite our deeply rooted selfish and violent impulses. And second, the need to cope with terrifying degrees of pain which arise from our

vulnerability to professional failure, to troubled relationships, to the death of loved ones and to our decay and demise.\textsuperscript{215}

“[Religions] have all made significant contributions to mainstream politics,” he asserts,

but their relevance to the problems of community are arguably never greater than when they depart from the modern political script and remind us that there is also value to be had in standing in a hall with a hundred acquaintances and singing a hymn together or in ceremoniously washing a stranger’s feet or in sitting at a table with neighbours and partaking of lamb stew and conversion, the kinds of rituals which, as much as the deliberations inside parliaments and law courts, are what help to fold our fractious and fragile societies together.\textsuperscript{216}

There is a demonstrable and objective value of religion, but in the end, it is important to remember, as Christian Smith puts it, “there is something particularly religious in religion, which is not reducible to nonreligious explanations . . . .”\textsuperscript{217} Religion has tremendous impact for good but cannot be simply reduced to its non-religious aspects and benefits. “Meaning” and “purpose” are hard to quantify but are crucial to the individual self-understanding of religious believers.\textsuperscript{218} Religion’s care for the other loses its power without religion’s reification of a divine other or identification of a transcendent reality.

German philosopher Hans Joas articulated the intangible value of religion well. Speaking at a historic meeting of German Protestant and Catholic clergy in 2003, Joas argued that our need for religion cannot just be understood by looking at the external value or usefulness of religion but more fundamentally at the need for the experience we call belief. He said, “The question is not ‘Is religion useful?’ but ‘Can we live without the experience articulated in faith, in religion?’”\textsuperscript{219}

Joas focuses on self-transcendent experiences, where individuals are “pulled beyond the boundaries of one’s self, being captivated by something outside of myself, a relaxation of or

\begin{thebibliography}{9}
\bibitem{215}DE BOTTON, supra note 157, at 12.
\bibitem{216}Id. at 50.
\bibitem{217}Smith, Theorizing Religious Effects, supra note 64, at 19.
\bibitem{218}See 115th U.S. CONG., supra note 87.
\bibitem{219}HANS JOAS, DO WE NEED RELIGION?: ON THE EXPERIENCE OF SELF-TRANSCENDENCE 7 (2016).
\end{thebibliography}
liberation from one’s fixation on oneself.” As he describes it, these self-transcendent experiences may be responses to the beauties or horror of nature, others, love, loss, brotherhood, or vulnerability. Religious traditions in his view are particularly powerful as they not only articulate these self-transcendent experiences, but also provide a rich repertoire of interpretations and catalyze having such self-transcendent experiences in the first place. Deep conviction can lead to a commitment to religious freedom and respect for pluralism as well. Religious experience can lead one to think of the religious freedom of others in terms of “want[ing] them to have the opportunity to develop their own authentic and unforced relationship to God.”

Similarly, American philosopher and legal scholar Martha C. Nussbaum, in her consideration of what makes religion “special,” points to its undeniable tie to liberty of conscience and human dignity. Using the words of Roger Williams, Nussbaum advocates for religious freedom as a way of protecting “a general power of choice, the directing capacity of our lives . . . a source of universal equality among human beings.” Under this view, the preservation of human dignity is the supreme social good religious freedom provides.

Religion brings enormous practical impacts, but our valuation of religion is ultimately tied to our valuation of the human experience and human dignity. Respecting the broad range of religious faith and action across the human experience and choice in the realm of religion means protecting religious liberty. Not only is religious freedom deeply practical, providing a crucial mechanism whereby the considerable benefits of religion’s thick community can be maintained while also allowing free exit and public criticism of religious beliefs, practices, and institutions. But in the end, religious freedom also has intrinsic value. Religious freedom is a recognition of the worth of the experience of belief or unbelief and human dignity.

220. Id.
221. Id. at 14.
222. Id. at 25.
223. Id. at 52; MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 167 (2008).
Simply put, religion matters to individuals, families, and communities for both deeply pragmatic and intrinsic reasons. And because it does, religious freedom matters as well.
When “Close Enough” is Not Enough: Accommodating the Religiously Devout

Dallan F. Flake*

Title VII of the Civil Rights Act of 1964 requires employers to “reasonably accommodate” employees’ religious practices that conflict with work requirements unless doing so would cause undue hardship to their business operations. Can an accommodation be reasonable if it only partially removes the conflict between an employee’s job and their religious beliefs? For instance, if a Christian employee requests Sundays off because he believes working on his Sabbath is a sin, and his employer responds by giving him Sunday mornings off to attend church services but requires him to work in the afternoon, has the employer provided a reasonable accommodation? The federal courts of appeals are divided. For some, the answer is no because the proposed accommodation does not eliminate the conflict; the employee still must choose between his job and his religion—the precise dilemma Title VII seeks to avoid. For others, the answer could be yes. These courts take the view that because the statute requires only “reasonable” accommodation, rather than “full,” “total,” or “complete,” an accommodation that lessens, but does not eliminate, the conflict may nonetheless be reasonable depending on the circumstances.

This Article argues that an accommodation is reasonable only if it fully eliminates the conflict between an employee’s job and religion. Several tools of statutory interpretation support this position, including textualism, legislative history, Supreme Court precedent, and agency guidance. Additionally, and perhaps even more importantly, a full-accommodation rule reflects the reality of religious devotion for the millions of American workers who believe in full obedience to the tenets of their faiths. For these individuals, religious observance is not something that can or should be done partway. If an employee believes it is sinful to work

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on Sundays, the ability to attend church in the morning hardly mitigates the sin of working in the afternoon. Thus, a partial accommodation is not just unreasonable – it is no accommodation at all.

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INTRODUCTION

A security guard asks his employer for an exemption from its grooming policy that bans facial hair, as his religious beliefs prohibit him from cutting his beard. The employer rejects the request but tells the employee he can keep his beard if he trims it to no more than a quarter inch in length. A store clerk asks his manager to not schedule him for Sunday shifts because he considers working

2. Id. at *2–3.
When “Close Enough” is Not Enough

on his Sabbath a sin. The manager is unwilling to give the employee Sundays off but offers to schedule him for later in the day so he can attend his church services in the morning. Production workers at a meatpacking plant ask their supervisor for short, periodic breaks during their shifts so they can pray at specific times in observance of a religious holiday. The supervisor denies the request but permits them to pray before and after their shifts and during their regularly scheduled breaks.

Title VII of the Civil Rights Act of 1964 requires employers to “reasonably accommodate” an employee’s religious observance unless doing so would impose “undue hardship” on their business operations. Have the employers in these scenarios complied with this duty by offering partial rather than full remedies for the conflict between the employees’ jobs and their religious beliefs? The federal courts of appeals are divided over the answer. Some circuits undoubtedly would find the proffered accommodations unreasonable as a matter of law. These courts have held that an accommodation that does not fully eliminate the employee’s conflict cannot be reasonable because it still forces the employee to choose between their job and their religion—the very dilemma Congress sought to avoid by requiring employers to reasonably accommodate. But in other circuits, the proposed accommodations could be entirely reasonable. These courts take the position that because Title VII expressly requires only “reasonable”—not “full,” “total,” or “complete”—accommodation, an accommodation that lessens but does not eliminate an employee’s conflict may nonetheless be reasonable depending on the circumstances.

4. Id. at 544–45.
6. Id. at 1229.
8. See infra Section I.C.1.
9. See infra Section II.B; Gordon v. MCI Telecommns. Corp., 791 F. Supp. 431, 435 (S.D.N.Y. 1992) (holding that the employer’s proposed accommodation forced the employee to choose between her job and her religious beliefs, “thereby vitiating its very existence for purposes of Title VII”).
10. See infra Section I.C.2.
This circuit split, which dates to 2008, shows no sign of resolution anytime soon. The two most recent appellate courts to address this issue could not have been further apart. In 2018, the Tenth Circuit held that “[a]dopting a per se ‘elimination’ rule that applies across all circumstances is not helpful” and that “ultimately the question of whether an accommodation is reasonable must be made on a case-by-case basis, grounded on the specific facts presented by a particular situation.” By contrast, four years later, the Third Circuit rejected the notion that a partial accommodation could ever be reasonable, no matter the particular facts. The court reasoned that “[t]o offer an accommodation that in practice will result in continued infringement does not fulfill Title VII’s requirements.” Consequently, “a legally sufficient accommodation under Title VII’s religious discrimination provision is one that eliminates the conflict between the religious practice and the job requirement.”

This issue is too consequential to be left to the fortuity of geography to determine. An employee’s ability to practice their religion and keep their job should not depend on whether the employee resides in the Tenth Circuit or the Third Circuit. This is especially true for members of minority religions, who are more likely than mainline Christians to find their religious practices at odds with workplace requirements. Sonia Ghumann and colleagues explain:

[A]lthough most American workplaces may be secular in nature, the majority of work policies and procedures favor Christian practices and observances (i.e., no work on Sundays, Christmas is considered a federal holiday) . . . . As religious diversity increases, some of the religions gaining increasing representation in America (i.e., Muslims, Sikhs) may have certain religious-based obligations requiring expression and requests for religious

11. Up until 2008, the appellate courts that had considered this issue agreed Title VII requires full accommodation. See infra Section I.C.1. But that year, both the Fourth and the Eighth Circuits took the opposite view. EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 313–15 (4th Cir. 2008); Sturgill v. United Parcel Serv., Inc., 512 F.3d 1024, 1032–33 (8th Cir. 2008).
12. Tabura v. Kellogg USA, 880 F.3d 544, 553–54 (10th Cir. 2018).
14. Id. at 171.
15. Id. at 169.
accommodations such as religious holidays during regular workdays, time off for prayer/rituals, religious attire, and grooming practices will also inevitably increase.16

Thus, accommodation is vital in promoting workplace diversity, equity, and inclusion because it enables members of minority religions to observe their beliefs on terms similar to those typically available to mainstream Christians.17

This Article argues that an accommodation must fully eliminate the conflict between an employee’s job and their religious beliefs to be reasonable. Several tools of statutory interpretation support this position. First, a full-accommodation rule is consistent with the plain meaning of the term “accommodate.”18 The placement of “reasonably” in front of “accommodate” does not lessen the requirement of full accommodation but rather relates to the manner in which an employer provides an accommodation.19 Second, Congress added the religious accommodation provision to Title VII to protect employees from having to choose between their jobs and their religious beliefs.20 A full-accommodation rule is consistent with congressional intent, for without it, employees would be forced into the very dilemma Congress sought to avoid. Third, although the Supreme Court has not been particularly hospitable to religious accommodations,21 there is much in its accommodation jurisprudence to suggest it reads Title VII as requiring full accommodation.22 Fourth, the Equal Employment Opportunity Commission (EEOC), the administrative agency tasked with interpreting Title VII, has long maintained that an accommodation


17. See Kathleen A. Brady, Religious Accommodations and Third-Party Harms: Constitutional Values and Limits, 106 KY. L.J. 717, 726 (2018) (“Accommodations for religious believers and groups whose beliefs and practices are out of step with prevailing norms protect the benefits of American pluralism.”).
18. See infra Section II.A.
19. See infra notes 189–95 and accompanying text.
20. See infra notes 208–14 and accompanying text.
21. See infra Section I.B.
22. See infra Section II.C.
cannot be reasonable unless it eliminates the conflict between an employee’s job and their religious beliefs.  

Beyond these traditional tools of statutory interpretation, there is a fifth, and perhaps even more compelling, justification for requiring full accommodation. Many religiously devout individuals believe they must be fully obedient to the tenets of their faiths or they risk jeopardizing their eternal salvation. For them, religious observance is a matter of principle rather than of degree; it is not something they can or should do partway. For the security guard who believes cutting his beard at all is a sin, the employer’s offer to allow him to keep a short beard is not a solution; he is still forced to choose between “losing his job or losing his God.” For the store clerk whose religion prohibits him from working on Sundays, the employer’s offer to let him work a later shift so he can attend church services before work may be a nice gesture, but it does nothing to remedy the actual conflict. And for the production workers who need to pray at specific times, it is no solution—and, frankly, is insulting—for their employer to suggest that praying before and after their shifts and during their regularly scheduled breaks would be close enough to what their religion required. No matter how well-meaning these employers might be, the accommodations they offer cannot possibly be reasonable because they run counter to the very nature of the employees’ religious needs. When an employer offers a partial accommodation, it is in effect asking the employee to compromise their religious beliefs. For many people of faith, compromising their beliefs so they can keep their jobs simply is not an option. For the religiously devout, an accommodation that lessens but does not eliminate the conflict between their jobs and their religious beliefs is not just unreasonable—it is no accommodation at all.

Before delving further, two points bear emphasis. First, this Article’s central argument, that reasonable accommodation requires full accommodation, does not imply that every accommodation that eliminates the conflict between an employee’s job and their

23. See infra Section II.D.
24. See infra Part III.
25. See infra Part III.
27. EEOC v. JBS USA, LLC, 115 F. Supp. 3d 1203, 1229 (D. Colo. 2015) (noting the employer’s position that “although these prayer opportunities are not perfect, they ‘occur reasonably close to Islamic prayer times.’”).
religious beliefs will automatically be reasonable. As several courts have pointed out, in addition to eliminating the conflict, the accommodation must ensure the employee is not unnecessarily disadvantaged in the terms and conditions of their employment.\textsuperscript{28} Suppose an employer with a no-headwear policy accommodates a Muslim worker by allowing her to wear a hijab, but it moves her workspace to a closet so she will be outside the view of other workers. Even though this would technically eliminate the conflict, the accommodation would not be reasonable because it would unnecessarily disadvantage the employee by subjecting her to considerably worse working conditions. Thus, although eliminating the conflict is necessary to establish a reasonable accommodation, it is not sufficient.

Second, in arguing for a full-accommodation rule, this Article by no means suggests employees have the absolute right to an accommodation. Title VII requires reasonable accommodation only if the accommodation would not cause the employer undue hardship.\textsuperscript{29} This means that even if an employer can fully accommodate an employee, it has no obligation to do so if the accommodation would impose undue hardship on its business. For instance, if an employer could fully accommodate an employee’s request to never work on his Sabbath, but the employer would have to pay another employee cost-prohibitive overtime wages to cover that shift, the employer would not have to provide the accommodation because it would cause the employer undue hardship.\textsuperscript{30} Whether an accommodation is reasonable and whether the accommodation would cause undue hardship are not two sides of the same coin; they are analytically distinct concepts that must be assessed separately.\textsuperscript{31} While this

\begin{itemize}
  \item \textsuperscript{28} See, e.g., Am. Postal Workers Union, S.F. Local v. Postmaster Gen., 781 F.2d 772, 776 (9th Cir. 1986) (explaining that Title VII “requires an employer to accommodate the religious beliefs of an employee in a manner which will reasonably preserve that employee’s employment status, i.e., compensation, terms, conditions, or privileges of employment”).
  
  \item \textsuperscript{29} 42 U.S.C. § 2000e(j).
  
  \item \textsuperscript{30} In Groff v. DeJoy, the Supreme Court clarified that to establish undue hardship, an employer must show “that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.” Groff v. DeJoy, 600 U.S. 447, 470 (2023) (citing Trans World Airlines v. Hardison, 432 U.S. 63, 83 n.14 (1977)).
  
  \item \textsuperscript{31} See Groff v. DeJoy, 35 F.4th 162, 172 (3d Cir. 2022), rev’d on other grounds, 600 U.S. 447 (2023) (“In addition to requiring that the accommodation eliminate the conflict, the statute requires that the offered accommodation be reasonable.”); Dallan F. Flake, Restoring
Article asserts that an accommodation must fully eliminate the employee’s conflict to be reasonable, whether the employer must ultimately grant the accommodation is a separate question altogether.

This Article proceeds in four Parts. Part I provides background on Title VII’s religious accommodation provision and explains how the endorsement of a partial-accommodation rule by some courts is consistent with broader judicial efforts to neutralize Title VII’s religious accommodation provision. Part II examines how several tools of statutory interpretation, including textualism, legislative history, Supreme Court jurisprudence, and EEOC guidance, support a full-accommodation rule. Part III explores the nature of religious devotion and how a full-accommodation rule is necessary to protect employees from being asked to compromise their religious beliefs to keep their jobs. Part IV considers the potential implications of a full-accommodation rule, including the possibility that such a rule might result in fewer accommodations.

I. BACKGROUND

This Part begins by explaining how Title VII, a statute that primarily prohibits status-based employment discrimination, came to include a provision that affirmatively requires employers to accommodate religious conduct. It next considers the various ways in which the courts have tried to strip the accommodation provision of its force, including by setting the standard for undue hardship so low that employers can deny almost any accommodation request, by allowing employers rather than employees to select the accommodation, by conflating the reasonableness and undue hardship tests, by limiting employees’ participation in the accommodation process, and by requiring only partial accommodation. This Part concludes by analyzing the split between circuits that require full accommodation, circuits that require only partial accommodation, and circuits where the issue is not yet settled.

Reasonableness to Workplace Religious Accommodations, 95 WASH. L. REV. 1673, 1707–11 (2020) [hereinafter Restoring Reasonableness] (analyzing cases in which courts have analyzed reasonableness separately from undue hardship).
A. Origins

Title VII of the Civil Rights Act of 1964 prohibits employers from “fail[ing] or refus[ing] to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”32 Because the statute’s primary aim was to eradicate race discrimination in employment, most of the legislative history focuses on that issue.33 Consequently, relatively little is known about how religion ended up as a protected trait. Some have argued that religion is an anomaly among Title VII’s protected characteristics because it is the only trait that is arguably mutable.34 But under more contemporary notions of immutability, religion’s inclusion makes sense, given the centrality of the trait to some individuals’ personal identities.35

Shortly after Title VII was enacted, it became evident to the EEOC that additional safeguards were necessary to protect employees from religious discrimination, as workers inundated the agency with complaints that they had lost their jobs because their religious practices conflicted with work requirements.36 Employers circumvented Title VII’s proscription against religious

34. See Rachel M. Birnbach, Love Thy Neighbor: Should Religious Accommodations that Negatively Affect Coworkers’ Shift Preferences Constitute an Undue Hardship on the Employer Under Title VII?, 78 FORDHAM L. REV. 1331, 1338–39 (2009) (“[I]t may seem anomalous that religion is a protected class under Title VII—religion is a trait that is directly within one’s control, whereas race or gender is typically immutable.”); Debbie N. Kaminer, Religious Conduct and the Immutability Requirement: Title VII’s Failure to Protect Religious Employees in the Workplace, 17 VA. J. SOC. POL’Y & L. 453, 457–58 (2010) (addressing the debate over whether religion is a mutable characteristic).
35. See Jessica A. Clarke, Against Immutability, 125 YALE L.J. 2, 28 (2015) (arguing that this revised version of immutability abandons the “fraught distinction between chance and choice[,]” “refocus[es] the doctrine to consider the costs of change for an individual’s sense of self[,]” “expands protection beyond those deemed blameless for possessing disfavored traits to include those who have made protected choices to adopt particular traits[,]” and “counters stigma by allowing those claiming discrimination to do so without disavowing their own agency and pride in determining the content of their characters”).
discrimination by discharging such employees, not directly because of their religious beliefs but rather because their religious beliefs inhibited them from performing certain work assignments. Thus, if an employer required its employees to work on Saturdays, and a Jewish employee was unable to work on Saturdays because of her religious beliefs, the employer could lawfully fire the employee based on her inability to meet the work requirement—even though the reason for the employee’s conflict was religiously based. To close this loophole, the EEOC issued guidelines in 1966 suggesting it was not enough for employers to treat religious employees merely the same as other employees.\textsuperscript{37} Instead, employers bore an affirmative obligation to accommodate an employee’s “reasonable religious needs” absent “serious inconvenience to the conduct of the business.”\textsuperscript{38} The following year, the EEOC softened its position somewhat, modifying the guidelines to require employers to provide “reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer’s business.”\textsuperscript{39} The EEOC did not expound on what it meant by “reasonable accommodations” or “undue hardship.”

\textbf{B. Judicial Hostility}

Almost immediately, the courts were suspicious of, if not outright hostile to, the concept of religious accommodation. In \textit{Dewey v. Reynolds Metals Co.}, the Sixth Circuit rejected the EEOC’s guidance outright:

Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act.

\ldots

To construe the Act as authorizing the adoption of Regulations which would coerce or compel an employer to accede to or

\textsuperscript{37} 29 C.F.R. § 1605.1(a)(2) (1967).
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} 29 C.F.R. § 1605.1(b) (1968).
accommodate the religious beliefs of all of his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment.

... The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees.40

When the Supreme Court subsequently affirmed Dewey by an equally-divided Court,41 Congress moved swiftly to pass legislation in 1972 that amended Title VII to require an employer to “reasonably accommodate to an employee’s or prospective employee’s religious observance or practice,” unless doing so would impose “undue hardship on the conduct of the employer’s business.”42 In doing so, Congress elevated religion over Title VII’s other protected traits. It is not enough for an employer merely to refrain from discriminating against an employee because of their religion; in some circumstances, the employer has an affirmative duty to provide an accommodation that enables the employee to perform their job without violating their religious beliefs. There is no corresponding duty to accommodate race, color, national origin, or sex.

Judicial hostility toward religious accommodations did not end once Congress amended Title VII. Just five years later, the Supreme Court stripped the religious accommodation provision of nearly all force.43 In Trans World Airlines, Inc. v. Hardison, the Court considered how much of a burden an employer must bear in

43. See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting) (“[I]f an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute, while brimming with ‘sound and fury,’ ultimately ‘signif[y] nothing.’” (second alteration in original)); J.H. Verkerke, Disaggregating Antidiscrimination and Accommodation, 44 WM. & MARY L. REV. 1385, 1399–1400 (2003) (“Unlike the toothless duty to accommodate employees’ religious practices that is contained in Title VII, this provision [of the Americans with Disabilities Act of 1990 (ADA)] has real bite.” (footnote omitted)); Small v. Memphis Light, Gas & Water, 952 F.3d 821, 829 (6th Cir. 2020) (Thapar, J., concurring) (“The American story is one of religious pluralism. The Founders wrote that story into our Constitution in its very first amendment. And almost two-hundred years later, a new generation of leaders sought to continue that legacy in Title VII. But the Supreme Court soon thwarted their best efforts.”).
providing a religious accommodation before the employer suffers “undue hardship,” a term the statute does not define.\textsuperscript{44} The Court interpreted “undue hardship” to mean anything “more than a \textit{de minimis} cost.”\textsuperscript{45} This standard was baffling, not only because neither party had argued for it,\textsuperscript{46} but also because it runs contrary to the plain meaning of the term.\textsuperscript{47} Regardless of the logical soundness of \textit{Hardison}, the result was clear: By setting the bar for what constitutes undue hardship so low, only the most unimaginative employer was unable to justify refusing a religious accommodation. By definition, an accommodation requires deviation from ordinary policies and procedures.\textsuperscript{48} Because nearly any deviation from the norm will impose at least some cost, employers could almost always lawfully deny an accommodation request under the \textit{Hardison} standard. And in the rare instance that an employee challenged that decision in court, the employer was practically guaranteed to prevail.

The \textit{Hardison} decision drew the immediate ire of Justice Thurgood Marshall, who lamented in dissent that the Court dealt a “fatal blow to all efforts under Title VII to accommodate work requirements to religious practices” by setting the bar for undue hardship so low that an employer “need not grant even the most minor special privilege to religious observers to enable them to

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\textsuperscript{44} \textit{Hardison}, 432 U.S. at 66.
\textsuperscript{45} Id. at 84.
\textsuperscript{46} Patterson v. Walgreen Co., 140 S. Ct. 685, 686 (2020) (Alito, J., concurring) ("[T]he parties' briefs in \textit{Hardison} did not focus on the meaning of [undue hardship]; no party in that case advanced the \textit{de minimis} position; and the Court did not explain the basis for this interpretation.").
\textsuperscript{47} \textit{Hardison}, 432 U.S. at 88, 92–93 n.6 (Marshall, J., dissenting) ("I seriously question whether simple English usage permits ‘undue hardship’ to be interpreted to mean ‘more than \textit{de minimis} cost . . . .’"); Patterson, 140 S. Ct. at 686 (Alito, J., concurring) (arguing that the \textit{de minimis} standard “does not represent the most likely interpretation of the statutory term ‘undue hardship’”); Brief of Religious Liberty Scholars, Employment Law Scholars, and KARAMAH: Muslim Women Lawyers for Human Rights as Amici Curiae in Support of Petitioner at 7, Small v. Memphis Light, Gas & Water, 141 S. Ct. 1227 (2021) (No. 19-1388), 2020 WL 4260328, at *7 ("[U]nder \textit{Hardison}'s reading, an ‘undue hardship’ occurs whenever a religious accommodation generates any cost for an employer that is more than a trifle. A trifle plus a dollar cannot be reconciled with the words ‘undue hardship.’")
\textsuperscript{48} See Bilal Zaheer, \textit{Accommodating Minority Religions Under Title VII: How Muslims Make the Case for a New Interpretation of Section 701(f)}, 2007 U. ILL. L. REV. 497, 520 (2007) ("Employers can easily demonstrate that a requested accommodation imposes a \textit{de minimis} cost on their operations because by definition every accommodation involves an exemption from an otherwise neutral employment rule or practice." (citing \textit{Hardison}, 432 U.S. at 87)).
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follow their faith.”

Marshall argued that “a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job.”

He warned that “[a]ll Americans will be a little poorer until today’s decision is erased.”

_Hardison_ wreaked havoc on religious-accommodation seekers for nearly five decades, until the Supreme Court finally held in 2023 that undue hardship does not mean anything “more than a _de minimis_ cost.” That long-held view of _Hardison_’s holding, according to the Court, was “mistaken”; the proper test of undue hardship is whether “the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of [the employer’s] particular business.” The Court made no attempt to define “substantial increased costs,” noting instead that “courts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, ‘size and operating cost of [an] employer.’” It remains to be seen how the courts will apply this new standard, but at least for now, it appears the danger _Hardison_ long posed to religious-accommodation seekers has been neutralized.

Nine years after _Hardison_, the Supreme Court dealt a second blow to religious accommodation seekers that remains unabated to this day. In _Ansonia Board of Education v. Philbrook_, the Court held that in situations where an employee could be accommodated in a variety of ways, and none would impose undue hardship, the employer—not the employee—decides which accommodation to provide. The Court explained that once an employer offers any reasonable accommodation, it has fulfilled its duty under _Title VII_ and is under no further obligation to consider other accommodations the employee suggests, even if they are reasonable and would not

49. _Hardison_, 432 U.S. at 86–87.
50. _Id. _at 87.
51. _Id. _at 97.
53. _Id. _at 2295–96 (citing _Hardison_, 432 U.S. at 83 n.14).
54. _Id. _at 2295 (alteration in original) (internal quotation omitted).
impose undue hardship. This holding further shifted power over religious accommodations from the employee to the employer. The decision fails to recognize that a religious employee is best positioned to determine which accommodation will best meet their needs. Since none of the options would impose more than de minimis cost on the employer, it should not matter to the employer which accommodation is selected. As Justice Marshall explained, this time concurring in part and dissenting in part, “It may be that unpaid leave [(the accommodation offered by the employer)] will generally amount to a reasonable accommodation, but this does not mean that unpaid leave will always be the reasonable accommodation which best resolves the conflict between the needs of the employer and the employee.”

Marshall urged that “[i]f an employee, in turn, offers another reasonable proposal that results in a more effective resolution without causing undue hardship, the employer should be required to implement it.”

In the lower courts, religious accommodations are often met with skepticism, if not outright hostility. One subtle yet damaging way in which some courts have chipped away at the right to a religious accommodation is by determining the reasonableness of an accommodation by how much it would burden the employer.

In essence, these courts read the reasonableness requirement out of Title VII by considering reasonableness and undue hardship to be one and the same: an accommodation is reasonable only if it does not cause the employer undue hardship. If all that matters is

56. Id. (“By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation. . . . Thus, where the employer has already reasonably accommodated the employee’s religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee’s alternative accommodations would result in undue hardship.”).
57. Id. at 74 (Marshall, J., concurring in part and dissenting in part).
58. Id.
59. See, e.g., EEOC v. Universal Mfg. Corp., 914 F.2d 71, 73 n.3 (5th Cir. 1990) (“Reasonableness seems to focus more upon the cost to the employer, the extent of positive involvement which the employer must exercise, and the existence of overt discrimination by the employer.”); EEOC v. Firestone Fibers & Textile Co., 515 F.3d 307, 314 (4th Cir. 2008) (acknowledging that reasonableness and undue hardship are “separate and distinct” inquiries but are “interrelated” and “there is much overlap between the two”); Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444, 455 (7th Cir. 2013) (“Reasonableness is assessed in context, of course, and this evaluation will turn in part on whether or not the employer can in fact continue to function absent undue hardship if the employee is permitted to take unpaid leave on the needed schedule.”).
whether the accommodation would unduly burden the employer, this renders the reasonableness requirement superfluous.\textsuperscript{60}

An additional tactic some lower courts employ to further diminish the religious accommodation requirement is to question whether religious-accommodation seekers are entitled to the same interactive process with their employers that disability accommodation seekers enjoy.\textsuperscript{61} In the disability context, courts have long followed EEOC guidance\textsuperscript{62} and required employers to engage in an interactive process with accommodation seekers, even though the Americans with Disabilities Act imposes no such mandate.\textsuperscript{63} This process generally requires that the employer meet with the employee in good faith to discuss if and how the employee’s job limitations might be accommodated.\textsuperscript{64} The employer must “[c]onsider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.”\textsuperscript{65} Although the EEOC has made clear that its guidance on the interactive process applies with equal force to religious accommodations,\textsuperscript{66} some courts

\textsuperscript{60}. Leslie Goddard, Searching for Balance in the ADA: Recent Developments in the Legal and Practical Issues of Reasonable Accommodation, 35 IDAHO L. REV. 227, 232 (1999) (“Any reading which equates the word ‘reasonable’ with ‘not imposing an undue hardship’ would make the use of the word ‘reasonable’ as a modifier for accommodation in this provision superfluous.”).

\textsuperscript{61}. See Dallan F. Flake, Interactive Religious Accommodations, 71 ALA. L. REV. 67, 86-89 (2019) (explaining how courts are reluctant to apply the interactive process requirement to religious accommodation claims).

\textsuperscript{62}. 29 C.F.R. § 1630.2(o)(3) (2019).

\textsuperscript{63}. See, e.g., Dansie v. Union Pac. R.R., 42 F.4th 1184, 1188 (10th Cir. 2022) (“When an employee provides notice to his employer of a disability and expresses a desire for a reasonable accommodation, the employee and the employer must engage in good-faith communications—what we have termed the interactive process.”); Arndt v. Ford Motor Co., 716 F. App’x 519, 528 (6th Cir. 2017) (“The ADA’s regulations require an employer “‘to initiate an informal, interactive process’ when necessary . . . .”).

\textsuperscript{64}. See McDonald v. UAW-GM Ctr. for Human Res., 738 F. App’x 848, 854 (6th Cir. 2018) (“Both the employer and the employee must participate in the interactive process in good faith.” (citing Kleiber v. Honda of Am. Mfg., Inc., 485 F.3d 862, 871 (6th Cir. 2007))); Phillips v. Victor Cnty. Support Servs., Inc., 692 F. App’x 920, 921 (9th Cir. 2017) (“[T]he interactive process requires ’direct communication between the employer and employee to explore in good faith the possible accommodations’” (quoting EEOC v. UPS Supply Chain Sols., 620 F.3d 1103, 1110 (9th Cir. 2010))).

\textsuperscript{65}. 29 C.F.R. § 1630 app. (2022).

question this proposition. Consequently, whereas a disability accommodation seeker can rightfully expect their employer to consult with them about their job-related limitations and to work closely with them to identify potential accommodations, a religious-accommodation seeker cannot necessarily expect the same level of involvement.

C. Full Versus Partial Accommodation

Against this backdrop of judicial hostility, it should come as little surprise that some courts would seek to further weaken the religious accommodation requirement by finding accommodations reasonable even if they do not fully eliminate the conflict between the employee’s job and their religion. While several circuits have adopted this position, others have rejected it. In still others, the issue remains undecided.

1. Full-Accommodation Circuits

Five circuits have adopted a full-accommodation requirement. The Second Circuit has decided two cases in which it required full accommodation. In Cosme v. Henderson, a letter carrier sued his employer, the U.S. Postal Service (USPS), for failing to reasonably accommodate his need to not work Saturdays so he could observe interactive process with employees to provide workplace [religious] accommodation.”; U.S. EQUAL EMP. OPPORTUNITY COMM’N COMPLIANCE MANUAL § 12-IV-A.2 (2008), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination [hereinafter COMPLIANCE MANUAL] (explaining that even though Title VII does not expressly require the interactive process, “as a practical matter it can be important to do so”); Plaintiff EEOC’s Response in Opposition to Defendant’s Motion for Summary Judgment at 48, EEOC v. JBS USA, LLC, 339 F. Supp. 3d 1135 (D. Colo. 2018) (No. 10-CV-0213-KLM), 2014 WL 11171486 (arguing that employers and employees “have a duty to cooperate with each other in an attempt to arrive at the [religious] accommodation, something akin to the duty to engage in an interactive process under the [ADA]”).

67. See, e.g., Miller v. Port Auth., 351 F. Supp. 3d 762, 787 (D.N.J. 2018) (acknowledging courts “have not been consistent” in deciding whether the interactive process applies to religious accommodations); EEOC v. Jetstream Ground Servs., Inc., No. 13-CV-02340-KMT, 2016 WL 879625, at *4 (D. Colo. Mar. 8, 2016) (observing that Title VII’s regulations, unlike the ADA’s, do not describe an interactive process). Judicial skepticism of the interactive process requirement for religious accommodations prompted drafters of the 1994 version of the Workplace Religious Freedom Act to include in the proposed legislation a provision that would have prohibited employers from determining they cannot provide an accommodation until “after initiating and engaging in an affirmative and bona fide effort” to accommodate the employee. H.R. 5233, 103d Cong. § 2 (1994).
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his Sabbath. In affirming the bench verdict for the employer, the appellate court explained that the proffered accommodation was only reasonable if it “eliminated” the employee’s conflict. The court found that two accommodations the USPS offered satisfied this requirement: designating the employee as an “unassigned regular,” and transferring him to other positions.

In Baker v. Home Depot, an evangelical Christian brought a failure to accommodate claim against his former employer, The Home Depot, for firing him for refusing to work Sundays due to his religious beliefs. The district court granted summary judgment to the employer, finding that its offer to schedule the employee for a later Sunday shift so he could attend his church services in the morning was a reasonable accommodation. The Second Circuit reversed, reasoning that the proffered shift change “was no accommodation at all because it would not permit him to observe his religious requirement to abstain from work totally on Sundays.” “Simply put,” the court explained, “[t]he offered accommodation cannot be considered reasonable because it does not eliminate the conflict between the employment requirement and the religious practice.”

The Third Circuit is the most recent appellate court to address this issue. Groff v. DeJoy involved a claim by a rural letter carrier against the USPS for failing to accommodate his need to not work Sundays due to his religious beliefs. The district court held that the USPS reasonably accommodated the employee by offering him the opportunity to swap shifts with other employees—even if he was ‘not happy’ with it,” and even if nobody was willing to trade.

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69. Id. at 159.
70. Id. at 159–61. The court also determined that in addition to eliminating the religious conflict, the proposed accommodations would not have caused the employee “to suffer an inexplicable diminution in his employee status or benefits.” Id. at 160.
72. Id. at 545.
73. Id. at 547–48.
74. Id. at 548 (alterations in original) (quoting EEOC v. Ilona of Hung., Inc., 108 F.3d 1569, 1576 (7th Cir. 1996)).
76. Id. at 164, 168 (quoting Groff v. DeJoy, No. 19-1879, 2021 WL 1264030, at *5 (E.D. Pa. Apr. 6, 2021)). Although the USPS offered to find coworkers to swap shifts with the
In reversing the lower court, the Third Circuit reasoned that “[i]nterpreting ‘reasonably accommodate’ to require that an accommodation eliminate the conflict between a job requirement and the religious practice is consistent with the meaning of the word ‘accommodate.’” The court then declared, “a legally sufficient accommodation under Title VII’s religious accommodation provision is one that eliminates the conflict between the religious practice and the job requirement.” The court concluded that although shift swapping could be a reasonable accommodation in some cases, here it was not because it failed to “successfully eliminate the conflict.” Nevertheless, the Third Circuit affirmed summary judgment for the USPS because accommodating the letter carrier would have imposed more than a de minimis burden on the employer. It was this determination that the Supreme Court reviewed and, ultimately, vacated and remanded based on its clarification of the undue hardship standard.

The Sixth Circuit has decided three cases concerning partial accommodations. EEOC v. University of Detroit involved an engineering professor who objected on religious grounds to paying service fees to or otherwise associating with a union that provided financial support to pro-abortion organizations. The union offered to reduce his fees by an amount proportional to what it contributed to the organizations, but the professor declined the offer because it did not address his associational concern. Although the accommodation resolved the professor’s concern about contributing directly to an organization that had adopted a pro-choice position, the employer made no effort to accommodate the accommodation seeker, there were more than twenty Sundays when no coworker would trade with him, and he did not work.

77. Id. at 169–70.
78. Id. at 169.
79. Id. at 173.
80. Id. at 175–76.
82. EEOC v. Univ. of Detroit, 904 F.2d 331, 332–33 (6th Cir. 1990).
83. Id. at 333.
84. Id. at 335.
professor’s other concern that he would still be required to associate with an organization that conflicted with his Catholic faith. 85

Cooper v. Oak Rubber Co. involved a production employee who objected to working from sundown on Fridays to sundown on Saturdays because it was her Sabbath. 86 The district court granted summary judgment to the employer, finding that the employer’s offer to move the employee to the Friday night shift (which ran from 11 p.m. to 7 a.m. the next day) so she could attend church on Saturday was reasonable as a matter of law. 87 The Sixth Circuit reversed, noting that although the employer’s offer addressed the employee’s concern about missing church, it did not address her objection to working on her Sabbath. 88 The court concluded that “[a]n employer does not fulfill its obligation to reasonably accommodate a religious belief when it is confronted with two religious objections and offers an accommodation which completely ignores one.” 89

Crider v. University of Tennessee, Knoxville involved a study-abroad coordinator who objected to monitoring an emergency cell phone on her Sabbath, from sundown on Fridays to sundown on Saturdays. 90 The university offered to limit the number of weekends she had to carry the phone to times when “one of the other [two] coordinators were out of town, had a family crisis, or in the event of an emergency.” 91 The employee maintained she was unable to ever monitor the phone on her Sabbath and consequently lost her job for being “inflexible, uncooperative, and unwilling to strike a reasonable compromise.” 92 Once again reversing a district court’s grant of summary judgment for the employer, the Sixth Circuit explained:

Although an employee is obligated to cooperate with an employer’s attempt at accommodation, cooperation is not synonymous with compromise, where such compromise would be in violation of the employees’ [sic] religious needs. Offering

85. Id.
86. Cooper v. Oak Rubber Co., 15 F.3d 1375, 1377-78 (6th Cir. 1994).
87. Id.
88. Id. at 1379.
89. Id.
90. Crider v. Univ. of Tenn., Knoxville, 492 F. App’x 609, 610-11 (6th Cir. 2012).
91. Id. at 611.
92. Id. at 612-13.
[the employee] fewer Saturday shifts is not a reasonable accommodation to religious beliefs which prohibit working on Saturdays.\textsuperscript{93}

The Seventh Circuit has twice held that an accommodation must fully eliminate an employee’s religious conflict to be reasonable. In \emph{Wright v. Runyon}, the court affirmed summary judgment for the USPS after it gave a postal worker the opportunity to bid on four positions that did not require him to work on his Sabbath.\textsuperscript{94} The worker declined the invitation, even though he was guaranteed to secure at least two of the positions, opting instead to bid for positions that he did not receive.\textsuperscript{95} Noting that a reasonable accommodation is one that “eliminates the conflict between employment requirements and religious practices,” the court found that the USPS satisfied its obligation by inviting the employee to bid on positions that did not require him to violate his Sabbath.\textsuperscript{96} Then, in \emph{EEOC v. Ilona of Hungary, Inc.}, the court upheld a bench verdict for two Jewish beauty-salon workers who were fired for refusing to work on Yom Kippur, a Jewish holiday.\textsuperscript{97} The appellate court agreed with the trial court’s determination that the salon’s offer to the workers to take a different day off was not reasonable because it failed to “eliminate the conflict” between their job and their religious beliefs.\textsuperscript{98}

The Ninth Circuit addressed the question in \emph{American Postal Workers Union, San Francisco Local v. Postmaster General}.\textsuperscript{99} The case involved two post office window clerks who objected to processing draft registration forms on religious grounds.\textsuperscript{100} The Postal Service adopted a rule requiring any window clerk who so objected to

\textsuperscript{93}. \textit{Id.} at 613.

\textsuperscript{94}. \textit{Wright v. Runyon}, 2 F.3d 214, 217–18 (7th Cir. 1993).

\textsuperscript{95}. \textit{Id.} at 216.

\textsuperscript{96}. \textit{Id.} at 217 (quoting Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 70 (1986)).

\textsuperscript{97}. \textit{EEOC v. Ilona of Hung., Inc.}, 108 F.3d 1569, 1572 (7th Cir. 1997).

\textsuperscript{98}. \textit{Id.} at 1576. In pointing out that the only attempt at accommodation was to offer the employees a different day off, the court somewhat curiously stated, “[a]side from that, Ilona offered no other accommodation. It did not, for example, offer a partial day off to either employee . . . .” \textit{Id.} A partial day off would not have eliminated the conflict, so it is puzzling why the court would give this example. Perhaps the court raised the example simply to highlight the salon’s unreasonableness in exploring any alternative accommodation, not to insinuate that such an accommodation would actually have been reasonable.

\textsuperscript{99}. \textit{Am. Postal Workers Union, S.F. Local v. Postmaster Gen.}, 781 F.2d 772 (9th Cir. 1986).

\textsuperscript{100}. \textit{Id.} at 774.
transfer to a non-window position that did not require draft registration processing. The clerks claimed the Postal Service failed to reasonably accommodate them by refusing their request to keep their positions and simply refer draft registrants to other window clerks. The district court held that although the transfer rule eliminated the employees’ conflict, the Postal Service was bound to accept their preferred accommodation unless doing so would impose undue hardship. The Ninth Circuit reversed, explaining that “[w]here an employer proposes an accommodation which effectively eliminates the religious conflict,” the employee is not entitled to their preferred accommodation. Instead, “the inquiry under Title VII reduces to whether the accommodation reasonably preserves the affected employee’s employment status.” Because the Postal Service’s rule that the objecting clerks transfer to a non-window position would have eliminated the conflict for the objecting employees, all that was left for the court to decide was whether such a transfer would have reasonably preserved the clerks’ employment status.

2. Partial-Accommodation Circuits

Three circuits have rejected the full-accommodation rule outright, holding instead that in certain circumstances, an accommodation can be reasonable even if it does not eliminate the employee’s conflict. In Sturgill v. United Parcel Service, Inc., the Eighth Circuit became the first appellate court to adopt this position. The case involved a delivery driver who sued his former employer for failing to accommodate his need to not work past sundown on Fridays. The trial court instructed the jury that “an accommodation is reasonable if it eliminates the conflict between Plaintiff’s religious beliefs and Defendant’s work requirements and

101. Id.
102. Id.
103. Id. at 775. The district court reached its decision prior to the Supreme Court holding in Ansonia that an employee is not entitled to their preferred religious accommodation. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68 (1986).
105. Id.
106. Id.
108. Id. at 1027.
reasonably permits Plaintiff to continue to be employed by Defendant.” On appeal, United Parcel Service (UPS) argued the instruction was erroneous “because, as a matter of law, an employer’s accommodation is reasonable if it provides a religion-neutral way for the employee to minimize a religious conflict.” The employee countered that the instruction was not erroneous “because, to be reasonable as a matter of law, an employer’s accommodation must eliminate the conflict and ‘fully satisfy the religious convictions of an employee.’”

The court rejected both contentions, opting instead to adopt a rule that “[w]hat is reasonable depends on the totality of the circumstances and therefore might, or might not, require elimination of a particular, fact-specific conflict.” The court acknowledged that in “many” cases, “the only reasonable accommodation [may be] to eliminate the . . . conflict altogether.” “But in close cases, that is a question for the jury because it turns on fact-intensive issues such as work demands, the strength and nature of the employee’s religious conviction, the terms of an applicable CBA, and the contractual rights and workplace attitudes of co-workers.”

The court stressed the importance of “bilateral cooperation” between employers and employees, explaining that while “Title VII requires employers to make serious efforts to accommodate,” the statute “also requires accommodation by the employee, and a reasonable jury may find in many circumstances that the employee must either compromise a religious observance or practice, or accept a less desirable job or less favorable working conditions.”

The court’s assertion that an accommodation’s reasonableness may depend on an employee’s willingness to compromise their religious beliefs is controversial, to say the least, and runs counter to the Sixth Circuit’s declaration in Crider that although Title VII requires employee cooperation, it does not require an employee to compromise their religious beliefs.  

109. Id. at 1030.
110. Id. (emphasis omitted).
111. Id. (emphasis omitted).
112. Id.
113. Id. at 1033.
114. Id.
115. Id. (emphasis added).
116. Crider v. Univ. of Tenn., Knoxville, 492 F. App’x 609, 613 (6th Cir. 2012); see also Redmond v. GAF Corp., 574 F.2d 897, 901 (7th Cir. 1978) (“We agree that the concept of a
Shortly after the Sturgill decision, the Fourth Circuit followed suit in EEOC v. Firestone Fibers & Textiles Co. The EEOC brought a failure to accommodate claim on behalf of an employee who was unable to work from sundown on Fridays to sundown on Saturdays due to his religious beliefs. Firestone did not offer the employee any accommodation beyond the standard attendance accommodations it made available to all employees who needed time off. After using all of his leave under this policy, the employee requested eleven days off to observe two religious holidays. Firestone denied the request and terminated his employment when he failed to report to work on those days.

The district court granted Firestone summary judgment based on its determination that the company had reasonably accommodated the employee through its standard policies. On appeal, the EEOC argued the accommodation was not reasonable because it did not fully eliminate the employee’s conflict. In rejecting this argument, the Fourth Circuit reasoned:

The problem with appellants’ “total” accommodation interpretation is that such a construction ignores the plain text of the statute, namely the inclusion of the word “reasonably” as a modifier of accommodate. If Congress had wanted to require employers to provide complete accommodation absent undue hardship, it could easily have done so. For instance, Congress could have used the words “totally” or “completely,” instead of “reasonably.” It even could have left out any qualifying adjective at all. Rather, ‘mutuality of obligation’ is inherent in accommodation, for rarely will an accommodation be successful without mutual efforts and cooperation. However, to the extent that the [Eighth Circuit’s holding in Chrysler Corp. v. Mann] may be interpreted to say that it is incumbent on plaintiff to show first that he has made some effort to either ‘compromise’ or accommodate his own religious beliefs before he can seek an accommodation from his employer, we disagree.”

118. Id. at 309, 311.
119. Under the collective bargaining agreement, an employee with the accommodation seeker’s level of seniority was entitled to fifteen vacation days and three floating holidays. Id. at 310. Firestone also allowed employees to swap shifts eight times per year. Id. Employees could also take up to sixty hours of unpaid leave annually, and if an employee took less than thirty-six hours of unpaid leave, he could use up to three vacation days in half-day increments, for a total of six half-day vacations. Id.
120. Id. at 311.
121. Id.
122. Id.
123. Id. at 313.
Congress included the term reasonably, expressly declaring that an employer’s obligation is to “reasonably accommodate” absent undue hardship—not to totally do so.124

The court further explained that “this is not an area for absolutes” because “[r]eligion does not exist in a vacuum in the workplace,” but “[r]ather . . . coexists, both with intensely secular arrangements such as collective bargaining agreements and with the intensely secular pressures of the marketplace.”125 The court viewed reasonable accommodation as “a field of degrees, not a matter for extremes” that is “dependent on the extent of the employee’s religious obligations and the nature of the employer’s work requirements.”126 Accordingly, “[a] duty of ‘reasonableness’ cannot be read as an invariable duty to eliminate the conflict between workplace rules and religious practice.”127

In determining reasonableness, the Fourth Circuit focused on how the proposed accommodation would impact the employer and other employees rather than whether the accommodation would fully eliminate the employee’s conflict.128 The court concluded that Firestone reasonably accommodated the employee through its pre-existing attendance policies because those policies permitted “most employees the opportunity to meet all of their religious observances.”129 And beyond these policies, Firestone allowed the employee to take more half-day vacations than allowed under the collective bargaining agreement, which “constitute[d] another meaningful accommodation to [the employee’s] religious observances.”130 It also altered his shift when possible, which demonstrated that “Firestone ‘actively attempt[ed] to accommodate [the employee’s] religious’ observances.”131

The Tenth Circuit has adopted a slightly more moderate position than the Fourth and Eighth Circuits. Tabura v. Kellogg USA

124. Id.
125. Id.
127. Id. at 314 (first citing Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 69 (1986); and then citing EEOC v. Ithaca Indus, Inc., 849 F.2d 116, 118 (1988)).
128. Id.
129. Id. at 316.
130. Id.
131. Id. (first alteration in original) (quoting Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1018 (4th Cir. 1996)).

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involved claims by Seventh-Day Adventist production workers that their employer failed to reasonably accommodate their need to avoid working from sundown on Fridays to sundown on Saturdays so they could observe their Sabbath.\footnote{Tabura v. Kellogg USA, 880 F.3d 544, 546 (10th Cir. 2018).} Kellogg refused to accommodate the employees beyond allowing them to use its generally applicable vacation and shift-swapping policies.\footnote{Id. at 547.} These policies afforded the employees some relief but did not protect them from all Sabbath work.\footnote{Id. at 547–48.} The employees eventually lost their jobs for missing too many weekend shifts.\footnote{Id. at 548.} The district court entered summary judgment for the employer, holding that the accommodations offered were reasonable as a matter of law.\footnote{Id. at 550.}

The Tenth Circuit disagreed, holding that a fact issue as to the reasonableness of the accommodations precluded summary judgment.\footnote{Id. at 555.} It began its analysis of reasonableness by stating that “an accommodation will not be reasonable if it only provides Plaintiffs an opportunity to avoid working on some, but not all, Saturdays”\footnote{Id. at 550 (citing Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 70 (1986)).}—an observation that seems in line with a full-accommodation requirement. But in the same breath, the court explained that “[o]n the other hand, to be reasonable, an accommodation need not provide a ‘total’ accommodation; that is, Kellogg is not required to guarantee Plaintiffs will never be scheduled for a Saturday shift, nor is Kellogg required to provide an accommodation that ‘spares the employee any cost whatsoever.’”\footnote{Id. at 550–51 (quoting Pinsker v. Joint Dist. No. 28J, 735 F.2d 388, 390–91 (10th Cir. 1994)) (citing Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 145–46, 146 n.3 (5th Cir. 1982)).} The court did not articulate what costs an accommodation seeker may be expected to bear but did seem to disagree with Sturgill’s observation that an employee may have to compromise their religious beliefs.\footnote{Id. at 551 (citing with approval Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 145–46, 146 n.3 (5th Cir. 1982), for the proposition that “of course, an employee is not required to modify his religious beliefs”).}

The Tenth Circuit rejected the employees and the EEOC’s (as amicus) argument that an accommodation is reasonable only if it
fully eliminates the conflict.\textsuperscript{141} Like the Fourth Circuit in \textit{Firestone}, the Tenth Circuit observed that Title VII requires only reasonable—not actual, total, or full—accommodation.\textsuperscript{142} It explained that a full-accommodation rule “would read ‘reasonably’ out of the statute,” “unnecessarily complicates the question of reasonableness,” and “begs additional questions, including what is meant by ‘eliminate’ or ‘totally’ eliminate or ‘completely’ eliminate.”\textsuperscript{143} The court then analyzed cases where courts required full accommodation and determined that “in most cases it is not clear that these courts reached any different result than if they simply considered whether the accommodation was reasonable.”\textsuperscript{144} The court saw “no need to adopt a per se rule requiring [full accommodation].”\textsuperscript{145} It concluded instead that “[t]he statute requires the accommodation to be reasonable and ultimately the question of whether an accommodation is reasonable must be made on a case-by-case basis, grounded on the specific facts presented by a particular situation.”\textsuperscript{146}

3. Inconsistent Circuits

While several circuits have taken a clear stand on whether a religious accommodation must partially or fully eliminate an employee’s conflict, the Fifth and the Eleventh Circuits have both taken inconsistent positions. The Fifth Circuit first addressed this issue in \textit{EEOC v. Universal Manufacturing Corp.}\textsuperscript{147} A machine operator asked for seven days off so she could observe a religious holiday and attend its corresponding festival.\textsuperscript{148} The employer offered to let her take five days off or, alternatively, to take seven days off if she worked one shift within those seven days.\textsuperscript{149} The

\begin{footnotesize}
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  \item[141.] \textit{Id.} at 551–52.
  \item[142.] \textit{Id.} at 551 (“At times, Plaintiffs add adjectives, arguing an accommodation must ‘actually’ or ‘totally’ or ‘fully and completely’ eliminate a conflict. But Title VII expressly requires only that an employer ‘reasonably accommodate’ an employee’s religion.” (first citing 42 U.S.C. § 2000(e)(1) (2018); and then citing \textit{EEOC v. Firestone Fibers & Textiles Co.}, 515 F.3d 307, 313 (4th Cir. 2008))).
  \item[143.] \textit{Id.}
  \item[144.] \textit{Id.} at 551–53.
  \item[145.] \textit{Id.} at 553.
  \item[146.] \textit{Id.} at 554 (first citing \textit{Thomas v. Nat’l Ass’n of Letter Carriers}, 225 F.3d 1149, 1157 n.8 (10th Cir. 2000); and then citing \textit{United States v. City of Albuquerque}, 545 F.2d 110, 115 (10th Cir. 1976)).
  \item[147.] \textit{EEOC v. Universal Mfg. Corp.}, 914 F.2d 71 (5th Cir. 1990).
  \item[148.] \textit{Id.} at 72.
  \item[149.] \textit{Id.}
\end{itemize}
\end{footnotesize}
employee rejected both proposals because neither resolved her concern about refraining from working during the religious holiday.\textsuperscript{150} When she attended the festival and did not report to work, her employer fired her.\textsuperscript{151} The EEOC subsequently brought suit, claiming the employer violated Title VII.\textsuperscript{152}

The district court granted the employer summary judgment, finding that the proposals constituted a reasonable accommodation as a matter of law.\textsuperscript{153} The Fifth Circuit disagreed.\textsuperscript{154} It stressed that the employee had presented two conflicts: attending the festival and refraining from working during that time.\textsuperscript{155} Although the employer provided an accommodation that allowed the employee to attend the festival, it made no attempt to accommodate her need to refrain from working at all during the holiday.\textsuperscript{156} The court rejected the employer’s claim that under Supreme Court precedent, an employer is not required to offer multiple accommodations.\textsuperscript{157} “Requiring the employer at least to attempt to accommodate each religious conflict that arises does not . . . contradict the Supreme Court’s reading of section 701(j)[,]” the court explained.\textsuperscript{158} “The Supreme Court has never held that the question of ‘reasonable’ accommodation focuses upon the number of conflicts or even upon the proportion of a single conflict eliminated by the employer’s offer of accommodation.”\textsuperscript{159} This language strongly suggests the Fifth Circuit will assess reasonableness based on whether the accommodation eliminates the employee’s conflict, not the proportion of the conflict that the accommodation eliminates.

The Fifth Circuit took the opposite view in \textit{Bruff v. North Mississippi Health Services, Inc.}\textsuperscript{160} A counselor was terminated for refusing on religious grounds to provide relationship counseling to a woman in a same-sex relationship.\textsuperscript{161} The appellate court affirmed

\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id. at} 73–74.
\textsuperscript{155} \textit{Id. at} 73.
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Bruff v. N. Miss. Health Servs., Inc.}, 244 F.3d 495 (5th Cir. 2001).
\textsuperscript{161} \textit{Id. at} 497–99.
summary judgment for the employer, finding reasonable the employer’s offer to give her thirty days, and the assistance of its in-house employment counselor, to find another position within the organization where “the likelihood of encountering further conflicts with her religious beliefs would be reduced.” 162 The court did not delve further into the issue, nor did it attempt to reconcile its view with the position it took in *Universal Manufacturing*. Nonetheless, its determination that an accommodation that could potentially “reduce” the conflict was reasonable suggests the Fifth Circuit may be more open to considering the proportion of the conflict that an accommodation eliminates than it previously indicated.

The Eleventh Circuit has likewise sent mixed signals. In *Patterson v. Walgreen Co.*, a training instructor brought suit against his former employer after he was terminated for refusing to work on his Sabbath. 163 Walgreens encouraged him to seek a different position within the company, including his former position as a customer care representative, where a larger pool of employees would make it easier for him to swap shifts in the future. 164 However, because Walgreens could not guarantee he would never have to work on his Sabbath, he did not pursue a new position. 165 In affirming summary judgment for the employer, the court explained that “[g]uarantees are not required[,]” and that even if switching positions “did not completely eliminate the conflict, it would have enhanced the likelihood of avoiding it.” 166

The Eleventh Circuit took the opposite view in *Bailey v. Metro Ambulance Services, Inc.* 167 An emergency medical technician requested an exemption from his employer’s grooming policy so he could keep his goatee in accordance with his Rastafarian religious beliefs. 168 The company sought to accommodate him by offering him a transfer to a non-emergency-transport EMT position that was not subject to the grooming code. 169 The employee declined the offer and brought suit for failure to accommodate. 170

162. *Id.* at 501.
164. *Id.* at 587.
165. *Id.* at 584–85.
166. *Id.* at 587.
168. *Id.* at 1269.
169. *Id.* at 1269–70.
170. *Id.* at 1270–71.
the reasonableness of the proffered accommodation, the Eleventh Circuit noted that “[a] ‘reasonable accommodation’ ‘eliminates the conflict between employment requirements and religious practices.’”\textsuperscript{171} It explained that a transfer to a comparable position that “removes the conflict between the policy and the practice, and reasonably preserves the employee’s terms, conditions, or privileges of employment, satisfies the reasonable-accommodation requirement.”\textsuperscript{172} Because the employer offered the employee a comparable position where he could maintain his goatee, it provided a reasonable accommodation.\textsuperscript{173}

As this Part demonstrates, the history of religious accommodations under Title VII has been somewhat of a rollercoaster ride. The statute did not originally include a religious accommodation provision, but one was soon added in response to outcry from employees who were losing their jobs because of their religious conduct rather than their religious status. The judicial skepticism of religious accommodations that predated Title VII’s amendment has carried over despite the statute’s plain requirements. Courts have employed several methods to diminish the religious accommodation provision, including by asserting that an accommodation does not have to eliminate the conflict between an employee’s job and their religion to be reasonable. Not all circuits have adopted this position; some have taken the opposite view, some have taken inconsistent positions, and still others are yet to weigh in on this critical matter.

II. STATUTORY INTERPRETATION

Although the circuit courts are split on the issue, several tools of statutory interpretation support a full-accommodation rule, even though Title VII does not expressly require it. This Part examines four of those tools. It begins by demonstrating that the statutory text itself supports a full-accommodation rule based on the plain meaning of the terms “reasonably” and “accommodate.” Next, it reviews the applicable legislative history, which shows Congress enacted the religious accommodation provision

\textsuperscript{171} Id. at 1276 (quoting Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 70 (1986)).

\textsuperscript{172} Id. (first citing Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 71 (1986); and then citing EEOC v. United Parcel Serv., 94 F.3d 314, 318–20 (7th Cir. 1996)).

\textsuperscript{173} Id.
specifically to protect employees who need full accommodations. It then turns to the Supreme Court’s accommodation jurisprudence, which includes numerous statements to suggest the Court may already read Title VII as requiring full accommodation, even if it has not explicitly said so. This Part concludes by examining the EEOC’s position, which has long been that a reasonable accommodation must eliminate the conflict between the employee’s job and their religion.

A. Statutory Text

The starting point in determining the meaning of “reasonably accommodate” is the statutory language itself.\textsuperscript{174} Because Title VII does not define “reasonably” or “accommodate,” the terms should “be interpreted as taking their ordinary, contemporary, common meaning.”\textsuperscript{175} “[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended.”\textsuperscript{176}

The plain meaning of “accommodate” requires the elimination of the conflict between work requirements and religious practices. Merriam-Webster’s Online Dictionary defines “accommodate” as: “to provide with something desired, needed, or suited,” “to bring into agreement or concord: reconcile,” and “to make fit, suitable, or congruous.”\textsuperscript{177} The Random House Dictionary of the English Language defines “accommodate” as “to bring into harmony; adjust; reconcile.”\textsuperscript{178} Black’s Law Dictionary defines “accommodation” as “[t]he act or an instance of making a change or provision for someone or something; an adaptation or adjustment.”\textsuperscript{179} “Adapt” means “to make fit (as for a new use) often

\textsuperscript{174} See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring) (“The starting point in every case involving construction of a statute is the language itself.”).
\textsuperscript{176} United States v. Mo. Pac. R.R., 278 U.S. 269, 278 (1928).
\textsuperscript{178} Accommodate, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1968).
\textsuperscript{179} Accommodation, BLACK’S LAW DICTIONARY (11th ed. 2019).
by modification,”180 and “adjust” means “to bring to a more satisfactory state: (1) settle, resolve (2) rectify.”181 The plain meaning of “accommodate,” as derived from the phrases and synonyms used in these definitions, makes clear that an accommodation “must actually allow the employee to engage in the religious practice without adverse employment consequences.”182 This, of course, is only possible if the accommodation eliminates the conflict between the employee’s job requirements and religious practices. If the proposed accommodation merely lessens the conflict, it is no accommodation at all because it does not “reconcile,” “settle,” or “resolve” the conflict; the employee must still decide between their job and their religion.

Courts, the EEOC, and scholars have taken the position that the plain meaning of “accommodate” requires full elimination of the conflict. The Third Circuit explained in Groff that “[i]nterpreting ‘reasonably accommodate’ to require that an accommodation eliminate the conflict between a job requirement and the religious practice is consistent with the meaning of the word ‘accommodate.’”183 Similarly, the EEOC has argued in amicus briefs that:

Under those ordinary meanings, an employer’s ‘accommodation’ of an employee’s religious practice must be suitable to meet the employee’s religious needs—that is, it must actually allow the employee to engage in the religious practice without adverse employment consequences. That is possible only if it eliminates the conflict between the employee’s religious practice and work.184

Further, Professors Kurtz and Sleeper’s analysis of the meaning of “accommodate” led them to conclude that Title VII’s “use of ‘accommodate’ obliges employers to meet the needs of employees’ religious convictions. The plain meaning of the phrases, and

184. Amicus Brief—Patterson, supra note 182, at *9.
synonyms used in the definitions, including ‘to make fit,’ ‘to make suitable,’ ‘rectify,’ and ‘reconcile,’ all indicate that the accommodation must eliminate the conflict between work and religion.”

Even circuit courts that require only partial accommodation do not seem to dispute that the term “accommodate” requires the conflict to be eliminated. Rather, they contend that the placement of “reasonably” in front of “accommodate” allows an accommodation to stop short of fully eliminating the conflict, and that if Congress had intended something different, it would have used an adverb such as “fully,” “totally,” or “completely”—or no modifier at all—instead of “reasonably.”

But, as Kurtz and Sleeper argue, adding a modifier such as “totally” would have been redundant because “[t]he use of the word ‘accommodate’ . . . demands removal of the conflict.” According to basic grammatical principles of how modifiers work, an adverb cannot contradict a verb. Thus, “reasonably” cannot possibly weaken the baseline requirement for an accommodation, which is that it eliminates the conflict between the employee’s job and religious practices. “Reasonably” does not convey the level of completeness required; the need for completeness derives directly from the word “accommodate.” Consequently, a partial accommodation can never be a reasonable accommodation.

If “reasonably” does not lessen the accommodation requirement, what role does it play in the statute? In Groff, the employer argued “the word ‘reasonable’ in other contexts does not require complete achievement of the action that the word ‘reasonable’ modifies.” For instance, “reasonable doubt” does

186. See Tabura v. Kellogg USA, 880 F.3d 544, 551 (10th Cir. 2018); EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 313 (4th Cir. 2008).
187. Kurtz & Sleeper, supra note 185, at 90.
188. See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 368 (2018) (“According to the ordinary understanding of how adjectives work, ‘critical habitat’ must also be ‘habitat.’ Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality. It follows that ‘critical habitat’ is the subset of ‘habitat’ that is ‘critical’ to the conservation of an endangered species.”).
189. See US Airways, Inc. v. Barnett, 535 U.S. 391, 400 (2002) (“[I]n ordinary English the word ‘reasonable’ does not mean ‘effective.’ It is the word ‘accommodation,’ not the word ‘reasonable,’ that conveys the need for effectiveness.”). Moreover, “the word ‘reasonably’ means ‘fairly’ or ‘moderately,’ not ‘partially’ or ‘incompletely.’” Kurtz & Sleeper, supra note 185, at 90.
When "Close Enough" is Not Enough

not mean there must be a complete elimination of all doubt to find a criminal defendant guilty. The Third Circuit conceded this was true but countered that "context matters":

The context in which the word “reasonable” is used informs what it modifies. In the Title VII religious discrimination context, the word “accommodate” requires the employer to offer an adjustment that allows the employee to fulfill the religious tenet but requires nothing more from the employer. The word “reasonably” informs how an employer provides an accommodation that eliminates the conflict, but it does not obligate the employer to “choose any particular reasonable accommodation,” or grant an employee’s preferred accommodation.

Thus, Title VII’s use of the modifier “reasonably” does not change the obligation to accommodate but instead describes the manner of the accommodation. It means that when adopting an accommodation, the employer possesses discretion to reasonably select among effective resolutions. “Reasonableness thus defines the outer bounds of an employer’s discretion to select among effective accommodations that resolve the religious conflict.” The Supreme Court seems to have endorsed this view of reasonableness, noting in Groff that “Title VII requires that an employer reasonably accommodate an employee’s practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations. This distinction matters[.]” the Court explained, because “[f]aced with an accommodation request like Groff’s, it would not be enough for an employer to conclude that forcing other employees to work

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191. Id.
192. Id. (citations omitted) (quoting Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68 (1986)) (citing Getz v. Pennsylvania, 802 F.2d 72, 74 (3d. Cir. 1986)).
193. Id. (“In evaluating whether the avenue is reasonable, we look at the manner in which the accommodation is implemented.”).
194. See, e.g., Cosme v. Henderson, 287 F.3d 152, 153 (2d Cir. 2002) (“[A]n employer need not offer the accommodation the employee prefers . . .”); Baker v. Home Depot, 445 F.3d 541, 548 (2d Cir. 2006) (explaining that “employees are not entitled to hold out for the ‘most beneficial accommodation’”).
overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary.”

 Courts that read “reasonably” as lessening the accommodation requirement seem driven by concern for how an accommodation might impact the employer.197 That concern is valid—but entirely misplaced. An accommodation’s reasonableness has nothing to do with how the accommodation would impact the employer. “Reasonably” informs how an employer provides an accommodation that eliminates the conflict, not whether the accommodation would unduly burden the employer. Title VII balances this initial requirement that employers provide accommodations that allow employees to fully observe their religious customs with a counter provision that excuses an employer from providing such an accommodation if it would impose undue hardship on the employer’s business. The undue hardship defense reflects the reality that in certain instances, an accommodation would simply be too burdensome for an employer to be expected to bear. Whether an accommodation is reasonable and whether an accommodation would impose undue hardship are separate inquiries.198 “[T]he employer’s burdens are assessed under the hardship defense, not used to dilute the front-line requirement that employers provide an accommodation that effectively eliminates the religious conflict.”

 **B. Legislative History**

 The legislative history of Title VII’s religious accommodation provision supports a full-accommodation requirement. When statutory terms are ambiguous, extrinsic materials, including legislative history, can be useful “to the extent they shed a reliable

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197. See, e.g., EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 314 (4th Cir. 2008) (explaining that “an accommodation that results in undue hardship almost certainly would not be viewed as one that would be reasonable”).
198. Groff, 35 F.4th at 169 ("[W]e must determine whether the employer offered a reasonable accommodation to the employee. If it did, then ‘the statutory inquiry is at an end.’ If it did not, then we evaluate whether the employee’s requested accommodation would cause the employer an undue hardship. Whether the employer provided a reasonable accommodation and whether the accommodation would cause an undue hardship are separate inquiries.").
light on the enacting Legislature’s understanding of [such] terms.”

And, as Justice Sotomayor has instructed, “[E]ven when . . . a statute’s meaning can clearly be discerned from its text, consulting reliable legislative history can still be useful, as it enables us to corroborate and fortify our understanding of the text.”

The religious accommodation provision’s legislative history is scant. Almost immediately after the Supreme Court upheld Dewey, the Sixth Circuit decision rejecting the EEOC’s guidance that Title VII required accommodation, Senator Jennings Randolph of West Virginia proposed legislation to amend Title VII to codify the EEOC’s position. The amendment somewhat awkwardly imposes the accommodation requirement as part of the statute’s definition of religion: “The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” Senator Randolph’s proposal faced virtually no resistance, as evidenced by the fact that the entire legislative history of the proposal consists of just two pages of the Congressional Record, in which Senator Randolph explains why the amendment is needed and answers four questions from two senators. The measure was ultimately “passed by a unanimous vote in the Senate” and by “similar approval by the House of Representatives . . . .”

204. 118 Cong. Rec. 705-06 (1972).
206. 118 Cong. Rec. 705–16 (1972); see also Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74–75 & n.9 (1977) (noting the “brief legislative history” of the 1972 Act, “consist[ing] chiefly of a brief floor debate in the Senate, contained in less than two pages of the Congressional Record and consisting principally of the views of . . . Senator Jennings Randolph,” who “expressed his general desire ‘to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law,’ but . . . made no attempt to define the precise circumstances under which the ‘reasonable accommodation’ requirement would be applied”).
The amendment’s historical context is critical to understanding how the legislative history supports a full-accommodation requirement. As previously noted, the impetus for the EEOC’s religious accommodation requirement was that employees whose religious beliefs prevented them from working on their Sabbath were losing their jobs because of their unwillingness to compromise their beliefs.208 Senator Randolph referenced these employees in his remarks on the Senate floor:

[T]here are several religious bodies . . . not large in membership, but with certain strong convictions, that believe there should be a steadfast observance of the Sabbath and require that the observance of the day of worship, the day of the Sabbath, be other than on Sunday. On this day of worship work is prohibited whether the day would fall on Friday, or Saturday, or Sunday.209

Senator Randolph’s repeated use of the word “day” underscores that the workers he had in mind were not the type who would be content with taking a few hours off on their Sabbath to attend religious services and then go to work; these were workers who needed a full accommodation that would allow them the entire day off to worship. Indeed, Senator Randolph emphasized that these workers could not compromise their beliefs, as their “religious practices rigidly require them to abstain from work in the nature of hire on particular days.”210 Senator Randolph was especially sympathetic to their plight because he, too, was a Sabbatarian. As part of his remarks to the Senate, he shared, “I am a member of a denomination which is a relatively small one, the Seventh-Day Baptists. . . . [W]e think in terms of our observance of the Sabbath beginning at sundown Friday evening and ending at sundown Saturday evening, following the Biblical words, ‘From eve unto eve shall you celebrate your Sabbath.’”211

Senator Randolph’s stated intent behind the amendment was “to assure that freedom from religious discrimination in the

208. See Brierton, supra note 36, at 167 (explaining that the EEOC “raised the issue of reasonable accommodation two years after the law had gone into effect due to complaints from religious employees that employers were refusing to allow them to take time off during the regular work week in order to observe holy days”).
209. 118 CONG. REC. 705 (1972).
210. Id.
211. Id.
employment of workers is for all time guaranteed by law.” In his view, “the law flowing from the original Constitution of the United States should protect [workers’] religious freedom, and hopefully their opportunity to earn a livelihood within the American system.” Given his references to workers like him who needed the entire day off to observe their Sabbath, “protect[ing] their religious freedom” while providing the “opportunity to earn a livelihood” was not something that could be accomplished through partial accommodation. The only solution would be for employers to provide accommodations that fully resolved the employees’ conflict.

This point was perhaps so obvious that neither Senator Randolph nor any member of Congress even raised the possibility that an accommodation could be reasonable if it did not fully eliminate the employee’s conflict. Instead, they intended and understood that the limiting feature of the amendment is the undue hardship clause. Responding to a hypothetical from Senator Dominick of Colorado about whether a particular situation would impose undue hardship on the employer, Senator Randolph stated that he did “not believe that an undue hardship would come to such an employer.” He then explained, “I have placed in the language of the amendment, that there would be such flexibility, there would be this approach of understanding, even perhaps of discretion, to a very real degree.”

This prompted Senator Williams of New Jersey to pose a follow-up hypothetical about whether it would be an undue hardship for an employer that operates only on the weekends to hire a worker whose Sabbath observance prohibited him from working on one of the two days of the employment. Senator Randolph confirmed this would constitute undue hardship and thus the amendment would not require accommodation in that case.

Senator Randolph’s exchanges with Senator Dominick and Senator Williams further demonstrate Congress’s intent that an accommodation fully

212. Id.
213. Id. at 706.
214. Id.
215. Id.
216. Id.
217. Id.
218. Id.
eliminate the conflict—and that any limitation on the employer’s duty to do so derives not from the reasonableness requirement but rather from the undue hardship provision.

C. Supreme Court Jurisprudence

The Supreme Court has never directly addressed whether a reasonable accommodation must fully eliminate the conflict between an employee’s job and their religion. And yet, it has made statements in three of the religious accommodation cases it has decided, as well as in a disability accommodation case, that support a full-accommodation rule.

1. Trans World Airlines, Inc. v. Hardison

Although *Hardison* is best known for its now-defunct interpretation of undue hardship, it also provides insight into the Supreme Court’s understanding of the reasonableness requirement. The case involved a Sabbatarian employee, who brought suit after his employer failed to accommodate his request to not work on his Sabbath or certain religious holidays.219 Neither the parties nor the Court contemplated the possibility of something less than a full accommodation. In fact, the Court noted that transferring the employee from the day shift to the twilight shift was “unavailing since that schedule still required Hardison to work past sundown on Fridays.”220 The record showed that the employer considered three potential solutions to Hardison’s conflict, each of which would have fully eliminated the employee’s conflict: (1) allow him to work a four-day week and fill his Saturday shift with a supervisor or another worker on duty elsewhere, (2) exempt him from Saturday work and fill his position from other available personnel, or (3) arrange a shift swap.221 The Court described these as “reasonable efforts to accommodate.”222 While it did not expressly state that the proposed accommodations were reasonable because they eliminated the employee’s conflict, this inference is logical. Upon declaring the proposed accommodations reasonable,
the Court turned its attention to the question of undue hardship.\textsuperscript{223} It concluded that because the accommodations would have imposed more than de minimis cost on the employer, it had no duty to accommodate and was, in fact, within its rights to terminate the employee for his religious-based absences.\textsuperscript{224}

In \textit{Firestone}, the Fourth Circuit took the view that \textit{Hardison} supports a partial-accommodation rule.\textsuperscript{225} It noted that in \textit{Hardison}, the Supreme Court had observed that “the statute provides no guidance for determining the degree of accommodation that is required of an employer,” and that while “the employer’s statutory obligation to make reasonable accommodation” was “clear,” the precise “reach of that obligation ha[d] never been spelled out by Congress” or by EEOC guidelines.\textsuperscript{226} The Fourth Circuit reasoned that “[b]y struggling to locate the degree of accommodation required under [Title VII], the Court recognized that the line was one of reasonable, not total, accommodation.”\textsuperscript{227} This conclusion seems misplaced. \textit{Hardison} was not a case about reasonableness; it was a case about undue hardship. The Supreme Court had no trouble determining the proposed accommodations were reasonable, as they fully eliminated the employee’s conflict.\textsuperscript{228} The difficulty of the case lay in how much of a burden an employer must bear before an accommodation imposes undue hardship.\textsuperscript{229} The Supreme Court’s “struggle” was with undue hardship—not reasonableness. The Fourth Circuit’s interpretation of \textit{Hardison} as requiring less than full accommodation simply is not justified.

The other aspect of \textit{Hardison} that some courts and litigants have seized on in claiming partial accommodations can be reasonable is the Supreme Court’s observation that the employer’s seniority system “represented a significant accommodation to the needs, both religious and secular, of all of TWA’s employees” because it was “a neutral way of minimizing the number of occasions when

\begin{itemize}
\item \textsuperscript{223} Id.
\item \textsuperscript{224} Id. at 84–85.
\item \textsuperscript{225} EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 313–14 (4th Cir. 2008).
\item \textsuperscript{226} Id. at 313.
\item \textsuperscript{227} Id. at 313–14.
\item \textsuperscript{228} Id. at 66 (“The issue in this case is the extent of the employer’s obligation under Title VII to accommodate an employee whose religious beliefs prohibit him from working on Saturdays.”).
\item \textsuperscript{229} Id. at 66.
\end{itemize}
an employee must work on a day that he would prefer to have off.”\textsuperscript{230} Some have taken this to mean an accommodation can be reasonable if it lessens but does not eliminate the conflict.\textsuperscript{231} In \textit{Sturgill}, the Eighth Circuit rejected this interpretation.\textsuperscript{232} The court explained that while the \textit{Hardison} court praised the employer’s seniority system under the specific circumstances of the case, it did not hold that an employer’s duty to reasonably accommodate will never require additional actions beyond a collective bargaining agreement or neutral policy:

But \textit{Hardison} did not hold, more broadly, that an employer’s duty to reasonably accommodate never requires additional actions beyond, but not inconsistent with, its contractual obligations under a collective bargaining agreement. Indeed, the Court in \textit{Hardison} discussed such additional actions but concluded on the facts of that case that they would have imposed an undue hardship.\textsuperscript{233}

The \textit{Sturgill} court’s assessment of \textit{Hardison} is correct. The \textit{Hardison} Court did not hold that the employer’s seniority system constituted a reasonable accommodation. It merely pointed out that for any employee wanting certain days of the week off, whether for religious or secular reasons, the seniority system provided a neutral way to minimize scheduling conflicts.\textsuperscript{234} The seniority system was a helpful starting point, but it was hardly sufficient to constitute a reasonable accommodation. The employee needed more than for his scheduling conflicts to be lessened; he needed an accommodation that allowed him to observe his Sabbath and religious holidays completely. Recognizing this reality, the employer explored options beyond the seniority system to try to fully accommodate the employee.\textsuperscript{235} It was those attempts to fully accommodate—not the seniority system’s ability to lessen

\begin{itemize}
\item \textsuperscript{230} Id. at 78.
\item \textsuperscript{231} See, e.g., Cook v. Chrysler Corp., 981 F.2d 336 (8th Cir. 1992) (holding that the employer’s protocols in place were a reasonable accommodation, even though the employee lacked enough seniority to utilize them); Mann v. Frank, 7 F.3d 1365, 1369 (8th Cir. 1993) (holding that the employer’s seniority-based shift system represented a reasonable accommodation, even if the employee could not get his Sabbath off every week).
\item \textsuperscript{232} Sturgill v. United Parcel Serv., Inc., 512 F.3d 1024, 1030 (8th Cir. 2008).
\item \textsuperscript{233} Id.
\item \textsuperscript{234} Hardison, 432 U.S. at 78.
\item \textsuperscript{235} Id. at 79–81.
\end{itemize}
scheduling conflicts—that led the Supreme Court to conclude that “TWA had made reasonable efforts to accommodate[.]”  

2. Ansonia Board of Education v. Philbrook

In *Ansonia*, the Supreme Court once again dealt with an employee whose religious beliefs sometimes conflicted with his work schedule. As a high school teacher, Ronald Philbrook’s religious conflict was not with his ability to observe his Sabbath but rather with his ability to observe those religious holidays that fell on school days. Under the terms of the collective bargaining agreement, Philbrook could use three days of paid leave annually for religious observance but could not use for religious observance any accumulated sick leave (three days of which were otherwise available for “necessary personal business”). Philbrook typically needed six days off per year to observe his religious holidays, so he asked the school board either to modify the leave policy to allow use of the three days of personal business leave for religious observance or, alternatively, to let him pay the cost of a substitute and receive full pay for additional days off for religious observance. The board rejected both proposals and opted instead to permit Philbrook to take unpaid leave for the three religious holidays not covered by the paid leave policy.

Unlike *Hardison*, which focused almost exclusively on whether the proposed accommodations would have imposed undue hardship on the employer, *Ansonia* primarily explores what it means for an employer to “reasonably accommodate.” Most of the Court’s analysis centers around the question of whether the employer or the employee gets to select the accommodation when multiple options are available that would not cause the employer undue hardship. Upon concluding the employer is entitled to

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236. *Id.* at 77.
237. *Id*. at 77.
238. *Id*
239. *Id.* at 63–64.
240. *Id.* at 64–65.
241. *Id.* at 65.
242. *Id.* at 63 (“We are asked to determine whether the employer’s efforts to adjust respondent’s work schedule in light of his belief fulfill its obligation under [Title VII] to ‘reasonably accommodate . . .’”).
243. *Id.* at 66–69.
select the accommodation in such cases, the Court turned its focus to whether the school board had provided Philbrook with a reasonable accommodation by allowing him to take unpaid leave. The Court decided that additional fact finding was necessary on this point, as neither the district nor appellate court had explicitly considered this question. It then explained:

We think that the school board policy in this case, requiring [Philbrook] to take unpaid leave for holy day observance that exceeded the amount allowed by the collective-bargaining agreement, would generally be a reasonable one. . . . The provision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work.

The Court made explicit what it left implicit in Hardison: the proffered accommodation was reasonable because it “eliminate[d] the conflict” by allowing Philbrook “to observe fully” his religious holidays.

Courts that require full accommodation routinely reference this passage to support their position. In Groff, the Third Circuit reasoned:

Our task is to determine whether an offered accommodation must eliminate the conflict between a job requirement and the religious practice. Cases from the Supreme Court and our Court answer this question. The Supreme Court has stated [in Ansonia] that an accommodation is reasonable if it “eliminates the conflict between employment requirements and religious practices.” Our Court has said that, where a good-faith effort to accommodate a religious practice has been “unsuccessful,” the inquiry must then turn to the undue hardship analysis, which suggests that an accommodation must be effective. Thus, a legally sufficient accommodation under Title VII’s religious discrimination provision is one that eliminates the conflict between the religious practice and the job requirement.

244. Id. at 70–71.
245. Id. at 70.
246. Id.
247. Id.
But not all courts read *Ansonia* so definitively. In *Sturgill*, the Eighth Circuit acknowledged the Supreme Court’s use of the word “eliminate” in *Ansonia* but downplayed its significance. It interpreted *Ansonia* to mean “that an accommodation is reasonable as a matter of law if it eliminates a religious conflict”; however, the Supreme Court “did not hold, indeed did not suggest, that an accommodation, to be reasonable as a matter of law, must eliminate any religious conflict.” While it is true that the word “must” appears nowhere in the *Ansonia* Court’s analysis, the fact that the Court declared the provision of unpaid leave to “generally be a reasonable [accommodation],” and then immediately noted that the policy eliminated Philbrook’s work-religion conflict by allowing him to “observe fully” his religious holidays, certainly allows the inference that an accommodation must eliminate the conflict to be reasonable.

Moreover, even if the Eighth Circuit’s reading of *Ansonia* were correct, its conclusion, that “the Court’s reference to ‘eliminat[ing] the conflict’ was not intended to pronounce a rule that all employees—absent undue hardship—must receive accommodations that eliminate any conflict between religion and work,” does not follow. Although the *Ansonia* Court did not expressly declare that accommodations must eliminate the conflict, the absence of such a declaration hardly signifies that it endorsed a partial accommodation approach. Indeed, nothing in *Ansonia* suggests anything less than full accommodation will suffice. That the school board offered Philbrook an accommodation that eliminated his conflict, and the Supreme Court deemed it reasonable because it allowed him to “fully” observe his religious holidays, indicates quite the opposite.


In *US Airways, Inc. v. Barnett*, the Supreme Court addressed whether the ADA required an employer to accommodate a worker with a back injury by permanently transferring him to a position he was not otherwise be entitled to under the employer’s seniority
system.253 Although the case did not arise under Title VII and therefore is not binding, the Court’s analysis is illuminating because “the [ADA’s and Title VII’s statutory schemes] are identical in many respects[.]”254 and “courts around the country—unless they find a good reason to do otherwise—generally use Title VII precedent to interpret ADA claims”255 (and vice versa).

The employer argued that a disability-neutral workplace rule, such as a seniority system, should never have to give way to an accommodation because the ADA merely requires equal—not preferential—treatment for those with disabilities.256 The Court rejected this contention, explaining that preferences, which come in the form of reasonable accommodation, “will sometimes prove necessary to achieve the Act’s basic equal opportunity goal.”257 It further noted that “[b]y definition any special ‘accommodation’ requires the employer to treat an employee with a disability differently, that is, preferentially. And the fact that the difference in treatment violates an employer’s disability-neutral rule cannot by itself place the accommodation beyond the Act’s potential reach.”258

Beyond making clear that accommodations not only justify but in fact require preferential treatment, the Court addressed the meaning of reasonable accommodation. The employee argued that the term means only “effective accommodation,” thus “authorizing a court to consider the requested accommodation’s ability to meet an individual’s disability-related needs, and nothing more.”259 The Court agreed that a reasonable accommodation must be effective, but it disagreed that the requirement derives from the term “reasonable.”260 It explained that “in ordinary English the word ‘reasonable’ does not mean ‘effective.’ It is the word ‘accommodation,’ not the word ‘reasonable,’ that conveys the need for effectiveness. An ineffective ‘modification’ or ‘adjustment’ will not accommodate a

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254. Walsh v. Nev. Dep’t of Human Res., 471 F.3d 1033, 1038 (9th Cir. 2006).
255. Garity v. APWU Nat’l Lab. Org., 828 F.3d 848, 858 n.9 (9th Cir. 2016); see also Flowers v. S. Reg’l Physician Servs. Inc., 247 F.3d 229, 233 (5th Cir. 2001) (“We conclude that the language of Title VII and the ADA dictates a consistent reading of the two statutes.”).
257. Id.
258. Id.
259. Id. at 399–400.
260. Id. at 400.
When “Close Enough” is Not Enough

disabled individual’s limitations.”\footnote{261. \textit{Id}.} The Court’s pronouncement that the word “accommodation” demands effectiveness is critical. It lends further support to the view that, on its face, an accommodation must eliminate the conflict, or it is no accommodation at all. An accommodation that merely lessens the conflict cannot be effective. If a factory worker has a back condition that prohibits him from lifting over fifteen pounds, an employer could hardly argue it reasonably accommodated the employee by exempting him from lifting over forty pounds but still requiring him to lift anything below that weight. The proffered accommodation may lessen the conflict, but it certainly would not be effective; the employee would still have to lift weight beyond what his disability allows. A religious accommodation that lessens but does not eliminate the employee’s conflict is no different.\footnote{262. See Amicus Brief—Patterson, supra note 182, at 10 (“Just as a method or policy cannot be considered effective under the ADA if it does not actually eliminate the barriers otherwise preventing a ‘qualified individual with a disability [from] perform[ing] the essential functions of a position,’ . . . so too a method or policy under Title VII cannot be considered effective if it does not actually eliminate all conflicts between the employee’s religious practice and workplace demands.”) (alterations in original).}

If “reasonable” is not synonymous with “effective,” what role does the term play in an accommodation analysis under the ADA? The \textit{Barnett} Court made clear that “an ordinary English meaning of the term ‘reasonable accommodation’ [does not] make of it a simple, redundant mirror image of the term ‘undue hardship.’”\footnote{263. \textit{Id. at 401–02; Groff v. DeJoy, 35 F.4th 162, 172 (3d Cir. 2022), rev’d on other grounds, Groff v. DeJoy, 600 U.S. 447 (2023).}} Instead, reasonableness goes to the manner in which the employer implements the accommodation.\footnote{264. \textit{Id. at 410–41; Barnett, 535 U.S. at 410 (O’Connor, J., concurring).}} Justice O’Connor explained in her concurrence that this requires a showing “that the method of accommodation the employee seeks is reasonable in the run of cases.”\footnote{265. \textit{Barnett}, 535 U.S. at 410 (O’Connor, J., concurring).} This interpretation of reasonableness is consistent with the Third Circuit’s view in \textit{Groff}, where it noted that the ordinary meaning of “reasonable” is “not conflicting with reason; not absurd; not ridiculous; being or remaining within the bounds of reason; not extreme; not excessive.”\footnote{266. \textit{Groff}, 35 F.4th at 172 (quoting \textsc{Webster’s Third New International Dictionary} 1892 (3d ed. 1993)).} The court concluded from

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\footnote{261. \textit{Id}.} \footnote{262. See Amicus Brief—Patterson, supra note 182, at 10 (“Just as a method or policy cannot be considered effective under the ADA if it does not actually eliminate the barriers otherwise preventing a ‘qualified individual with a disability [from] perform[ing] the essential functions of a position,’ . . . so too a method or policy under Title VII cannot be considered effective if it does not actually eliminate all conflicts between the employee’s religious practice and workplace demands.”) (alterations in original).} \footnote{263. \textit{Id. at 401–02; Groff v. DeJoy, 35 F.4th 162, 172 (3d Cir. 2022), rev’d on other grounds, Groff v. DeJoy, 600 U.S. 447 (2023).}} \footnote{264. \textit{Id. at 410–41; Barnett, 535 U.S. at 410 (O’Connor, J., concurring).}} \footnote{265. \textit{Barnett}, 535 U.S. at 410 (O’Connor, J., concurring).} \footnote{266. \textit{Groff}, 35 F.4th at 172 (quoting \textsc{Webster’s Third New International Dictionary} 1892 (3d ed. 1993)).}
this definition that, in the religious accommodation context, “the word ‘reasonable’ here requires that an adjustment to an otherwise neutral policy need not go beyond what is necessary to eliminate the conflict.” In short, reasonableness, as interpreted by the Supreme Court in Barnett and the Third Circuit in Groff, informs the method by which an employer provides an accommodation, but it has no bearing on the extent to which the accommodation must resolve the employee’s conflict.

4. EEOC v. Abercrombie & Fitch Stores, Inc.

In EEOC v. Abercrombie & Fitch Stores, Inc., the EEOC brought suit on behalf of a Muslim woman, whom Abercrombie & Fitch refused to hire because she wore a hijab. The hyper-image-conscious retailer did not want to have to grant her an exemption from its dress code, which prohibited certain employees from wearing “caps.” The bulk of the Court’s decision focuses on whether an employer must have actual knowledge of an individual’s need for an accommodation in order to discriminate. But in addressing that issue, the Court made a profound observation about accommodation in general that further supports the argument that an accommodation must fully eliminate the employee’s conflict. The Court explained that accommodation “means nothing more than allowing the plaintiff to engage in her religious practice despite the employer’s normal rules to the contrary.” The Court did not place any qualifier—partially, mostly, or reasonably—in front of “engage in her religious practice.” A proposed accommodation that does not allow an employee to “engage in her religious practice” is no accommodation at all. It “would not effectively reconcile the employee’s religious practices with his employment obligations and thus fails the plain meaning of the word accommodation.”

The Abercrombie Court likewise took aim at the notion that neutral employment policies constitute reasonable accommodations,

267. Id.
269. Id. at 770.
270. Id. at 772-75.
271. Id. at 772 n.2.
272. Id.
When “Close Enough” is Not Enough

a question arguably left open by the Hardison Court’s observation that TWA’s seniority system “represented a significant accommodation” because it was “a neutral way of minimizing” employee scheduling conflicts. Building on its declaration in Barnett that any accommodation, by definition, requires preferential treatment, the Court explained:

But Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not to fail or refuse to hire or discharge any individual . . . because of such individual’s ‘religion’ and practice. An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an ‘aspect of religious . . . practice,’ it is no response that the subsequent ‘failure . . . to hire’ was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation.

The Court’s position leaves no doubt that Title VII requires more than mere neutrality. A neutral workplace rule or policy that merely lessens an employee’s religious conflict cannot be sufficient. After Abercrombie, there can be no doubt that such an accommodation must “give way” to an accommodation that, in fact, eliminates the conflict.

In short, despite the Supreme Court never expressly holding that a reasonable accommodation must fully eliminate the conflict between an employee’s job and religion, there is ample support for this proposition in the Court’s accommodation jurisprudence. The Supreme Court has defined “accommodation” as “allowing the plaintiff to engage in her religious practice despite the employer’s normal rules to the contrary” and has acknowledged that an accommodation must be “effective” in resolving an employee’s

274. Trans World Air Lines, Inc., v. Hardison, 432 U.S. 63, 78 (1977); see also Amicus Brief—Patterson, supra note 182, at 22 (arguing that Abercrombie’s proclamation that “Title VII does not demand mere neutrality with regard to religious practices” but rather “gives them favored treatment” is “irreconcilable with Hardison’s focus on neutrality”).


276. Abercrombie, 575 U.S. at 775.

277. Id.

278. Id. at 772 n.2.
conflict. Consistent with this view, the Court has twice held that attempts to accommodate individuals in ways that would have fully eliminated their conflicts were reasonable, expressly stating in Ansonia that the accommodation it deemed reasonable “eliminate[d] the conflict between employment requirements and religious practices by allowing the individual to observe fully” his religious beliefs. Courts that do not require full accommodation attempt to justify their position by reasoning that “[i]n fact, few things in life can be conflict-free,” “[Title VII] is not an area for absolutes,” and that the Supreme Court never “intended to pronounce a rule that all employees—absent undue hardship—must receive accommodations that eliminate any conflict between religion and work.” This view cannot be reconciled with Supreme Court precedent.

D. EEOC Guidance

The EEOC’s interpretation of Title VII further supports a full accommodation rule. When a statute is ambiguous, courts accord some level of deference to the interpretation of the agency charged with administering and enforcing the statute. The EEOC is the government agency tasked with administering, interpreting, and enforcing Title VII. As such, the Supreme Court has held that the EEOC’s interpretation of Title VII should be given “great deference” by the courts. Although most EEOC guidance is entitled to Skidmore rather than the higher Chevron deference, the Supreme Court has endorsed the EEOC’s Compliance Manual

281. Ansonia, 479 U.S. at 70.
284. Sturgill v. United Parcel Serv., Inc., 512 F.3d 1024, 1031 (8th Cir. 2008).
285. See Union Pac. R.R. Co. v. United States, 865 F.3d 1045, 1048 (8th Cir. 2017) (“Generally, when Congress authorizes an agency to issue regulations interpreting a statute that the agency enforces, we defer to the agency’s interpretation of an ambiguous statute so long as the interpretation is reasonable.”).
288. See Ebbert v. DaimlerChrysler Corp., 319 F.3d 103, 114 (3d Cir. 2003) (“Instead of Chevron deference, therefore, this court will afford only Skidmore deference to the EEOC regulations and other articulations of policy.”).
under the *Skidmore* standard as “reflect[ing] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” Numerous courts, including the Supreme Court itself, have deferred to the EEOC’s guidance, as set forth in its Compliance Manual, in applying Title VII.

In its Compliance Manual, the EEOC takes the unequivocal position that a reasonable accommodation must fully eliminate the employee’s conflict: “An adjustment offered by an employer is not a ‘reasonable’ accommodation if it merely lessens rather than eliminates the conflict between religion and work, provided that eliminating the conflict would not impose an undue hardship . . . .”

The Commission reinforces this position with this hypothetical:

**EXAMPLE 33**

**Employer Violates Title VII if it Offers Only Partial Accommodation Where Full Accommodation Would Not Pose an Undue Hardship**

Rachel, who worked as a ticket agent at a sports arena, asked not to be scheduled for any Friday night or Saturday shifts, to permit her to observe the Jewish Sabbath from sunset on Friday through sunset on Saturday. The arena wanted to give Rachel this time off only every other week. The arena’s proposed adjustment does not fully eliminate the religious conflict and therefore cannot be deemed a reasonable accommodation in the absence of a showing that giving Rachel the requested time off every week poses an undue hardship for the arena.

By way of footnote, the Commission addresses *Firestone* and *Sturgill*. It does not claim those decisions were wrong per se but instead takes the view that, “in practice, even those courts have not

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292. COMPLIANCE MANUAL, supra note 66, at § 12-IV.A.3.

293. Id. at § 12-IV.A.3 n.227.
applied a standard that is materially different from the [full elimination] standard.”294 In holding that a reasonable accommodation need only lessen the conflict between religion and work, those courts considered “facts that the Commission and other courts would analyze as relevant only to undue hardship.”295 In other words, while those courts conflated their analyses by considering certain factors out of order, in the end they reached the correct outcome.

The EEOC has steadfastly maintained its position in litigation.296 In Tabura, the Commission filed an amicus brief in which it argued to the Tenth Circuit that “an employer violates Title VII if it offers only partial accommodation where full accommodation would not pose an undue hardship.”297 It explained that the Firestone and Sturgill courts had reached the conclusion that reasonable accommodation did not require full elimination “without benefit of the Supreme Court’s analysis in Abercrombie.”298 The Commission asserted that the Firestone court’s determination that a “reasonable” accommodation is, linguistically, less than a complete accommodation was erroneous: “The sweeping language in Abercrombie suggests that rather than diluting the accommodation obligation, the word ‘reasonable’ simply allows an employer to choose among various possibilities for eliminating the work/religion conflict . . . .”299 As for the Sturgill court’s observation that the purpose of Title VII’s reasonable accommodation provision “is to foster bilateral cooperation,” and that it would be “inconsistent with this purpose to [require full

294. Id.
295. Id.
296. See, e.g., Press Release, EEOC, Williamsburg Hometown IGA Sued by EEOC for Religious Discrimination (Dec. 27, 2022), https://www.eeoc.gov/newsroom/williamsburg-hometown-iga-sued-eec-religious-discrimination (announcing lawsuit against a grocery store that refused to hire an applicant who would not cut his hair due to his Spiritualist Rastafarian religious beliefs; quoting EEOC Indianapolis District Director Michelle Eisele as stating, “No employee or applicant should have to choose between their religion and their job,” and quoting EEOC Regional Attorney Ken Bird as stating, “Employers must consider reasonable accommodations, as necessary, which allow employees and applicants to hold jobs without sacrificing their religious beliefs.”).
298. Id. at 13–14.
299. Id. at 14.
elimination],” the EEOC argued that Abercrombie “eviscerated this analysis by making clear that, while cooperation is important, the central purpose of the reasonable accommodation provision is not to foster bilateral cooperation, but to require employers to modify neutral rules that conflict with an employee’s religious beliefs or practices when they can do so without undue hardship.”

Recently, the Supreme Court considered whether to grant certiorari in a case that raised the issue of whether Title VII requires full accommodation. The Court invited the Solicitor General to file an amicus brief expressing the views of the United States. In its brief, the government (including the senior counsel for the EEOC) argued that “an accommodation must eliminate any conflict between an employee’s religious practice and work requirements.” It reasoned that this interpretation flows from the ordinary meaning of “accommodate,” as well as from the Supreme Court’s observation in Ansonia that the accommodation “eliminate[d] the conflict between employment requirements and religious practices” and from its recognition in Barnett that “the word accommodation conveys the need for effectiveness.” Although the government ultimately took the position that the Court should not grant certiorari because the case was a “poor vehicle” for resolving the issue at hand, it left no doubt that its view on full accommodation that it articulated in its Compliance Manual, and advocated for in Tabura, remains unchanged.

In sum, various tools of statutory interpretation support the position that a reasonable accommodation must eliminate, not merely lessen, an employee’s religious conflict. These tools include the statute itself, its legislative history, Supreme Court jurisprudence, and EEOC guidance. While any one of these tools on its own may be sufficient to justify a full-accommodation rule, together their persuasive power is overwhelming. And yet, as the next Part explains, there is another, perhaps even more compelling, reason to require full accommodation.

300. Id. at 15.
303. Amicus Brief—Patterson, supra note 182, at 9.
304. Id. at 9–10 (alteration in original).
305. Id. at 14 (arguing that the appellate court correctly applied the full-accommodation rule, despite the employee’s claim to the contrary).
III. RELIGIOUS DEVOTION

A final reason for a full-accommodation rule is that it is consistent with the nature of religious devotion for the millions of American workers who believe they must be fully obedient to the tenets of their faiths. In amending Title VII to require religious accommodation, Congress recognized that religious conflicts are fundamentally different from secular conflicts. Most people would not walk away from their jobs because their employers occasionally schedule them to work on bowling league nights or impose grooming standards that conflict with their personal preferences. Yet, as the cases discussed herein demonstrate, some employees of faith would rather lose their jobs than ever work on their Sabbath, shave their beards, or otherwise violate their religious beliefs. The depth of some people’s religious conviction was on full display during the COVID-19 pandemic, when many organizations imposed vaccine mandates and fired employees who did not qualify for an exemption. Nick Rolovich, the head coach of the Washington State University football team, lost his job because of his religiously-based refusal to get vaccinated. Once the highest paid public employee in the state of Washington with a $3 million annual salary, Rolovich now works as an assistant coach at a high school in California. Likewise, when Lieutenant Colonel Edward Joseph Stapanon III faced discharge from the Air Force and possible imprisonment for refusing the COVID vaccine due to his religious beliefs, he testified in a preliminary injunction hearing:

306. See Roblyer, supra note 16, at 1699 (“[T]he constitutionally protected right to worship represents a rigid adherence to a higher law that is vastly different from the general needs of employees for time off.”).


308. See Scott Hanson, Ex-WSU Coach Nick Rolovich, Fired After Refusing COVID Vaccine, Reportedly Files Suit, SEATTLE TIMES (Nov. 14, 2022, 4:44 PM), https://www.seattletimes.com/sports/WSU-cougars-football/ex-wsu-coach-nick-rolovich-fired-after-refusing-covid-vaccine-reportedly-files-suit (reporting that Rolovich’s request for a religious exemption from the vaccine was denied).

Q. Now, you understand the seriousness of things, of the decision that you’re making today; correct?

A. Yes ma’am, I do.

Q. And if pushed, will you in fact go to prison to stand behind your religious beliefs?

A. Yes, Ma’am. I don’t see that I have any other alternative. When I meet my maker, I’m going to be held responsible for the decisions I’ve made, and I’d much rather go to prison. There’s been a lot of saints that have gone to prison, so I’m willing to do that.310

For some nonbelievers—and even some people of faith, for that matter—it can be difficult to comprehend how Coach Rolovich, Lieutenant Colonel Stapanon, or anyone else could feel so strongly about their religious beliefs that they are unwilling to compromise them in the least. After all, life is full of give and take, and intransigence rarely gets anyone anywhere. While a full examination of the psychology of religious devotion is beyond this Article’s scope, a few examples help to illustrate why some religious adherents are so committed to their beliefs.

Catholicism. For Catholics, “[a]nyone who is serious about obtaining Everlasting Life in Heaven will do all he can to increase in the virtue of obedience.”311 Father John Hardon taught that “obedience to God is without limit.”312 Saint Thomas Aquinas declared that God is to be obeyed in all things, while human authorities are to be obeyed in certain things.313 Pope Paul VI maintained that obedience is the chief of the vows because liberty is dearer to humans than anything else:

In professing obedience, religious offer the full surrender of their own will as a sacrifice of themselves to God and so are united permanently and securely to God’s salvific will. . . . In this way religious obedience, far from lessening the dignity of the human

313. THOMAS AQUINAS, SUMMA THEOLOGICA II, q. 104, art. 4–5, at 1225.
person, by extending the freedom of the sons of God, leads it to maturity.\textsuperscript{314}

The Catechism of the Catholic Church addresses the virtue of obedience, referring to it as a “duty.”\textsuperscript{315} While obedience is a virtue and a duty, Catholics likewise believe that disobedience is a sin. To preeminent Catholic scholar Oswin Magrath, disobedience “is a very special sin” because it signifies “contempt for authority,” whereas “obedience is precisely submission to authority.”\textsuperscript{316} Magrath reasons that “[f]ormal disobedience or formal contempt is always a mortal sin, even when the matter commanded is small, because it is a refusal to be subject to the authority of the superior. Its malice lies in the rebellious will rather than in the omission of the thing commanded.”\textsuperscript{317}

\textit{Islam}. For many Muslim women, wearing a hijab whenever they are in the presence of men who are not their close family members is a crucial component of their religious beliefs. Islamic scholars Kamal-Deen Olawale Sulaiman and Fatai Gbenga Raifu explain, “the Muslim must follow and obey the commands of Allah. This is the true meaning of \textit{Ibadah} (Islamic obligation), which is total submission to Allah’s commands in all aspects of our lives, big or small.”\textsuperscript{318} For Muslims, God has made clear that he will favor one human over the other based on the level of \textit{Taqwa} (piety or God-fearingness) a person possesses.\textsuperscript{319} Given these beliefs, “[t]he majority of Muslim women wear \textit{Hijab} . . . to obey God, and to be known as respectable women, as stated in the . . . \textit{Qur’an}. . . . [They] embrace the veiling act . . . as a way for them to express their own surrender to God,” which causes them to “feel closer to God and spiritually more satisfied.”\textsuperscript{320}

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\textsuperscript{315} \textit{CATECHISM OF THE CATHOLIC CHURCH}, par. 1900 (“The duty of obedience requires all to give due honor to authority and to treat those who are charged to exercise it with respect, and, insofar as it is deserved, with gratitude and good-will.”).


\textsuperscript{317} \textit{Id.} at 25.

\textsuperscript{318} Kamal-Deen Olawale Sulaiman & Fatai Gbenga Raifu, \textit{Investigating the Importance of Wearing Hijab by Muslim Women}, 5 \textit{J. ISLAMIC STUDIES IN INDON. & SE. ASIA} 1, 6 (2020).

\textsuperscript{319} \textit{Id.} at 11.

\textsuperscript{320} \textit{Id.} at 10, 12.
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**Judaism.** Obedience is a central feature of Judaism. Like other religions, Judaism links obedience to blessings and disobedience to punishment. Additionally, the Jewish believe they should obey God’s commandments because it would be unwise not to, and because the commandments are ethical and moral. Moreover, they see obedience to the commandments as part of their covenantal relationship with God, whereby God promised to enter into a relationship with the children of Israel that included giving them a homeland and rewarding them with prosperity in exchange for their obedience to God’s commands. Within Judaism, obedience to commandments is key to developing self-discipline. Rabbi Berel Wein teaches that obedience “is simply a test of faith and a willingness to obey a higher authority, even if one’s own intellect and nature cannot fathom the reason for the command itself.” “In effect,” he explains, “we are being taught that obedience is the necessary ingredient for human discipline and without human discipline people are little more than uncontrollable wild animals.” Thus, for many Jewish people, observing religious holidays, refraining from working on the Sabbath, and adhering to certain dress and grooming requirements is essential to their very existence.

**Latter-day Saintism.** Members of The Church of Jesus Christ of Latter-day Saints (sometimes referred to as “Mormons”) believe God requires complete obedience to His commands. In addition to the New Testament refrain that “[n]o man can serve two masters[,]” Latter-day Saint scripture teaches that “the Lord cannot look upon sin with the least degree of allowance . . . .” Although Latter-day Saints believe in the concept of repentance, they also believe it is only through obedience to God’s commandments

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322. Id.
323. Id.
325. Id.
326. Matthew 6:24 (King James).
327. DOCTRINE AND COVENANTS 1:31. See also THE BOOK OF MORMON, Alma 45:16 (“Thus saith the Lord God—Cursed shall be the land, yea, this land, unto every nation, kindred, tongue, and people, unto destruction, which do wickedly, . . . for the Lord cannot look upon sin with the least degree of allowance.”).
that a person can gain eternal life and live in God’s presence. For Latter-day Saints, obedience is not only important to their eternal welfare but is a key component of their daily living: They believe there is a direct link between obedience and earthly blessings, and also that obedience to the commandments is a way to show one’s love for God.

Seventh-day Adventism. Adventists are perhaps best known for their strict Sabbath observance from sundown on Fridays to sundown on Saturdays. Their refusal to perform work during their Sabbath has generated more religious accommodation litigation than perhaps any other religious requirement. Adventists believe the Sabbath is a “sacred day” that must be kept holy by “ceasing from the work of the week and reflecting on what [God] has done for us.” Their church teaches that “[t]he Sabbath encompasses our entire relationship with God” and “points men and women to the spiritual and to the personal.” For Adventists, “[t]he consequences for forgetting the Sabbath day to keep it holy are serious[,]” for “[i]t will lead to the distortion and eventual destruction of a person’s relationship with God.” The Church recognizes that to outsiders, its position on the Sabbath may seem extreme or irrational, but explains:

Sabbath keepers may have to face resistance at times because of their commitment to God to keep the Sabbath holy. To those who do not recognize God as their Creator, it seems arbitrary or inexplicable for someone to cease from all work on the Sabbath day for merely religious reasons. Meaningful Sabbath observance

328. See Joseph B. Wirthlin, Live in Obedience, The Church of Jesus Christ of Latter-day Saints (Apr. 1994), https://www.churchofjesuschrist.org/study/general-conference/1994/04/live-in-obedience?lang=eng (“We all want you to succeed in this life and to qualify for the greatest of God’s gifts—eternal life in the celestial kingdom. To achieve your goals in this mortal life and prove yourselves worthy of eternal blessings, learn to obey. There is no other way. Obedience brings great strength and power into your lives.”).

329. See Obedience, The Church of Jesus Christ of Latter-day Saints, https://www.churchofjesuschrist.org/study/manual/gospel-topics/obedience?lang=eng (last visited Sept. 25, 2023) (“One reason we are here on the earth is to show our willingness to obey Heavenly Father’s commandments. God gives commandments for our benefit. Obedience to the commandments leads to blessings from God and shows our love for Him.”).


332. Id.
testifies to the fact that we have chosen to obey God’s commandment. We thus recognize that our life is now lived in obedience to God’s Word. The Sabbath will be a special test in the end time. The believer will have to make a choice either to give allegiance to God’s Word or to human authority.\textsuperscript{333}

Thus, for Adventists, keeping the Sabbath holy by not performing any work is a “special test” that signifies one’s allegiance to God instead of to man.

A common theme among these religions, and many others, is that God requires complete obedience and devotion. For religiously devout employees who believe they must be fully obedient to their understanding of God’s will, an accommodation is only useful if it eliminates the conflict between their job and their religion. A partial accommodation is unhelpful because it only allows for partial obedience—and partial obedience is disobedience. Therefore, a religiously devout employee’s insistence on full accommodation does not stem from selfishness or intransigence but from the sincere belief that their very salvation hangs in the balance.\textsuperscript{334} This is what differentiates religious conflicts from other types of work conflicts. An employee who wishes to have Wednesday nights off so he can participate in a bowling league, or who desires to grow a long beard to look more fashionable, may be able to live with his employer giving him every other Wednesday night off, or his employer allowing him to grow a short beard. While the employer did not give the employee everything he wanted, the ability to bowl some of the time and to have at least some facial hair is arguably better than nothing because bowling and beards are not existential matters. By contrast, for the employee who believes it is a sin to ever work on Sunday or to cut his beard at all, giving him every other Sunday off and allowing him to keep a short beard are not better than nothing; his salvation may be in jeopardy because he is unable to fully obey his God’s commands.

In imposing a religious accommodation requirement, Congress understood the difference between the employee who wants work off so he can bowl and the employee who needs work off so he can observe his Sabbath. If Sabbath observance (and other forms of

\textsuperscript{333} Id. (citing Revelation 14:7, 12).

\textsuperscript{334} See, e.g., Opuku-Boateng v. California, 95 F. 3d 1461, 1464 (9th Cir. 1996) (noting that the employee refused to work on his Sabbath out of concern for his ultimate salvation).
religious expression) were a matter of mere preference, Congress would never have imposed a duty on employers to accommodate such behavior. In general, Title VII prohibits status- rather than conduct-based discrimination. Put differently, the statute protects traits that are immutable (i.e., status) but not traits that are mutable (i.e., conduct).\(^{335}\) Thus, as important as race, color, national origin, or sex-based conduct may be to an individual’s identity, employers have no obligation to accommodate such conduct. That Congress saw fit to amend Title VII to protect religious conduct, when it has made no similar effort to protect other trait-based conduct, is a clear indicator that it considers religious conduct fundamentally different from other forms of identity expression. In effect, Congress deemed religious conduct immutable—something a person cannot (or should not be expected to) change about themselves.\(^{336}\)

Courts that do not require full accommodation essentially take the position that religious conduct is mutable—a matter of choice or mere preference.\(^{337}\) Justice Sandra Day O’Connor said as much in Estate of Thornton v. Caldor, Inc., a case in which the Supreme Court struck down a Connecticut statute that granted employees the absolute right to not work on their Sabbath.\(^{338}\) She reasoned in her concurrence that the law was unconstitutional because it gave Sabbath observers “the right to select the day of the week in which to refrain from labor.”\(^{339}\) In response, Professor McConnell quipped that “[i]t would come as some surprise to a devout Jew to find that he has ‘selected the day of the week in which to refrain from labor,’

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335. See Kaminer, supra note 34, at 454 (“The federal courts explicitly distinguish between mutable and immutable traits—or status and conduct—when deciding most Title VII cases.”).
336. See Clarke, supra note 35, at 28 (explaining how more contemporary notions of immutability focus on the centrality of a trait to a person’s identity rather than whether the person was born with the characteristic).
337. See Kaminer, supra note 34, at 479 (“In making this determination [that less than full accommodation is required], these courts are essentially stating that it is reasonable to require a religious employee to alter or compromise on his religious conduct, which is only possible if religious conduct is mutable. Therefore, in holding that employees who have to alter their religious conduct have been ‘reasonably accommodated,’ courts clearly imply that religious conduct is mutable.”).
339. Id. at 711 (O’Connor, J., concurring).
since the Jewish people have been under the impression for some 3,000 years that this choice was made by God.”

Two problems arise when courts consider religious conduct mutable. First, if religious conduct is merely a choice, a court may be inclined to require the employee to compromise their beliefs rather than receive a full accommodation. This is precisely what happened in Sturgill, where the Eighth Circuit held that “[b]ilateral cooperation under Title VII . . . requires accommodation by the employee, and a reasonable jury may find in many circumstances that the employee must either compromise a religious observance or practice, or accept a less desirable job or less favorable working conditions.” The court framed its observation that an employee may need to compromise their religious beliefs as part of the “bilateral cooperation” that Title VII requires. Such requirement does not derive from the statute but rather stems from the Supreme Court’s observation in Ansonia that some courts had noted that “‘bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee’s religion and the exigencies of the employer’s business.’” In any event, cooperation is not synonymous with compromise, as several courts have recognized, particularly when it comes to a person’s religious beliefs. In Ansonia, the Supreme Court did not suggest or even insinuate that an employee has any obligation to compromise their religious beliefs in the name of bilateral cooperation. The accommodation at issue in that case, use of unpaid leave for days


341. Sturgill v. United Parcel Serv., Inc., 512 F. 3d 1024, 1033 (8th Cir. 2008). See Roblyer, supra note 16, at 1699 (arguing that the Sturgill court “treated these beliefs as easily alterable characteristics comparable to an employee’s desire to leave work early on bowling league night or take a family trip to the beach”).

342. Sturgill, 512 F. 3d at 1033.


344. See, e.g., Crider v. Univ. of Tenn., Knoxville, 492 F. App’x 609, 613 (6th Cir. 2012) (holding that religious accommodation requires cooperation but not compromise on the part of the employee).

345. See Keith S. Blair, Better Disabled Than Devout? Why Title VII Has Failed to Provide Adequate Accommodations Against Workplace Religious Discrimination, 63 ARK. L. REV. 515, 542 (2010) (“[I]t would be incongruous with Title VII to require an employee to compromise a religious belief in order to accommodate a religious conflict.”).
not worked, did not require the accommodation seeker to compromise his beliefs in the slightest. The only compromise required was wholly secular: the teacher would not be paid for the days he did not work.346 Thus, bilateral cooperation is not a call for employees to compromise their religious beliefs, nor should it be construed as a basis for offering an employee less than a full accommodation. Bilateral cooperation means an employee may need to be open to certain changes in the terms or conditions of their employment in exchange for receiving a full accommodation.347

The second problem with courts failing to recognize the immutability of religious conduct is that it opens the door for judicial scrutiny of the reasonableness of an employee’s religious beliefs and invites courts to replace the employee’s determination about how to worship with their own judgment on the matter.348 This is essentially what courts do whenever they deem an accommodation reasonable that does not eliminate the employee’s conflict. For instance, in Richards v. Walden Security, the district court determined that the reasonableness of an employer’s offer to allow an employee to keep a quarter-inch beard, when his religion prohibited him from shaving at all, was “best decided by the fact finder.”349 The court’s message to the employee was clear: the reasonableness of his religious belief was not for him, but for a jury, to decide. If the jury were to determine the employer’s offer was reasonable, it would in effect be telling the employee that his belief against shaving was unreasonable and that keeping a short beard should be good enough.350 This, of course, is preposterous and runs contrary to the longstanding recognition that courts should eschew

346. Ansonia, 479 U.S. at 70.
347. Such changes, however, must not “unnecessarily disadvantage the employee’s terms, conditions, or privileges of employment.” COMPLIANCE MANUAL, supra note 66, at § 12-IV.A.3.
348. See Roblyer, supra note 16, at 1702 (“How far must an employee compromise a belief? Must the employee compromise only beliefs that are not all that important (and who will determine which ones are central and which ones merely corollary)? Will employers and courts dictate to believers which of their beliefs are protected from compromise and which are outside legal protection? . . . Will employees who observe many religious holidays be required to choose the ones they think they absolutely must observe? Worse, will the employer or court judge which ones they should cease and which ones they can observe?”).
350. See EEOC v. JBS USA, LLC, 115 F. Supp 3d 1203, 1229 (D. Colo. 2015) (noting the employer’s argument that although the prayer opportunities it offered to Muslim employees were “not perfect,” they were “reasonably’ close to Islamic prayer times.”).
inquiry into an employee’s religious beliefs and practices whenever possible. This aversion to judicial inquiry into religion can be traced back to this country’s founding. John Adams once declared that “[n]othing is more dreaded than the [n]ational [g]overnment meddling with [r]eligion[,]” and James Madison observed that “[t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.” By permitting employers to provide less than full accommodations, courts usurp “a religious [individual’s] right to shape [their] own faith” and impose their own view on how a person should obey their God.

As this Part demonstrates, requiring full accommodation is consistent with the nature of religious devotion. For many religious individuals, partial obedience is not an option; their religions require full devotion—“a complete surrender” to their God. For these individuals, “faith is not a garment to be slipped on and off; it is a quality of the human spirit, from which it is inseparable.”

Obedience is not simply a choice or a preference; it is essential to

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351. See NLRB v. Cath. Bishop, 440 U.S. 490, 502 (1979) (warning that “the very process of inquiry” regarding religious belief can violate the Establishment Clause); Univ. of Great Falls v. NLRB, 278 F. 3d 1335, 1341 (D.C. Cir. 2002) (referring to religious examination and inquiry by courts and other governmental entities as “offensive” (quoting Mitchell v. Helms, 530 U.S. 793 (2000)).

352. Letter from John Adams to Benjamin Rush (June 12, 1812), in OLD FAMILY LETTERS, SER. A 391, 393 (Alexander Biddle ed., 1892).


356. See L. Nelson Bell, Victory Through Surrender, CHRISTIANITY TODAY (Jan. 15, 1971), https://www.christianitytoday.com/ct/1971/january-15 (“One of the paradoxes of the Christian life is that victory must be preceded by surrender, not a once-for-all act of submission of the will to Jesus Christ but a daily surrender of heart, mind, and body to the Lordship of Christ.”).

357. John Witte, Jr., Introduction, in CHRISTIANITY AND HUMAN RIGHTS, 8, 42 (John Witte, Jr. & Frank S. Alexander eds., 2010) (quoting the Ecumenical Orthodox Patriarch Bartholomew).
their very being. An accommodation that only partially eliminates the conflict fails to recognize this reality. It runs counter to the nature of religious devotion by allowing employers and courts to impose their own views of how a person should observe their religion. For the religiously devout, “close enough” is not enough. An accommodation that only partially resolves their conflict is no accommodation at all; they are still forced to choose between their employer and their God.

IV. POTENTIAL IMPLICATIONS

As it stands, whether an employee is entitled to a full accommodation depends largely on where they reside. In some circuits, the answer is yes; in others, the answer is no—and in still others, the answer is yet to be determined. Thus, the most immediate implication of a full-accommodation rule would be to create a uniform right to religious accommodation that no longer depends on geography. A full-accommodation requirement would not guarantee that an employee would always receive an accommodation that eliminates the conflict between their job and their religion, as Title VII exempts employers from providing accommodations that would impose undue hardship. But in situations where an employee can be accommodated without undue hardship, a full-accommodation requirement would ensure the employee is able to maintain their employment without having to compromise their religious beliefs. The employee may have to make certain secular concessions, such as taking unpaid leave or moving to a less desirable shift, as a tradeoff for full accommodation. This is not a perfect solution, but at least the employee would not be put in a position of having to decide whether to compromise their religious beliefs to keep their job.

Despite the clear benefits of a full-accommodation rule for employees, there is potentially one major drawback. Ironically, a full-accommodation rule could result in fewer accommodations. This is because it would generally be more costly for an employer to offer a full accommodation than a partial accommodation. Because of this additional cost, an employer may opt to provide no accommodation at all, if it could establish undue hardship by demonstrating that a full accommodation would impose

“substantial increased costs in relation to the conduct of its particular business.”

Returning to the hypothetical posed in the Introduction, suppose a Christian employee requests Sundays off so he can observe his Sabbath. If the employer grants the request, the employee would be fully accommodated, but the employer would have to pay another employee eight hours of overtime to cover the shift each week. If the employer could instead give the employee Sunday mornings off to attend his church services and require him to work a later shift, the employee would not be fully accommodated, but the employer would avoid the substantial financial cost of overtime because it could have him swap shifts with somebody already scheduled to work that day. If full accommodation were required, the employer could refuse to accommodate, assuming the cost of accommodation would be substantial under Groff. Consequently, the accommodation seeker would arguably be in a worse position than if the employer had offered a partial accommodation, because now he would receive no accommodation at all. If this is the case, is a full-accommodation requirement wise?

For at least three reasons, the answer is resoundingly “yes.” First, it may not be the case that the employee is actually worse off by receiving no accommodation instead of a partial accommodation. As discussed throughout this Article, for the religiously devout, a partial accommodation is no accommodation at all because it still forces the employee to choose between their religion and their job. The employee in this hypothetical may not feel the offer to let him work a later Sunday shift is helpful at all, since he would still be forced to violate his Sabbath.

Second, the concern that a full-accommodation requirement would result in fewer accommodations may be at least partially resolved by the Supreme Court’s clarification in Groff that undue hardship means “substantial increased cost” rather than anything.
“more than a de minimis cost.”362 Full accommodation will almost always result in more than a de minimis cost (the old standard for undue hardship), whereas a partial accommodation may not do so. Suppose a restaurant server requests to leave work fifteen minutes early on Wednesday nights to attend a Bible study class. If the employer allows this every week, it will result in the server’s coworkers having to cover his tables for an hour or more each month—more than a de minimis cost. But if the employer could instead permit the employee to leave early just once per month, his coworkers would only have to cover his tables for fifteen minutes more per month—less than a de minimis cost. If the de minimis standard were still applicable, a full-accommodation requirement might dissuade the restaurant from offering any accommodation: a full accommodation would impose more than a de minimis cost, and a partial accommodation would not be reasonable. The server arguably would be worse off than if the restaurant had given him the option of leaving early once per month. By contrast, under the heightened “substantial increased cost” standard for undue hardship now in place, a full-accommodation requirement does not change the server’s likelihood of receiving an accommodation. If requiring coworkers to cover the server’s tables for fifteen minutes per week would not amount to a substantial increased cost, a full-accommodation requirement would not decrease the likelihood of accommodation. Instead, such a requirement would ensure the server does not have to choose between his job and his religion.

A third possible response to this problem is for courts to follow EEOC guidance. The Commission takes the position that “[i]f all accommodations eliminating such a conflict would impose an undue hardship on an employer, the employer must reasonably accommodate the employee’s religious practice to the extent that it can without suffering an undue hardship, even though such an accommodation would be ‘partial’ in nature.”363 The EEOC supports this position by referencing Knight v. Connecticut Department of Public Health, a Second Circuit case that upheld a partial accommodation as reasonable.364 The employee requested permission to evangelize at all times, including with customers, but

362. Id. (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)).
363. COMPLIANCE MANUAL, supra note 66, at § 12-IV.A.3; see also Amicus Brief—Patterson, supra note 182, at 1.
the employer denied this request based on undue hardship.\textsuperscript{365} The employer instead offered to allow the employee to evangelize whenever she was not discussing state business with customers.\textsuperscript{366} Although the accommodation did not fully eliminate the conflict, the court deemed the accommodation reasonable based on the rationale that something is better than nothing.\textsuperscript{367}

The EEOC’s approach has some logical appeal, but it sends the wrong message—and, in fact, no court has ever even referenced it in a published opinion. The approach is problematic because it undermines the EEOC’s overarching position that an accommodation must eliminate work conflict to be reasonable. Essentially, the EEOC takes the view that an accommodation must fully eliminate the conflict, unless the employer would be unduly burdened, in which case the accommodation need only be partial. This signals that religious conduct is not immutable, and that whenever a full accommodation would impose undue hardship, it is the employee who must compromise their religious beliefs by accepting a partial accommodation.

As I have argued elsewhere, an alternative approach would be for courts to incentivize employers to offer to accommodate the employee as much as they can without suffering undue hardship, even though the accommodation would not fully eliminate the conflict between the employee’s job and religion.\textsuperscript{368} The employee could then choose whether to accept the accommodation, in which case they would waive any claim for failure to accommodate, or they could reject the accommodation and bring suit.\textsuperscript{369} The prospect of immunity could motivate many employers to offer the best accommodation possible, thus allowing employees to choose for themselves whether a partial accommodation is better than no accommodation. Under this approach, an employee would not be forced to compromise their religious beliefs but would remain free to challenge the reasonableness of the employer’s accommodation efforts.

\textsuperscript{365} Id. at 161.
\textsuperscript{366} Id. at 168.
\textsuperscript{367} Id.
\textsuperscript{368} Restoring Reasonableness, supra note 31, at 1721.
\textsuperscript{369} Id.
CONCLUSION

This Article is filled with examples of individuals who were forced to make the “cruel choice” between their job and their religion because their employers offered them accommodations that only partially eliminated the conflict between their religious beliefs and their jobs. Like millions of religiously devout workers, they believed they must be fully obedient to their understanding of God’s will or risk their eternal salvation. These employees declined their employers’ proposals and lost their jobs because of their faithfulness.

More than fifty years ago, Congress sought to protect religious employees from this very dilemma by amending Title VII to require employers to “reasonably accommodate” employees’ religious practices in the absence of undue hardship. Some courts interpret the reasonable accommodation requirement to mean an accommodation must fully eliminate the conflict between an employee’s job and their religious beliefs, while others maintain that an accommodation can be reasonable even if it only partially eliminates the conflict. This Article argues that an accommodation is only reasonable if it fully eliminates the conflict. Indeed, a full-accommodation rule is indispensable to protecting employees from having to choose between their religious beliefs and their jobs, thus fulfilling Congress’s intent.

Further, this Article demonstrates that a full-accommodation rule is consistent with the plain meaning of the term “reasonably accommodate.” It also comports with legislative intent, as the religious accommodation amendment was proposed by a senator whose purpose was to protect Sabbatarians like himself from having to perform work on their holy day. Moreover, although the Supreme Court has never directly addressed this issue, there is much in its accommodation jurisprudence—particularly after Abercrombie—to suggest the Court reads Title VII’s religious

[370. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting) (“[A] society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job.”).]
[372. See supra Section I.C.]
[373. See supra Section II.A.]
[374. See supra Section II.B.]
accommodation provision as requiring full accommodation.\textsuperscript{375} And while the Supreme Court’s position may be implicit, the EEOC has left no doubt where it stands. The agency has long maintained that an accommodation that merely lessens the employee’s conflict is not reasonable.\textsuperscript{376}

There are multiple justifications for a full-accommodation rule, but perhaps the most important reason is that the requirement captures the reality of religious devotion for millions of people of faith.\textsuperscript{377} Religious conflicts are fundamentally different from secular conflicts; to the believer, such conflicts may put their very salvation at risk. In \textit{EEOC v. University of Detroit}, the Sixth Circuit sided with Robert Roesser, an engineering professor who lost his job after turning down a partial accommodation.\textsuperscript{378} More than thirty years later, Professor Roesser filed an amicus brief urging the Supreme Court to grant certiorari in a case similar to his own.\textsuperscript{379} In the brief, he offered this insight into why a full-accommodation rule is vital:

\textit{Amicus} submits this brief to highlight the national importance of this case for Catholics, Seventh-day Adventists, and all other employees of faith who believe that they must be fully obedient to their understanding of God’s will. Partial accommodation is partial obedience to God. \textit{Amicus} would not render partial obedience, even though it cost him his faculty position. \textit{Amicus} desires to uphold the hard fought vindication of his rights rendered so many years ago in the Sixth Circuit.\textsuperscript{380}

As Professor Roesser argues, the only way to reasonably accommodate an employee who believes they must be fully obedient to their religious precepts is to grant them an accommodation that fully eliminates the conflict between their religion and their job. Anything less simply will not do.

As the American workforce continues to grow more religiously diverse,\textsuperscript{381} conflicts between employers’ work requirements and

\begin{itemize}
  \item \textsuperscript{375} See supra Section II.C.
  \item \textsuperscript{376} See supra Section II.D.
  \item \textsuperscript{377} See supra Part III.
  \item \textsuperscript{378} EEOC v. Univ. of Detroit, 904 F.2d 331, 335 (6th Cir. 1990).
  \item \textsuperscript{379} Amicus Brief – Roesser, supra note 355, at 2.
  \item \textsuperscript{380} Id.
  \item \textsuperscript{381} DIANA L. ECK, A NEW RELIGIOUS AMERICA 1-6 (1st ed. 2001) (explaining that although the United States has always been a country of many religions, the immigrations of the last several decades have expanded the diversity of religious life exponentially).
\end{itemize}
employees’ religious beliefs will likely become even more commonplace. If we are ever to approach Senator Randolph’s goal of “assur[ing] that freedom from religious discrimination in the employment of workers is for all time guaranteed by law[,]”\textsuperscript{382} requiring employers to provide full accommodations, in the absence of undue hardship, is a critical starting point.

\textsuperscript{382} 118 Cong. Rec. 705 (1972).
Don’t Say Gay or God: How Federal Law Threatens Student Religious Rights and Fails to Protect LGBTQ Students

Stephen McLoughlin, Esq.*

Federal law requires schools to protect students from discrimination based on their sexual orientation and gender identity. This protection is based on the principle that students must be free to explore their self-identity within the school environment as part of their intellectual development. Thus, schools must eliminate speech that threatens LGBTQ students based on their gender identity or sexual orientation. However, schools must also protect free speech and religious rights. Indeed, the expression of religious beliefs is also crucial to intellectual growth. Thus, schools must develop student speech policies that protect LGBTQ students from harmful speech while protecting controversial religious student speech. Unfortunately, federal law fails to provide clear guidance to help schools find this balance. Instead, federal law requires schools to limit speech that may cause “psychological trauma.” This vague requirement causes schools to adopt overly broad speech codes restricting controversial religious speech. These undefined speech codes also fail to target the specific speech that causes harm to LGBTQ students. To help schools find the necessary student speech balance, this Article proposes a new conception of harmful student speech based on social science’s insight into the specific features of speech that threaten LGBTQ students. This “Harmful Anti-LGBTQ Student Speech” concept will allow schools to eliminate speech that causes psychological trauma while protecting controversial speech necessary for religious identity development. By utilizing social science, this Harmful Anti-LGBTQ Student Speech conception will enable schools to create an educational environment that supports the intellectual development of all students.

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INTRODUCTION

Should schools eliminate religious student speech that is hostile toward transgender and gay students? Federal law generally requires schools to protect LGBTQ1 students from harassment and discrimination.2 This protection against harassment includes protection against speech that threatens students based on their sexual orientation or gender identity.3 At first blush, this principle may seem uncontroversial. However, it becomes more complex when schools address complicated issues regarding the conflicts between religious beliefs and gender identity and sexual orientation. Beyond harassment, schools must determine how to handle complicated topics such as student sexuality, parental upbringing rights, facility usage, privacy concerns, and athletic participation.4 Regardless of how the law or schools address these issues, students will likely have strong opinions, many of which are based on sincerely held religious beliefs.5

1. The term LGBTQ is generally defined as “lesbian, gay, bisexual, transgender and queer[,]” although the Q sometimes stands for “questioning” to represent people who are in the process of figuring out their sexual orientation or gender identity. Alia E. Dastagir, LGBTQ Definitions Every Ally Should Know for Pride Month (and All Year Long), USA TODAY (June 2, 2022), https://www.usatoday.com/story/news/nation/2022/06/02/lgbtq-glossary-ally-learn-language/7469059001. See also Kathleen Conn, Salvaging and Separating the 2020 Title IX Regulations, 386 EDUC. L. REP. 557, 580 (2021).


While schools must limit speech that creates a “hostile environment” for LGBTQ students, schools must also recognize that students retain free speech and religious rights within the school walls. Thus, schools must balance eliminating harmful speech that threatens LGBTQ students and protecting “controversial speech” to uphold religious and free speech rights.

Current federal law does not provide clear guidance to enable schools to address religious-based student speech concerning LGBTQ issues or “religious LGBTQ student speech.” This “religious LGBTQ student speech” includes any students speech that addresses LGBTQ issues from a religious perspective. For example, students may express their opinions regarding the validity of “gay marriage” from a religious perspective or discuss their religious beliefs about homosexuality. Instead, the prevailing federal court cases suggest that schools must eliminate religious LGBTQ student speech if it harms the right of other students “to be let alone” by creating “psychological injury.”

These undefined standards provide little guidance to enable schools to find the balance needed to protect LGBTQ students while upholding student religious and free speech rights. Indeed, the law and society create a toxic brew of influences that de-emphasize the importance of student speech and falsely suggest religious beliefs are uniformly hostile toward LGBTQ students. As a result, schools are encouraged to adopt various vague speech codes that eliminate


any form of speech that appears hostile toward LGBTQ people.\textsuperscript{10} These unclear speech codes threaten to eliminate student religious speech and the general expression of religious beliefs.\textsuperscript{11} In response, multiple states have adopted regulations, such as Florida’s “Don’t Say Gay Law” that overcompensate by limiting LGBTQ student expression.\textsuperscript{12} Texas has attempted to pass a vague law to generally protect religious discourse, but the law has been subject to constitutional challenges.\textsuperscript{13}

The current landscape has forgotten the goal of education, which is to protect and promote the development and growth of all students.\textsuperscript{14} Instead of encouraging the exchange of ideas necessary for a vibrant educational environment, student speech codes threaten religious identity development and create an artificial environment in which complex LGBTQ issues are ignored out of fear of violating the law.\textsuperscript{15} This result harms all students because it prevents them from having the open and honest discussion necessary to develop their personal belief system by robbing them of the ability to experience and face differing opinions.

This Article proposes that the law refocus on the education system’s primary goal of supporting and promoting the self-identity development and intellectual growth of all students.


14. John E. Taylor, Tinker and Viewpoint Discrimination, 77 UMKC L. Rev. 569, 630 (2009) (“The difficulties are especially great where the controversial student speech is religiously motivated, as much controversial speech in the schools surely is.”).

Indeed, social science demonstrates that self-identity development involves both sexual identity development and spiritual or religious belief development.\textsuperscript{16} While the law generally requires schools to pursue these goals, it provides little guidance regarding how these goals apply to religious speech and LGBTQ issues. However, social science offers insight that can help schools pursue both goals simultaneously.\textsuperscript{17} First, social science identifies the features of speech that harm self-identity development, specifically sexual orientation and gender identity development. Second, social science identifies speech that may be controversial but is necessary to allow students to express their religious beliefs. This controversial speech also contributes to the exchange of ideas needed for the development of all students.

This Article utilizes this social science insight to propose a concept of “Harmful Anti-LGBTQ Student Speech” that will allow schools to target the speech that causes psychological injury to LGBTQ students while protecting religious speech necessary for religious identity development and, therefore, overall student development. Instead of calling for a complete revision to current law, this Harmful Anti-LGBTQ Student Speech fits within the existing law by targeting the “psychological injury” element that the courts have attempted but failed to address.

To develop this concept of Harmful Anti-LGBTQ Student Speech, Part I of this Article summarizes the current law regarding student speech and its application to LGBTQ religious speech. This section confirms the general goal of ensuring speech in schools promotes intellectual growth by protecting self-identity development. However, it also demonstrates that the law has failed to define a precise balance between eliminating speech harmful to sexual identity development and protecting religious identity development. As a result, the law encourages schools to create vague speech codes that fail to foster effective self-identity development.


Part II of this Article reviews the social science research into self-identity development. This research supports the idea that self-identity development is a critical component of intellectual growth in children and, therefore, should be supported through school speech rules. This research also establishes that both sexual identity and religious beliefs are vital to the self-identity development of students and, therefore, must be supported through clear speech codes that identify harmful speech and separate controversial speech necessary for self-identity development and expression. This Part also reviews social science research into speech and self-identity development, demonstrating that harmful and beneficial speech can be identified through certain key features.

Part III proposes the Harmful Anti-LGBTQ Student Speech concept by infusing social science research into the current legal standards to assess student religious LGBTQ speech. As demonstrated in this section, this Harmful Anti-LGBTQ Student Speech conception will enable schools to evaluate speech based on its overall effect on self-identity development. Specifically, this conception will allow schools to identify and eliminate speech harmful to both sexual orientation and gender identity development while protecting speech necessary for religious identity development. Through this Harmful Anti-LGBTQ Student Speech concept, schools can create an educational environment that genuinely protects against the psychological injury that speech can cause while supporting intellectual growth by allowing all students to explore and express their self-identity free from artificial limits or threats.

I. FEDERAL LAW AND RELIGIOUS LGBTQ STUDENT SPEECH

Federal law generally recognizes that schools must create and sustain an environment that fosters intellectual development.18 Beyond academics, the goal of supporting intellectual development requires schools to support and promote students’

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18. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (“[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”). See also Mary Crossley, Rick’s Taxonomy, 66 SYRACUSE L. REV. 641, 646 (2016); David M. Rabban, Free Speech in Progressive Social Thought, 74 TEX. L. REV. 951, 972 (1996).
self-identity development. Self-identity development requires an educational environment where students feel safe and free to explore and express their personal characteristics and beliefs, including religious beliefs and sexual identity. Thus, the law generally requires schools to create an environment that supports all aspects of student self-identity development. Federal law also recognizes the vital role that student speech plays in self-identity development and, therefore, intellectual growth. To fully explore and develop self-identity, the law has recognized that students must have the right to freely express themselves within the school environment as part of their intellectual development. Thus, schools must permit controversial speech to create the vibrant marketplace of ideas necessary for spurring and developing intellectual growth. Indeed, courts have found that schools cannot eliminate student speech just because it makes some

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19. See Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1209 (9th Cir. 2005) (discussing the goal of education to help children become “healthy, productive, and responsible adults”).

20. See Josie Foehrenbach Brown, Representative Tension: Student Religious Speech and the Public School’s Institutional Mission, 38 J.L. & EDUC. 1, 3-4 (2009) (“As such an institution, the school must undertake a complex project—providing opportunities for children to express their identities, which may have a religious dimension, while ensuring that the school maintains its identity as a state institution that exhibits equal respect for all school community members without regard to their choices in matters of religious faith.”).

21. Id. See also Evan Ettinghoff, Outed at School: Student Privacy Rights and Preventing Unwanted Disclosures of Sexual Orientation, 47 LOY. L.A. L. REV. 579, 591 (2014) (discussing the process students go through to develop comfort with their sexual identity and the need to conduct this development in school without fear of rejection).


uncomfortable or clashes with popular opinion. This protection is guaranteed by free speech and religious protections, which schools must uphold.

However, the law also recognizes that schools must limit speech that would otherwise be protected in general society if it harms the intellectual development of other students. Specifically, the law recognizes that some speech in the school context can prevent other students from fully exploring and expressing the core characteristic of their self-identity.

Therefore, the law requires schools to find a delicate balance when addressing student speech to protect self-identity development and intellectual growth. Schools must honor speech rights to allow students to explore and express their self-identities fully. However, schools must also eliminate speech that harms the self-identity development and, therefore, the intellectual growth of other students. This balance requires schools to identify harmful speech while protecting “controversial speech” or speech that makes some uncomfortable but does not rise to the level of discourse that harms intellectual growth. To identify this speech


29. See Kevin W. Saunders, Hate Speech in the Schools: A Potential Change in Direction, 64 ME. L. REV. 165, 195 (2011 (discussing cases reviewing student speech and finding that speech can be limited if it threatens the “core characteristics” of a student’s identity).


32. Mollen, supra note 31, at 1523. See also Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 680 (7th Cir. 2008) (J., Rovner, concurring) (“The First Amendment as interpreted by Tinker is consistent with the school’s mission to teach by encouraging debate on controversial topics while also allowing the school to limit the debate when it becomes substantially disruptive.”).
and help draw this line, the courts rely on the U.S. Supreme Court’s Tinker standard.\textsuperscript{33}

\textbf{A. Protecting Self-Identity Development Through the Tinker Standard}

In the seminal case \textit{Tinker v. Des Moines Independent School District}, the Court established the general standard for placing limits on student speech.\textsuperscript{34} The Court generally recognized that students do not lose their free speech rights while in school.\textsuperscript{35} However, to promote intellectual growth and create a vibrant educational environment, the Tinker Court also established that schools could and should eliminate speech that harmed the education experience of other students.\textsuperscript{36}

To identify “harmful speech,” the Tinker Court established that schools should limit speech that either substantially interferes with the operation of the school or violates the rights of other students “to be secure and to be let alone.”\textsuperscript{37} The Court developed these standards to help schools find the balance between permitting speech to allow for intellectual growth and eliminating speech that harmed student development.\textsuperscript{38} However, the Tinker test has been subject to much debate and criticism by other courts and legal scholars claiming both standards provide vague conceptions of harmful speech and therefore fail to find the balance necessary to protect the intellectual growth of all students.\textsuperscript{39}

\begin{itemize}
\item \textsuperscript{34} Tinker, 393 U.S. at 504.
\item \textsuperscript{35} Id. at 506 (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).
\item \textsuperscript{36} Id. at 507.
\item \textsuperscript{37} See Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1067 (9th Cir. 2013). See also Martha McCarthy, \textit{Anti-Harassment Policies in Public Schools: How Vulnerable Are They?}, 31 J.L. & EDUC. 52, 53 (2002) (summarizing the standards established by the Tinker Court).
\item \textsuperscript{38} Tinker, 393 U.S. at 508–09 (citing Terminiello v. Chicago, 337 U.S. 1 (1949)). See also Bonnie A. Kellman, \textit{Tinkering with Tinker: Protecting the First Amendment in Public Schools}, 85 NOTRE DAME L. REV. 367, 371 (2009).
\end{itemize}
1. The Inherently Vague “Substantial Interference” Standard

The “substantial interference” standard of student speech created by the Tinker Court allows schools to limit speech if it constitutes “material and substantial interference with schoolwork or discipline.” However, the Tinker Court and several subsequent courts interpreting the “substantial interference” standard recognized that schools should not limit all speech that could potentially disrupt school. To actively promote the free exchange of ideas necessary for educational development, the courts recognized that schools must tolerate and encourage a certain amount of controversial speech. Even though this “controversial speech” may cause discomfort, eliminating it would prevent the free exchange of ideas necessary for intellectual growth.

Thus, the “substantial interference” standard established by the Tinker Court requires schools to identify harmful speech that substantially interferes with the educational experience and separate it from “controversial speech” that may cause some students to feel uncomfortable. However, neither the Tinker Court nor subsequent cases provide much specific guidance to find this balance. Courts and scholars have criticized the “substantial interference” standard as inherently vague and encouraging overbroad speech limits. Further, neither the Tinker Court nor other courts interpreting this standard provide a clear definition of the speech that may be disruptive but does not rise to the level of

40. Tinker, 393 U.S. at 511.
41. Tinker, 393 U.S. at 508 (establishing that speech cannot be limited just because it potentially creates “undifferentiated fear or apprehension of disturbance”). See also Grayned v. City of Rockford, 408 U.S. 104, 117 (1972); Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist., 969 F.3d 12, 25 (1st Cir. 2020); Cuff ex rel. B.C. v. Valley Cent. Sch. Dist., 677 F.3d 109, 112 (2d Cir. 2012); Guiles ex rel. Guiles v. Marineau, 461 F.3d 320, 326 (2d Cir. 2006); Sypniewski v. Warren Hills Reg’l Bd. of Educ., 307 F.3d 243, 253 (3d Cir. 2002); and Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 769 (5th Cir. 2007).
42. Tinker, 393 U.S. at 512 (citing Shelton v. Tucker, 364 U.S. 479, 487 (1960)).
43. See Tenney, supra note 3.
substantial interference.⁴⁷ Indeed, several courts and scholars have offered various concepts to encapsulate controversial speech that may cause discomfort in some students but must be protected to uphold free speech rights.⁴⁸ These attempts to provide further clarity suffer from the same vagueness that plagues the “substantial interference” conception provided in Tinker.⁴⁹ This substantive interference test is especially ill-equipped to address inherently controversial speech dealing with sexual orientation and gender identity issues.⁵⁰ Thus, the courts turned to the second conception of harmful speech outlined in Tinker to address student speech about LGBTQ issues.⁵¹

2. The Underdefined “Right to be Let Alone” Standard

The Tinker Court also established that schools can limit speech if it violates the “rights of other students to be secure and to be let alone.”⁵² After Tinker, the courts largely discounted the “right to be let alone” standard when assessing student speech.⁵³ The courts

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⁴⁷. Bo Malin-Mayor, Proceduralize Student Speech, 131 YALE L.J. 1880, 1894 (2022). See also Corales v. Bennett, 567 F.3d 554, 565 (9th Cir. 2009) But see Robert H. Wood, The First Amendment Implications of Sexting at Public Schools: A Quandary for Administrators Who Intercept Visual Love Notes, 18 J.L. & Pol’y 701, 717 (2010) (“While critics have suggested that the Court has implicitly abandoned Tinker, leaving no “comprehensive First Amendment approach to public education,” the Court has yet to explicitly abandon the Tinker approach, choosing to carve out exceptions on a case by case basis.”).


⁵³. Allison N. Sweeney, The Trouble with Tinker: An Examination of Student Free Speech Rights in the Digital Age, 29 FORDHAM Intell. Prop. Media & Ent. L.J. 359, 414 (2018) (“Though the Court explicitly recognized the ‘rights of other students to be secure and to be let alone,’ this prong of the Tinker standard is perplexingly largely overlooked by lower courts and seldom cited to justify the regulation of off-campus online student speech.”).
generally found the “right to be let alone” standard unclear and undefined. However, in Harper v. Poway Unified School District, the Ninth Circuit focused on this “right to be let alone” to analyze student religious speech about LGBTQ issues specifically.

In Harper, a student, Tyler Chase Harper (“Student Harper”), wore a shirt to school with the following statements: “I Will Not Accept What God Has Condemned,” and “Homosexuality Is Shameful ’Romans 1:27’” The school required Student Harper to remove the shirt, finding it threatened and interfered with the rights of LGBTQ students. In response, Student Harper sued the school district, claiming the school’s actions violated his free speech and religious rights.

Harper justifiably found that the substantial interference standard was ill-equipped to address the complexity of speech at issue. Thus, the Harper court focused on the “right to be let alone” standard established in Tinker. After a detailed analysis of this right, the court upheld the school’s decision to limit Student Harper’s speech, finding that it violated other students’ “right to be left alone” by threatening the “core characteristics” of LGBTQ students and, therefore, creating “psychological injury.”

Harper represented a significant step in the courts’ analysis of student speech in two ways. First, Harper suggested that the “right to be let alone” standard created in Tinker should be used to assess religious-based student speech to assess its effect on LGBTQ students. Although the “substantial interference” standard received most of the attention from the courts, Harper suggested a shift in focus. Secondly, Harper attempted to clarify the “right to be let alone” standard by establishing that student speech could

56. Id. at 1171.
57. Id.
58. Id. at 1173.
59. Id. at 1177.
60. Id. at 1177.
62. Id. at 1178. See also Elizabeth M. Jaffe & Robert J. D’Agostino, Bullying in Public Schools: The Intersection Between the Student’s Free Speech Rights and the School’s Duty to Protect, 62 MERCER L. REV. 407, 418 (2011).
63. See Sweeney, supra note 53.
violate other student’s rights by attacking their “core characteristics” and, therefore, creating “psychological injury.”\textsuperscript{64} Thus, \textit{Harper} linked the “right to be let alone” to the overall goal of promoting self-identity development by suggesting speech should be restricted if creates psychological injury by attacking a person’s core characteristics.\textsuperscript{65}

Although \textit{Harper} provided some clarity to the “right to be let alone” standard by introducing psychological injury into the analysis, it provided an incomplete and one-sided assessment. As noted in Judge Kozinski’s dissent, the speech at issue caused “psychological injury” but the school district failed to utilize psychological analysis to define or identify this “injury.”\textsuperscript{66} Further, the \textit{Harper} decision addressed the relationship between speech and self-identity development by focusing on how the speech at issue affected the “core characteristics” of LGBTQ students.\textsuperscript{67} However, the \textit{Harper} decision failed to consider how limiting the speech at issue would harm the core characteristics and self-identity development of the speaker’s religious beliefs.\textsuperscript{68}

In other words, \textit{Harper} provided an incomplete picture of how speech can cause psychological injury based on its relationship to core characteristics. While the court was correct in considering how speech affected the core characteristics of LGBTQ students, it failed to balance this concern with how limiting the speech would affect the core characteristic development of the speaker.\textsuperscript{69}

Although \textit{Harper} acknowledged the religious overtones of the speech at issue, the decision did not recognize the special place that religious beliefs play in the core characteristic of

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\textsuperscript{64} Harper, 445 F.3d at 1182. See also Bowler v. Hudson, 514 F. Supp. 2d 168, 183 (D. Mass. 2007).
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\begin{flushright}
\textsuperscript{65} See Steven J. Macias, Adolescent Identity Versus the First Amendment: Sexuality and Speech Rights in the Public Schools, 49 SAN DIEGO L. REV. 791, 806 (2012) (discussing antigay or anti-identity speech).
\end{flushright}

\begin{flushright}
\textsuperscript{66} Harper, 445 F.3d at 1198–99 (“What my colleagues say could be true, but the only support they provide are a few law review articles, a couple of press releases by advocacy groups and some pop psychology.”).
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\textsuperscript{67} Id. at 1182.
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\textsuperscript{68} See Martha McCarthy, Student Expression That Collides with the Rights of Others: Should the Second Prong of Tinker Stand Alone?, 240 EDUC. L. REP. 1, 8 (2009) (“Lower courts have not uniformly applied \textit{Tinker}’s second prong in post-\textit{Harper} cases”).
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\textsuperscript{69} See infra Part II.D. See also Clay Calvert, \textit{Tinker}’s Midlife Crisis: Tattered and Transgressed but Still Standing, 58 AM. U. L. REV. 1167, 1182 (2009).
\end{flushright}
some students. Instead, the Court relied on misunderstanding and misrepresentations of religious speech. Indeed, its failure to recognize the importance of religious development and speech contributed to a line of case law that de-emphasizes religious speech’s legal protections and developmental significance in schools.

3. Student Religious Speech Stripped of its Special Status

Student religious speech has a complex and changing history. Traditionally, student religious speech is treated as a distinctive form of speech that is entitled to more protections. This special status was based on the widely held acknowledgment that people often consider religious beliefs fundamental components of their core identity. Thus, the courts assessed religious speech based on the distinctive effect it can have, both for the speaker and students subject to it. Granting religious speech special consideration fell in line with the special considerations religious activities were afforded in the Constitution.

However, in a series of decisions starting in 1993, the Supreme Court removed the special consideration granted to student religious speech. Specifically, in Lamb’s Chapel v. Center Moriches Union Free School District, the Court found that religious speech should be subjected to the same test as other viewpoint speech.

72. Lee v. Weisman, 505 U.S. 577, 592 (1992). See also Steven K. Green, All Things Not Being Equal: Reconciling Student Religious Expression in the Public Schools, 42 U.C. Davis L. Rev. 843, 867–68 (2009) (“[P]articularly within the context of public education, the Court has traditionally viewed religious speech as distinctive from other forms of speech.”).
73. Josie Foehrenbach Brown, Representative Tension: Student Religious Speech and the Public School’s Institutional Mission, 38 J.L. & Educ. 1, 2 (2009) (explaining that student religious speech received special protection because schools are “a place where children have the opportunity to express their individual and family identities, identities that may or may not place religious belief at their core, while learning to negotiate how to share the school community with others whose identities differ but who have an equivalently legitimate claim to membership.”).
74. Id.
76. For a summary of the history of student religious speech, see Green, supra note 72 at 865.
when determining its appropriateness in the school setting.\footnote{Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 385 (1993).} This decision broke with the traditional analysis of student religious speech, which suggested that religious speech should be afforded special consideration based on religion’s unique role in self-identity formation.\footnote{Id. See also Green, supra note 72, at 865.}

This change from granting school religious speech special consideration to treating religious speech the same as other speech has been criticized for failing to recognize the importance of religious speech.\footnote{See, e.g., Green, supra note 72, at 867–68 (“The equal treatment theorem, though, undervalues these distinctive qualities of religious expression within the school context.”).} Some argue that treating religious speech as just another viewpoint grants it too much protection by ignoring the potentially powerful influence it could have on others.\footnote{René Reyes, The Fading Free Exercise Clause, 19 WM. & MARY BILL RTS. J. 725, 741 (2011).} Conversely, others contend that religious speech should be given special consideration because it represents more than mere opinions but principles that guide some people’s lives.\footnote{Id. See also Green, supra note 72, at 867–68.}

Justice Thomas is often credited as the driving influence that resulted in the Supreme Court subjecting school religious speech to the same treatment as other controversial speech.\footnote{Green, supra note 72, at 868–69.} However, stripping religious speech of its special consideration led other courts, including the Harper court, to underestimate the harm that eliminating religious speech has on the educational experience and overestimate the damage religious speech can have on other students.

4. Underestimating the Harm of Eliminating Student Religious Speech

Harper has become a seminal case with respect to how the courts approach religious LGBTQ speech.\footnote{See Mark A. Perlaky, Harper v. Poway Unified School District: The Wrong Path to the Right Outcome?, 27 N. Ill. U. L. Rev. 519, 536 (2007).} The Ninth Circuit’s analysis represents how the current process used by the courts to assess student speech mishandles religious LGBTQ speech issues.\footnote{Id. See also Perry A. Zirkel, The Rocket’s Red Glare: The Largely Errant and Deflected Flight of Tinker, 38 J.L. & EDUC. 593, 602 (2009).} Harper and subsequent cases analyzing student religious speech failed to
fully consider the importance of religious speech to the development of the speaker and its contribution to the exchange of ideas necessary for student intellectual growth.\textsuperscript{85} Instead, religious speech is often treated similarly to other controversial forms of speech, often focusing solely on the potential harm of the speech to the audience but failing to consider its importance to the speaker’s self-identity development.\textsuperscript{86} This lack of consideration resulted from several misconceptions about religious speech.

\textit{a. Undervaluing the importance of the school environment for religious identity development.} The Harper court recognized that the speech at issue expressed Student Harper’s religious beliefs.\textsuperscript{87} However, it found that restricting the speech did not create an undue burden on Harper’s religious practice because he was “free to express his views, whatever their merits, on other occasions and in other places.”\textsuperscript{88} Essentially, Harper and its progeny suggest that schools can limit student religious expression because students can express their religious beliefs outside school.\textsuperscript{89} However, the court’s suggestion that schools can restrict religious speech without stifling the student’s religious rights misrepresents the importance of student religious expression and the critical role that the school environment plays in student development.\textsuperscript{90}

\textsuperscript{85} Green, \textit{supra} note 72, at 868.

\textsuperscript{86} Prior to Harper, federal courts generally recognized the importance of religious speech in student development. See David de Andrade, \textit{The Equal Access Act: The Establishment Clause v. the Free Exercise and Free Speech Clauses}, 33 N.Y.L. SCH. L. REV. 447, 461 (1988) (“The federal courts have stated that religious discussion and study satisfy the standard that student activity groups promote the intellectual and social development of students.”). See also Widmar v. Vincent, 454 U.S. 263, 267 (1981) (affirming the lower court’s determination that the “primary effect” allowing religious speech “would not be to advance religion, but rather to further the neutral purpose of developing students’ social and cultural awareness as well as [their] intellect”).

\textsuperscript{87} Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1192 (9th Cir. 2006).

\textsuperscript{88} \textit{Id.} at 1188.


\textsuperscript{90} Richard M. Esenberg, \textit{Must God Be Dead or Irrelevant: Drawing a Circle that Lets Me In}, 18 WM. & MARY BILL RTS. J. 1, 6 (2009) ("The notion that faith can be cabined into a private sphere largely concerned with metaphysical assertions is itself a claim about what religion is or should be.").
In childhood, students explore, develop, and express their religious identity through social interactions with their peers.\textsuperscript{91} Thus, healthy religious development does not occur “in private” or solely in religious settings.\textsuperscript{92} Instead, religious development occurs through social interaction with peers who may not share the same views.\textsuperscript{93} Indeed, this social interaction may help students shed some negative beliefs encouraged within their religious communities but rejected by larger society based on the harm it can cause to others.\textsuperscript{94}

For many children, the school environment constitutes the primary setting where they can interact with their peers and society to fully develop their self-identity and religious identity.\textsuperscript{95} Thus, robbing students of their ability to express their religious beliefs in school robs them of one of the primary sources of social and personal development.\textsuperscript{96} Indeed, Harper acknowledged the importance of the school environment in children’s social development.\textsuperscript{97} It upheld the school’s decision to eliminate the speech at issue by finding that speech hostile towards LGBTQ issues is especially harmful to LGBTQ students’ development in a school context.\textsuperscript{98} However, it downplayed the role of a school

\textsuperscript{91} Green, \textit{supra} note 72, at 848–49 ("Religious faith is a significant component in the lives of many children, forming their identity, values, and sense of self-worth in their developing years. A climate that respects student religious expression enhances their personal and intellectual growth while it advances freedom of expression in the aggregate.").


\textsuperscript{93} \textit{Id.}


\textsuperscript{96} Clotilde Pontecorvo, \textit{Social Interaction in the Acquisition of Knowledge}, 5 \textit{EDUC. PSYCHOL. REV.} 293, 293–94 (1993).

\textsuperscript{97} Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1185 (9th Cir. 2006).

\textsuperscript{98} \textit{Id.}
environment when assessing the religious component of the speech at issue.99

This resulted in an inconsistent portrayal of the school environment in student development. On one hand, Harper found that the school environment played a crucial role in student development and, therefore, schools should eliminate speech hostile to LGBTQ students.100 On the other hand, it found that the school environment was not essential to a student’s religious development and, therefore, schools can limit religious speech.101 Other courts followed suit, issuing opinions that downplayed the importance of the school setting in religious identity development.102

Social science demonstrates that schools constitute a crucial environment for children’s self-identity development.103 Therefore, schools must support both religious identity development and sexual identity development. To create this supportive environment, schools must allow students to express their religious and sexual identities and beliefs, even if their views are controversial or unpopular. Thus, the critical role of schools in children’s development, as acknowledged and championed by Harper, does not justify limiting religious speech.104 Instead, the importance of the school environment requires schools and the law to find a balance between respecting speech necessary for religious identity development and eliminating speech harmful to sexual identity development. Harper attempted but failed to provide this balance by mispresenting the importance of religious speech within the school environment and offering an imbalanced process for analyzing student speech. This imbalanced view pervades other


100. *Harper*, 445 F.3d at 1178–79 (“The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development.”).

101. *Id.* at 1188 (“Harper remains free to express his views, whatever their merits, on other occasions and in other places. The prohibition against the wearing of a T-shirt in school does not constitute a substantial burden on the exercise of his religious beliefs.”).


103. *Infra* Part II.C.

courts’ decisions and contributes to the general de-emphasis of student religious speech rights.  

b. Stigmatizing religious beliefs through censorship. The Harper decision also failed to recognize the harmful effect that branding religious speech as improper can have on students’ religious identity development. As part of his claim, Student Harper argued that the school’s decision to limit religious speech constituted an improper attempt to change his religious beliefs. The court rejected this argument, finding that schools have the ultimate right to teach tolerance “even if the message conflicts with the views of a particular religion.” Thus, the court found that that school was justified in eliminating Student Harper’s religious speech to protect “civility essential to a democratic society.”

By suggesting that certain religious beliefs are “intolerant” and contrary to basic “civility,” schools are telling students that certain religious beliefs will be, or should be, rejected by the larger society. Moreover, this message will encourage students to hide or be ashamed of their religious beliefs, harming their religious identity development. Indeed, schools cannot promote “tolerance” by eliminating, and thereby being intolerant of, religious speech.

Tolerance and civility require schools to find the balance between protecting speech that may make some uncomfortable and eliminating speech that threatens the self-identity development of others. Harper was correct to declare that some specific speech should be limited because it harms the rights of others to express their core sexual characteristics. However, it failed to consider the harm that banning religious speech will have on the expression of the core characteristics of religious students. Just as harmful speech will make LGBTQ students afraid to express their sexual identity,

105. See Bowman, supra note 102.
107. Id. at 1189–90.
108. Id. at 1185 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986)).
overregulating religious speech will make religious students afraid to express their religious identity.

Indeed, eliminating religious speech harms the development of religious students and the intellectual debate necessary for intellectual growth. To create an environment that fosters intellectual growth, social science indicates that schools can and should protect speech expressing an opinion that might be controversial or outside the mainstream but does not threaten others.111 Indeed, this controversial speech is necessary for religious development and the free exchange of ideas required for intellectual growth.112 To support self-identity development in all its forms, schools should only limit speech that harms the intellectual debate itself by explicitly threatening the ability of others to express their self-identity.

By deeming religious beliefs “intolerant,” the courts and schools inject their opinion of what constitutes tolerance or acceptable viewpoints into controversies that have not been resolved within larger society. While many agree that discrimination against LGBTQ students is abhorrent, there are many LGBTQ-related issues that remain unresolved in society and are a topic of mainstream debate.113

c. Harming the Educational Mission of Schools by Restricting Student Religious Speech. The Harper court also found that schools can limit religious expression as part of “performing their proper educational mission.”114 However, it failed to provide a clear or complete definition of this “educational mission” and failed to acknowledge the role that free speech and religious expression play in this mission.

Indeed, one of the main “educational missions” of schools is to instill and uphold the essential elements of democracy, as suggested in Harper.115 However, these essential elements of

111. See infra Part II.D.
113. See Tenney, supra note 3.
democracy include the principles of free speech and religious expression freedom.\textsuperscript{116} To fulfill their educational mission, schools must create an environment where students are free to express their values and be exposed to different and controversial ideas.\textsuperscript{117} Thus, the “educational mission” of schools and the “essential elements of democracy” require schools to protect religious speech, even speech critical of LGBTQ issues, to fulfill their educational mission.

*Harper* and its progeny provide an accurate but incomplete assessment of the educational environment when assessing speech. To promote the self-identity development of all students, the educational mission requires schools to protect LGBTQ students from discrimination and uphold free speech and religious expression. In other words, the educational mission of schools requires a balance between eliminating speech harmful to civility and supporting speech necessary for intellectual development, even if this speech is offensive to some. The courts have failed to find this balance by underestimating the value and importance of religious speech to the educational mission of schools.

5. **Overestimating the Harm of Religious Speech**

In addition to underestimating the harm of limiting student religious speech, *Harper* and its progeny also overestimate the harm religious speech causes to LGBTQ students. Instead of relying on social science input, the court declared that specific speech could cause “psychological injury” and should be limited by schools.\textsuperscript{118} However, by failing to define this “psychological injury” with social science input, *Harper* propagated many misconceptions about the effect of religious speech on LGBTQ students.

- **Vaguely defining psychologically injurious speech.** The *Harper* decision generally recognized the need to protect “controversial speech” that may make some students uncomfortable.\textsuperscript{119} Nonetheless, it justified limiting Student Harper’s religious speech because it went beyond controversial speech and caused “psychological injury” to


\textsuperscript{117} See Bible Club, 573 F. Supp. 2d at 1294.

\textsuperscript{118} Harper, 445 F.3d at 1189.

\textsuperscript{119} Id. at 1182.
LGBTQ students by targeting their “core characteristics.” However, the court failed to define the features of speech that cause psychological injury or how this speech can be distinguished from speech that merely causes negative emotions in some students. Instead, it concluded that the religious speech was “demeaning” to LGBTQ students, not only to their psychological health and well-being but also to their educational development.

In his dissent, Judge Kozinski demonstrated that the majority did not rely on sufficient scientific or social science analysis to support its conclusion that the speech at issue caused psychological injury. Instead, the court based its “psychological injury” conclusion on “a few law review articles, a couple of press releases by advocacy groups, and some pop psychology.” The only scientific source cited by the court to support its psychological injury finding claimed, without scientific evidence, that school underachievement is likely caused by “verbal and physical abuse at school.” However, this research did not define “verbal abuse” or demonstrate that speech without the threat of physical abuse could cause psychological injury. Judge Kozinski noted that the analysis cited by the majority would not meet the general requirements for scientific evidence established by the federal courts, which require evidence to be more than subjective belief or unsupported speculation.

Harper confirmed and established that the potential harm of anti-LGBTQ speech could be assessed based on social science, namely the “psychological injury” that can result from speech. However, Harper relied on a general conception of “psychological injury” that did not distinguish harmful speech from speech that may cause emotional distress but does not cause the harm necessary to justify censorship. Without this clarity, the...
“psychological injury” concept has been interpreted broadly to include any speech that merely causes mental or emotional discomfort.\footnote{129}{Bd. of Educ, Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 880 (1982) (Blackmun, J., concurring). See Kevin W. Saunders, \textit{Hate Speech in the Schools: A Potential Change in Direction}, 64 Me. L. Rev. 165, 169 (2011).} Indeed, social science research about the effect of speech demonstrates that the psychological injury concept established by \textit{Harper} is overly broad and threatens to swallow up speech that does not cause psychological harm but merely creates distress.\footnote{130}{See infra notes 272–74 and accompanying text.} Social science suggests this distress-inducing speech not only does not create psychological injury but can provide psychological benefits.\footnote{131}{See infra Part II.D.} Indeed, religious-based speech benefits religious identity development.\footnote{132}{See Laura Leets, \textit{Experience Hate Speech: Perceptions and Responses to Anti-Semitism and Antigay Speech}, 58 J. Soc. Issues 341, 353–55 (2002).} It can also help the development of LGBTQ students by allowing them to face and overcome stressful speech in the school environment, which is a vital component of sexual identity development.\footnote{133}{See infra notes 275–77 and accompanying text.} Thus, by failing to fully define or analyze the potential “psychological injury” that speech may cause, \textit{Harper} added to the vagueness of \textit{Tinker}’s “right to be let alone” standard by suggesting speech causing discomfort could be considered psychologically injurious and subject to limitation.

\textit{b. Confusing “Compelling Speech” with “Convincing Speech.”} The \textit{Harper} decision also justified limiting student religious speech by deeming it an improper attempt to force religious beliefs on others: “The Constitution does not authorize one group of persons to force its religious views on others or to compel others to abide by its precepts.”\footnote{134}{Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1188 (9th Cir. 2006).} However, this conclusion fundamentally misrepresents the purpose and effect of student religious speech.

The Supreme Court has separately confirmed that schools cannot limit speech simply because it is intended to convince or convert other students.\footnote{135}{See generally Kimberly T. Morgan, \textit{Can Students Do What the State Cannot Do?: The Constitutionality of Student Initiated, Sponsored, Composed and Delivered Prayers at Graduation}, advocacy groups and some pop psychology. Aside from the fact that published articles are hardly an adequate substitute for record evidence, the cited materials are just not specific enough to be particularly helpful.

be exposed to different beliefs and opinions to create the marketplace of ideas necessary for intellectual growth. In other words, intellectual development in schools requires students to engage in speech that may try to convince each other of differing viewpoints.

A central principle of most major religions is to advocate for their faith and beliefs, known as proselytizing. The underlying intent of most religious speech is not to compel compliance but to convince others and the larger society of the religious principles underlying the speech. Thus, if the courts allowed schools to limit religious discourse based on its intent to convince or even convert others, all religious speech could be eliminated.

Indeed, social science demonstrates that students generally have the cognitive capacity to recognize and resist other student speech designed to convince them of beliefs or actions contrary to their self-identity. Thus, student speech intended to change or convince other students of specific ideas, including religious beliefs, generally does not have the effect of compelling or coercing compliance from other students. Schools cannot justify eliminating religious speech just because it intends to influence others. Harper incorrectly classified student religious speech as “compelling speech” when the law and social science recognized it as protected speech designed to convince.

c. Misrepresenting student speech as school-endorsed speech. Current student religious speech jurisprudence runs contrary to basic Establishment Clause principles by conflating the relationship

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12 ST. JOHN’S J. LEGAL COMMENT. 273, 290 (1996) (discussing how schools should protect student-initiated prayer even if the underlying intent is to inspire other students to pray). See also Christina Engstrom Martin, Student-Initiated Religious Expression After Mergens and Weisman, 61 U. CHI. L. REV. 1565, 1586 (1994) (“Student proselytizing . . . is protected by the Free Speech Clause, just as students’ attempts to convince other students to join the Democratic Party constitute protected speech.”).


137. See Martin, supra note 135.


between the school’s speech and a student’s speech.\textsuperscript{140} In sum, the courts suggest that schools can limit student speech because it would be interpreted as the school’s endorsement of the underlying religious belief, in violation of the Establishment Clause.\textsuperscript{141} However, this conclusion misrepresents the Establishment Clause’s scope and underestimates students’ ability to distinguish between school and student speech.

The Establishment Clause prohibits public schools from promoting or discriminating against religious beliefs.\textsuperscript{142} With respect to religious speech, the Establishment Clause prohibits schools from promoting speech that endorses a specific religion.\textsuperscript{143} However, the Supreme Court has established that religious speech is only subjected to the Establishment Clause limitation if the speech at issue is sponsored or could be reasonably interpreted as sponsored by the school.\textsuperscript{144} Thus, the Establishment Clause plays a role when student speech is made within the context of school-sponsored events, such as graduation or school newspapers.\textsuperscript{145} However, the Establishment Clause does not require or permit schools to limit student speech just because it occurs on school grounds.\textsuperscript{146} When students speak on their own accord, their speech is not endorsed by the school and, therefore, cannot be limited based on the Establishment Clause.\textsuperscript{147}

Recent law fails schools and students on many levels by failing to distinguish and protect religious-based speech. First, by failing to protect religious speech adequately, the law fails to support the critical role religious expression plays in students’ intellectual growth and self-identity development.\textsuperscript{148} Secondly, courts have

\begin{itemize}
\item \textsuperscript{141} Id. See also Gilbert A. Holmes, \textit{Student Religious Expression in School: Is It Religion or Speech, and Does It Matter}, 49 U. MIAMI L. REV. 377, 412 (1994).
\item \textsuperscript{143} Id. See also Ralph D. Mawdsley & Steven Permuth, \textit{Distribution of Religious Materials in Public Schools}, 197 EDUC. L. REP. 7 (2005).
\item \textsuperscript{144} Bd. of Educ. of Westside Cnty. Sch. v. Mergens \textit{ex rel. Mergens}, 496 U.S. 226, 228 (1990).
\item \textsuperscript{145} Norman B. Smith, \textit{Constitutional Rights of Students, Their Families, and Teachers in the Public Schools}, 10 Campbell L. Rev. 353, 372–73 (1988).
\item \textsuperscript{146} Good News Club v. Milford Cent. Sch., 533 U.S. 98, 115 (2001).
\item \textsuperscript{147} Id. See also Smith, supra note 145.
\item \textsuperscript{148} See infra Part II.B.
\end{itemize}
failed to fully uphold students’ legal religious and free speech rights.\textsuperscript{149} Finally, this failure to support the expression of sincerely held religious beliefs eliminates the free exchange of ideas necessary to promote intellectual development in schools for all students.\textsuperscript{150} These failures are exacerbated by the law’s failure to provide clear guidance regarding the protections schools must provide to LGBTQ students.

B. The Vague and Unsettled Federal Protections of LGBTQ Students

As demonstrated by Harper, religious student speech has been de-emphasized and unsupported by the courts for various unjustified reasons. In contrast, federal law includes several regulations designed to protect LGBTQ students.\textsuperscript{151} These protections generally require schools to eliminate speech that harms LGBTQ students.\textsuperscript{152} However, the law fails to establish the specific scope of this LGBTQ student protection or adequately balance it against competing concerns, including free speech and religious rights. This vagueness, along with the current societal focus on LGBTQ rights, further exacerbates the de-emphasis of religious speech and the imbalance regarding student speech regulations, harming all students.

1. Title IX’s Protection Against Sexual Harassing Speech

Federal law addresses sex-based discrimination in schools through Title IX of the Educational Amendments (“Title IX”).\textsuperscript{153} The scope of Title IX’s protection is determined by regulation and policies created by the Office for Civil Rights of the U.S. Department of Education (OCR).\textsuperscript{154} Taken together, Title IX and the

\textsuperscript{149}. See infra Part I.C.

\textsuperscript{150}. Daniel Washburn, Student-Initiated Religious Speech in Public Schools (Chandler v. James, 180 F.3d 1254 (11th Cir. 1999)), 39 WASHBURN L.J. 273, 286 (2000).

\textsuperscript{151}. For a summary of federal protections of LGBTQ students, see Marisa S. Cianciarulo, Refugees in Our Midst: Applying International Human Rights Law to the Bullying of LGBTQ Youth in the United States, 47 COLUM. HUM. RTS. L. REV. 55, 60–68 (2015).

\textsuperscript{152}. Id. See also Emily Suski, A First Amendment Deference Approach to Reforming Anti-Bullying Laws, 77 LA. L. REV. 701, 733–40 (2017).


regulations established by OCR require schools to protect against discrimination based on sexual orientation and gender identity.155

Concerning student speech, Title IX generally requires schools to eliminate sexual speech that constitutes sexual harassment by creating a “hostile environment.”156 This “hostile environment” speech may include speech referencing gender identity or sexual orientation.157 However, the Title IX definition of what constitutes a “hostile environment” has undergone several changes, none providing a clear conception of the type of speech that creates this “hostile environment” for LGBTQ students.158 This lack of clarity fails to enable schools to differentiate harmful LGBTQ speech versus speech that may be controversial but must be protected as free speech. Thus, schools have been left to attempt to design speech policies to protect LGBTQ students based on constantly changing but uniformly vague federal conceptions of harmful LGBTQ speech.

In 2010, OCR attempted to clarify the types of speech that constitute sexual harassment and, therefore, violates Title IX.159 Through published guidance, OCR indicated that speech constitutes sexual harassment if it is “sufficiently severe, pervasive, or persistent to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school.”160 This sexually harassing speech included speech that referenced gender identity or sexual orientation.161 Thus, schools had to determine whether the speech

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155. See OFF. FOR C.R., DEAR COLLEAGUE LETTER: HARASSMENT AND BULLYING, 8 (Oct. 26, 2010) (stating that Title IX protects LGBTQ students).
158. Rohleder-Webb, supra note 157, at 33–38 (summarizing the history of Title IX and the definition of sexual harassment).
160. Id.
161. Id. (“Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target.”). See also Arthur S. Leonard, U.S. Department of Education Doubles Down on Applying Bostock Reasoning to Title IX to Protect LGBT Students, 2021 LGBT L. NOTES 6 (2021).
at issue was “severe,” “pervasive,” or “persistent” enough to interfere with a student’s ability to participate in school programs. Free speech advocates argued that this definition was too broad and arbitrary to protect free speech.\textsuperscript{162}

In 2018, the Trump Administration implemented new Title IX regulations that defined sexual harassment as speech “determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.”\textsuperscript{163} In addition, the Trump Administration enacted a separate Title IX regulation requiring schools to implement Title IX protections in a way that did not violate other Constitutional rights, including free speech.\textsuperscript{164}

While these changes were hailed by those calling for free speech protections to balance out protections against sexual harassment, the changes primarily relied on the same vague terms originally established by OCR.\textsuperscript{165} The new definition still required schools to determine if the speech at issue was “severe,” “pervasive,” and “objectively offensive” enough to interfere with the educational experience of other students.

On June 24, 2022, the Biden Administration released new revisions to the Title XI regulations, which proposed changes to the definition of sexual harassment speech yet again.\textsuperscript{166} This new definition sought to reinstate the original conception of sexual harassment before the Trump Administration’s revisions.\textsuperscript{167} Specifically, the Biden Administration defined sexual harassment as “[u]nwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person’s

\textsuperscript{163} 34 C.F.R. § 106.30.
\textsuperscript{164} 34 C.F.R. § 106.6(d)(2) (2022).
\textsuperscript{165} 34 C.F.R. § 106.44.

\textsuperscript{166} Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390-01 (proposed July 12, 2022) (to be codified at 34 C.F.R. § 106).

ability to participate in or benefit from the recipient’s education program or activity (i.e., creates a hostile environment).”

This definition was hailed by those who advocated for a more robust definition of sexual harassment. However, others argued that this definition suffers from the same vagueness and over-broadness that infected the prior sexual harassment definitions. Still, the new definition relied on the same terms and added similar vague terms, requiring school districts to consider subjective and objective “circumstances” to determine if speech creates a hostile environment.

2. The Vague and Shifting Conception of Hostile LGBTQ Student Speech

Title IX has produced several vague, shifting conceptions of sexually harassing speech. Throughout these definitions, OCR has recognized that schools cannot limit speech that is merely controversial and, therefore, must only target sexually harassing speech that creates a “hostile environment” based on the several definitions offered through Title IX. The conception of harmful sexually harassing speech has changed from definitions that focus on eliminating all forms of sexual harassment to definitions that focus on protecting free speech. However, all definitions rely on inherently vague terms and fail to provide objective guidance to


identify harmful speech and differentiate controversial speech. Further, the definitions of sexually harassing speech have been, and continue to be, subject of controversy and legal challenges, leaving schools without consistent or stable regulations guiding their speech policies.

Thus, school districts are left navigating several vague, volatile, and controversial laws to develop a speech policy to address sexual harassment speech generally and harassment of LGBTQ students specifically. Although OCR and the Title IX regulations have consistently recognized the need to balance protections against harassing speech with the need to respect free speech rights and protect “controversial speech,” the law has failed to provide clear or consistent guidance. The courts continue to rely on the Tinker standard in conjunction with Title IX to assess LGBTQ student speech, even though Tinker occurred before Title IX came into effect and is mostly ill-equipped to address the complexities of student religious LGBTQ speech.

C. The Current Legal Landscape for Religious LGBTQ Student Speech

In sum, the law fails to provide schools with the clear guidance necessary to address religious speech regarding LGBTQ issues. Instead of establishing the delicate balance between protecting against speech harmful to LGBTQ students and protecting religious rights, schools are left to navigate a legal landscape filled with conflicting, changing, and vague requirements.

The law requires schools to meet several basic requirements. Generally, schools must eliminate speech that interferes with the rights of others “to be let alone” by causing “psychological injury.” However, the law fails to clarify these standards, suggesting schools should eliminate any speech critical of LGBTQ

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173. See supra Part I.B.
175. Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 679 (7th Cir. 2008) (noting that there is a difference between religious speech that may be offensive to LGBTQ students LGBTQ harassment, which is a distinction that the Tinker standard does not address).
issues. The law also requires schools to protect against sexual harassment by removing speech that creates a “hostile environment” for LGBTQ students. However, various definitions of this sexually harassing speech offered by the law are similarly vague and subject to continuous changes and legal challenges. Conversely, the law also requires schools to uphold students’ religious and free speech rights but fails to provide guidance or explicit protections regarding religious speech. Finally, the law requires school districts to generally balance protecting LGBTQ students from harmful speech while upholding religious rights and free speech but fails to provide clear guidance establishing this balance.

The lack of clear guidance as to these requirements, along with societal influences, creates increasing pressure on schools to adopt policies that provide vague and overbroad protections to LGBTQ students without the balance necessary to support the rights and development of all students. As a result, schools have adopted similarly unclear and skewed school codes that ignore the validity of religious-based speech to eliminate any speech critical of sexual orientation or gender identity issues. Instead of upholding the self-identity development of all students, schools often focus on policies that will avoid the political blowback and potential legal problems associated with speech critical of LGBTQ issues. Instead of adopting speech policies that attempt to find the balance between religious and sexual identity development, schools are compelled to focus on sexual identity development at the expense of religious development.

To support both religious and sexual identity development, and therefore, the self-identity development and intellectual growth of

178. See supra Part I.B.
181. See supra notes 10–11 and accompanying text.
all students, the law must provide clear speech guidelines. These guidelines must find a balance between protecting free speech and religious expression to allow students to freely explore and express their self-identify while eliminating speech that threatens the self-identity development of others. To find a balance between protecting sexual identity and religious self-identity development, the law can turn to social science.

II. SOCIAL SCIENCE AND SELF-IDENTITY DEVELOPMENT

Social science provides vast insight into the components necessary to create a school environment that supports intellectual development.\(^{182}\) Social science establishes that schools must create an environment beyond the fundamentals of education that allows students to develop their self-identity to support intellectual growth.\(^{183}\) In an environment where students are free to explore, develop, and express their self-identity, students not only develop a healthy self-identity but also learn how to interact with and accept others with different identities.\(^{184}\) Thus, social science supports the general principle, also found in the law, that schools must support student self-identity development to support intellectual growth in students.\(^{185}\)

Social science broadly defines self-identity as the core beliefs and characteristics that make up a person’s self-description.\(^{186}\) Thus, self-identity is a combination of personal traits and fundamental beliefs.\(^{187}\)

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185. See supra Part IA.

186. Steven Hitlin, Values as the Core of Personal Identity: Drawing Links Between Two Theories of Self, 66 SOC. PSYCH. Q. 118, 120 (2003).

187. Id. See also Rebecca Schlegel, Joshua Hicks, Jaime Arndt & Laura King, Thine Own Self: True Self-Concept Accessibility and Meaning in Life, 92 J. PERS. SOC. PSYCHOL. 473, 475 (2009).
Healthy self-identity development occurs during adolescence and involves sexual identity development and spiritual or religious belief development. Thus, to support intellectual growth, schools must create an environment where students are free to explore, express, and develop both their sexual identity and religious identity. Student speech is vital to this supportive environment.

A. Self-Identity Development Includes Sexual Identity Development

A key component of self-identity development in adolescents involves the development of sexual identity. The term “sexual identity” generally means how a person forms romantic and relational attachments and encompasses sexual orientation and gender identity. For many young people, exploring, finding, and becoming comfortable with sexual orientation and gender identity is critical to self-identity development and intellectual growth. Although gender identity and sexual orientation development are often associated with LGBTQ students, this “sexual identity” development is necessary for all students, including cisgender and heterosexual students. A healthy sexual self-identity concept is important to healthy psychological development for all students.


189. See Beyers & Cok, supra note 188 at 148. See also Michael Shively & John DeCecco, Components of Sexual Identity, 3 J. HOMOSEXUALITY 41, 41–2 (1977).


1. Self-Identity Development and Sexual Orientation

To develop a healthy self-identity, students must feel free to “come out of the closet” and express their sexual orientation in society and school. Adolescents unable to express their sexual orientation in social settings, including school, often suffer from depression, poor self-concept, and decreased school performance. Conversely, students who can explore and express their sexual orientation in a supportive social environment are more likely to develop a healthy self-identity conception.

Thus, social science supports the general idea that students must be free to explore and express their sexual orientation in school as part of their overall self-identity development and intellectual growth. To support this expression, schools must protect against speech that harms or threatens students’ ability to express their sexual orientation. Specifically, schools must create an environment where students can express their sexual orientation without fear of harm from other students.

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2. Self-Identity Development and Gender Identity

Gender identity is a critical component of self-identity. Gender identity refers to a person’s internal sense of their gender. While most people’s gender identity matches their biological sex, many identify with a gender different from their biological sex or with alternative gender configurations such as non-binary and gender fluid. Gender identity development begins in adolescence.

Students who are unable or afraid to explore or express their gender identity are susceptible to psychological difficulties similar to those who are unable to express their sexual orientation. Specifically, stifling student gender identity expression can cause depression, anxiety, and low self-esteem. Social science also recognizes a specific psychological malady known as gender dysphoria, which develops when individuals struggle with expressing their gender identity. Further, gender dysphoria can be resolved through a social process in which children are supported in exploring and resolving their gender identity issues.

Adolescents must be free to explore and express their gender identity in social settings to develop a healthy self-identity, specifically with a peer group. Schools play a significant and vital role in facilitating a healthy development of gender identity.
role in gender identity development by providing the primary forum
where most children interact with their peer group and with
society. Thus, to promote self-identity development, schools must
ensure that students feel safe to explore and express their gender
identity. Specifically, schools must protect against student speech
that makes others afraid to explore their gender identity.

Social science supports the idea that schools must create an
environment where students can develop their “sexual identity,”
including their sexual orientation and gender identity, to promote
overall self-identity development. Specifically, students must feel
free to “come out of the closet” and express their sexual orientation
and gender identity to their peers in the education environment.

To create this supportive environment, schools must eliminate
speech that harms sexual identity development by making students
afraid to explore or express their sexual orientation and gender
identity. Thus, instead of targeting speech that creates
“psychological injury” as suggested by the courts, social science
suggests schools can target speech that threatens the self-identity
development of other students, which ultimately creates the
“psychological injury” targeted by the courts.


210. Kay Bussey, Gender Identity Development in HANDBOOK OF IDENTITY THEORY AND
RESEARCH 603, 603–28 (Seth Schwartz et al. eds., 2011).

211. Lucia F. O’Sullivan, Heino F. L. Meyer-Bahlburg & Ian W. McKeague, The
Development of the Sexual Self-Concept Inventory for Early Adolescent Girls, 30 PSYCH.

212. Id.

213. Kathleen Conn, Transgender Students on Campus: Challenges and Opportunities, 330
EDUC. L. REP. 441, 463 (2016) (“Student development theory also emphasizes the role that
colleges and universities play in the development of healthy self-identities among all
students. A more fluid understanding of sex, gender, and sexuality appears to be developing
among student affairs professionals, although these changes may not reflect students’
experiences after graduation.”).

214. Patrick Corrigan & Alicia Matthews, Stigma and Disclosure: Implications for Coming
Out of the Closet, 12 J. MENTAL HEALTH 235, 237–39 (2003). See also Chad M. Mosher, The Social
Implications of Sexual Identity Formation and the Coming-Out Process: A Review of the Theoretical

215. Marilyn S. Anglade, A Study of Sexual and Gender Identity Theories and the Legal
Implications of the Departure from the Traditional Binary Understanding of Sex and Gender, 317
EDUC. L. REP. 15, 18 (2015). See also Catherin V. Talbot, Amelie Talbot, Danielle J. Roe & Pam
Briggs, The Management of LGBTQ+ Identities on Social Media: A Student Perspective, 24. NEW
MEDIA & SOC’Y, 1729, 1740–42 (2022).
B. Self-Identity and Religious Identity Development

In addition to personal characteristics such as sexual identity, beliefs form the core of a person’s self-identity.216 Self-identity often includes a core set of religious beliefs.217 Although religious beliefs vary, most major religions develop ideas that pervade their followers’ self-identity and form believers’ religious or spiritual self-identity.218

1. Religious Identity Development in Schools

Similar to sexual identity development, religious identity development often begins in childhood.219 Furthermore, this religious self-identity development is not limited to private prayer or practice within one’s religious group but instead must be developed and expressed in general society.220 Thus, children must be able to explore and express their religious beliefs with their peer group to form a healthy self-identity.221

The school environment represents a key area for children to explore and express self-identity, including religious beliefs, as part of their overall self-identity development.222 Because the primary source of childhood social interaction with society occurs in schools, adolescents often rely on the school environment to develop their self-identity through school peer interaction.223 Further, schools provide a place where students can learn how their religious beliefs fit within larger society through the

219. See Waterman, supra note 182.
220. Id. See also Visser-Vogel et al., supra note 94, at 108–10.
responses they receive from authority figures such as teachers and administrators.\textsuperscript{224} Thus, adolescents must be free to fully explore and express their religious beliefs in school to develop their religious self-identity.\textsuperscript{225}

Indeed, social science suggests that adolescents unable to fully express their core beliefs, including their religious beliefs, in social settings such as schools are susceptible to the same psychological harm that affects students unable to express their sexual identity.\textsuperscript{226} Stifling religious beliefs can lead to depression, low self-esteem, and poor school performance.\textsuperscript{227} In addition, students unable to express their religious beliefs feel like they cannot express their true selves to their peer group and form connections necessary for intellectual growth.\textsuperscript{228} Conversely, students who can express their views, even if their peers largely reject them, benefit from learning to fit in their peer group while upholding their religious beliefs.\textsuperscript{229}

Further, the expression of religious self-identity is necessary for the overall social development of all students.\textsuperscript{230} In an environment in which students are free to exchange beliefs, students can express their views, receive feedback regarding their beliefs from other students, and be exposed to different religious viewpoints as part of their overall self-identity development.\textsuperscript{231}

Schools must support religious self-identity development to support student self-identity development and, therefore, the intellectual growth of all students. Religious identity development must be protected and promoted within schools, just like sexual

\textsuperscript{224} Id.

\textsuperscript{225} Id. at 306.


\textsuperscript{227} Id. See also Julie J. Park, Jude Paul Matias Dizon & Moya Malcolm, \textit{Spiritual Capital in Communities of Color: Religion and Spirituality as Sources of Community Cultural Wealth}, 52 URB. REV. 127, 133 (2019).

\textsuperscript{228} Park et al., supra note 227. See also Charles C. Helwig, \textit{The Role of Agent and Social Context in Judgments of Freedom of Speech and Religion}, 68 CHILD DEV. 484, 485–90 (1997).

\textsuperscript{229} See MacLeod, supra note 226.

\textsuperscript{230} REBECCA NYE, \textit{CHILDREN’S SPIRITUALITY: WHAT IT IS AND WHY IT MATTERS} 41–55 (Church House Publishing 2009).

\textsuperscript{231} Id.
identity development, to promote overall self-identity development and growth.  

2. Religious Identity Development and Sexual Identity

Religious identity development often involves beliefs regarding gender identity and sexual orientation. Indeed, the major world religions hold specific beliefs about sexual identity, including sexual orientation and gender identity. Moreover, religious beliefs about sexual identity often connect to fundamental religious beliefs about society and morality. Thus, religious beliefs about sexual orientation and gender identity cannot simply be dismissed as insignificant or peripheral ideas that can be limited without stifling students’ religious development and identity.

Although religious beliefs about gender identity and sexual orientation may appear hostile towards LGBTQ individuals, most religious beliefs about sexual identity are not intended to threaten or harm others. Instead, these beliefs focus on instituting change as part of the overall goal of promoting a worldview that is ultimately designed to help individuals and society. For example,

232. William P. Marshall, Religion as Ideas: Religion as Identity, 7 J. CONTEMP. LEGAL ISSUES 385, 400 (1996) (“To begin with, religion is more than ideas; it is also ritual and practice. Leaving these aspects of religion unprotected will therefore undercut many values that religion offers. These values include, as we have seen, religion’s particularly compelling role in the formation of an individual’s sense of self and its benefits in furthering the values of pluralism through its role in the fostering, and in the sustaining, of community. A jurisprudence that does not protect religious identity would therefore miss much of what is most valuable about religion.”).


235. Id.


238. Moon, supra note 237. See also Stacey Horn, Schooling, Sexuality, and Rights: An Investigation of Heterosexual Students’ Social Cognition Regarding Sexual Orientation and the
many religious preach the general idea of “love the sinner hate the sin.” Thus, instead of threatening or harming LGBTQ individuals, religious beliefs are often intended to convince others to adopt their worldview. Furthermore, many religious beliefs involve nuanced issues still debated in society and by social science. Indeed, social science research suggests that the general view that religion is hostile towards LGBTQ individuals is overstated.

With respect to sexual orientation, religious beliefs often involve general concerns about the over-sexualization of children by exposing children to sexually explicit material. In addition, religious speech often focuses on the rights and needs of parents to guide their child’s sexual identity development and instill religious teachings regarding sexual orientation. These beliefs do not intend to harm or threaten other LGBTQ students and do not necessarily result from an underlying hostility towards LGBTQ students but instead relate to concerns about how children are raised. Indeed, some of the issues involving the over-sexualization of students are shared by LGBTQ advocates.

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Rights of Gay and Lesbian Peers in Schools, 64 J. SOC. ISSUES 791, 791 (2008) (providing studies indicating that adolescents differentiate between their beliefs about homosexuality and the rights of others to be safe in school).


240. See supra notes 237 and 239.


242. See Horn, supra note 238.


246. Id. See also L. Kris Gowen & Nichole Winges-Yanez, Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning Youths’ Perspectives of Inclusive School-Based Sexuality Education, 51 J. SEX RSCH. 788, 790–91 (2013).
Similarly, many religious-based beliefs regarding gender identity do not result from an underlying hostility towards transgender students. Instead, they are based on concerns over privacy, safety, and parental rights to be involved in their child’s gender identity journey. Indeed, religious beliefs often support protecting transgender individuals from harm and harassment while focusing on the rights of other individuals.

Of course, some students may find these religious-based beliefs offensive or even disruptive to their educational experience. However, the law requires, and social science supports, differentiating harmful speech from controversial speech, even if the controversial speech causes distressful emotions in some. Indeed, social science suggests that speech based on sincerely held religious beliefs does not threaten sexual identity development or cause psychological injury associated with other forms of speech. Specifically, this religious-based speech enables LGBTQ students to face and overcome negative speech in the “controlled” environment of schools. Expressing these religious beliefs can also assist LGBTQ students struggling with conflicting religious beliefs. Further, this religious-based speech contributes to the overall school environment by allowing the free exchange of ideas necessary for intellectual growth.

247. Gowen et al, supra note 246.
254. Jaffe v. Alexis, 659 F.2d 1018, 1021 (9th Cir. 1981). See also Charles J. Russo, Mergens v. Westside Community Schools at Twenty-Five and Christian Legal Society v. Martinez: From...
Of course, some speech uses religious beliefs to justify threatening or harming individuals who do not conform to their beliefs, specifically regarding gender identity or sexual orientation. This threatening speech is not necessary for religious identity development, even though it claims to be tied to religion. Religious identity development is not furthered by and therefore does not require protection of ideas that intend to threaten or harm individuals. Simply stated, religious-based speech is necessary for self-identity development while hate-based speech is not. Thus, this harmful speech can and should be distinguished from speech based on sincerely held religious beliefs that do not carry the same ill intent. While the law has failed to provide definitive guidance to distinguish harmful speech from controversial speech, social science suggests that the underlying religious intent of the speech differentiates harmful speech from controversial speech necessary for religious identity development.

C. Sexual Identity and Religious Identity Development in Schools

In sum, social science demonstrates that schools must support both sexual identity development and religious identity development to create an environment that promotes overall self-identity development and intellectual growth for all students. For sexual identity development, students must be free to express
their sexual orientation and gender identity in the school environment. For religious identity development, students must be free to express their sincerely held religious beliefs, including those related to sexual identity, in the school environment. If schools stifle either sexual identity development or religious identity, students can be subject to similar psychological trauma that will harm their intellectual development. Still, the question remains, how do schools create an environment that supports self-identity development generally and both religious identity and sexual identity development specifically?

D. Speech and Self-Identity Development

Speech policies play a vital role in creating an environment that supports self-identity development. Generally, social science suggests that students must be free to fully express their beliefs and personal characteristics in the school setting as part of their self-identity and intellectual growth. This expression includes expressing religious beliefs as well as expressing sexual orientation and gender identity. The expression of religious beliefs consists of the expression of viewpoints that may seem controversial or even hostile toward LGBTQ issues. The expression of sexual identity requires students to feel safe and free to identify and express their sexual orientation and gender identity in the school environment, even if it clashes with religious principles. Thus, social science suggests schools should support student speech to allow for self-identity development in all its forms, even if some consider the speech controversial.

However, social science also recognizes that some speech can harm self-identity development by preventing others from feeling
safe exploring and expressing their identities. In other words, specific speech blocks the creation of an environment conducive to self-identity exploration and expression. Some speech can harm the sexual identity development of LGBTQ students by threatening their ability to explore and express their sexual orientation or gender identity fully. Moreover, this harmful speech about LGBTQ issues and sexual identity not only threatens sexual identity development but can cause measurable psychological injury.

Thus, social science generally supports the principle within the law that student speech should be protected unless it creates a “hostile environment” causing psychological injury, specifically through threatening students based on their sexual orientation or gender identity. However, speech causing psychological injury is not as broad of a category as the law has established. Most speech that is seemingly hostile towards LGBTQ issues does not create harm to self-identity development or the psychological injury that would justify its elimination. Instead, this “controversial speech” benefits the self-identity development of the speaker, often by promoting the speaker’s religious self-identity development, and benefits LGBTQ students by allowing them to face and overcome hostile speech within the school environment. This controversial speech is also necessary to create an educational environment that


270. Barvosa, supra note 269.

271. Leets, supra note 132 (“Hurling hate slurs in an effort to harm a person’s identity does not appear to be similar to slinging arrows at the concentric circles of a target, as some would imagine. That is, there does not seem to be a center point for the maximal damage, with the degree of hurt varying with distance to that point. Instead, there seems to be a narrow mark that delineates damage, with all the slurs outside it having no effect.”).

272. Id.

promotes intellectual growth generally through the free exchange of ideas.\textsuperscript{274}

1. The Components of Speech Harmful to Self-Identity Development

According to social science, speech harmful to self-identity, specifically sexual identity development, can be identified through specific, measurable features.\textsuperscript{275} These features distinguish harmful LGBTQ speech from “controversial speech” that may be objectionable to some but does not carry the inherent harm to self-identity development.\textsuperscript{276} Instead of relying on the general and vague conceptions of harmful speech that causes “psychological injury,” as suggested by the law, social science suggests harmful student speech can be identified and separated from controversial speech based on distinct factors.\textsuperscript{277} These features can be used to develop a “Harmful Anti-LGBTQ Student Speech” conception that will identify the particular speech that threatens sexual identity development while separating religious speech needed for religious self-identity development.

\textit{a. Individual versus general targeted speech}. Speech harmful to self-identity development can be identified based on its target.\textsuperscript{278} Speech that targets specific people by singling them out based on their actual or perceived sexual identity can harm self-identity development by making the target feel unsafe expressing their sexual identity.\textsuperscript{279} By targeting a specific person, speech can create fear and anxiety in the target, making them afraid to express their gender identity or sexual orientation fully.\textsuperscript{280}

\begin{itemize}
\item \textsuperscript{274} See supra notes 253–57.
\item \textsuperscript{275} See Leets, supra note 132.
\item \textsuperscript{277} See infra notes 282–03.
\item \textsuperscript{278} Chris Demaske, Social Justice, Recognition Theory and the First Amendment: A New Approach to Hate Speech Restriction, 24 COMM. L. & POL’y 347, 399 (2019).
\item \textsuperscript{279} Id.
\item \textsuperscript{280} Thomas H. Ollendick, Audra K. Langley, Russell T. Jones & Christina Kephart, Fear in Children and Adolescents: Relations with Negative Life Events, Attributional Style, and Avoidant Coping, 42 J. CHILD PSYCH. & PSYCHIATRY & ALLIED DISCIPLINES 1029, 1031–32
\end{itemize}
Conversely, speech that does not target individuals but instead constitutes general statements about sexual orientation or gender identity issues is less likely to cause the fear and anxiety that stifle sexual identity development. Indeed, social science suggests this “generalized targeted” speech may assist students in their sexual identity development by allowing them to confront and overcome negative comments without invoking the fear of speech that targets them personally. The school environment can further this benefit by providing a safe environment where students exchange “generally targeted” speech as part of the school’s intellectual discussions while the school implements speech policies to ensure the speech does not turn into personally targeted attacks.

Further, this “generalized targeted” speech is necessary to enable people to express their beliefs and, therefore, is essential for self-identity development. Thus, this generalized targeted speech can express sincerely held religious beliefs about sexual orientation or gender identity issues without the harm associated with individually targeted speech. Although some may claim that this generalized targeted speech causes harm by making some students feel uncomfortable, this uncomfortableness is necessary to help students overcome negative speech that does not inherently threaten self-identity development. In sum, generally targeted speech does not harm the sexual identity of other students, aids in


281. Burke et al., supra note 280.


286. See Rock, supra note 273.
the religious identity development of the speaker, and contributes to the overall exchange of ideas necessary for intellectual growth.

b. Perceived intent to threaten versus change. Secondly, social science establishes that the perceived intent of the speech determines its overall effect on self-identity development.287 Speech can harm sexual identity development if the “targets” of speech believe the speaker intends to harm or threaten them based on their sexual orientation or gender identity.288 This perceived intent may cause the target to withhold, or at least restrict, the expression of their sexual orientation or gender identity, which, in turn, harms sexual identity development.289

Conversely, speech with the perceived intent to elicit change is less likely to invoke the emotions that harm sexual identity development. 290 This “change intent” develops if the speaker’s target believes the speaker intends to convince them to change their sexual orientation, gender identity, or behaviors instead of threatening them into compliance.291 If the target believes the speech is intended to inspire change, the target is less likely to experience the fear that harms their sexual identity development.292 Instead of eliciting fear or anxiety, speech with this perceived intent to elicit change often inspires people to express their sexual identity and engage in counter-speech.293 Indeed, this “change intent” speech often invokes the robust debate and exchange of ideas necessary for intellectual growth.294 Thus, speech that intends to

292. See TEMPERMAN, supra note 291.
elicit change does not tend to harm self-identity development or create psychological injury. 295

Social science suggests that sincerely held religious beliefs regarding sexual orientation or gender identity are often driven by the intent to inspire change.296 Therefore, if the target perceives the speaker intends to express a religious belief to effect change in society, the speech is less likely to threaten the target’s self-identity development.297 Thus, the “change intent” factor will separate speech necessary for religious identity development and supportive of sexual identity development.

Of course, for some individuals, this religious speech may create negative feelings or inspire adverse reactions, causing them to feel uncomfortable expressing their sexual identity. However, schools should not eliminate speech just because it creates an adverse response.298 Indeed, social science demonstrates that part of sexual identity development includes facing and overcoming adverse reactions to one’s sexual orientation or gender identity.299 In addition, children will likely encounter even harsher language outside of school.300 Thus, schools can provide a safe environment for students to face, address, and overcome this stressful language.

2. Utilizing Social Science to Identify Harmful Anti-LGBTQ Student Speech

In sum, social science supports the general principle that schools must create an environment that promotes self-identity development to support intellectual growth.301 Further, this research demonstrates that self-identity development includes

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296. See supra notes 237–42.

297. See Geiger & Fischer, supra note 287.

298. See supra Part I.A and Part II.D.


301. See infra Part III.
religious beliefs, sexual orientation, and gender identity.\textsuperscript{302} Thus, to support all forms of self-identity development, school districts must find a balance between allowing speech that expresses sincerely held religious beliefs while eliminating speech that threatens the sexual identity development of others.\textsuperscript{303}

This insight can be applied directly to real-world issues facing school districts. For example, student speech that tries to convince people that there are only two genders is less likely to cause psychological injury when compared to speech that attempts to bully transgender students into “conforming” with traditional gender norms. Instead of trying to have an open discussion on gender identity issues, this harmful language attempts to coerce compliance through threats.

To make real-world use of this social science insight, we must pair it with the legal conception of harmful speech to develop a concept that schools can use to craft speech policies that will find the delicate balance between harmful and controversial speech.

\textbf{III. \textsc{The Updated Conception of Harmful Anti-LGBTQ Student Speech}}

Both the law and social science suggest schools must create an environment that supports self-identity development to promote intellectual growth and meet the fundamental obligations and purpose of education.\textsuperscript{304} Further, the law and social science recognize that self-identity development includes sexual orientation, gender identity, and religious belief development.\textsuperscript{305}

To promote self-identity development, schools must balance protecting speech to allow for self-identity expression and eliminating speech that stifles self-identity development.\textsuperscript{306} Specifically, schools must find a balance between protecting against speech that threatens students based on sexual orientation and gender identity while protecting speech necessary for religious

\textsuperscript{302}. \textit{See infra} Part III.A and Part III.B.
\textsuperscript{303}. \textit{See supra} Part II.D.
\textsuperscript{304}. \textit{See supra} notes 18–22 and accompanying text. \textit{See also supra} notes 182–85 and accompanying text.
\textsuperscript{305}. \textit{See supra} notes 23–27 and accompanying text. \textit{See also supra} notes 186–89 and accompanying text.
\textsuperscript{306}. \textit{See supra} Part I.A and Part II.D.
identity development.\footnote{See supra Part II.C and Part II.D.} In the legal realm, this balance is dictated by freedom of speech and religious expression versus the school’s obligation to protect students from sexual harassment.\footnote{See supra Part I.C.} In the social science realm, this balance is dictated by speech that is necessary for personal development versus speech that stifles self-identity development.\footnote{See supra Part II.}

Thus, both the law and social science establish that schools should identify and eliminate speech that harms LGBTQ students while protecting controversial speech that is necessary for religious identity development.

A. The Law’s Failure to Define Harmful Student LGBTQ Speech

Despite the general legal recognition of the need to balance speech to promote self-identity development, the law has failed to find the balance.\footnote{See supra Part I.C.} Instead, the law generally suggests that speech should be limited if it causes “psychological injury” by harming the rights of others “to be let alone.”\footnote{See supra Part I.A.2.} However, the law fails to define psychological injury or explain how it can be distinguished from controversial speech that must be protected as free speech to maintain the free exchange of ideas necessary for intellectual growth.\footnote{See supra Part I.C.} Further, the law fails to grant any special consideration to religious-based student speech, thereby ignoring the critical role religious identity development plays in the self-identity development of students. The law currently does not provide clear guidelines to distinguish between harmful speech that should be restricted to protect sexual identity development and controversial speech that must be upheld to support religious identity development.

Despite its deficiencies, the law correctly suggests that schools should assess student LGBTQ speech based on its psychological impact.\footnote{Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1189 (9th Cir. 2006).} This “psychological injury” test sets the stage for utilizing social science to identify how speech can cause psychological injury to LGBTQ students. Indeed, social science demonstrates that certain
speech can cause psychological injury to LGBTQ students through specific features that threaten self-identity development. Social science also suggests that eliminating religious speech can cause psychological injury by stifling religious identity development, leading to similar psychological maladies. Thus, instead of relying on the vague conception of “psychological injury,” social science suggests schools can protect LGBTQ students while upholding religious identity development by targeting speech that exhibits the specific factors that harm self-identity development.

B. Filling in the Gaps of the Legal Pathway to Protect Student Self-Identity Development

Speech causes psychological injury to LGBTQ students through two main factors, the “target factor” and the “perceived intent” factor. The target factor distinguishes speech that targets a specific individual’s sexual identity from speech discussing sexual orientation or gender identity issues. Speech that identifies a particular student based on his actual or perceived gender identity could create a hostile environment for that individual, making them afraid to explore or express their sexual identity. However, social science suggests that generally targeted speech about sexual orientation or gender identity issues does not cause the psychological harm associated with individually targeted speech. Instead, this generally targeted speech supports religious identity development and the exchange of ideas necessary for intellectual growth.

The “perceived intent” factor focuses on how the target of the speech likely interprets the speaker’s intent. If speech carries the perceived intent to threaten or harm individuals based on their sexual orientation or gender identity, it is more likely to threaten sexual identity development. Conversely, if the speech carries the

315. See supra Part II.D.
316. See supra Part II.D.1.a.
317. See supra notes 278–80 and accompanying text.
318. See supra notes 280–83 and accompanying text.
319. See supra notes 284–86 and accompanying text.
320. See supra Part II.D.1.b.
321. See supra notes 288–89 and accompanying text.
perceived intent to elicit change, it is less likely to cause harm. Instead, this “change intent” speech is necessary to promote the speaker’s self-identity development and the exchange of ideas required for intellectual growth.

Both factors can be used to identify speech that is harmful to LGBTQ students by threatening their self-identity development. Moreover, these factors explicitly distinguish harmful speech from speech that may cause negative emotions but does not threaten sexual identity development and is necessary for religious identity development.

C. Defining Harmful Student LGBTQ Speech

Based on this social science insight, harmful student LGBTQ can be defined as speech that a responsible person would interpret as personally targeting their ability to express their sexual orientation or gender identity. This “Harmful Anti-LGBTQ Student Speech” conception incorporates the two features of speech that threaten sexual identity development by creating three separate elements to assess speech. To be deemed Harmful to LGBTQ Student Speech, the speech must: (1) target an individual, (2) create the perceived intent to harm, and (3) be based on gender identity or sexual orientation.

Speech that does not fit this conception can be deemed controversial speech that must be protected to promote self-identity development and uphold students’ free speech and religious expression rights. This controversial student speech expresses a general opinion or belief about gender identity or sexual orientation issues with the intent to elicit change. Sincerely held religious-based speech necessary for religious identity development belongs in this controversial student speech category because it does not hold the features of Harmful Anti-LGBTQ Student Speech. Namely, most sincerely held religious beliefs do not intend to harm or threaten individuals but instead intend to elicit change.

Thus, this Harmful Anti-LGBTQ Student Speech conception will allow schools to eliminate speech that creates a hostile environment for LGBTQ students while protecting religious speech.

322. See supra notes 291–92 and accompanying text.
323. See Roe, supra note 294.
necessary to support religious self-identity development. Further, this Harmful Anti-LGBTQ Student Speech conception will uphold the general goal of protecting self-identity development by targeting speech that threatens sexual identity development while protecting speech necessary for religious identity development.

1. Fitting Within the Current Legal Landscape

This conception of Harmful Anti-LGBTQ Student Speech does not require a full-scale re-conception of harmful speech, or a rejection of the standards already established in the law. Instead, it fits within the current legal conception of harmful speech by showing precisely how speech interferes with the rights of others by causing psychological injury. Thus, the Harmful Anti-LGBTQ Student Speech concept can be used to clarify and define this psychological injury specifically based on speech’s effect on self-identity development. Indeed, the specific components of the Harmful Anti-LGBTQ Student Speech concept fit within the current legal framework by clarifying the concepts the law has attempted to use to identify harmful speech.

The perceived intent factor does not require an assessment of the speaker’s actual intent but, instead, how a reasonable person would interpret the intent. The “reasonable person” standard is established throughout the law and exists in the definition of sexually harassing speech offered through Title IX. The reasonable person test allows an assessment of speech that avoids the common deficiencies of other laws attempting to address speech. The reasonable person test enables schools to assess speech without having to get “inside the head” of the speaker to determine intent. Similarly, focusing solely on how the target perceives the speech can make the assessment too subjective and overly reliant on the


326. Katherine Parker, Expanding the Regulation of Online Speech Through the Commerce Clause to Reduce Cyber Harassment, 47 HASTINGS CONST. L.Q. 475, 486 (2020).
conditions of the target. Instead, the perceived intent factor allows schools to assess speech based on how a reasonable person would interpret the intent of the speech. Of course, the speaker’s true intent can be considered part of this analysis, but it also allows for consideration of how the intent would likely be perceived by a person standing in the shoes of the target.

Further, by focusing on speech that intends to cause harm, the Harmful Anti-LGBTQ Student Speech conception will avoid eliminating student speech intended to inspire change. The courts recognize that students have the right to try to convince or even convert other students within schools, specifically with respect to religious beliefs. Thus, the Harmful Anti-LGBTQ Student Speech conception fits within the general legal principles that require schools to eliminate harassing speech while protecting the rights of students to engage in pervasive speech.

2. Protecting Sincere Religious Student Speech

Most sincerely held religious speech necessary for religious self-identity development does not contain the features of Harmful Anti-LGBTQ Student Speech. Instead, most religious-based speech focuses on making general comments about gender identity and sexual orientation issues with the intent to elicit change. Most religious believers differentiate between their beliefs regarding gender identity and sexual orientation issues and the rights of other students to exist free of threat. Thus, this conception of Harmful Anti-LGBTQ Student Speech will distinguish and protect speech based on sincerely held religious beliefs while targeting harmful speech.

This Harmful Anti-LGBTQ Student Speech concept acknowledges that some people strongly disagree with religious beliefs about sexual orientation and gender identity and contend that expressing these

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327. Synder v. Warren Hills Reg’l Bd. of Educ., 307 F.3d 243, 268–69 (3d Cir. 2002) (“When policies focus broadly on listeners’ reactions, without providing a basis for limiting application to disruptive expression, they are likely to cover a substantial amount of protected speech.”).
329. See supra Part II.B.2.
330. See supra notes 238–42 and accompanying text.
331. See supra notes 253–54.
beliefs harms individuals struggling with sexual identity issues. However, from a legal perspective, speech cannot be limited simply because it attempts to spread a religious belief. Furthermore, from a social science perspective, this religious-based speech may elicit negative emotions but is unlikely to threaten sexual identity development or cause psychological injury.

Indeed, social science suggests that allowing this controversial speech in school helps students who may find it objectionable by enabling them to develop the skills to address and overcome controversial speech. This supports the general idea that schools should support the free exchange of ideas, even if some ideas make some uncomfortable, as part of the intellectual development process. Schools can still provide resources to help students address the discomfort associated with this speech and ensure all students that speech crossing the line to personal threats will not be tolerated.

The Harmful Anti-LGBTQ Student Speech concept will also enable schools to eliminate harmful religious speech. Some hateful speech is couched in religious beliefs as either a way to avoid the label of hate speech or because the speaker truly believes their religion calls on them to threaten or even harm LGBTQ students. This speech, despite its religious overtones, will still fit in the concept of Harmful Anti-LGBTQ Student Speech. This speech can and should be restricted even though it has religious overtones, both because it does not represent common religious self-identity expression and because its harm to LGBTQ students overwhelms any benefit it provides to religious self-identity development. While this harmful religious speech may be protected outside

333. See supra Part I.A.
334. See supra Part II.B.2.
335. See Rock, supra note 273.
336. See supra Part II.D.
338. See Todd Powell-Williams & Melissa Powell-Williams, “God Hates Your Feelings”: Neutralizing Emotional Deviance within the Westboro Baptist Church, 38 DEViant BEHAV. 1439, 1440 (2016).
of the school environment, the law can deem this speech inappropriate for educational purposes because it harms self-identity development. By targeting speech based on its harmful features, instead of merely separating “religious speech,” the Harmful Anti-LGBTQ Student Speech conception will enable schools to eliminate “hateful speech” that is either hidden as religious speech or based on harmful religious beliefs.

By defining Harmful Anti-LGBTQ Student Speech as speech that targets individuals with the intent to harm or threaten their sexual identity, schools will be able to eliminate speech that, according to social science, harms sexual identity development by threatening LGBTQ students. Conversely, by separating and protecting speech that makes general comments about sexual orientation or gender identity issues with the perceived intent to change, schools will protect speech necessary for religious identity development. This conception of Harmful LGBTQ Speech fits within the current parameters of the law by providing further clarity to the “right to be let alone” standard for accessing student speech generally and the “psychological injury” that the courts have attempted to assess when reviewing student LGBTQ speech.

CONCLUSION

To promote intellectual growth, schools must create an environment that protects the self-identity development of all students. Self-identity development and intellectual growth require respect for religious beliefs, sexual orientation, and gender identity development. Gender identity, sexual orientation, and religion are complex subjects and involve many controversial issues. Unfortunately, the current legal framework for assessing student speech fails to enable schools to address these issues in a way that will protect the rights and self-identity development of all students. Instead, the law provides vague and overbroad conceptions of

340. Mahanoy Area Sch. Dist. v. B. L. ex rel. Levy, 141 S. Ct. 2038, 2047 (2021) (discussing cases establishing that schools can limit speech that would protect “outside the school context”).

harmful speech that encourage schools to adopt overly broad speech codes that fail to identify harmful speech or adequately protect religious expression.

However, the law correctly establishes that harmful student speech should be assessed based on the psychological injury it can create. Social science can be used to further define this “psychological injury” standard concerning LGBTQ student speech by focusing on speech’s effect on self-identity development which includes the development of sexual identity, gender identity and religious or spiritual identity. Indeed, social science demonstrates that speech can harm self-identity development and cause psychological injury through specific features. These features distinguish harmful speech from controversial speech that must be protected to uphold religious rights and encourage the free exchange of ideas necessary for intellectual growth. This Article proposes a concept of “Harmful Anti-LGBTQ Student Speech” that incorporates social science to identify the specific speech that causes the psychological harm the law has attempted but failed to address.

By focusing on self-identity development, this “Harmful Anti-LGBTQ Student Speech” standard will enable schools to eliminate speech that harms LGBTQ students and protect controversial speech necessary for religious identity development. This Harmful Anti-LGBTQ Student Speech includes speech that specifically (1) targets an individual, (2) creates the perceived intent to harm, and (3) is based on gender identity or sexual orientation. With this trained focus, the law can enable schools to truly promote self-identity development in all its forms by protecting religious speech while eliminating harmful speech. In addition, this Harmful Anti-LGBTQ Student Speech conception will also uphold the legal principles of free speech, religious freedom, and protection from sexual discrimination.

As stated in Harper, beyond simple education, the fundamental purpose of schools is “the inculcation of fundamental values of habits and manners of civility essential to a democratic society.”

Perhaps the most basic value of a democratic society is respect for different lifestyles and beliefs. Therefore, instead of trying to dictate the type of speech that promotes civility in relation to the complex

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issues related to gender identity and sexual orientation, schools should focus on creating an environment where students are free to explore, develop and express their self-identity, including their individual religious beliefs, sexual orientation, and gender identity. To achieve this goal, schools must adopt student speech policies that protect controversial speech and limit only the speech that crosses the line between controversial and threatening speech. With the conception of Harmful Anti-LGBTQ Student Speech based on social science, schools can find this balance and create an environment where all students are free to explore, explore and develop their self-identities on their path toward intellectual growth.
Free Exercise of Abortion

Elizabeth Sepper*

For too long, religion has been assumed to be in opposition to abortion. Abortions consistent with, motivated by, and compelled from religion have been erased from legal and political discourse. Since the fall of Roe v. Wade, free exercise claims against abortion bans have begun to correct course. Women and faith leaders in several states have filed suit, asserting their religious convictions in favor of abortion. They give form to the reality—as progressive theologians have long argued—that to have a child can be a sacred choice, but not to have a child can also be a sacred choice. And they center women’s conscientious decisions for the first time in many decades.

In law and religion circles, the predominant response has been skepticism. As claims for reproductive freedom have appeared, erstwhile supporters of expansive exemptions propose to raise the bar. They increase standards for religiosity, sow doubts about women’s sincerity, and argue for lightening the government’s burden. Constitutionally illicit stereotypes about women’s (in)capacity for moral agency, trustworthiness, and altruism seep into religious liberty arguments.

These attacks on the free exercise of religious convictions about abortion implicitly—and sometimes expressly—advance religious preferentialism. They invite and expect the courts to reject pro-abortion religious claims even as they urge courts to treat anti-abortion convictions as sacrosanct. The consequence would be to exile some categories of religious people from religious liberty protections, while Christian conservatives gain systematic favor.

* Professor of Law, University of Texas School of Law. This Article builds on my remarks delivered as the Law and Religion Lecture at BYU School of Law on February 8, 2023. Thank you to the editors of the BYU Law Review, in particular Anna Mae Walker and Mason Spedding, and to the BYU students and faculty, in particular Fred Gedicks, for their hospitality. My appreciation to James Nelson, Micah Schwartzman, Larry Sager, Aziza Ahmed, David Schraub, Linda McClain, Chip Lupu, Susan Appleton, Fred Gedicks, and David Cohen for their helpful comments and conversation.
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INTRODUCTION

Motivated by her Unitarian Universalist religion, Misha Sanders chose medication abortion early in her pregnancy. As a single parent, she knew, “[t]he only decision that I could make, as a loving mother, was to focus on mothering this child that I brought into the world and terminating this new pregnancy. . . . It was absolutely the right decision.”

Sidrah, a Muslim woman with three children and a “very religious person,” says her abortion brought her closer to God. “At that moment, only He was giving me the light, the rope to get out of that situation. . . .”


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“[A] very faithful woman” and conservative Christian, Jill Hartle prayed long and hard after a routine ultrasound revealed a severe fetal heart malformation eighteen weeks into her pregnancy. The baby was unlikely to survive to birth and, if born alive, would live only a short time.3 “The best option to protect our daughter from pain and suffering was to send her to heaven,” Jill said. “When I prayed for healing – sometimes that healing does not happen on this earth.”

We rarely hear from religious people who choose abortion.5 Less often still do we encounter religion as a motivating factor in their decisions. The religious position on abortion is assumed to be anti-choice. Abortions consistent with, motivated by, and compelled from religion have been absent from legal and political discourse.

Yet each year approximately 900,000 Americans vote “with their feet to say abortion is ethical—or at minimum ethical enough to choose abortion instead of childbearing.”6 Sixty percent report a
religious affiliation, and the majority identify as Christian. The conflation of religion with “pro-life” simply does not reflect “the actual lives of the many believing women who are getting abortions—quietly, secretly, and in substantial numbers.”

Since the fall of Roe v. Wade, claims to the free exercise of abortion have begun to correct course. Women in several states have challenged abortion bans under state constitutions and religious freedom restoration acts, asserting their religious convictions in favor of abortion. For the first time in many decades, their claims appropriately center women as the relevant religious and moral agents. They make visible what we once knew and were made to forget: that we undertake reproductive decisions—to have children, form a family, and end a pregnancy—consistent with conscience and religious faith.

Their claims arrive at a fortuitous time in free exercise law. The Supreme Court has transformed what was relatively permissive judicial scrutiny of regulations under the Religious Freedom Restoration Act (RFRA) into an “exceptionally demanding” burden on the state. Most recently, it has radically revised constitutional doctrine, instructing lower courts that states may not withhold a religious exemption where equivalent secular exceptions exist in the law.

Yet the predominant response to abortion-related claims has been skepticism. Proponents of exemptions are incredulous of the religious nature of women’s motivations to seek abortion.

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They deny the sincerity, not only of the individual plaintiffs, but of any person who seeks abortion. They seek to erect doctrinal barriers that don’t apply to other believers.

This Article evaluates these attacks on the free exercise of religious convictions about abortion. It demonstrates that resistance to abortion-related exemptions reflects unsurfaced normative judgments about women as a class—their capacity for moral judgment, veracity, and altruism. These stereotypes, which have plagued the politics of abortion in legislatures and courts, risk being imported into religious liberty doctrine. Equally troublingly, erstwhile defenders of religious liberty implicitly—and sometimes expressly—advance a preference for conservative religions. Convictions merit protection only insofar as they oppose abortion.

Part I begins with a background on religious liberty and abortion in women’s lives and the law. We once understood that for people seeking abortion, abortion can be a sacred choice, motivated by religion and experienced as moral agency. But the rise of the Religious Right and the framing of abortion rights jurisprudence around doctors obscured this reality. Over decades of reproductive rights cases, courts never seriously considered any claims to free exercise from women seeking abortion. Now, however, the overturning of Roe has aligned with a dramatic and ongoing transformation of religious liberty doctrine.

The rest of the Article is structured around the requirements to make out a claim under most state RFRAs—religiosity, sincerity, substantial burden, and strict scrutiny. Unless courts resolve to treat religious people committed to abortion differently from other objectors (or, indeed, from religious people opposed to abortion), free exercise doctrine should permit exemption. I have long been a critic of the Supreme Court’s radical exemption doctrine, but straightforwardly applied, it makes a convincing case to exempt...
women who sincerely seek religiously motivated abortions from the reach of abortion bans. In the lawsuits filed so far, plaintiffs persuasively plead religious conviction and sincerity and demonstrate that abortion bans burden their free exercise. As a result, opposition has urged courts to redefine doctrine and manufacture a set of rules that apply to religiously motivated abortion seekers but no others. As Part II argues, abortion-related lawsuits have prompted attempts to redefine “religion” and “free exercise” in ways without foundation in judicial doctrine or statutory text. As Part III shows, while sincerity is usually assumed of religious claimants, suspicions abound where abortion is involved. Scholars who treat concerns about employee benefit plans and beard length as deserving of unquestioning respect deny that a woman’s moral and religious convictions may sincerely shape—and indeed drive—her reproductive decisions.

As Part IV demonstrates, abortion bans impose substantial burdens on religious exercise under any formulation of the substantial burden test—directness, secular costs, or plaintiff’s own beliefs. The believer is compelled to continue a pregnancy, labor, and deliver a child contrary to religious convictions. State law denies their ability to exercise religious judgment about pregnancy and parenthood.

Part V argues that any compelling interest in preservation of fetal life (or future children) is undermined by various exemptions. State laws contain carveouts for life, health, disposal of embryos created through IVF, and beyond—secular exceptions that equally endanger fetal life. The underinclusive nature of bans indicates that a total prohibition for religious believers is unlikely the least-restrictive means of achieving protection for fetal life.

At root, religious freedom means the government may not favor some religious believers and discriminate against others. The opposition to abortion-related claims has invited courts to do just that. If courts were to go along, religious exemption doctrine’s favoritism for conservative Christians would be exposed. Disfavored religious minorities would find no shelter in the courts. What’s more, people capable of reproduction would become strangers to free exercise. Women would face further subordination within constitutional law.
I. RELIGIOUS LIBERTY AND ABORTION IN WOMEN’S LIVES AND UNDER THE LAW

Section A sets out the history and present of religion-informed abortion. It uses empirical studies and abortion patients’ own narratives to show that abortion is typically undertaken with moral responsibility and sometimes motivated by religious faith. The importance of reproductive freedom to religious liberty (and vice-versa) is longstanding, but until recently, as Section B shows, the opportunity to make out free exercise claims was limited. The current Supreme Court’s radical and expansive religious liberty doctrine makes plausible, and even persuasive, litigation that once would have failed.

A. Free Exercise of Religion and Reproduction

The idea that reproductive regulation puts the pregnant person’s free exercise of religion at stake has a long history. Pre-Roe, the Clergy Consultation Service united religious leaders in a movement to counsel and aid people seeking abortion care. Pastors in the group insisted that “every woman must possess the freedom, guaranteed by the U.S. Constitution, to follow her religious conscience in the determination of whether she will or will not bear a child.” Numerous Protestant congregations issued statements in support of abortion rights or nuanced appraisals that abortion could be morally justified. Early litigation representing women directly argued for their free exercise rights.

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Consistent with recognition of the diversity of religious views, abortion bans were taken to implicate religious establishment—amounting to adopting an inherently religious view on when life begins and how fetal and maternal life should be valued.

The fact that decisions to conceive, carry, or end a pregnancy could be decisions of conscience was so commonly understood that the early abortion rights movement debated whether to use the term “choice” or “conscience.” In the early 1970s, the enactment of federal law permitting conscientious refusal to perform abortion saw Congresspeople, religious leaders, and advocacy groups acknowledge that conscience and religion equally supported decisions to seek out abortion. Conscience doesn’t have to be religiously motivated of course—but for people of religious faith, it often is.

But we lost this understanding. Women’s religious convictions were slowly erased from legal and popular discourse around abortion. The rise of the Religious Right made religion synonymous with anti-choice viewpoints. In this myth making, secularism would be set against faith, with little understanding of the disagreements between faiths and the complexities within them on the issue of abortion. Policymakers, courts, and the public could remain ignorant of pro-choice religious positions.

At the same time, abortion rights jurisprudence contributed to the invisibility of people who need abortions. As Robin West argues, the privacy of the abortion right “obfuscate[d] the moral

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*McRae, see Rhonda Copelon & Sylvia Law, “Nearly Allied to Her Right to Be” – Medicaid Funding for Abortion: The Story of Harris v. McRae, in WOMEN & THE LAW STORIES 207, 233 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011).*


quality of most abortion decisions.” 23 Roe v. Wade emphasized (male) physicians as the authority figures and granted them standing to advance their patients’ interests. 24 Doctors and clinic owners became the public face of abortion. 25 Their willingness to come forward effectively protected generations from concrete constitutional and physical injuries, but it also helped abstract away from actual women. 26 There was no physical body and moral person to the pregnant patient.

Policymaking and scholarship compounded this omission by foregrounding the religious convictions of doctors and hospitals who refused abortion care. 27 The woman making decisions about

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24. Roe v. Wade, 410 U.S. 113, 165–66 (1973) (“The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.”); id. at 163 (“[F]or the period of pregnancy prior to this ’compelling’ point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.”).

25. Even before the development of constitutional abortion rights jurisprudence, the “therapeutic model” of abortion reform in the 1960s granted physicians decision-making power and marginalized women. Siegel, supra note 19, at 1880–88.

26. See Francesca LaGuardia, Pain That Only She Must Bear: On the Invisibility of Women in Judicial Abortion Rhetoric, 9 J. of L. & Biosciences 1, 2 (2022) (describing how the extremely painful experiences of pregnancy and childbirth are blunted by judicial language of “burdens” and “risk” in “sharp and stunning contrast to the graphic descriptions courts offer in other contexts”).

her pregnancy was but an object of their refusal.\textsuperscript{28} Across
disciplines of law, bioethics, and religion, we “undervalued the
moral status of women.”\textsuperscript{29}

In the meantime, each year hundreds of thousands of women—
the majority of whom identify as religious—exercise their moral
agency to choose abortion. They overwhelmingly experience
abortion as an exercise of moral responsibility. The Turnaway
Study, a multiyear survey comparing women who received legal
abortions and those who were turned away from abortion clinics,
illuminates. The authors found that women seeking abortion
“emphasized their conscious examination of the moral aspects of
their decisions” and took into account moral obligations to their
families, to themselves, and to future children.\textsuperscript{30} Many women
“described the indiscriminate bearing of children as a sin.”\textsuperscript{31}

Study after study has found that women understand their
abortion as “the right decision.”\textsuperscript{32} In interviews over five years
following their abortion, ninety-five percent of women remain
resolute.\textsuperscript{33} One woman recalls her decision to terminate at six weeks
“a pregnancy that [she] had prayed for”; she says, “To this day I

\begin{thebibliography}{99}
\item[28.] To the extent that legal scholars have engaged with the idea of a woman’s
religiously motivated decision to have an abortion since RFRA, they have largely done so in
response to Ronald Dworkin’s argument that the abortion decision almost by necessity
compels religious decision-making, but these responses took place at a highly theoretical
rather than doctrinal or practical level. See generally Eric Rakowski, \textit{The Sanctity of Human Life},
103 YALE L.J. 2049 (1994).
\item[29.] Watson, \textit{Ethics of Access, supra} note 6, at 23 (calling bioethicists “to recognize the
ways we may have undervalued the moral status of women”); \textsc{Kira Schlesinger, Pro-
Choice and Christian: Reconciling Faith, Politics, and Justice} 73 (2017) (proposing that
religious leaders start with women instead of putting out statements that “seem to be written
without ever talking to a woman who has contemplated or decided on abortion”).
\item[30.] Lawrence B. Finer, Lori F. Frohwirth, Lindsay A. Dauphinee, Susheela Singh &
Ann M. Moore, \textit{Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives},
37(3) PERSPS. ON SEXUAL AND REPROD. HEALTH 110, 118 (2005).
\item[31.] Id.
\item[32.] Lauren J. Ralph, Diana Greene Foster, Katrina Kimport, David Turok & Sarah C.M.
Roberts, \textit{Measuring Decisional Certainty Among Women Seeking Abortion}, 95 CONTRACEPTION
269, 276 (2017); Sarah C.M. Roberts, David K. Turok, Elise Belusa, Sarah Combellick &
Ushma D. Upadhyay, \textit{Utah’s 72-Hour Waiting Period for Abortion: Experiences Among a Clinic-
Based Sample of Women}, 48 PERSPS. ON SEXUAL AND REPROD. HEALTH 179 (2016); Iris Jovel,
Alice F. Cartwright, Lauren Ralph & Ushma D. Upadhyay, \textit{Abortion Waiting Periods and Decision Certainty
Among People Searching Online for Abortion Care}, 137 OBSTETRICS & GYNECOLOGY 597 (2021).
\item[33.] Foster, \textit{supra} note 3, at 124.
\end{thebibliography}
still think about that pregnancy, but I know that it was the best decision” for the “better livelihood [of my children.]”

Abortion patients often consider seriously the life they are carrying and their responsibility to be able to provide for it. An unemployed woman explains that parenthood was “not a decision [she could] face morally without being able to raise it properly. An abortion was the best option.” Others recognize physical dangers. An abortion provider recalls a colleague who explained that “she was so happy to be pregnant, but when she was sixteen weeks, her husband had beaten her so badly that she ended up in the hospital with multiple broken ribs. She had an abortion because she couldn’t see herself or her child being safe.” As clinic worker Jeannie Ludlow notes, she often encounters patients who pray to God “to send back to them the child they are aborting, at a time in the future when they are better able to care for it.”

Religion can play a particularly supportive role in the decision to end a pregnancy after a diagnosis of fetal anomaly. One woman explains: “We lost our oldest son at 6 years and 10 months old, to complications from having a rare type of dwarfism. . . . We knew without a doubt that we could never in good conscience bring another child into this world with that disease.” In these circumstances, many people of faith describe their abortion as an “act of compassion.” A number of them choose labor induction

34. Motherhood Meets Medicine, Abortion Stories: Taking a Walk with Women who Have All Had Different Experiences, at 28:00-30:58 (Sept. 28, 2022), https://open.spotify.com/episode/7Lx6tBotII1aAaPyrOX3U?si=dqOwCmZQ1Ka7tP558oCw.

35. Foster, supra note 3, at 7 (noting 12% of women cited obligation to future child); Jeannie Ludlow, Sometimes, It’s a Child and a Choice: Toward an Embodied Abortion Praxis, 20 NWSA J. 27, 31 (2008) (“Hidden in the gap of the U.S. abortion debate is the relationship between woman and fetus, a relationship that many women consider seriously when they choose abortion.”).

36. Foster, supra note 3, at 15.

37. MEERA SHAH, YOU’RE THE ONLY ONE I’VE TOLD 9 (2020).

38. Ludlow, supra note 35, at 43.


41. Kerns et al., supra note 39, at 245.
over surgery citing religious reasons, usually a desire to baptize
the infant.42

As these accounts should make clear, for some, religion
motivates or even compels their abortion decision. To be sure, not
all people who decide to terminate a pregnancy are exercising their
religious faith. Some religious women feel guilt and ask for God’s
forgiveness or anticipate moral censure from their religious
community.43 Many others describe complicated beliefs about the
role of religion. Others still choose abortion without regard to
religious faith.

Many religions take positions supportive of abortion decisions.
Jewish law, for example, does not take a fetus to be a person and
commits to preserving the interests of the mother.44 A number of
traditions in Islam also reject fetal ensoulment at conception and
authorize abortion for any reason during early pregnancy45 (and
indeed nearly all abortions take place very early in pregnancy).46
Beyond that window, they may allow or direct abortion where a
pressing need requires.47 The majority of Christian denominations

42. Id. at 245.

43. Lori Frohwirth, Michele Coleman & Ann M. Moore, Managing Religion and Morality
Within the Abortion Experience: Qualitative Interviews with Women Obtaining Abortions in the
U.S., 10 WORLD MED. HEALTH POL’Y 381 (2018); Watson, Scarlet A, supra note 5, at 26
(describing an anti-abortion protestor indicating that abortion is terrible and the wrong
thing, but never wavering from saying choosing an abortion “is the best decision for me”);
After Tiller, supra note 4, at 59:40-1:00:05 (a woman having an abortion saying she is “hoping
God forgives me”).

44. Lisa Fishbayne Joffe, Do Abortion Bans Violate Jews’ Religious Rights?, June 16, 2022,
https://www.brandeis.edu/jewish-experience/social-justice/2022/june/abortion-
judaism-joffe.html. For explorations of interpretations of Jewish law on abortion from a
variety of perspectives, see Yechiel Michael Barilan, Jewish Bioethics: Rabbinc Law
and Theology in Their Social and Historical Contexts ch. 3 & 4 (2014); Ronit Irshai,
Fertility and Jewish Law: Feminist Perspectives on Orthodox Responsa Literature
111–202 (2012); Daniel Schiff, Abortion in Judaism (2002).

45. Leila Hessini, Islam and Abortion: The Diversity of Discourses and Practices, 39(3) IDS
BULLETIN 18, at 23 (2008).

46. Katherine Kortsmit, Antoinette T. Nguyen, Michele G. Mandel, Elizabeth Clark,
Lisa M. Hollier, Jessica Rodenhizer & Maura K. Whiteman, Abortion Surveillance – United
States, 2020, 71 CDC SURVEILLANCE SUMMARIES 1 (Nov. 2022), www.cdc.gov/
reproductivehealth/data_stats/abortion.htm (reporting that 93% of abortions occur in the
first trimester of pregnancy).

47. Machalow, supra note 22, at 495–96 (reviewing a variety of religious teachings on
and in favor of abortion).
likewise grant primacy to the woman’s life and health over the fetus.\textsuperscript{48} Others emphasize the moral importance of being prepared socially, physically, and financially to raise a child.\textsuperscript{49} As Dan Maguire, a former priest and professor of moral theology, has argued, to have a child can be a sacred choice, but not to have a child can also be a sacred choice.\textsuperscript{50}

B. Tandon, Dobbs, and the Advent of Abortion-Ban-Related Free Exercise Lawsuits

Until now, free exercise jurisprudence and abortion rights doctrine have largely passed like ships in the night. The Supreme Court first granted religious exemptions to laws indirectly burdening religion in the early 1960s.\textsuperscript{51} By the early 1970s, \textit{Roe v. Wade} recognized a constitutional right to abortion. The only time that free exercise of abortion approached the Court—in \textit{Harris v. McRae}, a challenge to the ban on Medicaid funding for medically necessary abortions—it dodged the issue. It held that the plaintiffs did not have standing, either because they had failed to allege detailed religious beliefs or could not show “they are or expect to be pregnant.”\textsuperscript{52}

\begin{itemize}
\item \textsuperscript{49} E.g., McRae v. Califano, 491 F. Supp. 630, 700–02 (E.D.N.Y.), rev’d sub. nom. Harris v. McRae, 448 U.S. 297 (1980) (discussing mainline Protestant insistence on bringing life into the world “under conditions which make it possible for that life to participate in God’s intention” and which will not “threaten to undermine the theologically understood fulfillment of already existing human beings” and listing “many circumstances in which it might be contrary to God’s purposes to bear a child”). For arguments for abortion from various Christian perspectives, see BEVERLY WILDUNG HARRISON, OUR RIGHT TO CHOOSE: TOWARD A NEW ETHIC OF ABORTION (1983); DANIEL DEMBROWSKI & ROBERT DELTET, A BRIEF, LIBERAL CATHOLIC DEFENSE OF ABORTION (2000); REBECCA TODD PETERS, TRUST WOMEN: A PROGRESSIVE CHRISTIAN ARGUMENT FOR REPRODUCTIVE JUSTICE (2018).
\item \textsuperscript{51} See generally DANIEL C. MAGUIRE, SACRED CHOICES: THE RIGHT TO CONTRACEPTION AND ABORTION IN TEN WORLD RELIGIONS (2001) (exploring support for contraceptive and abortion decisions across religious traditions).
\item \textsuperscript{52} Harris v. McRae, 448 U.S. 297, 320 (1980). Opponents of religious liberty claims against abortion bans tend to overclaim the significance of \textit{Harris}. See Douglas Laycock, \textit{The
Then in 1990, the Court repudiated any heightened scrutiny of laws burdening religious exercise in *Employment Division v. Smith.* Religious objectors no longer could seek exemptions from laws that apply generally. Under the rule in *Smith*, courts could conclude that abortion-related restrictions were “neutral [and] generally applicable” and justified by a legitimate purpose.

As Congress debated restoring religious objectors’ ability to seek judicial exemption through the Religious Freedom Restoration Act (RFRA), anti-abortion activists initially opposed the statute. They anticipated that the Supreme Court would overrule *Roe* with *Planned Parenthood v. Casey*—and worried that the right to religious liberty would permit religious women to access abortion consistent with their religious beliefs. But in 1992 *Casey* reaffirmed the abortion right. RFRA was enacted, allowing sincere religious objectors to win exemption from regulations that substantially burden their free exercise of religion, unless the government can justify the burden as the least-restrictive means of furthering a compelling governmental interest.

When RFRA was passed, it was fair enough to think challenges to abortion restrictions would fail. Following *Casey*, commentators assumed the permanence of the abortion right. They understood that any of the rare claims against informed consent rules, waiting periods, and targeted regulations of abortion providers would have little traction. They also took for granted that free exercise...
doctrine under RFRA would work as it had pre-Smith. Under that approach, courts required meaningful burdens on a plaintiff’s free exercise of religion and proved deferential to government formulations of its compelling interests and means to achieve them. And for the first two decades of RFRA, this pattern largely continued.

State laws escaped much in the way of religious liberty challenges. Shortly after RFRA’s enactment, the Supreme Court held that Congress had exceeded its power in applying the statute to the states. Over the next two decades, nearly half of states came to enact their own RFRAs, which usually adopt the language of the federal RFRA and apply to state and local laws—including abortion restrictions. Constitutional free exercise still had limited impact. The idea that secular exceptions necessarily led to religious exemptions under the Constitution had not yet gained traction.

But in the last decade, the Supreme Court has turbocharged religious liberty rights. In Burwell v. Hobby Lobby, it rejected the

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idea that pre-RFRA free exercise cases govern. It redefined each of the central terms of the federal RFRA—“substantial burden,” “least-restrictive means,” and “compelling interest”—terms employed in state RFRAAs. As a result, religious objectors today bear a much lighter burden to win exemption, while the government’s burden has become “exceptionally demanding.”

More recently, the Court has shifted the constitutional standard. A majority of the justices have expressed dissatisfaction with Smith, which largely disallowed religious challenges to neutral and generally applicable laws under the Free Exercise Clause. Presented with religious institutions resisting public health precautions against Covid-19, Tandon v. Newsom radically revised the doctrine. Laws are no longer generally applicable and must “trigger strict scrutiny . . . whenever they treat any comparable secular activity more favorably than religious exercise.”

A single secular exception seems to require religious exemption.

And then on June 24, 2022, the Supreme Court overruled Roe and Casey. Since that time, about half of states have enacted bans or strict gestational limits on abortion. In broad strokes, these criminal laws permit no medication abortion, surgical abortion, or induction of labor at any stage in a pregnancy, including where a person is miscarrying. They contain relatively few exceptions,

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66. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, n.3 (2014) (“RFRA did more than merely restore the balancing test used in the Sherbert line of [Free Exercise] cases; it provided even broader protection for religious liberty that was available under those decisions.”) (quoting City of Boerne v. Flores, 521 U.S. 507 (1997)).


68. Hobby Lobby, 573 U.S. at 728.


71. Id. at 1296 (citing Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–68 (2020) (per curiam)).

72. E.g., Fulton, 141 S. Ct. at 1877 (“A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.”); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422 (2022) (quoting Fulton and applying this test).


often authorizing rescue only where a pregnant person is “on death’s door.”

For people whose religious beliefs motivate their abortions like the women whose stories begin this Article, these bans burden not only their bodies but their religious liberty as well. A handful of women who desire or are likely to become pregnant have filed suit, raising free exercise claims under state constitutions and RFRAs. Others may follow.

The claims seem easily to satisfy the predicates of religiosity and sincerity. In the lawsuits filed so far, plaintiffs cite specific teachings well-founded in their various religious traditions. Jewish women have become standard bearers, because virtually all Jewish denominations “agree that Jewish religious law does not just permit but sometimes requires abortion.” Relying on “[m]illennia of commentary from Jewish scholars,” plaintiffs in Kentucky argue


78. Schraub, supra note 14, at 20; see also Corbin, supra note 14 (using Jewish faith as the touchstone for a RFRA claim against state abortion bans).
that consistent with their faith, abortion must be allowed “in the event a pregnancy endangers the woman’s life and causes the mother physical and mental harm,” a category broader than the narrow “health” exemption to the state abortion ban.\textsuperscript{79} The lead plaintiff in Indiana, a Jewish woman, wants to have another child, but because of her ethnicity and age, she has a high risk of having a pregnancy with severe fetal abnormalities and “cannot become pregnant in Indiana unless she is able to obtain an abortion consistent with her religious beliefs[].”\textsuperscript{80} Her co-plaintiff, a Muslim woman, likewise claims that her religious beliefs would call for abortion should she become pregnant.\textsuperscript{81} No evidence has been presented that any of these plaintiffs is insincere in their religious commitments.

State courts need not necessarily rely on the Supreme Court’s approach in interpreting their own RFRAs, but they seem likely to do so.\textsuperscript{82} State courts routinely cite federal case law, including expansionist lines of reasoning from \textit{Hobby Lobby} and \textit{O Centro}.\textsuperscript{83} State courts are accustomed to applying the federal case law in lawsuits under the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). The textual similarities between federal and state statutes may drive this result. The Arizona Supreme Court, for example, has instructed that “[b]ecause the text and requirements of FERA and RFRA are nearly identical, we rely on cases interpreting RFRA as persuasive authority in construing the requirements of FERA.”\textsuperscript{84} A particularly persuasive argument could be made that those state RFRAs enacted after \textit{Hobby Lobby}’s expansionist interpretation of the federal act’s terms adopt its approach to the strict scrutiny test.

\textsuperscript{79} Complaint, Sobel, \textit{supra} note 10, at 6.

\textsuperscript{80} Class Action Complaint for Declaration and Injunctive Relief, Anonymous Plaintiffs, \textit{supra} note 10, at 10–15.

\textsuperscript{81} Id. at 18–21. This plaintiff subsequently moved out of state and withdrew from the suit.

\textsuperscript{82} Ira C. Lupu, \textit{Moving Targets: Obergefell, Hobby Lobby, and the Future of LGB


\textsuperscript{84} Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 919 (2019) (citing State v. Hardesty, 214 P. 3d 1004, 1008 (Ariz. 2009)).
Assuming state courts follow the Supreme Court, abortion prohibitions should fail strict scrutiny. Bans prevent some believers from engaging in religiously motivated abortions—that is, from freely exercising their religious beliefs. Under the new radical approach to free exercise, their demands for exemption are persuasive. Any compelling interest in preservation of fetal life (or future children) is undermined by various exemptions, including for rape, incest, and disposal of embryos created through in vitro fertilization. Bans prove both under- and over-inclusive in ways that undercut the argument that a total prohibition for religious believers is the least-restrictive means of achieving protection for fetal life.

State courts have indicated openness to religious liberty lawsuits against abortion bans. In Kentucky, a trial court opined that the state’s prohibition “implicates” religious liberty “by unduly interfering with the free exercise of other religions that do not share that same belief” about when life begins.85 A Utah court similarly issued a preliminary injunction against the state’s ban, in part because of the risk that it violated the “right of conscience” under the Utah Constitution.86 That same month, a Wyoming state judge paused its state’s ban, observing that the plaintiffs’ claims—including one under the state Constitution’s protections for religious liberty—raised “important legal questions.”87 In December 2022, an Indiana trial court ruled on the merits in favor

of the religious liberty claimants under that state’s RFRA.\textsuperscript{88} Other cases advance in Florida and Ohio.\textsuperscript{89}

To the extent that successful religious liberty claims involving abortion once depended on “an extraordinarily unlikely combination of circumstances,”\textsuperscript{90} those circumstances have now materialized. What’s more, the series of assumptions on which counterarguments once rested no longer hold. What’s left is partiality toward anti-choice religions and distrust of women as moral decisionmakers.

II. DENYING PRO-CHOICE RELIGION

Scholars and activists have told us for decades that decisions about pregnancy and abortion involve the most fundamental of religious questions, central to the identity of people of religious faith. Now, however, women with beliefs in favor of abortion have appeared. “[B]eset with anxiety” about abortion-related claims, conservative advocates of the Supreme Court’s newly expansive free exercise law have taken to “denigrating or denying their validity as genuinely religious[].”\textsuperscript{91}

This Part identifies two central moves—rewriting the definition of religion and narrowing free exercise to situations where the state prohibits action that a religion compels. Each has been rejected by the Supreme Court and expressly denied by the text of most state RFRAs. Each works to build a barrier for abortion-related claims that others have not faced. Together, they tend to prioritize conservative or fundamentalist religions and to imagine people seeking abortion as without religion.


\textsuperscript{90} Laycock, \textit{supra} note 52, at 242.

\textsuperscript{91} Schraub, \textit{supra} note 14, at 63–64.
A. Redefining “Religion”

First, some advocates attempt to restrict the definition of “religion.” The state of Indiana, for example, argues that the religious women’s claims must be rejected because “‘religious exercise’ means that an action itself is imbued with ‘religious significance.’”\(^92\) Eligible for protection are kosher diets, holy day gatherings, and sacramental use of bread and wine.\(^93\) Unlike each of these practices at the core of religious exercise, abortion, the state notes, is an act that is not consistently—even for these plaintiffs—filled with religious meaning.

The state’s proposed definition of religion would implicitly restrict “religion” to conduct with no secular analogs. This logic would exclude a large array of religious acts protected by constitutional doctrine. Refusal of military service, provision of elementary education, or distribution of food to the poor would not be recognized as the exercise of religion.\(^94\) It would also seem to rule out the many practices that aren’t themselves imbued with religious significance that the Supreme Court has treated as religious—including baking a cake for a marriage celebration, offering health insurance, running a for-profit corporation, or praying at the fifty-yard line immediately following a football game, as opposed to a half hour later.\(^95\) This proposal, like others we will see, seems to construct a standard specific to pro-choice religions and no others.


\(^93\) Brief of Appellants, The Individual Members of the Medical Licensing Board of Indiana, et al., at 43–44.


A related move is to insist that “religion” demands dogma. Unless an adherent can point to a directly relevant doctrinal tenet, they cannot claim religious belief. Earlier free exercise cases sometimes did employ something like this reasoning, requiring plaintiffs to show that compliance with a regulation would violate “a ‘fundamental’ tenet” or “practice of an organized religion.”

Consider one 1979 challenge to a state abortion regulation. There, the plaintiffs presented testimony that abortion was a religious duty in some circumstances and “the most moral option” in others. But the court rejected the free exercise claims, because “unlike the Amish, the various Protestant denominations . . . have few or no religious dogmas and strictures.” The First Amendment would not shield them “in the exercise of the most moral option in accordance with their consciences.” In 2023, Josh Blackman echoed this conclusion, this time for Jews, arguing that given the lack of a Pope, Judaism’s progressive movements have no fundamental tenets, only “aspirational principles.”

Another variant would police intrafaith disputes in a way foreign to U.S. commitment to religious pluralism. As the argument goes, plaintiffs asserting religious motivations in favor of abortion have simply misunderstood their own religion. Orthodox Jews, we are told, have the correct interpretation of faith. Reform Jews,

96. Women’s Servs., P.C. v. Thone, 483 F. Supp. 1022, 1040 (D. Neb. 1979), aff’d, 636 F.2d 206, 209 (8th Cir. 1980), vacated, 452 U.S. 911 (1981) (requiring this evidence at both trial and appellate level). In the District Court case, the courts went so far as to say that “the fact that procuring an abortion may be a religious duty for some, but not for others, who are pregnant indicates that unfettered abortion does not constitute a religious ‘tenet,’ much less a ‘fundamental’ tenet of any religion” — intrafaith disagreement rendered the religious duty less than obligatory in the court’s view.

98. Id.
99. Id.


by contrast, are mistaken. These commentators could be correct as a theological matter, but they miss the mark as to U.S. law.

For purposes of free exercise doctrine, intrafaith disputes do not render an individual’s belief any less religious. *Thomas v. Review Board* forecloses any argument to the contrary.\(^{102}\) In that case, the state had denied unemployment benefits to a Jehovah’s Witness on the ground that his reasons for quitting his job were inconsistent with other Witnesses’ beliefs and thus not truly religious. In rejecting this view, the Court said, “Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one.”\(^{103}\) And for good reason. We want to avoid courts adjudicating faith disputes between religious factions.

Nor does religious liberty doctrine demand dogma. In *Frazee v. Illinois Department of Employment Security*, the Supreme Court categorically rejected the argument that a religious objection had to respond to dogma or command of an established religious organization to be sincere.\(^{104}\) There, a plaintiff averred that “as a Christian” he could not work Sundays but could not point to a tenet of an established religious body or show that he shared this belief with a particular religious sect that refused to work Sundays—yet he won. Federal and state RFRAs commonly define “religious exercise” in this way and stipulate that the plaintiff need not identify a tenet “central to . . . a system of religious belief.”\(^{105}\) While most plaintiffs in cases filed thus-far tend to point to formal religious doctrine (not “aspirational principles”), they need not do so to merit exemption under most state RFRAs.

Even if it had a foothold in doctrine, this emphasis on rite, dogma, and theological accuracy has glaring downsides. First, it explicitly prefers some conservative, or even fundamentalist,
religious beliefs. Mainline Protestants and Reform Jews, for example, apparently can’t profess to exercise religion at all. Second, the logic of these arguments would freeze religious doctrine in time, blocking through the state’s courts the evolution of theological reasoning. That fact that adherents of a faith frequently do not track official teaching would exclude them from constitutional and RFRA protection. But the unaffiliated, or minority, believers of today may become the mega-church of the future. A faith’s tenets may evolve. In 1970, Baptists who were strongly anti-abortion were not mainstream; asked to determine the “fundamental tenets” of Baptist faith, a court probably would have concluded the faith permitted, or even supported, abortion. If those facts had been found, would they have set the religious dogma in stone?

B. Narrowing “Free Exercise” to Compulsion

A final response is to argue that free exercise should require compulsion. As this argument goes, religious people seeking abortion are precluded from exemption unless they prove that they have a religious duty to terminate a pregnancy. Proponents say that “few could plausibly argue that their religion demands abortion. Instead, they will say that their religion permits abortion, or a specific abortion.” Without a specific order from an authority figure, adherents have no legally cognizable claim to exercise religion.

106. See, e.g., ISAAC B. SHARP, THE OTHER EVANGELICALS: A STORY OF LIBERAL, BLACK, PROGRESSIVE, FEMINIST, AND GAY CHRISTIANS—AND THE MOVEMENT THAT PUSHED THEM OUT (2023) (showing that the post-World War II era saw fights over the title of “evangelical” and the expulsion of progressive and feminist evangelicals from both the leadership and the religious tradition). One could equally imagine the question of religious doctrine coming out differently for many faiths in earlier decades. GLORIA H. ALBRECHT, ABORTION IN GOOD FAITH 16 (1995) (noting that most Christian theologians had little to say about abortion until the modern era).


108. C. John Sommerville, Defining Religion and the Present Supreme Court, 6 UNIV. OF FLA. J.L. & PUB. POL’Y 167, 179 (1994) (“Religions do not permit things; they command them.”).

109. In the debates over RFRA, advocates and scholars also offered this narrow view, according to which only religious obligation to save a pregnant person’s life qualifies as religious. Roat, supra note 11, at 70.
Michael McConnell, for example, has long argued that religious liberty challenges to abortion laws should turn on requirement and cannot succeed where they depend on the argument that “the decision whether to have an abortion is an issue of religiously informed conscience.” He would insist on a new prerequisite that objectors be able to point to religious teaching that dictates abortion in the precise circumstances. Only Orthodox Jews in situations of life-saving abortions, he predicts, will meet that standard. Most women simply lack the requisite compulsion from religion.

The initial (and damning) error of this argument is that current law explicitly rejects a requirement of compulsion. RFRA defines “religious exercise” broadly to “include[] any exercise of religion, whether or not compelled by . . . religious belief.” Many state RFRA’s likewise expressly reject a requirement of religious compulsion in favor of religious motivation. As Dahlia Lithwick and Micah Schwartzman say, a state can infringe on religious exercise “even if it doesn’t require religious believers to violate a religious obligation or commit a sin.”

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111. Schraub, supra note 14, at 66 (citing the argument in McConnell, supra note 110, at 174 as an example of “implicit denigration and diminishment of liberal Jewish religious priorities”).

112. 42 U.S.C. § 2000e-7(a)(1). In the analogous area of Title VII, “religion” is defined to encompass “all aspects of religious observance and practice as well as belief,” regardless of whether those beliefs are “new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or . . . seem illogical or unreasonable to others.” EEOC Compliance Manual, Section 12: Religious Discrimination (Jan. 15, 2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#---text=12-1.

113. ARIZ. REV. STAT. ANN. § 41-1493(2) (2022); ARK. CODE ANN. §§ 16-123-403(3)(B) (West 2022); IDAHO CODE ANN. § 73-401(2) (West 2022); KAN. STAT. ANN. § 60-5302(5) (West 2022); LA. STAT. ANN. § 13:5234(5) (West 2022); N.M. STAT. ANN. § 28-22-2(A) (West 2022); TEX. CIV. PRAC. & REM. CODE ANN. § 110.001(1) (West 2022); Some statutes make this clear in their definition of substantial burden. IDAHO CODE ANN. § 73-401(5) (West 2022) (defining “substantially burden” as “to inhibit or curtail religiously motivated practices”); TENN. CODE ANN. § 4-1-407(a)(7) (West 2022) (including an almost identical definition); VA. CODE ANN. § 57-2.02 (West 2022) (also including an almost identical definition).

Courts safeguard a great deal of religiously motivated, but not obligated, decisions. For example, courts recognize religious exercise in social services even though most religions engage in social services out of a general motivation to aid the poor, not out of an obligation to run adoption services or hospital emergency rooms in particular.115 Or consider that no mainstream religion commands a person to take contraceptives. Yet, barring the use of contraception would seem to be a major infringement on religious freedom for people of many faiths. For that matter, no one is religiously mandated to work as a doctor or a wedding photographer; each of these is a choice between morally permissible options.116

The second fundamental error is to mistake the nature of religious practice. Contrary to the views of McConnell and his acolytes, religious objectors to abortion bans do not simply claim that their religion grants them permission to make whatever choices they want. For some, religion will be motivating. For others, their religion may offer no specific doctrinal rule that requires abortion, but their religious leaders may advise terminating the pregnancy given their circumstances.117 The official policy of The Church of Jesus Christ of Latter-day Saints, for example, “allows for possible exceptions” to its anti-abortion stance where pregnancy is the result of rape or incest, the pregnant person’s life or health is at risk, or there are fatal fetal anomalies.118 It specifically empowers the pregnant person to decide on such abortion after they “have received confirmation through prayer.”119 As this suggests, an abortion permitted by official doctrine may become personally obligatory after consultation with God.120


116. Indeed, no one seemed bothered by the fact that in 303 Creative LLC v. Elenís, the website designer had never designed a wedding website. And the law did not require her to do so for anyone. 143 S. Ct. 2298 (2023).


119. Id.

120. Thank you to Fred Gedicks for raising this point.
And for many believers, their religion will demand that the pregnant individual must follow their religiously informed conscience—even if it contradicts state law. Many Christian denominations concur on this point.\footnote{121} For Catholics, for example, conscience is the “aboriginal vicar of Christ,” and a person compelled by conscience “not only may but must follow” its dictates.\footnote{122} Failure to exercise religiously informed conscience is itself violative of religious imperative.

A decision to have an abortion thus may be religiously compelled for non-fundamentalist women. David Schraub elaborates, “nobody suggests that a pregnant person is religiously obligated to have an abortion in any pregnancy. So the operative question is: what factual predicates do generate such an obligation?”\footnote{123} Some faiths would say that obligation arises when pregnancy threatens the person’s health. Others would answer, “when the pregnant woman, in her considered judgment, concludes that an abortion is necessary for her own well-being.”\footnote{124} Still others would point to requirements of responsible parenthood and the imperative of being economically and otherwise prepared to support a child.\footnote{125} Across the board, “[o]nce that judgment is made and that fact is established, the abortion...is just as religiously ‘obligatory’... as a life-saving abortion is for Orthodox Jews.”\footnote{126} The beliefs of some number of religiously sincere plaintiffs shade into obligation.

\footnote{121}{E.g., \textit{Michael G. Baylor, Action and Person: Conscience in Late Scholasticism and the Young Luther} 254 (1977) (noting that “Luther continued to assert the principle that it is always wrong to act against conscience”).}

\footnote{122}{\textit{Catechism of the Catholic Church} ¶1778 (2d ed. 1997) (quoting Cardinal John Henry Cardinal Newman in “Letter to the Duke of Norfolk,” in \textit{Certain Difficulties felt by Anglicans in Catholic Teaching} II (London: Longmans Green, 1865), 248 for the proposition that “[c]onscience is the aboriginal Vicar of Christ”); \textit{Richard P. McBrien, Catholicism} 973 (1994) (“If... after appropriate study, reflection, and prayer, a person is convinced that his or her conscience is correct, in spite of a conflict with the moral teachings of the church, the person not only may but must follow the dictates of conscience rather than the teachings of the church.”).}

\footnote{123}{Schraub, supra note 14, at 28.}

\footnote{124}{\textit{Id}.}

\footnote{125}{Right To Choose v. Byrne, 398 A.2d 587, 596 (citing testimony of Presbyterian theologian, that a religious duty of a pregnant woman could arise where she was unable to care for an infant, was mentally incompetent, or where the family would be impoverished from the addition of a child).}

\footnote{126}{Schraub, supra note 14, at 28–29.}

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Like other religious liberty plaintiffs, however, women need only prove religious motivation, not compulsion. And some number will be able to do so. Consider one woman who was overjoyed to be pregnant until she discovered that the fetus carried trisomy 18, an abnormality that almost always ends in stillbirth.\textsuperscript{127} A devout Muslim, she says, “I did pray . . . I did turn to God.”\textsuperscript{128} She discussed with multiple Islamic scholars and determined to end the pregnancy. Or take another example. Here, just months after the birth of her first child, a twenty-three-year-old woman found herself pregnant. Raised “totally anti-abortion,” she concluded after “some deep soul-searching” that “God puts everybody here for a reason. There was a reason for abortion, and it was for people in situations like I was.” She had an abortion at eight weeks. She says, “I had to put my strong faith from my childhood behind” and “make sacrifices . . . no matter how bad it hurts” for her existing child.\textsuperscript{129} For these pregnant people, the abortion decision was motivated, if not obligated, by their faith.

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These counterarguments to the religiosity of abortion-related claims are implicitly skeptical of the moral agency of women, even as they are expressly incredulous of pro-choice religions. Plaintiffs are accused of mistaking the religious significance of their decisions and misunderstanding the teachings of their faith. They are treated as distinctly incapable of exercising religious judgment.

These arguments track a long tradition in abortion rights doctrine of characterizing women as unable to exercise moral responsibility.\textsuperscript{130} While \textit{Roe v. Wade} centered (male) physicians as the appropriate authority over abortion, opponents of free exercise

\textsuperscript{127} Consider This from NPR, \textit{Some Muslim Americans Turn to Faith for Guidance on Abortion}, \textsc{Spotify}, at 7:20-8:28 (Jan. 24, 2023), https://open.spotify.com/episode/4v6k4bb0foDwOtIjTS7Y3V7si=QjAQGqOzSV5z6v-WarzHQ.

\textsuperscript{128} Id.

\textsuperscript{129} Foster, supra note 3, at 37, 58–62.

\textsuperscript{130} \textsc{James E. Fleming} & \textsc{Linda C. McClain}, \textsc{Ordered Liberty: Right, Responsibilities, and Virtues} 51, 53 (2013); see also Jill Elaine Hasday, \textit{Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality}, 84 \textsc{N.Y.U. L. Rev.} 1464, 1479–80 (2009) (noting anti-abortion campaign to argue that women regretted abortion employed “the premise that women’s decisions to have abortions were not to be trusted”); Foster, supra note 3, at 9 (noting that the doubt as to decision-making is “facilitated by the fact that the vast majority of people needing abortions are women”).

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rights over abortion instead delegate control to religious leaders, presumed male. For women’s convictions to be recognized, men—whether priests, rabbis, or conservative justices—must set down rules that dictate their behavior.

To insist on a command of religious authority once again favors patriarchy. Alan Brownstein offers a provocative example: “Suppose a woman believes as a matter of religious conviction that her decisions about family life must be subordinate to her husband’s decisions. And her husband does not think they should have another child and she should have an abortion.” As Brownstein says, “There has to be something wrong with a religious liberty framework that only protects her decision to have an abortion if it is subordinate to someone else’s.” More generally, if this test were adopted, clergy—a category overwhelmingly likely to be male—would have stronger claims than the women whose beliefs and bodies bear the burden of abortion bans. Clergy often speak in terms of obligation. We would also revert to prioritizing doctors, as their religious beliefs also can act as a duty to preserve life and health.

The assertion that abortion seekers lack conviction also resonates with gender stereotypes within abortion rights law. The Supreme Court often depicted pregnant people as uncertain. In Casey, for example, even as it acknowledged that “the abortion decision may originate within the zone of conscience and belief” of the woman herself, the Court seeded doubt about women’s


132. For an account of a conservative Christian woman who sought an abortion under similar circumstances, see Claudia Davis, A Pastor’s Wife Faces Truth in ABORTION, MY CHOICE, GOD’S GRACE: CHRISTIAN WOMEN TELL THEIR STORIES 73, 76 (Anne Eggebroten, ed. 1994) (describing herself as perhaps simply following her husband’s wishes because she had been conditioned to play a submissive role and, due to her religious background, was “not used to having any control over my life”).

133. Thank you to Alan Brownstein for this example.

134. E.g., Pomerantz Complaint, supra note 76, at para. 157 (citing leaders’ duty to “honor congregants’ autonomy and right to self-determination, which includes the right to reach informed decisions about the termination of pregnancy”).

135. Taking Conscience Seriously, supra note 76, at 1538; Brownstein, supra note 115 (“The argument for physicians might avoid the issue of generality and choice when they believe they are required by their faith to provide the medical care their patients seek . . . ”).

capacity to wield this authority. It worried “that a woman may elect an abortion, only to discover later, with devastating psychological consequences” that she did not “apprehend the full consequences of her decision.”137 The anti-abortion movement pushed this view, arguing that even those people who “sincerely thought they wanted to abort” experienced false consciousness138 and could be convinced of their errors. In 2007, the Gonzales v. Carhart Court ruminated that despite “no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”139 Just as abortion jurisprudence put women in the posture of uncertainty rather than conviction, so too do arguments against their religious exercise. Women seeking abortion have no convictions, only aspirations.

In sum, in response to the religious liberty of abortion seekers, some advocates and scholars have called for heightening the burdens on plaintiffs and limiting the meaning of religious exercise to ritual, dogma, and compulsion. State courts can easily dispose of this line of attack, citing Supreme Court cases and statutory text expressly rejecting such narrow definitions of religion.

III. DISTRUSTING WOMEN

Douglas Laycock and Oliver Thomas once wrote, “[r]eligious believers acting on their faith are not suspicious characters seeking unprincipled special treatment . . . . What is suspicious is not the believer practicing his faith, but the government seeking to stop him.”140 Law and religion disputes tend to take this position. Outside the limited contexts of incarcerated people and controlled

137. Id. at 882. See also Maya Manian, The Irrational Woman: Informed Consent and Abortion Decision-Making, 16 DUKE J. GENDER L. & POL’Y 223, 226 (2009) (arguing that Casey implemented a gender-specific constitutional rule on the basis of women’s irrationality).

138. Hasday, supra note 130, at 1479-80.


140. Laycock & Thomas, supra note 58, at 244-45.
substance users, objectors’ sincerity is rarely contested.\textsuperscript{141} Thus, few inquired into the veracity of claims by religious institutions that they must defy public-health orders requiring masking and capacity limits.\textsuperscript{142} When a rifle scope manufacturer and military contractor claimed that its commitment to preserving life demanded it exclude contraceptives from an insurance plan, its sincerity went unchallenged.\textsuperscript{143} Courts, too, handle the question of sincerity “with a light touch, or ‘judicial shyness.’”\textsuperscript{144}

But where abortion is involved, suspicions about sincerity have abounded. Because there is no evidence that any of the individual plaintiffs are insincere, parties, amici, and scholars argue that women seeking religious exemption from abortion bans should be categorically deemed unable to establish sincerity. The political climate renders them untrustworthy, and the material benefits of abortion entice them to selfishness. This Part explains that neither politics nor self-interest distinguishes abortion from other contexts where exemptions are granted.

\textit{A. Politics and Pretense}

Advocates and scholars have launched heated charges of insincerity against the women who have dared to challenge abortion bans as violations of their religious liberty.\textsuperscript{145} So what is it that calls their sincerity into question? There is no evidence of individual insincerity. Instead, women objecting to abortion bans are painted as categorically insincere. One line of argument points to the risk that religious liberty could act as a front for political ideology. We might be particularly suspicious here because of the

\begin{itemize}
\item \textsuperscript{142} Commonwealth v. Beshear, 981 F.3d 505, 509 (6th Cir. 2020) (assuming a Christian school has a “sincerely held religious belief” regarding in-person schooling”).
\item \textsuperscript{144} Moussazadeh v. Tex. Dep’t of Crim. Just., 703 F.3d 781, 791–92 (5th Cir. 2012). See also Xiao Wang, \textit{Religion as Disobedience}, 76 VAND. L. REV. 999 (2023) (reviewing 350 cases that examined sincerity under RFRA and the Religious Land Use and Institutionalized Persons Act and concluding that “sincerity has become a meaningless requirement”).
\item \textsuperscript{145} In Indiana, the Becket Fund argues, “There is powerful evidence that Plaintiffs’ beliefs are not sincere.” Proposed Amicus Curiae Brief of the Becket Fund for Religious Liberty in Support of Appellants at 11-17, The Individual Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1 No. 22A-PL-02938(Ind. Ct. App.) (filed Jan. 18, 2023).
\end{itemize}
political climate around abortion—pitting fetal protection against women’s autonomy. We might fear that movement actors will employ religion as strategy. These arguments alternate between painting women as unscrupulous political actors and describing them as pawns of the abortion rights movement. In either case, they cannot explain how these concerns are specific to abortion bans.

The alignment of politics and religion is unexceptional and rarely leads courts and commentators to dismiss religious objectors’ sincerity. Otherwise, presumably we would not see accommodation of anti-abortion religion. Anti-abortion commitments intersect with secular beliefs about the place of women in society and their proper role as mothers.\textsuperscript{146} Partisanship is strongly predictive of abortion views. And growing numbers of people strongly opposed to abortion have no religious affiliation.\textsuperscript{147} Yet, courts and lawmakers have understood opposition to abortion to be religious.\textsuperscript{148} Parsing what is actually religious from what is politically motivated has not previously been the trend in litigation, advocacy, or scholarship.\textsuperscript{149}

Suspicion that claims favoring abortion might be pretext for ideology is undercut by the reality that plaintiffs will not

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\item \textsuperscript{146} E.g., KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 158–91 (1985) (showing through interviews with activists that beliefs about abortions are tied to beliefs about the proper role of women and parenting); Perry Undum, Assessing the State of Public Opinion Toward Women, Gender, Equality – and Abortion, ANALYSIS FROM NATIONAL PERRYUNDEM SURVEY (Jan. 31, 2023), https://perryundem.com/wp-content/uploads/2023/01/PerryUndem-Landscape-of-Views-toward-Women-Gender-and-Abortion.pdf (a nationwide survey reporting that holding sexist beliefs about women in general and women who have had abortions in particular are stronger predictors of opposition to abortion than religiosity).
\item \textsuperscript{147} People with no religious affiliation increasingly make up a substantial share of anti-choice advocates. Kathryn Watson, They’re Not Religious. But They Oppose Abortion, CHRISTIANITY TODAY (Nov. 21, 2022), https://www.christianitytoday.com/ct/2022/december/pro-life-none-non-religious-secular-atheist-feminist-ally.html.
\item \textsuperscript{148} See, e.g., Kenny v. Ambulatory Ctr. of Mia., Fla., Inc., 400 So. 2d 1262, 1264-65 (Fla. Dist. Ct. App. 1981) (employee’s opposition to abortion accepted as religious belief); Elizabeth Sepper, Conscientious Refusals of Care, in THE OXFORD HANDBOOK OF U.S. HEALTH LAW 354, 366 (I. Glenn Cohen, Allison K. Hoffman & William M. Sage, eds. 2017) (“Medical conscience legislation tends to assume all refusals are motivated by conscience. Many statutes protect “refusal” without limiting it to religious, moral, or ethical beliefs. None requires providers to show the sincerity or depth of their convictions.”).
\item \textsuperscript{149} Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 725 (2014) (insisting “it is not for us to say that their religious beliefs are mistaken or insubstantial”). Consider, for example, business owners seeking to discriminate against same-sex couples. Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019); Brush & Nib Studio, LC v. City of Phoenix, 418 P.3d 426, 438–39 (Ariz. Ct. App. 2018).
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necessarily hold progressive values. (Indeed, some of the stories in this Article come from conservative Christians choosing abortion). Traditionalist views of gender, motherhood, and sexuality equally can motivate abortion decisions. For example, according to the Turnaway Study, patients sometimes choose abortion out of desire that children be raised in a two-parent home with a father. Many religions place a great emphasis on female fertility, such that a pregnancy threatening future reproductive capacity might be terminated for the greater good. Likewise, a pregnant woman might seek to end a pregnancy that impedes her ability to carry out her religion-mandated duty to stay home and care for her existing small children.151

The worry about lying women—or, if one prefers, the “sincerity problem” also tracks the anti-abortion movement’s narrowing of exceptions to abortion regulations. Once supportive of rape and incest exceptions, advocates have pushed to shrink and then eliminate them. This trend has been founded on two related, but not perfectly overlapping, myths: first, that women lie about sexual assault, and second, that women lie to gain access to abortion. In reality, people who are raped often avoid reporting; only about 0.5% of rape reports are inaccurate. And vanishingly small numbers of people run the gauntlet necessary to obtain rape or incest exceptions.

150. Foster, supra note 3, at 7; Rachel K. Jones, Lori F. Frohwirth & Ann M. Moore, “I Would Want to Give My Child, Like, Everything in the World”: How Issues of Motherhood Influence Women Who Have Abortions, 29 J. OF FAM. ISSUES 79, 93 (2008) (“Women wanted to avoid bringing their children into situations that they had been through that they regarded as being undesirable—that is, raising their existing children, or being raised themselves, without a father.”).

151. For stories from women who terminated their pregnancies to take care of their young children due to the health effects of pregnancy, see Jones et al., supra note 150, at 90.


But, some posit, abortion-related religious liberty claims might go beyond mere alignment of politics and religion and verge into a strategic (and insincere) move from the pro-choice movement.\textsuperscript{157} There seems to be no factual foundation to this charge. In more than a year since \textit{Dobbs}, only two lawsuits have been filed by women raising their religion. The initiative did not come from national reproductive rights movement actors. And many reproductive justice groups remain disinclined to advance religious liberty arguments. They likely disagree with the direction of the Court’s church-state doctrine over the last decade. Having seen religion weaponized against reproductive healthcare, many advocates are reluctant to pick up the master’s tools.\textsuperscript{158} In addition, they recognize that religious liberty arguments can devalue the serious and morally important reasons that non-religious people have for seeking abortion.\textsuperscript{159} They may apprehend that exemptions stand to exacerbate disparities based on race, ethnicity, class, and beyond. Black and Latina abortion patients, for example, are more likely to report moral and religious beliefs against abortion than their White peers.\textsuperscript{160} The movement may eventually soften, but it has not yet.

More fundamentally, the image of reproductive rights groups as puppet masters again denies religious women their moral agency. It echoes long-standing stereotypes about women’s susceptibility to manipulation by purportedly unscrupulous abortion providers.\textsuperscript{161} As Reva Siegel argues, the anti-abortion movement has long advanced arguments that women obtain abortions not out of free choice, but due to coercion and misunderstanding—in this view, restricting abortion protects women.\textsuperscript{162} So too, the notion that women could be manipulated

\textsuperscript{157}. E.g., W. Cole Durham, Jr., Edward McGlynn Gaffney, Douglas Laycock & Michael W. McConnell, \textit{For the Religious Freedom Restoration Act, First Things} 42, 43 (Mar. 1992) (“A desperate and frustrated pro-choice movement will try every theory it can devise, and RFRA will surely be among them.”).


\textsuperscript{159}. Requiring religious motivations also seems likely to favor older women and those who are already mothers—who frequently cite family responsibilities to others—over younger people without children—who often invoke unpreparedness to parent. Finer, \textit{supra} note 30, at 117.

\textsuperscript{160}. Foster, \textit{supra} note 3, at 172.

\textsuperscript{161}. Mary Ziegler, \textit{Abortion and the Law of Innocence}, 2021 U. ILL. L. REV. 865, 907 (2021) (discussing anti-abortion strategy of arguing that “abortion profiteers are exploiting women”).

\textsuperscript{162}. Siegel, \textit{supra} note 139, at 1031–36.
into making (dishonest) free exercise arguments takes women to be objects with limited capacity. Like the “regret rationale” of Carhart, this theory seems to reflect “a lack of trust in women’s capacity for responsible moral agency, and a view that women are incompetent decision makers who need protection.”\textsuperscript{163} It simultaneously infantilizes women who advance religious suits and justifies paternalism from the state.\textsuperscript{164}

The juxtaposition of these claims with other objections is revealing. Take religious exemptions from payment of workplace union dues. Websites of anti-union groups provide form letter religious opt-outs; as a first step, they suggest that an employee determine that union activities violate their religion and provide a list of possible beliefs that one might invoke.\textsuperscript{165} Or consider the more high-profile example of businesses demanding exemptions from the contraceptive mandate. A number were notable political opponents of healthcare reform before they filed suit.\textsuperscript{166} Having failed in the political process, they rallied religion in the courts. Movement actors guided the litigation. Hobby Lobby, for example, previously included emergency contraception in its insurance plan but dropped the coverage at the urging of the conservative legal movement group, the Becket Fund, and thus became subject to the contraceptive mandate and able to file suit against it.\textsuperscript{167} Yet, few insisted on probing plaintiffs’ sincerity.

\textsuperscript{163} FLEMING & MCCAIN, supra note 130, at 73.
\textsuperscript{164} Kathryn Abrams & Hila Keren, Who’s Afraid of Law and the Emotions?, 94 MINN. L. REV. 1997, 2029–31 (2010) (arguing that in the abortion context the idea of any emotional reaction “infantilizes women” and “authorizes a highly paternalistic and restrictive state response”).
B. Self-interest and Selfishness

The ample material benefits of abortion might provide an alternative, sufficient reason to distrust women’s claims. Exemption from an abortion ban can mean saving life and continued health. In states with bans in place, pregnant women have gone into shock, suffered hysterectomy or fertility loss, and risked hemorrhage and sepsis because doctors could not intervene until death was imminent. More generally, control over the timing of parenthood tends to come with benefits. As the Turnaway Study makes clear, women who get abortions when they want them are in better physical health, have more stable relationships, are financially better off, and raise their children with more resources compared to people who were turned away from abortion clinics. Exemptions can mean escape from pregnancies that will derail lives and destabilize families.

But religious claims to abortion are not unique in generating material benefits. Church-state doctrine is shot through with cases where religious exemptions furthered secular interests, and plaintiffs nonetheless were treated as sincere. The series of cases involving unemployment insurance featured plaintiffs who, having been fired from work, wanted (and won) state insurance payouts. The Amish families in Yoder received an exemption from school attendance requirements and gained the benefit of (unpaid) teen labor on their homesteads. A glance at the Supreme Court’s contemporary docket reveals prisoners on death row gaining religious exemption with the effect of delaying execution,


169. FOSTER, supra note 3, at 21.

170. Suzanne O. Bell, Elizabeth A. Stuart & Alison Gemmill, Research Letter, Texas’ 2021 Ban on Abortion in Early Pregnancy and Changes in Live Births, 330 JAMA 281, 281 (2023) (finding the Texas six-week ban that went into effect in September 2021 was associated with 9,799 additional live births between April and December 2022).


parents securing governmental funding for their preferred private schools, and religious employees taking Sundays off. 173 The Religious Land Use and Institutionalized Person Act is another example, inviting religious institutions to litigate for secular benefits for their religious practice—exemption from parking minimums, expansion of school facilities, etc. 174 Indeed, it seems to be the rare case where an individual objector’s religious liberty argument runs contrary to their secular or material interests.

The implication of the “abortion is different” argument is that women will pursue their self-interest even if it means perjury. This viewpoint bakes in the assumption “that bad decisions (e.g., lack of contraception planning, promiscuity, etc.) got them into this mess; hence, they will probably continue to make bad decisions.” 175 It also trades on our societal misgivings about women who refuse motherhood. 176 From this perspective, people seeking abortion are by definition non-normative women, casting off their natural duty of motherhood to prioritize themselves. 177

This trope of self-interest and selfishness is belied by how women themselves experience abortion. Studies tell us that other-regarding reasons overwhelmingly drive women’s abortion decisions. 178 Mothers—who constitute more than sixty percent of abortion patients—commonly choose abortion out of responsibility for other people. 179


175. Kamitsuka, supra note 8, at 136.

176. Clare Huntington, Familial Norms and Normality, 59 EMORY L.J. 1103, 1137 (2010) (arguing that mandated scripts and ultrasounds before abortion as well as “extra-legal efforts contribute to an anti-abortion social norm treating “women as mothers, regardless of their desire to be so; and abortion as a shameful and regret-inducing act”).

177. Reva B. Siegel, The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument, 57 DUKE L.J. 1641, 1688 (2008) (“The claim is that by restricting all women, government can free women to be the mothers they naturally are.” “It restricts women’s choices to free them to perform their natural role as mothers.”); Reva B. Siegel, Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart, 117 YALE L.J. 1694, 1721-23 (2008) (analyzing David Reardon’s writings and observing that for much of the anti-abortion movement “[a] pregnant woman is a mother, and a mother’s interests are defined by the needs of her child” even if she fails to recognize it).

178. The Turnaway Study found that 74% of women identified concern for or responsibility to other people as a reason for their abortion. M. Antonia Biggs, Heather Gould & Diana Greene Foster, Understanding Why Women Seek Abortions in the US 13 BMC WOMEN’S HEALTH 29, 31 (2013).
to their existing children.\textsuperscript{179} One lower income, divorced mother of two explained: “There is just no way I could be the wonderful parent to all three of them . . . .”\textsuperscript{180} Another anticipated that another child “would break us” and “I couldn’t do that to my kids.”\textsuperscript{181} Other parents tell of having to prioritize resources, time, and care for ill or disabled children.\textsuperscript{182} Where diagnoses of anomaly have been made, over and over again, people recount a desire to avoid causing their baby’s “suffering.”\textsuperscript{183} As one woman said, “I saved my baby from pain. And I firmly stand by that.”\textsuperscript{184}

Some even experience abortion as self-sacrificing—requiring an act contrary to their own desires and needs. One study reports that women sometimes express “a conflict between their realistic assessments of their situations and what they classified as their ‘selfish’ desire to mother another child.”\textsuperscript{185} Other women tell similar stories. Consider, for example, “C,” who very much wanted another baby but “breaks her own heart and sets aside her own desires in pursuit of her family’s well-being, her daughter’s flourishing.”\textsuperscript{186} As Robin West reminds us, “the decision to abort is almost invariably made within a web of interlocking, competing, and often irreconcilable responsibilities and commitments.”\textsuperscript{187}

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\item \textsuperscript{179} Jones et al., supra note 150.
\item \textsuperscript{180} Finer, supra note 30, at 117.
\item \textsuperscript{181} Motherhood Meets Medicine, supra note 34, at 11:45–12:57 (“[W]hat prevailed was my current love for my current children . . . .”).
\item \textsuperscript{182} E.g., Foster, supra note 3, at 38 (parent of three children explaining that her son was recently diagnosed with cancer and that “[h]is treatment requires driving 10 hours”); Jones et al., supra note 150, at 90 (recounting stories of a parent of a child with recent open-heart surgery and another parent with a severely disabled child and another child to care for).
\item \textsuperscript{183} See, e.g., Watson, supra note 6, at 194 (describing that after every ultrasound seemed to turn up a new problem with her baby, one Catholic woman had a second-trimester abortion to prevent its suffering); Amicus Brief of the Institute for Reproductive Health Access at 10–11, Gonzales v. Carhart 127 S. Ct. 1610 (2007) (Nos. 05-1382, 05-380) (reporting stories of two women whose fetuses had anomalies who respectively explained “[w]e didn’t want her to suffer the definite and the untold problems she was sure to endure, if she even made it” and “why put the baby through suffering if I can end his life and set him free of his suffering . . . .”); After Tiller, supra note 4, at 25:28-26:10 (describing her abortion as the “most loving choice I could make” to give her son “a dignified birth”).
\item \textsuperscript{184} Motherhood Meets Medicine, supra note 34, at 55:40–56:30.
\item \textsuperscript{185} Jones et al., supra note 150, at 93.
\item \textsuperscript{186} HANNAH MATTHEWS, YOU OR SOMEONE YOU LOVE: REFLECTIONS FROM AN ABORTION DOULA 131 (2023) (driven by financial and logistical limits on ability to parent another child).
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Note too that unlike some other religious liberty claims, there is no hedonic appeal to abortion. Although people often experience abortion as relief, it is a medical procedure or the taking of pills. In both cases, it can involve some pain, cramps, and bleeding. People do not pursue abortions for pleasure, indulgence, or financial gain. We are not talking about religious groups who don’t want to pay worker’s compensation or unemployment insurance—whose sincerity is widely accepted in legal scholarship and doctrine.188

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Religious objectors to abortion bans may hold political ideology matching their religious beliefs and receive material as well as spiritual benefits from exemption. But the political economy does not render them categorically insincere. In this, their suits cannot be distinguished from many recent cases around Covid-19, reproductive healthcare, antidiscrimination, and “school choice.” The response to abortion-related claims suggests that commentators may have given in to “the dangerous temptation to confuse sincerity” with their views on the “underlying truth” of the plaintiffs’ religious beliefs.189 They also, as this Part has suggested, may rely on constitutionally illicit gender stereotypes.

IV. THE MANY BURDENS OF ABORTION BANS

Where religiosity and sincerity are satisfied, the only task left to the religious objector is to show a substantial burden on their religious exercise. Under virtually any formulation of substantial burden, people of reproductive age with a relevant and sincere religious motivation in favor of abortion should be able to make out a claim against an abortion ban. The believer is prevented from conducting themself consistent with their religion and compelled to continue a pregnancy, labor, and deliver a child contrary to their beliefs.190 The ability to exercise religious judgment about

188. E.g., Big Sky Colony, Inc. v. Montana Dep’t of Lab. & Indus., 291 P.3d 1231 (Mont. 2012); United States v. Indianapolis Baptist Temple, 224 F.3d 627 (7th Cir. 2000).
189. Ben Adams & Cynthia Barmore, Questioning Sincerity: The Role of the Courts After Hobby Lobby, 67 STAN. L. REV. ONLINE 59, 64 (2014); see also Anna Su, Judging Religious Sincerity, 5 OXFORD J.L. & RELIGION 28, 42 (2016) (“It is easy to believe that someone is sincere about a particular assertion of belief if such is intelligible to the court.”).
190. Law, Rights, and Religion Project, supra note 55, at 12 (noting that the definition varies by state but generally the law must restrict the ability to perform religiously motivated acts or require action that conflicts with religious beliefs).
pregnancy and parenthood is denied by state law. This Part reviews three potential approaches to the question of substantial burden.


With regard to abortion, state coercion to violate religious belief is extreme, direct, and proximate. Abortion prohibitions assign onerous Good Samaritan duties to pregnant women in a way unique to U.S. law.\footnote{Suzanna Sherry, Women’s Virtue, 63 TUL. L. REV. 1591, 1593 (1989) (describing the Samaritan argument); Judith Jarvis Thomson, A Defense of Abortion, 1 PHIL. & PUB. AFFAIRS 47, 63–64 (1971) (describing the absence of such Samaritan duties in law and exploring those duties in ethics).} Where religious belief motivates pregnancy termination, the believer “is forced to act . . . in defiance of, her own beliefs about what respect for human life means and requires.”\footnote{RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 99 (1996).}

She has no way to avoid the conflict between the state’s abortion ban and her religion.\footnote{A Satanic Temple member challenged a requirement that patients receive a booklet which includes a prominently displayed statement: “The life of each human being begins at conception” and requires her to sign a receipt. Based on signals from the Supreme Court that signing a standard bureaucratic form (containing no religiously offensive message) is a substantial burden, the free exercise claim survived the pleading stage, Doe v. Greitens, 530 S.W.3d 571, 577–78 (Mo. Ct. App. 2017), but was ultimately dismissed because the law left her free to decline to read the booklet or expose herself to its religiously objectionable message, Doe v. Parson, 567 S.W.3d 625, 630 (Mo. 2019).} The pregnancy takes place in her body. She only gets one life, one health, one opportunity to raise her children. She is denied her ability to carry out her sincere, religiously motivated decision about the right course.
But in 2015, the Supreme Court destabilized this traditional approach to substantial burden. It suggested a second approach: that the legal standard might be satisfied by whatever the religious objector believes to be a substantial burden. The religious objector’s own framing of their belief then would be outcome-determinative on the question of substantial burden. As Caroline Corbin says, this amounts to no test at all.

Alternatively, the Court proposed a third approach that instead would evaluate the burden on free exercise by the cost of noncompliance with the law. In the context of the contraceptive mandate, offering non-ACA-compliant insurance plans would result in stiff tax penalties, and dropping coverage might increase labor costs. Because the contraceptive mandate worked “to make the practice of . . . religious beliefs more expensive in the context of business activities,” the Court concluded that it impermissibly burdened the exercise of religion.

Once again, abortion bans impose substantial burdens under this approach. Noncompliance with an abortion ban could mean leaving the state permanently—with severe consequences of loss of work, home, and social ties. Or noncompliance could mean travel out of state with attendant delays of medical care, missing work, travel time, childcare and travel expenses, unwanted disclosures to employers and friends, and financial debts. Procuring an illegal

197. Lederman, supra note 60, at 426 (“RFRA claimants’ very framing of their alleged religious obligations therefore might be sufficient to clear the RFRA hurdle of showing a ‘substantial burden’ . . . .”). See also Corbin, supra note 14, at 489 (noting that the justices have allowed challenges to public accommodations laws where “the link between the law (prohibiting discrimination against customers based on sex or sexual orientation) and the religious moral wrong (marrying someone of the same sex) is extremely attenuated . . . .”).
200. Hobby Lobby, 573 U.S. at 710.
abortion within a state could mean exposing one’s partner, friends, family, and helpers to ruinous civil suits or criminal penalties. While most state abortion bans except the pregnant person from criminal enforcement, enterprising prosecutors could bring charges under other criminal laws.

As filings in the abortion-related religious liberty suits highlight, bans on abortion burden a spectrum of faith-motivated reproductive decisions. Plaintiffs attest to remaining celibate lest the state compel them to continue a resulting pregnancy in contravention of their religious beliefs. Infertile couples avoid continuing fertility treatments. For example, although the Jewish beliefs of the Kentucky plaintiffs “demand that they have more children through IVF,” the abortion ban forces them “to abandon their sincere religious beliefs of having more children . . . .” In this sense, bans are anti-natalist, putting a great deal of pressure on some people, especially those at risk of passing on genetic conditions or suffering complications from preexisting conditions, to avoid pregnancy. Beyond the bounds of these lawsuits, people living under abortion bans report undergoing sterilization or deferring beginning a family.

V. STRICT IN THEORY, UNPRINCIPLED IN FACT?

Once the plaintiff has shown religiosity, sincerity, and substantial burden, the state must convince the courts that the


prohibition on abortion furthers a compelling governmental interest and that application of the law to the religious objector is the least-restrictive means to achieve that interest. This is no easy feat. The current Court’s expansive approach to religious liberty under RFRA has transformed what was relatively permissive judicial scrutiny of law into an “exceptionally demanding” burden.207 Related, the any-secular-exemption approach of Tandon leads rather straightforwardly to religious exemption under the Constitution because bans permit abortions for secular reasons like life, rape, incest, or IVF—but not religion.208

As section V.A elaborates, the asserted governmental interest in potential life is undermined by a series of exceptions. These exceptions expose states as willing to sacrifice their purportedly compelling interest for an array of secular but not religious reasons. It reveals that state abortion bans may be designed more to punish certain abortions than to safeguard fetal life. Section V.B explains that even assuming a compelling interest in prohibiting abortion, applying the bans to religious objectors may not satisfy the least-restrictive means analysis. This reality has prompted newfound concern for the deregulatory effects of exemption. Section V.C argues that this concern, while valid, inheres in the enterprise of the Supreme Court’s radical revision of free exercise. It sets out a list of reasons why claims in favor of abortion will be relatively limited.

A. A Less-than-Compelling Interest in Abortion Ban Enforcement

In applying strict scrutiny to abortion bans, one’s initial instinct might be that the state’s argument for compelling interest will prevail. For this reason, skeptics of abortion-related religious liberty claims sometimes jump directly to the state’s interest in

208. Schwartzman & Schragger, supra note 14, at 2321. Blackman, Slugh, and Fortgang claim that the plaintiffs in the religious liberty challenges to abortion bans create “serious problems” in that “if the existence of exceptions automatically undermines the least restrictive means prong” then most laws would have to have religious exceptions. Blackman et al., supra note 152, at 445. This criticism of the more extreme versions of “most-favored-nation” test is well-founded. See Andrew Koppelman, The Increasingly Dangerous Variants of the “Most-Favored-Nation” Theory of Religious Liberty, 108 IOWA L. REV. 2237 (2023) (providing a thorough-going critique of the most-favored-nation approach). But pointing the finger at these plaintiffs is misguided; the responsibility lies with the Supreme Court that adopted this test and the advocates who pushed it to do so.
potential life.\textsuperscript{209} They prefer to center the fetus rather than the religious observer.\textsuperscript{210} As this argument goes, the Supreme Court long treated protecting potential life as an interest that is legitimate and, once the fetus is viable, even compelling.\textsuperscript{211} In enacting bans, states have gone beyond these bounds and asserted a compelling interest in life beginning at fertilization.\textsuperscript{212} There seems little doubt that this Supreme Court would agree (although it did not do so in \textit{Dobbs}). A state court might do so as well.

But this analysis overlooks the interpretation of “compelling interest” in religion law doctrine. In recent years, the Court repeatedly has plucked out and emphasized a sentence from \textit{Gonzales v. O Centro Espiritu Beneficente Uniao do Vegetal} that “the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.”\textsuperscript{213} More specifically, \textit{Hobby Lobby} instructed courts to “look to the marginal interest” in enforcing legal obligations.\textsuperscript{214}

The question is no longer whether the state has a compelling interest in protecting fetal life in general (as the argument above assumes). Instead, RFRA “contemplates a ‘more focused’ inquiry.”\textsuperscript{215} A state must prove a compelling interest in “denying an exception” to the specific religious objector.\textsuperscript{216} In this inquiry, exemptions and under-inclusion are highly relevant, divulging that the state does not treat its asserted interest as of “the highest

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\item[209.] See Roat, \textit{supra} note 11, at 70 (describing this move at the time of debates over RFRA).
\item[210.] This argument mirrors the anti-abortion movement’s emphasis on the interests of a potential person over the pregnant person. Siegel, \textit{supra} note 139, at 1014–17 (explaining emphasis on fetal personhood in the 1970s–90s); Mary Ziegler, \textit{The Conservative Magna Carta}, 94 N.C. L. REV. 1653, 1661 (2016) (discussing fetal pain as a more recent rhetorical move in this direction).
\item[211.] Roe v. Wade, 410 U.S. 113, 163 (1973) (recognizing “the State’s important and legitimate interest in potential life,” which becomes “compelling” at the point of viability).
\item[212.] Brief of Appellants, The Individual Members of the Medical Licensing Board of Indiana, et al., at 20.
\item[214.] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 727 (2014); Little Sisters of the Poor v. Pennsylvania, 140 S. Ct. 2367, 2392 (2020) (Alito, J., concurring) (“We can answer the compelling interest question simply by asking whether Congress has treated the provision of free contraceptives to all women as a compelling interest.”).
\item[215.] Hobby Lobby, 573 U.S. at 726.
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order.” As Justice Gorsuch notes, courts must give “due weight to exemptions other groups enjoy[,]” and governments must “offer a compelling explanation why the same flexibility extended to others cannot be extended to” religious objectors. If the state’s interest is so important, why are exceptions allowed?

To begin to apply this test to abortion prohibitions, consider that virtually all bans allow the disposal of embryos created through in vitro fertilization. This dramatic underinclusion indicates that the government authorizes some significant destruction of embryonic life. On top of this near-universal carve-out, approximately half of state bans continue to include exceptions for rape and incest. Some do so for fetal anomaly. Most do so for ectopic pregnancy.

States have failed to articulate any plausible explanation for permitting loss of fetal life for these reasons but not when religion instructs. In all cases, the state interest in potential life is impeded. As Micah Schwartzman and Richard Schragger say, “the danger here to fetal life is the same, whether a patient decides to terminate a pregnancy for powerful secular reasons or to act in accordance with their religious convictions.” Yet, religious reasons are disfavored compared to IVF, rape/incest, fetal anomaly, and beyond. The one court to reach the merits of a religious exemption claim found this argument convincing—holding that the fact that “the statute explicitly allows abortions in circumstances that the State acknowledges constitute the ‘killing’ of an ‘innocent human being’” required similarly allowing religiously motivated abortions.

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217. Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 547 (1993); see also Holt, 574 U.S. at 367, 135 S. Ct. 853 (“[T]he Department has not adequately demonstrated why its grooming policy is substantially underinclusive . . . ”).


220. Seven states have such an exception, mostly for lethal fetal anomaly. Id. Only Louisiana specifies the conditions that give rise to the exception. Id.


222. Schwartzman & Schragger, supra note 14, at 2322.

223. Anonymous Plaintiffs, supra note 88, at 37 (noting exemptions for “rape or incest and where the fetus is viable but will not live beyond three months after birth”).
Abortion opponents Josh Blackman, Howard Slugh, and Tal Fortgang attempt to defend against religious exceptions by arguing that rape and incest exceptions do not undermine the same state interest (they fail to acknowledge other exceptions). But they simply assert, “there are many possible reasons a state could be willing to allow abortions in cases of rape or incest—both of which are crimes—while prohibiting abortions for fetuses that were conceived by lawful means.”224 They do not articulate any such state interest.

Unlike life (and possibly health) exceptions, abortions for reasons of rape or incest are not easily justified by self-defense. As Glenn Cohen explains, the timing is wrong (resulting after the violation, not to prevent the violation), and the victim’s identity does not match (the exception grants a pregnant person the prerogative to kill the fetus, not her assailant).225 The tradition of self-defense, moreover, allows only proportionate force and does not permit killing a bystander.226

The obvious candidate is an interest in punishing women for “lawful” sex while treating women who are assaulted as innocent.227 Indeed, rape and incest exceptions originate in 1950s law reform efforts that separated innocent victims from women guilty of having had sex. From this point of view, abortions for rape or incest could be allowed without “extending an invitation to promiscuity”—as further liberalization of abortion, it was feared, might do.228 Over the next several decades, states sometimes attempted to defend restrictions on contraception as justified as penalizing sex. The Supreme Court repeatedly threw cold water on

227. Sherry F. Colb, What Proponents of the “Rape Exception” Teach Us About Abortion, FINDLAW, Jul. 11, 2007, https://supreme.findlaw.com/legal-commentary/what-proponents-of-the-rape-exception-teach-us-about-abortion.html (arguing that the rape exception ultimately seems to come down to “the view of sexual intercourse as a sin that carries its own punishment: pregnancy and labor”).
228. Ziegler, supra note 161, at 872.
the idea that pregnancy could be used as punishment, rejecting any such interest as illegitimate.\textsuperscript{229}

This analysis reveals a goal altogether different from preservation of fetal life. Rape and incest exceptions turn on the idea that abortions can have good or bad motivations behind them.\textsuperscript{230} In exempting abortions for these reasons, the state shows itself “less focused on the absolute moral unacceptability of abortion than on the pregnant woman’s perceived moral culpability.”\textsuperscript{231} The rape-incest exceptions, even if rarely permitted to women, undermine the idea that the state’s interest is fetal protection. Equally important for our purposes, openly disfavoring religion as a “bad” reason for abortion flies in the face of the Court’s recent approach to exemptions.

Another exception from state abortion bans yet unremarked by scholars or advocates lays bare a chasm in the states’ approach to fetal life protection. Almost all state laws do not apply to pregnant people who self-manage abortion.\textsuperscript{232} In Texas, for example, pre-\textit{Roe} criminal bans and a more recent trigger ban on abortion both exempt the pregnant person.\textsuperscript{233} This exception dramatically

\begin{flushright}
\textsuperscript{229} See \textit{Eisenstadt v. Baird}, 405 U.S. 438, 448 (1972) (describing as “plainly unreasonable” to assume the state was furthering an interest in assigning “pregnancy and the birth of an unwanted child as punishment for fornication”); \textit{Baird v. Eisenstadt}, 429 F.2d 1398, 1402 (1st Cir. 1970) (“To say that contraceptives are immoral as such, and are to be forbidden . . . , means that such persons must risk for themselves an unwanted pregnancy . . . . In the absence of demonstrated harm, we hold it is beyond the competency of the state.”); \textit{Carey v. Population Servs., Int’l}, 431 U.S. 678, 695 (1977) (“remaining] reluctant to attribute any such ‘scheme of values’ to the State”). \textit{See also} \textit{Roe v. Wade}, 410 U.S. 113, 148 (1973) (noting that “it appears that no court or commentator has taken the argument seriously” that abortion bans can be justified by an interest in discouraging “illicit sexual conduct”).

\textsuperscript{230} Cohen, supra note 225, at 87.


\textsuperscript{233} Elizabeth Sepper, Ghazaleh Moayedi, Lauren Thaxton, Anita Beasley, Laura Dixon & Kari White, \textit{After Roe: Criminal Abortion Bans in Texas}, Tex. Policy Evaluation Project Research Brief 4 (June 2022), https://sites.utexas.edu/txpep/files/2022/06/TexasPostRoeCriminalAbortionBans-TxPEP-PolicyBrief_27June22.pdf (“Likewise, the Texas homicide statute exempts a pregnant person for conduct they committed that caused the end of their pregnancy.”).
undermines the state interest. In excluding the person who sets the abortion in process and takes the pills, the state shows it does not treat the end of fetal life as equivalent to murder.

Perhaps such an exception would not have condemned a law when all or most abortions were done in-office with vacuum aspiration. But states have passed and implemented current bans with the knowledge that there will be no “abortion provider.” In these states, the lion’s share of pregnant people who obtain abortions in the state will self-manage their abortion. Many women will proactively obtain medication abortion pills via the internet from foreign or out-of-state sources before they are pregnant. They may purchase misoprostol, a drug used for stomach ulcers, without the seller having any intent or knowledge that it will be used for an abortion. For the run-of-the-mill abortions in a ban state, no one will be subject to the abortion ban’s criminal prohibitions.

Finally, consider that nearly all such laws contain exceptions for life, and many allow termination where the pregnant person will otherwise experience severe health effects. Now, one might think life and health exceptions are easily distinguishable from religious exemptions. These exceptions together seem to balance state interests in the life of both the fetus and the pregnant person. An analogy to common law self-defense could justify termination.

234. This aspect of abortion bans also dooms the purported analogy to criminal prohibitions on murder. Cf. Mitchell Rocklin & Howard Slugh, Pro-life Laws Don’t Establish Christianity and Religious Liberty Is Not a License to Kill, PUB. DISCOURSE (May 27, 2019), https://www.thepublicdiscourse.com/2019/05/52456; Andrew Kubick, Why Religious Freedom Can’t Protect Abortion, PUB. DISCOURSE (Sept. 6, 2022), https://www.thepublicdiscourse.com/2022/09/84357. The exception for women shows that states do not consider or treat abortion akin to murder or treat the fetus as equivalent to an independent human being.

235. I use “self-managed” abortion mostly to refer to abortion outside of the formal healthcare system, although the term also could apply to obtaining abortion pills prior to pregnancy through the formal healthcare system and using them later at home.


to preserve life—and perhaps avoid severe health consequences in emergencies.238

But as Schwartzman and Schragger argue, this argument is “in significant tension with the views of conservative Justices” and an increasing number of appellate courts about constitutional protections for free exercise.239 They point to recent constitutional free exercise cases involving pandemic health measures where the federal courts condemned any preference for “life-sustaining” over “soul-sustaining” exemptions.240 The fact that grocery stores were open meant churches also had to be available. Lower courts granted religious exemptions to vaccine mandates on the ground that medical exceptions—for people whose health is endangered by vaccination—equally undermine the state’s goals.241 Justices Gorsuch, Alito, and Thomas agreed.242 Nor does the interest in the preservation of human life clearly distinguish abortion from these settings. Precautions against COVID-19 were premised on preserving human life and health—yet exemptions were granted. And studies showed that church gatherings resulted in outbreak, morbidity, and death.243 Under this reasoning, Schwartzman and

238. Sherry F. Colb, What Proponents of the “Rape Exception” Teach Us About Abortion, FINDLAW (Jul. 11, 2007), https://supreme.findlaw.com/legal-commentary/what-proponents-of-the-rape-exception-teach-us-about-abortion.html (noting that the “life of the mother” exception can be justified as an issue of “self-defense”); but see Susan Frelich Appleton, We Need to Talk About Abortion as Self-Defense, WASH. U. STUDENT LIFE (Oct. 19, 2022), https://www.studlife.com/forum/2022/10/19/we-need-to-talk-about-abortion-as-self-defense (observing that “self-defense is more capacious” in U.S. law than limitations for “medical emergencies’ or life-threatening pregnancies” allow). Appleton’s account suggests that religiously motivated abortions invoking this more capacious view of self-defense should be viewed as affecting state interests in fetal life and maternal self-defense equal to the life and emergency exceptions.

239. Schwartzman & Schragger, supra note 14, at 2326–27 (“[I]t is difficult to see how they could, in a principled way, recognize medical exceptions to abortion bans without finding that those exceptions undermine the state’s interest in fetal life.”).

240. Id. at 2322 (quoting Maryville Baptist Church v. Beshear, 957 F.3d 610, 614 (6th Cir. 2020)).

241. Id. at 2327.


Schrager conclude, medical exceptions to abortion bans “ought to trigger the requirement that comparable religious claims also receive accommodations” under the Constitution.244

Although today’s abortion bans are draconian, they contain dramatic underinclusions. Excising destruction of embryos for IVF, rape/incest, life/health, and the abortion-seeker herself, states do such damage to their purported interest as to reveal it to be less-than-compelling for the state (or arguably not the goal at all).

Given these exceptions, courts can easily find that RFRA’s compelling interest test is unsatisfied. States fail to offer a compelling interest in applying the law to the individual religious objector’s abortion, but not to people acting for secular reasons. In their analysis, courts also might draw on the Supreme Court’s recent constitutional approach in Tandon, Fulton, and beyond to emphasize the ways secular exceptions support the case for religious exemption.

B. The Availability of Less-Restrictive Means

Even assuming a compelling interest in potential life, a court might find that the state has means less restrictive of religious exercise available to advance its interest. In situations of pre-viability miscarriage and severe fetal anomaly, the application of the law to religiously motivated abortions fails to promote the state’s goal at significant cost to free exercise. More generally, several courts have adopted the view that a framework for exemption itself may be a least-restrictive means to ensure overall advancement of the state’s goal while respecting religion.

As an initial matter, in some circumstances, abortion bans impede religiously motivated decisions about pregnancy without advancing a state interest in potential life. This is so because in addition to their significant underinclusion, abortion bans are overinclusive. First, the vast majority apply to pre-viability miscarriages where there is no possibility of continuing the
pregnancy to viability. In such scenarios, preventing the induction of labor or performance of a D&C does not further an interest in fetal life. And it seriously risks the health and life of the pregnant person in ways that may burden religious exercise.

Second, prohibitions often apply where fetal anomalies incompatible with life are found. As the complaint filed in Kentucky on behalf of Jewish plaintiffs argues, “[f]orcing a mother to deliver a dead fetus to term, or one that will certainly die moments after birth, does not advance a governmental interest to protect fetal life . . . and serves no legitimate purpose at all.”245

Within the first year of Dobbs, women were repeatedly conscripted to carry a fetus without a brain, kidneys or a skull.246 In twin pregnancies where one fetus would not survive to birth, some women faced the reality that complying with the law could mean losing both twins.247 The application of bans to these situations may substantially burden free exercise without justification.

To the extent that rape/incest exceptions are granted through an administrative procedure, a court might conclude it should be equally available for people seeking religiously motivated abortions. As the Supreme Court has indicated, when the state’s “proffered objectives are not pursued with respect to analogous nonreligious conduct,” it suggests that “those interests could be achieved by narrower ordinances that burdened religion to a far

246. Kristen Schorsch, Abortion Bans Are Fueling a Rise in High-Risk Patients Heading to Chicago Hospitals, WBEZ, June 28, 2023, https://www.wbez.org/stories/illinois-hospitals-see-influx-of-high-risk-abortion-patients-from-out-of-state/b8005315-8983-43fe-86a2-f841265237d4 (Emily, Missouri, 22-weeks, fetus with no kidneys and undeveloped lungs, describing wanting a peaceful death for her son); Ashley White, Her Unborn Baby Was Developing Without a Skull. She Had to Leave Louisiana to Get an Abortion., ACADIANA ADVOCATE (June 13, 2023), https://www.theadvocate.com/acadiana/news/abortion-laws-prevent-healthcare-access-baby-forming-without-skull/article_ed2dcee2-096c-11ee-8521-5b7163add532.html#text=But%20when%20she%20went%20in,her%20Centers%20for%20Disease%20Control%20%28Centers%20for%20Disease%20Control%29%20said%20the%20baby%20was%20a%20skull%20as%20large%20as%20her%20head%20and%20its%20brain%20was%20not%20formed%20%28%29%20%28%29; Adi Schanie, Mt. Washington Woman Travels to Maryland for Abortion After Baby Was Diagnosed with Fatal Birth Defect, WDRB (Jul. 13, 2023), https://www.wdrb.com/news/mt-washington-woman-travels-to-maryland-for-abortion-after-baby-was-diagnosed-with-fatal-birth/article_e62b4c3a-21a1-11ee-86b7-d7b1252f29b.html (Kentucky couple discovering at 19 weeks that their baby would be born without parts of the brain and skull).
lesser degree.” Several federal courts have recently held that a system that grants religious exemptions while otherwise furthering the government interest is a required less-restrictive means. The Fifth Circuit, for example, held that assuming a compelling state interest in sex equality, the government had less restrictive means to advance that interest: “propagating guidance that provides a framework for employers . . . that oppose homosexual or transgender behavior on religious grounds, to obtain an exemption.” On this analysis, the possibility of implementing administrative processes for exemption may condemn a law to fail strict scrutiny.

Here, a state court might look to the Supreme Court’s recent constitutional free exercise doctrine. A string of recent cases instructs the courts that government regulations neither further a compelling governmental interest nor are the least-restrictive means to do so “whenever they treat any comparable secular activity more favorably than religious exercise.” The purpose of this analysis—as with strict scrutiny generally—is to test the law’s scope against its purported goals. If the regulation reaches religiously motivated acts while excluding the same act done for secular reasons, how can the state defend its law as imposing the least restriction on religion necessary to further its interests? According to the Court, where the state excepts secular actors, its interest in enforcement against a believer wanes. The any-secular-exemption approach of Tandon leads rather straightforwardly to religious exemption, where bans permit abortions for secular reasons like life, rape, incest, or IVF—but not religion.

At a higher level of generality, abortion-ban states have ample law-making room to pursue the protection of fertilized eggs as full moral and legal persons with less infringement on religious liberty.

249. Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm’n, 70 F.4th 914, 940, n.59 (5th Cir. 2023) (“The lack of any guidance or method of gaining an exemption gives rise to the inference that the EEOC ‘has no intention in granting an exception’ regardless of an employer’s religious exercise claim.”) (quoting Fulton, 141 S. Ct. at 1878).
250. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (“A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.”).
251. Schwartzman & Schragger, supra note 14, at 2323.
252. Schwartzman & Schragger, supra note 14, at 2321.
Many of these states rank at the bottom of national (and international) charts for maternal and infant mortality, child poverty, and uninsurance, systematically refusing to protect infants and children from harm.\textsuperscript{253} If a fertilized egg were a full person, one would expect governments to devote overwhelming resources to end spontaneous miscarriage, the “single biggest killer” of humans “by a huge margin.”\textsuperscript{254} In the past decade, federal courts have begun to indicate that the federal RFRA may require government expenditure and programming to advance compelling interests in ways less restrictive of religious objectors. State courts could come to similar conclusions here, especially in light of the gap between state policy and its purportedly compelling interest in potential life.

\textbf{C. Raising the Specter of Deregulatory Effects}

Often supporters of the Supreme Court’s expansion of religious exemption rights argue that free exercise claims are by their nature limited. They result in exemptions—not the striking down of a statute in its entirety. Now, however, sudden concern for deregulatory effects arises. Because exemptions will spur additional claims, the strength of the government’s interest in applying the regulation to religious objectors may be weightier than the previous Section indicated. Even if plaintiffs in ongoing cases are sincerely religiously motivated, exemptions will invite insincere and non-religious people to come out of the woodwork.

The worry that exemptions can undermine the generality of legislation is not without foundation. Exemptions often hold appeal beyond the religious objector. Religious accommodations in the workplace mean non-payment of union dues and time off on the weekends.\textsuperscript{255} Non-objectors likely value such flexibility. During the COVID-19 pandemic, religiously affiliated schools won the


right to reopen their doors, gaining a competitive advantage over secular facilities. Or take federal lands; Native American tribes seek access to perform rituals at sacred sites, but many others would enjoy entry for secular reasons—to hike or climb or picnic. Even dress and food requests may have allure.

How many people will bring claims if one of these abortion-related suits succeeds? We don’t know, but our inability to calculate a potentially sizeable number does not distinguish abortion from other disputes. Take religious groups’ demands to be freed of caps on gathering size during the early months of the COVID-19 pandemic—potentially millions of people had secular reasons to want to come together. Businesses asserting religious identity have cast off costly legal regimes, an option which many others might want for the financial benefits. Empirical studies have shown significant me-too effects where religious objectors are exempted from antidiscrimination law. But in none of these cases were these incentives, and the numbers of potential objectors, enough to reject religious objections out of hand. Instead, the Supreme Court has repeatedly said, “At bottom, this argument is but another formulation of the ‘classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.’”

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259. Netta Barak-Corren & Tamir Berkman, Narrow Decisions, Broad Consequences: Evidence from Fulton v. City of Philadelphia (manuscript on file with author) (showing that the exemption of a single religious agency in Fulton v. City of Philadelphia encouraged discriminatory behavior from agencies nationwide); Sara Emily Burke & Roseanna Sommers, Reducing Prejudice Through Law: Evidence from Experimental Psychology, 89 U.N. CHI. L. REV. 1369 (2022) (demonstrating that when the Court permits discrimination, it sends a signal that can cause more prejudicial attitudes toward the minority group).

260. E.g., Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n, 138 S. Ct. 1719 (2018); 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023). In the lower courts, see Braidwood Mgmt., Inc., 70 F.4th 914; Franciscan All., Inc. v. Becerra, 47 F.4th 368 (5th Cir. 2022); New Hope Family Servs., Inc. v. Poole, 966 F.3d 145 (2nd Cir. 2020); Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019).

To put the deregulatory effect of abortion-related claims into perspective, consider that the consistent trend in religion law doctrine and scholarship over the past decade has been to favor exempting institutions—from for-profit employers to multi-billion-dollar healthcare systems. When megachurches, employers, and educational institutions objected to public health measures, for example, the exemption of any single one of them undermined governmental goals to a significant degree. Similarly, a single district court decision exempted a chain of Catholic healthcare facilities as well as the purported 18,000 members of the Christian Medical and Dental Association from duties of sex nondiscrimination, raising the question of whether filing a claim for accommodation itself violated free exercise, involved thirty-seven large non-profit employers and tens of thousands of insurance beneficiaries. Abortion-related claims do not come from large institutions, but from individuals, each of whom must prove their religiosity and sincerity.

The resolution of institutional claims has swept broadly. For example, although Hobby Lobby was not a class action, the Supreme Court’s holding—that “[t]he contraceptive mandate, as applied to closely held corporations, violates RFRA”—necessarily prompted administrative action extending well beyond the parties to any closely held corporation with a religious objection. More recently, even as it reversed the certification of a class of “every employer in the United States that opposes homosexual or transgender behavior for sincere religious reasons,” the Fifth Circuit held that Title VII of the Civil Rights Act is not a least-restrictive means to pursue sex equality in the workplace. This analysis both provided a clear path to exemption for any future objector and indicated a demand for “guidance” that permits objecting employers—beyond the parties before the court—to gain exemptions.

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And so, after *Hobby Lobby* and *Tandon*, the problem of deregulation inheres in the enterprise of judicial exemptions. Abortion is not special in this regard. But that ship has sailed, and many of the movement actors now expressing concern about the number of abortion-related exemptions were steering the ship or blowing wind in its sails.²⁶⁸

Some realism about abortion claims is also in order. By contrast to the campaigns against the contraceptive mandate, vaccines, public schooling, and antidiscrimination laws, there is no organized, well-resourced movement for religious exemptions to abortion bans.²⁶⁹ Three out of four abortion patients are poor or low-income.²⁷⁰ They will lack the privilege and connections to access the courts and to obtain a court order permitting access to abortion.²⁷¹

The overwhelming stigma surrounding abortion necessarily will deter many, perhaps most, religious adherents from claiming free exercise rights. In a study of over 4,000 women getting abortions, fifty-eight percent planned to keep their abortion a secret from close friends and family.²⁷² Religious abortion patients are even less likely to come forward. One survey of over 700 self-identified conservative Christian abortion patients found that nearly 80 percent had not confided in a single person. As one woman said, “The only person I told ‘bout my abortion was Jesus. That’s it. And Jesus, He understands.”²⁷³ Beyond abortion stigma, our “societal pressure for women to become mothers and

²⁶⁸. Tal Fortgang & Howard Slugh, *Abusing Religious Freedom for Abortion Access*, *Public Discourse* (Jan. 29, 2023), https://www.thepublicdiscourse.com/2023/01/87141 (bemoaning that if these plaintiffs prevail, “[s]tates would have to choose between religious liberty laws and every other law they would enforce . . .”).

²⁶⁹. See supra notes 157–160 and accompanying text.


²⁷¹. A court would likely issue an injunction preventing enforcement of abortion bans against physicians, healthcare institutions, or anyone who assists the religious objector in obtaining an abortion. Analogous orders have been issued in the contraceptive mandate context, enjoining the government from enforcing the mandate against insurance companies as well as the objectors. See, e.g., *Mar. for Life v. Burwell*, 128 F. Supp. 3d 116, 131–33 (D.D.C. 2015); *Wieland v. U.S. Dep’t of Health & Hum. Servs.*, 793 F.3d 949, 957 (8th Cir. 2015).

²⁷². Watson, supra note 6, at 28 (citing study).

graciously to welcome the sacrifices that entails is very strong.”\textsuperscript{274} For all these reasons, pregnant people seem far less likely to game religious exemptions than other types of plaintiffs.

Where individual objectors secure counsel and succeed in court, their suits usually seem likely to nibble at the margins, mostly affecting situations involving health complications and fetal anomalies. (Overall, only 0.9\% of abortions occur after twenty-one weeks, usually the point at which fetal anomalies are first detected).\textsuperscript{275} The limited nature of relief is on the face of the complaints filed so far—most of the plaintiffs would not seek to abort any pregnancy, but rather certain pregnancies with complications.\textsuperscript{276}

Courts may occasionally certify a class of religious objectors. The numbers of women involved will usually be small. To the extent that Judaism makes the clearest case for exemption, Jews represent approximately 1\% of the population in states with abortion bans.\textsuperscript{277} Perhaps a fifth of them are women of reproductive age; and a vanishingly small number in any given year will become pregnant and seek an abortion for religious reasons.\textsuperscript{278} The lawsuit in Indiana has resulted in certification of a larger class—defined as “[a]ll persons in Indiana whose religious beliefs direct them to obtain abortions” and will need and not be able to obtain an abortion because of the state ban.\textsuperscript{279} The class includes up to 1,300 Jews, 104 Unitarians, and some number of Episcopal, Muslim, and Pagan women. As the state of Indiana indicated, these numbers are artificially inflated due to the heterogeneity of beliefs on abortion

\begin{verbatim}
274. SCHLESINGER, supra note 29, at 10.
275. Kortsmit et al., supra note 46, at 1.
276. Laycock & Thomas, supra note 58, at 231 (predicting that the numbers would be relatively small because “[i]n a few narrow circumstances, mostly involving threats to the mother’s life, some religions teach a duty to abort. A somewhat larger group of women might claim that their religious beliefs somehow contributed to their decision to seek an abortion.”).
\end{verbatim}
within these faiths. Even among this modest number, few will ultimately seek abortion.

The remedy that results for a class also matters to the reach of these lawsuits. State courts might look to the certification of other classes of religious objectors. For example, faced with over 6,000 service members seeking exemption from a vaccine mandate, the Sixth Circuit affirmed class certification and said that, “just because [the state] might have a compelling interest in the abstract does not mean that it has one ‘in each marginal percentage point by which’ it achieves this abstract interest.” Despite the documented risk of fakery and pressing risk to regulatory goals, the court’s decision effectively provided each service member with an individualized administrative process where the state must show a compelling interest in the individual’s vaccination.

State courts could order the same for classes of religious women. With regard to abortion, states with bans in place previously had a system for expedited court review in place for minors. The adaptation of such a system for religious objectors would be a mechanism to ensure religious liberty claims are granted expeditiously with individualized determination of sincerity. Courts might use the judicial bypass process—requiring speedy access and decisions—to assess the substance of an objector’s religious sincerity (rather than the minor’s maturity). Alternatively, something in the nature of a certification process through the state health department—which regulates the providers who would otherwise be restrained from performing abortions—could remedy the burdens on religious liberty beyond the parties.

At the moment, abortion seekers lack the resources, the organizational support, and the institutional structures of other religious objectors. Their religious claims are typically modest. Their numbers are likely to be relatively small. Perhaps these dynamics will change, but for now they favor granting exemption.

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Past is prologue. During debates over RFRA, scholars assuaged the anti-choice movement by insisting on RFRA’s preference for

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280. Id. at 16–17.
282. My thanks to Chip Lupu for raising this possibility.
Free Exercise of Abortion

anti-abortion religions. They argued that “the most likely and important effect of RFRA [would be] to protect pro-lifers from pro-abortion laws.”283 By contrast, a religious liberty claim to access abortion would fail—any “rogue district court, frustrated over the reversal of Roe,” would “be reversed on appeal.”284 If one day any such claim arrived at the Supreme Court, the Court could be counted on to apply a heightened doctrinal test.285

Today, claims to free exercise of abortion once again have inspired calls to hold pro-choice religious believers to different standards than others.286 Scholars widely predict that the Supreme Court will privilege some kinds of religious claims over others.287 Its expansive and radical free exercise doctrine of the twenty-first century will be partial. But this litigation proceeds under state law, and state courts can—and should—be evenhanded.

CONCLUSION

Through the abortion debate, Christian conservatives commandeered the authority to define what it means to be “religious” and erased pro-choice religious beliefs from the public square. The handful of lawsuits now filed against state abortion bans reclaim religion. In advancing their religious motivations for abortion, the Jewish, Muslim, Pagan, and Christian plaintiffs remind us of what we once knew: religions differ between and among themselves on the issue of abortion. What’s more, the central issues of reproductive justice—how to constitute a family, whether to bear children, how to define marriage, and how to raise children—are also fundamental to religious liberty, especially for

283. Durham et al., supra note 157, at 43.
284. Id.
286. Schwartzman & Schragger, supra note 14, at 2330 (noting this advocacy).
287. Kelsey Dallas, Does Religious Freedom Law Give You a Right to Abortion?, DESERET NEWS, May 14, 2022 (quoting Douglas Laycock as saying “They care about abortion a lot more than they care about religious liberty for religious views they disagree with. That’s the realist answer.”); Sherry F. Colb, Are Religious Abortions Protected?, VERDICT (June 7, 2022), https://verdict.justia.com/2022/06/07/are-religious-abortions-protected (predicting religious abortion seekers will go unprotected because “the Court is all about Christianity rather than some capacious vision of religious liberty for all”); Corbin, supra note 14, at 510 (“[T]he current Supreme Court is unlikely to let itself be cornered into applying its own doctrine to reach results it does not like.”).
those whose bodies and souls bear the burdens of pregnancy, labor, and motherhood.

As claims for reproductive freedom have appeared, erstwhile supporters of expansive exemptions doctrine propose to raise the bar. They increase standards for religiosity, sow doubts about sincerity, and argue for lightening the government’s burden. Advocates urge courts to take this path, even as they otherwise support the rapid and radical expansion of free exercise doctrine. The expectation is that courts will reject pro-abortion religious claims even as they treat claims against abortion as sacrosanct.

State courts should refuse to go along. The Supreme Court may continue to stray from principled free exercise doctrine, but state courts need not follow. They should resist the invitation to create a law specific to abortion-seekers in their own state RFRAs and constitutions.

To do otherwise would be to leave some categories of religious people outside of religious liberty protections, while Christian conservatives gain systematic favor. The very meaning of religion would constrict. “Free exercise” of religion would pertain not to all religions, but to Christianity288 and, indeed, not to all Christian beliefs, just to conservative ones.289

Women of reproductive age would likewise be made strangers to free exercise. Constitutionally illicit stereotypes about our (in)capacity for moral agency, trustworthiness, and altruism might seep into religious liberty doctrine. Our reproductive functions could come to limit not only our bodily autonomy, but our religious freedom as well.


289. Russell K. Robinson, What Christianity Loses When Conservative Christians Win at the Supreme Court, 2021 Sup. Ct. Rev. 185 (2022) (arguing that the Supreme Court’s recent religious exemption cases result in not only favoritism for conservative Christians, but also the conflation of all of Christianity with one vein of Evangelical Christianity).
The Right to Be Proselytized Under International Law

Ryan Cheney*

Legal analyses of proselytism have tended to focus on the rights of the proselytizer and on the right of the target of proselytism, or “proselytizee,” to be free from such “interference.” However, such analyses do not fully account for all rights involved in proselytism. When people are prevented from being proselytized, such as by law or by persecution, an important consequence is that they are cut off from a significant source of information on and mechanism for exploring and joining other religions. Despite stigmatizations of proselytism, many people regularly accept it and learn about and join other faiths through it. Cutting people off from proselytism thus impedes their ability to receive information, exercise their capacities of reason and conscience, and order their lives as they choose. These results harm people’s human dignity, to which the capacities of reason and conscience are central, and human rights, such as the right to have or to adopt a religion or belief of one’s choice. These consequences suggest people have an international legal right to be proselytized. This Note explores whether such a right exists in international law and shows that several rights guaranteed by the ICCPR together establish and support the right to be proselytized. These rights include the rights to proselytize, adopt a religion or belief free of coercion, freedom of opinion, freedom of expression, freedom of assembly, and freedom from religious discrimination. Like some of the rights that constitute it, the right to be proselytized can be validly limited in certain circumstances. Considering and respecting the right to be proselytized can make a meaningful, positive difference in legal analyses and decisions, including by more fully respecting proselytizees’ human dignity.

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INTRODUCTION

In Greece on March 2, 1986, Georgia Kyriakaki allowed a Jehovah’s Witness couple, Minos Kokkinakis and his wife, into her home to share “good news.”1 Mrs. Kyriakaki listened to their message for several minutes, though she was not inclined to accept it.2 When her husband, a Greek Orthodox cantor, discovered the Jehovah’s Witnesses in his home, he called the police, who arrested the couple.3 A Greek trial court convicted the couple of violating a law prohibiting proselytism,4 and an appeals court upheld Mr. Kokkinakis’s conviction.5 The Greek Court of Cassation dismissed

2. See id. ¶ 10.
3. See id. ¶ 7 (Valticos, J., dissenting).
4. Id. ¶¶ 8-9.
5. Id. ¶ 10.
a further appeal. Both the trial court and the appeals court supported their decisions by reasoning that Mr. Kokkinakis had taken advantage of Mrs. Kyriakaki’s supposed inexperience and naiveté. Ultimately, Mr. Kokkinakis appealed to the European Court of Human Rights, which found that Greece had violated the European Convention on Human Rights by restricting proper proselytism without showing a need to do so. That decision pointed out a lack of evidence that Mr. Kokkinakis had tried to convince Mrs. Kyriakaki by improper means. However, the decision did not fully analyze the case from Mrs. Kyriakaki’s perspective.

Like Greece, other countries severely restrict proselytism, purportedly to protect the rights of its targets, whom we might call “proselytizers.” For example, several Indian states have adopted laws that prohibit “convert[ing] or attempt[ing] to convert, either directly or otherwise, any person form [sic] one religious faith to another by the use of force or by inducement or by any fraudulent means . . . .” These laws also ban “abet[ting] such conversion.” Fischer points out that these laws, which fail to adequately define the prohibited means of conversion, have an “unstated but obvious premise . . . that Muslims and Christians are forcibly converting the poor and disadvantaged away from Hinduism.” However, that premise lacks supporting evidence. In addition, while ostensibly aiming to protect groups presumed to be vulnerable, these laws actually demean these groups’ dignity. Fischer notes that “[t]he laws do not recognize that converts have any agency in their conversions . . . .” Furthermore, as another scholar has argued:

6. See id. ¶¶ 11–12.
7. See id. ¶¶ 9–10.
8. See id. ¶ 1.
10. See id. ¶ 49.
12. See Fischer, supra note 11.
13. Id. at 20.
14. Id.
15. Id.
Conversion laws . . . construct women, Scheduled Tribes, and Scheduled Castes as victims, and construct converts (particularly group converts) as passive dupes of the machinations of active converters. Such language reduces the convert to a victim—particularly converts from groups seen as vulnerable, commonly referred to as the “weaker sections” in Indian society. These laws perpetuate a longstanding tendency to see converts or potential converts as victims.16

Underlying the Greek courts’ judgments in the Kokkinakis case and anti-conversion laws like these Indian prohibitions appears to be a presumption that proselytism is exploitative, a violation of the proselytizee’s rights. Ironically, as shown above, such a presumption may demean more than protect targets of proselytism. By assuming proselytizes to be victims, governments ignore proselytizes’ abilities to reason and choose, which, as discussed later, are key elements of universal human dignity. For this reason, and for other reasons discussed in Part I, this Note argues that legal analyses of proselytism that neglect proselytizes’ relevant affirmative rights do not give a full picture of the international legal rights involved in proselytism. Taken together, these rights protect an international legal right to be a target of proselytism, or to “be proselytized.”

Consideration of this right calls for concrete changes in legal analyses and decisions. For example, considering this right may have led the Greek courts to acquit Mr. Kokkinakis, recognizing that Mrs. Kyriakaki was a dignified agent who exercised a right to listen to him, rather than convict Mr. Kokkinakis on the grounds that Mrs. Kyriakaki was naively exploited by him. Acknowledging the right to be proselytized also calls for changes to laws that ignore the agency and dignity of proselytizes.

This Note begins by discussing current literature on the rights involved in proselytism. The literature focuses on the rights of the proselytizer and on negative freedoms of the proselytizee, neglecting whether people have a right to experience proselytism. This Note then investigates whether a right to be proselytized exists under international law. This analysis shows that international law protects such a right, particularly through provisions in the

International Covenant on Civil and Political Rights (ICCPR) and other treaties. Finally, this Note concludes that this right must be balanced with international legal protections against coercive or physically harmful proselytism. Moreover, states may legitimately impose some limitations on this right if necessary to pursue certain valid aims.

I. DISCUSSION OF CURRENT LITERATURE ON THE RIGHT TO BE PROSELYTIZED

Current literature on proselytism and international law focuses substantially on the right to proselytize. In this Note, I use the definition of “proselytize” given by Professor Witte in his article A Primer on the Rights and Wrongs of Proselytism: “to ‘manifest,’ ‘teach,’ ‘express,’ and ‘impart’ religious ideas for the sake, among other things, of seeking the conversion of another.” 17 Scholars have analyzed people’s right to engage in proselytism, including that right’s interactions with other human rights. 18 Some scholars argue in favor of the right to proselytize, pointing out that it is protected by international law 19 or that it helps provide important benefits to individuals and society. 20 Other scholars have suggested that proselytism may inappropriately intrude into others’ religious lives, 21 and some people have questioned proselytism’s legality. 22

While proselytizers’ perspectives and rights are worthy of attention, they represent only half of the proselytism equation. Proselytism also engages a person who is proselytized, as well as her rights, the inclusion of which is crucial to a full, fair legal analysis of proselytism. Drawing on Witte’s definition of “proselytize,” I define “being proselytized” as being a target of the ‘manifest[ation],’ ‘teach[ing],’ ‘express[ion],’ and ‘impart[ation]’ of religious ideas for the sake, among other things, of being converted

to another religion.\textsuperscript{23} Proselytism may be solicited or unsolicited by the proselytizee. I define “being proselytized” as experiencing either kind of proselytism.

While not as numerous as those analyzing the issue from the proselytizer side, some scholars have discussed proselytizees’ rights. For example, Hirsch divides the rights implicated by proselytism into “the freedom of the proselytizers to conduct proselytizing activities and the freedom of the potential proselyte not to be interfered with by such activities.”\textsuperscript{24} He bases the idea of freedom “[to not] be interfered with” by proselytism on the notion of “negative” freedom, or freedom from “unwanted interference,” discussed by Berlin.\textsuperscript{25} However, the assumption that proselytism constitutes “unwanted interference” to be free from neglects the possibility that people may be free to experience proselytism.

Others have also argued that proselytism violates proselytizees’ freedom of religion. Some Muslims have objected to proselytization of members of their faith on the ground that Islam forbids “apostasy” and proselytism interferes with Muslim proselytizees’ right to follow that doctrine.\textsuperscript{26} Some people have also suggested that proselytism violates the proselytizee’s right to freedom from “injury to religious feelings”\textsuperscript{27} or to peaceful enjoyment of her religion.\textsuperscript{28} Further, some have defended anti-proselytism laws by arguing that they protect the integrity of the dominant religious community in a state.\textsuperscript{29} Such protection has been justified as promoting the common good because of the dominant religion’s important contributions to the state’s society.\textsuperscript{30} Finally, some

\textsuperscript{23} See Witte, supra note 17, at 627.
\textsuperscript{24} Hirsch, supra note 18, at 409.
\textsuperscript{25} See id. (citing ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 118, 122–23 (Cox & Wyman, Ltd. 1979) (1969)).
\textsuperscript{27} See Danchin, supra note 22, at 288-89.
\textsuperscript{28} See id. at 274.
\textsuperscript{29} See, e.g., id. at 275 (discussing use of this argument in the dissenting opinion of Judge Valticos in Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) (1993)).
\textsuperscript{30} See, e.g., id. at 275–76.

The above analyses of the rights of the proselytizee center on her purported negative freedom—freedom from interference, including with her affairs, religious practice, religious feelings, or peaceful enjoyment of her religion. However, the proselytizee’s freedoms are not exclusively negative. When people are impeded or prevented from being proselytized, an important consequence is that fewer people exercise certain positive freedoms—the right to hear or decline to hear a religious message, the right to learn new religious information, and the right to adopt new beliefs and religions.

Some scholars have touched on how proselytism invites the exercise of rights by the proselytizee. For example, Garnett argues that “proselytism and its legal protection” are “integral to the flourishing and good exercise of . . . freedom [of conscience].”\footnote{Richard W. Garnett, Changing Minds: Proselytism, Freedom, and the First Amendment, 2 U. of St. Thomas L.J. 453, 457 (2005) (emphasis omitted).} He supports this argument by referencing writings of Pope John Paul II that, by sharing the gospel, the Catholic Church “‘proposes,’ thereby inviting the exercise of human freedom, ‘she imposes nothing.’”\footnote{Id. (emphasis omitted) (quoting Pope John Paul II, Redemptoris Missio, ¶ 39 (Dec. 7, 1990), https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_07121990_redemptoris-missio.html).} Garnett and the former Pope thus argue that proselytism invites people to exercise their right to accept or reject a religious message. However, that argument alone does not quite establish people’s right to be presented with a religious message.

Some scholarship has touched directly on the right to be proselytized. While not using those terms, Danchin briefly explores whether people have such an affirmative right.\footnote{See Danchin, supra note 22, at 271–72.} He notes that, as mentioned by the European Court of Human Rights (ECtHR), “the freedom to change religion would be a ‘dead letter’ if the freedom to manifest religion did not include ‘the right to try and convince one’s neighbour.’”\footnote{Id. (quoting Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A), ¶ 31 (1993)).} He also notes that the “freedom to seek [and] receive . . . information and ideas of all kinds” granted in the
ICCPR\textsuperscript{36} strengthens this argument that the opportunity to be proselytized is important to the right to convert.\textsuperscript{37} He concludes, however, that the rights to receive information and to change one’s religion do not necessarily imply a “right to be confronted with all possible forms of unsolicited views, including those that the state deems important to restrict either to protect the ‘fundamental rights and freedoms of others’ from specific harms or to serve some other compelling state interest.”\textsuperscript{38} Danchin’s brief analysis provides some insight on arguments for and against an international legal right to be proselytized. However, the literature still lacks a fully fleshed-out analysis of this right.

In this Note, I aim to flesh out that analysis by thoroughly exploring international law’s protection of a right to be proselytized.

**II. Existence of the Right to Be Proselytized Under International Law**

Through the analysis below, I establish that international legal instruments and principles appear to protect a right to be proselytized. The ICCPR and other international treaties guarantee freedoms that together constitute this right. In addition, human dignity, a widely accepted principle undergirding much of international human rights law, seems to call for protection of the right to be proselytized. Each of the rights that constitute the right to be proselytized may be validly restricted in some circumstances, and the latter right may by implication also be legitimately limited in those circumstances. It may be difficult in practice to legitimately limit the right to be proselytized, but international law protects proselytizees against coercive or harmful proselytism.


\textsuperscript{37} See Danchin, supra note 22, at 271–72.

\textsuperscript{38} See id. (quoting ICCPR, supra note 36, at art. 18, ¶ 3).
The International Covenant on Civil and Political Rights, a legally binding treaty that nearly every country has ratified, protects freedoms that together appear to establish an international legal right to be proselytized. These include “the right to freedom of thought, conscience and religion,” including the right to “manifest [one’s] religion or belief” and to “adopt a religion or belief of [one’s] choice” free from coercive interference; “the right to hold opinions without interference;” “the right to freedom of expression,” including the “freedom to seek, receive and impart information and ideas of all kinds;” the right to freedom of peaceful assembly; and the right to freedom from religious discrimination.

A. The Right to Proselytize

Because experiencing proselytism requires that someone else proselytize, protections on the right to proselytize safeguard the right to be proselytized. Though proselytism is controversial and stigmatized, international human rights instruments establish a right to engage in non-coercive proselytism. The ICCPR provides in Article 19(2) for the “freedom to . . . impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in

39. Note that, because the above analysis has heavily relied on the ICCPR, this analysis does not necessarily establish that states not full parties to the Covenant are obligated to respect the right to be proselytized. Those states may still have this obligation under customary international law, though, as Lerner notes, “[i]n view of the intensity of their objections, it seems difficult to assert that [some religious communities] should be expected to consider the rights to change religion and to proselytize as reflecting binding customary law for them.” Lerner, supra note 19, at 560. A full analysis of whether states not full parties to the ICCPR are bound by customary international law to respect the right to be proselytized is beyond the scope of this Note. However, it is worth noting that a significant number of states that have objected to legal recognition of the right to change religion became parties to the ICCPR without objecting to this right as codified in that treaty. See id. at 522. In addition, as established below, universal human dignity, which people have regardless of whether their country has ratified the ICCPR, calls for all states to respect this right. Thus, even states not parties to the Covenant should arguably respect the right to be proselytized.

40. See U.N. HUM. RTS.: OFF. OF THE HIG’L COMM’R, Status of Ratification Interactive Dashboard: Int’l Covenant on Civ. and Pol. Rts., https://indicators.ohchr.org (last updated Feb. 21, 2023). One 173 countries have ratified the treaty, six have signed but not ratified it, and eighteen have taken no action regarding its adoption. Id.

41. ICCPR, supra note 36, at arts. 18–19, 21, 26.

42. See Lerner, supra note 19, at 479.

print...or through any other media of [one’s] choice.”

Proselytism involves “impart[ing]” religious “information and ideas[.]” usually through oral, written, or printed communication. Article 19(2)’s phrase “regardless of frontiers” suggests protection of such communication from people of foreign countries, which is also common in proselytism. ICCPR Article 19(2) thus serves to protect the international legal right to proselytize.

That right is also supported by ICCPR Article 18, which provides that everybody “shall have the right to freedom of thought, conscience and religion.” This right includes “freedom, either individually or in community with others and in public or private, to manifest [one’s] religion or belief in... practice and teaching.” This right strongly grounds the right to proselytize.

The United Nations Human Rights Committee (UNHRC), the body charged with applying the ICCPR in interstate disputes arising under the Covenant, has issued a series of General Comments that give official guidance on interpreting the ICCPR. General Comment 22 explains that the freedom to manifest one’s religion “encompasses a broad range of acts...[including] acts integral to the conduct by religious groups of their basic affairs, such as...freedom to prepare and distribute religious texts or publications.”

These acts are common in proselytism, and General

44. ICCPR, supra note 36, at art. 19, ¶ 2. The Universal Declaration of Human Rights, a non-binding, instrument, see Miguel Gonzales Marcos, The Universal Declaration of Human Rights and Constitutional Adjudication: Challenges to Cosmopolitan Law, 30 HAMLINE J. PUB. L. & POL’Y 245, 250–51 (2008), also protects this freedom, see G.A. Res. 217 A (III), art. 19 (Dec. 10. 1949) [hereinafter UDHR].

45. See Witte, supra note 17, at 626 (emphasis omitted) (quoting ICCPR, supra note 36, at art. 19, ¶ 2, reprinted in RELIGION AND HUMAN RIGHTS: BASIC DOCUMENTS Part I, no. 3 (Tad Stahinke & J. Paul Martin eds., 1998)).

46. See Bielefeldt, supra note 43, ¶ 26.

47. ICCPR, supra note 36, at art. 18, ¶ 1.

48. Id. Two other international agreements also affirm this right: the non-binding UDHR, see Marcos, supra note 44, at 250–51 (stating that the UDHR is non-binding); UDHR, supra note 44, at art. 18 (declaring the right), and the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, see Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, art. 1, ¶ 1 (Nov. 25, 1981) [hereinafter 1981 Declaration]; DURHAM & SCHARFFS, supra note 31, at 84–85 (stating the 1981 Declaration is non-binding).

49. See ICCPR, supra note 36, at arts. 28, 41.

Comment 22 does not limit the freedom to perform these acts to non-proselytic contexts. Some states, narrowly interpreting ICCPR Article 18(1), have argued that valid religious manifestations do not include proselytism. However, because proselytism is integral to many religions, including major religions, it seems unlikely that it falls outside the “broad range of acts” that constitute valid religious manifestations. As a U.N. Special Rapporteur on Freedom of Religion or Belief (FoRB) concluded in an official interim report, “[i]t cannot be denied that [the Article 18(1) freedom to manifest one’s religion] covers non-coercive attempts to persuade others, sometimes also called ‘missionary work.’”

The right to proselytize suggests an international legal right to be proselytized. It would be illogical to hold that a person can proselytize if others cannot legally be proselytized. In addition, the right to be proselytized is hollow without the right to proselytize. Thus, international law’s protection of the latter helps establish and protect the former.

B. The Right to Choose One’s Religion

In addition to the right to manifest one’s religion, the “freedom of thought, conscience and religion” guaranteed in the ICCPR also includes freedom to “have or to adopt a religion or belief of [one’s] choice.” A person’s choice of religion or belief is limited if she is

51. See id.
52. Danchin, supra note 22, at 259.
53. See UNHRC, supra note 50, ¶ 4.
54. Danchin, supra note 22, at 258.
55. Bielefeldt, supra note 43, ¶ 26. Bielefeldt clarifies that, when he uses terms like “missionary work” in this report, he does not intend “to reflect specifically denominational concepts. Similar concepts include ‘bearing witness’, ‘da’wa’ (the call), ‘invitation’, etc.” Id. at n.15.
56. ICCPR, supra note 36, at art. 18, ¶ 1; see also UDHR, supra note 44, at art. 18. The UDHR explicitly provides for the freedom to “change [one’s] religion or belief.” UDHR, supra note 44, at art. 18. When the ICCPR was being negotiated, it was proposed that it also explicitly guarantee the right to “change” one’s religion. U.N. Secretary-General, Elimination of All Forms of Religious Intolerance, ¶ 48, U.N. Doc. A/60/399 (Sept. 30, 2005). However, some countries protested that this language might encourage proselytism or anti-religious advocacy, so the somewhat less explicit phrase “have or adopt a religion or belief of [one’s] choice” was used instead. Id. This language was approved, with no country dissenting. Id. This language may seem somewhat less clear than that used in the corresponding article of the UDHR. See Danchin, supra note 22, at 271. However, the right to “adopt a religion or
blocked from receiving through proselytism information about other religions that may inform her choice whether to retain or to change her religion or beliefs. As the ECtHR has noted, the freedom to change religion would likely be meaningless without the right to proselytize. For the right to adopt a religion to be more than a "dead letter," a person arguably must have the right to be approached by proselytizers with information on and invitations to investigate another religion.

C. The Right to Freedom from Coercion in Religious Affiliation

The ICCPR also provides for freedom from "coercion which would impair [one’s] freedom to have or to adopt a religion or belief of his choice." As established above, preventing people from being proselytized impedes their ability to adopt a religion or belief of their choice. Preventing proselytization also arguably constitutes coercion. The second edition of Black’s Law Dictionary defined coercion in relevant part as "[c]ompulsion [that] may be . . . implied, . . . where the relation of the parties is such that one is under subjection to the other, and is thereby constrained to do what his free will would refuse." By preventing people from being proselytized, a state subjects their will to its own and compels them to not hear proselytizers’ messages, even if they would prefer to hear them. Thus, the right to freedom from coercion obstructing the free holding or adoption of a religion or belief arguably requires that people be able to decide themselves whether to listen to and

belief” of one’s choice seems functionally equivalent to the right to “change” one’s religion or belief, especially considering the ICCPR’s subsequent provision, which guarantees that “[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” ICCPR, supra note 36, at art. 18, ¶ 2. If a person is free to adopt a religion of her choice and free from coercion impairing that freedom, then she seems free to change her religion. The United Nations Human Rights Committee has confirmed this conclusion in its General Comment No. 22: “[T]he freedom to ‘have or to adopt’ a religion or belief necessarily entails the freedom to choose a religion or belief, including . . . , the right to replace one’s current religion or belief with another or to adopt atheistic views.” UNHRC, supra note 50, ¶ 5.

58. Id.
59. ICCPR, supra note 36, at art. 18, ¶ 2.
60. Coercion, BLACK’S LAW DICTIONARY (2d ed. 1910).
accept a proselytizer’s message. That ability relies on a right to be offered the chance to hear that message— to be proselytized.\textsuperscript{61}

\textbf{D. Right to Freedom of Opinion}

The right to be proselytized is also supported by the international legal right to freedom of opinion. The ICCPR provides that “[e]veryone shall have the right to hold opinions without interference.”\textsuperscript{62} This right is absolute and cannot be restricted.\textsuperscript{63} The right to freedom of opinion covers religious opinions and allows a person to change these opinions “whenever and for whatever reason [he] so freely chooses.”\textsuperscript{64} Furthermore, according to the UNHRC, this freedom prohibits “[a]ny form of effort to coerce the holding or not holding of any opinion[.]”\textsuperscript{65} As explained above, preventing proselytization seems to constitute such coercion, which can cause people to retain their current religious opinions and not hold others. Because preventing proselytization interferes with a person’s right to freely hold religious opinions for whatever reason she chooses, the right to freedom of opinion calls for the right to be proselytized.

\textbf{E. Freedom of Expression}

Next, the ICCPR also guarantees freedom of expression.\textsuperscript{66} This right includes “freedom to seek [and] receive . . . information and ideas of all kinds, regardless of frontiers, either orally, in writing or

\begin{itemize}
\item \textsuperscript{61} Some may argue that proselytism itself constitutes such coercion and that states should prevent proselytism to guarantee freedom from such coercion. While, as discussed further in Section III.B.1, infra, coercive proselytism should be prevented, but proselytism is not inherently coercive. Freedom from coercion impairing one’s ability to adopt a chosen religion or belief requires that the person himself, not the state, be able to decide whether to listen to proselytizers.
\item \textsuperscript{62} ICCPR, supra note 36, at art. 19, at ¶ 1.
\item \textsuperscript{64} Id. at ¶ 10.
\item \textsuperscript{65} Id. at ¶ 9.
\item \textsuperscript{66} ICCPR, supra note 36, at art. 19, ¶ 2. Note that Article 19 of the UDHR combines the freedom of opinion and the freedom of expression into one right (“the right to freedom of opinion and expression”) and provides that this right includes the same freedoms that ICCPR Article 19(2) attaches to the right to freedom of expression, though in less fleshed-out terms than the ICCPR. See UDHR, supra note 44, at art. 19.
\end{itemize}
in print... or through any other media of [one’s] choice.”

That broad guarantee presumably protects a right to receive religious information through proselytism. As explained by the UNHRC, the freedom of expression protects “receipt of communications of every form of idea and opinion capable of transmission to others, [including] canvassing,... teaching, and religious discourse.”

Banning proselytism, which constitutes religious “teaching” and “discourse,” if not also “canvassing,” impedes a person from seeking and receiving information “of all kinds” by any media. For the right to seek and receive information to encompass all that the ICCPR guarantees, it should include the right to seek and receive religious information from proselytizers.

F. Freedom of Assembly

Next, ICCPR Article 21 recognizes the “right of peaceful assembly....” The freedom of peaceful assembly allows people to assemble for religious purposes and “take[...part in a gathering of persons for a purpose such as expressing oneself, conveying a position on a particular issue or exchanging ideas.”

Protected assemblies should consist of more than one person and may be spontaneous or planned. When a person is proselytized, she participates in a gathering with a proselytizer for religious purposes, including exchanging religious ideas and communicating positions on religious issues. Such gatherings may be spontaneous, such as when a proselytizer engages a stranger in a religious discussion, or they may be planned, such as when a proselytizee invites a proselytizer to return for a subsequent religious discussion. Thus, the international legal right to freedom of assembly should allow a person to be proselytized.

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67. See ICCPR, supra note 36, at art. 19, at ¶ 2.
68. UNHRC, supra note 63, at ¶ 11.
69. ICCPR, supra note 36, at art. 21.
71. See id. at ¶ 13.
72. See id. at ¶ 14.
Finally, the right to be proselytized is also protected by ICCPR Article 26’s prohibition on religious discrimination. This Article guarantees all persons the equal protection of the law without discrimination, including religious discrimination. The right to be proselytized is undermined by restrictions on the right to convert to a new religion or on the right to proselytize because, as explained above, those rights help establish the right to be proselytized. Such restrictions are often designed or implemented in ways that discriminate against religious minorities. By prohibiting such infringement on the right to be proselytized, the international legal prohibition on religious discrimination protects that right.

In sum, international law protects a right to be proselytized through the rights to proselytize, adopt a religion or belief of one’s choice without coercive interference, freedom of opinion, freedom of expression, freedom of assembly, and freedom from religious discrimination. Together, these rights establish that a person has a right to seek and receive religious ideas from a proselytizer, who can rightfully share these ideas in spontaneous or planned meetings without undue governmental interference, and to act on those ideas by adopting a new religion or belief. In short, international law grants a right to be proselytized.

H. Interconnection with Human Dignity

Preventing people from being proselytized conflicts with not only the terms of international law, but also with people’s human dignity, a principle underlying much of international human
rights law. The UN Charter,\textsuperscript{77} the UDHR,\textsuperscript{78} the ICCPR,\textsuperscript{79} and several regional human rights instruments\textsuperscript{80} begin by affirming universal human dignity and its importance in human rights. As illustrated by the ubiquity of references to human dignity in international human rights instruments, and as pointed out in the Punta del Este Declaration on Human Dignity for Everyone Everywhere,\textsuperscript{81} human dignity is a strong point of common ground in different cultures’ and countries’ perspectives on human rights.

There are various ways to define human dignity, though the above-mentioned international human rights instruments share a common vision of a ubiquitous human dignity that underpins human rights. Nordenfelt outlines four types of human dignity,

\begin{itemize}
\item\textsuperscript{77} One of the purposes of the United Nations is to “reaffirm faith . . . in the dignity and worth of the human person.” See U. N. Charter, pmbl.
\item\textsuperscript{78} The UDHR, which is itself a foundation of much of modern human rights law, Hurst Hannum, \textit{The UDHR in National and International Law}, 3 HEALTH & HUM. RTS. 144, 144 (1998), begins in its preamble by asserting that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,” UDHR, supra note 44, pmbl. The UDHR also declares in its first Article that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” \textit{Id.} at art. 1.
\item\textsuperscript{79} See ICCPR, supra note 36, pmbl.
\item\textsuperscript{81} See \textit{THE HUMAN DIGNITY INITIATIVE, PUNTA DEL ESTE DECLARATION ON HUMAN DIGNITY FOR EVERYONE EVERYWHERE: SEVENTY YEARS AFTER THE UNIVERSAL DECLARATION OF HUMAN RIGHTS} ¶ 6 (Dec. 2018), https://www.dignityforeveryone.org/wp-content/uploads/sites/5/2019/02/Punta-del-Este-Declaration.pdf. This document was drafted and signed by law and religion scholars from around the world at an academic conference in Punta del Este, Uruguay. \textit{HUMAN DIGNITY INITIATIVE, PUNTA DEL ESTE DECLARATION ON HUMAN DIGNITY FOR EVERYONE EVERYWHERE – INTRODUCTION} (2022), https://www.dignityforeveryone.org/introduction. “The conference was the culmination of a series of conferences held over the course of 2018 that explored the notion of human dignity, its relation to freedom of religion or belief, and the important role it has played in forming, guiding, and sustaining consensus on core human rights values despite tensions in a highly pluralized world.” \textit{Id.}
\end{itemize}
including a “universal” one, whose meaning appears to align with this usage of the term “human dignity.” He identifies this type of dignity as that mentioned in Article 1 of the UDHR. All people have this universal human dignity equally, always, and unconditionally, simply because they are humans. Nordenfelt argues that, because all share this dignity equally, everyone’s human rights derived from this dignity must be respected equally. The widely accepted modern basis for universal human dignity is humans’ capacity to think, reason, and decide how to live. The capacities of reason and conscience may be seen as “the core of human dignity.”

The foundational legal principle of human dignity calls for protection of the right to be proselytized. When a person is proselytized, she can exercise her capacities of reason and conscience and, by implication, exert her human dignity. She can decide for herself whether to consider and believe religious information. When someone is prevented from being proselytized, such as by a law banning proselytism, another actor denies her that opportunity to exercise and expand her capacities of reason and conscience. Such intervention prevents the exercise and expansion of these capacities fundamental to human dignity and essentially

82. See Lennart Nordenfelt, The Varieties of Dignity, 12 HEALTH CARE ANALYSIS 69, 69 (June 2004). In addition to the universal human dignity, Nordenfelt also discusses “the dignity of identity,” “the dignity of merit,” and “the dignity of moral stature.” See id.
83. See id. at 78. In some provisions of international human rights instruments, human dignity is also referred to in a sense that seems to align better with other types of human dignity discussed by Nordenfelt. For example, Articles 5 and 6 of the American Convention on Human Rights require States to respect a dignity associated with the human body by refraining from physically abusive practices. See Organization of American States, American Convention on Human Rights, arts. 5.2, 6.2, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. That type of human dignity seems to match what Nordenfelt calls the “dignity of identity,” a human dignity “tied to the integrity of the subject’s body and mind.” See Nordenfelt, supra note 82, at 80.
84. See Nordenfelt, supra note 82, at 78.
85. Id. at 77–78. Nordenfelt refers to this dignity by the German term “Menschenwürde.” See id.
86. See id.
87. Id. at 78.
88. See DURHAM & SCHARFFS, supra note 31, at 177 (referring to “the inner domain of ‘thought, conscience and religion’” as “the core of human dignity”). Reinforcing these capacities’ importance to human dignity, UDHR Article 1 follows its declaration of universal dignity and rights only and immediately with the statement that everyone is “endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” UDHR, supra note 44, at art. 1.
decides for another person that she would rather not experience proselytism, this kind of intervention thus mutes and usurps the person’s human dignity.

Preventing a person from being proselytized further offends her human dignity by restricting a deeply personal part of her life—her religious beliefs. This conflicts with one of the bases of universal human dignity—the person’s ability to choose how to live—because religious beliefs are fundamental to many people’s lifestyles. The freedom to change one’s religion or beliefs also plays an important role in how millions of people choose to live; about 70 million people are predicted to change their religious affiliation between 2010 and 2050. As explained earlier, this freedom is hollow without the right to be proselytized. Preventing people from being proselytized trespasses on the bases of universal human dignity, a principle foundational to international human rights law. This fundamental principle supports the right to be proselytized.

III. CONTRARY LEGAL ARGUMENTS AND PROPER RESTRICTIONS ON THE RIGHT TO BE PROSELYTIZED

As explained earlier, scholarly literature lacks direct discussion of the right to be proselytized. Thus, arguments explicitly against this right’s existence are scarce. However, Danchin has raised possible arguments directly against the right to be proselytized.

While noting that the rights to religiously convert and to receive information may support a right to experience proselytism, Danchin skeptically refrains from accepting that idea. To illustrate that conversion does not require proselytization, he references a statement by the Malaysian government claiming that Malaysian citizens were free to investigate and join other religions on their own.

89. See Christian Educ. S. Afr. v. Minister of Educ. 2000 (10) BCLR 1051 (CC) para. 36 (S. Afr.) (“For many believers, their relationship with God or creation is central to all their activities. . . . For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief . . . affects the believer’s view of society and founds the distinction between right and wrong.”).

90. See PEW RSCH CTR., THE FUTURE OF WORLD RELIGIONS: POPULATION GROWTH PROJECTIONS, 2010–2050 11 (2015). This report does not predict how many people will change their religion during that time period due to proselytism.

91. It is also noteworthy that universal human dignity is important in the majority of religions. See Nordenfelt, supra note 82, at 78.

92. See Danchin, supra note 22, at 271–72.
own initiative, in spite of the country’s anti-proselytism law. This statement seems to partially concede the right to be proselytized, as it appears to claim that citizens are entitled to solicit proselytism. Additionally, as Danchin points out, the freedom to change religion would lack meaning without the right to proselytize. Still, Danchin concludes that the rights to convert and receive information do not necessarily imply “the right to be confronted with all possible forms of unsolicited views.” He suggests that a state might legitimately prevent people from being confronted with views it “deems important to restrict either to protect the ‘fundamental rights and freedoms of others’ from specific harms or to serve some other compelling state interest.” His discussion of the right to be proselytized ends there.

While Danchin identifies some valid grounds for limiting the right to be proselytized, his analysis does not disprove that right’s existence. His reference to protecting the “fundamental rights and freedoms of others” calls up ICCPR clauses allowing for limitations on some rights that establish the right to be proselytized. Of those rights, the ICCPR permits restrictions on only the freedom to manifest one’s religion or belief, the freedom of expression, and the freedom of peaceful assembly. The Covenant does not allow for limitations on the other rights that establish the right to be proselytized — the right to adopt a new religion or belief, freedom from coercion impeding the ability to do so, freedom of opinion, or freedom from religious discrimination. Restricting the right to be proselytized would limit one or more of the freedoms that establish that right; for example, if Greece passed a law

93. Id. at 271.
95. Id. at 272.
96. Id. (quoting ICCPR, supra note 36, at art. 18, ¶ 3).
97. See ICCPR, supra note 36, at art. 18.
98. See id. at art. 19.
99. Id. at art. 21.
100. Id. at art. 19, ¶ 1. See also Bielefeldt, supra note 43, ¶ 19 (“[T]he right to conversion has the rank of an absolutely protected right within freedom of religion or belief and does not permit any limitations or restrictions for any reason.”).
101. See UNHRC, supra note 50, ¶ 8.
102. ICCPR, supra note 36, at art. 19, ¶ 1.
103. Id. at art. 26.
explicitly prohibiting citizens like Mrs. Kyriakaki from being proselytized, it would infringe on those citizens’ right to receive information and likely on other rights, such as proselytizers’ rights to share their messages with those citizens. Thus, it seems that limitations on the freedoms constituting the right to be proselytized comprehensively represent states’ methods for limiting that right. To illuminate the extent to which states can limit that right, and to examine whether states can limit the right to the point of negating it as Danchin suggests, I explore below the permissible extent of limitations on the elements of the right that states can restrict—the right to manifest one’s religion through proselytism, to freedom of expression, and to peaceful assembly.

States may restrict these three rights if necessary to serve interests specified in the ICCPR. All three rights may be restricted if “necessary to protect public . . . order, health, or morals.” The rights to religious manifestation and to freedom of assembly can also be restricted for “public safety.” Similarly, the rights to freedom of expression and freedom of assembly can be restricted to protect national security. The rights to religious manifestation and to freedom of assembly can also be limited to protect others’ rights and freedoms, though those rights and freedoms must be “fundamental” to justify restrictions on the former right. Furthermore, the right to freedom of expression can also be limited if needed to protect others’ “rights or reputations.”

States cannot restrict the rights to religious manifestation, freedom of expression, or peaceful assembly on any grounds not specified in the ICCPR or otherwise “to a greater extent than is provided for in the . . . Covenant.” Thus, though Danchin suggests that

104. See id. at arts. 18, ¶ 3; 19, ¶ 3; 21.
105. Id. at art. 18, ¶ 3; see id. at arts. 19, ¶ 3; 21.
106. Id. at arts. 18, ¶ 3; 21.
107. Id. at arts. 19, ¶ 3; 21.
108. Id. at arts. 18, ¶ 3; 21.
109. Id. at art. 19, ¶ 3.
110. See UNHRC, supra note 50, ¶ 8 (“[R]estrictions on the right to manifest one’s religion or belief] are not allowed on grounds not specified [in Article 18(3)].”); UNHRC, supra note 63, ¶ 22 (“Restrictions on the right to freedom of expression “are not allowed on grounds not specified in [Article 19(3)], even if such grounds would justify restrictions to other rights protected in the Covenant.”); UNHRC, supra note 70, ¶ 36 (“Authorities must be able to show that any restrictions [on the right of peaceful assembly] . . . are . . . necessary for . . . at least one of the permissible grounds for restrictions enumerated in article 21.”).
111. See ICCPR, supra note 36, at art. 5, ¶ 1.
governments might prevent people from being proselytized “to serve [a] compelling state interest[,]”\textsuperscript{112} states parties to the ICCPR can restrict the right to be proselytized only in service of a compelling interest specified in the Covenant. Restrictions on the right to religious manifestation or to freedom of expression must be “prescribed by law,”\textsuperscript{113} while restrictions on the right to freedom of assembly must be “imposed in conformity with the law.”\textsuperscript{114}

Restrictions on any of these three rights must also comply with additional strict criteria. Such restrictions must be not only necessary\textsuperscript{115} but also proportionate to the need on which they are based.\textsuperscript{116} According to the UNHRC, restrictions on the right of peaceful assembly must be catered to individual situations; “[b]lanket restrictions on peaceful assemblies are presumptively disproportionate.”\textsuperscript{117} This suggests that general restrictions on the right to meet with a proselytizer are invalid under the Covenant. Restrictions on the right to religious manifestation, freedom of expression, or peaceful assembly also must preserve, not undermine, those rights.\textsuperscript{118}

Nonetheless, “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed,” a state may derogate from its responsibility to respect the rights to freedom of opinion, expression, and peaceful assembly

\textsuperscript{112} See Danchin, supra note 22, at 272.

\textsuperscript{113} See ICCPR, supra note 36, at art. 18, ¶ 3, art. 19, ¶ 3.

\textsuperscript{114} Id. at art. 21.

\textsuperscript{115} See id. at arts. 18, ¶ 3; 19, ¶ 3; 21 (requiring that restrictions on these rights be “necessary” to achieve a specified aim). Note that restrictions on the right of peaceful assembly must meet the particularly strict requirement of being “necessary in a democratic society” for a specified aim. Id. at art. 21.

\textsuperscript{116} See UNHRC, supra note 50, ¶ 8 (explaining that limitations on the right to manifest one’s religion or belief must be “proportionate to the specific need on which they are predicated”); UNHRC, supra note 63, ¶ 22 (Limitations on the right to freedom of expression “must conform to the strict test[] of . . . proportionality.”); UNHRC, supra note 70, ¶ 36 (Restrictions on the right to freedom of assembly must be “proportionate to at least one of the permissible grounds for restrictions . . . .”).

\textsuperscript{117} UNHRC, supra note 70, ¶ 38.

\textsuperscript{118} See UNHRC, supra note 50, ¶ 8 (“In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26.”). See also UNHRC, supra note 70, ¶ 36 (restrictions on the right to peaceful assembly “must not be discriminatory, impair the essence of the right, or be aimed at discouraging participation in assemblies or causing a chilling effect”).
and to freedom from religious discrimination.\textsuperscript{119} However, a state may do so only “to the extent strictly required by the exigencies of the situation” and in a way “[consistent] with [the state’s] other obligations under international law . . . .”\textsuperscript{120} In addition, such derogation may not religiously discriminate,\textsuperscript{121} and no derogation from the rights guaranteed in Article 18 is allowed, even in a public emergency.\textsuperscript{122}

In short, absent an official, nation-threatening public emergency, states must protect the rights constituting the right to be proselytized, can limit only three of them, and must do so only when necessary, in a way that preserves the restricted rights, and in conformity with other strict criteria. Because states cannot religiously discriminate and because limitations on these rights must be necessary and proportionate, states likely cannot target limitations to negate the right to be proselytized. In normal circumstances, then, it appears that states can limit but not eliminate the right to be proselytized. It seems plausible that states might temporarily negate this right in an emergency that threatens the life of the nation, as such an emergency would allow them to derogate from their duty to protect most of the elements of the right to be proselytized. Still, such derogation would need to be necessary and end with the public emergency.

\textbf{A. Restrictions on the Right in Practice}

To make this analysis more concrete, it is helpful to explore the viability in normal conditions of specific grounds for limiting the right to be proselytized. Several arguments for limiting the right to proselytize, a key element of the right to be proselytized, to serve different aims identified in the ICCPR have been advanced. These arguments are analyzed below.

\textsuperscript{119} See ICCPR, supra note 36, at art. 4.
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{Id.}
1. Protecting National Security

Some have argued that proselytism threatens national security or public order or morals. Such claims appear plausible at least in relatively extreme situations, such as if proselytism is used as a cover for espionage or if proselytizers call for listeners to revolt against the government. It also seems possible that face-to-face proselytism could threaten public health in an extreme situation such as a pandemic. However, it appears unclear how normal proselytism, as defined at the beginning of this Note, would threaten these interests in regular conditions. Some countries have attempted to essentially equate public order or morals with the integrity and teachings of a state’s dominant religion, which would mean that proselytism of the dominant faith’s members undermines public order and morals. However, the UNHRC has cautioned that “the concept of morals” referred to in ICCPR Article 18(3) “derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.” Some countries have alleged that proselytism threatens public order because it can cause social turmoil by offending people’s religious sensibilities. However, as Stahnke notes, a proper response to such turmoil would be for the state not to restrict the right to manifest religion but to fulfill “its own obligation to promote tolerance, mutual understanding and

123. See Garnett, supra note 32, at 456.
125. The Malaysian Supreme Court underscored the disconnect between proselytism and public peril when hearing the case of a person arrested for allegedly threatening national security by attending religious meetings and converting six Malays: “We do not think that mere participation in meetings and seminars can make a person a threat to the security of the country. As regards the alleged conversion of six Malays, even if it was true, it cannot in our opinion by itself be regarded as a threat to the security of the country.” Id. at 308–09 (quoting Minister for Home Affairs v. Othman 1 M.L.J. 418, 419–20 (Sup. Ct. 1989)).
126. See, e.g., Stahnke, supra note 124, at 282–83 (discussing Mauritania’s attempt to equate public order and morals with the integrity and teachings of Islam, the state’s dominant religion).
127. UNHRC, supra note 50, ¶ 8.
peaceful relations between groups.”  Though proselytism can be restricted when necessary to protect public safety, health, order, or morals, situations of such necessity seem likely to be relatively rare.

2. Protecting “Rights and Freedoms of Others”

Some specific “rights and freedoms of others” have been suggested as grounds to limit the right to proselytize. For example, as mentioned before, some have suggested that this right must be balanced with potential proselytizees’ right to be left alone or to be free from interference with their religious practice or their religious feelings. Some have also suggested that the right to proselytize must be balanced with a right of religious communities to retain their members or respect for their reputations. These rights rest on a relatively weak legal foundation and thus seem unlikely to ground great limitations on the right to be proselytized.

First, some have argued that proselytism conflicts with people’s right to “not be interfered with by such activit[y].” Hirsch bases this idea on Berlin’s concept of negative freedom, which Hirsch describes as “the freedom to be free of unwanted interference.” According to Berlin, “[t]he wider the area of non-interference the wider my freedom.”

While many people generally prefer to not be proselytized, there are problems with categorizing proselytism as unwanted interference from which people have negative freedom. This idea is illogical regarding solicited proselytism, which cannot be termed unwanted. Furthermore, even unsolicited proselytism arguably cannot be categorically labeled “unwanted interference.” Though such proselytism is not solicited, that does not mean that its targets necessarily find it undesirable. Many people regularly

130. Hirsch, supra note 18, at 409.
131. Id. (citing Berlin, supra note 25, at 122).
132. Berlin, supra note 25, at 123.
133. Note that Hirsch appears to be discussing only non-solicited proselytism, but I mention this assumption’s illogic regarding solicited proselytism because I define proselytism as either solicited or unsolicited in this Note, see Section I, supra.
respond favorably to such proselytism, including by accepting new religions.  

In addition, the idea that people have a “negative freedom” from proselytism seems to lack a firm basis in international law. A potential basis for this suggested right may be ICCPR Article 17, which provides that people shall be free from “arbitrary or unlawful interference with [their] privacy, family, home or correspondence, [and from] unlawful attacks on [their] honour and reputation.” Article 17 further provides that “[e]veryone has the right to the protection of the law against such interference or attacks.” It may be argued that proselytism constitutes interference with a person’s privacy, as it can include unsolicited attempts to influence a personal part of someone’s life. However, as established previously, non-coercive proselytism is lawful; thus, it does not constitute “unlawful interference.” Unsolicited proselytism may seem to some proselytizees like “arbitrary” interference with their privacy, though it is not clear that the ICCPR’s prohibition of such interference covers proselytism. The second edition of Black’s Law Dictionary defined “arbitrary” to mean “[n]ot supported by fair, solid, and substantial cause, and without reason given.” Proselytism has a manifest reason—converting someone to a certain religious faith. This cause seems “substantial” and “solid,” as proselytism seeks converts for the purpose of securing them spiritual guidance or blessings. This cause also seems “fair,” given international law’s protection of proselytism. Thus, proselytism does not seem to meet this legal definition of “arbitrary.” In addition, the UNHRC has explained that Article 17’s reference to “the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of

134. See, e.g., PUBLIC BROADCASTING SERVICE, THE MORMONS: THE MISSION (Apr. 30, 2007), https://www.pbs.org/mormons/faqs/mission.html (“Each year, approximately 53,000 Mormon missionaries go out into the world to win as many as 250,000 converts to their faith.”).
135. ICCPR, supra note 36, at art. 17, ¶ 1.
136. Id. at art. 17, ¶ 2.
137. Arbitrary, BLACK’S LAW DICTIONARY (2d ed. 1910) (citing Treloar v. Bigge, 9 LR Exch. 155 (1874)).
the Covenant . . .”138 Thus, it appears that the prohibition on arbitrary interference with privacy is aimed more at legislative acts than at the private action of proselytism. If unsolicited proselytism were prohibited by ICCPR Article 17, then that Article would likely also cover other unsolicited, persuasive information sharing, such as political campaign outreach efforts. But such efforts are protected by international law,139 and, as Witte has explained, “the Covenant regards the religious expression inherent in [non-coercive] proselytism as no more suspect than political, economic, artistic, or other forms of expression and entitled to the same protection.”140

A right to freedom from proselytism as unwanted interference might also flow from ICCPR Article 19(1)’s provision that “[e]veryone shall have the right to hold opinions without interference.”141 Proselytism might arguably interfere with one’s right to hold religious opinions. Coercive proselytism likely unlawfully interferes with this right. However, if proselytism generally does so, then other efforts to share information for the purpose of persuading the listener to change their beliefs or affiliation would likely also violate this right. For example, advertising for a political candidate to convince listeners to switch their support to that candidate might be considered contrary to Article 19(1). Such an interpretation of the Covenant would undermine the freedom of expression that Article 19 guarantees.142 Thus, Article 19(1) also does not appear to strongly ground a right to freedom from proselytism as unwanted interference.

Further conflicting with the notion of negative freedom from proselytism is the fact that experiencing proselytism can strengthen what Berlin terms a person’s “positive” freedom—her ability to order her life as she chooses.143 By providing a person with information about a religion and opportunities to act on it, proselytism can expand her range of choices on how to order her life.

139. See UNHRC, supra note 63, ¶¶ 11, 37.
140. Witte, supra note 17, at 627.
141. See ICCPR, supra note 36, at art. 19, ¶ 1.
142. See UNHRC, supra note 63, ¶ 37 (discussing restrictions on political campaign outreach efforts as inconsistent with ICCPR Article 19).
By contrast, preventing someone from experiencing proselytism may constrict the range of choices of which she is aware and thereby shrink the “area of non-interference” by which Berlin measures positive freedom. Thus, proselytism can build a proselytizee’s positive freedom, while prohibiting proselytism interferes with that freedom.

Next, some have suggested that the right to proselytize must be balanced against a proselytizee’s right to freedom from injury to her religious feelings or from interference with her peaceful enjoyment of her religion. Neither of these rights appear to be clearly articulated in international law. A UN action plan casts doubt on the proposed right to freedom from injury to one’s religious feelings by stating that “the right to freedom of religion or belief, as enshrined in relevant international standards, does not include the right to have a religion or a belief that is free from criticism or ridicule.” The idea of freedom from proselytism as interference with peaceful enjoyment of one’s religion appears to be a narrower version of the right to freedom from proselytism as unwanted interference. Perhaps, as with the latter, the former may be grounded in the international legal right to privacy. However, as discussed above, that right does not provide a strong basis for legal freedom from proselytism. It seems unclear to what extent the right to proselytize must be balanced with the right to freedom from injury to religious feelings or from interference with peaceful enjoyment of one’s religion, though the former’s stronger legal grounding suggests that it weighs more heavily than the latter two rights.

3. Protecting Other Religions

As mentioned above, some states have argued that restricting proselytism is necessary to protect the integrity of their dominant religious communities. Some have argued that such protection is justified because of the important role that the dominant religion
has played in the state.\textsuperscript{149} However, favoring one religious community over others, particularly over minority religious communities, is inconsistent with ICCPR Article 18.\textsuperscript{150} That practice also violates ICCPR Article 26,\textsuperscript{151} which prohibits discrimination on the basis of religion.\textsuperscript{152} In addition, as explained earlier, preventing proselytism to keep people from leaving a religious community seems to constitute “coercion which would impair [a person’s] freedom to have or to adopt a religion or belief of his choice,” contrary to Article 18(2) of the ICCPR.\textsuperscript{153} Because it thus interferes with a person’s autonomy, trying to keep people in a religious community in this way actually can send a message of exclusion to them.\textsuperscript{154} Preventing proselytism to protect a religious community’s integrity violates international law and can harm individuals.

Finally, some have suggested that proselytism threatens religions’ reputations.\textsuperscript{155} While freedom of expression can be limited to protect “the rights or reputations of others[,]”\textsuperscript{156} “international human rights law protects individuals, not Religion or Belief per se.”\textsuperscript{157} As mentioned above, the right to proselytize cannot be restricted to protect a religion from “criticism or ridicule.”\textsuperscript{158} Thus, states likely cannot prevent proselytization to protect religions’ reputations.

As this analysis shows, a right to freedom from proselytism as unwanted interference with one’s affairs, religious practice, or religious feelings, as well as a right of religious communities to retain their members and have their reputations respected, rest on a relatively tenuous international legal foundation. Thus, it does not seem that these rights negate the right to be proselytized\textsuperscript{159} or

\textsuperscript{149} See id. at 275–76.
\textsuperscript{150} UNHRC, supra note 50, ¶¶ 2, 9.
\textsuperscript{151} See id. ¶ 9.
\textsuperscript{152} ICCPR, supra note 36, at art. 26.
\textsuperscript{153} See id. at art. 18, ¶ 2.
\textsuperscript{154} See Nordenfelt, supra note 82, at 75–76.
\textsuperscript{156} See ICCPR, supra note 36, at art. 19, ¶ 3.
\textsuperscript{157} EU Guidelines, supra note 76, ¶ 32(b).
\textsuperscript{158} See Human Rights Council, supra note 146, ¶ 19.
\textsuperscript{159} Even if the former rights are valid, that would not eliminate the right to be proselytized. A person could theoretically have both the right to be free from proselytism
that their protection could be a legitimate basis for significantly limiting that right by restricting the right to proselytize.

B. Enforcement of the Right to Be Proselytized

Because the ICCPR protects the right to be proselytized, the Covenant obligates its member states to enforce that right. The ICCPR requires each state party “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . “160 States parties must also enact laws and other measures, if not already enacted, to protect the rights recognized in the ICCPR161 and must ensure162 and enforce163 “an effective remedy” for anyone whose Covenant rights are violated. Because the ICCPR protects the right to be proselytized, these obligations logically extend to that right.

A thorough discussion on enforcing the right to be proselytized is beyond the scope of this Note. However, a few important notes on that subject can be made here. First, the right to be proselytized can be enforced directly, such as through explicit recognition of it in national or international law, or indirectly, such as through improved protection of the rights that constitute the right to be proselytized. Next, many state and other actors violate those constituting rights,164 so improvement in this enforcement is needed. Finally, states and other actors can help enforce the right to and the right to experience it. Though those rights may seem contradictory, international law recognizes other pairs of rights that often seemingly conflict with each other. See Gustavo Arosemena, Conflicts of Rights in International Human Rights: A Meta-Rule Analysis, 2 GLOB. CONSTITUTIONALISM 6, 7–8 (2013). For example, it recognizes a right to freedom of speech, ICCPR, supra note 36, at art. 19, ¶ 2, and a right to privacy, id. at art. 17, which can conflict in situations such as when a journalist attempts to publish photos of a celebrity’s personal life, see Arosemena, supra, at 7. In response to such conflicts, international law practitioners can balance, prioritize, or harmonize the competing rights. See id. at 12–27. If a person has the right to be free from proselytism under international law, then that right could represent a competitor to, not the negation of, the right to be proselytized. And as shown above, the suggested right to be free from proselytism would likely be a relatively weak competitor.

160. ICCPR, supra note 36, at art. 2, ¶ 1.
161. See id. at art. 2, ¶ 2.
162. Id. at art. 2, ¶ 3(a).
163. Id. at art. 2, ¶ 3(c).
164. See, e.g., SAMIRAH MAJUMDAR & VIRGINIA VILLA, Globally, Social Hostilities Related to Religion Decline in 2019, While Government Restrictions Remain at Highest Levels, PEW RSCCH. CTR., 78–80 (2021) (documenting high levels of religious harassment and legal restrictions on proselytism throughout the world).
be proselytized in various ways, from codifying it or its constituting rights in national law, to punishing these rights’ violation domestically or internationally. States and the international community should pursue such measures more to ensure that the right to be proselytized is properly protected.

Although international law protects a right to be proselytized, that right does not encompass any and all proselytism. International law prohibits coercive proselytism. The UNHRC has explained that such proselytism “inclues the use of threat of physical force or penal sanctions to compel [people] to . . . recant their religion or belief or to convert.” Proselytism may also be coercive when directed at people lacking ability to decline it, such as children or prisoners or when a proselytizer “offer[s] material or social advantages with a view to gaining new members for a Church or exert[s] improper pressure on people in distress or in need.” However, “unwanted, annoying[,] or offensive acts of proselytism—even though they may result in social disruption—are not necessarily improperly coercive. Indeed, these conditions reflect circumstances under which a person can make a free and informed choice regarding religious beliefs.” States also should not attempt to protect proselytizees from hearing religious information because the state deems it “false”; that would likely constitute religious discrimination contrary to the ICCPR.

International law protects persons against improper, including coercive and physically harmful, proselytism, but it does not protect them against religion-related irritation, offense, or ideas with which the state disagrees; proselytizees can presumably handle the latter problems themselves.

Relatedly, international law establishes a right, not an obligation, to be proselytized. In other words, while international law calls for

165. See EU Guidelines, supra note 76, ¶ 32(b); ICCPR, supra note 36, at art. 18, ¶ 2 (“No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”).
166. UNHRC, supra note 50, ¶ 5.
167. See Stahnke, supra note 124, at 332.
169. Stahnke, supra note 124, at 340. It is also noteworthy that, while coercive proselytism is illegal, “the right to try to convert others by means of non-coercive persuasion . . . constitutes an inextricable part of freedom of religion or belief.” Bielefeldt, supra note 43, ¶ 66.
states to open a space wherein people can be approached by proselytizers, it does not oblige states to ensure that people are approached by proselytizers. For example, while international law arguably allowed Mrs. Kyriakaki a right to a legal system in which Mr. Kokkinakis could non-coercively approach her with a religious message, it did not require Greece to send Mr. Kokkinakis to her door. States also need not ensure that proselytism is effective or reaches many people; such effort could likely constitute or engender undue religious favoritism. States should not prevent people from being proselytized or compel them to be proselytized.

CONCLUSION

In conclusion, international law protects a right to be proselytized. The current literature on law and proselytism focuses on the rights of the proselytizer and on negative rights of the proselytizee. Some scholarship has touched on affirmative rights of the proselytizee and even to a limited extent on the right to be proselytized, but the current literature lacks a fleshed-out analysis of whether this right exists in international law. This Note has furthered the legal discourse on the international legal rights involved in proselytism by performing such an analysis and showing that international law does protect such a right. This right

171. To respect people’s right to be proselytized and their right to freedom from religious coercion, states should refrain from interfering with the religious information market. The concept of a “marketplace of ideas” holds that ideas should be allowed to flow freely among people, as “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” David Shultz, Marketplace of Ideas, THE FIRST AMEND. ENCYCLOPEDIA (Jan. 1, 2009), https://firstamendment.mtsu.edu/article/marketplace-of-ideas (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). This concept has been invoked many times by the U.S. Supreme Court as a justification for the right to free speech, id., and it provides a compelling justification for the right to free religious speech in international law. The Council of the European Union makes use of a similar idea in the EU Guidelines on The Promotion and Protection of Freedom of Religion or Belief: “[T]he most effective way to combat a perceived offense from the exercise of freedom of expression is the use of freedom of expression itself. Freedom of expression applies online as well as offline. New forms of media as well as information and communications technology provide those who feel offended by criticism or rejection of their religion or belief with the tools to instantly exercise their right of reply.” EU Guidelines, supra note 76, ¶ 32.a.iv (citing U.N. GAOR Hum. Rts. Council, The Promotion, Protection and Enjoyment of Human Rights on the Internet, U.N. Doc. no. A/HRC/RES/20/8 (July 16, 2012)) (note that the Council here is discussing responses to offensive religious speech that does not “rise to the level of incitement prohibited under article 20 of the ICCPR, and is thus an exercise of free speech.” See EU Guidelines, supra note 76, ¶ 32.a). Essentially, states should allow for a free, unregulated market of religious ideas.
is established and supported by the international legal rights to proselytize, adopt a religion or belief free of coercion, freedom of opinion, freedom of expression, freedom of assembly, and freedom from religious discrimination, as well as the international legal principle of human dignity. At the same time, international law protects proselytizees against coercive proselytism, and states can limit the right to be proselytized when necessary to pursue certain legitimate aims. Considering and protecting the right to be proselytized can positively impact legal analyses and decisions by framing proselytism issues with a fuller perspective of proselytizees’ rights and dignity.
Dignity, Deference, and Discrimination: An Analysis of Religious Freedom in America’s Prisons

Elyse Slabaugh* 

The free exercise of religion often presents a complex reality in prison. Over the years, the standard of scrutiny for free exercise claims has not only been easily alterable but also unclear and inconsistent in its application. Recent legislation, such as RLUIPA and RFRA, has significantly improved the state of religious freedom in prisons. However, two U.S. Supreme Court decisions on RLUIPA—Cutter v. Wilkinson and Holt v. Hobbs—have led to some confusion among lower courts regarding the level of deference that should be afforded to prison officials. Although Holt demonstrated a hard look approach to strict scrutiny, it did nothing to strike down or clarify Cutter’s deferential language. This is problematic because there is an inherent contradiction in applying strict scrutiny with deference. Although many courts follow a true strict scrutiny approach, in practice, remnants of a deferential approach remain among lower courts.

This Note argues that courts must adhere to strict scrutiny, not only in theory, but also in practice. In doing so, it first gives a brief, general overview of the history of religious freedom in the prison system, with particular focus on the efforts and struggles of religious minorities. Then it addresses the inconsistency between Cutter and Holt while comparing the due deference and hard look approaches. Finally, to provide some concrete examples of why this inconsistency matters, it examines two issues more in-depth: First Amendment retaliation claims and equal treatment claims. It looks at several recent cases to further support the conclusion that strict scrutiny is not only necessary to protect religious minorities’ rights, but it is also both practical and feasible, even in the prison context.

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INTRODUCTION

“Prisoners are persons whom most of us would rather not think about[.]” Justice William J. Brennan states at the beginning of his dissenting opinion in O’Lone v. Estate of Shabazz.¹ He continues: “Incarceration by its nature denies a prisoner participation in the larger human community. To deny the opportunity to affirm membership in a spiritual community, however, may extinguish an inmate’s last source of hope for dignity and redemption.”²

Justice Brennan’s opinion reflects a thorough understanding of religion’s centrality in American society and its ability to provide hope and meaning to one’s life. His response also reveals a deep concern for the incarcerated—who often cannot enjoy the full exercise of their religion while in prison. At the heart of his statement is the idea that prisoners—even those perceived as society’s “worst offenders”—still retain human dignity. They are still individuals who, although they may be denied full participation in society, desire full participation in their chosen spiritual community. They are still individuals who “hope for

² Id. at 368.
dignity and redemption[,]”3 and as such are deserving of the fullest measure of religious freedom that can be offered to them.

However, the free exercise of religion often presents a complex reality in prisons. Courts have long rejected the view that prisoners are “slaves of the State”4 to whom the Bill of Rights does not apply,5 but it is well-settled that “[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.”6 Yet courts have consistently held that religious freedom is “one of the fundamental ‘preferred’ freedoms guaranteed by the Constitution[,]” and therefore religious freedom claims “fall[] in quite a different category” than other claims.7

Even so, there are compelling penological objectives—such as security, safety, deterrence of crime, rehabilitation, and orderly administration—that often come into direct conflict with an inmate’s right to free exercise of religion. Thus, the ability and willingness of prison administrators to accommodate religion in prisons has fluctuated over the years. Although the ideal of religious freedom was written into America’s earliest documents, “[t]he struggle to make religious freedom real in America has been long and tempestuous[,]”8 and the story is no different in America’s prisons.

Examining this history reveals two important points: first, religious minority groups have played a central role in the progression of religious freedom in prison; and second, over the years, the standard of scrutiny for free exercise claims has not only

3. Id.
7. Pierce v. La Vallee, 293 F.2d 233, 235 (2d Cir. 1961). See also Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (“Freedom of press, freedom of speech, freedom of religion are in a preferred position.”); Marsh v. Alabama, 326 U.S. 501, 509 (1946) (“When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion . . . we remain mindful of the fact that the latter occupy a preferred position.”).
been easily alterable but also unclear and inconsistent in its application. A glance back to the not-so-distant past confirms that “[t]he difficulties of prison administration create the potential for prisons to succumb to neglect, racism, and religious intolerance and for prison officials to curtail inmates’ rights not only when necessary, but also when merely convenient.”

Recent legislation, such as the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA), has significantly improved the state of religious freedom in prisons by not only offering more protection to religious minorities through a return to strict scrutiny, but also providing a more permanent and effective standard to guide courts in their efforts to balance the competing interests of state and individual. Even so, the unique nature of the prison context, the variety of free exercise issues that can arise there, and an extensive history of overlapping and conflicting legal standards has led to confusion, even today, among courts as to how exactly those standards should be applied in practice.

This inconsistency is due in large part to two U.S. Supreme Court decisions. The first, *Cutter v. Wilkinson*, upheld RLUIPA as constitutional, but also put forth a “due deference” approach in dicta. The second, *Holt v. Hobbs*, decided ten years later, took a more scrutinizing approach but did nothing to strike down or clarify *Cutter’s* deferential language. In the aftermath of *Holt*, most lower courts have followed its hard look approach; however, given that *Cutter* has not been overruled or discounted by subsequent decisions, due deference remains an avenue for courts to use when they so choose. Thus, although the *theory* of strict scrutiny was well-established through RLUIPA, in *practice*, some remnants of a deferential approach remain among lower courts.

This Note argues that courts must adhere to strict scrutiny, not only in theory, but also in practice. In doing so, it will first give a brief, general overview of the history of religious freedom in the prison system, with particular focus on the efforts and struggles of religious minorities. Then it will address the inconsistency between *Cutter* and *Holt* while comparing the due deference and

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hard look approaches. Finally, to provide some concrete examples of why this matters, this Note will examine two issues more in-depth: First Amendment retaliation claims and equal treatment claims. It will look at several recent cases to further support the conclusion that strict scrutiny is not only necessary to protect religious minorities’ rights, but it is also both practical and feasible, even in the prison context.

I. EARLY AMERICAN PRISONS

In 1785, James Madison penned an eloquent and well-reasoned defense of religious freedom, titled Memorial and Remonstrance Against Religious Assessments. Among the arguments set forth, Madison asserted that a society built on one particular religion or belief system would only lead to oppression and conflict, while a society built on principles of religious freedom would flourish. However, the reality of this flourishing society would prove to be more elusive in prison life; it seemed that the more religious diversity increased in prisons, the more security threats and administrative problems arose for prison officials.

Like many other aspects of society, early American prisons were highly influenced by Christianity. Andrew Skotnicki has stated that “[r]eligion was not an external force outside the [prison] walls, simply reacting to events, but an integral part of the internal logic by which the prisons were governed.” For example, many early prison reformers endeavored to bring about the “moral and religious improvement” of inmates by implementing religious services, encouraging Bible studies, and allowing visits from church ministers. The New York Prison Association, formed in

13. Id. (“Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution.”).
15. Id. at 38.
16. In 1787, Benjamin Franklin, along with a group of Quaker men, formed the Philadelphia Society for Alleviating the Miseries of Public Prisons and subsequently
1844, issued several official reports that demonstrated the importance of religion and its role in reforming inmates. One report from 1867 had forty pages devoted to “Moral and Religious Agencies,” with the opening paragraph stating:

The importance of suitable and adequate provisions for the moral and religious instruction of prisoners, whether regard be had to public worship, Sunday school lessons, daily prayer and reading of the scriptures, or private visitation, can scarcely be exaggerated. If the design be to reform and restore them to virtue, religion is needed above everything . . . We have a profound conviction of the inefficacy of all measures for reformation, except such as are based on religion . . . .

However, most references to “religion” in these early documents really only referred to Christian religions.

This partly explains why religious freedom claims were not very common until the mid-twentieth century; because Christianity was well-protected and incorporated into prison life, as well as in society at large, most inmates belonging to mainstream Christian sects were able to freely exercise their religion with little opposition from prison officials. An 1845 report on the Maryland State Prison illustrates this point: “Every opportunity is allowed to the convicts to receive religious instruction, and they are left...”

undertook efforts to reform Philadelphia’s Walnut Street Jail by implementing religious services there. Id. at 32. The society was highly motivated by religion, as evident from its constitution, which declared that “the obligations of benevolence . . . are founded on the precepts and example of the author of Christianity.” ROBERTS VAUX, NOTICES OF THE ORIGINAL, AND SUCCESSIVE EFFORTS, TO IMPROVE THE DISCIPLINE OF THE PRISON AT PHILADELPHIA AND TO REFORM THE CRIMINAL CODE OF PENNSYLVANIA WITH A FEW OBSERVATIONS ON THE PENITENTIARY SYSTEM 10–11 (1826). Inspired by the reforms made in Philadelphia, Quaker reformer Thomas Eddy pushed for similar prison reforms in New York in the late 18th century. JENNIFER GRABER, THE FURNACE OF AFFLICTION: PRISONS & RELIGION IN ANTEBELLUM AMERICA 26 (2014). Eddy believed that by incorporating religion into New York’s prison, crime would also be reduced. Id. at 27, 30.

17. The NYPA was itself very influenced by religion, as evidenced by its motto: “Sin No More.” MARY BOSWORTH, 1 ENCYCLOPEDIA OF PRISONS AND CORRECTIONAL FACILITIES 420 (2005).


19. For an analysis of how mass incarceration and evolving social norms have influenced prisoners’ rights in general, see Robert T. Chase, We Are Not Slaves: Rethinking the Rise of the Carceral States through the Lens of the Prisoners’ Rights Movement, 102 J. AM. HIST. 73 (2015) (arguing that multiple prisoners’ rights movements between 1965 and 1995 attempted to challenge the construction of the carceral state by using legal, political, and social strategies).
entirely at liberty to select for the purpose the minister of any religious denomination whom they may prefer, and who is willing to attend on them.” With the introduction of more non-Christian inmates in the twentieth century, however, this accommodating view was challenged.

II. THE GROWTH OF RELIGIOUS MINORITIES

As the nineteenth century came to a close, many of its pivotal events were still causing ripple effects throughout the nation. The end of the Civil War, the Great Migration, influxes in immigration, increasing urbanization, countless social movements, and a changing political landscape all contributed to an increase in racial and ethnic tensions, deteriorating urban conditions, overcrowding, and increasing crime rates. This in turn led to a strain on prisons themselves. As officials struggled to keep peace and order as well as find space for the increasing number of prisoners, an influx of diverse racial, ethnic, and religious groups added to that strain. However, by the 1950s, one group in particular stood out to prison officials as posing the greatest threat: the Nation of Islam.

The Nation of Islam (NOI) was founded in 1930 by Wallace D. Fard Mohammed. In its early days, it was characterized by the press as a “jungle cult,” with “sinister influences of voodooism.” However, when some of its more troubling racial rhetoric became more widely known, many began to denounce the NOI much more fervently. The press began to characterize it as “a subversive political group in the guise of religion.” One Harvard professor

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24. Fundamental to NOI beliefs is the concept that Black Americans are a chosen people, superior to the white race. See LEE, supra note 22. Additionally, during World War II, many NOI followers were arrested for draft evasion, professing pro-Japanese sentiment and other troubling statements about how World War II was a “white man’s war.” See Felber, supra note 23, at 16–22.
25. Felber, supra note 23, at 19.
opined that “white supremacists and the Black Muslims are two sides of the same coin”; a former prison warden claimed it was the “Black Ku-Klux-Klan.” Yet, as Malcom X remarked during his own time in prison, “All of the opposition was, after all, helpful toward the spread of Islam there, because the opposition made Islam heard of by many who otherwise wouldn’t have paid it the second thought.”

And so, by the end of the 1950s, the Nation of Islam was flourishing in America’s prisons. The NOI’s radical views caused concern for many prison officials, and they went to great lengths to prevent these prisoners from gathering together, obtaining NOI literature, and practicing or even conversing about their religion with others. Eldridge Cleaver, who later went on to become a leader of the Black Panthers, wrote an essay detailing the extent of the discrimination and retaliation that Black Muslims faced in prison. He stated:

In those days if you walked into any prison in the State of California and visited the unit set aside for solitary confinement, there was absolutely no doubt that you’d find ten or fifteen Black Muslims who were being “disciplined” for staunchly confronting prison officials with implacable demands that Muslims be allowed to practice their religion with the same freedom and privileges as the Catholics, Jews, and Protestants.

Beginning in the 1960s, many Muslim inmates took to the courts to fight for their religious freedom. Many of these early claims alleged not only that their free exercise rights were violated, but also that they faced retaliation because of their religious beliefs.

26. Id. at 36.
27. Id. at 29.
29. For additional sources that address the topic of Anti-Muslim discrimination in prisons, see Kenneth L. Marcus, Jailhouse Islamophobia: Anti-Muslim Discrimination in American Prisons, 1 RACE AND SOC. PROBLEMS (2009); Dulcey A. Brown, Black Muslim Prisoners and Religious Discrimination: The Developing Criteria for Judicial Review, 32 GEO. WASH. L. REV. 1124 (1963); SpearIt, 9/11 Impacts on Muslims in Prison, 27 MICH. J. RACE & L. 233 (2021); Colley, supra note 28; SpearIt, Muslim Radicalization in Prison: Responding with Sound Penal Policy or the Sound of Alarm, 49 GONZ. L. REV. 37 (2013).
31. See, e.g., Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961); Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961); Sostre v. McGinnis, 334 F.2d 906 (2d Cir. 1964).
Examining a few court cases from this time period sheds light not only on the conditions and limitations that religious minorities faced in prison, but also traces the first application of judicial scrutiny to religious freedom cases.\footnote{Some scholars have tied the prisoners’ rights movement to various other social movements of that time period, making the argument that the movement inside the prisons cannot be understood without understanding the movements outside the prisons. See James B. Jacobs, \textit{The Prisoners’ Rights Movement and Its Impacts}, 1960–1980, \textit{2 Crime and Justice} 429, 432 (1980); Garrett Felber, “\textit{Shades of Mississippi}”: \textit{The Nation of Islam’s Prison Organizing, the Carceral State, and the Black Freedom Struggle}, 105 \textit{J. Am. Hist.} 71, 71–72 (2018).}

\textbf{III. EARLY EFFORTS}

In 1961, Jesse L. Ferguson and nine other inmates at Folsom State Prison petitioned the Supreme Court of California for a writ of habeas corpus. They sought to call attention to the discrimination they faced as Muslims, claiming that they were not allowed to worship or meet together, obtain the Quran or other religious texts, or receive visits from their religious leaders—all practices that Christian and Jewish inmates could do.\footnote{In re Ferguson, 361 P.2d 417, 420 (1961).} The court denied their petition, reasoning that the prisoners were not protected by the California Constitution, nor could they seek relief under the federal Constitution.\footnote{Id. at 420–21.} The court clarified that inmates of state prisons could not assert those rights except “in cases of extreme mistreatment by prison officials,” and refusing to allow the Muslim inmates to practice their religion did not fall under that category.\footnote{Id. at 421.}

More significantly, however, the court candidly admitted that Muslims \textit{were} targeted and denied rights based on their religion. This discrimination was justified because Muslims “were not entitled to be accorded the privileges of a religious group or sect.”\footnote{Id. at 418.} The Department of Corrections’ policy at the time was that “[o]ther religious groups are allowed to pursue religious activities, but the Muslims are not allowed to engage in their claimed religious practices.”\footnote{Id.} The court indicated that because Muslim beliefs and actions posed “potentially serious dangers to the established prison
society[,]” the prison’s policy was reasonable and not an abuse of discretion.38

Such views were not uncommon at the time. A few years later, the U.S. Court of Appeals for the Second Circuit addressed similar complaints from Muslim inmates of Attica State Prison, affirming, as the Supreme Court of California did, that courts must defer to prison administrators’ judgment on such issues, even when important rights were involved.39 The court stated: “No romantic or sentimental view of constitutional rights or of religion should induce a court to interfere with the necessary disciplinary regime established by the prison officials.”40

Gradually, however, courts’ views regarding prisoners’ rights changed, even if attitudes toward Muslims themselves did not change so easily. In Pierce v. La Vallee, three inmates of Clinton State Prison in New York alleged that they were being denied the opportunity to buy the Quran and receive visits or even contact a spiritual advisor.41 They also brought a claim under 42 U.S.C. § 1983, alleging that they were being punished with solitary confinement because of their religious beliefs.42

The district court had previously refused to even hear their claims, but the Second Circuit held that “this is not a case where federal courts should abstain from decision because the issue is within state cognizance.”43 The appellate court pointed out that this was not a claim that involved “ordinary problems of prison discipline,” but rather involved a charge of religious persecution, which “falls in quite a different category.”44 Citing several Supreme Court cases from the 1940s,45 the court clarified that religious freedom is “one of the fundamental ‘preferred’ freedoms guaranteed by the Constitution[,]” and therefore is deserving of greater protection, even for prisoners.46 Although on remand, the district

38. Id. at 422.
40. Id. at 908.
41. Pierce v. La Vallee, 293 F.2d 233, 234 (2d Cir. 1961).
42. Id.
43. Id. at 236.
44. Id. at 235.
46. Pierce, 293 F.2d at 235.
court ruled in favor of the prison, \textsuperscript{47} Pierce v. La Vallee still had a great impact in moving forward other religious freedom cases.

Several years later, the Supreme Court solidified Pierce’s ruling and extended federal jurisdiction over state prisons in Cooper v. Pate, \textsuperscript{48} definitively requiring federal courts to hear prisoners’ constitutional claims. \textsuperscript{49} On remand, the U.S. Court of Appeals for the Seventh Circuit addressed the inmate’s claims, which included a statutory retaliation claim, as well as allegations that the prison prohibited him from obtaining the Quran, attending religious services, and meeting with spiritual advisors. \textsuperscript{50} The court noted that “although the deference to administrative discretion is not as complete in a case like the present, weight is still given to the judgment of the administrators in determining the practices which are necessary and appropriate in the conduct of a prison.” \textsuperscript{51}

Therefore, although the Supreme Court’s decision in Cooper was a significant victory for prisoners’ rights in allowing inmates’ claims to be heard, the reality was that courts still afforded significant deference to prison officials, who were more aware of the security and safety measures necessary for their institution, as well as the economic and practical concerns of accommodating inmates’ religious exercise.

Additionally, Cooper did little to clarify how courts should analyze such prisoner claims. In the years following Cooper, the U.S. Court of Appeals for the Third Circuit noted that “the test of what actions are unreasonable restraints on the exercise of religion has of necessity proceeded on an ad hoc basis.” \textsuperscript{52} In other words, there was no uniform standard being applied; courts were merely balancing the competing interests at hand on a case-by-case basis. In practice, this meant that prisons often “succumb[ed] to neglect, racism, and religious intolerance” and that many “curtail[ed] inmates’ rights not only when necessary, but also when merely convenient.” \textsuperscript{53} But in 1972, the Supreme Court gave some clearer

\begin{itemize}
  \item \textsuperscript{47} Pierce v. La Vallee, 212 F. Supp. 865 (N.D.N.Y. 1962).
  \item \textsuperscript{48} Cooper v. Pate, 378 U.S. 546 (1964).
  \item \textsuperscript{49} Christopher E. Smith, \textit{Black Muslims and the Development of Prisoners’ Rights}, 24 J. \textit{Black Stud.} 131, 141 (1993).
  \item \textsuperscript{50} Cooper v. Pate, 382 F.2d 518, 520 (7th Cir. 1967).
  \item \textsuperscript{51} \textit{Id.} at 521.
  \item \textsuperscript{52} Gittlemacker v. Prasse, 428 F.2d 1, 4 (3d Cir. 1970).
  \item \textsuperscript{53} Solove, \textit{supra} note 9, at 463.
\end{itemize}
guidance on how lower courts should proceed in Cruz v. Beto, a case that marks the beginning of the high point of religious freedom in America’s prisons.54

IV. THE RISE AND FALL OF RELIGIOUS FREEDOM IN PRISON

Fred Cruz was a Buddhist inmate in the Texas Department of Corrections. Among other injustices,55 Cruz was prohibited from contacting a Buddhist religious advisor and was denied access to the prison chapel, while inmates of other faiths were allowed access.56 When deciding on Cruz’s claim, the Supreme Court acknowledged that courts should not be heavily involved in prison affairs, since prison officials know the rules and regulations necessary to ensure order and safety in their institutions.57 However, the Court held that “persons in prison, like other individuals, have the right to petition the Government for redress of grievances[,]”58 and therefore “reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear or penalty.”59 The Supreme Court remanded Cruz’s case, stating that “[i]f Cruz was a Buddhist and if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts, then there was palpable discrimination by the State against the Buddhist religion[.]”60

Cruz v. Beto was significant for two reasons: first, it further solidified prisoners’ right to bring constitutional claims to court; and second, it established a somewhat clearer standard for courts

55. Cruz also brought a retaliation claim, alleging that he was placed in solitary confinement for two weeks because he had shared religious materials with other inmates. Further, the prison had a reward system in place whereby inmates were given points for attending “orthodox religious services”; these points in turn “enhance[d] a prisoner’s eligibility for desirable job assignments and early parole consideration.” Id. at 320. Thus, not only was Cruz denied the ability to practice his religion, but this injustice was compounded by the fact that inmates were encouraged by prison officials to practice their religion and received rewards for doing so—but only those who belonged to a more mainstream religion.
56. Id. at 319.
57. Id. at 321.
58. Id.
59. Id. at 322 n.2.
60. Id. at 322.
to analyze prisoners’ religious freedom claims. Prisoners must be afforded “reasonable opportunities” to pursue their faith, especially if such opportunities are available to other prisoners. If one sect is denied those opportunities, absent reasonable efforts or reasonable justification from the prison, then that constitutes religious discrimination. In 1974, the Supreme Court clarified that the reasonable justification requirement “must be analyzed in terms of the legitimate policies and goals of the corrections system.” It was not enough to give a reason for the restriction on a prisoner’s religious exercise; prison administrators needed to give a reasonable and substantial justification for the restrictions, which was a much higher burden to meet.

Although the Court had established a clearer standard for religious claims in Cruz, lower courts remained divided as to the exact level of scrutiny required by Cruz. Some courts only required minimal scrutiny of prison policies, requiring that the infringement on free exercise be “reasonably related” to a penological interest. However, others were more skeptical of prison administrators’ policies and reasoning, and they required officials to show not only that the rules and regulations prohibiting a prisoner’s free exercise were legitimate, reasonable,

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61. Id. at 322 n.2.
62. See, e.g., O’Malley v. Brierley, 477 F.2d 785, 795 (3d Cir. 1973) (“Where a state does afford prison inmates the opportunity of practicing a religion, it may not, without reasonable justification, curtail the practice of religion by one sect.”).
64. Gallahan v. Hollyfield, 670 F.2d 1345, 1346 (4th Cir. 1982) (quoting Sweet v. S.C. Dep’t of Corr., 529 F.2d 854, 863 (4th Cir. 1975)).
65. Solove, supra note 9, at 468.
66. See, e.g., Brown v. Johnson, 743 F.2d 408, 412 (6th Cir. 1984) (upholding a prison regulation banning congregate worship services by plaintiffs because plaintiffs ministered to the spiritual needs of homosexuals and prison officials presented testimony indicating there was a strong correlation between homosexuality and violence); Madyun v. Franzen, 704 F.2d 954 (7th Cir. 1983) (holding that a prison regulation allowing for female guards to “frisk search” male inmates was reasonably adapted to achieve a compelling state objective and was therefore sufficient to overcome a Muslim inmate’s First Amendment claim); Rogers v. Scurr, 676 F.2d 1211, 1215 (8th Cir. 1982) (upholding a prison regulation that prohibited Muslim inmates from wearing prayer caps and robes outside religious services; the court noted that courts “should not substitute [their] judgment for that of the officials who run penal institutions.”); St. Claire v. Cuyler, 634 F.2d 109, 115 (3d Cir. 1980) (noting that “courts must defer to the expert judgment of the prison officials unless the prisoner proves by substantial evidence... that the officials have exaggerated their response to security considerations, or that their beliefs are unreasonable.”) (internal quotations and citations omitted).
and important in upholding the prison’s function, but also that no less restrictive alternatives existed.67

This strict scrutiny approach did not go unchallenged. In 1987, two Supreme Court cases delivered a significant blow to prisoners’ free exercise claims, marking the decline of the higher degree of protection that religious freedom had enjoyed since Cruz. The first case, Turner v. Safley, dealt not with religious claims, but with two other constitutional claims—the right of inmates to marry and the right of inmate correspondence.68

Turner rejected a strict scrutiny approach in the prison context, and instead clarified that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”69 The Court established a four-pronged test to determine reasonableness: (1) “there must be a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it”; (2) courts must weigh “whether there are alternative means of exercising the right that remain open to prison inmates”; (3) courts must consider “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally”; and (4) there must be an “absence of ready alternatives[].”70 A few days later, the Supreme Court applied this four-part test to an inmate’s free exercise claim.71

In O’Lone v. Estate of Shabazz, the question before the Court was whether a Leesburg State Prison policy infringed upon two Muslim inmates’ right to attend Jumu’ah, a Muslim worship service held

67. See, e.g., Shabazz v. Barnauskas, 790 F.2d 1536, 1539 (11th Cir. 1986) (finding that under a “less restrictive means test[,]” the prison’s no beard policy was constitutional); Gallahan, 670 F.2d at 1346 (finding that a prison regulation prohibiting beards unconstitutionally restricted an inmate’s right to free exercise because less restrictive means of achieving the prison’s compelling interests were available); Teterud v. Burns, 522 F.2d 357, 362 (8th Cir. 1975) (finding that “the legitimate institutional needs of the penitentiary can be served by viable, less restrictive means which will not unduly burden the administrator’s task”); Barnett v. Rodgers, 410 F.2d 995, 1000 (D.C. Cir. 1969) (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)) (“For ‘even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.’”).


69. Id. at 89.

70. Id. at 89–90 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

on Fridays.\textsuperscript{72} The district court initially held that there was no First Amendment violation, but on appeal, the Third Circuit, following the strict scrutiny standard established in previous cases, ruled that the prison needed to show that the policies “were intended to serve, and do serve, the important penological goal of security,” and there was no less restrictive alternative available.\textsuperscript{73}

However, after applying \textit{Turner’s} four-part reasonableness test, the Supreme Court reversed. The Court noted that it was wrong to put the burden on prison officials to prove that no other alternatives existed or that the chosen policy was the least restrictive means available.\textsuperscript{74} Additionally, the Court stated its refusal to “‘substitute [its own] judgment on . . . difficult and sensitive matters of institutional administration,’ for the determinations of those charged with the formidable task of running a prison.”\textsuperscript{75} In other words, the Court determined that strict scrutiny did not belong in prisons, even when free exercise claims are involved.

\textit{O’Lone} therefore significantly weakened the religious freedom protections afforded to prisoners. In applying the four-part \textit{Turner} test to free exercise claims, the Court essentially reverted to the deferential approach taken by courts decades earlier, ruling that it was not prison officials’ job to search for every available less restrictive alternative to accommodate every inmate’s religious beliefs, nor was it the Court’s job to interfere in the way prisons are run.

This decision preceded the landmark religious freedom case, \textit{Employment Division v. Smith}, which dismantled strict scrutiny even for individuals outside of prison.\textsuperscript{76} One scholar, in examining the two cases together, noted “[t]he Court’s judicial restraint in \textit{Smith} and \textit{O’Lone} had all but eviscerated the judiciary’s role in balancing religious liberty against governmental and penological interests: \textit{Smith} delegated the task of balancing to the legislature while \textit{O’Lone} surrendered it to prison officials.”\textsuperscript{77} However, in the years following these two decisions, Congress proposed a different solution—one that attempted to bring the protections of religious freedom back to citizens and prisoners alike.

\begin{thebibliography}{9}
\bibitem{72} Id. at 344–45.
\bibitem{73} Id. at 347 (quoting Shabazz v. O’Lone, 782 F.2d 416, 420 (3d Cir. 1986)).
\bibitem{74} Id. at 350.
\bibitem{75} Id. at 353 (quoting Block v. Rutherford, 468 U.S. 576, 588 (1984)).
\bibitem{77} Solove, \textit{supra} note 9, at 470.
\end{thebibliography}
V. The Effect of Recent Legislation

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA) in order “to provide a claim or defense to persons whose religious exercise is substantially burdened by government.” The Act served to restore the strict scrutiny standard and “to guarantee its application in all cases where free exercise of religion is substantially burdened.” RFRA’s influence extended to prisoners’ rights as well, and the bill’s passage revealed that many people believed that prisoners’ religious freedom deserved protection.

However, in 1997, the Supreme Court struck down RFRA as an unconstitutional exercise of Congress’s power in City of Boerne v. Flores. The Court noted that although Congress has power to enforce the Free Exercise Clause under Section 5 of the Fourteenth Amendment, Congress exceeded its powers in enacting RFRA for the following reason: “Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”

In the face of RFRA’s defeat, some states quickly passed their own legislation to ensure the continued protection of religious

79. Id.
82. Id. at 519.
83. Although the Supreme Court found RFRA was unconstitutional as applied to states, it remains constitutional on the federal level. Therefore, in the prison context, RFRA only applies to federal prisons, not state or local jails.
freedom under strict scrutiny, but Congress soon found a more lasting solution.

On September 22, 2000, President Clinton signed the Religious Land Use and Institutionalized Persons Act (RLUIPA) into law. Along with protecting religious institutions from burdensome or discriminatory land use and zoning regulations, Section 3 outlines the protections afforded to institutionalized persons. This section states:

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

Therefore, RLUIPA essentially restored the strict scrutiny standard for prisoner religious freedom claims: government actors must clearly demonstrate both a compelling government interest and that there is no less restrictive way to satisfy that interest. However, it is important to note that “RLUIPA’s enactment did not change the level of constitutional scrutiny to be used for inmate free exercise claims, [but rather] it created a statutory right that functionally abrogates O’Lone v. Estate of Shabazz.”

The joint statement of the bill’s authors, Senators Orrin Hatch and Edward Kennedy, clarifies the logic behind RLUIPA and why they believe that strict scrutiny is necessary for prisoners’ free exercise claims in particular:


87. Id. § 2000cc-1(a).

Far more than any other Americans, persons residing in institutions are subject to the authority of one or a few local officials. Institutional residents’ right to practice their faith is at the mercy of those running the institution, and their experience is very mixed . . . . Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.89

Additionally, the legislative history compiled by Congress demonstrated that “prison officials sometimes impose frivolous or arbitrary rules.”90 In the light of these challenges, “[t]he compelling interest test is a standard that responds to facts and context” to ensure that prisoners’ rights are not egregiously or unnecessarily infringed.91

VI. RLUIPA APPLIED: THE IMPACT OF CUTTER AND HOLT

As with RFRA, RLUIPA’s constitutionality was subsequently challenged.92 In Cutter, several inmates from “nontraditional” religions, including Satanists, Wiccans, Asatruar, and Church of Jesus Christ Christians, brought a complaint alleging that Ohio prison officials violated RLUIPA by failing to accommodate their religious exercise in various ways.93 In response, the prison officials argued that RLUIPA itself was unconstitutional because it

90. Id. Congress cited several examples “such as Jewish prisoners denied matzo bread at Passover, prisoners denied the ability to wear small religious symbols such as crosses that posed no security risk, and a Catholic prisoner whose private confession to a priest was recorded by prison officials.” U.S. DEP’T OF JUST., REPORT ON THE TWENTIETH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 5, (2020) (citing H.R. Rep. 106-219, 9–10 (1999)).
91. 146 CONG. REC. at 16699.
93. Cutter v. Wilkinson, 544 U.S. 709, 712 (2005). The inmates alleged that prison officials had retaliated and discriminated against them by “denying them access to religious literature, denying them the same opportunities for group worship that are granted to adherents of mainstream religions, forbidding them to adhere to the dress and appearance mandates of their religions, withholding religious ceremonial items that are substantially identical to those that the adherents of mainstream religions are permitted, and failing to provide a chaplain trained in their faith.” Id. at 713.
“improperly advance[d] religion in violation of the . . . Establishment Clause.”

When the case came before the Supreme Court in 2005, the Supreme Court upheld RLUIPA, finding that it did not violate the Establishment Clause by impermissibly favoring religion.

In a unanimous decision, Justice Ginsburg reasoned that RLUIPA is “compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise.” However, she also noted that while RLUIPA is meant to “protect[] institutionalized persons who are unable freely to attend to their religious needs,” it should not be read “to elevate accommodation of religious observances over an institution’s need to maintain order and safety.”

The Court clarified that RLUIPA established a strict scrutiny standard, but one that should be applied with “due deference to the experience and expertise of prison and jail administrators.”

After Cutter, lower courts were split on exactly how much deference to afford prison officials. It was not uncommon for different courts to come to different conclusions regarding the same prison regulation. For example, in Warsoldier v. Woodford, the U.S. Court of Appeals for the Ninth Circuit ruled in favor of a Native American inmate who challenged a prison regulation prohibiting hair longer than three inches. The court acknowledged that security was a compelling interest in maintaining a hair grooming policy, but the prison had failed to demonstrate that the current policy was the least restrictive means of achieving that compelling interest. The court clarified that this requires a demonstration

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94. Id. at 713.
95. Id. at 720.
96. Id.
97. Id. at 721.
98. Id. at 722.
99. Id. at 717 (quoting 146 Cong. Rec. 16698–99 (2000)) (“Congress carried over from RFRA the ‘compelling governmental interest’/’least restrictive means’ standard. Lawmakers anticipated, however, that courts entertaining complaints under § 3 would accord ‘due deference to the experience and expertise of prison and jail administrators.’”).
100. Some scholars criticized the Supreme Court’s decision, arguing that it would result in “excessive litigation and unacceptable threats to important penological interests.” See Johnson, supra note 92, at 587.
101. Warsoldier v. Woodford, 418 F.3d 989, 991 (9th Cir. 2005).
102. Id. at 998–1001.
that the prison “has actually considered and rejected the efficacy of
less restrictive measures before adopting the challenged practice[,]”
and furthermore, prison officials must do more than “present[] only
conclusory statements.”103 The Ninth Circuit carefully scrutinized
the prison officials’ arguments and found that they had failed to
explain why a religious exemption would not be feasible or why
female inmates did not have the same grooming restrictions.104

Yet the U.S. Court of Appeals for the Sixth Circuit came to the
opposite conclusion in a case regarding the same hair grooming
regulation.105 The district court granted a Native American inmate
a temporary injunction that allowed him to maintain a “kouplock”
(a two-inch-by-two-inch square section of hair at the base of his
head that can be grown longer). But the Sixth Circuit reversed,
holding that “[w]hile the district court is not required to blindly
accept any policy justification offered by the state officials, the
district court’s analysis does not reflect the requisite deference to
the expertise and experience of prison officials.”106 The district
court had scrutinized the testimony of prison officials, noting that
the warden did not produce any evidence demonstrating that
previous regulations, which had allowed individualized exceptions
in the past, had led to increased security threats.107 The Sixth
Circuit, however, citing Cutter’s due deference instruction, did not
scrutinize the prison’s policy, stating that “the testimony from [the
prison officials] was sufficient to demonstrate that individualized
exceptions did not sufficiently protect the state’s interest in security
and safety, particularly in light of the deference accorded to the
judgment of prison officials.”108

In 2015, the Supreme Court revisited RLUIPA in the seminal
case Holt v. Hobbs.109 Holt, a Muslim inmate, challenged an
Arkansas Department of Correction grooming regulation that
prohibited him from growing a half-inch beard according to his

103. Id. at 998–99.
104. Id. at 999–1000.
105. Hoevenaar v. Lazaroff, 422 F.3d 366, 367 (6th Cir. 2005) (Ohio’s regulation also
required hair to be no longer than three inches).
106. Id. at 371.
107. Id.
108. Id. at 371–72.

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religious beliefs. The state argued that the policy furthered prison security and safety for two reasons: it prevented prisoners from hiding contraband, and it prevented them from disguising their identity. The Court, however, concluded that the policy violated RLUIPA because the state’s policy was not the least restrictive means of accomplishing those compelling interests. First, regarding the contraband issue, the court indicated that the argument that a half-inch beard could hide any contraband was “hard to take seriously”; further, the state had not explained why they could not satisfy these security concerns through searches, as they did with hair and clothing. Regarding the identification issue, the Court deemed it a valid concern but found that the problem could be easily solved by taking both a clean-shaven and a bearded photo of inmates.

The Supreme Court’s approach in Holt indicated that courts must take a hard look at the justifications set forth by prison administrators when a policy places a substantial burden on an inmate’s free exercise of religion. Although applying strict scrutiny seemed to definitively answer the question regarding how much deference to afford prison officials, Holt did not explicitly overrule Cutter, neither did it clarify Cutter’s deferential language or attempt to reconcile the two seemingly contradictory approaches. The only clear instruction regarding deference was that RLUIPA “does not permit . . . unquestioning deference.”

Justice Sotomayor alone addressed the two cases in her concurrence, maintaining that “[n]othing in the Court’s opinion calls into question our prior holding in Cutter v. Wilkinson.”

110. Id. at 355–56.
111. Id. at 363.
112. Id. at 365.
113. Id. at 363–67.
114. Id. at 363.
115. Id. at 365.
116. Id. at 367 (“We are unpersuaded by these arguments for at least two reasons. First, the Department failed to show, in the face of petitioner’s evidence that its prison system is so different from the many institutions that allow facial hair that the dual-photo method cannot be employed at its institutions. Second, the Department failed to establish why the risk that a prisoner will shave a ½-inch beard to disguise himself is so great that ½-inch beards cannot be allowed, even though prisoners are allowed to grow mustaches, head hair, or ¼-inch beards for medical reasons.”).
117. Id. at 364.
118. Id. at 370 (Sotomayor, J., concurring).
However, some scholars have argued that the heart of Cutter’s analysis focused on the constitutionality of RLUIPA, and therefore “its language regarding heightened deference towards prison officials was never intended to bind lower courts.” Others have reasoned that “[s]ince strict scrutiny and deference to the government are in a sense opposites, there [is] incoherence in the very notion of strict scrutiny with deference[,]” and therefore the deferential language in Cutter must be “sent to the dustbin of history.” Yet the Third, Fourth, Sixth, Ninth, and Eleventh Circuits have all cited Cutter’s due deference language in cases as recent as 2022. Therefore, the fact remains that Cutter—although perhaps not as widely cited as it was before Holt—is still very much alive.

With both a historical background on religious freedom and minorities in prison and an understanding of current legislation and the problems posed by Cutter and Holt, the next Part will explore some current issues in prisoner free exercise claims—retaliation and equal treatment—in depth.

VII. FIRST AMENDMENT RETALIATION IN PRISON

The statutory basis of retaliation claims comes from the Civil Rights Act of 1871, which is codified as 42 U.S.C. § 1983. This Act was passed in the aftermath of the Civil War to provide an avenue for individuals to obtain federal relief for constitutional violations caused by state actors. Although retaliation “is not expressly
referred to in the Constitution, [it] is nonetheless actionable because retaliatory actions may tend to chill individuals’ exercise of constitutional rights.”

Courts have clarified that even “government actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for exercise of a constitutional right.”

Retaliation claims outside of the prison context require a fairly straightforward analysis. The individual bringing the claim must demonstrate three elements: (1) she “engaged in protected conduct” and (2) the defendant took some “adverse action” against her (3) because of that “protected conduct.” Several issues arise with this test in the prison context. First, courts are more skeptical of prisoner retaliation claims in general because, as the U.S. Court of Appeals for the Fourth Circuit has noted:

Every act of discipline by prison officials is by definition “retaliatory” in the sense that it responds directly to prisoner misconduct. The prospect of endless claims of retaliation on the part of inmates would disrupt prison officials in the discharge of their most basic duties. Claims of retaliation must therefore be regarded with skepticism, lest federal courts embroil themselves in every disciplinary act that occurs in state penal institutions.

United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,” 42 U.S.C. § 1983. § 1983 claims most commonly include allegations of First Amendment, see, e.g., Garcetti v. Ceballos, 547 U.S. 410 (2006) (employee alleged retaliation in violation of right to free speech), Fourth Amendment, see, e.g., Rivas-Villegas v. Cortesluna, 142 S. Ct. 4 (2021) (plaintiff alleged that a police officer used excessive force while arresting him, in violation of the Fourth Amendment), Eighth Amendment, see, e.g., Colwell v. Bannister, 763 F.3d 1060 (9th Cir. 2014) (inmate brought a claim alleging inadequate medical care in violation of the Eighth Amendment), or Fourteenth Amendment violations, see, e.g., Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009) (a student and her parents brought a claim against a school committee alleging inadequate response to sexual harassment in violation of the Equal Protection Clause).

125. Id. at 394.
126. Adams v. Rice, 40 F.3d 72, 74 (4th Cir. 1994); see also Woods v. Smith, 60 F.3d 1161, 1166 (5th Cir. 1995) (“To assure that prisoners do not inappropriately insulate themselves from disciplinary actions by drawing the shield of retaliation around them, trial courts must carefully scrutinize these claims.”).
Therefore, what may be seen as “retaliation” to an inmate may be merely adherence to or enforcement of a legitimate regulation or standard prison practice.

Additionally, what would normally be considered protected conduct for a non-incarcerated plaintiff may not be considered protected conduct for an incarcerated plaintiff, given the necessary limitations on prisoners’ constitutional rights while incarcerated.\(^\text{127}\) As noted above, the need for disciplinary rules and regulations in prisons makes it harder to determine what constitutes an adverse action\(^\text{128}\) and whether that action was motivated by the prisoner’s exercise of a protected right or whether it was a justified response to the violation of some other prison regulation.\(^\text{129}\)

Thus, the inherent nature of incarceration necessitates a different analysis for prisoner retaliation claims. In general, a prisoner bringing a § 1983 claim must still prove the same three elements required in a standard retaliation claim: (1) protected conduct, (2) adverse action, and (3) causation.\(^\text{130}\) However, for prisoners, the analysis does not end there. Although the specific test varies by jurisdiction, most courts will also either require the plaintiff to show that the adverse action did not reasonably advance a legitimate penological goal,\(^\text{131}\) or require prison officials to demonstrate that they “would have made the same decision absent the protected conduct for reasons reasonably related to a legitimate penological interest.”\(^\text{132}\)

\(^{127}\) Heard v. Strange, No. 2:21-cv-10237, 2022 WL 1164919, at *5 (E.D. Mich. Mar. 22, 2022) (“Generally, the freedoms to discuss religion with members of one’s faith, pursue litigation, and even proselytize, are protected by the First Amendment. But prisoners do not enjoy the same protections as nonincarcerated individuals[,] and therefore prison officials are granted a great degree of deference to impose restrictions on such religious practices when necessary to meet legitimate penological interests.”).


\(^{129}\) See, e.g., Runningbird v. Weber, 198 F. App’x 576 (8th Cir. 2006) (holding that there was no retaliation because the inmate was disciplined for possessing tobacco, a restricted item, in his cell, and not because of his religious conduct).

\(^{130}\) Watson v. Rozum, 834 F.3d 417, 422 (3d Cir. 2016) (citing Rauser v. Horn, 241 F.3d 330, 333–34 (3d Cir. 2001)).

\(^{131}\) Rhodes v. Robinson, 408 F.3d 559, 567–68 (9th Cir. 2005).

\(^{132}\) Watson, 834 F.3d at 422 (quoting Rauser, 241 F.3d at 334).
First Amendment retaliation claims brought by inmates, however, raise additional questions. These types of claims can entail allegations of retaliation because an inmate filed an internal prison grievance or a lawsuit, or they could also deal with allegations of retaliation because of the inmate’s religious beliefs or practices themselves. It is well established that filing both internal prison grievances and filing lawsuits are protected conduct, although there is some disagreement among lower courts as to whether threatening to initiate a lawsuit is also considered protected conduct under the First Amendment.

When the claim involves allegations of retaliation because of an inmate’s religious beliefs or practices, determining protected conduct becomes somewhat more difficult. Just as with other constitutional rights, an inmate’s First Amendment rights may be limited in prison. Therefore, what would normally constitute protected conduct for a non-incarcerated individual may not


135. See, e.g., Anderson v. Davila, 125 F.3d 148, 161 (3d Cir. 1997) (holding that filing a lawsuit is protected conduct); Herron v. Harrison, 203 F.3d 410, 415 (6th Cir. 2000) (holding that filing grievances against prison officials is protected conduct); Entler v. Greigori, 872 F.3d 1031, 1039 (9th Cir. 2017) ("The most fundamental of the constitutional protections that prisoners retain are the First Amendment rights to file prison grievances and to pursue civil rights litigation in the courts . . . .")

136. For instances in which a threat to file a grievance or lawsuit has been found to be protected conduct, see Entler, 872 F.3d at 1041–43 ("[I]t is illogical to conclude that prison officials may punish a prisoner for threatening to sue when it would be unconstitutional to punish a prisoner for actually suing."); White v. McKay, Case No. 18-1473, 2019 WL 5420092 (6th Cir. June 27, 2019). But see Bridges v. Gilbert, 557 F.3d 541, 555 (7th Cir. 2009) ("[I]t seems implausible that a threat to file a grievance would itself constitute a First Amendment-protected grievance."); Ingram v. SCI Camp Hill, Civil No. 3:08-CV-0023, 2010 WL 4973302, at *15 (M.D. Pa. Dec. 1, 2010) ("Stating an intention to file a grievance is not a constitutionally protected activity."). off il sub nom. Ingram v. S.C.I. Camp Hill, 448 F. App’x 275 (3d Cir. 2011).
necessarily be protected conduct for an incarcerated individual.\textsuperscript{137} Given that inmates’ free exercise is limited in prison, courts must determine if a prison regulation exists that limits what would normally be protected conduct. In the absence of such a regulation, if the conduct would be considered protected under the First Amendment outside of the prison context, then it is assumed that the prisoner’s conduct is protected as well.

However, one question that arises is whether the prison regulation itself—the one that limits an inmate’s ability to engage in what would otherwise be considered protected conduct—must also undergo a constitutional evaluation. This step in the analysis essentially turns retaliation claims on their head. Normally, “First Amendment challenges [require] the Court [to] ask[] whether a ‘policy’ or ‘action’ is constitutional,” whereas retaliation claims ask “whether the individual’s conduct is protected.”\textsuperscript{138} In analyzing the prison policy in this way, the retaliation claim essentially becomes a typical First Amendment claim. While there is nothing inherently wrong with this, it does raise a question about the appropriate test or standard of scrutiny that should be used to determine protected conduct. Is this prison regulation to be analyzed under the \textit{Turner}/\textit{O’Lone} standard of reasonableness or under RLUIPA’s strict scrutiny standard?

Consider the following hypothetical:\textsuperscript{139} As part of his work assignment, a Muslim inmate is assigned to the prison kitchens where he is ordered to cook and handle pork. The inmate informs prison officials that handling pork is against his religious beliefs. Instead of accommodating the inmate, officials file a negative performance report, which impacts his ability to earn good points and other program benefits. Suppose that the prison has a policy that any inmate who refuses to comply with his or her work assignment will be given a negative performance report. Normally, an individual outside of prison would be free to decide to comply

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\textsuperscript{137} See Heard, No. 2:21-cv-10237, slip op. at *14–15 (“The Court cannot conclude, in a vacuum, that a prisoner has a right under the First Amendment—while a right may be protected in one context, the same right may also be infringed upon in a different context.”).

\textsuperscript{138} Id. at *14.

\textsuperscript{139} This hypothetical draws from some of the facts of a case that came before the Ninth Circuit in 2015. See Jones v. Williams, 791 F.3d 1023 (9th Cir. 2015). The Muslim inmate was assigned to work in the kitchen and handle pork, although in that case, the inmate alleged retaliation because he threatened to sue the prison officials, which was considered protected conduct by the court. Id. at 1028–29.
}
with her religious beliefs and there would be no issue of whether this decision was protected conduct or not. However, given the prison context, a court hearing this claim would have to analyze whether the prison regulation was constitutional or whether it unduly burdened free exercise.

Under RLUIPA, the court would consider whether the prison had a compelling interest and whether there was a less restrictive way to satisfy that interest. It is likely that whatever compelling interest the prison has in ensuring that prisoners comply with their work assignments, providing no exception or accommodation for individuals whose religious beliefs come into conflict with that work assignment is not the least restrictive way to satisfy that compelling interest.

The Turner/O’Lone standard, however, is much more deferential to prison officials. If prison officials can demonstrate that the regulation is reasonably related to a legitimate penological interest, the regulation will be upheld. If courts determine that the prison’s policy of filing a negative performance report when inmates refuse to comply with work assignments is reasonably related to the prison’s legitimate goal of maintaining order and security in the prison, then the prisoner’s retaliation claim will fail. It is interesting, however, that a Free Exercise claim brought under RLUIPA regarding the very same set of circumstances would likely succeed.

This inconsistency has not been addressed by many courts, although a district court in Michigan recently addressed the difficulty in determining protected conduct in prison in *Heard v. Strange.*\(^{140}\) In 2016, Lamont Heard, who was in the midst of litigation against a group of prison officials with two other inmates, was separated from his co-plaintiffs and transferred to a different prison unit.\(^{141}\) Heard claimed that this transfer was “motivated by animus towards Heard’s Islamic faith and a desire to quell Heard’s litigation.”\(^{142}\) But the prison officials argued that the transfer was not motivated by any religious animus nor in retaliation for Heard’s lawsuit.\(^{143}\) Instead, prison officials decided to transfer him because they observed Heard talking to younger inmates about the

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141. *Id.* at *2–3.
142. *Id.* at *1.
143. *Id.*
Nation of Islam and “were concerned that this might give Heard excessive influence over other prisoners, threatening prison safety and order.”144

In evaluating these two competing narratives, the court addressed how to determine the protected conduct of prisoners. The court noted that “to determine whether a First Amendment activity is protected, the Court must weigh the prisoner’s interest in an activity against some government action.”145 However, interestingly, the court explained that while that government action may be a pre-existing prison regulation, “a prisoner’s First Amendment activity is not ‘protected’ simply because prison officials have not yet tried to restrict it through some formal policy.”146 But this statement goes against the established principle that “[t]here is no iron curtain . . . between the Constitution and the prisons of this country.”147 Both O’Lone and Turner reiterated that “[i]nmates clearly retain protections afforded by the First Amendment,”148 and therefore in the absence of a valid prison regulation that limits those rights, prisoners enjoy the same First Amendment rights as citizens outside of prison.149

The district court ultimately utilized the Turner test to evaluate Heard’s actions (both the defendants’ claims that he was proselytizing and Heard’s claims that he was practicing his religion and engaging in litigation) and found that even when viewing the facts in the light most favorable to the defendant, proselytizing was a protected conduct in prison because the prison did not demonstrate that it threatened prison security.150

Both the earlier hypothetical and this recent case illustrate that there are still many questions surrounding First Amendment retaliation claims and the applicable standard of scrutiny.

144. Id. at *1–2.
145. Id. at *15.
146. Id. at *16.
149. See Pell v. Procunier, 417 U.S. 817, 822 (1974) (“[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.”).
150. Heard, No. 2:21-cv-10237 at *6–11 (denying Heard’s motion for summary judgment, not on the grounds of a lack of protected conduct, but rather because there was a genuine dispute of fact regarding the second element required in retaliation claims: adverse action).
Although most inmates bringing First Amendment retaliation claims also bring claims under RLUIPA, the potential disconnect between the two claims should be explored further.

Although there are valid reasons to be skeptical of prisoner retaliation claims in general, there is no compelling state interest in retaliation itself. The history of retaliation against religious minorities in America’s prisons suggests that the standard to evaluate retaliation claims must be stricter when dealing with allegations of religious retaliation. Such an approach does more to protect religious minorities while still respecting the valid penological concerns of prison administrators. As the U.S. Court of Appeals for the District of Columbia Circuit has noted:

To say that religious freedom may undergo modification in a prison environment is not to say that it can be suppressed or ignored without adequate reason. And although ‘within the prison society as well as without, the practice of religious beliefs is subject to reasonable regulations, necessary for the protection and welfare of the community involved,’ the mere fact that government, as a practical matter, stands a better chance of justifying a curtailment of fundamental liberties where prisoners are involved does not eliminate the need for reasons imperatively justifying the particular retraction of rights challenged at bar. Nor does it lessen governmental responsibility to reduce the resulting impact upon those rights to the fullest extent consistent with the justified objective.

In conjunction with this issue, and to further support this argument, the following Part will analyze several recent cases dealing with the equal treatment of religious minorities. In doing so it will demonstrate both the necessity of strict scrutiny and the feasibility of such an approach in prisons.

151. Professor James Robertson makes the argument that allegations of retaliation as a result of filing a prison grievance should be treated differently because inmate grievants share many similarities with whistleblowers. He argues that any adverse changes to the inmate’s condition of confinement that occurs within sixty days of filing the grievance should create a rebuttable presumption of retaliation. See James E. Robertson, “One of the Dirty Secrets of American Corrections”: Retaliation, Surplus Power, and Whistleblowing Inmates, 42 U. Mich. J. L. Reform 611 (2009).

VIII. EQUAL TREATMENT ISSUES IN PRISON

As briefly touched on above, many early prisoner free exercise cases dealt not just with inmates who faced a substantial burden on their religion, but also with equal treatment issues, where inmates belonging to a religious minority were denied the opportunity to practice their religion while inmates of other religious faiths were allowed to do so.\(^{153}\) Prison officials have long been used to accommodating Christian inmates, but such accommodations have not always been offered to inmates of other faiths—for various reasons, including limited resources, budget concerns, or simply the practical challenges of prison administration.

Although the state of religious freedom in prison has largely improved since those early cases, equal protection issues still frequently arise in the prison context. Common issues include failure to provide inmates with the opportunity or the space to hold worship services,\(^ {154}\) prohibitions on religious materials,\(^ {155}\) denying access to clergy,\(^ {156}\) failure to provide food consistent with religious diets,\(^ {157}\) and discriminatory dress and grooming regulations,\(^ {158}\) among other issues. The reality is that “[w]hile language explicitly denying religious accommodation to one group such as Muslims and accommodating others such as Christians has arguably been

\(^{153}\) See, e.g., Cruz v. Beto, 405 U.S. 319 (1972) (per curiam); In re Ferguson, 361 P.2d 417, 420 (Cal. 1961).

\(^{154}\) See, e.g., Williams v. Conway, No. 19-cv-03988, 2020 WL 5593233, *1-2 (N.D. Cal. 2020) (alleging that the prison had refused to give a Muslim inmate adequate space to conduct prayer services, while other religions were allowed to use the chapel every week).

\(^{155}\) See, e.g., McFaul v. Valenzuela, 684 F.3d 564, 568–69 (5th Cir. 2012) (alleging free exercise, equal protection, and RLUIPA violations because prison officials would not let an inmate buy religious medallions needed for his Celtic Druid ceremonies, although inmates in other prison units were allowed to purchase such religious medallions).

\(^{156}\) See, e.g., Hartmann v. Cal. Dept’ of Corr. and Rehab., 707 F.3d 1114, 1119 (9th Cir. 2013) (alleging discrimination because the prison hired chaplains of five other denominations but refused to hire a Wiccan chaplain).

\(^{157}\) See, e.g., Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 810–12 (8th Cir. 2008) (alleging that the prison had violated a Muslim inmate’s equal protection and free exercise rights for failing to provide halal meals while kosher meals were provided to Jewish inmates); Ephraim v. Angelone, 313 F. Supp. 2d 569, 571 (E.D. Va. 2003), aff’d without opinion, 68 F. App’x 460 (4th Cir. 2003) (alleging First Amendment and equal protection violations when an inmate belonging to the Charismatic Christian religion requested a vegetarian diet).

\(^{158}\) See, e.g., United States ex rel. Goings v. Aaron, 350 F. Supp. 1, 5 (D. Minn. 1972) (claiming that a prison grooming regulation was discriminatory because the regulations permitted Afro hairstyles and mustaches but gave no specific religious exception for Native Americans).
eliminated from prison policies, the elimination of all prejudice and enforcement of equal protection for minority religious groups continues to be a problem.\textsuperscript{159}

It is foreseeable that regarding any of these issues, an inmate would bring a First Amendment or RLUIPA claim, just on the basis that their free exercise has been unconstitutionally burdened. However, in some cases, equal protection issues arise as well as free exercise issues. Consider the following case that came before the Third Circuit in 2004.

DeHart was a Buddhist inmate at a state correctional facility in Pennsylvania who brought a claim under § 1983 alleging Free Exercise and Equal Protection rights violations, as well as an RLUIPA claim.\textsuperscript{160} DeHart alleged that prison administrators refused to provide him with a vegetarian diet that was consistent with his Buddhist beliefs, but provided a kosher diet to Jewish inmates.\textsuperscript{161} The Third Circuit noted that for Equal Protection claims, as with Free Exercise claims, the Turner test applies.\textsuperscript{162} Because DeHart’s dietary request imposed a significantly higher burden on the prison than the Jewish dietary requests, there was no Equal Protection Clause violation.\textsuperscript{163}

This case demonstrates there is a slight difference in the question asked when applying Turner to each of these respective claims. For Free Exercise claims, courts use the Turner/O’Lone test to ask whether the prison regulation that limits an inmate’s free exercise is reasonably related to a legitimate penological goal. With Equal Protection claims, however, courts will look at whether the prison regulation that discriminates against a certain religious group or in some way leads to a difference in treatment between


\textsuperscript{160} DeHart v. Horn, 390 F.3d 262, 264 (3d Cir. 2004).

\textsuperscript{161} Id. at 265.

\textsuperscript{162} Id. at 272.

\textsuperscript{163} Id. at 270 (“DeHart’s diet would require individualized preparation of his meals, which is made more burdensome by the fact that the Prison’s kitchen was set up only for bulk food preparation. Additionally, it would require special ordering soy milk, whole grain bread and extra servings of the few alternative protein sources DeHart would eat, all at extra cost to the Prison. . . . In contrast, the District Court found that the religious diets provided to Jewish and Muslim inmates did not require special ordering of items not already available at the Prison or through the Prison’s current vendors, nor did they require individualized preparation of meals.” (citation omitted)).
religious groups is reasonably related to a legitimate penological goal. “Thus the focus of an equal protection *Turner* claim is not the treatment per se, but the difference in treatment.”\(^{164}\)

Recently, the Supreme Court has addressed the difference in treatment of inmates on death row who requested the presence of a spiritual advisor in the execution room. In 2019, the Supreme Court ruled on two cases that came before it on the Court’s emergency, or “shadow,” docket. Both cases concerned death row inmates—one Muslim and one Buddhist—who were denied their requests to have their respective spiritual advisors’ presence in the execution chamber. Although the two cases dealt with very similar prison policies, each had a different outcome.

The first case, *Dunn v. Ray*, concerned Ray—a Muslim inmate on Alabama’s death row.\(^{165}\) Alabama’s prison had a policy that did not allow any clergy inside the execution chamber other than the prison’s chaplain, who was Christian.\(^{166}\) Shortly before his scheduled execution date, Ray met with the prison warden, who explained the prison’s policy regarding chaplains. A few days later, Ray brought a claim alleging violations of his rights under RLUIPA and the Establishment Clause of the First Amendment.\(^{167}\) The Eleventh Circuit issued a stay of execution, holding that there was likely an Establishment Clause violation since “Alabama’s policy facially furthers a denominational preference.”\(^{168}\) However, on appeal, the Supreme Court vacated the stay, given the “last-minute nature” of the claim.\(^{169}\)

The second case, *Murphy v. Collier*, was decided a little over a month later.\(^{170}\) In a very similar set of facts, Murphy, a Buddhist inmate at a Texas correctional facility, requested a Buddhist spiritual advisor to be present in the execution chamber during his upcoming execution. The prison’s policy allowed Christian and Muslim inmates to have a state-employed chaplain in the execution

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166. Id. at 661; see also Ray v. Comm’r, Ala. Dep’t of Corr., 915 F.3d 689, 692–93 (11th Cir. 2019).
167. Ray, 915 F.3d at 693.
168. Id. at 697.
169. Dunn, 139 S. Ct. at 661 (quoting Gomez v. U.S. Dist. Ct. for N. Dist. of Cal., 503 U.S. 653, 654 (1992) (“A court may consider the last-minute nature of an application to stay an execution in deciding whether to grant equitable relief.”)).
chamber but did not allow Buddhist inmates (or those belonging to other religious denominations) to have a religious advisor in the execution chamber.\textsuperscript{171}

The Supreme Court ultimately granted Murphy’s application for a stay of execution, and, in his concurring opinion, Justice Kavanaugh clarified some of the Court’s reasoning.\textsuperscript{172} He explained that Texas’s policy violated the Constitutional prohibition on “denominational discrimination,” and the State would have to remedy the equal treatment issue by either allowing inmates of all denominations to have a religious advisor of their choice in the execution room, or have a standard policy that only allow religious advisors in the waiting room, regardless of the inmate’s religion.\textsuperscript{173} He emphasized that “[w]hat the State may not do . . . is allow Christian or Muslim inmates but not Buddhist inmates to have a religious adviser of their religion in the execution room.”\textsuperscript{174}

Justice Kavanaugh also responded to the dissent’s comparison of this case to \textit{Dunn v. Ray}. In his view, the distinguishing factor between the two cases was the nature of the claim being brought.\textsuperscript{175} Ray did not bring an equal treatment claim, he only brought claims under RLUIPA and the Establishment Clause, and therefore, the U.S. Court of Appeals for the Eleventh Circuit was wrong to grant the stay of execution on an Equal Protection Clause basis.\textsuperscript{176} Kavanaugh also explained that the timing of the request also influenced the difference in outcome.

Interestingly, Kavanaugh noted that “States . . . have a strong interest in tightly controlled access to an execution room in order to ensure that the execution occurs without any complications, distractions, or disruptions.”\textsuperscript{177} He opined that for this reason, “an inmate likely cannot prevail on a RLUIPA or free exercise claim to have a religious minister in the execution room.”\textsuperscript{178} However, a year later, the Court granted a stay of execution for an Alabama

\begin{itemize}
\item \textsuperscript{171} Id. at 1475 (Kavanaugh, J., concurring).
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Id.
\item \textsuperscript{174} Id. at 1476.
\item \textsuperscript{175} Id. at 1476–77
\item \textsuperscript{176} Id.
\item \textsuperscript{177} Id.
\item \textsuperscript{178} Id.
\end{itemize}
death row inmate who brought a claim under RLUIPA after he was denied access to clergy in the execution chamber.\textsuperscript{179}

To provide some context for this decision, after \textit{Ray} and \textit{Murphy} were decided, both Alabama and Texas changed their prison policies to prohibit clergy from being present in the execution room altogether. In \textit{Dunn v. Smith}, after an inmate subsequently challenged Alabama’s new policy, the Supreme Court held that “Alabama’s policy substantially burden[ed] Smith’s exercise of religion” because the prison had not met the “exceptionally demanding” burden of showing that the policy was “necessary to ensure prison security.”\textsuperscript{180}

In the aftermath of \textit{Dunn}, Texas again changed its policy to allow clergy to be present in the execution room; however, one correctional facility instituted a new policy that prohibited them from speaking aloud or touching the inmate.\textsuperscript{181} That policy was soon challenged by an inmate facing execution who wanted his Christian pastor to lay hands on him and pray audibly over him in the execution chamber.\textsuperscript{182} The Supreme Court granted certiorari to consider whether \textit{Ramirez}, who sought a preliminary injunction ordering Texas to permit his religious exercise,\textsuperscript{183} was likely to succeed on his RLUIPA claim. After determining that \textit{Ramirez} had exhausted all available remedies,\textsuperscript{184} and that his requests were based on a sincere religious belief,\textsuperscript{185} the Court addressed the prison’s compelling interest arguments, as required by RLUIPA.\textsuperscript{186}

\begin{footnotes}
\item[179.] Dunn v. Smith, 141 S. Ct. 725 (2021) (mem.). See also Gutierrez v. Saenz, 141 S. Ct. 127 (2020) (mem.).
\item[180.] Dunn, 141 S. Ct. at 725–26 (“Prison security is, of course, a compelling state interest. But past practice, in Alabama and elsewhere, shows that a prison may ensure security without barring all clergy members from the execution chamber. Until two years ago, Alabama required the presence of a prison chaplain at an inmate’s side. . . . Nowhere, as far as I can tell, has the presence of a clergy member (whether state-appointed or independent) disturbed an execution.”).
\item[181.] Ramirez v. Collier, 142 S. Ct. 1264, 1274 (2022).
\item[182.] Id.
\item[183.] Id. at 1272.
\item[185.] Ramirez, 142 S. Ct. at 1277 (Having a pastor lay hands on and pray over someone “are traditional forms of religious exercise. . . . Ramirez’s grievance states, ‘it is part of my faith to have my spiritual advisor lay hands on me anytime I am sick or dying.’” Further, Ramirez’ pastor “agrees that prayer accompanied by touch is ‘a significant part of [their] faith tradition as Baptists.’”).
\item[186.] Id. at 1278.
\end{footnotes}
Regarding the ban on audible prayer, prison officials cited the following compelling penological interests: first, absolute silence is necessary in the execution chamber so that prison officials can monitor the inmate’s condition through a microphone suspended in the room; and second, prison officials must prevent disruptions and maintain solemnity and decorum in the execution chamber—something that might be jeopardized if the pastor chooses to make a statement to the witnesses or officials present.  

Regarding the ban on religious touch, prison officials cited the following reasons: “[maintaining] security in the execution chamber,[188] preventing unnecessary suffering,[189] and avoiding further emotional trauma to the victim’s family members.”[190]

Although the Court recognized all of the prison’s proffered reasons as compelling and important state interests, the Court ultimately held that Ramirez was likely to prevail on the merits of his RLUIPA claim. The Court’s reasoning in Ramirez, as with Holt, demonstrated a hard look approach to strict scrutiny. Primarily because Texas had previously allowed audible prayer and touch in the execution room,[192] the Court stated that the prison officials had not given sufficient reasons explaining why departure from that precedent was now necessary to further compelling state interests. Neither had they demonstrated that a categorical ban was the least restrictive means to handle their interest in preventing disruptions, maintaining safety and security during the procedure, or monitoring the inmate’s condition. In fact, the Court proposed

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187. Id. at 1279–80.
188. Id. at 1280 (“[P]rison officials] say that allowing a spiritual advisor to touch an inmate would place the advisor in harm’s way because the inmate might escape his restraints, smuggle in a weapon, or become violent. They also contend that if a spiritual advisor were close enough to touch an inmate, he might tamper with the prisoner’s restraints or yank out an IV line.” (citation omitted)).
189. Id. at 1281 (“The theory is that [a pastor] might accidentally jostle, pinch, or otherwise interfere with an IV line, and that this in turn might affect the administration of the execution drugs in a way that results in greater pain or suffering.”).
190. Id. (“[A]llowing certain forms of religious touch might further traumatize a victim’s family members who are present as witnesses, reminding them that their loved one received no such solace.”).
191. Id. at 1284.
192. The Court noted that not only had Texas “long allowed prison chaplains to pray with inmates in the execution chamber[,]” but “there is [also] a rich [national] history of clerical prayer at the time of a prisoner’s execution, dating back well before the founding of our Nation.” Id. at 1278–79.
several other measures that could be implemented that would adequately address the prison’s concerns while still allowing the inmate to exercise his religion. The Court noted that prison officials were offering only conclusory statements and “ask[ing] that we simply defer to their determination,” but “[t]hat is not enough under RLUIPA.”

Ramírez demonstrates that a hard look approach to strict scrutiny can protect the religious freedom of inmates without compromising compelling penological interests such as security, safety, or order. Even in a highly sensitive and unpredictable environment like the execution chamber, where prison officials have an extremely compelling interest in maintaining order, safety, and security, careful scrutiny is feasible. Such an approach holds prison officials to a higher degree of accountability, ensuring that when a prison policy or regulation exists that burdens an inmate’s religious freedom, it truly is a necessary and unavoidable intrusion on their rights. This ultimately benefits individuals of all religious denominations, but especially religious minorities, who have experienced a history of religious discrimination and unequal treatment in prison, and who still face significant and disproportionate burdens on their free exercise today.

Although a strict scrutiny approach may seem at odds with the interests of prison officials, this is not entirely true. Often, the rationales behind many of the regulations that limit inmates’

193. For example, regarding the prison’s interest in having complete silence and maintaining security in the execution chamber, the Court noted that “there appear to be less restrictive ways to handle any concerns. Prison officials could impose reasonable restrictions on audible prayer in the execution chamber—such as limiting the volume of any prayer so that medical officials can monitor an inmate’s condition, requiring silence during critical points in the execution process (including when an execution warrant is read or officials must communicate with one another), allowing a spiritual advisor to speak only with the inmate, and subjecting advisors to immediate removal for failure to comply with any rule. Prison officials could also require spiritual advisors to sign penalty-backed pledges agreeing to abide by all such limitations.” Id. at 1280.

194. Id. at 1279.

195. One scholar notes, however, that the Supreme Court’s reliance on history in Ramírez may have a negative effect for religious minorities. See, Leading Cases, Religious Land Use and Institutionalized Persons Act—Religious Liberty—Death Penalty—Ramírez v. Collier, 136 HARV. L. REV. 470, 470 (“[T]he Court’s use of history in its strict scrutiny analysis incorporated an atextual inquiry that both diverges from RLUIPA jurisprudence and threatens to skew RLUIPA toward mainstream religions, undermining its neutrality. While the outcome expands religious exercise for condemned persons, the Court’s overreliance on history could result in asymmetric outcomes for litigants.”).
religious freedom are the prison administrator’s interest in maintaining security, safety, and order in prisons. But another consideration for prison administrators is the effect that providing equal treatment can have on those compelling penological interests. One scholar noted: “Creating conditions of fair treatment and equal opportunities is paramount in prisons, not just to bring [prison officials] in line with equality legislation, but also as a safeguarding priority for the offenders themselves. . . . [P]erceptions of fairness have demonstrable effects on order and well-being.”  

Further, by providing religious accommodations and ensuring equal treatment of minorities, prison officials will be more likely to avoid time-consuming and costly litigation. The Court acknowledged some of these considerations in Ramirez. Justice Kavanaugh noted in his concurring opinion that states wishing “to avoid persistent future litigation and the accompanying delays” should “try to accommodate an inmate’s timely and reasonable requests [for religious accommodation].”  

It seems, then, if equal treatment and opportunities are provided to inmates, this can contribute to greater order, better inmate well-being, less litigation, and increased safety and security in general. This does not mean that every request for religious accommodation must be granted, but it does mean that prison officials should carefully scrutinize their policies, considering both the effect they may have on religious exercise and the feasibility of granting religious accommodations when conflicts between compelling penological interests and an inmate’s religious practices arise. Both prison officials and courts must support the legislature’s efforts “to reconcile, in an honest and public way, the competing interests of the individual and the community,” when dealing with religious freedom issues that arise in the prison context.  


198. Solove, supra note 9, at 490.
CONCLUSION

When trying to pass RFRA, Senator Orrin Hatch stated: “We want religion in the prisons.” 199 Although a laudable statement, it is arguably misleading. Religion has always existed in prisons. Even the briefest glance at this country’s history reveals that Christianity had a strong and well-protected presence in early-American prisons. Religious freedom, on the other hand, has not always existed in America’s prisons. What many do not understand is that religion and religious freedom are not interchangeable terms. Just because religion exists in prison life does not mean that religious freedom does. Therefore, a more fitting statement would be: “We want religious freedom in the prisons.”

Although many individuals are afforded the freedom to exercise their religion in prison, many others are not. While some may be complacent with the fact that most mainstream religions are afforded free exercise in prisons, those with a more thorough understanding of religious freedom know that merely providing protection for the majority is not enough. James Madison recognized this when considering the dangers posed by granting government favor to one religious sect. He said, “Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?” 200 Therefore a threat to one religious denomination can easily be transferred to another denomination or to all religions in general if protections are not in place for religious freedom. Religious freedom ultimately protects everyone—believers and nonbelievers alike—when it protects the rights of the minority.

Although the realities of prison life raise complex issues regarding the free exercise of religion, key court decisions and legislation like RFRA and RLUIPA have established that religious freedom should not be suppressed or infringed without compelling and reasonable justification from prison officials. The history of religious freedom in America’s prisons, however, demonstrates that the level of judicial scrutiny applied to free exercise cases has been quite variable. Even with RLUIPA’s strict scrutiny mandate, courts remain confused regarding the amount of deference that

199. Id. at 459 (quoting 139 CONG. REC. S14,367 (daily ed. Oct. 26, 1993)).
should be afforded to prison officials, and in practice, remnants of a deferential approach remain among lower courts. This is troubling because such practices weaken the protections provided by RLUIPA’s strict scrutiny standard.

Additionally, because the status of religious freedom in prisons has fluctuated over the years, there are still many unsettled questions that must be addressed in the future, both regarding the level of deference in RLUIPA claims, but also regarding other issues such as retaliation and equal treatment. Reflecting on the history of religious freedom in prisons and current issues that still arise for religious minorities, it is clear that a true hard look approach to strict scrutiny can resolve some of those issues while still addressing important penological concerns. Holt and Ramirez have demonstrated that a hard look strict scrutiny standard is feasible. Even in the most intense and precarious of situations—such as the execution of a death row inmate, where security, safety, and order are of utmost importance—strict scrutiny has proven to be a workable standard.

Such an approach acknowledges the central role that religious freedom plays in protecting human dignity. Professor Eiichiro Takahata has stated that “every person has a right to behave as a human, be treated as a human, and think as a human.” Part of what makes us human is our ability to seek out religious meaning and purpose in our lives. Although prisoners are by necessity denied many basic constitutional rights, to also deny them of religious expression and community is to deny them an important part of their human dignity. In his concurring opinion in Procunier v. Martinez, Justice Marshall stated:

> When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. . . . It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit.

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Understanding this core principle of human dignity as well as the importance of safeguarding religious freedom for all individuals—whether mainstream or marginalized—must therefore be the guiding light behind any discussions surrounding religious freedom in prisons. Only with this perspective can courts, prison administrators, and scholars resolve the complexities of free exercise litigation.

While deference to prison officials may be the easier choice in many situations, a hard look analysis does more to balance the competing interests at play—both respecting the human dignity of the inmate and protecting the prison’s compelling interest in security and safety. Although deference has a time and place, its place is not with strict scrutiny. RLUIPA requires courts to uphold strict scrutiny not only in theory, but also in practice.