Religious Freedom and Abortion

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ABSTRACT: The demise of Roe v. Wade *has raised a host of religious liberty questions that were submerged prior to the Supreme Court's decision in* Dobbs v. Jackson Women's Health Organization. *One question is whether state abortion bans are subject to challenge under the Establishment Clause, and state analogs, on the grounds that the government is forbidden from imposing religiously motivated laws. Another question is whether abortion restrictions violate the free exercise rights of people who are religiously motivated to seek, provide, or facilitate abortion services.*

We evaluate these claims by way of making a more sustained argument about the current politics of church-state relations under the Roberts Court. First, we argue that abortion bans should be vulnerable to Establishment and Free Exercise challenges under doctrinal standards adopted in recent cases, which have closely scrutinized laws burdening religiously motivated conduct. Second, despite the Justices' expansive approach to religious freedom, we nevertheless predict that the Supreme Court will deny exemptions in the abortion context. It will do so not only because of the Justices' political inclinations, but also because the doctrine is sufficiently malleable to allow rejecting certain kinds of religious liberty claims while accepting others. Third, we argue that this selective application of the Court's religious liberty jurisprudence vindicates a long-standing critique of judicially mandated free exercise exemptions, namely, that such exemptions too easily permit judges to pick and choose among religious claims.

The Court's recent innovations in free exercise doctrine will favor certain religious believers over others, raising a broader question about whether it is possible for liberal and progressive believers to vindicate their claims to religious freedom. In the abortion context, those who demand exemptions to advance their belief that life begins at conception will receive them, while those

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who demand exemptions to protect their belief that life begins later, or that the health and life of pregnant individuals are of paramount importance, will not. In this way, free exercise exemption doctrine serves as an instrument of religious preferentialism.

INTRODUCTION

The demise of *Roe v. Wade* has raised a host of religious liberty questions that had been submerged prior to the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.[1] One question is whether state abortion bans are subject to challenge under the Establishment Clause of the First Amendment, and similar provisions in state constitutions, on the grounds that the government is forbidden from imposing religiously motivated laws.[2] There

1. *See generally* Roe v. Wade, 410 U.S. 113 (1973); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2285 (2022).

2. The requirement that laws have a primary secular purpose—that they not be motivated solely or predominantly by religious ends—was an aspect of the much-maligned *Lemon* test, which was used for decades to apply the federal Establishment Clause. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). But despite long-standing criticisms of *Lemon*, the Supreme Court repeatedly reaffirmed this aspect of Establishment Clause doctrine. *See* McCreary County v. ACLU of Ky., 545

is renewed interest in this question,[3] stemming from the widely held view that abortion bans rest on controversial theological or philosophical claims about when life begins or, more accurately, about when to assign rights associated with moral or legal personhood.[4] Another question is whether abortion restrictions violate the free exercise rights of people who are religiously motivated to seek, provide, or facilitate abortion services.[5]

U.S. 844, 859–60 (2005) ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality . . . ."); Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314–15 (2000); Edwards v. Aguillard, 482 U.S. 578, 583 (1987); Wallace v. Jaffree, 472 U.S. 38, 56–61 (1985); Stone v. Graham, 449 U.S. 39, 41 (1980). Although the Court has now effectively overruled *Lemon*, see *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427–28 (2022), it has not directly addressed the status of its precedents involving a secular purpose requirement. We return to this issue below at *infra* Section II.A.

3. *See, e.g.*, Jack Karp, *Religious Freedom Arguments Gain Ground in Abortion Fights*, LAW360 PULSE (Aug. 10, 2022, 4:37 PM), https://www.law360.com/pulse/articles/1519708/religious-freedom-arguments-gain-ground-in-abortion-fights [https://perma.cc/537Y-J4MN]; Kelsey Dallas, *Do Abortion Bans Violate the Establishment Clause?*, DESERET NEWS (July 10, 2022, 10:00 PM), https://www.deseret.com/faith/2022/7/10/23195510/do-abortion-bans-violate-the-establishment-clause-christian-nation-separation-of-church-and-state [https://perma.cc/LQ4H-YRML]; Madeleine Carlisle & Abigail Abrams, *Does Religious Freedom Protect a Right to an Abortion? One Rabbi's Mission to Find Out*, TIME (July 7, 2022, 6:51 PM), https://time.com/6194804/abortion-religious-freedom-judaism-florida [https://perma.cc/8QJW-D4YA]; Melody Schreiber, *'Theocratic' US Abortion Bans Will Violate Religious Liberty, Faith Leaders Say*, GUARDIAN (June 2, 2022, 8:42 AM), https://www.theguardian.com/world/2022/jun/02/abortion-bans-violate-religious-liberty [https://perma.cc/69WR-CYY5]. *See also* Linda Greenhouse, Opinion, *Let's Not Forget the Establishment Clause*, N.Y. TIMES (May 23, 2019), https://www.nytimes.com/2019/05/23/opinion/abortion-supreme-court-religion.html [https://perma.cc/2H5M-E2AV] (noting that "[t]here was once a robust Establishment Clause conversation surrounding restrictions on abortion" and suggesting that arguments from that conversation "are perhaps even more relevant today than they were [thirty] years ago").

4. *See* Kate Greasely, *In Defense of Abortion Rights*, *in* ABORTION RIGHTS: FOR AND AGAINST 1, 6–7 (2017) (distinguishing the questions of when human life begins and when to ascribe moral personality and rights).

5. Multiple suits have been filed asserting these types of religious freedom challenges. *See, e.g.*, Verified Complaint, Pomerantz v. Florida, No. 1544464609 (Fla. Cir. Ct. 11th Aug. 1, 2022) [hereinafter Complaint, *Pomerantz*]; Second Amended Complaint, Generation to Generation, Inc. v. Florida, No. 2022-ca-000980 (Fla. Cir. Ct. 2d Aug. 9, 2022) [hereinafter Complaint, *Generation*]; Complaint, Satanic Temple v. Little, No. 1:22-cv-00411 (D. Idaho Sept. 30, 2022); Complaint, Satanic Temple v. Holcomb, No. 1:22-cv-01859 (S.D. Ind. Sept. 21, 2022); Class Action Complaint for Declaratory and Injunctive Relief, Anonymous Plaintiffs v. Individual Members of the Med. Licensing Bd. of Ind., No. 49D01-2209-pl-031056 (Super. Ct. Ind. Sept. 8, 2022) [hereinafter Complaint, *Anonymous Plaintiffs*]; Complaint, Sobel v. Cameron, No. 3:22-cv-00570-RGJ (W.D. Ky. Oct. 26, 2022) [hereinafter Complaint, *Sobel*]; Complaint, Blackmon v. Missouri, No. 2322-CC00120 (Mo. Cir. Ct. Jan. 19, 2023) [hereinafter Complaint, *Blackmon*]; Complaint, Satanic Temple, Inc. v. Hellerstedt, No. 4:21-cv-00387 (S.D. Tex. Feb. 5, 2021); Complaint, Planned Parenthood Assoc. of Utah v. Utah, No. 220903886 (D. Utah June 25, 2022); Complaint, Johnson v. Wyoming, No. 18732 (D. Wy. July 25, 2022); *see also A Religious Right to Abortion*: *Legal History & Analysis*, COLUM. L. SCH.: L., RTS. & RELIGION PROJECT 1, 15–23 (Aug. 2022), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/LRRP%20Religious%20Liberty%20%26%20Abortion%20Rights%20memo.pdf [https://perma.cc/XY48-JRFY] (collecting free exercise cases challenging abortion restrictions).

In this Essay, we evaluate these claims by way of making a more sustained argument about the current politics of church-state relations under the Roberts Court. First, we argue that abortion bans should be vulnerable to Establishment and Free Exercise challenges under doctrinal standards adopted in recent cases, which have closely scrutinized laws burdening religiously motivated claimants. The Court's recent invalidation of COVID-related public health regulations on free exercise grounds illustrates its eagerness to provide expansive protections for religious liberty.[6] Applied fairly, that doctrine should also protect those who object in conscience to prohibitions on abortion.

Second, despite the Justices' expansive rhetoric and doctrine concerning religious freedom, we expect that, if faced with the issue, the Supreme Court would deny religious exemptions in the abortion context. Some state courts might be more amenable to such exemption claims.[7] But more conservative federal courts, including the Supreme Court, will reject them, not only because of the political inclinations of those courts, but also because the doctrine is sufficiently manipulable that it can be used to reject certain kinds of religious liberty claims while accepting others.

Third, and finally, we argue that the reality of this "selective" application of religious liberty jurisprudence vindicates a long-standing critique of judicially mandated free exercise exemptions, namely, that such exemptions too easily permit judges to pick and choose among religious liberty claimants.[8]

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6. *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021); *see also infra* note 108 (collecting cases).

7. As this Essay was in the publication process, a state trial court in Indiana became the first to apply a state RFRA to grant a preliminary injunction for religious exemptions from a state abortion ban. *See* Anonymous Plaintiffs 1-5 v. Individual Members of the Med. Licensing Bd. of Ind., No. 49D01-2209-pl-031056, slip op. at *43 (Super. Ct. Ind. Dec. 2, 2022) (order granting preliminary injunction).

8. *See, e.g.*, Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 37 (2015) ("Over time, however, that [religious exemption] regime is highly likely to be unprincipled, ad hoc, inconsistent, subject to manipulation, and predominantly statist."); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 311 (1991) (arguing that a doctrine of religious exemptions will favor majority over minority religions); *see also* Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2480 (2021) [hereinafter Tebbe, *Equal Value*] (arguing that that Court's recent free exercise jurisprudence "risks the impression that it is pursuing a distinctive mix of preferentialism and libertarianism"); Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 317 (2021) [hereinafter Tebbe, *Liberty of Conscience*] ("Recent studies have provided empirical evidence that is consistent with the impression that the Roberts Court favors religious interests with detectable systematicity. Moreover, the current Court's support for religious actors tracks both partisan affiliation and conservative ideology."); Leah M. Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1, 74 (2022) ("The Court's free exercise cases provide some additional fodder for critics . . . who have expressed concern that the [political process] theory would result in courts picking and choosing between groups in unprincipled ways and ultimately favoring their preferred causes and groups.").

We have also contributed to advancing this critique of religious preferentialism. *See* Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341, 1349 (2020) [hereinafter Schragger & Schwartzman, *Religious Antiliberalism*]; Richard Schragger & Micah Schwartzman, *Establishment Clause Inversion in the Bladensburg Cross Case*, 2019 ACS SUP. CT. REV. 21, 24, 55–57 [hereinafter Schragger & Schwartzman, *Establishment Clause Inversion*].

The Court's recent innovations in free exercise doctrine will invariably favor certain religious believers over others, raising a broader question about whether it is possible for liberal and progressive believers to vindicate their claims to religious freedom. In the abortion context, those who demand exemptions to advance their belief that life begins at conception will receive them, while those who demand exemptions to protect their belief that life begins later, or that the health and life of pregnant people are of paramount importance, will not. In this way, free exercise exemption doctrine serves as an instrument of religious preferentialism.

I. RELIGIOUS ESTABLISHMENT AND ABORTION

Immediately after the Court handed down its decision in *Dobbs*, overruling *Roe v. Wade*,[9] a number of existing state abortion restrictions or "trigger laws" went into effect.[10] Some states, including Arkansas, Mississippi, Missouri, Oklahoma, and South Dakota, enforced abortion bans under nearly all circumstances.[11] Within months, other state legislatures introduced numerous bills proposing restrictions, including early gestational bans in some states and total prohibitions in others.[12] In most states where abortion is prohibited, there are now no exceptions for cases of rape and incest.[13]

In response to some of these abortion bans, several lawsuits have been filed raising Establishment and Free Exercise claims. There are cases now pending in multiple states, including Florida, Idaho, Indiana, Kentucky, Missouri, and

9. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242–43 (2022).

10. *See* Larissa Jimenez, *60 Days After* Dobbs*: State Legal Developments on Abortion*, BRENNAN CTR. FOR JUST. (Aug. 24, 2022), https://www.brennancenter.org/our-work/research-reports/60-days-after-dobbs-state-legal-developments-abortion [https://perma.cc/C9WM-GNU6]; Devan Cole & Tierney Sneed, *Where Abortion 'Trigger Laws' and Other Restrictions Stand After the Supreme Court Overturned* Roe v. Wade, CNN (July 4, 2022, 8:20 PM), https://www.cnn.com/2022/06/27/politics/states-abortion-trigger-laws-roe-v-wade-supreme-court/index.html [https://perma.cc/Y8AG-ANQ5].

11. *See* Natasha Ishak, *Trigger Laws and Abortion Restrictions, Explained*, VOX (June 25, 2022, 5:02 PM), https://www.vox.com/2022/6/25/23182753/roe-overturned-abortion-access-reproductive-rights-trigger-laws [https://perma.cc/HB5B-NR4N].

12. *See* Sarah McCammon, *Two Months After the* Dobbs *Ruling, New Abortion Bans are Taking Hold*, NPR (Aug. 23, 2022, 2:42 PM), https://www.npr.org/2022/08/23/1118846811/two-months-after-the-dobbs-ruling-new-abortion-bans-are-taking-hold [https://perma.cc/QGK5-MH3G]; *see also Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Feb. 10, 2023, 5:00 PM); https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html [https://perma.cc/2R6B-XWRJ].

13. Fabiola Cineas, *Rape and Incest Abortion Exceptions Don't Really Exist*, VOX (July 22, 2022, 4:20 PM), https://www.vox.com/23271352/rape-and-incest-abortion-exception [https://perma.cc/E9SY-TCZW]; Louis Jacobson, *15 States with New or Impending Abortion Limits Have No Exceptions for Rape, Incest*, POYNTER (July 20, 2022), https://www.poynter.org/fact-checking/2022/post-roe-v-wade-state-bans-no-exceptions-rape-incest [https://perma.cc/LUA8-9LU3].

Texas,[14] and more are likely to follow.[15] With *Dobbs* foreclosing a constitutional right to reproductive privacy or autonomy under the federal constitution, the terrain for challenging abortion restrictions has shifted, in part, to religious liberty. In the complaints filed so far, litigants have asserted under state and federal Establishment Clauses that abortion bans are religiously motivated and advance or endorse a particular religious doctrine, in violation of the separation of church and state.[16] The complaints also assert free exercise claims on the grounds that abortion restrictions impose substantial burdens on people who are motivated by their religious commitments to seek abortions or to counsel, assist, or provide others with abortion services.[17]

We consider the basis for these claims under the Court's existing Religion Clause jurisprudence. Without endorsing that body of law, much of which we have criticized extensively elsewhere,[18] we argue that both challenges are stronger than might be expected, even though neither is likely to succeed in a Supreme Court dominated by a lopsided conservative majority. In this Part, we examine objections to abortion bans under the Establishment Clause, and in the next we turn to Free Exercise. Our focus here is on federal law, though our analysis may also apply where plaintiffs have brought state constitutional and statutory claims. Where state courts follow U.S. Supreme Court doctrine, the analysis may be similar or perhaps even identical, but where they depart—and this may occur especially on the Establishment Clause side—plaintiffs' claims may be stronger under state constitutional provisions than under the First Amendment.[19]

A. THE ESTABLISHMENT CLAUSE CHALLENGE

Establishment Clause challenges to state abortion bans claim that these laws impose a particular and controversial religious doctrine by declaring that life begins at conception and by giving priority to the life of the fetus, even when the pregnant person's health and life are in jeopardy. Abortion bans are said

14. *See* complaints cited *supra* note 5.

15. *See* Rylee Wilson, *Some North Texas Ministers Tell Paxton Abortion Ban Violates Their Religious Freedom*, DALL. MORNING NEWS (Aug. 26, 2022, 6:13 PM), https://www.dallasnews.com/news/politics/2022/08/26/some-north-texas-ministers-tell-paxton-on-abortion-ban-violates-their-religious-freedom [https://perma.cc/LA2U-9BAF].

16. *See, e.g.*, Complaint, *Pomerantz*, *supra* note 5, at 31–33 (stating a claim under the federal Establishment Clause).

17. *See* complaints cited *supra* note 5, (raising state or federal free exercise claims, or both).

18. *See* Schragger & Schwartzman, *Religious Antiliberalism*, *supra* note 8, at 1381–1409 (surveying collapse of church-state doctrine); Schragger & Schwartzman, *Establishment Clause Inversion*, *supra* note 8, at 55–56 (discussing the Supreme Court's turn toward religious preferentialism).

19. State constitutions contain provisions that often differ from the U.S. Constitution's Religion Clauses, often providing more detailed rights of conscience or restrictions on support for religion. *See generally* Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 VAL. U. L. REV. 353 (2004) (detailing the history and relevancy of state religion clauses).

to codify the views of religious conservatives, especially those of white evangelicals and conservative Catholics, in opposition to the convictions of most mainline Protestants, Reform and Conservative Jews, many Muslims, and other liberal or progressive believers.[20] To the extent that such bans "require[] individuals to lead their lives in accord with the religious beliefs of others,"[21] such bans are unconstitutional.[22]

This objection accords with a commonly held view that the abortion controversy is a conflict among competing religious doctrines. As Ronald Dworkin once argued, "the popular sense that the abortion issue is fundamentally a religious one, and some lawyers' sense that it therefore lies outside the proper limits of state action, are at bottom sound . . . ."[23] Justice Stevens embraced a similar objection in *Webster v. Reproductive Health Services*.[24] Others have criticized this argument, in part on the ground that prohibitions on abortion might be justified based on secular moral commitments.[25]

Whether abortion bans could, in theory, have secular justifications, an Establishment Clause objection can also be framed in terms of improper government motivation. The basic principle is that the state cannot have as its actual purpose religious reasons for legislation. For example, a law outlawing the sale or consumption of pork would be illegitimate if it were adopted on the grounds that a ban is required by the tenets of a particular religion.[26] As applied to abortion bans, the argument is that even if a law appears to be facially neutral with respect to religion—even if it does not purport to take a religious position—the purpose, intent, or motivation for the law is theological.[27]

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20. *See, e.g.*, Complaint, *Pomerantz*, *supra* note 5, at 7 ("Since time immemorial, the questions of when a potential fetus becomes a life and how to value maternal life during a pregnancy have been answered according to religious beliefs and creeds. HB 5 codifies one of the possible religious viewpoints on the question . . . ."); Complaint, *Generation*, *supra* note 5, at 21 ("In matters of abortion, the Act establishes and imposes, upon Jews, a Christian view . . . .").

21. Geoffrey R. Stone, *Same-Sex Marriage and the Establishment Clause*, 54 VILL. L. REV. 617, 618 (2009).

22. For arguments along these lines, see RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 162–64 (1993); Judith Jarvis Thomson, *Abortion: Whose Right?*, BOS. REV. (Oct. 16, 1995), https://www.bostonreview.net/forum/judith-jarvis-thomson-abortion-o [https://perma.cc/PG4A-ZWAP]; and Leo Pfeffer, *Abortion and Religious Freedom*, 43 CONG. MONTHLY 9, 11–12 (1976).

23. DWORKIN, *supra* note 22, at 164.

24. Webster v. Reprod. Health Servs., 492 U.S. 490, 566–67 (1989) (Stevens, J., concurring in part and dissenting in part).

25. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1350 (2d ed. 1988).

26. *See* Micah Schwartzman, *Must Laws Be Motivated by Public Reason?*, *in* PUBLIC REASON AND COURTS 45, 60 (Silje A. Langvatn, Mattias Kumm & Wojciech Sadurski eds., 2020) (discussing this example).

27. *See, e.g.*, Brief of the Freedom from Religion Foundation et al. as Amici Curiae Supporting Respondents at 4, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) [hereinafter Brief of the Freedom from Religion Foundation, *Dobbs*] ("[S]tate actors passing pre-viability bans on abortion engage in acrobatics to obfuscate their true legislative motivation and intent—imposing a particular religious ideology upon other citizens."); Complaint, *Generation*,

And if there is sufficient evidence that an abortion ban is religiously motivated or aims to promote religious values, then the ban violates the Establishment Clause requirement that all laws must have a primary or predominant secular purpose.[28]

We recognize, of course, that these types of Establishment Clause arguments face immediate and seemingly insurmountable obstacles under existing doctrine. First, as is well known, the Supreme Court rejected an Establishment Clause challenge to the Hyde Amendment, which prohibited federal funding of medically indicated (or "therapeutic") abortion.[29] In *Harris v. McRae*, the Court applied the *Lemon* test, including its secular purpose requirement,[30] but held that the Hyde Amendment did not run afoul of the Establishment Clause merely "because it 'happens to coincide or harmonize with the tenets of some or all religions.'"[31] The Court reasoned just because "Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny."[32] And it extended this logic to the abortion context, holding "that the fact that the funding restrictions . . . may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause."[33] The same reasoning, we expect, would apply not only to funding restrictions, but also to bans on abortion.

Even if *McRae* were not sufficient to dispose of the issue, the current Court has recently signaled its rejection of the *Lemon* test. In *Kennedy v. Bremerton School District*, which involved a challenge to teacher-led prayer in public schools, the Court announced, for the first time, that it had "long ago abandoned *Lemon* and its endorsement test offshoot" in favor of an approach to interpreting the Establishment Clause in "'reference to historical practices and understandings.'"[34] In making this announcement, the Court did not directly address its line of cases involving the secular purpose requirement, including cases from within the last two decades.[35] One might consider the possibility that "historical practices and understandings" support a secular

supra note 5, at 20–21 ("The Act reflects the views of a minority of Christians in the Act's restriction of religious freedom to others."); Complaint, *Sobel*, *supra* note 5, at 9 ("Kentucky's Abortion Law is a product of this sectarian movement.").

28. *See supra* note 2 and accompanying text; *see also* Karp, *supra* note 3 ("'These laws have a religious purpose. They're unconstitutional under the First Amendment,' Cavell of the Freedom from Religion Foundation said. 'I think that's a clean, simple and obvious argument.'").

29. *See* Harris v. McRae, 448 U.S. 297, 315 (1980).

30. *Id.* at 319.

31. *Id.* (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

32. *Id.*

33. *Id.* at 319–20.

34. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

35. *See* McCreary County v. ACLU of Ky., 545 U.S. 844, 864–65 (2005); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308–09 (2000).

purpose requirement, both from the Founding era and following ratification of the Fourteenth Amendment.[36] But for the conservative Justices who dominate the Supreme Court, it seems reasonably clear that they have either already rejected such a requirement, as part of their "abandonment" of *Lemon*, or that they are prepared to do so. Some of the Justices have been fairly explicit in this regard. In a recent diatribe against *Lemon*, Justice Gorsuch, joined by Justice Thomas, ridiculed the idea that laws must have a secular purpose, asking "[h]ow much religion-promoting is too much?" and "[a]re laws that serve both religious and secular purposes problematic?"[37]

In asking this question, Justice Gorsuch did not address the central issue of whether laws can have only religious reasons, which would have required taking the antitheocratic constitutional concern behind *Lemon* seriously enough to imagine the full implications of rejecting a secular purpose requirement. We might ask: Would it be permissible for a state to enact an abortion ban on the grounds that God's authority demands it? Or what about a prohibition on gay marriage justified in this way? Or a law relying on biblical grounds to criminalize sexual relationships between LGBTQ+ people?

The Establishment Clause claim in the abortion context cannot so easily be distinguished from these others. Although he may not have intended it this way, Justice Gorsuch's question—"[h]ow much religion-promoting purpose is too much?"—strikes us as perfectly sensible, and is one that has informed Religion Clause jurisprudence for decades**.**

B. SECULAR PURPOSE, ANIMUS, AND PREFERENCE

We turn to that question here. Courts considering Establishment Clause challenges—under either the First Amendment or state analogs—cannot simply cite *McRae* and move on. A state court interpreting its own disestablishment provision is not bound by *McRae,* and it could apply a more searching standard of review to religiously motivated laws. And while some conservative Justices may disfavor a secular purpose requirement, the principle that motivates that requirement is deeply rooted in federal constitutional law.

Our view is reinforced by some recent decisions of the Roberts Court that work to undermine standard objections to a secular purpose requirement. Those objections tend to focus on (1) whether courts can know if, or when,

36. Perhaps surprisingly, this history may not yet be told, but its outlines from Locke through Madison are clear enough. *See, e.g.*, Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 383 (2002). The main arguments for disestablishment in the American Founding turned on a distinction between civil interests, on one side, and theological ends, on the other. The government had jurisdiction over the former, but not over the latter—hence Madison's declaration "that religion is wholly exempt from [Civil Society's] cognizance." *See* James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* MADISON: WRITINGS 29, 30 (Jack N. Rakove ed., 1999). For Madison, as for Locke, it was impermissible for the government to use its power to advance religious ends.

37. *See, e.g.*, Shurtleff v. City of Boston, 142 S. Ct. 1583, 1603–04 (2022) (Gorsuch, J., concurring).

government officials have a religious or secular purpose,[38] (2) whether having a religious purpose changes the meaning of an otherwise facially neutral government act, (3) whether a law that has both religious and secular purposes is permissible—the Court's concern in *McRae* and a version of Justice Gorsuch's question, but this time taken seriously—and (4) whether a secular purpose requirement discriminates, in effect, against religious believers.

1. The Epistemic Objection

The answer to the first of these concerns about determining official intentions, which one of us has elsewhere called the "epistemic objection,"[39] is that the Court has adopted a totality-of-the-circumstances approach for discerning government purpose in free exercise cases.[40] As a matter of principle and consistency, the same approach to sorting out whether the government has complied with its "obligation of religious neutrality"[41] should apply under the Establishment Clause.

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, seven Justices agreed to a holistic, multifactored assessment of the government's neutrality.[42] The relevant factors, borrowed from Equal Protection Clause doctrine involving race discrimination under *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,[43] "include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body."[44] Considering those factors in *Masterpiece Cakeshop*, the Court found that statements made by public officials demonstrated hostility to religion in violation of the Free Exercise Clause.[45] Moreover, the Court held that the failure of other state officials to disavow those statements tainted the entire decision-making process for which those officials were responsible.[46]

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38. For general statements of this objection, see Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 148 & n.95 (2018) (collecting cites).

39. *See id.* at 148; Micah Schwartzman, *Official Intentions and Political Legitimacy: The Case of the Travel Ban*, 61 POL. LEGITIMACY 201, 204–05 (2019).

40. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018).

41. *Id.* at 1723.

42. *Id.* at 1731.

43. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).

44. *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993)). In adopting these factors in *Masterpiece Cakeshop*, Justice Kennedy, writing for the Court, relied on his earlier free exercise opinion in *Lukumi*, which had applied the Court's approach to determining invidious purpose under the Equal Protection Clause. *See* 508 U.S. at 540 (opinion of Kennedy, J.) (citing *Arlington Heights*, 429 U.S. at 267–68); *see also* Kendrick & Schwartzman, *supra* note 38, at 148–49 (discussing the evidentiary approach for discerning animus in *Masterpiece*).

45. *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

46. *Id.* at 1729–30.

If the same approach is applied under the Establishment Clause—and it is difficult to see why an approach that holds under Free Exercise and Equal Protection Clauses should not also extend in this way—then religious statements made by public officials who are responsible for legislating, implementing, and adjudicating abortion bans are relevant to determining whether their official conduct is "consistent with the requisite religious neutrality that must be strictly observed."[47] And, as in *Masterpiece Cakeshop*, those statements might be held against other officials involved in the decision-making process. If officials do make statements suggesting that their actions are religiously motivated, and if those motivations lack neutrality toward the religious beliefs of others—for example, those who do not believe that life begins at conception—then the political process might be, in the words of the *Masterpiece Cakeshop* Court, "inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion."[48]

2. Facial Neutrality

A second objection to secular purpose inquiries is that a showing of religious motivation does not alter the meaning of a facially neutral law. This claim is sometimes supported by the doctrinal observation that, unlike in the free exercise context, all of the Court's "secular purpose" cases have involved government religious expression,[49] such as prayer in public school or the posting of the Ten Commandments on public property.[50] The argument, then, is that religious motivation only matters when a law has overtly religious content, but not when it is otherwise facially neutral.

There are at least three problems with this objection. First, nothing in the reasoning of *Masterpiece Cakeshop* limits the Court's approach to discerning intent to cases involving free exercise. The multi-factor inquiry under *Arlington Heights*, *Lukumi*, and *Masterpiece Cakeshop* is fully general in its scope—applying to legislative, executive, and judicial decisions.[51] And that inquiry is designed to ferret out impermissible motive, even where laws, or other official acts, are purportedly neutral. The Court itself has observed as much. In *McCreary County*

47. *Id.* at 1732.

48. *Id.*

49. *See* Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL'Y 1, 20 (2002); Michael Stokes Paulsen, Lemon *Is Dead*, 43 CASE W. RSRV. L. REV. 795, 802 n.23 (1993) ("The Court as a whole has consistently rejected the argument that a law violates the Establishment Clause when it is simply consistent with religion. The 'purpose' test came to be understood to invalidate only laws motivated *wholly* by a desire to *promote* religion, not laws intended to accommodate the free exercise of religion or laws that reflect underlying religious or moral values.").

50. *See* cases cited *supra* note 2.

51. *See also* Dr. A. v. Hochul, 142 S. Ct. 552, 555 (2021) (Gorsuch, J., dissenting from the denial of application for injunctive relief) (mem.) ("[W]e have said that government actions burdening religious practice should be 'set aside' if there is even 'slight suspicion' that those actions 'stem from animosity to religion or distrust of its practices.'" (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1731)).

v. ACLU of Kentucky, the majority cited its free exercise jurisprudence in *Lukumi*, alongside decisions under the Equal Protection Clause, in holding that the same doctrine applies "when a court enquires into [government] purpose after a claim is raised under the Establishment Clause."[52]

Second, although the Supreme Court has never invalidated a facially neutral law for lacking a secular purpose, it has rejected reliance on religious reasons to justify legislation that might otherwise seem religiously neutral. For example, in cases affirming LGBTQ rights—including cases protecting rights to sexual autonomy[53] and same-sex marriage[54]—the Court held that laws that were either motivated by traditional religious views, or perhaps merely "coincided" with those views, were either based on animus toward LGBTQ people, or, alternatively, were based, at least in part, "on decent and honorable religious or philosophical premises"[55] that nevertheless led "to put[ting] the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."[56] Whether the Court has characterized laws motivated by conservative religious views as "inexplicable by anything but animus toward the class it affects,"[57] or perhaps more charitably, as "sincere, personal opposition,"[58] it has never recognized religious reasons as sufficient grounds for restricting others' liberty, even when the laws that purport to do so are facially neutral.

A third problem with the claim that the Court has never invalidated a facially neutral law because of its religious motivation is that many of the conservative Justices on the Roberts Court apparently have no difficulty describing facially neutral laws in religious terms, even when those laws are justified on secular grounds. For example, in a recent case involving whether Yeshiva University is required to comply with a state law prohibiting discrimination on the basis of sexual orientation and gender, Justice Alito, joined by Justices Thomas, Gorsuch, and Barrett, claimed that the state antidiscrimination law imposed "its own mandatory interpretation of scripture" and required "Yeshiva to make a 'statement' in support of an interpretation of Torah with which the University disagrees."[59]

These are surprising, even shocking, ways to describe the content and operation of a facially neutral public accommodations law. But if the Justices

52. McCreary County v. ACLU of Ky., 545 U.S. 844, 862 (2005).

53. *See* Romer v. Evans, 517 U.S. 620, 632–36 (1996); Lawrence v. Texas, 539 U.S. 558, 574–75 (2003).

54. United States v. Windsor, 570 U.S. 744, 770 (2013).

55. Micah Schwartzman, Richard Schragger & Nelson Tebbe, Obergefell *and the End of Religious Reasons for Lawmaking*, RELIGION & POL. (June 29, 2015), https://religionandpolitics.org/2015/06/29/obergefell-and-the-end-of-religious-reasons-for-lawmaking [https://perma.cc/P84R-ZDF7].

56. Obergefell v. Hodges, 576 U.S. 644, 672 (2015).

57. *Romer*, 517 U.S. at 632.

58. *Obergefell*, 576 U.S. at 672.

59. Yeshiva Univ. v. Yu Pride All., 143 S. Ct. 1, 2–3 (2022) (Alito, J., dissenting) (mem.).

understand a facially neutral law to be an "imposition" of scripture and to mandate religious speech in violation of free exercise doctrine,[60] then a facially neutral law that is religiously motivated can have the same effect under the Establishment Clause. An abortion ban might, borrowing Justice Alito's language, "impos[e] . . . its own mandatory interpretation of scripture,"[61] and, in prohibiting "conduct that aids or abets the performance or inducement of an abortion,"[62] it also might be described as requiring religious organizations, and their clergy, to speak in a manner consistent with an interpretation of the Bible with which they disagree.[63]

3. Mixed Motives

If the Roberts Court were consistent in applying its doctrines of religious neutrality in the Establishment Clause context, it would not only use a holistic approach to discern government purpose, including when laws are facially neutral, but it would also reject the application of laws that are improperly motivated, even if the state might have independent and sufficient purposes to justify its actions.

Again, in *Masterpiece Cakeshop*, having found that state officials expressed hostility to religion, the Court did not then ask whether the government had mixed motives or whether it would have reached the same outcome regardless of animus.[64] Nor did the Court apply strict scrutiny; rather, it proceeded directly to invalidate the state's action as applied to the religious claimant in the case.[65] As the Court later recognized, although without explanation, "[a] plaintiff may also prove a free exercise violation by showing that 'official expressions of hostility' to religion accompany laws or policies burdening religious exercise; in cases like that we have 'set aside' such policies without further inquiry."[66]

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60. *See id.* at 2.

61. *Id.* Indeed, one state trial court recently reached a similar conclusion. *See Anonymous Plaintiffs*, *supra* note 7, at 33 ("The Supreme Court already recognized in *Hobby Lobby* that the question of when life begins is a religious one that the State may not answer legislatively or as a factual matter. 573 U.S. at 720 (taking as the starting point that 'the [plaintiffs] have a sincere religious belief that life begins at conception').") (alteration in original).

62. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West 2021); *see also, e.g.*, FLA. STAT. § 777.011 (2022).

63. *See* Complaint, *Pomerantz*, *supra* note 5, at 7 ("[The Act] further burdens the ability to speak freely and publicly about religious beliefs and to provide and receive religious counseling consistent with their sincerely held religious beliefs . . . .").

64. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018).

65. *See* Kendrick & Schwartzman, *supra* note 38, at 166.

66. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422 n.1 (2022) (citing *Masterpiece Cakeshop*, 138 S. Ct. at 1732).

This "silver bullet"[67] theory of animus is difficult to reconcile with the approach to impermissible religious purpose in *McRae*, which rejected an Establishment Clause objection to the Hyde Amendment, primarily on the ground that religious justifications for restricting abortion might happen to overlap with the state's purposes.[68] But the aim of some officials to promote sectarian religious views is not different in this regard from the motivations of others who are hostile to some religious views. In both instances, the state's purposes might, to borrow from *McRae*, "coincide or harmonize with the tenets of some or all religions."[69] And if the Court rejects a mixed-motive, burden-shifting framework for failures of neutrality that are based on hostility to religion, it should apply the same reasoning when laws are motivated to advance impermissible religious ends.

In its current approach, by contrast, the Court is not pursuing an ideal of "religious neutrality," as it claims to,[70] but rather one of preference for religion. The present doctrinal rule can be stated as follows: When officials pass laws that are motivated by hostility to religion, then the Court will invalidate those laws, even if they were also justified on alternative, permissible grounds; but when officials pass laws motivated to advance religion, then the Court will simply defer to those laws. This approach captures the Court's current Free Exercise and Establishment Clause doctrines—with the glaring exception of *Trump v. Hawaii*, in which the Court ignored blatant animus against Muslims to affirm President Trump's travel ban.[71] But even if the Court had acted with integrity in that case, its doctrine would nevertheless display a preference for laws that advance religious views over laws that are deemed to be in conflict with them.

The intuition behind the Court's decision in *McRae* is present in other constitutional cases involving the taint of impermissible or invidious purpose.[72] The worry is that it would be absurd to invalidate a law that is justified on legitimate grounds merely because some of the people who support it—or who supported it sometime in the past—did so for illegitimate reasons. As Justice Stevens once put it, "[a] law conscripting clerics should not be invalidated because an atheist voted for it."[73] And the same thought might hold for an abortion ban. It should not be invalidated merely because some religious believers voted for it.

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67. *See* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 889 (2012); *but see* WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW 118–21 (2017).

68. *See* Harris v. McRae, 448 U.S. 297, 319 (1980).

69. *Id.* (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

70. *See Masterpiece Cakeshop*, 138 S. Ct. at 1723–24.

71. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018); *see also* Kendrick & Schwartzman, *supra* note 38, at 152, 168.

72. *See* Schwartzman, *supra* note 39, at 222 (discussing tainted policies in the context of President Trump's travel ban); W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1192, 1246–51 (2022) (showing the relevance of taint in cases involving racial and religious discrimination).

73. Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

How to respond to tainted laws is an old and difficult problem. Our aim here is not to resolve that question, but to show that it is not easily cast aside in the Establishment Clause context, especially given that the Court has adopted an extremely aggressive approach to taint under the Free Exercise Clause. At the least, where abortion bans are supported by official expressions that indicate they were adopted for sectarian religious purposes,[74] courts should engage in a searching inquiry to determine whether the government's application of its law is consistent with whatever legitimate secular grounds might be provided for it.[75] State courts applying their own disestablishment provisions may also have reason to hold abortion bans unconstitutional under this analysis.

4. Equality of Religion

The federal Supreme Court, by contrast, will likely persist with an asymmetric doctrine that rejects state action tainted by animus, even in cases of mixed motives, while permitting religiously motivated laws, including abortion bans. One explanation for this asymmetry might be that most of the conservative Justices accept that religious convictions are appropriate grounds for legislation. Conservative scholars have long advocated for this view.[76] They claim that religious values must be treated like all other moral, ethical, and political considerations. To single them out for special disability under the Establishment Clause is tantamount, in this view, to discriminating against religious believers and denying them equal access to the political process. The final move in this argument is to claim that discriminating against religious believers in this way burdens their ability to exercise their faith, leading to the tidy conclusion that interpreting the Establishment Clause to include a secular purpose requirement violates the Free Exercise Clause.[77]

No Supreme Court Justice has fully embraced this line of reasoning, but it would not be surprising to see versions of this argument expressed when religious freedom claims against abortion bans are litigated over the next several years, including, or perhaps especially, in state courts. Anticipating this response, it is worth emphasizing how radical it would be for the Court to reject a secular purpose requirement on the grounds that religious reasons must be treated no differently from other justifications for state action. Without a secular purpose requirement, religious ends might serve not only as rational bases for

74. For examples, see *infra* text accompany notes 123–27.

75. *See* Schwartzman, *supra* note 39, at 220–21.

76. *See, e.g.*, Michael W. McConnell, *Secular Reason and the Misguided Attempt to Exclude Religious Argument from Democratic Deliberation*, 1 J.L., PHIL. & CULTURE 159, 160 (2007); Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 642–43; Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 795 (1993).

77. *See, e.g.*, Paulsen, *supra* note 49, at 803–04 n.29 ("Imposition of a disability on religious persons' (or groups') participation in the political process because of their religious beliefs or identity violates the Free Exercise Clause.").

legislation, but they might also be invoked as compelling interests, sufficient to override others' constitutional rights.[78] The implications would be far-reaching, opening possibilities for morals legislation that were previously foreclosed under both the Establishment and Equal Protection Clauses.[79] If the Court were willing to accept religious ends as legitimate or compelling state interests, legislatures with religious majorities could reject same-sex marriage,[80] impose religious restrictions on divorce,[81] prohibit blasphemy,[82] reinstate Sabbath laws,[83] require school prayer,[84] and much else—all without having to show that any of these policies are, or could be, justified by secular or public reasons.

Courts that reject Establishment Clause challenges to abortion bans may pull up short of these radical lines of argument. They are likely to follow *McRae* in claiming that states have traditional interests that justify restricting abortion and that these interests are not necessarily grounded in religious values,[85] while ignoring religious statements by public officials. For the reasons given above, these would not be principled decisions; nor would they be consistent

78. For development of this point, see Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 163–65 (2002); Micah Schwartzman, *What If Religion is Not Special?*, 79 U. CHI. L. REV. 1351, 1398–99 (2012) [hereinafter Schwartzman, *What if Religion is Not Special?*]; Camilo Andres Garcia, *Religious Reasons in Politics: Some Problems for the Free Marketplace Model*, 41 L. & PHIL. 601, 605–11 (2022); and Micah Schwartzman & Richard Schragger, *Slipping from Secularism*, *in* DISCRIMINATION BY/AGAINST RELIGION (Cécile Laborde, Micah Schwartzman & Nelson Tebbe eds., forthcoming) (manuscript at 1–2) [hereinafter Schwartzman & Schragger, *Slipping from Secularism*].

79. *See* Schwartzman et al., *supra* note 55.

80. *See, e.g.*, ERLC Staff, *Four Reasons Christians Should Still Oppose Same-Sex Marriage*, ETHICS & RELIGIOUS LIBERTY COMM'N (June 11, 2021), https://erlc.com/resource-library/articles/four-reasons-christians-should-still-oppose-same-sex-marriage [https://perma.cc/3LL5-HUZJ] (offering Christian theological grounds for rejecting same-sex marriage); *see also* Stone, *supra* note 21, at 620 ("Presumably, Proposition 8 [prohibiting same-sex marriage in California] would violate the Establishment Clause if it had expressly stated that same-sex marriage is banned because 'homosexuality is sinful and same-sex marriage in not sanctioned by God.' But, of course, Proposition 8 said no such thing; that underlying rationale was left unspoken.").

81. *See, e.g.*, Elizabeth Reiner Platt, *Texas Woman Opposes Divorce Citing 'Blood Covenant'; Will Anti-Sharia Law Get in the Way?*, REWIRE NEWS GRP. (Jan. 31, 2019, 5:07 PM), https://rewirenewsgroup.com/2019/01/31/texas-woman-opposes-divorce-citing-blood-covenant-will-anti-sharia-law-get-in-the-way [https://perma.cc/5525-KEG9].

82. *See* Chad Pecknold, *The Religious Nature of the City*, POSTLIBERAL ORD. (Jan. 24, 2022), https://postliberalorder.substack.com/p/the-religious-nature-of-the-city?r=1fvu9&s=r [https://perma.cc/ET5E-4U3B] (calling for blasphemy laws).

83. *See* Sohrab Ahmari, *What We've Lost in Rejecting the Sabbath*, WALL ST. J. (May 7, 2021, 4:43 PM), https://www.wsj.com/articles/what-weve-lost-in-rejecting-the-sabbath-11620399624 [https://perma.cc/P7AH-ZMYK] (arguing for reinstatement of Sabbath laws).

84. *See* Steven D. Smith, *Why School Prayer Matters*, FIRST THINGS (May 2020), https://www.firstthings.com/article/2020/05/why-school-prayer-matters [https://perma.cc/VKP3-ZB46] (criticizing Supreme Court decisions prohibiting school prayer under the Establishment Clause).

85. *See* Harris v. McRae, 448 U.S. 297, 319 (1980) ("The Hyde Amendment . . . is as much a reflection of 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion.").

with the "obligation of religious neutrality"[86] to which the Supreme Court remains ostensibly committed. But even as courts affirm legislation despite evidence of its primarily religious motivation, perhaps they will pay lip service to the demand that laws have some secular or public justification, avoiding the total abandonment of a secular purpose requirement while rarely, if ever, enforcing it.[87]

We would anticipate this form of underenforcement in cases before the Supreme Court. But it should be noted that state courts interpreting their own constitutional disestablishment provisions need not follow Supreme Court doctrine. Instead of strictly policing intent on the free exercise side and ignoring it on the Establishment Clause side, state courts can choose to apply the doctrine consistently. Abortion bans subject to secular purpose analysis in state court might be vulnerable on these grounds.[88]

Consider a recent lawsuit brought by multiple clergy challenging Missouri's abortion ban and related provisions under the Missouri Constitution on the grounds that "the true purpose and effect of these laws was to enshrine certain religious beliefs in law."[89] The Missouri ban is clear about its purpose. The statute declares that "'it is the intention of the general assembly of the state of Missouri' to '[r]egulate abortion' 'in recognition that Almighty God is the author of life.'"[90] The lead sponsor of the legislation is quoted as saying that "as a Catholic I do believe life begins at conception and that is built into our legislative findings."[91] Clergy representing a range of religious traditions have asserted that these and other legislative statements evincing a religious rationale for the ban should disqualify it under the state constitution's religious liberty protections.[92] If the state court seriously contends with the question of legislative motivation, then there appears to be significant evidence that this law was intended to enact a particular set of religious convictions.

This raises the possibility, however, that a state court's determination that an abortion ban was adopted for impermissible religious reasons might be challenged as a form of "discrimination" against religious legislators and their religious constituents. A Supreme Court majority that believes that the secular purpose requirement is not only difficult to apply but in fact discriminates against religion might hold that state courts applying their state establishment

86. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018).

87. *See* Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 592–94 (2011).

88. *See, e.g.*, EMW Women's Surgical Ctr. v. Cameron, No. 22-CI-3225, slip op. at 15–16 (Ky. Cir. Ct. July 22, 2022) (opinion and order granting temporary injunction) (holding, in part, that a Kentucky abortion ban likely violated the state's Establishment Clause "by impermissibly establishing a distinctly Christian doctrine of the beginning of life").

89. Complaint, *Blackmon*, *supra* note 5, at 7.

90. *Id.* at 41 (alteration in original).

91. *Id.* at 7.

92. *See id.* at 78–81.

clauses are violating the Free Exercise Clause. This would take the "equal treatment" argument to its ultimate conclusion, with an interpretation of free exercise that, rather strikingly, includes a legislative "right" to adopt religiously motivated laws.

II. FREE EXERCISE AND ABORTION

The argument that abortion bans violate the right of religious free exercise has been made in the past,[93] but post-*Dobbs* litigation has put the issue once again in the spotlight. The cases filed so far include a range of plaintiffs: pregnant women, people trying to become pregnant, clergy, and others whose sincere religious convictions require them to seek or provide abortion services, to aid others in receiving those services, or to counsel abortion access or referrals.

For example, the lead plaintiff challenging Indiana's abortion ban contends that, as a Jewish woman, she has an obligation to protect her health and welfare over the continued existence of a fetus, that because of her ethnicity and advanced maternal age she is at high risk of having a pregnancy resulting in serious fetal abnormalities, and that "although [she] and her husband wish to try to have another child, she cannot become pregnant in Indiana unless she is able to obtain an abortion consistent with her religious beliefs," should her pregnancy result in serious fetal defects.[94] Other plaintiffs include women seeking to use assisted reproductive services that may result in the need for an abortion,[95] a Muslim woman who is currently abstaining from sexual intercourse because her health limits her contraceptive options,[96] and clergy from different faith traditions—Jewish, Christian, Unitarian, and Buddhist—who fear that counseling, referring, or advising their congregants on abortion access will expose them to criminal or civil liability.[97]

These plaintiffs have alleged that state prohibitions on abortion conflict with their sincere religious beliefs and impose substantial burdens on their free

93. Indeed, this argument has a decades-long history that deserves more attention. *See generally* Olivia Roat, *Free-Exercise Arguments for the Right to Abortion: Reimagining the Relationship Between Religion and Reproductive Rights*, 29 UCLA J. GENDER & L. 1, 6 (2022); Violet S. Rush, Note, *Religious Freedom and Self-Induced Abortion*, 54 TULSA L. REV. 491 (2019); Carla Graff, Note, *The Religious Right to Therapeutic Abortions*, 85 GEO. WASH. L. REV. 954 (2017); ELIZABETH REINER PLATT, KATHERINE FRANKE, KIRA SHEPHERD & LILIA HADJIIVANOVA, COLUM. L. SCH., L., RTS. & RELIGION PROJECT, WHOSE FAITH MATTERS? THE FIGHT FOR RELIGIOUS LIBERTY BEYOND THE CHRISTIAN RIGHT (2019), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Images/Whose%20Faith%20Matters%20Full%20Report%2012.12.19.pdf [https://perma.cc/7ZAM-ECFA].

94. Complaint, *Anonymous Plaintiffs*, *supra* note 5, at 10–15.

95. *Id.* at 21–23; *see also* Complaint, *Sobel*, *supra* note 5, at 2, 10 (stating religious liberty claims of Jewish plaintiff seeking IVF treatment).

96. Complaint, *Anonymous Plaintiffs*, *supra* note 5, at 18–21.

97. *See, e.g.*, Complaint, *Pomerantz*, *supra* note 5, at 8; *see also* Michelle Boorstein, *Clerics Sue Over Florida Abortion Law, Saying It Violates Religious Freedom*, WASH. POST (Aug. 2, 2022, 1:50 PM), https://www.washingtonpost.com/dc-md-va/2022/08/01/florida-abortion-law-religion-desantis [https://perma.cc/7F72-TY6K].

exercise.[98] They assert that abortion bans require them either to perform acts to which they are religiously opposed or to abstain from acts that are religiously motivated.[99] Either way, they claim that the state must satisfy strict scrutiny to justify its abortion restrictions.[100] A central question arising from these complaints is whether the state can meet that burden.

A. THE FREE EXERCISE CHALLENGE

Free exercise challenges to abortion bans come at a moment when the Supreme Court is remaking religious liberty jurisprudence. In *Employment Division v. Smith*, decided in 1990, the Supreme Court held that the Free Exercise Clause does not require exemptions from neutral and generally applicable laws. [101] *Smith*, however, has been under attack for some time. The compelling interest test that *Smith* abandoned has been "restored" statutorily at the federal level by the Religious Freedom Restoration Act ("RFRA"),[102] and in many states,[103] and several Justices have argued that *Smith* itself should be abandoned.[104] So, too, recent cases have interpreted free exercise expansively and limited *Smith* substantially or not applied it at all.

Consider some decisions from the past decade. In *Burwell v. Hobby Lobby*, decided in 2014, the Court read RFRA, which applies to federal law, to exempt for-profit employers with religious objections to providing contraceptive services in their employee health care plans under the Affordable Care Act.[105] Four years later, in *Masterpiece Cakeshop*, the Court relied on the Free Exercise Clause to invalidate application of a state public accommodations law requiring nondiscrimination on the basis of sexual orientation, thus allowing a Christian baker to refuse service to a gay couple.[106] Three years after *Masterpiece*, in *Fulton v. City of Philadelphia*, the Court held that the city violated the Free Exercise Clause when its officials refused to grant a religious accommodation to a foster care agency that objected to complying with the city's LGBTQ antidiscrimination policy.[107]

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98. *See, e.g.*, Complaint, *Anonymous Plaintiffs*, *supra* note 5, at 1–2.

99. *See id.* at 15, 21, 23.

100. *See id.* at 1.

101. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).

102. *See* Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J.F. 416, 428 (2016) (discussing the structure and purpose of RFRA).

103. *See* Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 164 (2016) (discussing state RFRAs).

104. Justice Alito's concurrence in *Fulton*, which called for *Smith* to be overruled, was joined by Justices Gorsuch and Thomas. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1926 (2021) (Alito, J., concurring). Justices Barrett and Kavanaugh have expressed skepticism about *Smith* but so far refused to overturn Justice Scalia's landmark free exercise decision. *Id.* at 1882 (Barrett, J., concurring).

105. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 692 (2014).

106. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1724 (2018).

107. *Fulton*, 141 S. Ct. at 1878 ("The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given,

In addition to these statutory and constitutional developments in free exercise doctrine, perhaps the most dramatic change occurred in response to the pandemic. In a series of cases, including most prominently *Roman Catholic Diocese of Brooklyn v. Cuomo* and *Tandon v. Newsom*, the Court held that public health regulations limiting social gatherings, including for religious worship, were not "generally applicable" and, for that reason, required strict scrutiny under the Free Exercise Clause.[108] As the Court explained, most explicitly in *Tandon*, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[109] The Court further held that whether "activities are comparable . . . must be judged against the asserted government interest that justifies the regulation at issue."[110] Applying this "single secular exception"[111] approach to general applicability, the Court in *Tandon* found that California's capacity limits for private residences were not generally applicable, and therefore violated the Free Exercise Clause, because secular businesses that supposedly posed similar risks of transmission were subject to less restrictive regulations than at-home religious gatherings.[112]

These cases demonstrate that free exercise doctrine is in flux, but several principles are becoming clear. First, as noted above, animus is a possible ground for rejecting a law's application. If a government regulation targets religious practice or exhibits hostility to religion, the Court may find it to be per se invalid,[113] although this rule has been unevenly applied.[114] Second, *Smith* persists, but its scope has been narrowed significantly. For a law to be neutral and generally applicable, it cannot have any exemptions that do not apply equally

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because it 'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude—here, at the Commissioner's 'sole discretion.'") (alteration in original) (citation omitted).

108. *See* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020); Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021) (mem.); Gateway City Church v. Newsom, 141 S. Ct. 1460, 1460 (2021) (mem.). *See also* 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, 722–31 (2022) (discussing free exercise decisions on the Supreme Court's emergency docket following *Roman Catholic Diocese* and leading up to *Tandon*).

109. *Tandon*, 141 S. Ct. at 1296.

110. *Id.*

111. *See* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 21 ("But a single secular exception also triggers strict scrutiny if it undermines the state interest allegedly served by regulating religious conduct.").

112. *Tandon*, 141 S. Ct. at 1297.

113. *See supra* text accompanying notes 64–67.

114. *See* Kendrick & Schwartzman, *supra* note 38, at 168 (noting the Court's failure to apply its animus doctrine in the Travel Ban case).

to comparable religious claimants.[115] As some commentators have put it, religious exercise has "most-favored nation status,"[116] meaning that government regulation must treat religious activities at least as well as the most favorably treated comparable secular activities. Third, the government's asserted compelling interest in enforcing a regulation that burdens religious belief or practice cannot be general. There must be specific evidence that a government regulation or rule achieves its stated purpose.[117] And fourth, recent cases have minimized or entirely rejected third-party harms as a limitation on religious exemptions.[118] The COVID cases suggest that the Court will vindicate religious liberty claims and grant exemptions even when those exemptions may cause substantial harm to the public.[119]

This set of doctrines supports free exercise challenges to abortion restrictions or bans, which can be criticized for lacking both neutrality and general applicability under *Smith* and its more recent progeny.

1. Neutrality

If abortion restrictions are motivated even in part by religious hostility, then they are vulnerable to free exercise objections under *Masterpiece Cakeshop*, which, as we have noted,[120] adopted a holistic, totality-of-the-circumstances approach to determining whether the government has complied with its

115. *See Tandon*, 141 S. Ct. at 1296 ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.").

116. *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49; Tebbe, *Equal Value*, *supra* note 8, at 2414; Alan E. Brownstein & Vikram David Amar, *Locating Free-Exercise Most-Favored-Nation-Status (MFN) Reasoning in Constitutional Context*, 54 LOY. U. CHI. L.J. (forthcoming 2023); Jim Oleske, Tandon *Steals* Fulton*'s Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG (Apr. 15, 2021, 10:13 AM), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990 [https://perma.cc/3RXH-BU99]. *See also* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2612 (2020) (mem.) (Kavanaugh, J., dissenting from denial of application for injunctive relief) (citing Laycock's use of "most-favored nation status").

117. *See Tandon*, 141 S. Ct. at 1297–98; *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 726–27 ("[The RFRA] 'requir[es] the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the person—the particular claimant whose sincere exercise of religion is being substantially burdened.'" (quoting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006))).

118. *See* Tebbe, *Liberty of Conscience*, *supra* note 8, at 308 ("An important limit on conscience exemptions is the imperative of avoiding harm to others. . . . Yet today there are signs that such precedent is unlikely to be observed."); *First Amendment—Freedom of Religion—Ministerial Exception*—Our Lady of Guadalupe School v. Morrissey-Berru, 134 HARV. L. REV. 460, 465 (2020).

119. *See* Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty*, 108 IOWA L. REV. 2237 (2023); Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J.F. 1106, 1135–36 (2022).

120. *See infra* Sections II.B.1–.3.

obligation of religious neutrality.[121] In some cases, there may be ample evidence of "explicit bias"[122] on the part of government officials. For example, a coauthor of the antiabortion legislation challenged in *Dobbs* had earlier remarked during a floor debate in the Mississippi legislature that "God had a lot to say about the people who sacrificed their children to the god of Molech and of the pagan communities throughout the Bible, but we sacrifice our children to the gods of selfishness by the millions in this country."[123] As compared with the statements that the Court condemned in *Masterpiece Cakeshop*, these remarks hardly seem to give "neutral and respectful consideration" to those whose religious views lead them in good faith to oppose abortion bans.[124]

Or consider the recent remarks of a Kentucky legislator during a House floor debate on an omnibus antiabortion bill. In arguing for restrictions on abortion medications, Representative Danny Bentley claimed that RU-486, an abortifacient drug, was created by a Jew and that it was developed and used during the Holocaust to kill millions of Jews.[125] In response to a proposed amendment that would have allowed Jewish women to be exempt from Kentucky's abortion ban, Representative Bentley also claimed that Jewish women have only one sexual partner, that they "ha[ve] less cancer of the cervix than any other race in this country or this world," and that, for these reasons, "the Jewish people" do not approve of abortifacients.[126] To all of this one might have expected objections from Bentley's colleagues in the Kentucky House of Representatives, but apparently, during a lengthy debate, no other legislator responded to his antisemitic remarks.[127]

Under any fair reading of *Masterpiece Cakeshop*, the statements made by public officials in these examples—and there are no doubt others[128]—display

121. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018); *see also* Kendrick & Schwartzman, *supra* note 38, at 148–49 (discussing the totality-of-the-circumstances approach in *Masterpiece Cakeshop*).

122. *See* Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 508 (2018) (drawing attention to cases of discrimination involving "overt, explicit, and blatant forms of bias").

123. *See* Brief of the Freedom from Religion Foundation, *Dobbs*, *supra* note 27, at 12.

124. *Masterpiece Cakeshop*, 138 S. Ct. at 1729, 1732.

125. *See* Morgan Watkins & Joe Sonka, *Kentucky Lawmaker Apologizes for Referencing Jewish Women's Sex Life Amid Abortion Debate*, LOUISVILLE COURIER J. (Mar. 3, 2022, 1:46 PM), https://www.courier-journal.com/story/news/politics/ky-general-assembly/2022/03/02/kentucky-lawmaker-danny-bentley-invokes-holocaust-jewish-women-sex-life-floor-speech/9350236002 [https://perma.cc/4MQ5-3KZG]; Ron Kampeas, *Kentucky Republican's Anti-Abortion Speech Links Jewish Scientists to Nazi Killing Methods*, JEWISH TELEGRAPHIC AGENCY (Mar. 3, 2022, 7:35 AM), https://www.jta.org/2022/03/03/politics/kentucky-republicans-anti-abortion-speech-links-jewish-scientists-to-nazi-killing-methods [https://perma.cc/WNP3-EXG9].

126. Watkins & Sonka, *supra* note 125.

127. *See* Lee Chottiner, *Bentley Speech Should Have Been Challenged Swiftly—Jewish Leaders*, JEWISH LOUISVILLE CMTY. (Mar. 3, 2022), https://jewishlouisville.org/bentley1-speech-shuld-have-been-challenged-swiftly-jewish-leaders [https://perma.cc/PLB4-SCBY] (noting that "two hours passed before anyone spoke up about the rant of Rep. Danny Bentley").

128. For additional examples of explicit bias, see Brief of the Freedom from Religion Foundation, *Dobbs*, *supra* note 27, at 10–12.

religious hostility to those who reasonably oppose abortion regulations on religious grounds. Official statements of this kind are inconsistent with the requirement of religious neutrality and could well serve as the basis for free exercise, establishment, and equal protection challenges under both federal and state law.

2. General Applicability

Even if some abortion restrictions are found to be religiously neutral, they may nevertheless be challenged for lacking general applicability under the Court's recent decisions in *Tandon* and *Fulton*. Recall that, in those cases, the Court held that the government may not favor secular activities over comparable religious practices without triggering strict scrutiny.[129] But despite efforts by some conservative politicians and activists who favor categorical abortion bans,[130] all existing state laws include secular exceptions for when terminating a pregnancy is medically necessary to save the pregnant person's life.[131] In some states, abortion laws also make exceptions for rape and incest, for certain fetal abnormalities, or for the health of the pregnant individual.[132]

Under *Tandon*, these secular exceptions to abortion bans ought to trigger the requirement that comparable religious claims also receive accommodations.

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129. *See* Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) ("A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.").

130. *See* Mary Ziegler, *Why Exceptions for the Life of the Mother Have Disappeared*, THE ATLANTIC (Aug. 2, 2022, 5:53 PM), https://www.theatlantic.com/ideas/archive/2022/07/abortion-ban-life-of-the-mother-exception/670582 [https://perma.cc/E2YW-BVTV] ("Conservative states are rushing to eliminate or narrow existing exceptions to their laws."); Ariana Eunjung Cha & Emily Wax-Thibodeaux, *Abortion Foes Push to Narrow 'Life of Mother' Exceptions*, WASH. POST (May 13, 2022, 7:08 PM), https://www.washingtonpost.com/health/2022/05/13/abortion-ban-exceptions-mothers-life [https://perma.cc/W4ET-XC2V].

131. *See* J. David Goodman & Azeen Ghorayshi, *Women Face Risks as Doctors Struggle with Medical Exceptions on Abortion*, N.Y. TIMES (July 20, 2022), https://www.nytimes.com/2022/07/20/us/abortion-save-mothers-life.html [https://perma.cc/S5VH-R74L] ("Each of the [thirteen] states with bans on abortions allows for some exemption to save the life of the mother or to address a serious risk of 'substantial and irreversible impairment of a major bodily function.'").

Existing medical and emergency exceptions have received significant criticism. Whether a patient's life is at risk can be a difficult medical question, and doctors facing criminal and civil penalties for performing abortions may be inclined to place patients at great risk before acting. *See* Whitney Arey et al., *A Preview of the Dangerous Future of Abortion Bans—Texas Senate Bill 8*, NEW ENG. J. MED. 387, 389 (2022) ("The climate of fear created by SB8 has resulted in patients receiving medically inappropriate care."); Mary Kekatos, *Why Doctors Say the 'Save the Mother's Life' Exception of Abortion Bans is Medically Risky*, ABC NEWS (June 13, 2022, 5:03 AM), https://abcnews.go.com/Health/doctors-save-mothers-life-exception-abortion-bans-medically/story?id=84668658 [https://perma.cc/D859-XQGT]; Elizabeth Reiner Platt, *Here's What Hospital Care Could Look Like in a Post-*Roe *World*, RELIGION DISPATCHES (May 4, 2022), https://religiondispatches.org/heres-what-hospital-care-could-look-like-in-a-post-roe-world [https://perma.cc/8ECH-K3NG].

132. *See State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (Feb. 1, 2023), https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions [https://perma.cc/XA6Q-6XLW].

The state may have secular reasons for permitting abortion—for example, in cases of rape, incest, or to protect the life of the pregnant person—but, at least as the Court's conservative majority has articulated its doctrine of general applicability, those exceptions will undermine the state's asserted interest in protecting fetal life in the same manner as would abortions that are motivated on religious grounds. The existence of secular exemptions shifts the burden to the government to prove that its regulation satisfies strict scrutiny, and, to do that, "it must show that the religious exercise at issue is more dangerous than those [secular] activities."[133] But the danger here to fetal life is the same, whether a patient decides to terminate a pregnancy for powerful secular reasons or to act in accordance with their religious convictions. To paraphrase the *Tandon* Court, "[c]omparability is concerned with the risks various activities pose, not the reasons why people [engage in those activities]."[134] Under this rule of general applicability, a regulatory scheme must treat religious conduct as "most favored," or at least no less favorably than comparable secular conduct. It follows that access to abortion cannot be limited to those with secular reasons for acting but must also extend to those who are religiously motivated.[135]

Compare the decision in *Maryville Baptist Church, Inc. v. Beshear*, in which a federal court of appeals ruled against a Kentucky pandemic restriction that had the effect of limiting church gatherings while also permitting grocery stores, transportation hubs, and other retail businesses to remain open.[136] The court there held that the government cannot favor "life-sustaining" over "soul-sustaining" activities that pose similar risks of contagion when implementing its public health regulations.[137]

By the same logic, if a medical procedure is permitted for life-sustaining reasons, then it must be permitted for soul-sustaining reasons, so long as the activity (in this case, the medical procedure) is the same. Indeed, Kentucky argued in the pandemic case that grocery stores and churches were categorically different on the grounds that church attendance was not necessary for obtaining necessities and was more likely to result in community spread.[138] The court,

133. *Tandon*, 141 S. Ct. at 1297. For recent application of this reasoning in the abortion context, see Doe v. Att'y Gen. of Ind., No. 1:20-cv-03247, 2022 WL 5237133, at *8–9 (S.D. Ind. Sep. 26, 2022) (holding, in part, that because a state law requiring burial of fetal remains treated secular conduct more favorably than comparable religious conduct, the law was not neutral or generally applicable and was therefore subject to strict scrutiny, which it failed to satisfy), *rev'd*, Doe v. Rokita, 54 F.4th 518, 519 (7th Cir. 2022).

134. *Tandon*, 141 S. Ct. at 1296.

135. If religious exemptions are granted on these grounds, there may be a further remedial question about which parties are entitled to relief from enforcement of abortion restrictions. For exemptions to be effective, courts would have to extend their scope not only to those seeking abortion services, but also to providers. For raising this issue, we thank Jessie Hill and Elizabeth Platt.

136. Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 611 (6th Cir. 2020).

137. *Id.* at 614.

138. *See* Brief of Governor Andy Beshear at 25–26, *Maryville Baptist Church*, 957 F.3d 610 (No. 20-5427), 2020 WL 4551930.

however, rejected the distinction, holding that the state had discriminated against those seeking to fulfill their religious needs.[139] Compare these activities to abortion, where the medical procedure is the same whatever its reason. The sole question is whether the state can favor medical or "life-sustaining" ends over those that are spiritual or "soul-sustaining" in limiting access to abortion procedures. That limitation seems problematic under the reasoning of *Maryville Baptist Church* and, more importantly, under *Tandon*, which requires that secular and religious reasons for exceptions receive equal treatment, at least when they pose comparable risks.[140]

These arguments can be deployed in state RFRA cases as well. Like the federal RFRA, state RFRAs require that the government show a compelling government interest and that its regulations are the least restrictive means of achieving that interest.[141] Certainly, after *Dobbs*, those states with abortion bans will assert a compelling interest in potential or fetal life. But the purpose of the "most favored nation" approach is to test the general applicability of the state's regulation in light of its articulated interest. If its interest is so important, why is the state permitted to include any exemptions at all? Moreover, why are those exemptions limited to secular reasons for action when religious reasons are privileged under both the First Amendment and state statutory and constitutional religious freedom provisions? The government might attempt to answer these questions, and we shall explore some possibilities below,[142] but current free exercise doctrine leans strongly in favor of granting exemptions, even when the state has weighty interests supporting its regulations.[143]

B. STRATEGIES OF PREFERENCE UNDER FREE EXERCISE

We have shown that there is a compelling case that abortion bans violate religious liberty under the Roberts Court's free exercise jurisprudence. Despite the doctrinal possibilities, however, we are skeptical that the Supreme Court will ultimately require religious exemptions from restrictions on abortion. That is not a function of the doctrine, which is now capacious enough to require exemptions; rather, it is because the doctrine gives courts the means to pick and choose among religious claimants. Free exercise doctrine is, and perhaps has always been, manipulable.[144] Despite its recent articulation of expansive free exercise doctrines, the Court has left itself room to be selective in determining which types of exemptions to grant. Here, we describe some

139. *Maryville Baptist Church*, 957 F.3d at 614.

140. *See* Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021).

141. *See* Lund, *supra* note 103, at 164.

142. *See* discussion *infra* Section III.B.

143. *See generally, e.g.*, *Anonymous Plaintiff*, *supra* note 7 (granting a preliminary injunction for religious exemptions from an abortion ban under a state RFRA).

144. *See* sources cited *supra* note 8.

potential doctrinal avenues that the Court could use to reject abortion-ban exemptions.[145]

1. The Reemergence of *Smith*

The first line of defense for state abortion bans is *Smith*: Neutral and generally applicable laws do not trigger strict scrutiny.[146] We have already noted how the Court has seemingly modified *Smith* by interpreting the concept of general applicability according to the "single secular exception" approach.[147] But the Court has not fully repudiated *Smith*, nor clarified how it might apply its general applicability test going forward.[148]

Resistance to repudiating *Smith* might be purposeful. The Court could replace *Smith* with the regime that existed prior to that decision. Under *Sherbert v. Verner*, laws that incidentally burdened religion were nevertheless subject to strict scrutiny.[149] Returning to such a regime seems an obvious choice for a Court protective of free exercise, especially when RFRA already applies the same standard to federal law.[150]

But as one of us has argued previously, despite *Smith*'s unpopularity, it serves an important purpose: It permits the Court to limit the reach of free exercise where a majority is inclined to do so.[151] Indeed, *Smith* continues to live on despite its detractors. In *Fulton*, the Court had the opportunity to overrule *Smith*. Four sitting Justices had previously invited challenges to that decision,[152] and three—Justices Alito, Gorsuch, and Thomas—argued that it should be

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145. Our focus in this Part is on the standard of review and its application in free exercise cases, whether under *Smith* or more recent decisions. But some avoidance strategies might apply to threshold elements that plaintiffs must demonstrate regardless of the standard of review. In any free exercise challenge, plaintiffs must show that they have a sincere religious belief or practice that the government has substantially burdened. We consider some recent arguments targeting these elements of (1) sincerity, (2) religiosity, and (3) substantial burden with respect to free exercise objections to abortion bans. *See infra* Section IV.A.

146. *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 886 n.3 (1990) ("[G]enerally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest . . . .").

147. *See supra* Section III.A.

148. The Court has repeatedly denied emergency relief in cases involving free exercise challenges to vaccine mandates, drawing dissents from conservative Justices who would extend *Tandon*'s logic to grant vaccine exemptions. *See* Doe v. Mills, 142 S. Ct. 17, 19 (2021) (Gorsuch, J., dissenting from denial of application for injunctive relief) (mem.); Dr. A. v. Hochul, 142 S. Ct. 552, 556 (2021) (Gorsuch, J., dissenting from denial of application for injunctive relief) (mem.).

149. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963).

150. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006) ("RFRA expressly adopted the compelling interest test as set forth in *Sherbert v. Verner* . . . ." (internal quotation marks omitted)).

151. *See* Richard Schragger, *The Politics of Free Exercise after* Employment Division v. Smith*: Same-Sex Marriage, the "War on Terror," and Religious Freedom*, 32 CARDOZO L. REV. 2009, 2031 (2011) ("And because *Smith* can serve political masters on both the left and the right, it may yet have a long life.").

152. *See* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (mem.) (Alito, J., statement respecting the denial of certiorari).

replaced with *Sherbert*'s compelling interest test.[153] Nevertheless, the Court refused to do so.[154] Justice Barrett, joined by Justice Kavanaugh, expressed skepticism about adopting a "categorical strict scrutiny regime" for laws that incidentally burden religion.[155] She asked in her concurrence, "what should replace *Smith*?"[156]—though she did not provide an answer.[157]

Fulton was decided only a year before *Dobbs*. No doubt Justice Barrett was aware that a decision on abortion was imminent. Thus, when she asked what would replace *Smith*, she was likely aware—as were the other conservative Justices—that *Roe* would be sharply limited or even reversed. And like some antiabortion organizations that initially resisted RFRA because of their fear that it would subject abortion restrictions to strict scrutiny, which they might not survive,[158] Barrett and the other conservative Justices must also have known that religious liberty claims would follow—as they have—from state abortion bans.

Smith is strategically useful. It allows a court to defer to legislatures on the grounds that a law is neutral and generally applicable. And thus, it would not be surprising if courts cite *Smith* in rejecting abortion-related exemptions. Nor would it be a surprise if *Smith* experiences a resurgence. Free exercise challenges to abortion bans may provide motivation for *Smith*'s continued survival, giving judges who support those restrictions a doctrinal mechanism for rejecting religious liberty claims.

2. Compelling Interest Redefined

An obvious response to our realism about the uses of *Smith* is that, even under a strict scrutiny regime, conservative courts are likely to reject free exercise objections to abortion bans. Under the *Sherbert* standard, the government would have to show that an abortion ban serves a compelling interest and is the least restrictive means of achieving that interest. During the *Sherbert* era, courts

153. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1924 (2021) (Alito, J., concurring in the judgment).

154. *Id.* at 1881 (majority opinion) ("Because the City's actions are therefore examined under the strictest scrutiny regardless of *Smith*, we have no occasion to reconsider that decision here.").

155. *Id.* at 1883 (Barrett, J., concurring).

156. *Id.* at 1882.

157. *See id.* at 1882–83. But for some different answers, see Christopher Lund, *Answers to* Fulton*'s Questions*, 108 IOWA L. REV. 2075, 2083–84 (2023); and Tebbe, *Liberty of Conscience*, *supra* note 8, at 270.

158. *See* Roat, *supra* note 90, at 67–68 (2022) ("Some anti-abortion individuals and groups . . . opposed RFRA because they feared that it would create an independent statutory basis for the right to abortion. Specifically, these groups believed that it would enable women whose religious convictions led them to seek abortions to argue that laws regulating abortion burdened their religious exercise.") (citation omitted).

often deferred to the government's articulation of its compelling interest,[159] though, more recently, the Court has been skeptical—as noted above.[160]

State abortion bans will nevertheless be defended on the grounds that there is no less restrictive means to advance the government's compelling interest in protecting fetal life. Yet, as a matter of public policy, abortion restrictions might *increase* risks to fetal health if pregnant people fail to seek necessary treatment or resort to unsafe abortions.[161] So, too, if abortion bans do not decrease rates of abortion—and there is comparative evidence to suggest that they do not[162]—then the state has failed to use appropriate means to achieve its compelling interest in protecting fetal life. Similarly, if the state asserts a compelling interest in maternal health, abortion bans may achieve the opposite.[163] In relation to both fetal and maternal health, there may be less restrictive—and more effective—means to achieve the government's goals.[164]

A conservative Supreme Court is unlikely to credit these kinds of arguments, nor will it recognize the obvious conflict between fetal life and the pregnant person's health. If the state is permitted to choose one over the other—which might be the case post-*Dobbs*—then the state can assert a compelling interest in the fetus's survival even if that means risking the pregnant person's death. A religious objection seems an odd barrier to abortion bans if the health and safety of pregnant individuals can already be sacrificed to the state's interest in fetal life.

Would abortion bans survive the compelling interest/least restrictive means test even if the law contains medical exceptions? The state could argue that the way it balances fetal life and the wellbeing of pregnant persons is appropriate, and that allowing medical exemptions from otherwise categorical bans is permissible. In other words, the state may claim that it has a compelling interest

159. *See* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1412 (1992) (showing that under *Sherbert* "the free exercise claimant, both in the Supreme Court and the courts of appeals, rarely succeeded under the compelling interest test, despite some powerful claims").

160. *See supra* Section III.B.2.

161. *See* SUSHEELA SINGH, LISA REMEZ, GILDA SEDGH, LORRAINE KWOK & TSUYOSHI ONDA, GUTTMACHER INST., ABORTION WORLDWIDE 2017: UNEVEN PROGRESS AND UNEQUAL ACCESS 10–11 (2018), https://www.guttmacher.org/sites/default/files/report_pdf/abortion-worldwide-2017.pdf [https://perma.cc/RN3L-KR57].

162. *See* Michelle Oberman, *What Will and Won't Happen When Abortion Is Banned*, 9 J.L. & BIOSCIENCES 1, 7–8 (2022) ("Outlawing abortion may lead to a short-term decline in US abortion rates. . . . But as we learn from the experiences of countries throughout the world, this decline is unlikely to be sustained.") (citation omitted).

163. *See* Amanda Jean Stevenson, Leslie Root & Jane Menken, *The Maternal Mortality Consequences of Losing Abortion Access*, 1, 3 (June 29, 2022) (unpublished manuscript) (SocArXiv) (estimating that "ending abortion in the United States would result in a [twenty-four percent] increase in maternal deaths overall"); Olga Khazan, *When Abortion Is Illegal, Women Rarely Die. But They Still Suffer*, THE ATLANTIC (Oct. 11, 2018), https://www.theatlantic.com/health/archive/2018/10/how-many-women-die-illegal-abortions/572638 [https://perma.cc/3GDP-G9JV].

164. *See* Oberman, *supra* note 162, at 11–13 (discussing a range of "pro-natal" policies).

to protect maternal health in certain circumstances, even as it also seeks to advance the compelling interest of protecting fetal life. Thus, even under *Tandon*'s single secular exception approach, courts could defer, holding that the secular exceptions for medical emergencies do not undermine the state's balance of interests and, for that reason, are not comparable to religious exemptions that would threaten the state's interest in protecting fetal life without advancing its interest in protecting the life or health of the pregnant person.

This response rightly recognizes that the state may have a complex set of compelling interests and that secular exemptions may balance those interests in a way that religious exemptions may not—a point we have defended elsewhere.[165] But it is worth observing that, in the abortion context, this reasoning is in significant tension with the views of conservative Justices who have refused to recognize a state's secular interest in preventing physical harms and in saving lives through medical exceptions.

For example, in multiple cases involving religious objections to vaccine mandates, Justices Gorsuch, Alito, and Thomas have argued that medical exceptions trigger strict scrutiny because the risks they pose to the state's interest in preventing contagion are comparable to the risks created by religious exemptions.[166] Setting aside the falsity of their claims about comparability,[167] note that these Justices simply ignore that the state has an independent and compelling interest in protecting the health and life of those who are medically contraindicated from receiving the COVID-19 vaccine. Indeed, the goal of herd immunity is precisely to protect those who are immunosuppressed or who cannot for other medical reasons build up immunity via vaccination.[168] In these vaccine cases, the government has at least two compelling interests: to protect those who, for medical reasons, cannot be vaccinated and to prevent contagion. The state's medical exception strikes a balance between those interests, just as the state might purport to balance its interest in maternal and fetal life in the abortion context.

To the extent some of the conservative Justices reject such a balance in the vaccine cases, however, it is difficult to see how they could, in a principled way, recognize medical exceptions to abortion bans without finding that those exceptions undermine the state's interest in fetal life. Perhaps that is another reason why Justices Kavanaugh and Barrett have so far not applied *Tandon* to

165. *See* Schwartzman & Schragger, *Slipping from Secularism*, *supra* note 78 (manuscript at 8).

166. *See* Dr. A. v. Hochul, 142 S. Ct. 552, 556 (2021) (Gorsuch, J., dissenting) (mem.); *see also* Doster v. Kendall, 54 F.4th 398, 423–24 (6th Cir. 2022) (relying on medical exemptions to reject the U.S. Air Force's claim that vaccine requirements satisfy strict scrutiny).

167. *See* Koppelman, *supra* note 119.

168. *See* Brief for Public Health Associations and Scholars of Public Health as Amicus Curiae Supporting Respondents at 7, Doe v. Mills, 142 S. Ct. 17 (2021) (No. 21A90) (mem.); Dorit R. Reiss, *Vaccines Mandates and Religion: Where are We Headed with the Current Supreme Court?*, 49 J.L. MED. & ETHICS 552, 558 (2021).

cases involving vaccine exemptions.[169] Their studious avoidance of those cases leaves them room to maneuver in forging a conservative majority to reject free exercise challenges to abortion bans.

3. Abortion Absolutism

In addition to medical exemptions, some state abortion bans contain exceptions for rape and incest,[170] and some bans appear to exempt the disposal of fertilized embryos created through in vitro fertilization ("IVF").[171] These secular exemptions seem to undermine the state's asserted interest in protecting fetal life from conception, a conclusion that at least one state court has reached with regards to the rape exception.[172] Even if a court were to find that medical exceptions are not fatal under the *Tandon* standard, it would have to contend with these other secular exemptions—each of which would be fatal to a ban if the Court's "most favored nation" approach to free exercise is applied consistently.

In this way, and perhaps ironically, free exercise doctrine pushes toward abortion absolutism. After *Tandon*, a single secular exception may undermine the law's general applicability and thus deny it judicial deference under *Smith*; or a secular exception may cast doubt on the state's compelling interest in fetal life, thus making the abortion restriction vulnerable to free exercise challenges. Despite being more hostile to religious liberty, an abortion ban with no exceptions may be less susceptible than one that seeks to balance competing interests. To insulate their abortion bans from free exercise challenges, state legislatures thus have a legal incentive to eliminate existing exemptions. In this way, free exercise doctrine may influence the shape of abortion legislation, making it even more draconian.

The trend toward absolutes is a function of an emerging free exercise jurisprudence that does not leave much room for balancing. Under *Smith*, at

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169. *See Dr. A.*, 142 S. Ct. at 2569 (denying certiorari in free exercise challenge to New York health care worker vaccine mandate); Austin v. U.S. Navy SEALS, 142 S. Ct. 1301, 1302 (2022) (mem.) (Kavanaugh, J., concurring) (relying on deference to military judgments and not reaching the merits of a free exercise challenge to vaccine mandates for Navy SEALS).

170. *See* Mark Scolforo, *Some State Abortion Limits Allow Rape, Incest Exceptions*, AP NEWS (July 15, 2022), https://apnews.com/article/abortion-us-supreme-court-health-ohio-indiana-d92c8dc5adb6dbf6933ddfc7f2c9e5cc [https://perma.cc/45NW-2CU8].

171. *See, e.g.*, The Effect and Scope of the Human Life Protection Act, Op. Att'ys Gen. (2022) ("[Kentucky's abortion ban] does not apply to the use, care, or disposition of embryos fertilized by in vitro fertilization."); Applicability of the Human Life Protection Act to the Disposal of Human Embryos that Have Not Been Transferred to a Woman's Uterus, Op. Att'y Gen. No. (Oct. 22, 2022) (stating that Tennessee's abortion ban "only applies when a woman has a living unborn child within her body," while also claiming that "an embryo that was created *outside* a woman's body . . . may fit the Act's definition of '[u]nborn child'" (alteration in original) (citation omitted)).

172. *See Anonymous Plaintiffs*, *supra* note 7, at 37 ("[T]he statute explicitly allows abortions in circumstances that the State acknowledges constitute the 'killing' of an 'innocent human being': for example, where the pregnancy is the result of rape or incest and where the fetus is viable but will not live beyond three months after birth.").

least as interpreted by the Court in *Tandon* and *Fulton*, neutrality and general applicability are advanced by clear rules and categorical prohibitions. Attempts at legislative balance are read by courts as inconsistency or as inappropriate political compromise, something we have seen in pandemic cases involving challenges to public health regulations.[173] Efforts to achieve practical solutions are affirmatively penalized.[174] At the other extreme, strict scrutiny analysis under federal and states RFRAs also penalizes balancing. Laws justified by a general state interest, without specific evidence of particular harms, are considered suspect. Any wavering in the state's defense of regulations can also be reimagined as animus, as in *Masterpiece Cakeshop*, or as ad hoc or discretionary decision-making, as in *Fulton*.

Abortion absolutism could run into Establishment Clause problems, as we argued above.[175] Without health exceptions, and with vague exceptions to save the pregnant person's life, categorical abortion bans will seem more like expressions of religious doctrine than a balanced pursuit of secular ends. Nevertheless, as already observed, the Supreme Court has long avoided striking down laws for improper religious purpose. In embracing abortion bans, the Roberts Court will have little difficulty with religiously motivated legislation.

This narrowing of the Establishment Clause, too, is an incentive for abortion absolutism. In the absence of a secular purpose requirement, there is no constitutional obstacle to enacting fetal personhood laws that are explicitly justified on religious grounds. The door is open for religious legislation that conservative courts will then insulate from free exercise challenges.

III. CAN LIBERALS BE RELIGIOUS?

The availability of *Smith* and the manipulability of the compelling interest analysis provide predictable—though not principled—doctrinal grounds for the Supreme Court (and lower courts) to reject free exercise challenges to abortion bans. That conclusion supports a long-running critique of judicially mandated free exercise exemptions, namely, that they allow courts to privilege some religious claims over others.[176] Some initial responses to free exercise challenges in the abortion context, however, suggest an even more profound conceptual attack on religious exemptions, one that distinguishes not only

173. *See* Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. 1067, 1105–24 (2022) (surveying free exercise challenges to COVID-19 related public health orders); Rothschild, *supra* note 119, at 1123–28 (reviewing early vaccine challenges in the lower courts).

174. *See* ELIZABETH REINER PLATT, KATHERINE FRANKE & LILIA HADJIIVANOVA, COLUM. L. SCH., L., RTS & RELIGION PROJECT, WE THE PEOPLE (OF FAITH): THE SUPREMACY OF RIGHTS IN THE SHADOW OF A PANDEMIC 26 (2021), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Reports/We%20The%20People%20%28of%20Faith%29%20Report.pdf [https://perma.cc/86GK-G2Z4] ("The pressure on legislators to either include no exceptions to a rule, or to include religious exemptions, will make it more difficult for them to make the kind of compromises usually required to garner enough votes to pass new legislation.").

175. *See supra* Section II.A.

176. *See* sources cited *supra* note 8.

secular conscience claims from religious ones—itself a violation of equality norms—but also some *kinds* of religious claims from others. That move has not been endorsed by the courts explicitly—at least not yet—but its possibility is lurking in the structure of free exercise doctrine.

A. CHRISTIANS V. PAGANS

Liberal thinkers have long had difficulty understanding why conscientious objectors who are religiously motivated should be entitled to exemptions, when those who are motivated by secular ethical and philosophical beliefs are not.[177] For some commentators, this unequal treatment is morally, and perhaps legally, impermissible and requires that religious exemptions be extended to those with comparable secular claims of conscience.[178] Others, seeking to maintain the special status of religion, have sought to justify the distinction between religious and secular commitments.[179] Still others argue that "religion" is a proxy for various moral goods and is sufficient to protect a broad range of beliefs and practices, even if it is ultimately underinclusive.[180] Others assimilate certain kinds of secular beliefs to religious ones, arguing that the definition of "religion" should be broadened to include deeply-held beliefs and practices not formally tied to an established religion,[181] a strategy suggested by the Vietnam draft protest cases from the 1960s.[182]

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177. *See, e.g.*, CÉCILE LABORDE, LIBERALISM'S RELIGION 201–02 (2017); NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 72–73 (2017); RONALD DWORKIN, RELIGION WITHOUT GOD 112–16 (2013); BRIAN LEITER, WHY TOLERATE RELIGION? 113 (2013); JOCELYN MACCLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 9–14 (2011); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 13 (2007); MILTON R. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE: A CONSTITUTIONAL INQUIRY 98–106 (1968); Schwartzman, *What If Religion is Not Special?*, *supra* note 78, at 1401–03; Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L. REV. 555, 573–74 (1998).

178. *See, e.g.*, Micah Schwartzman, *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085, 1103 (2014); Nelson Tebbe, *Reply: Conscience and Equality*, 31 J.C.R. & ECON. DEV. 1, 5 (2018).

179. *See, e.g.*, KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE 302 (2015); ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 101–03 (2013); JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 57 (1996); Michael Stokes Paulsen, *Is Religious Freedom Irrational?*, 112 MICH. L. REV. 1043, 1045 (2014) (reviewing BRIAN LEITER, WHY TOLERATE RELIGION? (2013)); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 (2000).

180. *See* Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481, 496–98 (2017); Andrew M. Koppelman, *"Religion" as a Bundle of Legal Proxies: Reply to Micah Schwartzman*, 51 SAN DIEGO L. REV. 1079, 1081–82 (2014); Thomas C. Berg, *"Secular Purpose," Accommodations, and Why Religion Is Special (Enough)*, 80 U. CHI. L. REV. ONLINE 24, 36–38 (2013) (responding to Micah Schwartzman, *What if Religion is Not Special?*).

181. *See, e.g.*, Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 336 (1996).

182. *See* Welsh v. United States, 398 U.S. 333, 340 (1970); United States v. Seeger, 380 U.S. 163, 176 (1965).

All these options are offered within the confines of a familiar debate. The question, as one of us has posed it, is whether religion is or should be treated as special.[183] If religion is special, then religious beliefs and practices are entitled to constitutional solicitude. If not, then the religious/secular distinction should be received with some skepticism and perhaps replaced by other categories that do a better job of tracking our underlying moral and legal interests.[184]

Here, however, we want to focus on a conceptual argument raised by critics who have long asserted that liberalism or secularism itself is a "religion."[185] This argument also leads to the deconstruction of the religious/secular distinction. But in this case, the argument is made in the context of demands for equal government treatment of religion. In this view, if "secular" public schools are in fact "religious"—teaching secular humanism, for instance—then it is rank religious discrimination to fund those schools and not private religious schools. So, too, asserting that liberalism is a religion is meant to suggest that secular state regulations represent a *religious* imposition, no more justifiable for their effects on conscience than the imposition of any traditional religious doctrine. Again, according to this argument, if secular law requires conformity with a religious view, then the Establishment and Free Exercise Clauses are violated daily by the demands of secular liberalism.

Liberalism as religion is a trope of antiliberal thought. It is regularly asserted both in popular and in more esoteric settings.[186] A common rhetorical approach is to understand the religion of liberalism as "pagan" and contrast it with something else—traditionalism or Christianity.[187] Steven Smith follows this bifurcation in his recent book, contrasting pagans and Christians.[188] He borrows the dichotomy from T.S. Eliot, who decried the decay of Christian civilization

183. Schwartzman, *What If Religion is Not Special?*, *supra* note 78, at 1353.

184. *See, e.g.*, LABORDE, *supra* note 177, at 8; James W. Nickel, *Who Needs Freedom of Religion?*, 76 U. COLO. L. REV. 941, 955–56 (2005).

185. *See* Schragger & Schwartzman, *Religious Antiliberalism*, *supra* note 8, at 1359 (surveying versions of this critique).

186. *See, e.g.*, ROD DREHER, LIVE NOT BY LIES: A MANUAL FOR CHRISTIAN DISSIDENTS 47 (2020); Adrian Vermeule, *All Human Conflict Is Ultimately Theological*, UNIV. NOTRE DAME: CHURCH LIFE J. (July 26, 2019), https://churchlifejournal.nd.edu/articles/all-human-conflict-is-ultimately-theological [https://perma.cc/47CA-AZ4J]; R. R. Reno, *Liberal Integralism*, FIRST THINGS (Mar. 14, 2018), https://www.firstthings.com/web-exclusives/2018/03/liberal-integralism [https://perma.cc/NV4S-TFS2]; Howard P. Kainz, *Liberalism as Religion*, 19 TOUCHSTONE 22, 23–25 (2006).

187. *See, e.g.*, Christopher Caldwell, Opinion, *Is the West Becoming Pagan Again?*, N.Y. TIMES (Dec. 29, 2021), https://www.nytimes.com/2021/12/29/opinion/christianity-paganism-woke.html [https://perma.cc/P6S8-M55N]; Robert P. George, *The Pagan Public Square: Our Christian Duty to Fight Has Not Been Cancelled*, TOUCHSTONE (June 2020), https://www.touchstonemag.com/archives/article.php?id=33-03-024-f [https://perma.cc/G49D-5EUJ]; Charles J. Chaput, *The Future of the West: Christian or Pagan?*, CRISIS MAG. (June 9, 2017), http://www.crisismagazine.com/2017/future-west-christian-pagan [https://perma.cc/DJV9-XHEC]; Adrian Vermeule, A Christian Strategy, FIRST THINGS (Nov. 2017), https://www.firstthings.com/article/2017/11/a-christian-strategy [https://perma.cc/ZHF7-VL59].

188. *See* STEVEN D. SMITH, PAGANS & CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC 8–11 (2018).

into paganism in a number of lectures and essays in the 1930s and 40s.[189] Eliot was a critic of "liberalism," which he associated with "free-thinking Jews" and other cosmopolitans.[190] There is a history to these kinds of arguments (whether or not accompanied by antisemitism) which tend to attribute the "decline" of the West to the rise of secular liberalism. For Eliot, Smith, and other religious antiliberals, secularism, liberalism, and paganism are interchangeable descriptions for what has become the religion of the modern state.[191]

These kinds of arguments are grand-historical—they suggest a clash of civilizations—and are deployed primarily in the context of culture war battles. But for those who take them seriously, there are important implications for First Amendment doctrine. The distinction between pagan and Christian achieves a couple purposes. First, it gives a name to the religion that is secular liberalism and thereby equates it with a kind of theocracy: If liberalism is not neutral, then it is a religious imposition, violative at its core of the very conscience protections that liberalism purports to guarantee through constitutional provisions like the First Amendment. This argument alleges a form of hypocrisy, hoisting up liberal pieties—freedom of religion and belief—on their own petard.

Second, the pagan/Christian distinction radically reduces religious diversity, separating two forms of religiosity from each other. Smith, for example, defines pagans as secular liberals regardless of their religious or denominational affiliations.[192] Pagans are identified by their rejection of transcendent religion, including biblical morals, in favor of an immanent conception of value, which "locates the sacred *within* this world."[193] Their ethical and moral views are either given subjectively or, if conceived objectively, without any independent, metaphysical, or nonmoral foundation.[194] Smith describes "Christians," in contrast, as those who, regardless of religious affiliation, accept God's transcendence as the source of moral and ethical value, giving meaning and purpose to human life and to the natural world.[195] This immanence/transcendence distinction is what marks the difference between pagans from Christians. In this account, there are "Christian" Jews (and Muslims, Protestants, etc.) who believe in transcendent religiosity, and

189. *See* T.S. ELIOT, AFTER STRANGE GODS: A PRIMER OF MODERN HERESY 19–21 (1934); T.S. ELIOT, CHRISTIANITY AND CULTURE: THE IDEA OF A CHRISTIAN SOCIETY AND NOTES TOWARDS THE DEFINITION OF CULTURE 9–13 (1949).

190. *See* Richard Schragger & Micah Schwartzman, *Jews, Not Pagans*, 56 SAN DIEGO L. REV. 497, 502–03 (2019) [hereinafter Schragger & Schwartzman, *Jews, Not Pagans*] (discussing Eliot's antisemitism in the context of his attack on liberalism).

191. *See* Schragger & Schwartzman, *Religious Antiliberalism*, *supra* note 8, at 1368.

192. *See* SMITH, *supra* note 188, at 218, 248.

193. *See id.* at 111, 223 (emphasis in original).

194. *See id.* at 22–23, 234–36, 369–70.

195. *See id.* at 111–15.

"pagan" Jews (and Muslims, Protestants, etc.), who affirm immanent conceptions of the good.[196]

One can immediately see the free exercise implications of the pagan/Christian divide. If the harm to religious people is the pain of violating a transcendent law—a law external to oneself—or, in other words, if we understand free exercise exemptions as lifting burdens on those who cannot possibly comply with secular law because of their commitments to higher law—then Christians and pagans can be treated differently for purposes of accommodations. The religious/secular distinction is exploded, but then reinstantiated in the contrast between paganism and Christianity. The former is not the type of "religion" that was meant to be protected under the First Amendment. Because "pagan" views do not demand fealty to a higher being, they are different in kind from transcendent religion. If the Free Exercise Clause is meant to moderate conflicts between God's law and positive law, then it is not implicated by pagan religiosity. Paganism is a religion, but not the sort contemplated by constitutional provisions for guaranteeing religious liberty.[197]

This is what we mean when we ask the provocative question: Can liberals be religious? We ask the question only somewhat facetiously, but others have been rather more pointed in claiming that, at some level, the answer is "no." In the abortion context, conservative critics have floated arguments along these lines, claiming that liberal Jews—the ultimate pagans in the descriptive schemes of Eliot and Smith[198]—have no religious duties or obligations with respect to abortion and, for that reason, no grounds to assert free exercise claims.[199] For example, Josh Blackman has argued that because Reform Jews do not believe that *halacha*, or traditional sources of Jewish law, are binding, they can adopt religious views at their whim.[200] Liberal and progressive Jews—or pagans of any sort—can believe whatever they want, and so they have no real moral or ethical obligations.

There is a doctrinal edge to this argument. The claim is that to show a substantial burden under the *Sherbert* framework requires demonstrating that one has a *binding* or *obligatory* religious belief.[201] And if Reform Jews have no obligatory beliefs, then they can never show a substantial burden for purposes of triggering strict scrutiny. And if a liberal believer does assert that their views

196. This paragraph draws from Schragger & Schwartzman, *Jews, Not Pagans*, *supra* note 190, at 505.

197. *See, e.g.*, Paulsen, *supra* note 179, at 1043–44 ("Religious freedom . . . at bottom only makes full sense on the suppositions that God exists or may well exist . . . ." (footnote omitted)).

198. Schragger & Schwartzman, *Jews, Not Pagans*, *supra* note 190, at 501.

199. *See, e.g.*, Josh Blackman, *Tentative Thoughts on the Jewish Claim to a "Religious Abortion,"* VOLOKH CONSPIRACY (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/8UDV-DV4E]; Andrew Kubick, *Why Religious Freedom Can't Protect Abortion*, PUB. DISCOURSE (Sept. 6, 2022), https://www.thepublicdiscourse.com/2022/09/84357 [https://perma.cc/X5JF-YLHU].

200. Blackman, *supra* note 199.

201. *Id.*

are obligatory, then, according to this argument, courts should be skeptical of their sincerity. Since liberal Jews don't believe that any religious law is binding, rather than "advisory" or "aspirational," they cannot sincerely assert that their religion *requires* any conduct that conflicts with a prohibition on abortion—or, for that matter—any other law.[202]

The result of this argument, which we can call the *sincerity objection*, is that liberal Jews—and presumably other liberal religious believers (aka "pagans")—cannot sincerely assert that the law ever substantially burdens their faith, which means that they can never raise religious liberty claims under the First Amendment or under other statutory or constitutional provisions that incorporate *Sherbert*'s compelling interest test.[203] So much, then, for religious objections to abortion bans.

It would not be surprising if this objection, or some argument similar to it,[204] is taken up by conservative judges. Deciding on sincerity grounds would provide them with a way to avoid the complexities of *Tandon*'s single secular exception doctrine or the compelling interest test required under federal and state RFRAs. By denying the threshold elements of a free exercise claim—the showing of a sincere religious belief that is substantially burdened—the argument might have considerable tactical appeal. But as a matter of strategy, it requires either denying the sincerity of liberal believers or holding that they can never be substantially burdened—conclusions that would impose deep and lasting damage on the idea that religious freedom benefits those of all faiths.

We hasten to add that, as presented, the sincerity objection is also mistaken as a matter of both law and theology.[205] With respect to legal doctrine, the Supreme Court has never held that a claimant must assert a religious obligation to show a substantial burden under the *Sherbert* standard. And, in fact, Congress explicitly repudiated that view when it "restored" the *Sherbert* test in the text of RFRA, which defines "religious exercise" to "include[] any exercise of

202. *Id.*

203. For an argument that this position reflects a kind of "antisemitic supersessionism," see David H. Schraub, *Liberal Jews and Religious Liberty*, 98 N.Y.U. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4269319 [https://perma.cc/VE82-W7BN].

204. Sincerity objections have already been leveled against plaintiffs in post-*Dobbs* free exercise litigation. *See* Proposed Amicus Curiae Brief of the Becket Fund for Religious Liberty in Support of Appellants at 14, Individual Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff, No. 22A-pl-02938 (Ind. Ct. App. Jan. 18, 2023) (asserting that Jewish plaintiffs are insincere and that they "are acting 'not because they ha[ve] a sincere religious belief' that mandates abortion but because they think RFRA will serve as a 'cloak' for their non-religious objections to [the state abortion ban]" (alteration in original)); *see also* Brief of Appellants at 35–36, Individual Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff, No. 22A-pl-02938, (Super. Ct. Ind. 2022) (claiming that the state has not been able to test plaintiffs' sincerity).

205. *See* 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/9EZG-WMC3].

religion, *whether or not compelled by, or central to*, a system of religious belief."[206] As for theology, the claim that liberals Jews adhere to a religious tradition that "does not actually impose any requirements on congregants" is also false, disparaging, and offensive.[207]

But the sincerity objection is nevertheless instructive. It shows how a less sophisticated or popular version of the pagan/Christian distinction can be connected to free exercise doctrine in order to undermine the claims of liberal and progressive believers. The argument that "[t]hose who are less devout are less likely to be burdened by restrictions on religion"[208] is a tautology given the claim that liberal believers have no obligation that the law could possibly burden. But the contrast with orthodox and traditional believers—who were, we are told, "[h]istorically, the people who brought Free Exercise claims"[209]—is telling. Liberal Jews, like Smith's pagans, are on the wrong side of the immanent/transcendent or advisory/obligatory distinction, which allows conservative, traditionalist, and anti-liberal critics to assert both that religious groups (i.e., liberals, progressives, humanists, secularists, and pagans) are oppressing them and that members of these groups are not entitled to the protections of religious liberty.

B. Free Exercise Preferentialism

As we have argued, current free exercise doctrine gives courts significant discretion for granting exemptions. As the Court unravels *Smith*, its standards have become increasingly vague, manipulable, and readily exploited. It is notable that free exercise victories thus far in the Roberts Court have mostly benefited religious conservatives, whatever their denomination, and the most high-profile cases have involved resisting antidiscrimination, public accommodation, equal access, and public health laws.[210] At the same time, the most notable

206. 42 U.S.C. § 2000cc-5-7(A) (2000) (emphasis added).

207. *See* Lithwick & Schwartzman, *supra* note 205 ("Now, one problem with this argument is that many Conservative and Reform Jews sincerely believe that they *do* have religious obligations. Because we do."); Schraub, *supra* note 203, at 53 ("Such a position displays a palpable disrespect towards liberal Jews and their genuinely held religious commitments."). For approaches to abortion ethics within Reform Judaism, see, e.g., MARK WASHOFSKY, JEWISH LIVING: A GUIDE TO CONTEMPORARY REFORM PRACTICE 239–42 (URJ Press rev. ed. 2010); and Joshua R. S. Fixler & Emily Langowitz, *Stricken from the Text: Sacred Stories of Reproductive Justice*, *in* THE SOCIAL JUSTICE TORAH COMMENTARY 105, 105–110 (Barry H. Block ed., 2021).

208. Blackman, *supra* note 199.

209. *Id.*

210. *See* Tandon v. Newsom, 141 S. Ct. 1294, 1296–98 (2021); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021); Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 889, 889 (2020); High Plains Harvest Church v. Polis, 141 S. Ct. 527, 527 (2020); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65–66 (2020); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1875–76 (2021); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2372–73 (2020); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2251–52 (2020); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1722–24 (2018), Trinity Lutheran Church

case in which plaintiffs lost a claim to religious freedom involved blatant and obvious discrimination against Muslims.[211]

The Court's free exercise decisions are complemented by an Establishment Clause doctrine that barely restrains legislatures from adopting selective exemptions that benefit particular religions. The Court seems unwilling to enforce doctrinal limits on legislative accommodations, despite obvious religious discrimination and significant third-party harms.[212] The result is an unavoidable regime of religious preferentialism, which favors some religious views over others and generally favors religious over nonreligious views. This preferentialism is the predictable outcome of legal doctrines that have long been criticized on these grounds.

Consider some further examples that implicate abortion and reproductive rights. During the height of the recent COVID-19 pandemic, the government distributed pandemic relief funds through the Paycheck Protection Program, part of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act.[213] The Small Business Administration lifted restrictions that would have prevented

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of Colum., Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017), Zubik v. Burwell, 578 U.S. 403, 405–10 (2016); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 692 (2014); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 176–79 (2012).

In the last decade, there are, at best, token examples of religious exemptions cases in the Supreme Court that might code as liberal or progressive. After initially rejecting an exemption in a death penalty case, in which a Muslim prisoner sought to have clergy present in the execution chamber, see *Dunn v. Ray*, 139 S. Ct. 661, 661 (2019), the Court was embarrassed into granting similar requests in later cases brought by Buddhist and Muslim prisoners. *See* Murphy v. Collier, 139 S. Ct. 1475, 1475 (2019); Ramirez v. Collier, 142 S. Ct. 1264, 1284 (2022); *see also* Ian Millhiser, *The Supreme Court Must Decide if it Loves Religious Liberty More than the Death Penalty*, VOX (Nov. 7, 2021, 8:30 AM), https://www.vox.com/22763939/supreme-court-death-penalty-religious-liberty-ramirez-collier-execution-pastor [https://perma.cc/8Y97-TKLH] ("After witnessing the bipartisan backlash to this decision [in *Ray*] — the conservative National Review's David French labeled it a 'grave violation of the First Amendment'—the Court eventually started to slink away from it."). And even these cases drew dissents from conservative Justices, including Justices Alito, Thomas, and Gorsuch, in *Murphy*, 139 S. Ct. at 1478, and Justice Thomas, questioning a prisoner's religious sincerity, in *Ramirez*, 142 S. Ct. at 1297–98.

In a recent survey of liberal and progressive free exercise challenges, Professor Angela Carmella argues that "[w]hen religious progressives challenge laws, . . . [t]hey show us that religious freedom is broader than the protection of conservative causes . . . ." Angela C. Carmella, *Progressive Religion and Free Exercise Exemptions*, 68 U. KAN. L. REV. 535, 615 (2020). She further claims that "the presence of progressive litigants now in the free exercise space begins to challenge the entrenched conservative and liberal narratives regarding the meaning and scope of religious freedom . . . ." *Id.* We agree, but find little, if anything, in Professor Carmela's review of the cases to suggest that this Court will recognize liberal or progressive religious claims in high stakes cases. The pending abortion free exercise claims will be a significant test for her thesis.

211. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

212. *See* Schragger & Schwartzman, *Establishment Clause Inversion*, *supra* note 8, at 27–28; Tebbe, *Liberty of Conscience*, *supra* note 8, at 307–10; Developments in the Law, *Reframing the Harm: Religious Exemptions and Third-Party Harm after* Little Sisters, 134 HARV. L. REV. 2186, 2207 (2021).

213. *See* Pub. L. No. 116-136, § 1102, 134 Stat. 281, 287–294 (2020); *PPP Loan Forgiveness*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program/ppp-loan-forgiveness [https://perma.cc/39BB-8NL5].

faith-based organizations from participating in the program.[214] But, in addition, the SBA granted a religious exemption from eligibility rules that excluded nonprofit organizations with more than five hundred employees, including those employed by affiliate organizations.[215] As a result of this exemption, large religious organizations and their local affiliates became eligible for and received federal funding that may have been denied to similarly-structured secular nonprofits.[216] By some estimates, faith-based organizations received $6 to 10 billion under the program, with affiliates of the Catholic Church receiving from $1.4 to 3.5 billion and entities affiliated with other denominations collecting at least $3 billion.[217] At the same time, and at the behest of antiabortion conservatives in the U.S. Senate, the Trump Administration launched an investigation into Planned Parenthood for violating SBA's affiliation rules in seeking the same type of funding made available to religious non-profits under SBA's waiver.[218]

Another example of free exercise preferentialism involves abortion carve-outs from the scope of state RFRAs. Like the federal RFRA, these laws apply a

214. *See Frequently Asked Questions Regarding Participation of Faith-Based Organizations in the Paycheck Protection Program (PPP) and the Economic Injury Disaster Loan Program (EIDL)*, U.S. SMALL BUS. ADMIN. 1, (Apr. 3, 2020), https://www.sba.gov/sites/default/files/2020-06/SBA%20Faith-Based%20FAQ%20Final-508.pdf [https://perma.cc/67WT-J2XM]; Dale R. Rietberg, SBA Addresses Concerns of Faith-Based Organizations, NAT'L L. REV. (Apr. 7, 2020), https://www.natlawreview.com/article/sba-addresses-concerns-faith-based-organizations [https://perma.cc/8KG5-D8B2].

215. *See* 13 C.F.R. § 121.103(b)(10).

216. Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Separation of Church and State Is Breaking Down Under Trump*, THE ATLANTIC (June 29, 2020), https://www.theatlantic.com/ideas/archive/2020/06/breakdown-church-and-state/613498 [https://perma.cc/CGB7-A8PK].

217. *See* Elliot Hanon, *The Catholic Church, with Billions in Reserve, Took More than $3 Billion in Taxpayer-Backed Pandemic Aid*, SLATE (Feb. 4, 2021, 11:05 AM), https://slate.com/news-and-politics/2021/02/catholic-church-usd3-billion-taxpayer-backed-pandemic-aid-ppp-paycheck-protection.html [https://perma.cc/R2Y6-QKPS]; Benjamin Fearnow, *Religious Organizations Receive $7.3 Billion in PPP Loans, Megachurches Amass Millions*, NEWSWEEK (July 7, 2020, 11:05 AM), https://www.newsweek.com/religious-organizations-receive-73-billion-ppp-loans-megachurches-amass-millions-1515963 [https://perma.cc/57TZ-G347]; Tom Gjelten, *Religious Groups Received $6-10 Billion in COVID-19 Relief Funds, Hope for More*, NPR (Aug. 3, 2020, 6:57 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/08/03/898753550/religious-groups-received-6-10-billion-in-covid-19-relief-funds-hope-for-more [https://perma.cc/M6TU-Q6SG]; Reese Dunklin & Michael Rezendes, *AP: Catholic Church Lobbied for Taxpayer Funds, Got $1.4B*, AP NEWS (July 10, 2020), https://apnews.com/article/economy-wv-state-wire-new-york-il-state-wire-dc-wire-dab8261c68c93f24cobfc1876518b3f6 [https://perma.cc/V8MM-9TEW].

218. Catholic News Service, *Planned Parenthood Urged to Return $80 Million in PPP Funds*, NAT'L CATH. REP. (May 27, 2020), https://www.ncronline.org/news/coronavirus/planned-parenthood-urged-return-80-million-ppp-funds [https://perma.cc/B3E7-8MBH] ("In separate statements, Sens. Marco Rubio, R-Florida, and Josh Hawley, R-Missouri, said the money needed to be returned and they urged an investigation into how the Planned Parenthood affiliates qualified for the loans."); Aaron Gregg, *Stimulus Turns Political as SBA Tries to Claw Back Funding from Planned Parenthood*, WASH. POST (May 23, 2020, 2:28 PM), https://www.washingtonpost.com/business/2020/05/23/planned-parenthood-sba-ppp-loans [https://perma.cc/5LZ4-D7CX].

compelling interest test to regulations that substantially burden religion.[219] They are drafted generally to apply across legislative domains and without regard to specific religious practices.[220] But at least two state legislatures have enacted laws that specifically bar exemption claims under their state RFRAs.[221] By combining abortion prohibitions with *sui generis* exclusions to block RFRA challenges, these states have engaged in blatant religious preferentialism, starkly illustrating how religiously motivated lawmaking and selective exemptions can be joined to favor some religious doctrines over others.

Mississippi's H.B. 1523 is another example.[222] In 2016, responding to the Supreme Court's decision to constitutionalize same-sex marriage in *Obergefell*, the Mississippi legislature adopted a statute that granted blanket exemptions to any state or local law that impinges on three "sincerely held religious beliefs or moral convictions": "(a) Marriage is or should be recognized as the union of one man and one woman; (b) Sexual relations are properly reserved to such a marriage; and (c) Male . . . or female . . . refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth."[223]

Here again is free exercise preferentialism at work. Those individuals or groups with moral, ethical, or religious convictions that are contrary to the three "protected beliefs" receive no special protections from burdens imposed by the state.[224] H.B. 1523 thus creates a stark inequality between religious convictions that are sanctioned by the state and those that are not. Consider also the Mississippi abortion restriction upheld in *Dobbs*.[225] The state could choose to adopt a conscience exemption protecting against burdens imposed by the restriction, but it has not done so. Essentially, Mississippi has adopted

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219. *See* Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 478 (2010).

220. *Id.* at 475–76.

221. The two states are Oklahoma and West Virginia. Oklahoma's abortion ban specifies that it cannot be challenged under the state RFRA. *See* OKLA. STAT. tit. 63, § 1-745.39(J) (2022) ("[A] civil action under this section . . . shall not be subject to any provision of the Oklahoma Religious Freedom Act."). To similar effect, West Virginia recently enacted a state RFRA that explicitly carves out free exercise challenges to state abortion restrictions. *See* Leah Willingham, *West Virginia GOP Governor Signs 'Religious Freedom' Bill*, W. VA. DAILY NEWS (Mar. 10, 2023), https://wvdn.com/123749 [https://perma.cc/8EPH-NALH] ("The bill also dictates the proposed law could not be used as an argument to defend abortion, which was effectively banned by West Virginia lawmakers last year. The provision was included as abortion rights groups are challenging abortion bans in some states by arguing the bans violate the religious rights of people with different beliefs.").

222. *See* H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016).

223. MISS. CODE ANN. § 11-62-3 (2016).

224. *See* Lindsay Krout Roberts, *Protecting "Sincerely Held Religious Beliefs": Lessons from Mississippi's HB 1523*, 36 MISS. C. L. REV. 379, 396 (2018) (concluding that "the majority of [HB 1523's] provisions implicitly and unconstitutionally promote one religious doctrine over another and one group of people over another").

225. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (discussing Mississippi's Gestational Age Act).

and endorsed a highly specific religious or moral creed with its three protected beliefs, while rejecting exemptions for religious and moral beliefs not shared by that state's political majority. Again, the effect is to turn an exemption regime into one of religious preferentialism.

A final and increasingly important set of examples involves the asymmetry in conscience protections for medical providers in the abortion context. As Elizabeth Sepper demonstrated more than a decade ago, federal and state laws provide extensive protections for doctors and nurses who are religiously or morally opposed to participating in providing abortions, but there are few, if any, protections for doctors and patients who have conscientious objections to complying with abortion bans, even when abortion is medically indicated.[226] This asymmetry—protecting the consciences of those who refuse care but not those who provide and receive it—is a model of free exercise preferentialism. And, as Sepper has shown, while this form of disparate treatment developed substantially in the medical and abortion contexts, it has now extended beyond them to encompass refusals of service and complicity claims involving insurance coverage, employment discrimination, and equal access to social services and public accommodations.[227]

Preferentialism is not easily contained. The problem of religious favoritism masking as "mere" accommodations was addressed for decades by subjecting exemptions to scrutiny under both Religion Clauses. As the Court itself has recognized,[228] some criteria for assessing whether an accommodation crossed the line have included whether the government was lifting burdens or providing benefits,[229] whether others similarly situated were also included in the exemption,[230] and whether the exemption caused harms to third parties.[231]

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226. *See* Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1506 (2012) ([E]xisting legislation generates significant asymmetries in the resolution of conflicts between medical providers and the hospitals, clinics, and nursing homes where they practice . . . ."); Elizabeth Sepper, *Conscientious Refusals of Care*, *in* THE OXFORD HANDBOOK OF U.S. HEATH LAW 354, 367 (I. Glenn Cohen, Allison K. Hoffman & William Sage eds., 2017) ("While legal and ethical frameworks include refusals with no basis in conscience, they simultaneously exclude the consciences of patients who require care and providers who seek to deliver it.").

227. *See* Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1513–18 (2015).

228. *See* Cutter v. Wilkinson, 544 U.S. 709, 720–21 (2005).

229. *See* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987); Bd. of Educ. of Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687, 724–25 (1994) (Kennedy, J., concurring in the judgment).

230. *See* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 673 (1970); Larson v. Valente, 456 U.S. 228, 246–47 (1982); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 14–15 (1989); *Grumet*, 512 U.S. at 702–03.

231. *See* United States v. Lee, 455 U.S. 252, 261 (1982); Estate of Thornton v. Caldor, 472 U.S. 703, 710 (1985); Tony & Susan Alamo Found. v. Sec'y. of Labor, 471 U.S. 290, 299 (1985); *Cutter*, 544 U.S. at 720, 722–23. *See also* KENT GREENAWALT, 2 RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 336–52 (2008) (surveying constitutional limits on religious accommodations); Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781, 811 (2018) (discussing doctrine of third-party harms).

But the Roberts Court has largely abandoned the third-party harm doctrine and seems unwilling to enforce other restraints on preferential exemptions. There are thus few remaining checks on the proliferation of "exemptions" that are meant to codify particular religious views, that treat certain religious believers and organizations more favorably, and that deny such exemptions to those whose religious beliefs or moral convictions run counter to state orthodoxy.[232]

CONCLUSION

Abortion is a test case for the Court's emerging religious freedom jurisprudence, under both the Establishment and Free Exercise Clauses. This doctrine, which appears conscience-friendly but is easily manipulated to favor religious conservatives, encourages abortion absolutism and allows state legislatures to provide selective exemptions against a deregulatory judicial backdrop that treats secular law as structurally hostile to religious actors.

The long-standing problems with religious exemptions are all now fully magnified. Judicially mandated accommodations are unfair and unequal insofar as they do not recognize secular claims of conscience. Yet, even limited to religious claims, free exercise doctrine in the courts invariably leads to selective applications. Moreover, those conscience claims most likely to succeed will be supportive of conservative religious norms. Legislatures sympathetic to those norms are permitted to enact selective accommodation laws, while those that seek to enforce liberal or progressive norms—such as equal access to public accommodations—are prevented from doing so.

This combination of legislative privilege and judicial intervention is a means of re-establishing a religious hierarchy. Under this system, those with conscientious objections that are inconsistent with the prevailing religious orthodoxy—in this case, the anti-abortion orthodoxy—will find no recourse in courts that view their claims as part of a liberal ideology that is both a source of secular oppression and undeserving of religious liberty protections.

232. *See also* Caroline Mala Corbin, *Religious Liberty for All? A Religious Right to Abortion*, 2023 WISC. L. REV. 475, 510–11 ("[D]espite crafting a doctrine that seems to privilege religion, the Supreme Court is expected to rule against those seeking religious exemptions from abortion laws. In the end, the Supreme Court has not expanded religious liberty but facilitated conservative Christianity. Its jurisprudence does not create religious liberty for all.").