

# Why Majority Religions Should Not Be Accommodated

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*ABSTRACT: This Essay argues that religious exemptions to generally applicable law (or overly generous ‘most favored nation’ interpretations of the concept of religious discrimination—which amount in practice to exemptions), also known as “accommodations,” should not be extended to members of faith groups with sufficient political, economic, or social power to defend themselves in the democratic process (“majority religions”).*

*The argument begins with the best defense of accommodations. From the standpoint of the normative principle known as “the rule of law,” religious accommodations protect adherents of minority faiths from having their interests disregarded by dominant social and political groups. In the absence of accommodations, religious minorities may be subject to law that does not genuinely treat them as free and equal members of a pluralistic community. However, such considerations cannot justify accommodations for powerful faith groups which are capable of protecting themselves outside the legal system and whose members are unlikely to have their interests disregarded by legislators. Moreover, members of groups with substantial political, social, and economic power can use exemptions not to protect their own freedom and equal standing, but to undermine the freedom and equal standing of others, a dynamic prominently illustrated by litigation over contraception coverage requirements under the Affordable Care Act.*

*Unfortunately, the courts are unlikely to be willing to bear the epistemic burden of sorting exemptions claims by the power of those making them. In view of the likely impending fall of the Employment Division v. Smith doctrine, under which exemptions are not required under the Free Exercise Clause, the argument of this Essay suggests a substantial risk that Free Exercise jurisprudence may actually undermine rather than protect the freedom of those who are not adherents of powerful religions—particularly secularists and*

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*adherents of very small and unconventional religions such as Wicca, the Satanic Temple, and others—to pursue their conceptions of the good and the fulfillment of their moral values in their own lives. The most likely future for Free Exercise doctrine threatens to make those of us who are not members of sizable mainstream Abrahamic religions less free and less equal.*

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#### INTRODUCTION

This Essay argues that adherents to majority religions should not be accommodated. To “accommodate” an individual is to grant that individual an exemption from an otherwise generally applicable law on account of the burden that law imposes on their religious practice. By “majority” religion, I do not simply mean a religion whose adherents represent a numerical majority of the population. Instead, I use “majority,” or sometimes “powerful,” to stand in for circumstances where the person demanding an accommodation is a member of a faith group which enjoys (on its own or through alliance with similar believers) substantial political, economic, or social power in the jurisdiction from whose laws the individual seeks an accommodation. I cannot fully define “substantial” for the purposes of the previous sentence, but it should be taken to refer to situations where the group in question is likely to be able to adequately defend its interests in the political process, as well as to situations where accommodations are likely to aggravate the power that those seeking accommodations already have over nonadherents in the ways described in Part III of this Essay.

The argument of this Essay is rooted in strategic considerations suggesting that those three types of power can, when associated with the capacity to claim accommodations, undermine both the freedom and the equal standing of those

who are not members of the accommodated religion.<sup>1</sup> The argument below applies beyond religious accommodations to any accommodations which a liberal constitutional democracy might want to offer to alleviate the burdens law imposes on an individual, for example, on account of cultural practices (such as for an ethno-national tradition not associated with religion) or objections of conscience (such as for a secular pacifist in wartime). However, for simplicity, this Essay will assume the accommodations under consideration are religious in character.

The undersigned is something of an outlier in this symposium, being not a law and religion scholar but a liberal political and constitutional theorist. From the standpoint of liberal theory, the notion of religious accommodations is best understood as a matter for analysis in terms of the normative ideal of the rule of law, most conceptions of which suppose that the law must be general—that is, it must apply equally to all.<sup>2</sup>

A naive conception of the rule of law as described in the previous sentence would condemn accommodations *tout court*, insofar as accommodations definitionally amount to applying different law for some people based on their religion. However, a conception of the rule of law that recognizes that general law need not be the same for each person, so long as differences in the legal treatment of people are justified by public reasons,<sup>3</sup> can acknowledge that there may be public reasons to respect religious belief. Such public reasons could include, *inter alia*, to accommodate underlying diversity or to protect religious minorities against laws which would too-excessively undermine their individual liberty by posing disparate burdens on believers. This Essay will first describe the less naive argument, and then will contend that it fails when applied to majority religions.

Thus, Part I describes a liberal case—rooted in an account of the relationship between the rule of law and individual freedom associated (but not originating) with F.A. Hayek and hybridized with my own egalitarian conception of the rule of law's generality principle<sup>4</sup>—for the notion that religious accommodations

1. It is also rooted in a more basic assumption, associated with a foundational proposition of American constitutional law, that those who are less capable of defending their own interests should be the core beneficiaries of judicial intervention to overrule democratic decisions. *See, e.g., United States v. Carolene Prods. Co.*, 304 U.S. 144, 152, n.4 (1938) (articulating justification for aggressive judicial scrutiny rooted in political powerlessness of party challenging legislation). *See generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (forwarding a more scholarly, book-length, defense of same proposition).

2. *See* PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD*, 28–29 (2016) (describing landscape of rule of law conceptions of generality).

3. *See* Paul Gowder, *Equal Law in an Unequal World*, 99 *IOWA L. REV.* 1021, 1027–49 (2014) (defending such a conception). For a concrete example of this kind of a case where the law treats people differently but does not violate the rule of law in virtue of the justifiability of the distinction, we don't let people under age 15 or so drive; that's not a failure of the rule of law but a recognition of the relevance of mental and physical maturity to safely operating a motor vehicle.

4. My own conception is described *id.* The discussion below will run together freedom-oriented and equality-oriented accounts of the rule of law; I think this is defensible because, as I

will sometimes be required by the rule of law. The subsequent Parts reveal the limitations of that case. Part II defends a necessary intermediate premise of the argument, which is that any practicable version of religious accommodations must contain some kind of intensity requirement imposed on a believer who seeks exemption from a law that would otherwise apply to them.<sup>5</sup> Part III describes three mechanisms through which religious accommodations may undermine freedom and equality and argues that all result from the way in which those with political, economic, or social power may use accommodations to reinforce that power and enhance their ability to coerce others. The Conclusion argues that, in order to prevent accommodations from being used to undermine the freedom and equality of those subject to political, economic, or social power, accommodations from generally applicable law should only be extended to those who can demonstrate that they lack the capacity to protect themselves through the democratic process in the jurisdiction which enacted the law from which an accommodation is claimed.

### I. THE RULE OF LAW CASE FOR ACCOMMODATIONS

A popular, if controversial, requirement of the normative principle known as “the rule of law” is that law must be general.<sup>6</sup> While there are a number of ways to flesh out precisely what it might mean for law to be general,<sup>7</sup> one plausible and reasonable minimal requirement which it would seem that any conception of the idea of general law must entail is that those who enact and enforce the law must apply the law to and enforce the laws against themselves—we can call that the *self-enforcement* conception of generality.<sup>8</sup>

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have argued before, they ultimately amount to the same idea, which we could call respect for freedom or respect for autonomy—the recognition of the equal moral worth of persons and hence their entitlement to pursue their own ends without domination or subordination. See GOWDER, *supra* note 2, at 74–77 (defending this theory). This corresponds to at least some defenses of liberty of conscience and accommodation in the existing literature. See, e.g., Alan Patten, *The Normative Logic of Religious Liberty*, 25 J. POL. PHIL. 129, 148 (2017) (defending liberty of conscience—potentially including accommodations under some conditions—based on a principle that people must have “fair opportunity to pursue and fulfill their religious commitments”).

5. Sometimes I will describe this as “preference intensity.” By doing so, I don’t mean to endorse the view that religious demands are mere matters of preference or “expensive tastes.” See generally Michael McGann, *Equal Treatment and Exemptions: Cultural Commitments and Expensive Tastes*, 38 SOC. THEORY & PRAC. 1 (2012) (describing and rejecting expensive tastes account of religious demands). However, I don’t mean to deny the expensive-tastes view either. This Essay is self-consciously agnostic, as it were, about the nature of religious belief. For the purposes of this argument, I simply need some word to describe the property of felt demandingness according to which some kinds of reasons for action are treated as more important than others in a person’s life, and “preference” serves with this caveat.

6. See GOWDER, *supra* note 2, at 28–29.

7. *Id.*

8. *Id.* at 29. Of course, as with all formal conceptions of the rule of law requirement of generality, the self-enforcement idea breaks down on the margins (for the argument, see *id.* at 29–33) because there may be public reasons for applying different laws to legislators and law-enforcers than ordinary people. For the most obvious example, the exceptions to the Fourth Amendment’s

F.A. Hayek articulated a version of the self-enforcement conception connected to an appealing argument about freedom: According to Hayek, if leaders were required to apply the laws to themselves, it would help preserve freedom by ensuring that they would feel the pain of their own harsh and oppressive legislation.<sup>9</sup> Hayek's argument is worth quoting in its entirety here, for it directly confronts the core issue of the relationship between religion and oppressive law:

It is not to be denied that even general, abstract rules, equally applicable to all, may possibly constitute severe restrictions on liberty. But when we reflect on it, we see how very unlikely this is. The chief safeguard is that the rules must apply to those who lay them down and those who apply them—that is, to the government as well as the governed—and that nobody has the power to grant exceptions. If all that is prohibited and enjoined is prohibited and enjoined for all without exception (unless such exception follows from another general rule) and if even authority has no special powers except that of enforcing the law, little that anybody may reasonably wish to do is likely to be prohibited. It is possible that a fanatical religious group will impose upon the rest restrictions which its members will be pleased to observe but which will be obstacles for others in the pursuit of important aims. But if it is true that religion has often provided the pretext for the establishing of rules felt to be extremely oppressive and that religious liberty is therefore regarded as very important for freedom, it is also significant that religious beliefs seem to be almost the only ground on which general rules seriously restrictive of liberty have ever been universally enforced. But how comparatively innocuous, even if irksome, are most such restrictions imposed on literally everybody, as, for instance, the Scottish Sabbath, compared with those that are likely to be imposed only on some! It is significant that most restrictions on what we regard as private affairs, such as sumptuary legislation, have usually been imposed only on selected groups of people or, as in the case of prohibition, were practicable only because the government reserved the right to grant exceptions.<sup>10</sup>

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warrant requirement permit the police to stop and search private persons, but do not so permit you and I; similarly, the Constitution's Speech and Debate Clause provides special legal immunities for members of Congress that the rest of us do not have. But those are, at least arguably, closely related to the need to carry out their official roles. Nonetheless, even though I believe that the public reason conception of generality, which I articulated *id.* at 28–41, is the *best* way to conceptualize generality, I also think that the self-enforcement conception does, for reasons described over the next few paragraphs, capture some strong and plausible strategic features of general legal order.

9. FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 154–55 (1960).

10. *Id.*

Hayek elaborates this version of the self-enforcement conception in the most detail and with explicit attention to religion, but he did not originate it. An earlier version appears in John Locke's Second Treatise in the context of an argument for the separation of legislative and executive powers.<sup>11</sup> Locke argues that if executive and legislative powers are vested in the same officials, those officials in their executive capacities "may exempt themselves from obedience to the laws they make" in their legislative capacities.<sup>12</sup> Doing so creates a disjuncture between legislators' own interests in the content of the law and the interests of the public, which reduces legislators' incentive to legislate for "the public good."<sup>13</sup>

James Madison made a similar argument in Federalist 57, one which specifically appealed to the democratic connection between Congress and the people to buttress the generality of the laws.<sup>14</sup> In his defense of the structure of the House of Representatives, he emphasized "that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society."<sup>15</sup> Like Locke, he argued that the self-enforcement principle is important to ensure the "communion of interests" between the people and their legislators, though he added the caveat that this communion of interests was ultimately the responsibility of the democratic public to enforce.<sup>16</sup>

In a 1949 opinion, Justice Robert Jackson identified an importantly broader conception of self-enforcement which prohibits discrimination against minorities as a key principle underlying the Equal Protection Clause.<sup>17</sup> In a concurring opinion urging the Court to enforce that clause more rigorously, he explained:

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political

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11. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 82 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1688). For a careful interpretation of this passage in the context of Locke's conception of the rule of law, see Assaf Sharon, *Locke, Liberty, and Law: Legalism and Extra-Legal Powers in the Second Treatise*, 21 EUR. J. POL. THEORY 230, 234–38 (2022).

12. LOCKE, *supra* note 11, at 82.

13. *Id.*

14. See THE FEDERALIST NO. 57 (James Madison); see also PAUL GOWDER, THE RULE OF LAW IN THE UNITED STATES: AN UNFINISHED PROJECT OF BLACK LIBERATION 18–29 (2021) (providing discussion on Federalist 57).

15. GOWDER, *supra* note 14, at 18.

16. *Id.*

17. *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring).

retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.<sup>18</sup>

Justice Jackson's opinion is worthy of particular attention because it illustrates the connection between the narrow conception of self-enforcement in which what matters is that the legislators and enforcers apply the law *to themselves* and a broader conception in which what matters is that the legislators and enforcers apply the law to *themselves and their political allies and people similar to them*. As Locke and Madison explain, the point is for officials and people to share the same interests, so that their own self-interest restrains officials from oppressing the public. Justice Jackson implicitly extends the Locke/Madison argument by recognizing that in a pluralistic democracy, officials also stand in for the interests of particular social groups (often majorities). Another way that the interests of legislators can diverge from the interests of (some of) the people and lead to oppression is if legislators can enact laws that exempt their political supporters (i.e., the majorities that elected them) and burden minorities.

To see that the self-enforcement conception in its various versions is plausible and appealing, consider what happens when we disregard it. The predatory, revenue-oriented, policing strategy made infamous by Ferguson, Missouri is a concrete illustration.<sup>19</sup> In Ferguson and similar municipalities, local governments have enacted and aggressively enforced numerous penny-ante regulations of day-to-day life as a tool to extract fees, fines, and forfeitures from subordinated groups in the populace.<sup>20</sup> As I have argued elsewhere, such a system is only sustainable when paired with disparate enforcement: That kind of harsh and oppressive policing doesn't work when social elites are genuinely subjected to it on the same terms as the poor and racially subordinated.<sup>21</sup> Consistent with this hypothesis, observe that a dense social network of elite lawyers who served as prosecutors and as judges across the various municipal courts in the St. Louis County region developed a practice of giving one another sweetheart deals—in effect, ameliorating the impact of predatory policing practices on those who happened to be socially connected or wealthy enough to have access to a locally elite lawyer.<sup>22</sup> In other words,

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18. *Id.*

19. See Devon W. Carbado, *Predatory Policing*, 85 UMKCL. REV. 545, 556–60 (2017) (describing revenue-oriented Ferguson policing); Bernadette Atuahene, *Predatory Cities*, 108 CALIF. L. REV. 107, 175 (2020) (describing revenue-oriented Ferguson policing).

20. Carbado, *supra* note 19, at 556–60.

21. Paul Gowder, *Resisting the Rule of Men*, 62 ST. LOUIS U. L.J. 333, 341–43 (2018).

22. Jennifer S. Mann, Jeremy Kohler & Stephen Deere, *A Web of Lawyers Play Different Roles in Different Courts*, ST. LOUIS POST-DISPATCH (Mar. 29, 2015), [https://www.stltoday.com/news/local/crime-and-courts/a-web-of-lawyers-play-different-roles-in-different-courts/article\\_b61728d1-09b0-567f-9ff4-919cf4e34649.html](https://www.stltoday.com/news/local/crime-and-courts/a-web-of-lawyers-play-different-roles-in-different-courts/article_b61728d1-09b0-567f-9ff4-919cf4e34649.html) [<https://perma.cc/2LQE-LDMD>] (describing lawyers who swap roles across Ferguson and other municipal courts in St. Louis County); see U.S. DEP'T OF JUST., CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 49 (2015), <https://w>

Ferguson officials didn't apply the laws to themselves or to their political allies, they just applied them to an oppressed minority. Had they been required to subject themselves and their friends to the same degree of police and court harassment as the people they were expropriating, we could predict, with Locke, Madison, Jackson, and Hayek, that they would have had strong incentives to radically reduce that harassment and find a different way of funding their municipal operations. More generally, residential racial segregation permits pervasive policing in subordinated communities of color without imposing the costs of that supervision on, and hence drawing the opposition of, wealthy whites.<sup>23</sup>

However, the relationship between self-enforcement and freedom potentially breaks down in the face of sufficient diversity in the population.<sup>24</sup> Self-enforcement does not protect minorities who differ greatly in the sorts of acts which they're motivated to undertake. The most obvious example is that legislatures dominated by straight people maintained criminal prohibitions on sodomy for generations.<sup>25</sup> It seems obvious to me that these bans were in part because the burden of self-enforcement was low, among other reasons, because straight people had the benefits associated with socially sanctioned cohabitation and marriage, with its attendant control over physical privacy associated with the home, to shelter their sex acts from the attentions of nosy neighbors and the police.<sup>26</sup> Hayek evidently did not consider that "restriction[] on what we regard as private affairs" due to the heterosexist social context in which he wrote,<sup>27</sup> but it obviously serves as a counterexample to the claim that general legislation on the basis of the personal preferences of a religiously motivated majority is unlikely to be oppressive.

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ww.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\_police\_department\_report.pdf [https://perma.cc/5KU2-59U8].

23. This argument is developed in Paul A. Gowder, *Is Criminal Law Unlawful?*, MICH. STATE L. REV. (forthcoming 2023). Beyond the domain of policing, this feature of residential segregation has been recognized by scholars at least since 1944. See GUNNAR MYRDAL WITH THE ASSISTANCE OF RICHARD STERNER & ARNOLD ROSE, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 618 (9th ed. 1944) (noting that residential segregation "permits any prejudice on the part of public officials to be freely vented on Negroes without hurting whites").

24. See GOWDER, *supra* note 2, at 63.

25. The Court claimed, in the since-overruled decision upholding such laws, that such bans extended back to the founding generation. *Bowers v. Hardwick*, 478 U.S. 186, 192–94 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

26. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (explaining that contraceptive privacy was rooted in traditional protections against intrusions of the police into the marital bedroom: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship").

27. HAYEK, *supra* note 9, at 155.



This diversity gives rise to the liberal case for accommodations.<sup>28</sup> If Christians take power in the legislature and enact a law forbidding work on Sunday and requiring it on Saturday, we can easily identify that Jews, among other Saturday sabbatarians, would experience this law as particularly oppressive. Rather than protecting freedom, the general applicability of that law would undermine the freedom of Saturday sabbatarians. Hence, it would be justifiable in the interests of liberal freedom to exempt them from its application. This strategy is familiar in the United States from various federal and state Religious Freedom Restoration Acts (“RFRA”),<sup>29</sup> as well as from the Free Exercise Clause jurisprudence prior to *Employment Division v. Smith* and to which we will almost certainly shortly return.<sup>30</sup> It might be expected to protect individuals in diverse societies from oppressive law, and hence contribute to the realization of the sort of freedom and equality which the self-enforcement conception of generality aims at, but doesn’t quite hit.

In the remainder of this Essay, however, I argue that matters are somewhat more complex. There are at least three circumstances under which accommodations might actually undermine freedom, associated with three ways in which a religion’s adherents might enjoy power, be that social, economic, or political. This Essay will elaborate each of them below in Part III.

Before summarizing them, however, it is notable that each assumes that accommodations depend in some sense on motivational or preference strength, i.e., that there is a threshold of intensity with which a person must desire to violate some law before they become entitled to an exemption. Such a requirement is necessary for any conceivably workable system of accommodations. In its absence, accommodations would simply mean an individual not having to obey any law if they just didn’t feel like it—it would make all laws optional. That is the argument of Part II. Under those circumstances, the following three mechanisms can lead to accommodations undermining rather than promoting freedom.

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28. Of course, the example of sodomy laws reveals that religious accommodations are necessarily incomplete: Any minority subjected to potentially oppressive law arguably ought to have a claim for accommodation. One of the odd quirks of American law is that religious minorities have a plausible case for carveouts through accommodations, while every other minority must find a due process claim to have some oppressive law struck down altogether, as of course gays and lesbians eventually did.

29. See, e.g., Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (1993), *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997); 775 ILL. COMP. STAT. 35/1 to 35/99 (1998) (Illinois RFRA); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001–110.012 (West 1999) (Texas RFRA); FLA. STAT. §§ 761.01–761.061 (1998) (Florida RFRA).

30. See generally *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990) (ruling that the Free Exercise Clause, standing alone, does not require religious exemptions to generally applicable laws that do not target specific religious practices). For a discussion of the pre-*Smith* jurisprudence, see *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1889–91 (2021) (Alito, J., concurring). For a discussion of the likelihood of overturning *Smith*, see Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 267–270 (2021).

First, there may be a correlation in the population between strength of a group's preferences over their own conduct and strength of their preferences over the conduct of others. If this correlation exists, then whenever high own-conduct/high other-conduct preferers hold economic (and perhaps also political) power, they have the means and motivation to limit the freedom of others in ways which those others will not be able to use the accommodations system to avoid.

Second, the existence of accommodations may alter the political incentives of legislatures: Because those with very strong preferences over their own conduct (and hence strong reasons to oppose restrictive legislation) may obtain accommodations, legislators enacting restrictive laws may not need to worry about determined opposition. Accordingly, legislators may find it politically easier to impose more restrictions on those of us with less strong preferences when those with strong preferences are also those with the political power to resist legislation.

Third, a particular arrangement of strong preferences (such as a particular religion) may be socially dominant, including within the judiciary. Under such circumstances, judges are more likely to understand the values, motivations, and demands of those with that arrangement of preferences, and hence there is likely to be a systematic bias in favor of evaluating those preferences as high-intensity and evaluating the preferences of others as low-intensity.

I now turn to the argument.

## II. ACCOMMODATIONS MUST EITHER HAVE AN INTENSITY PREDICATE OR ENTAIL ANARCHISM

Recently, constitutional law professor Josh Blackman wrote a very controversial blog post contending that lawsuits challenging abortion restrictions on behalf of liberal Jews who believe that their faith places the wellbeing of the pregnant person above preservation of a fetus are unlikely to succeed.<sup>31</sup> Blackman's argument runs as follows: The Rabbis who hold such a view are unlikely to understand abortion as *mandatory* as opposed to merely *permissible*.<sup>32</sup> To see this, imagine that a congregant came to a Rabbi and asked whether they were *required* to procure an abortion to preserve their own health.<sup>33</sup> The Rabbi would be unlikely to say "yes."<sup>34</sup> But, Blackman thinks, under pre-*Employment Division v. Smith* caselaw, one was entitled to an accommodation only when the law ordered them to violate the *commands* of their religion.<sup>35</sup> Accordingly, the claim that a restriction on abortion conflicts with their interpretations of

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31. Josh Blackman, *Tentative Thoughts on the Jewish Claim to a "Religious Abortion,"* REASON (June 20, 2022, 5:04 PM), <https://reason.com/volokh/2022/06/20/tentative-thoughts-on-the-jewish-claim-to-a-religious-abortion> [<https://perma.cc/49KP-W5ZL>].

32. *See id.*

33. *Id.*

34. *See id.*

35. *See id.*

Jewish law would be insincere under the standards likely to be applied after the fall of *Smith*.<sup>36</sup>

Blackman's blog post came in for harsh criticism on the grounds that it amounted to questioning the religious sincerity of liberal Jews.<sup>37</sup> Moreover, to the extent Blackman's argument was meant in part to interpret existing religious freedom legislation (as opposed to merely the pre-*Smith* caselaw), his reading of the statutory framework seems incorrect: The Religious Land Use and Institutionalized Persons Act ("RLUIPA") makes clear that for the purposes of RFRA and RLUIPA, "religious exercise" is not limited to compulsory or central practices.<sup>38</sup>

Notwithstanding those serious problems, I think Blackman captured an intuition that is implicit in the law. Not all cases in which one's faith and the law prescribe different behavior amount to conflicts or burdens. If one's faith says something is advisable rather than mandatory, does it count as a burden or conflict for the law to prohibit it? What if one's faith merely says that one should have a choice about a thing? What if one gets extra religious brownie points for the thing, but isn't subjected to scolding if one doesn't do the thing?

Blackman's intuition might be more convincing if we swap in a less politically controversial issue than abortion, and if we replace Judaism with a majority religion without the same history of being victimized by discrimination. Thus, imagine that you adhere to a version of Christianity which holds almsgiving to be praiseworthy, but not mandatory (supererogatory, in philosophers' terms). If you give a lot of money to the poor, you get a bunch of compliments at church, sort of like lawyers get praised for contributing lots of pro bono hours. But you don't get *disciplined* if you don't do any pro bono at all, and in our imaginary version of Christianity you don't go to hell—or even get the stink eye from your priest—if you don't give anything to the poor. Moreover, you, personally, do not in fact give a lot of money to the poor, though you feel vaguely guilty for that fact. Now suppose that your municipality enacts an anti-panhhandling law which prohibits almsgiving on the street. Can you really say that your religious exercise has been subjected to a genuine restriction? Is there really a conflict between the law and your faith?

I take it that Blackman would answer "no" to those questions. And I claim that Blackman *must* be right, at least at some degree of the softness of the

36. See *id.*

37. See, e.g., Dahlia Lithwick & Micah Schwartzman, *Is the Religious Liberty Tent Big Enough to Include the Religious Commitments of Jews?*, SLATE (June 22, 2022, 3:48 PM), <https://slate.com/news-and-politics/2022/06/do-proponents-of-religious-liberty-really-intend-to-dispute-the-religious-commitments-of-jews.html> [<https://perma.cc/2H4R-PBA8>] ("As practicing Jews, we could pause here to comment on how disrespectful and disparaging it is when legal pundits describe our religious commitments as fickle and shifting by the moment.").

38. Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc-5(7)(A) (2000).

religious demand, or else religious accommodations necessarily entail anarchy. Let's back up and make the argument more carefully.

First, I take it as uncontroversial that human beings have heterogenous preferences. I like pineapple on pizza but hate mayonnaise, you may be the opposite. More importantly for present purposes, we also have heterogenous degrees of preference intensity. There are things which I would rather not do but am willing to put up with if someone else asks nicely enough (give a conference presentation over Zoom rather than in person); there are other things that I would not do except under extraordinary incentives, or possibly never (move to Alaska). Even if you feel the same as I do about the direction of those preferences (i.e., both Zoom conferences and Alaska are unpleasant), the relative ranking you give to them may be different. We can model preference intensity as a one-dimensional continuum from strongest (a categorical command which one would rather die than disobey) to weakest (a mild preference for which one might be paid, say, a single dollar to abandon). Preferences can be more or less intense for a variety of reasons, for example, because of one's beliefs about the consequences of violating them (going to hell vs. getting the stink eye), because of their importance (or, I will later say, "centrality") to the rest of one's commitments, or simply because of the degree of one's emotional reaction to them.

One source of very strong preferences is religion—and one plausible defense of religious accommodations is that there is a special degree of intensity for religious preferences which is qualitatively different from other kinds of preferences, to the extent such preferences come as categorical commands.<sup>39</sup> Consider one prominent scholarly example. Jocelyn Maclure and Charles Taylor describe the liberal strategy of accommodations in the workplace as handling situations where people are *unable* to comply with general rules:

[T]he result may be that a pregnant woman, a person living with a physical disability, or someone whose faith entails specific obligations (in terms of worship, dress, or diet) cannot continue to exercise his or her profession if the work schedule or working conditions are not adapted to their particular characteristics.<sup>40</sup>

The analogy between religious obligation and physical disability seems, at first pass, grossly overstated to the point of bizarreness. Surely an Orthodox Jew is not *unable* to work on Saturday in the same sense that a person who

39. See, for example, the characterization of religious preferences in Joshua Cohen, *Pluralism and Proceduralism*, 69 CHI-KENT L. REV. 589, 604–05 (1994) (“I am assuming that members of the different religious traditions take their religious views to impose obligations on them, including obligations about the day of worship; seen from the inside, so to speak, the requirements are not matters of preference or choice.”). Such characterizations do real normative work, for example, as part of an argument about the kinds of protections that democratic societies must offer religious believers to earn their rational adherence. *See id.*

40. JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* 66–67 (Jane Marie Todd trans., Harvard Univ. Press 2011) (2010).

relies on a wheelchair is unable to walk up the stairs. People sin, by their own lights, all the time. But the analogy becomes, if not wholly convincing, at least defensible, if associated with a story about the importance of religious preferences, as opposed to all other preferences, for everything else that matters to a person. Thus, Maclure and Taylor fill out their argument with the suggestion that religious beliefs are “core” and “meaning-giving” because obeying one’s religious beliefs “is a condition for his self-respect” and a person who disobeys them “is in peril of finding his sense of moral integrity violated.”<sup>41</sup> As a result, they suggest that the person who is forced to violate their faith suffers a “moral harm” similar to the “*physical* harm” suffered in the case of failure to accommodate disability which leads to injury.<sup>42</sup> Thus, the unique force of religious preferences makes the analogy to disability go through.

However, not all religious motivations are necessarily categorical or even particularly strong: A person might follow a religion that does not issue categorical commands or even a religion centered around individual freedom of choice and authenticity rather than a specific set of rules to follow. Satanism and Thelema are extant examples of religions which are unlikely to issue categorical commands, although they might do so for a particular adherent.<sup>43</sup> Some religions, such as Judaism, have more or less strict versions along a recognizable spectrum—hence the Blackman debate.

Intensity can come in different forms. What’s notable is that arguments for and about accommodations seem to all depend on intensity in one way or another. Thus, Blackman’s version of intensity distinguishes between mandatory and optional religious conduct. But others attend less to the mandatory nature of a practice and more to the centrality of that practice to a person’s identity. The South African Constitutional Court, in the analogous context of cultural practices, explains:

The traditional basis for invalidating laws that prohibit the exercise of an obligatory religious practice is that it confronts the adherents with a Hobson’s choice between observance of their faith and adherence to the law. There is however more to the protection of religious and cultural practices than saving believers from hard choices. As stated above, religious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality. Are voluntary practices any less a

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41. *Id.* at 76; *cf.* Tebbe, *supra* note 30, at 275 (describing rationale for religious accommodations as avoiding “the strains of conscience and commitment that would result if government were to burden their deepest beliefs or core aspects of their moral, spiritual, or philosophical identity”).

42. MACLURE & TAYLOR, *supra* note 40, at 77.

43. See discussion *infra* Section III.C.

part of a person's identity or do they affect human dignity any less seriously because they are not mandatory?<sup>44</sup>

Note that while the court doesn't demand that practices be mandatory, it does demand that they be "central," or at least that centrality matters in determining whether an accommodation will be extended: "[T]he centrality of the [religious or cultural] practice, which may be affected by its voluntary nature, is a relevant question in determining the fairness of the discrimination."<sup>45</sup> The court's argument closely resembles that of Maclure and Taylor, comparing the sort of burdens that a lack of religious or cultural accommodation would impose on a person to the sort of burdens that a lack of disability accommodation imposes.<sup>46</sup> Ultimately, the court engaged in a balancing test which weighed "the importance of the practice[s]"<sup>47</sup> and their "centrality"<sup>48</sup> against "the hardship that permitting [the accommodation] . . . would cause the [government]."<sup>49</sup>

The court's analysis of this "centrality" notion reveals it to be closely associated with something like preference strength. Thus, it seemed particularly important as evidence of "centrality" that the person seeking the accommodation stubbornly stuck to her guns notwithstanding the serious costs imposed on her: "In spite of these difficulties, [the claimant] did not alter her conduct or belief. None of this evidence was disputed and it all points to a very strong belief on [the claimant]'s part that the nose stud was important for her identity."<sup>50</sup>

I contend that the South African Constitutional Court had no real choice, even when it expressed respect for voluntary religious or cultural practices, to nonetheless import a notion of preference strength remarkably like the talk about categorical prohibitions in American and Canadian literature. In a society that contains a significant amount of religious diversity, accommodations will not be workable unless there is some point on the continuum of strength that divides those preferences which warrant an accommodation from those that do not. For ease of future references, let us call this claim the *minimum strength cutoff proposition*.

Let's defend that proposition by contradiction. Consider an extreme case of what could happen if a society failed to have a minimum strength cutoff—if any religiously motivated preference entitled a person to an accommodation. Imagine a hypothetical adherent of the religion of Thelema, which is oriented

44. *MEC for Education: Kwazulu-Natal v. Pillay* 2007 (1) SA 474 (CC) at para. 62 (S. Afr.) (footnotes omitted).

45. *Id.* at para. 67.

46. *Id.* at paras. 73–75.

47. *Id.* at para. 79.

48. *Id.* at paras. 86, 88.

49. *Id.* at para. 79.

50. *Id.* at para. 90.

around the writings of occultist Aleister Crowley.<sup>51</sup> Our hypothetical Thelemite places particular importance on Crowley's dictum that "[d]o what thou wilt shall be the whole of the law."<sup>52</sup> Of course, there are multiple ways to interpret that dictum—it might be understood as a categorical command to discover one's "True Will" and follow that, for example.<sup>53</sup> But let's suppose our believer instead interprets it in an individualistic, libertarian, way, as a commandment to resist external impositions on their will.<sup>54</sup> *Ex hypothesi*, then, our believer has religious warrant to do *anything* they want to do, and hence, in principle, has a claim to an accommodation exempting them from any law which happens to be contrary to their preferences.

In the United States, our libertarian Thelemite is not completely above the law—generally applicable laws that burden their exercise of religious freedom may still be subject to strict scrutiny (so they probably don't get to murder people).<sup>55</sup> Nonetheless, they will be *substantially* above the law, in that the only laws that get to regulate their behavior will be those which can pass strict scrutiny. This is obviously unsustainable—strict scrutiny is an extremely high standard, and it would be extremely unjust to permit some people to ignore any law that cannot pass strict scrutiny while the rest of us must follow all kinds of inconvenient laws under the rational basis test that applies to most of them.<sup>56</sup>

51. See Hugh B. Urban, *The Beast With Two Backs: Aleister Crowley, Sex Magic and the Exhaustion of Modernity*, 7 NOVA RELIGIO: J. ALT. & EMERGENT RELIGIONS 7, 9–11 (2004) (describing Crowley's founding of Thelema).

52. See *id.* at 18 (quoting Crowley's belief in "the absolute liberty of each individual will" following from acceptance of that law); see also *Theology*, US GRAND LODGE ORDO TEMPLI ORIENTIS, <https://oto-usa.org/thelema/theology> [<https://perma.cc/RBL3-QUXB>] (describing present-day Thelemite adherence to Crowley's law). Another faith that might generate a similar libertarian principle would be Gardnerian Wicca, which subscribes to something like the Millian harm principle, "an' it harm none, do what ye will." See generally Ethan Doyle White, "An' it Harm None, Do What Ye Will": A Historical Analysis of the Wiccan Rede, 10 MAGIC, RITUAL & WITCHCRAFT 142 (2015) (describing history of Gardner's ethical principle).

53. The Ordo Templi Orientis offers such a reading. *Theology*, *supra* note 52.

54. Cf. Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1227 (2017) (explaining that U.S. religious freedom law counts idiosyncratic deviations from group belief as sincere, "tolerates religious atomism"). For a pre-*Smith* example, see *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 715–16 (1981) (holding that the lower court erred in denying religious accommodation in part based on deviation between claimant's interpretation of religious commands and those of his co-religionists). The same disagreement might apply to our hypothetical Wiccan—some believers might just interpret the "do what ye will" principle as a rule for the use of magic within that religion rather than a general ethical principle. See, e.g., White, *supra* note 52, at 155–56 (quoting Wiccan writings fleshing out the rule as relating to the use of magic). But other believers might well interpret it more broadly. See, e.g., *id.* at 157 (quoting writings from another prominent Wiccan treating the Rede as "a simple, positive moral code" representing a "teaching of tolerance and freedom, and mutual respect").

55. See, e.g., 42 U.S.C. § 2000bb-1 (b) (2018) (permitting generally applicable law to burden religious exercise if it passes strict scrutiny).

56. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) ("The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without

Making matters worse, the scope of such exemptions would be likely to increase over time, as a general exemption from most laws is likely to give people a very strong incentive to adopt religions similar to our hypothetical libertarian version of Thelema.<sup>57</sup> This is so even if, as a whole, those converts lack any particularly strong preferences to engage in any particular legally forbidden behavior, for it is likely to be highly advantageous (and hence strongly preferred and motivational) to be able to exempt oneself from many laws even when one only cares a little bit about each one. For that reason, any society that adopts a system of accommodations for *all* religious belief is likely to feature an increasing difficulty over time in enforcing any law of less than critical (and hence strict scrutiny passing) importance. In other words, anarchy (or at least extreme libertarianism).

There are several ways of avoiding the anarchist outcome. One option is to impose some kind of constraint on the religious diversity of the underlying society. For example, we may assume that society contains no libertarian religions. Or we may rule out certain kinds of substantive beliefs—assuming that society only contains religions with preferences over sexual behavior, not traffic rules or taxpaying. All those assumptions, however, amount to ruling out certain kinds of religion, either from society or from being the beneficiaries of accommodation. Hence, all are incompatible with full religious diversity in a society of equals—in other words, they would be objectionably illiberal. To have nonanarchic accommodations, there must be a method of restricting the scope of what religious preferences may be

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due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.”).

57. Here, the reader may object that such conversions wouldn't be sincere because they would not occur in response to a genuine change of belief. But that objection is nonsense: People convert all the time for nondoxastic reasons without having some kind of road to Damascus moment. For the most obvious example, people regularly convert because they love and wish to marry someone whose religion does not permit them to marry outside the faith. *See generally, e.g.,* Shifra Kisch, *Marriage Conversions: Shari'a Courts, Romanian Brides and Palestinian Bedouin In-Laws*, 27 J. MEDITERRANEAN STUD. 149 (2018) (providing ethnographic research into women who converted to Islam to marry Muslim men). We need not treat those conversions as any less meaningful or sincere than doxastic conversions. For example, Shifra Kisch describes the way in which converts integrated their two religious identities—identifying as Christian as well as keeping Muslim practices and declaring that the underlying deity is the same. *Id.* at 152–54. Moreover, nondoxastic reasons for adopting a religion feature prominently in the history of western liberalism, as the Peace of Augsburg adopted the principle *cuius regio, eius religio*—that the monarch of a territory was entitled to dictate the religion of subjects, which later became implicated (in a controversial way) in the resulting Peace of Westphalia, the foundation of modern sovereignty. *See* Benjamin Straumann, *The Peace of Westphalia as a Secular Constitution*, 15 CONSTELLATIONS 173, 178–80 (2008) (discussing the principle enshrined at Augsburg and differing interpretations of how it was carried forward in Westphalia).



accommodated that does not entail restricting religions or what they believe—in other words, we need at least a formally *neutral* restriction on the scope of accommodations.

Human psychology being what it is, our libertarian Thelemite is unlikely to perceive every imposition on their will as equally burdensome. It might be mildly inconvenient that the law requires them to signal before a turn, but extremely burdensome that the law requires them to carry an unwanted pregnancy to term. Accordingly, a system of religious accommodation which only extends accommodations to particularly intense or central preferences can encompass our libertarian Thelemite without placing them above the law.<sup>58</sup> In other words, accommodations work without entailing anarchy if Maclure and Taylor are right that religious preferences (or at least those granted accommodations) are somehow super strong or super important to those who hold them. The Maclure/Taylor claim amounts to a scope restriction that allows us to tell the libertarian Thelemite “if some behavior really matters to you a lot, you can do it notwithstanding the law, but you can’t just run around ignoring the law altogether.”

Since America is religiously diverse, it should be unsurprising that this intensity/centrality restriction arguably exists in our law. There are several places we can locate it. With Blackman, we might find it in the notion that religious objections to some legal requirement must be “sincere,” or perhaps even in the notion that law must pose a “burden” to religious exercise. We could also (controversially) locate it in the requirement under RFRA (and some pre-*Smith* caselaw), that the “burdens” a law imposes must be “substantial.”<sup>59</sup>

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58. The reader might object: What if the Thelemite has an *extremely strong* commitment to overall libertarianism? But it seems reasonable for a court to observe that this extremely strong commitment is unlikely, again given the realities of commonly understood human psychology, to manifest in every situation—our Thelemite, for example, probably doesn’t experience themselves as immensely burdened in response to people insisting on ordinary social politeness, even when that politeness is inconvenient—mature human adults just don’t act that way, at least not if they expect themselves to live in a society.

59. See 42 U.S.C. § 2000bb-1(a) (discussing the substantiality requirement); see, e.g., *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989) (an example of pre-*Smith* caselaw). See generally Chapman, *supra* note 54 (discussing the requirement of sincerity). For a discussion of the relationship between sincerity and substantial burden under RFRA, see *id.* at 1245–53. Chapman argues that “substantial burden” is not the correct statutory location for a judgment of whether a claimant seeking a religious accommodation has a sufficiently strong motivation. See *id.* at 1252. While Chapman also doesn’t seem to treat the intensity requirement as directly entailed by the requirement of sincerity, it seems to creep into his argument despite his best intentions. In particular, he argues that evidence that a person’s behavior was inconsistent with the commands of their religion might count against a finding of their sincerity, which seems to implicitly adopt the Blackman view—ruling out religious recommendations as opposed to commands—since one might disobey an optional suggestion of one’s religion without thereby providing evidence that one doesn’t consider it a suggestion of one’s religion. See *id.* at 1234.

Or we might even go so far as to find it in the predicate requirement that the character of the burden is religious at all.<sup>60</sup>

At this point, I consider the minimum strength cutoff proposition adequately defended. Formally speaking, the foregoing does not prove that proposition, since there may be other neutral restrictions which are compatible with religious diversity. But—since this is the neutral scope restriction which we can observe in the wild—it seems at least reasonable at this point to shift the burden to the reader to come up with some other neutral restriction which will do the trick.<sup>61</sup>

### III. ACCOMMODATIONS AND UNFREEDOM

This Part will leverage the minimum strength cutoff proposition to argue that there are three pathways through which religious accommodations may undermine individual liberty. The core mechanism of each pathway is similar: Religious accommodations take those with very strong religion-derived preferences out of the Hayekian system of legal solidarity. When those preferences are accompanied by power, accommodations enable the powerful to impose additional burdens on others.

Before turning to the argument, I stipulatively define three kinds of power in a liberal democracy. First, *economic power* is the control over substantial economic resources, such as wealth, and with it an advantageous negotiating position in market transactions, which, depending on the degree of resources controlled and the competitiveness of the underlying market, might rise to the level of coercive power over others in virtue of having control of the essential needs of those others.<sup>62</sup> *Political power* is the tendency of an individual

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60. At least one plurality opinion in the Supreme Court seems to define the religious character of some belief in terms of its strength. *Welsh v. United States*, 398 U.S. 333, 339–340 (1970) (“What is necessary under *Seeger* for a registrant’s conscientious objection to all war to be ‘religious’ within the meaning of § 6(j) is that this opposition to war stem from the registrant’s moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions.”). Chapman also moves a little bit in this direction, implicitly, when he rules out certain religious “parodies” as not being genuinely religious. See Chapman, *supra* note 54, at 1234, 1242–43 (discussing the Satanic Temple). I think this is a mistake. See *infra* notes 91–95 and accompanying text. While Chapman might not endorse this reading of his Article, it seems to me that his dismissal of “parodies” is an intensity requirement creeping in, insofar as the most plausible way to distinguish a “parody” from a “real” religion is in terms of the extent to which its commands get a strong grip on its members.

61. I note that accepting the minimum strength cutoff proposition does not require us to accept Blackman’s conclusion about Jewish objections to abortion laws. Recall that the mandatory/optional distinction is not the only way to have a strength predicate on accommodations. A centrality requirement could do the trick, so a liberal Jew could still say that women’s bodily autonomy and the priority of protecting the pregnant person’s health is closely related to core moral principles of their faith such that having a choice about that matter is particularly important to them.

62. See generally Paul Gowder, *Market Unfreedom*, 26 CRITICAL REV.: J. POL. & SOC’Y 306 (2014) (defending the notion of coercion within markets); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) (defending claim that rights of property owners count as coercive against others).

or group to succeed in the face of political conflict. When there's an election, a politically powerful group's members, allies, or people who are relevantly similar tend to win (often but not exclusively because they together make up a numerical majority of the electorate) and politicians tend to make decisions with an eye toward keeping the group happy. Finally, *social power* represents the general level of esteem held by members of a group and the extent to which that group's values and ways of thinking are familiar and accepted in the wider society. A group that lacks social power may, for example, experience what feminist philosophers have characterized as "epistemic injustice"—when, due to having a marginalized identity, the knowledge and understanding of a group is discounted in the wider community.<sup>63</sup>

There is, of course, an intuitive connection between the three types of power—those with social or economic power are likely to also have political power, as both wealth and overall social influence are useful in acquiring political influence, the latter especially in a country like ours in which the wealthy exercise outsized political power.<sup>64</sup> Social power and political power are likely, all else equal, to increase in the share of the population a group holds—demographic majorities naturally dominate both social life and political life in a liberal democracy, although of course minorities with certain kinds of cohesive interests may be able to exercise substantial local political power through their greater capacity to act collectively.<sup>65</sup> And political power certainly facilitates the acquisition of wealth through familiar mechanisms such as the capture of political institutions.<sup>66</sup>

#### A. ECONOMIC POWER AND CORRELATED PREFERENCES

Here is a description of *Hobby Lobby* and its progeny which frames the argument of this Section.<sup>67</sup> A group of religious believers had substantial

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63. See generally Rachel McKinnon, *Epistemic Injustice*, 11 PHIL. COMPASS 437 (2016) (reviewing literature).

64. See generally Jeffrey A. Winters & Benjamin I. Page, *Oligarchy in the United States?*, 7 PERSPS. ON POL. 731 (2009) (arguing that the United States is oligarchic in virtue of the influence over politics exercised by the wealthy).

65. See generally Mancur Olson, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups*, in 124 HARV. ECON. STUD. (1965) (providing a classic account of the capacity of small cohesive groups to exercise public power through collective action advantages).

66. See generally George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (providing a classic public choice account of the capture of regulators by industries for the sake of their own profit, such as by limiting market entrants).

67. See generally *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (ruling that Religious Freedom Restoration Act requires government to accommodate religiously motivated objections of owners of closely-held corporate employers to providing insurance that covers certain methods of contraception); *Zubik v. Burwell*, 578 U.S. 403 (2016) (considering, but not resolving, question of whether post-*Hobby Lobby* compromise in which religious employers may notify government or insurers of religious objection to providing contraception and such notification would trigger alternate provision of coverage itself violates Religious Freedom Restoration Act when applied to employers who object to causal role of notification in provision of coverage to employees).

economic resources, giving them significant market power over those wishing to deal with them, particularly their employees.<sup>68</sup> They also had very demanding religious preferences over the use of those resources (even by other people), believing that they were forbidden from permitting those resources to be used to contribute to abortions and having a broad conception of what sorts of things constituted abortion—a conception that conflicted with the provisions of the Affordable Care Act.<sup>69</sup> Accordingly, they claimed an accommodation under RFRA permitting them to use their economic power to deny access to health insurance coverage including some putatively abortion-like methods of contraception to their employees.<sup>70</sup>

Justice Ginsburg's dissent in *Hobby Lobby* identified the dangerous interaction between accommodations and economic power over others, citing a pre-*Smith* case which highlighted the risk that such accommodations would “impose the employer's religious faith on the employees.”<sup>71</sup> Luckily, the federal government found a workaround so that the affected employees could still access contraception, but that's merely a matter of serendipity.<sup>72</sup> We can imagine a hypothetical *Grim Hobby Lobby* in which the job market is so weak that the company's employees lack the practical capacity to switch jobs and the federal government doesn't figure out a way to get the disputed forms of contraception to the employees without Hobby Lobby money being involved. Under *Grim Hobby Lobby*, the owners indeed would have gotten to impose their religion (or at least avoidance of the forms of contraception prohibited by that religion) on their employees.

I claim that the risk of *Grim Hobby Lobby* is pervasive. Some belief systems confer on their adherents preferences not only over their own behavior but over the behavior of those who do not share their faith. For example, Catholic integralists like Adrian Vermeule apparently believe that the law should impose their views of sexual morality on the rest of us.<sup>73</sup>

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68. See *Hobby Lobby*, 573 U.S. at 700, 702.

69. See *id.* at 697–98, 701–02, 703–04.

70. *Id.* at 703–04.

71. *Id.* at 769 (Ginsburg, J., dissenting) (quoting *United States v. Lee*, 455 U.S. 252, 261 (1982)).

72. See *id.* at 692, 730–31 (majority opinion).

73. Compare Adrian Vermeule, *A Christian Strategy*, FIRST THINGS (Nov. 2017), <https://www.firstthings.com/article/2017/11/a-christian-strategy> [<https://perma.cc/6PQP-X4JC>] (arguing that the Catholic Church is “principal target and antagonist” of liberalism, with the primary ground of that opposition described in terms of divergent views on sexuality; and that Catholics should adopt a deep political and legal “flexibility” allowing them to pursue the goals of (his version of) the faith independent of potentially transient commitment to “ultimate allegiances to political parties, to the nation, even to the Constitution,” which “may all have to go if conditions warrant it” (emphasis omitted)), with Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037> [<https://perma.cc/GUK6-AEDY>] (arguing for theory of ““common-good constitutionalism”” under which then-existing liberal rules of constitutional law “on free speech, abortion, sexual liberties, and related matters will prove vulnerable,” judicial affirmation in *Planned Parenthood v. Casey* of pluralism in terms of conceptions of the good will “be not only rejected but stamped as abominable, beyond

Less demandingly but potentially more significantly in real-world contexts, some belief systems confer on their adherents preferences over their own *participation* in the behavior of others.<sup>74</sup> Such preferences seem harmless, until we remember that we all exist in a market and social system where nobody is genuinely independent except a hermit. In an economic system characterized by pervasive mutual interdependence, those with economic power are likely to find themselves “participating,” in some sense of the term, in lots of other people’s behavior in virtue of the fact that the wealthy tend to control lots of resources which other people make use of via market transactions.

Thus, in *Hobby Lobby*, the owners of the plaintiff companies controlled lots of economic resources which their employees made use of via the market transaction of working for compensation, including compensation with health insurance benefits. The government’s effort to regulate that compensation arrangement in the Affordable Care Act brought the plaintiff’s nonparticipation preferences into conflict with their employees’ interest in receiving the same health insurance compensation, permitting the same behavior (including the use of the same kinds of contraception) as those who happened to be employed by people with different beliefs.<sup>75</sup>

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the realm of the acceptable forever after,” and “the state will enjoy authority to curb the social and economic pretensions of the urban-gentry liberals who so often place their own satisfactions (financial and sexual) and the good of their class or social milieu above the common good”). It’s impossible to read those two articles together and not conclude that 2020 Vermeule is giving a constitutional recipe for 2017 Vermeule to carry out the strategy of subordinating political and legal allegiances to the quest of coercively imposing his conception of Catholic sexual morality on the American people.

74. See, e.g., *Wheaton Coll. v. Burwell*, 573 U.S. 958, 960 (2014) (Sotomayor, J., dissenting) (explaining that Wheaton College objected to filing a form requesting exemption from ACA contraception requirement “on the theory that its filing of a self-certification form will make it complicit in the provision of contraceptives by triggering the obligation for someone else to provide the services to which it objects”).

75. At some point, positions like those of the *Hobby Lobby* plaintiffs fall prey to a kind of *reductio ad absurdum* argument relating to the simple fact that all employees are always paid in currency that can be used to commit acts that their employers see as sinful. Rather than taking their employer-provided health insurance and using it to acquire forms of contraception that their employers see as abortion-like, they could just take their employer-provided salary, cash the checks, and walk straight over to their local Planned Parenthood clinics to abort as many fetuses as they can afford. Does this mean that Hobby Lobby could also claim an exemption from the minimum wage provision of the Fair Labor Standards Act, 29 U.S.C. § 206(a) (2020), insofar as that statute requires the company to pay its employees in universally negotiable U.S. dollars? Must employers be allowed to pay their employees in some kind of monopoly money (maybe a theologically approved cryptocurrency) that is only usable for purposes which are consistent with the employer’s faith? This is not hyperbole or fiction: As Delaware Supreme Court Justice Leo Strine recounts in a critique of the *Hobby Lobby* decision along the lines of this footnote, some companies used to pay their employees “in scrip that could only be used in company stores, in part to prevent employees from using their pay to buy liquor,” and that others “conditioned employment or higher wages on employees following the employers’ moral code, including church attendance on Sundays.” Leo E. Strine Jr., *A Job is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71, 73 (2015).

The point is that the ordinary functioning of economic, social, and governmental life may bring believers into situations where they would normally be obliged to participate in the choices of others, such as by supplying health insurance, a marriage license, or numerous other goods or services. If the believer in question's preferences are sufficiently strong to entitle them to accommodations, and they have the practical power to intervene on the choices of others due to their relative market power, they may impose those preferences on nonadherents.

This risk explains why there is often seen to be a tension between antidiscrimination laws and religious accommodation.<sup>76</sup> Sometimes, particularly in the domain of sexual orientation and gender identity, the religious views of some market participants conflict with the claims to equal standing of others. When a believer has preferences over the sexuality of another person or their participation therein, then they may have the power to undermine the other's freedom and equal standing when (a) the strength of the believer's preferences confer on them the ability to claim an accommodation to avoid complying with relevant antidiscrimination law, and (b) they have sufficient market power that their refusal to trade with the other meaningfully affects the latter's access to necessary goods or services.

In the United States, many adherents to conservative versions of Christianity seem to be eager to escape regulation of themselves, on religious grounds—as characterized for example by religious opposition to Covid restrictions,<sup>77</sup> religious freedom arguments against antidiscrimination laws and jurisprudence,<sup>78</sup> and religiously-motivated withdrawal from secular education systems.<sup>79</sup> Adherents to those same versions of Christianity also seem to have strong religious preferences over the behavior of others, such as by the numerous post-*Dobbs* (and revived pre-*Dobbs*) abortion prohibitions,<sup>80</sup>

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76. See, e.g., Tebbe, *supra* note 30, at 312–16 (describing background of accommodations challenge to civil rights laws).

77. See discussion *infra* Section III.C.

78. See, e.g., H. Howell Williams, *From Family Values to Religious Freedom: Conservative Discourse and the Politics of Gay Rights*, 40 NEW POL. SCI. 246, 258–60 (2018) (describing political salience to conservatives of resisting the extension of antidiscrimination rights to LGBT individuals); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1874–76 (2021) (use of religious discrimination claim to defend access to foster care process for religious organization that engaged in sexual orientation discrimination); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603–05 (1983) (rejecting, against religious discrimination claim, suit challenging denial of tax exemption to religious schools on the basis of race discrimination).

79. *Carson ex. rel. O.C. v. Makin*, 142 S. Ct. 1987, 2000 (2022) (stating that states may not choose to subsidize private secular schools while refusing to subsidize private religious schools). *But see* James Madison, Memorial and Remonstrance Against Religious Assessments (June 1785), in 8 THE PAPERS OF JAMES MADISON 295–304 (Robert A. Rutland et al. eds., 1973) (condemning a bill to fund “Teachers of the Christian Religion” as an establishment of religion).

80. Allison McCann et. al., *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Feb. 10, 2022, 5:00 PM), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.h>

as well as the aforementioned efforts to deny market services to LGBT individuals notwithstanding antidiscrimination laws.<sup>81</sup> Accordingly, in localities where conservative Christians hold economic power, we can expect increasing conflict rooted in the claims of such believers to accommodations from economic regulations meant to secure for others—workers, consumers—equal and open access to goods and services in the free market.

B. *POLITICAL POWER AND THE DESTRUCTION OF LEGAL SOLIDARITY*

The alternative to claiming an accommodation to avoid complying with some proposed law is to oppose it through the democratic process. Legislators obviously have an electoral disincentive to enact laws that are likely to provoke intense opposition from powerful constituents, including when those constituents perceive them to threaten their ability to follow the commands of their religion. The availability of accommodations likely mitigates that opposition by eliminating its source in the pain of complying with a law that violates one's faith. This means that legislators who might otherwise be scared off from regulating the rest of us (those without sufficiently strong preferences to claim an accommodation) can be free to enact the offensive legislation if those who would be bothered most by it can avoid compliance.<sup>82</sup>

This is simply an extended version of the self-application argument about general law. While that argument focuses on the notion that legislators who must apply the laws to *themselves* are thereby deterred from making oppressive law, the same argument also applies on its own terms to legislators who must apply the laws to *those whose political support the legislators need*. To the extent needed supporters may exempt themselves from some oppressive law, a legislator need not worry about political consequences for supporting that law. Unsurprisingly, this point is not novel to the religious freedom literature.<sup>83</sup>

More generally still, any democratic system with diverse preferences that ties together the fates of people who value particular choices a lot and those who value those choices a little is likely to preserve a greater space for individual freedom than one which does not tie them together. This is so because the tying—which we could also describe as *solidarity*—recruits everyone who values any particular freedom a lot to the vigorous defense of those who only value such a freedom a little bit. The political effectiveness of the National

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tml [<https://perma.cc/TF4H-RQ93>] (tracking resource continuously updated to reflect new state laws).

81. See *supra* note 78 and accompanying text.

82. An important concrete example of this dynamic is the granting of statutory accommodations for sacramental wine in the prohibition era. See Michael deHaven Newsom, *Some Kind of Religious Freedom: National Prohibition and the Volstead Act's Exemption for the Religious Use of Wine*, 70 BROOK. L. REV. 739, 864–73 (2005) (arguing that exemptions were included in order to avoid political resistance from Episcopalians and others).

83. See Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2444–48 (2021) (describing debate around extent to which religious exemptions for majority faiths can undercut political opposition to laws burdening minority faiths).

Rifle Association is a good example of this: Because a sufficiently powerful group of people intensely values the freedom to go about armed, they have a strong incentive to defend that freedom on behalf of everyone else. But if it were possible to enact laws that forbade only non-NRA members to carry arms, the NRA would have significantly less incentive to oppose such laws.

In principle, this dynamic is empirically tractable. We would expect, if my description of the relevant incentive structure above is correct, to observe harsher laws in categories that apply to both religious and nonreligious activity in states that have enacted Religious Freedom Restoration Acts. Moreover, we would expect harsher laws to generally postdate such acts. Examples of relevant areas of law would include, for example, curricular standards in private schooling, vaccine requirements, and zoning regulations.

I must alert the reader that I have made some modest (and highly preliminary) effort to examine data that might offer evidence for this hypothesis and have not (yet?) found such evidence. I have scraped data on childcare and school vaccination requirements and religious exemptions from the website of an advocacy group.<sup>84</sup> I expected to see states that permit religious exemptions to vaccine requirements in such settings to have overall more demanding requirements (for example, requiring vaccinations for more diseases). Unfortunately, after a preliminary examination of the data, I could not find any difference in the overall burdensomeness of vaccine requirements between states that offer and do not offer religious exemptions.

However, the above is not sufficient reason to abandon the hypothesis of this Section, as I only engaged in an extremely preliminary examination of very partial data. In order to do a serious empirical study, it would be necessary to acquire far more granular data (for example, county-level data) in order to acquire sufficient statistical power to actually test the hypothesis. It would also be necessary to conduct fairly sophisticated modeling in order to account for the likely complex causal relationship between the underlying religious diversity in a community, the presence of religious exemptions, and the strength of vaccine requirements.<sup>85</sup> Accordingly, while I cannot offer support for this hypothesis yet, it is not ruled out, and with sufficient resources (i.e., to gather and code local vaccine requirements, curricular standards, or zoning regulations), it could be done. I offer this as a prime potential area for future research by empirical scholars on the impact of religious accommodations.

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84. *State Laws and Mandates by Vaccine*, IMMUNIZE.ORG (Jan. 23, 2023), <https://www.immunize.org/laws> [<https://perma.cc/NS93-T4S6>].

85. Both the extent of vaccine requirements and the presence of a religious exemption are likely to be influenced by the underlying distribution and strength of religious preferences in a community, and without more understanding of those underlying characteristics and a more fleshed out theory of their causal role, it would be impossible to devise a serious model permitting plausible causal identification.



C. A ONE-WAY RATCHET AWAY FROM FREEDOM AND EQUALITY

Suppose that rather than having permanent political power, those with strong religious preferences share political power with those who lack such power. Further suppose that the correlated preferences described in Section III.A hold: Those who have intense preferences over their own behavior also have intense preferences over the behavior of others. I claim that this dynamic could lead to a progressive increase in the burdensomeness of laws—and that we are observing this in our own society right now.

Consider a two-party society where one party is composed of members of a liberal faith with weak correlated self/other preferences and the other is composed of members of a strict faith with strong correlated self/other preferences. Further suppose that the democratic process generates frequent changes of power: The voters sometimes put the liberal party in power and sometimes put the strict party in power. When each party is in power, they can pass laws prohibiting the behavior of other people which they happen to oppose—when the liberal party is in power, for example, they enact antidiscrimination laws; when the strict party is in power, they enact sexual morality laws. However, this pattern of regulating the behavior of other people is systematically biased: When the liberal party is in power, accommodations mean that they cannot fully regulate the behavior of the members of the strict party; when the strict party is in power, they *can* fully regulate the behavior of the members of the liberal party.

Under such circumstances, the members of the strict party have an incentive to resist other individual rights which can override their legislative preferences. I think we can see this in our current constitutional trajectory: The Supreme Court, dominated by America's strict party, applied in the *Dobbs* case a particularly strict version of the *Washington v. Glucksberg* test<sup>86</sup> for discovering fundamental rights—one which many commentators have observed threatens to undo the entire apparatus of fundamental rights relating to intimacy, marriage, and the family.<sup>87</sup>

In the absence of religious accommodations, this would be somewhat surprising—after all, fundamental family rights and rights over intimate conduct or even bodily autonomy can also protect religiously motivated conduct, such as the refusal of medical procedures by believers or religious choices in

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86. See generally *Washington v. Glucksberg*, 521 U.S. 702 (1997) (describing the test for fundamental rights).

87. See generally *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (applying a stricter version of the test). For the threat to other fundamental rights, see, for example, Evan D. Bernick, *Vindicating Cassandra: A Comment on Dobbs v. Jackson Women's Health Organization*, 2021–2022 CATO SUP. CT. REV. 227, 269; Richard Johnson, *Dobbs v. Jackson and the Revival of the States' Rights Constitution*, 93 POL. Q. 612, 618 (2022); and Melissa Murray, *Thomas Hints at Future Battles, Opinion to 'Abortion Is Just the Beginning': Six Experts on the Decision Overturning Roe*, N.Y. TIMES, <https://www.nytimes.com/interactive/2022/06/24/opinion/politics/dobbs-decision-perspectives.html> [https://perma.cc/5S69-2TN2].

childrearing and other family arrangements.<sup>88</sup> A truly narrow version of the *Glucksberg* test would put all of that at risk. However, if members of the strict religious party can be confident in their religious accommodations, then they need not fear that abolishing these rights will come back to bite them.

Given the current Supreme Court, such confidence would seem to be warranted: After all, the same majority that overruled *Roe v. Wade* seems poised to formally constitutionalize accommodations and has already *de facto* constitutionalized them through an extremely broad notion of what it means to discriminate against religious exercise.<sup>89</sup> Thus, the same believers who see the end of a constitutional right to abortion as a vindication of their religiously-derived morality can also feel secure, thanks to accommodations, that their own choices as to how to arrange their family and sexual lives will be safe from government regulation. But because members of the liberal party either have weak religious preferences or nonreligious preferences, accommodations do not (thanks to the minimum strength cutoff proposition) protect their behavior.

On the basis of that argument, the abstract structure of correlated religious preferences and political power seems to explain our current constitutional jurisprudence across the entire domain of personal, sexual, family, and educational liberty, and to suggest a natural endpoint for that jurisprudence: People whose personal, sexual, family, and educational choices are motivated by demanding conservative religions get to do whatever they want; the rest of us have to follow morality legislation imposed on us by the strictest version of conservative Christianity that regularly wins elections. That's about as close to theocracy as you can get without actually putting the clergy in charge of the state.

#### D. SOCIAL POWER AND BIASED LEGAL INTERPRETATION

Religious accommodations adjudications are likely to be systematically biased in favor of socially powerful religions because judges and other decisionmakers are likely to have a greater understanding of the demands of those religions. In the context of the minimum strength cutoff proposition, this suggests that judges are more likely to appreciate the strength of the preferences associated with religions with which they are familiar.<sup>90</sup>

88. This was part of the basis for the *Smith* Court's distinguishing of preexisting precedent, such as *Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972): that such cases had combined free exercise rights with other fundamental rights, such as parental child-rearing rights. *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 881 (1990).

89. See discussion *infra* notes 95–113 and accompanying text.

90. A version of this argument appears in Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith*, 102 NW. U. L. REV. 1189, 1227–43 (2008). In particular, Krotoszynski makes an important point:

The very notion of 'religion' triggers deep-seated, largely unconscious cultural associations and understandings. To ask someone to characterize a particular group as a 'religion' requires her to draw a material equivalency between the beliefs of the group in question and her own beliefs; if the equivalency seems unwarranted because

The worst of the Covid restriction decisions illustrates this affinity between judicial understanding and social power. In *On Fire Christian Center, Inc. v. Fischer*,<sup>91</sup> then-District Court Judge Justin R. Walker (who shortly thereafter received a—frankly terrifying—promotion to the District of Columbia Circuit from Donald Trump)<sup>92</sup> wrote an opinion which openly appealed to elements of Christian doctrine to justify enjoining a city’s enforcement of Covid capacity restrictions against a church in the early days of the pandemic. Among the many astonishing things about this opinion—I have elsewhere argued that the opinion itself violated the Establishment Clause<sup>93</sup> —is the fact that it seems to assume that the reader understands and accepts particular elements of Christian doctrine and need not be convinced or even receive an explanation about why activities such as attending church on Easter are important. Thus, Walker led his opinion with the following:

On Holy Thursday, an American mayor criminalized the communal celebration of Easter.

That sentence is one that this Court never expected to see outside the pages of a dystopian novel, or perhaps the pages of *The Onion*. But two days ago, citing the need for social distancing during the current pandemic, Louisville’s Mayor Greg Fischer ordered Christians not to attend Sunday services, even if they remained *in their cars* to worship – and even though it’s *Easter*.

The Mayor’s decision is stunning.

And it is, “beyond all reason,” unconstitutional.<sup>94</sup>

The italics in the opinion are Walker’s, and I think they are the most significant part of this passage, for they illustrate the supposition that any reader would immediately understand and accept the significance of Easter. While the opinion does later note that it is part of “the holiest week of the year” to Christians,<sup>95</sup> this was several pages later—for the first part of the opinion, in a section obviously intended to have an immediate persuasive impact on the

of the bizarre nature of the group’s theology, she might well prove unwilling to accept that the other group is a legitimate ‘religion’ in the same way as her own.

*Id.* at 1235 (footnote omitted).

91. *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 901 (W.D. Ky. 2020).

92. Madison Alder, *Senate Confirms McConnell Protege Walker to D.C. Circuit*, BL (June 18, 2020, 3:36 PM), <https://news.bloomberglaw.com/us-law-week/senate-confirms-mcconnell-protége-justin-walker-to-d-c-circuit> [<https://perma.cc/A4F8-2DPV>].

93. Paul Gowder, *The Dangers to the American Rule of Law Will Outlast the Next Election*, 2020 CARDOZO L. REV. DE NOVO 126, 154–55. In view of the apparent overruling of the *Lemon* test in *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022), that argument is, alas, now obsolete.

94. *On Fire Christian Ctr.*, 453 F. Supp. 3d at 905.

95. *Id.* at 909 (quoting Mayor Greg Fischer, *COVID-19 Daily Briefing 04-10-2020*, FACEBOOK (Apr. 10, 2020), [https://www.facebook.com/watch/live/?ref=watch\\_permalink&v=514408469234775](https://www.facebook.com/watch/live/?ref=watch_permalink&v=514408469234775) [<https://perma.cc/R8NN-RGVX>]).

reader, Walker assumed that all readers would have an understanding like his own of the significance of Easter for Christians. And he was probably right.

Imagine, if you will, the unlikelihood of an opinion about the practices of a minority religion reading that way. Will we ever see a judicial opinion which leads with something like “purporting to protect the public from scandalous nudity, an American mayor prohibited the Gardner temple of Los Angeles from celebrating the Goddess Skyclad, even if their celebration was entirely on private property—and even though it’s *Beltanē*?” I think not. The practices and beliefs of minority religions simply do not form a common cultural core which judges may casually (or hysterically, as the case may be) reference. More importantly, in the absence of such a common cultural core, it is likely to be more difficult for judges to understand and believe the claims of minority religions to intensity or centrality. Is Beltane as important to Wiccans as Easter is to Christians? How many deeply embedded assumptions about what kinds of religious rituals are important will a judge who grew up in a Christian-dominated community, who is statistically more likely to themselves be Christian, have to overcome to fairly adjudicate the accommodations claim of a Wiccan?

Now return to the Blackman blog post. At one point, he makes the telling claim that the doctrine itself embeds an assumption of Christian modes of legal exercise: “The legal concept of a ‘substantial burden,’ which was developed in the context of Christian faiths, does not neatly map onto a Jewish faith that does not actually impose any requirements on congregants, but instead only offers aspirational principles.”<sup>96</sup> If Blackman is right about this, and I see no reason to doubt it, then the American doctrinal instantiation of the minimum preference strength cutoff already has a thumb on the scale for religions that look like Christianity—religions that tend toward mandatory commands rather than aspirational principles.

If Blackman is right that the law we have is biased toward Christianity, in virtue of that religion’s social power (represented in his argument by the notion that the doctrine “was developed in the context of Christian faiths”), that seems to me to constitute a knock-down objection to the doctrine from anyone who values liberal religious neutrality.<sup>97</sup> Even if Blackman misinterprets the law, if judges share his interpretation, either consciously or unconsciously (through their inability to understand the importance of non-Christian religious claims), the objection still holds.

In this context, consider the Satanic Temple. This new religion is famous for their efforts to combat things like government displays of religious symbology by demanding that if, for example, a public facility displays Christian symbols

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96. Blackman, *supra* note 31.

97. *Id.*

they must also display the Temple's gigantic statue of Baphomet.<sup>98</sup> Religion scholar Joseph Laycock has analyzed the Temple through the lens of a notion of "serious parody" according to which it is *simultaneously* a real religion and a political project.<sup>99</sup> On the other hand, Nathan S. Chapman says that it's not even a real religion at all, at least for legal purposes.<sup>100</sup> It seems to me that Laycock has the right of it—as he explains, they hold rituals, they have a moral code which they actively debate, they engage in communal events similar to those of more established churches. But what happens if Laycock is right, but judges tend to think like Chapman?

The Temple has announced two "abortion rituals" which it identifies as a way to "affirm[] [a member's] autonomy and free will" by reciting several of the Temple's tenets—including the third tenet: "One's body is inviolable, subject to one's own will alone"—before terminating a pregnancy.<sup>101</sup> The context of the abortion ritual makes it transparently obvious that its purpose is to defy post-*Dobbs* laws regulating abortion. For example, another page on the Temple's website includes the following text directly above a link to the page about the abortion ritual:

The Satanic Temple's religious abortion ritual exempts TST members from enduring medically unnecessary and unscientific regulations when seeking to terminate their pregnancy. The ritual involves the recitation of two of our Tenets and a personal affirmation that is ceremoniously intertwined with the abortion. Because prerequisite procedures such as waiting periods, mandatory viewing of sonograms, and compulsory counseling contravene Satanists' religious convictions, those who perform the religious abortion ritual are exempt from these requirements and can receive first-trimester abortions on demand in states that have enacted the Religious Freedom Restoration Act.<sup>102</sup>

When a member of the Temple seeks an abortion in a state that proscribes it and this ritual ends up in court, what can we expect our legal system to make of it? Either under the Religious Freedom Restoration Act or under any post-*Smith* regime the Supreme Court might devise, we are likely to see the minimum

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98. See generally Adam Gabbatt, *Friend of Satan: How Lucien Greaves and His Satanic Temple Are Fighting the Religious Right*, *GUARDIAN* (Jan. 5, 2023, 4:56 AM), <https://www.theguardian.com/us-news/2023/jan/04/friend-of-satan-how-lucien-greaves-and-his-satanic-temple-are-fighting-the-religious-right> [<https://perma.cc/N27M-MSTY>] (describing Temple's advocacy surrounding Baphomet statue).

99. JOSEPH P. LAYCOCK, *SPEAK OF THE DEVIL: HOW THE SATANIC TEMPLE IS CHANGING THE WAY WE TALK ABOUT RELIGION*, 103–30 (2020).

100. Chapman, *supra* note 54, at 1243.

101. *Satanic Abortions Are Protected by Religious Liberty Laws*, SATANIC TEMPLE, <https://announcement.thesatanictemple.com/rrt-campaign41280784> [<https://perma.cc/45AM-WCPg>].

102. *Religious Reproductive Rights*, SATANIC TEMPLE, <https://thesatanictemple.com/pages/rrt-campaigns> [<https://perma.cc/3EN9-A988>].

strength cutoff proposition manifested in a demand that the member of the Temple prove their “sincerity.” But how is such proof to be procured, given the explicitly political context of the Temple’s religion? Are our courts capable of incorporating the “serious parody” concept into religious accommodations jurisprudence? Or will it be impossible for a member of the Temple to enjoy religious freedom?

#### CONCLUSION: AGAINST ACCOMMODATING THE POWERFUL

The rule of law case for religious accommodations elucidated in Part I of this Essay makes sense when applied to religious minorities, who lack political, social, and economic power. The problem that accommodations solve is that elected officials might make laws which don’t seem oppressive to them, but do seem oppressive to those with different religious views: Sunday closing laws in a society with a majority of Christians and a minority of Jews, laws prohibiting head coverings in a society with a Muslim minority, conscription laws with a Quaker minority, mandatory schooling laws with an Amish minority, prohibitions on peyote with a Native American religious minority, and so forth. This is the stuff out of which the argument for religious accommodations, as well as our underlying intuitions about freedom and oppression, are built.

But our intuitions about the experience of exclusion and denigration associated with a lack of accommodations that result from deliberating on cases like Muslims in France simply don’t work when applied to conservative Christians in the United States. The one is an oppressed minority doubly victimized by the legacy of colonization and by extreme religious and cultural bigotry.<sup>103</sup> The other shares a basic religious identity (albeit one with substantial internal diversity) with the overwhelming majority of the politicians who represent them, sees its way of life constantly affirmed in public and private affairs on a regular basis and has its preferred policies directly written into the political platforms of one of the two major parties which wins just as many elections as the other one. Electing an anti-Muslim politician in France is (unfortunately) an ever-present risk.<sup>104</sup> Electing an anti-Christian politician in the United States is (thankfully) impossible. This undeniable political reality matters.

The failure to attend to this reality has already led to some truly bizarre distortions in our caselaw even in the absence of a constitutional requirement

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103. See Aala Abdelgadir & Vasiliki Fouka, *Political Secularism and Muslim Integration in the West: Assessing the Effects of the French Headscarf Ban*, 114 AM. POL. SCI. REV. 707, 709–10 (2020) (recounting history of French headscarf ban in schools, origins in anti-Muslim bigotry and fears about Muslim “assimilability”).

104. See generally Catherine Fieschi, *Muslims and the Secular City: How Right-Wing Populists Shape the French Debate over Islam*, BROOKINGS (Feb. 28, 2020), <https://www.brookings.edu/research/muslims-and-the-secular-city-how-right-wing-populists-shape-the-french-debate-over-islam> [<https://perma.cc/5DGE-R7KP>] (describing roots of France’s increasingly popular far-right party in anti-Islamic hatred and in colonialism).

to accommodate religious exercise.<sup>105</sup> For example, in numerous cases since the beginning of the COVID-19 pandemic federal courts, including the Supreme Court, have struck down or preliminarily enjoined as “discrimination” restrictions on religious activity meant to keep people out of crowded rooms doing things like singing (and breathing on one another) to mitigate the spread of the deadly virus.<sup>106</sup> These cases have nearly universally relied (either directly, or by citing other cases in this collection which so relied) on *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, which held that, notwithstanding *Employment Division v. Smith*, the government violates the Free Exercise Clause when it targets religious exercise for especially poor treatment.<sup>107</sup>

The differences between *Lukumi Babalu Aye* and the COVID-19 cases are so obvious—and so connected to disparities in political power—that it is almost impossible to understand that reliance as even in good faith. *Lukumi Babalu Aye* concerned a tiny minority religion—the Santeria church.<sup>108</sup> The people of Hialeah enacted an anti-animal-sacrifice ordinance for the express purpose of chasing the church out of town, and notwithstanding the fact that the jurisdiction was already covered by perfectly good statewide animal cruelty laws that handled the only possible nonbigoted reason for the enactment.<sup>109</sup> By contrast, the COVID-19 cases almost universally involved Christians, with the only exceptions being a couple of Jewish groups in New York and New Jersey (where Jewish people probably constitute enough of the population to have some protection from discrimination by elected officials, at least relative to, for example, practitioners of Santeria in Florida).<sup>110</sup> And the alleged discrimination against

105. I think the Koppelman contribution to this symposium shows that the so-called “most-favored nation” approach to interpreting the prohibition on religious discrimination present in the Supreme Court’s existing jurisprudence essentially collapses into a requirement for accommodations. Andrew Koppelman, *The Increasingly Dangerous Variants of the “Most-Favored-Nation” Theory of Religious Liberty*, 108 IOWA L. REV. 2237, 2250–53 (2023).

106. See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460, 1460 (2021) (mem.); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889, 889 (2020) (mem.); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021); *Gish v. Newsom*, 141 S. Ct. 1290, 1290 (2021) (mem.); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65 (2020); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527, 527 (2020); *Robinson v. Murphy*, 141 S. Ct. 972, 972 (2020) (mem.). In contexts like the COVID-19 cases, the Supreme Court’s emergency injunctions, even if nominally preliminary, can be *de facto* final, and scholars have also observed that such orders can for all intents and purposes shift First Amendment doctrine even in the absence of a written opinion. See, e.g., Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U.J.L. & LIBERTY 699, 730–31 (2022) (explaining how the Court used an emergency COVID-19 injunction without an accompanying majority opinion in one case as precedent in a subsequent COVID-19 injunction).

107. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

108. *Id.* at 524.

109. *Id.* at 526–28, 534–42.

110. See, e.g., Eliza Shapiro & Brian M. Rosenthal, *In Hasidic Enclaves, Failing Private Schools Flush With Public Money*, N.Y. TIMES (Sept. 12, 2022), <https://www.nytimes.com/2022/09/11/ny-region/hasidic-yeshivas-schools-new-york.html> [<https://perma.cc/S6UK-HBKA>] (describing

religion in these cases, rather than being some effort by local leaders to drive a disfavored group out of town, simply amounted to ham-fisted policy choices made in a time of crisis—closing churches but leaving some other facilities open which arguably were no more necessary in the emergency than churches. Those policy choices may have been misguided but they weren't in any reasonable interpretation rooted in the kind of bigotry displayed by the town of Hialeah—and obviously not, because that kind of bigotry in any of the elected officials at issue in the COVID-19 cases would have been met by severe electoral consequences, because the underlying religions were perfectly capable of defending their interests in the political process.

In other contexts, I have argued that our rule of law discourse has the unfortunate habit of tracking existing relationships of power. We tend to make and hear rule of law claims on behalf of property holders, corporations, and other dominant social groups, but fail to hear them on behalf of immigrants, those accused of crime, those subject to racial injustice, and other subordinated or denigrated social groups.<sup>111</sup> This is exactly backwards. If the function of the rule of law is to protect against arbitrary power, then our moral concern ought to be directed toward those who are likely to be the victims of arbitrary power, that is, those who lack sufficient reserves of social, economic, or political power to defend themselves from legal injustice.

Precisely the same point applies to religious accommodations and religious discrimination jurisprudence. The best justification of Free Exercise Clause jurisprudence either in its accommodations guise or its discrimination guise is to protect religious minorities from laws which arbitrarily regulate their faith.<sup>112</sup> But, religious majorities are much less likely to be subjected to arbitrary power. Nonetheless, as Epstein and Posner have empirically identified, one difference between the Free Exercise jurisprudence in the days before *Employment Division v. Smith* and the Roberts Court's Free Exercise jurisprudence in the slow-boiling collapse of the *Smith* regime is that the former tended to protect members of minority faiths, while the latter tends to protect Christian, majority interests.<sup>113</sup>

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subsidies to schools run by Hasidic Jewish groups and protection of those subsidies due to political power of those groups in New York). Among the cited cases in footnote 98, all involved Christian plaintiffs who won injunctive relief against Covid restrictions; two of them, *Robinson v. Murphy* (out of New Jersey) and *Roman Catholic Diocese of Brooklyn v. Cuomo* (out of New York), also had Jewish plaintiffs. See *supra* note 105.

111. See, e.g., Paul Gowder, Book Review, 31 LAW & POL. BOOK REV. 12, 40–41 (2021) (reviewing CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE (2020)), <http://www.lpbr.net/2021/01/law-and-leviathan-redeeming.html> [<https://perma.cc/Q33R-V2DS>]; GOWDER, *supra* note 14, at 3–5; Gowder, *supra* note 23, at 3.

112. By “arbitrary” here, I mean to describe situations in which those exercising regulatory power are insufficiently accountable to those over whom power is exercised to ensure that the legitimate interests of the latter are taken into consideration.

113. Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315, 325–26.



In the United States, we're notoriously bad at applying legal rules meant to protect the powerless against the powerful in ways that are conscious of disparities of power. This point is most famously made by critical race theorists in the case against so-called "color blindness,"<sup>114</sup> and by constitutional theorists in the case for antisubordination vs. anticlassification approaches to equal protection.<sup>115</sup> But it applies on similar terms to our understanding of Free Exercise. When applied to protect minorities, either the accommodations or the discrimination side of Free Exercise can protect liberal democratic freedom. But like in the critique of color blindness and the associated critique of the classification approach to equal protection, when you apply a hierarchy-sensitive legal principle in a hierarchy-blind way, that principle starts to do more harm than good, to oppress rather than liberate.

So why must we blind ourselves to the underlying sociopolitical reality that members of minority faiths have a lot less power than the majority does? (Where is *Carolene Products* Footnote Four<sup>116</sup> when we need it?) The only possible justification for neglecting reality is the unfortunate fact that sociologically informed jurisprudence is *hard*. Judges arguably are not competent to determine who is a religious minority and who is a religious majority in a given case. The minority status of The Church of the Lukumi Babalu Aye is obvious—but how about, for example, Pentecostals, or even Catholics? Are they members of a majority religion because they're Christians, or minority religions because they are meaningfully different from, and a small part of, other Christians? Or do we require contextually rooted judgments, evaluating, for example, Mormons as a majority religion in Utah but a minority religion in California? And what on earth do we do when we disaggregate from institutional religions with clear public identities to individual religious practice which may not match any organized doctrine?

Yet we have long had a tool in the law for dealing with epistemic lacunae of all kinds: burden-shifting. Often in the law we identify some overriding policy reason in favor of favoring one outcome over another in the face of a difficult-to-know contingency about the world, or a disparity in knowledge between the parties in some dispute, and choose to resolve it by imposing on the party with greater knowledge or against whom the weight of policy considerations lies the burden of crossing the epistemic gap.<sup>117</sup> In view of the unacceptable risk

114. See generally, e.g., Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991) (critiquing color-blind constitutionalism).

115. See generally Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004) (describing the debate over antisubordination and anticlassification).

116. See *supra* note 1 and accompanying text.

117. For just one famous example, see *Summers v. Tice*, 199 P.2d 1, 4-5 (Cal. 1948) (shifting burden of proof on causation to defendants in negligence case involving multiple simultaneous unreasonable gunshots on the dual basis that defendants might be in better position to prove lack of involvement and that policy considerations forbade stripping innocent plaintiff of right to recovery).

that accommodations for those with political, social, or economic power might become tools of oppression rather than guards against it, we should do the same thing here. Once *Employment Division v. Smith* finally keels over, the Court should limit accommodations to cases where there is a *clear* inequality of power by imposing the burden on litigants seeking a religious accommodation to prove that they lack the ability to protect themselves in the political process. This could be done through, for example, direct evidence of official bias like in *Lukumi*, or it could be through the expert testimony of political scientists, demographers, and sociologists about the minority status of their faith, or exclusion of people with beliefs like theirs from power, in the relevant jurisdiction.

The same rule ought to be applied to non-accommodations-based claims of religious discrimination such as in the COVID-19 cases described above. As discussed, it's patently absurd to suppose that a COVID-19 public gathering restriction, which exempts, say, grocery stores and not churches, reflects some kind of official denigration of religion or judgment that "feeding the soul" is less important than "feeding the body." Occam's Razor would suggest that such restrictions were instead hasty but good-faith responses to a public emergency which attempted to balance various needs of physical survival (getting food, avoiding disease) against one another. The judgment that the antireligious theory of COVID-19 restrictions is patently absurd is rooted in two observations. First is what we all know from our daily lives: urgent decisions in times of crisis are always messy. Second, and more importantly, many religious groups—particularly those which represent majorities, independently or in coalition with similar groups—have genuine political power. Any interpretation of the COVID-19 restrictions that attributes them to some kind of disdain for religion (or for any specific religion) rather than ham-fistedness requires a story about how the supposed religion-haters overcame that political power. In the doctrine, we should adopt that commonsense approach by imposing the requirement that those claiming discrimination make a credible showing that their religious interests were actually disregarded (as opposed to merely outweighed by the likes of a public health emergency). That showing becomes less plausible to the extent the plaintiff's faith dominates the local community. Requiring it could prevent bizarre and nonsensical claims of "discrimination," like those characterizing the COVID-19 cases, from undermining public policy and from trivializing cases of genuine discrimination against religious minorities as in *Lukumi*.<sup>118</sup>

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118. Moreover, the real-world political underpinnings of a claim of religious discrimination were at least relevant to some of the pre-*Smith* caselaw. See, e.g., *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (rejecting claim for religious accommodations to law requiring provision of Social Security number to obtain welfare benefits in part on grounds that "[t]here is no claim that there is any attempt by Congress to discriminate invidiously or any covert suppression of particular religious beliefs"); *id.* at 708 ("Here there is nothing whatever suggesting antagonism by Congress towards religion generally or towards any particular religious beliefs.").

Returning to *On Fire Christian Ctr. v. Fischer*: According to the Pew Research Center, the state of Kentucky is seventy-six percent Christian, including forty-nine percent Evangelical Protestant.<sup>119</sup> I have been unable to find a similarly authoritative recent source on the religious demographics of Louisville alone, but a 2010 Ph.D. dissertation from the University of Louisville concludes, based on 2006 data, that Louisville had sixty percent non-Catholic Christians and twenty-four percent Roman Catholics within the population.<sup>120</sup> Either way you count it, the best available evidence is that a gigantic majority of the electorate that could punish a Louisville politician for shuttering a church on Easter were people whose religious identity would have led them to care about Easter. It is politically delusional—or dishonest—to suppose, as Judge Walker apparently did, that Louisville’s COVID-19 restrictions could have been implemented based on animus toward, or even disregard of, the religious motivation of Christians to attend Easter services.

On Fire Christian Center should not have received an exemption from Louisville’s COVID-19 regulations. Neither should any other religious group perfectly capable of protecting itself in the political process, whether under a discrimination theory or an accommodations theory.

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119. *Religious Landscape Study: Adults in Kentucky*, PEW RSCH. CTR., <https://www.pewresearch.org/religion/religious-landscape-study/state/kentucky> [<https://perma.cc/PW36-P8A8>].

120. Joshua D. Ambrosius, *Religion and Regionalism: Congregants, Culture and City-County Consolidation in Louisville, Kentucky* 126 (May 2010) (Ph.D. dissertation, University of Louisville), [https://ecommons.udayton.edu/cgi/viewcontent.cgi?article=1030&context=pol\\_fac\\_pub](https://ecommons.udayton.edu/cgi/viewcontent.cgi?article=1030&context=pol_fac_pub) [<https://perma.cc/3EJL-6MH7>].