HARMONIZING FREEDOM OF SPEECH AND FREE EXERCISE OF RELIGION

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INTRODUCTION

For the past several decades, judges, legislators, and commentators have disputed the core meaning of the Free Exercise Clause, leaving religious freedom in a state of uncertainty. A focal point of this dispute has been the Supreme Court's 1990 decision in *Employment Division v. Smith*,[1] which held that the Free Exercise Clause does not require the government to exempt religious conduct from otherwise valid regulations. It prohibits governmental discrimination against religion; not incidental burdens of general and neutral laws.[2] *Smith* overruled the standard associated with *Sherbert v. Verner*[3] and *Wisconsin v. Yoder*[4] that any application of a law that substantially burdens religious freedom must be narrowly tailored to serve a compelling governmental interest.[5] In doing so, *Smith* triggered widespread alarm, prompting Congress and many states to respond with legislation aimed at restoring the

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1 *See generally* 494 U.S. 872 (1990).

2 *Id.* at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'").

3 374 U.S. 398 (1963).

4 406 U.S. 205 (1972).

5 *See Smith*, 494 U.S. at 882–90.

Sherbert/*Yoder* strict scrutiny standard[6] to various spheres of regulation,[7] causing more constitutional litigation[8] and a patchwork of religious freedoms standards across the states.[9] Meanwhile, some Supreme Court Justices have continued to call for reconsideration of *Smith* as new problems have emerged.[10]

Now, a majority of the Supreme Court seems poised to complete the comeback and overrule *Smith*. In *Fulton v. Philadelphia*,[11] Justices Alito, Gorsuch, and Thomas recently argued for the wholesale overruling of *Smith* and restoration of *Sherbert*,[12] while Justices Barrett and Kavanaugh indicated dissatisfaction with the *Smith* test but found it unnecessary to decide yet whether to overrule *Smith*.[13]

Justice Barrett wisely advised caution, recognizing that there are many intermediate possibilities between holding that the Free Exercise Clause offers nothing more than protection from discrimination (a position she attributes to *Smith*)[14] and requiring strict scrutiny whenever a regulation burdens religion.[15] In pondering the question, what should replace *Smith*? Justice Barrett instructively suggested that the Court could take guidance from other areas of First Amendment jurisprudence where the Court has taken a "more nuanced" approach between the extremes presented by *Smith* and *Sherbert*.[16]

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[6] For simplicity I will refer to this as the *Sherbert* standard in this Article.

[7] *E.g.*, Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to bb-4 (1994) (applicable in its present version to federal law); Religious Land Use and Institutionalized Person's Act, 42 U.S.C. § 2000cc-1 (2006) (applicable to state and local land use regulation).

[8] *E.g.*, City of Boerne v. Flores, 521 U.S. 507, 516–29 (1997) (holding that Congress lacks the power under the Fourteenth Amendment to impose RFRA's obligations on the states on the basis of a disagreement with the Court's interpretation of the Free Exercise Clause).

[9] Twenty-one states have adopted state RFRAs; whereas ten states have no state RFRA but require strict scrutiny under the state constitution; and nineteen states do not have state RFRAs and require either intermediate scrutiny or no scrutiny. EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES 963 (6th ed. 2016).

[10] Justice Gorsuch has noted that "*Smith* has been criticized since the day it was decided. No fewer than ten Justices—including six sitting Justices—have questioned its fidelity to the Constitution." Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1931 (2021) (Gorsuch, J., concurring).

[11] *See generally id.* (majority opinion).

[12] *Id.* at 1883–926 (Alito, J., concurring) (joined by Justices Thomas and Gorsuch).

[13] *Id.* at 1882–83 (Barrett, J., concurring) (joined by Justice Kavanaugh). Justice Breyer also joined much of Justice Barrett's concurrence but not the paragraph expressing skepticism of *Smith*. *Id.* at 1882 (Barrett, J., concurring) (joined by Justice Kavanaugh and with whom Justice Breyer joined as to all but the first paragraph).

[14] *Id.* This is an oversimplification of *Smith*'s implications, particularly if one considers post-*Smith* case law that has supplemented it. The exceptions to *Smith*, while initially thought to be minor, have grown to become significant tools for protecting religious freedom against facially neutral systems of regulation and incentivizing government to leave ample space for religious exercise. *See infra* Sections II.C–D.

[15] *Fulton*, 141 S. Ct. at 1882–83.

[16] *Id.* at 1883.

An obvious candidate for this comparison is the Speech Clause. Freedom of speech is the most developed and multifaceted area of First Amendment jurisprudence. In addition, it raises parallel problems and features that are at the core of the *Smith*/*Sherbert* debate. Among these is the question of how to interpret the Speech Clause to protect a meaningful range of expressive freedom beyond merely requiring government to refrain from speech discrimination.[17] To the extent the Speech Clause protects positive liberty, how should courts reconcile this norm with competing goals of law and order, and translate the balance into concrete rules or threshold requirements for strict scrutiny or intermediate scrutiny?

In addition, the Speech and Free Exercise Clauses share a related purpose rooted in the libertarian idea that individuals have the capacity and natural right to think for themselves on such matters as happiness, truth, right and wrong, our relationship to the Divine, social welfare, and public policy.[18] These Clauses protect not only an individual's freedom to hold opinions that differ from the mainstream, but also to act on those views and seek to influence others.[19] The close relationship between the free exercise of religion and the freedom of speech points to the sensible assumption that they should receive similar interpretation when dealing with parallel types of problems, or at least that differences in interpretation should be carefully justified.

With this premise, this Article compares freedom of speech and free exercise jurisprudence in various parallel applications, with the suggestion of harmonizing them more closely. While other commentators have compared freedom of speech and free exercise case law with a narrower focus (most commonly, focusing on the incidental burdens issue presented in *Smith*),[20] I consider here multiple ways in which free exercise and free speech standards of protection differ, or where some have argued that they differ. These include the treatment of incidental burdens, underinclusive

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[17] *See generally* John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103 (2005) [hereinafter Fee, *Speech Discrimination*] (discussing how the First Amendment principle disfavoring content-based regulation serves indirectly to promote a substantive expressive freedom, rather than indicate a guiding norm of government viewpoint neutrality).

[18] *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1197–98 (1996).

[19] David A. Bogen, *Generally Applicable Laws and the First Amendment*, 26 SW. U. L. REV. 201, 245–47 (1997).

[20] Commentators who have argued for a unified treatment of speech and free exercise protection against incidental regulatory burdens include: Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion* Clauses, 48 VAND. L. REV. 1335, 1364–74 (1995) (arguing that intermediate scrutiny standard based on speech jurisprudence should apply to inadvertent burdens to speech or religion); Dorf, *supra* note 18, at 1178–79 (arguing that heightened scrutiny should apply to substantial regulatory burdens to speech, religion and other fundamental rights); Bogen, *supra* note 19, at 253–58 (arguing that the *O'Brien* test should apply to both speech and free exercise of religion). *But see* Dan T. Coenen, *Free Speech and Generally Applicable Laws: A New Doctrinal Synthesis*, 103 IOWA L. REV. 435, 464–68 (2018) (arguing that the differing dynamics of the Free Exercise and Speech Clauses justify differing treatment).

regulations, regulations that allow individualized exemptions, freedom of association, regulations that compel behavior, and conditions on public employment. In addition, I consider the overlapping protection these freedoms provide for religious expression, and what the Court's apparent preference for using speech jurisprudence here signifies.

In arguing that free speech and free exercise jurisprudence should be more closely aligned in these respects, I am not claiming that they lack distinctive features and applications. Whereas some have argued that we should understand the free exercise of religion as largely or wholly subsumed within the freedom of speech[21] (similar to the freedom of the press), in my view, this does not give adequate weight to the text of the First Amendment or to the historical reasons for protecting the free exercise of religion independently.[22] While the Free Exercise and Speech Clauses overlap in their spheres of protection, the Court has correctly interpreted them as independent rights that protect different sets of behavior.

Comparing judicial treatment of these freedoms may potentially benefit both lines of jurisprudence. While it is plausible to use the freedom of speech to inform free exercise jurisprudence, we should also recognize that freedom of speech jurisprudence remains puzzling, ambiguous, and contested in many ways, both as to general theory and specific doctrines. This Article is as much about how free speech jurisprudence may improve by adapting to free exercise jurisprudence as the reverse.

Using free exercise jurisprudence to inform freedom of speech is particularly promising in light of post-*Smith* free exercise developments. *Smith* initially caused widespread alarm about the state of religious freedom by suggesting that the Free Exercise Clause is nothing more than a protection from religious discrimination.[23] But since *Smith*, the Court has regularly found ways to offer significant protection for religion in cases that have not involved facial or proven religious discrimination. These include by interpreting the "generally applicable" requirement of *Smith* rigorously, making it a test of underinclusiveness;[24] interpreting the "individualized exemptions" exception to *Smith* expansively;[25] and recognizing another significant

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[21] Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. L.J. 71, 71–84 (2001) (arguing that the Free Exercise Clause offers little protection beyond what the Speech Clause already provides); *see also* Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807, 832–35 (2009) (arguing that the freedom of religion, properly understood, is an aspect of a wider human freedom that does not require defining religion as a distinct activity).

[22] *See* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 12–16 (2000) (discussing various reasons the framers sought to protect the freedom of religion independently).

[23] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., concurring).

[24] *See, e.g.*, Lukumi Babalu Aye, Inc. v. Hialieah, 508 U.S. 520, 542–46 (1993) (striking down three facially neutral city ordinances that outlawed animal sacrifices; citing *Smith*, the Court held that the ordinances were underinclusive because they prohibited religious conduct while allowing comparable secular conduct).

[25] *See, e.g.*, *Fulton*, 141 S. Ct. at 1879 ("The creation of a formal mechanism for granting

component of religious freedom that *Smith* did not mention—the right to choose one's religious teachers and ministers—as categorically protected.[26] These emerging doctrines usefully protect substantive religious liberty where it may reasonably be accommodated, without requiring courts to scrutinize potentially any regulation because it conflicts with someone's religion.[27] Yet they do not have obvious analogues in free speech law, and one wonders why not? As Michael McConnell has suggested, the religion clauses may serve as a model for understanding and enforcing other constitutional rights.[28]

Part I develops the premise of this Article, that the Free Exercise Clause and the Speech Clause are related, complementary provisions of the First Amendment. The rights of free exercise and speech arise from a common source: the individual's capacity as a free agent in the use of one's mind and the practice of one's opinions. As pillars of American liberalism, they work in tandem to protect values rooted in conscience, the search for truth, pluralism, and participation. Because of their close relationship, and the common sorts of judicial questions they invoke, we should harmonize free exercise and speech methodologies where possible.

In Part II, the heart of this Article, I discuss various areas of application as candidates for harmonization. This includes the constitutional treatment of religious speech, incidental burdens, regulations that lack general applicability, and the rights of organizations to choose their representatives, compelled behavior, and public employment. The comparison reveals that the constitutional landscape has changed significantly since *Smith*, and the common assumption that the law treats religious freedom significantly less favorably than speech is no longer accurate. The Court's post-*Smith* free exercise jurisprudence, as well as new rulings on speech, have brought the enforcement of these rights closer in some ways, but have also created new differences. And in some respects, such developments have made the First Amendment more protective of free exercise than it is of speech. While each of these points of comparison invites further analysis, I offer tentative recommendations for how speech and free exercise protections may be improved in these areas in relation to each other.

In the Conclusion, I draw some general conclusions and offer a framework for harmonizing the two constitutional clauses. This framework is based on the norms of positive pluralism and selective judicial scrutiny. The first norm includes the idea that government need not be—indeed, should not be—neutral to the value of speech

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exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it 'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude . . . .").

[26] *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012) (the Court distinguished *Smith* and affirmed that the First Amendment requires a ministerial exception, even in instances involving "valid and neutral law[s] of general applicability.").

[27] *Fulton*, 141 S. Ct. at 1877.

[28] McConnell, *supra* note 22, at 43.

and religious exercise in society, but rather should promote and protect conditions for a wide variety of expressive behavior and religious behavior to flourish. The second norm has to do with how courts protect religious and expressive pluralism without overstepping their role in relation to other branches of government.

In both areas of jurisprudence, courts have developed useful threshold rules that serve to identify suspicious regulations, which, in the words of Justice Roberts, "appear[] to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake,"[29] and appropriately call for heightened judicial scrutiny. In examining the respective rules that courts have developed for the protection of speech and religion, we see that each has some tools that the other lacks and that could make sense to adopt.

I. SPEECH AND RELIGIOUS EXERCISE AS COMPLIMENTARY RIGHTS

It is no accident that the freedom of speech and the free exercise of religion appear together in the First Amendment of the United States Constitution. The two clauses protect what many early Americans considered natural individual rights in relation to government.[30] According to this view, the freedom of speech and the free exercise of religion arise from the individual's capacity as a free agent in the use of one's mind and practice of one's opinions.[31]

In his 1792 essay, *Property*, James Madison highlighted these as examples of natural rights, in which individuals have a property, and which government has a primary duty to protect.[32] According to Madison, whereas the term "property" in a particular sense refers to one's claims over the external things of the world in exclusion of others, "[i]n its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; *and which leaves to every one else the like advantage*."[33] His leading examples were the freedom of speech and the free exercise of religion: "In the latter sense, a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them."[34]

Madison's thesis in *Property* is that "[g]overnment is instituted to protect property of every sort,"[35] including especially these freedoms that are rooted in

[29] S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 717 (2021).

[30] *See* James Madison, *For the* National Gazette*, 27 March 1792*, *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/01-14-02-0238 [https://perma.cc/RX5B-G9XB].

[31] *See id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* Madison follows these with "the safety and liberty of his person," and "the free use of his faculties and free choice of the objects on which to employ them" as among the rights in which all individuals have property. *Id.*

[35] *Id.*

personhood.[36] No matter how scrupulously a government protects the possessions of individuals, sparing praise is owed to a government that "does not protect them in the enjoyment and communication of their opinions, in which they have an equal, and in the estimation of some, a more valuable property."[37] Likewise, a just government protects the religious freedom of individuals, for "[c]onscience is the most sacred of all property; other property depending on part on positive law, the exercise of that, being a natural and unalienable right."[38]

Madison's pairing of speech and religious liberty makes sense in light of their intertwined history during preceding centuries. During the Protestant Reformation, religious freedom was a widely disputed topic, as many sought the freedom to formulate their own religious beliefs and to worship God according to their own conscience.[39] However, as many scholars have noted, in seeking this freedom, religious leaders invoked a host of other rights.[40] Among these was free speech.[41] Reformers and converts alike sought not just to have differing beliefs, but to *express* those differing beliefs.[42] In fact, a phrase used by Martin Luther in his 1520 Manifesto—that each person is "prophet, priest, and king"—was later used as a popular rally cry in favor of free speech, especially among English Calvinists.[43] Accordingly, some scholars have claimed that free speech during the Reformation "was treated primarily as an aspect of a wider issue, that of *religious toleration*."[44]

In the years following the Reformation, freedom of speech expanded to other areas of society. Early iterations of the right to free speech in various founding documents were primarily focused on formal political speech.[45] For example, the English Bill of Rights, enacted in 1689, established "that the Freedome of Speech

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[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] John Witte, Jr., *Law, Religion, and Human Rights: A Historical Protestant Perspective*, 26 J. RELIGIOUS ETHICS 257, 258 (1998).

[40] *Id.* ("The Protestant Reformation was, in part, a human rights movement"); Anshuman A. Mondal, *Articles of Faith: Freedom of Expression and Religious Freedom in Contemporary Multiculture*, 27 ISLAM & CHRISTIAN-MUSLIM RELS. 3, 5 (2016) ("[F]reedom of speech emerged out of the debates concerning religious toleration in the seventeenth and eighteenth centuries.").

[41] Witte, *supra* note 39, at 260–61.

[42] Mondal, *supra* note 40, at 7 ([E]arly Protestants sought "not just to confess their religious beliefs in private without molestation . . . but also to profess them in public . . . .").

[43] John Witte, Jr., *Prophets, Priests, and Kings: John Milton and the Reformation of Rights and Liberties in England*, 57 EMORY L.J. 1527, 1541 (2008).

[44] Joris van Eijnatten, *In Praise of Moderate Enlightenment: A Taxonomy of Early Modern Arguments in Favor of Freedom of Expression*, *in* FREEDOM OF SPEECH: THE HISTORY OF AN IDEA 19, 20 (Elizabeth Powers ed., 2011). For an overview of how the Reformation influenced liberalism in general, see John W. Shepard, Jr., *The European Background of American Freedom*, 50 J. CHURCH & STATE, 647, 654 (2008).

[45] Mondal, *supra* note 40, at 8–9.

and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament."[46]

During the American colonial period, arguments for an even wider freedom of speech developed as a natural exercise of liberty. Indeed, "[o]nce it was acknowledged that the offensiveness of religious beliefs did not justify suppression, it became easier to argue that the offensiveness of ideas did not make their expression an 'abuse' of liberty."[47] *Cato's Letters* was among the most influential publications arguing for a freedom of speech in the colonial period.[48] Many of the essays addressed the common source of free speech and religious freedom.[49] In one essay, liberty was defined as "the Right of every Man to pursue the natural, reasonable, and religious Dictates of his own Mind; to think what he will, and act as he thinks . . . ."[50] It was argued, therefore, that freedom of speech was "the great [b]ulwark of Liberty; they prosper and die together."[51]

As the American concept of the freedom of speech grew in the 18th century, concepts of religious liberty continued to develop as well, culminating in the First Amendment. Whereas a century earlier John Locke's arguments in favor of religious toleration were progressive by the standards of his time,[52] for many Americans of the founding generation, Locke's concept of "toleration" did not go far enough: they sought to recognize a natural right to religious freedom that does not depend on positive law.[53] Neither was the term "freedom of conscience" sufficient for some, as it potentially implied a mere right to hold one's beliefs in private.[54] After considering earlier drafts for a Bill of Rights provision protecting religious toleration or

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[46] An Act declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown 1688, 1 W. & M., sess. 2, c. 2. Similarly, the Massachusetts Declaration of Rights (1780) stated: "The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." Declaration of Rights para. XXI (Mass. 1780), *reprinted in* 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 343 (1971).

[47] David Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 456 (1983).

[48] *See id.* at 445.

[49] *See id.* at 446.

[50] 2 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS; OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 248 (6th ed. London 1775).

[51] 1 *id.* at 100.

[52] *See* Steven J. Heyman, *The Light of Nature: John Locke, Natural Rights, and the Origins of American Religious Liberty*, 101 MARQ. L. REV. 705, 709–11 (2018); JOHN LOCKE, A LETTER CONCERNING TOLERATION (William Popple trans., London 1689).

[53] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1431, 1443–44 (1990) ("The ways in which American advocates of religious freedom departed from Locke . . . are as significant as the ways in which they followed him.").

[54] *See id.* at 1449–55.

freedom of conscience, Congress settled on the phrase "free exercise of religion" as it made clear that it covered a right to put one's religious beliefs into practice.[55]

The substitution of "free exercise of religion" for "freedom of conscience" may have influenced the placement of the freedom of speech in the First Amendment. Whereas an earlier draft of the Bill of Rights had placed the freedom of speech in a separate provision, the final Bill placed them adjacent in the First Amendment.[56] According to Anshuman Mondal, this made sense after the freedom of religion was clarified as an active right to exercise one's religious beliefs, which, without a secular counterpart, would seem incomplete or incongruous.[57] The freedom of speech filled that void, as it too was based on the freedom to exercise one's beliefs, even on secular subjects, in the mode of communicating them to others.[58] This is consistent with Madison's treatment of speech and religious exercise as parallel rights in *Property* rooted in one's capacity as an individual.[59]

I do not wish to overstate the point, as one can also make distinctions in the historical development of these rights and the potential reasons for including them in the First Amendment. Free exercise of religion was a more developed concept than the freedom of speech in the late 18th century, and was closely connected to the decision that government should make no establishment of religion.[60] Madison suggested at times that religious freedom had "peculiar value," because one's obligations to God naturally precede one's obligations to civil government.[61] One could also point out that the freedom of speech has a differing and more direct role than religious freedom in politics, as republican government depends upon the participation of enlightened, informed citizens in the formation of governmental policy. Nevertheless, the Framers did not provide a Speech Clause limited to protecting political speech, nor suggest that the freedom of speech exists solely for facilitating democratic government.[62] Martin Redish has argued that the ultimate value of the Speech Clause is better described as individual self-realization, which encompasses democratic participation and much more.[63] Such an explanation resonates with the

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[55] *See id.* at 1488–91.

[56] *See id.* at 1481–84.

[57] Mondal, *supra* note 40, at 10–11.

[58] *See id.*

[59] *See also* Bogen, *supra* note 47, at 456 ("[T]he stylistic innovation that led to the coupling of free speech and religious freedom in a single amendment [leads] to a perception that they are related.").

[60] *See id.* at 454–55, 459–62.

[61] *See* Madison, *supra* note 30; *see also* JAMES MADISON, *A Memorial and Remonstrance against Religious Assessments*, *in* SELECTED WRITINGS OF JAMES MADISON 21, 25 (Ralph Ketcham ed., 2006).

[62] *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 596–611 (1982) (arguing against a limited democratic process model for freedom of speech).

[63] *Id.* at 593, 625–45.

original natural law understanding of the freedom of speech as beginning with the individual and makes it a natural companion to religious freedom.[64]

Consistent with this, Supreme Court decisions emphasized the connection between the freedom of speech and the free exercise of religion. In *Capitol Square Review & Advisory Board v. Pinette*, for example, the Court explained that "in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince."[65] In *Lee v. Weisman*, the Court noted that "[t]he Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment . . . ."[66] More recently, in *Kennedy v. Bremerton*, the Court stated: "These Clauses [the Free Exercise and Free Speech Clauses] work in tandem. . . . That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent."[67]

Accordingly, it is natural to treat the freedoms of speech and religious exercise as companion rights. They arise from a strong conception of individuals as having the natural capability and prerogative to judge truth and error, right and wrong, and pursue happiness (within the bounds of respecting similar freedom for others) according to their own consciences. They are pillars of American liberalism.

II. DOCTRINAL COMPARISON OF SPEECH AND FREE EXERCISE

The freedom of speech and free exercise of religion are not only related in purpose, but also in sharing various common challenges in translating their ideals into concrete rules and standards. In this Part, I compare various aspects of free exercise and free speech jurisprudence under currently controlling constitutional law. Both are patchworks of various standards, threshold rules, levels of scrutiny, and exceptions. While in some ways the law treats these Clauses harmoniously,[68] in other ways, the law for each diverges inexplicably.[69] Moreover, the common assumption that the law treats free exercise as weaker than the freedom of speech is no longer accurate. Since the Supreme Court's decision in *Employment Division v. Smith*, the picture has become more nuanced, even reversed in several important ways.

To be clear, by questioning differences between speech and free exercise protections, I am not referring to the fact that the Speech and Free Exercise Clauses

[64] *See id.*

[65] 515 U.S. 753, 760 (1995).

[66] 505 U.S. 577, 591 (1992).

[67] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2421 (2022); *see also* MADISON, *supra* note 61.

[68] *See, e.g.*, *Kennedy*, 142 S. Ct. at 2421; Murdock v. Pennsylvania, 319 U.S. 105, 107–17 (1943).

[69] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 277 (1981); *Pinette*, 515 U.S. at 757, 760; Rosenburger v. Rector, 515 U.S. 819, 823, 837, 846 (1995).

protect different, although overlapping, sets of interests and behavior. We may suppose that some claims should prevail on free exercise grounds but not on speech grounds and vice versa, as one should expect if these Clauses are not redundant. Rather, I focus here on questionable differences between judicial rules for the enforcement of those respective spheres. I also consider the area where speech and free exercise protection overlap, and are sometimes coterminous, but where some have argued that the Court has preferred relying on the Speech Clause.[70] The question of favoritism here is not about substantive differences between speech and free exercise protections, but rather about whether this preference symbolically indicates a primacy of speech over religion.

For illustration, I make tentative suggestions in each of these areas for how free exercise and free speech protections might be harmonized, but a complete exploration of these individual points requires further development. My primary important point is that there is an opportunity for improvement or clarification of First Amendment jurisprudence in various ways by adjusting speech or religion protections toward one another and presuming their common method of enforcement.

A. Religious Expression

Let us first consider the Supreme Court's treatment of the overlap between free exercise and free speech protection. It has been common historically, and remains so today, for First Amendment litigants to make speech and free exercise claims side by side.[71] This happens where the government seeks to regulate or punish behavior that, to the claimant at least, is both expressive and religious.[72] The practice of combining speech and free exercise claims began in the early 20th century with the Jehovah's Witnesses cases and continues today.[73]

The overlap represents a significant portion of both religious behavior and of contested expressive behavior. While not all religious behavior is necessarily expressive, arguably most of it is. This includes not only such verbal acts as teaching, evangelizing, writing, distributing literature, reciting or singing phrases and organizing to worship with others; it also includes various forms of nonverbal expression, including rituals, sacraments, gestures, dress, art and architecture and many other

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[70] *See* Stephen M. Feldman, *The Theory and Politics of First Amendment Protections: Why Does the Supreme Court Favor Free Expression Over Religious Freedom?*, U. PA. J. CONST. L. 431, 447–48 (2006); TIMOTHY ZICK, THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS 109–17 (2018).

[71] *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 300 (1940); *Murdock*, 319 U.S. at 107; *Kennedy*, 142 S. Ct. at 2419.

[72] *See, e.g.*, *Cantwell*, 310 U.S. at 300–02; *Murdock*, 319 U.S. at 106–07; *Kennedy*, 142 S. Ct. at 2415, 2419.

[73] *See Cantwell*, 310 U.S. at 300–02; *Murdock*, 319 U.S. at 106–07; *Kennedy*, 142 S. Ct. at 2415, 2419.

potential forms.[74] It is also a common tenet of religion to abstain from saying some things (such as blasphemy or swearing allegiance to anyone other than God)[75] or from making certain symbolic representations ("Thou shalt not make unto thee any graven image . . . ."),[76] which implicates speech doctrines concerning compelled speech.

It is also remarkable that many speech cases involve religious claimants, even though the Speech Clause protects a much wider sphere. The story of the Jehovah's Witnesses' significant influence on free speech developments of the 20th century is well known,[77] and the pattern of religious claimants often appearing in important speech cases continues to this day, as indicated by the Supreme Court's recent decisions in *Kennedy v. Bremerton School District*[78] and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[79] and the Court's recent decision in *303 Creative LLC v. Elenis*.[80] Presumably the reason for this is that fervent religious believers and communities often are cultural minorities and therefore find themselves in conflict with majority-influenced regulations of speech; and the majority, whether due to purposeful discrimination or simple indifference to the outsider's peculiar religious interests, is unwilling to adjust.[81]

In early First Amendment cases, the Supreme Court tended to treat the two rights together, even in unison. For example, in *Cantwell v. Connecticut*,[82] the Supreme Court struck down a licensing requirement for solicitors of religious or charitable causes based on the freedom of speech and free exercise of religion without differentiating the two.[83] Likewise, in *Murdock v. Pennsylvania*,[84] the Court relied on both speech and free exercise to hold unconstitutional the State's application of a licensing tax to door-to-door sales of religious literature. In doing so, the Court held that spreading one's faith by selling religious literature is a protected form of religious exercise, as protected as worshiping in the churches, and "has the same claim as [other forms of religion] to the guarantees of freedom of speech and freedom of the press."[85] The

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[74] *See* Daniel J. Hay, *Baptizing* O'Brien*: Towards Intermediate Protection of Religiously Motivated Expressive Conduct*, 68 VAND. L. REV. 177, 179, 188, 200, 212–13 (2015).

[75] *Exodus* 20:3–7 (King James); *Leviticus* 24:16 (King James).

[76] *Exodus* 20:4 (King James).

[77] *See* Richard C. C. Kim, *The Constitutional Legacy of the Jehovah's Witnesses*, 45 SW. SOC. SCI. Q. 125, 125 (1964); William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 U. CIN. L. REV. 997, 997–99 (1987).

[78] 142 S. Ct. at 2415–16, 2419.

[79] 584 U.S. 617, 621–25 (2018).

[80] *See* 600 U.S. 570, 580 (2023).

[81] *See Kennedy*, 142 S. Ct. at 2423–25.

[82] 310 U.S. 296 (1940).

[83] *Id.* at 303, 307, 311.

[84] 319 U.S. 105, 107–17 (1943).

[85] *Id.* at 109; *accord* Jamison v. Texas, 318 U.S. 413, 417 (1943).

Court also discussed the limitations of free exercise and free speech together, implying that their limitations are structurally parallel.[86]

Nevertheless, in other cases from the same period, and for decades thereafter, the Supreme Court began to treat the Speech Clause as the preferred grounds for protecting religious and other interests where possible.[87] Thus, in *West Virginia v. Barnette*,[88] the Court relied on the Speech Clause to hold that Jehovah's Witnesses could not be compelled to say the Pledge of Allegiance and salute the American flag, overruling its prior holding in *Minersville School District v. Gobitis*[89] on that point, but conspicuously did not overrule *Gobitis*'s holding that the compulsion was valid under the Free Exercise Clause.[90] Perhaps most remarkably, the Court in cases such as *Widmar v. Vincent*,[91] *Capitol Square Review and Advisory Board v. Pinette*,[92] and *Rosenburger v. Rector*[93] often relied on the Speech Clause alone to strike down regulations that were both content-based and religiously discriminatory, even though the Court could just as easily relied upon the Free Exercise Clause alone or both clauses together.

More recently, in *Kennedy v. Bremerton School District*,[94] the Court returned to the *Cantwell*/*Murdock* approach of relying on both Clauses to protect religious expression, emphasizing "[t]hese Clauses work in tandem."[95] Whether this signals a new trend remains to be seen.

Why the apparent judicial preference (until recently) for relying on the Speech Clause rather than the Free Exercise Clause in cases where both kinds of discrimination are clearly present? Stephen Feldman suggests that this represents a twentieth century shift in the Supreme Court's political leanings from a Protestant-grounded form of republican pluralism to one of broader democratic pluralism.[96] Whereas religious free exercise was a natural pillar of the older republican framework, it did

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[86] For example, the Court pointed to *Chaplinsky v. New Hampshire*, 316 U.S. 568, 574 (1942), and *Cox v. New Hampshire*, 312 U.S. 569, 578 (1941), both speech cases in which the government prevailed, to assure that freedom of speech and religion are not unbounded. *Murdock*, 319 U.S. at 110.

[87] *See* Feldman, *supra* note 70, at 432.

[88] 319 U.S. 624, 639, 642 (1943).

[89] 310 U.S. 586, 587 (1940).

[90] The emphasis in *Barnette* on the Speech Clause seems justified on the basis that the compulsion was undoubtedly content-based and communication-oriented, both in its governmental purpose and objectively, whereas it only incidentally implicated religion due to the conflicting beliefs of the claimants. Nevertheless, some have taken *Barnette* to be an indication of an emerging general preference for the Speech Clause over the Free Exercise Clause. *See* Feldman, *supra* note 70, at 450–51; ZICK, *supra* note 70, at 110.

[91] 454 U.S. 263, 277 (1981).

[92] 515 U.S. 753, 760 (1995).

[93] 515 U.S. 819, 837, 846 (1995).

[94] 142 S. Ct. 2407, 2421 (2022).

[95] *Id.*

[96] Feldman, *supra* note 70, at 432.

not comfortably fit within the emerging democratic pluralism framework that guided the Court in the middle- and later-twentieth century; instead freedom of speech became the paramount First Amendment freedom.[97]

Feldman's descriptive explanation is persuasive in some respects but may not adequately account for the Court's occasional vigorous enforcement of free exercise in this period, particularly in *Sherbert* and *Yoder*. Moreover, there may be a more free-exercise-friendly explanation for the Court's reliance on the Speech Clause where possible to resolve cases involving religious speech: to keep both First Amendment protections harmonious and inclusive. Resolving cases involving religiously content-based regulations under the Speech Clause seems justified by the value of ruling on more inclusive grounds where possible, thus avoiding any implications that the First Amendment creates special privileges for religious speech. If courts were to interpret the Free Exercise Clause as protecting religious speech independently (and, therefore, potentially more favorably, as the Speech Clause protects non-religious speech), this would create a kind of content-based constitutional structure and bring the norms of two clauses into apparent conflict.[98] By relying wherever possible on the Speech Clause to confront content-based regulations of religious speech, the Court reduces the risk or appearance of pitting these freedoms against one another.

Nevertheless, the Court's tendency to rely on the Speech Clause alone in cases where it might have relied upon both clauses in unison has given air to the belief that the Free Exercise Clause has become a subordinate freedom at best.[99] If Feldman is right about twentieth century democratic pluralism leaving little role for religious freedom, it is an unfortunate narrative, as it is possible to envision a Constitutional system that encourages various forms of pluralism of independent value, including religious pluralism, toward the end of achieving individual fulfillment and social progress.[100]

Tentative Recommendation: Kennedy's approach to treating the Free Exercise and Speech Clauses in tandem represents a positive development for the treatment of religious expression. By more frequently relying upon both Clauses where their protections overlap, the Court avoids sending a message that the Free Exercise Clause is subordinate to the Speech Clause, or that it has wholly separate purposes. At the same time, by including the Speech Clause in the analysis, the Court makes clear that it is not creating special advantages for religious speech but enforcing an equivalent freedom for all.

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[97] *See id.* at 433.

[98] This coincides with the plurality's analysis in *Texas Monthly v. Bullock*, 489 U.S. 1, 25 (1989), that government may not favor religious publications over non-religious publications in sales taxes, even for the benign purpose of reducing governmental burdens on religion.

[99] *See* Widmar v. Vincent, 454 U.S. 263, 277 (1981); Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995); Rosenberger v. Rector, 515 U.S. 819, 837, 846 (1995).

[100] *See* Feldman, *supra* note 70, at 432–33.

B. Generally Applicable Law and Incidental Burdens

A commonly noticed difference between judicial protections of speech and free exercise has to do with incidental burdens that arise from general laws of conduct. All agree that religious conduct and expressive conduct must remain bounded at times by general regulations, but does the First Amendment require exceptions where the government can accommodate them?

Employment Division v. Smith holds that, under the Free Exercise Clause, the answer is no, provided that the regulation is generally applicable and religiously neutral.[101] On the other hand, in *United States v. O'Brien*,[102] the Supreme Court provided a more generous test for expressive exemptions that has not been overruled. Under *O'Brien*, where government seeks to prohibit or punish conduct that is expressive, the government must show that its regulation (a) "furthers an important or substantial governmental interest"; (b) that the regulation is "unrelated to the suppression of free expression"; and (c) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[103]

The *O'Brien* test has been described as an intermediate scrutiny test, paralleling the level of scrutiny that courts apply to content-neutral regulations of speech.[104] It is true that, in practice, courts usually defer to governmental interests while applying the test, as the Court did in *O'Brien* itself,[105] so perhaps it is a soft form of intermediate scrutiny.[106] Nevertheless, some expressive actors have prevailed against general conduct laws in the lower courts under the *O'Brien* test.[107] Moreover, the *O'Brien* test provides a negotiating point for those seeking exemptions from general laws, and even the threat of litigation may nudge some governmental actors towards

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[101] 494 U.S. 872, 882, 890 (1990).

[102] *See generally* 391 U.S. 367 (1968).

[103] *Id.* at 377.

[104] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 (1984) (explaining that the *O'Brien* test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.").

[105] 391 U.S. at 376–77.

[106] *See* Dorf, *supra* note 18, at 1208 (noting that the Court has applied the *O'Brien* test with deference to the government).

[107] *E.g.*, Baribeau v. City of Minneapolis, 596 F.3d 465, 477–78 (8th Cir. 2010) (dressing as zombies to protest consumer culture was protected as expressive conduct); Hodgkins v. Peterson, 355 F.3d 1048, 1059–60, 1064 (7th Cir. 2004) (holding curfew law for minors fails the *O'Brien* test); *see also* Aimee Green, *Judge Clears Nude Bicyclist in Portland*, THE OREGONIAN (Nov. 13, 2008, 12:46 AM), https://www.oregonlive.com/news/2008/11/judge_throws_out_charges_again.html [https://perma.cc/ZHS2-XHZU] ("A Multnomah County judge has cleared a Northeast Portland nude bicyclist of criminal indecent exposure charges, saying cycling naked has become a 'well-established tradition' in Portland and understood as a form of 'symbolic protest.'").

accommodation of expression.[108] The *O'Brien* test's presence reminds government actors to remember the constitutional value of private expression and to accommodate it where possible.[109]

Even if the *O'Brien* test's protectiveness for expressive conduct is modest, there is no justification for lacking a parallel First Amendment standard that protects religious conduct. Some may point out that a high percentage of religious conduct is in fact expressive, and thus is already protected under *O'Brien*,[110] but this is not enough to solve the discrepancy. First, the Supreme Court requires conduct to be "inherently expressive" to merit *O'Brien*-level protection, which the Court has interpreted as limited to traditional forms of expression or such acts that would be understood as expressive without the benefit of words.[111] Under such standards, some religious conduct, even that is intended to be expressive, may not qualify.[112] In any case, relying on *O'Brien* and the Speech Clause to protect religious conduct misses the point that the Free Exercise Clause protects a sphere of behavior that need not be communicative to any other person, but can be wholly private.

Potential differences in the Speech and Free Exercise Clauses' purposes do not justify elevating expressive conduct above religious conduct in relation to incidental burdens. First, let's suppose that *O'Brien* rests on the idea that the freedom of speech protects individual self-fulfillment through expression.[113] There is no doubt that creative and symbolic expressive action, in many forms, can be both satisfying and edifying to the individual actor, as well as to those who observe. Symbolic behavior can demonstrate love, express anger, and evoke many other emotions. These effects,

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[108] *See* John Fee, *The Freedom of Speech-Conduct*, 109 KY. L.J. 81, 94–95 (2021) [hereinafter Fee, *Speech-Conduct*].

[109] Even when government actors refuse to give exemptions for expressive conduct, the *O'Brien* test may lead officials to show greater respect to freedom of speech claimants in the process, by forcing them to articulate a substantial interest for the decision rather than simply saying "we are not required to give your peculiar personal interests any weight." *See id.* As the Supreme Court's decision in *Masterpiece Cakeshop* reminds us, the manner in which government actors reject an individual's request for an exemption, whether respectful or disrespectful, has independent constitutional significance, even if the result could have been properly justified. *See* 584 U.S. 617, 617–37 (2018).

[110] *See generally* Hay, *supra* note 74.

[111] United States v. O'Brien, 391 U.S. 367, 376 (1968).

[112] For example, in *Masterpiece Cakeshop* members of the Court struggled at oral argument with whether making a wedding cake would be sufficiently expressive to warrant Speech Clause protection, Transcript of Oral Argument at 4–47, 77–84, *Masterpiece Cakeshop*, 584 U.S. 617 (2018) (No. 16-111), before ultimately resolving the case on narrow free exercise grounds, 584 U.S. at 639–40.

[113] *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879–81 (1963) (describing the freedom of expression as justified first of all as a protection for individual self-fulfillment); Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring) ("The First Amendment . . . serves the needs . . . of the human spirit—a spirit that demands self-expression.").

in turn, may facilitate stability in society and greater happiness for all. (Of course, symbolic expression run amok can also create disorder and other civic problems, but presumably the *O'Brien* test filters those negative effects.) This justification for *O'Brien* is plausible if one reads the Speech Clause broadly—that is, as protecting expression for what it means to the speaker.

The self-fulfillment justification, however, fails to distinguish the freedom of speech from the free exercise of religion; if anything, this understanding of the freedom of speech makes it a close parallel to religion. The Free Exercise Clause has as much claim, and perhaps even more directly so, to protecting individual and social means of achieving self-realization and of practicing one's conscience as the Speech Clause. Anything that can be said about expressive conduct's potential to enhance personal or community fulfillment, whether political or artistic or otherwise, could be said of religious conduct, which the First Amendment explicitly protects.[114]

What then of the Speech Clause's outward functions, namely facilitating political deliberation and society's search for truth?[115] While these justifications may distinguish the Speech Clause from the Free Exercise Clause for some purposes, they do not explain large portions of current Speech Clause jurisprudence. Specifically, they are weak justification for exempting nonverbal expressive acts from general conduct laws under the *O'Brien* test. To the extent that the freedom of speech aims to ensure participation in public deliberation and the marketplace of ideas, towards the end of assisting audiences to make informed and rational assessments of truth, it makes sense to ensure that speakers have adequate means to get their concrete ideas across. Normally, however, one would expect a healthy deliberative process to favor communication through words, whether spoken or written, which the First Amendment's explicit protections for "speech" and "press" presupposes. Words, after all, remain generally the best way to communicate ideas that are precise, informative, and persuasive.

Nonverbal symbolic expression, on the other hand, such as through gestures and demonstrations, are supplementary at best to constructive deliberation, and even have the potential to distract from it. They may be more effective than words for venting frustration or making appeals to emotion, but that is not the same as rational public deliberation. What does nude dancing or burning things in the public square contribute to public deliberation, one may ask? And if such actions do contribute something positive, are they the only adequate way?

Importantly, the *O'Brien* test does not ask whether the actor has adequate alternative means to contribute to public deliberation for the audience's benefit.[116] It

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[114] *See* Emerson, *supra* note 113, at 883.

[115] *See* Coenen, *supra* note 20, at 466–67 (arguing that the Speech Clause's importance to the political process justifies giving enhanced protection to expression under *O'Brien* as compared to *Smith*'s treatment of free exercise).

[116] 391 U.S. at 388–89 (Harlan, J., concurring).

simply asks, as a threshold matter, whether the conduct is inherently expressive.[117] This suggests that the test is aimed at protecting some other interest. If courts did ask the "alternative means" question from a public deliberation perspective, they would need to consider whether spoken words, written words, and all lawful forms of expressive conduct would be enough to make the point so that audiences would understand. In *O'Brien*, for example, the Court might have asked whether David O'Brien could have used a sign, an essay, a public speech, a march, a dramatic performance (without draft card burning) or any other legal means to inform audiences that he was strongly opposed to the draft and willing to disobey it. A fair answer would have been yes: he had plenty of legal ways to make his point, even strenuously.[118]

This is not to say that the *O'Brien* test is unjustified; only that it is best understood as protecting expression for what it means to the actor and perhaps for how it may inspire others (both of which may be said of religious exercise), rather than its value to the political deliberative process. The Speech Clause's special concerns for informing the political process and marketplace of ideas do not justify having greater protections for expressive conduct against incidental burdens than the Free Exercise Clause offers for religious conduct.

If the *O'Brien* test or its equivalent should apply to incidental regulatory burdens to the free exercise of religion, we should also consider *O'Brien*'s limited scope under existing law. Courts do not apply *O'Brien s*crutiny to every instance in which a generally applicable law conflicts with a person's subjective desire to express something through action.[119] In *O'Brien*, the Court cautioned: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[120] Instead, *O'Brien* scrutiny applies only where the individual's conduct is "inherently expressive"—that is, expressive in an objectively discernable sense.[121] In practice, this means that *O'Brien* applies to traditional forms of symbolic expression[122] and

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[117] *Id.* at 385.

[118] Of course, symbolic conduct can potentially spur discussions that might not otherwise occur, so, in that sense, contribute to public deliberation. But the same could be said of religious conduct generally and many other forms of behavior, including illegal acts not intended as expressive. If merely having the potential to prompt discussion were enough to invoke *O'Brien*-level scrutiny, then every application of law to conduct should be subject to *O'Brien*-level scrutiny. Such a rationale for *O'Brien* is overbroad and does not distinguish religious conduct.

[119] *See* Fee, *Speech-Conduct*, *supra* note 108, at 99–100 (discussing the Supreme Court's application of the "inherently expressive" requirement for expressive conduct).

[120] 391 U.S. at 376.

[121] *See* Rumsfeld v. FAIR, 547 U.S. 47, 65–66 (2006).

[122] Hurley v. Irish Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569–70 (1995) (recognizing parades and other traditional expressive forms as constitutionally protected even without a particularized message).

to conduct that would convey a particularized message understandable to audiences without accompanying verbal explanation.[123]

The Supreme Court's concerns under *O'Brien* with applying heightened scrutiny to protect a "limitless variety" of conduct also apply to the free exercise of religion.[124] The Constitution places no limits on the types of religious beliefs one may have,[125] so any behavior could (and likely does) have religious significance to some believers; indeed, there are likely many who consider *all* of their daily behavior to be an exercise of religion, as, for example, the Bible counsels this.[126] It was this limitless variety concern that motivated the Court in *Smith* to reject across-the-board heightened scrutiny for incidental regulatory conflicts with religious exercise.[127] *Smith* may have been an overreaction, but the Court was correct to observe that applying heightened scrutiny to any regulation that incidentally burdens religion from a religious believer's perspective cannot be sustainable.

For these reasons, applying heightened scrutiny to regulations that incidentally burden religious conduct under the Free Exercise Clause presumably should come with limitations parallel to those under the Speech Clause. This suggests that the heightened scrutiny test for incidental burdens should apply to common forms of religious exercise and religious conduct that would be discernable in its context as such (without verbal explanation). This includes such recognized forms of worship as organizing in congregations, prayer, rituals, sacraments, and likely much more. But heightened scrutiny would not apply to every regulated action that the actor personally believes is religiously significant. For example, if free exercise scrutiny were parallel to speech protections, heightened scrutiny should not apply to a religious believer's refusal to obey a general anti-discrimination law while doing business with the public.[128] This does not mean that less traditional or recognizable forms of religious exercise would have no protection under the Free Exercise Clause, only that the incidental burden/heightened scrutiny test does not apply. As

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[123] *See FAIR*, 547 U.S. at 66 ("If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it.").

[124] 391 U.S. at 376.

[125] *See* U.S. CONST. amend I.

[126] *Colossians* 3:17 (King James) ("And whatsoever ye do in word or deed, *do* all in the name of the Lord Jesus . . . ."); *Deuteronomy* 6:7–8 (King James) ("[T]hou shalt teach [the Lord's words] diligently unto thy children, and shalt talk of them when thou sittest in thine house, and when thou walkest by the way, and when thou liest down, and when thou risest up. And thou shalt bind them for a sign upon thine hand, and they shall be as frontlets between thine eyes.").

[127] 494 U.S. 872, 896–97 (1990) (O'Connor, J., concurring).

[128] Such a case arising under the Free Exercise Clause would be similar to *Rumsfeld v. FAIR*, where the Court held that *O'Brien* scrutiny did not apply to law schools' refusal to provide services to military recruiters as a protest against the military's treatment of gay service members because such conduct did not qualify as inherently expressive. 547 U.S. at 65–66.

under current law, religious conduct of this sort would remain fully protected by other facets of free exercise jurisprudence, including anti-discrimination and under-inclusivity protections.[129]

Another limitation to the *O'Brien* test comes from the Supreme Court's decision in *Arcara v. Cloud Books*,[130] and has to do with general background laws that indirectly affect speech and expression.[131] In *Arcara*, the Court held that the *O'Brien* test did not apply to a city's closure of a bookstore due to its finding of illegal prostitution connected to the business.[132] Even though the City's action shut down admittedly protected First Amendment behavior, the Court did not even apply *O'Brien* scrutiny because the predicate rule of conduct (a prohibition on prostitution) lacked any focus on communication or purpose having to do with communication.[133] Observing that there are countless legal rules that affect speech and expression in similar indirect ways (consider traffic laws, property laws, business laws, and tax laws—all of which affect one's legal capacity to exercise First Amendment freedoms), the Court stated: "[W]e have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place . . . or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity."[134]

The *Arcara* rule qualifies the idea that incidental regulatory restrictions on speech or inherently expressive conduct call for heightened scrutiny. Dan Coenen calls these "doubly-incidental-burdens."[135] I prefer to think of them as inherent limitations and effects of general background laws.[136] Either way, taking *Arcara* into account, even when dealing with a general law that has a clear effect on protected First Amendment behavior, one may need to additionally find that the relevant law operates directly on the protected conduct, or at least targets behavior that is often expressive or religious, or creates potential disparate impacts toward protected conduct before *O'Brien*-level scrutiny would apply.

While contours of *Arcara*'s holding remain imprecise and in need of development,[137] *Arcara* shows that some limiting principle must exist to prevent the application of heightened scrutiny to any regulation remotely affecting speech and religion (even in their traditional forms), as essentially all law affects the background conditions, privileges, property rights, and entitlements within which speech and

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[129] *See* Randall P. Bezanson et al., *Mapping the Forms of Expressive Association*, 40 PEPP. L. REV. 23, 44–45 (2012).

[130] 478 U.S. 697 (1986).

[131] *Id.* at 706, 707.

[132] *Id.* at 705, 707.

[133] *Id.* at 707.

[134] *Id.* at 706–07.

[135] Coenen, *supra* note 20, at 441, 475–78.

[136] Fee, *Speech-Conduct*, *supra* note 108, at 111–13.

[137] For a thorough treatment of many possible interpretations of the *Arcara* principle, see Coenen, *supra* note 20, at 479–94.

religious exercise operate. The concerns that give rise to the *Arcara* principle for the freedom of speech would be equivalent for the free exercise of religion to the extent that heightened scrutiny applies to incidental burdens in that sphere as well.

Tentative Recommendation: The Court should apply meaningful intermediate scrutiny to incidental restrictions that directly burden traditional forms of symbolic expression and of religious exercise. The limitations on the *O'Brien*-test's applicability should be parallel for religion and expression. These limitations include boundaries on what may be considered a traditional or recognized form of expression or religion respectively, and *Arcara*'s exclusion of broad and general background laws that create no disparate impact to religion or expression.

C. Regulations That Lack General Applicability

Free exercise and speech jurisprudence also differ in the treatment of regulations that are underinclusive in relation to their objectives or that allow individualized exemptions. The Supreme Court has interpreted the Free Exercise Clause more protectively than the Speech Clause with respect to such regulations, holding such regulations subject to strict scrutiny on the basis that they are lacking in general applicability.[138] By contrast, under the Speech Clause, it is possible for strict, intermediate, or no scrutiny to apply to these kinds of underinclusive regulations.[139] The difference should prompt us to consider why general applicability matters to religious and expressive freedom, and consider adjusting both areas of jurisprudence toward another. This feature of free exercise jurisprudence indicates that speech jurisprudence is not protective enough in some applications, while at the same time, free exercise jurisprudence may be too strict in its treatment of general applicability.

Under the Free Exercise Clause, a regulation that burdens religious exercise is subject to strict scrutiny if it is not generally applicable.[140] Such regulations fall outside the scope of *Employment Division v. Smith*, and, therefore, are subject to the pre-*Smith* strict scrutiny regime.[141]

Moreover, the Supreme Court has interpreted general applicability to mean more than religious neutrality, which is a separate prong of the *Smith* test.[142] One way a regulation may lack general applicability is "if it prohibits religious conduct while permitting secular conduct that undermine the government's asserted interests in a similar way."[143] Put another way, a regulation lacks general applicability if it is underinclusive in relation to its secular objectives.[144]

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[138] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1872 (2021).

[139] Williams-Yulee v. Fla. Bar, 575 U.S. 433, 449 (2015).

[140] Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 521 (1993).

[141] *See* 494 U.S. 872, 882 (1990).

[142] *See Lukumi*, 508 U.S. at 540–45 (analyzing neutrality and general applicability separately).

[143] *Fulton*, 141 S. Ct. at 1877.

[144] *See* Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) ("[W]hether two activities are

The Supreme Court applied this understanding of general applicability in C*hurch of Lukumi Babalu Aye, Inc. v. Hialeah*,[145] where it held unconstitutional city regulations prohibiting the ritual slaughter of animals, which burdened the religious practices of the Santeria. The government justified the prohibition against ritual slaughter on the grounds of preventing animal cruelty and public health concerns related to disposing carcasses.[146] The Supreme Court found, however, that the ordinances were underinclusive in relation to these objectives because the law permitted other forms of animal killing, including hunting and commercial animal slaughter, which implicated these same interests.[147] Accordingly, the Court applied strict scrutiny and found the ordinances unconstitutional.[148]

More recently, the Court used the same principle to enjoin several COVID-related regulations that restricted the ability of religious groups to gather and worship during the pandemic.[149] Whereas the Court did not question that regulations of group meetings would serve the government's significant interest in limiting the spread of COVID, the Court found some regulations lacking in general applicability where the law allowed secular activities under more favorable terms than the religious gatherings at issue. For example, in *Tandon v. Newsom*, the Court found that a state prohibition on gatherings at homes with more than three households lacked general applicability under the Free Exercise Clause, even though it applied to all at-home gatherings regardless of religious purpose, because the law failed to restrict some commercial activities in a like manner, potentially allowing them to bring together more than three households at time.[150] The commercial activities that the Court deemed comparable to home gatherings included hair salons, retail stores and restaurants.[151] The Court dismissed the argument that the State could reasonably conclude that at-home gatherings posed a greater risk of COVID transmission than these commercial activities by noting only the lack of factual findings to support this.[152] *Tandon* shows how rigorous the Free Exercise Clause's general applicability requirement can be where it places a factual burden on the government, even during a pandemic, to justify religiously neutral and plausibly sensible regulatory classifications that result in restrictions to religious liberty, the failure of which results in strict scrutiny.

Another way for a regulation to lack general applicability for free exercise purposes is if it allows for individual exemptions. The Court has held that "where the

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comparable for purposes of the Free Exercise Clause must be judged against the asserted governmental interest that justified the regulation at issue.").

[145] 508 U.S. at 521.

[146] *Id.* at 545.

[147] *Id.*

[148] *Id.* at 546–47.

[149] *Tandon*, 141 S. Ct. at 1296; Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 15, 17–18 (2020); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021).

[150] 141 S. Ct. at 1297.

[151] *Id.*

[152] *Id.*

State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[153] In *Smith*, the Court relied on this principle to distinguish prior religious freedom cases, including *Sherbert v. Verner*, involving unemployment compensation regulations that had contained a "good cause" requirement for refusing alternative work.[154] More recently, in *Fulton v. City of Philadelphia*,[155] the Court used this test of general applicability to invalidate a religious foster care agency's contractual obligation to certify foster families without discriminating against same-sex couples. The Court noted that the agency's contract allowed the commissioner responsible for foster care to make exceptions to the non-discrimination requirement "in his/her sole discretion."[156] The Court found that this potential exception required strict scrutiny of the government's enforcement of the non-discrimination requirement against a religious objector, even though the government had never made an exception under this provision.[157]

There are no equivalent rules in speech jurisprudence for regulations lacking in general applicability. To be sure, some underinclusive regulations affecting speech may draw strict scrutiny where they are content based. For example, in *Reed v. Gilbert*,[158] the Court applied strict scrutiny to a sign regulation enacted to control visual clutter because it treated temporary directional signs less favorably than other types of signs.[159] But content-based regulations are not the only potentially underinclusive regulations that burden speech.

Consider *Price v. Garland*, where the D.C. Circuit recently upheld a federal regulation requiring a permit and fee for commercial filmmaking in national parks.[160] The regulation, enacted for the purposes of raising revenue and controlling the overuse of sensitive federal lands, imposes a clear burden and tax on First Amendment–protected behavior.[161] It applies even to a single hiker who uses a cell phone to capture video for purposes of profit,[162] and yet does not apply to a variety of comparable activities including filmmaking for newsgathering,[163] non-commercial

[153] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) (quoting Emp. Div. v. Smith, 494 U.S. 872, 884 (1990)).

[154] *Smith*, 494 U.S. at 884.

[155] 141 S. Ct. at 1877.

[156] *Id.* at 1878.

[157] *Id.* at 1879.

[158] 576 U.S. 155 (2015).

[159] *Id.* at 163–71.

[160] 45 F.4th 1059, 1064 (D.C. Cir. 2022).

[161] Although the court distinguished filmmaking on federal lands from communicative behavior for purposes of its forum analysis (as filmmaking is only a step towards ultimate publication of a film), it acknowledged that such activity is "protected as speech under the First Amendment." *Id.* at 1070.

[162] 43 C.F.R. § 5.12 (2022) (defining "commercial filming" as "the film, electronic, magnetic, digital, or other recording of a moving image by a person, business, or other entity for a market audience with the intent of generating income.").

[163] *Id.* § 5.4.

video production,[164] taking of still pictures for profit,[165] or non-expressive visitor conduct.[166] The D.C. Circuit found the permit and fee requirement constitutional as a reasonable, viewpoint-neutral regulation of speech in a nonpublic forum.[167] While recognizing that the regulation did not apply to some similar activities, the court explained that underinclusiveness has limited relevance to freedom of speech analysis.[168] If the regulation had burdened religion instead of only speech, perhaps because the filmmaker sought to make a religious film, free exercise analysis would have required strict scrutiny, and application of the law would have been unconstitutional.

There is also no general freedom of speech principle requiring strict scrutiny where there are individualized exemptions available.[169] It is true that where a government imposes prior restraints on speech, such as permit requirements, the government must employ neutral, nondiscretionary standards to avoid the potential for content-based discrimination.[170] Thus, a parade permit regulation with discretionary exemptions would likely be unconstitutional. But the general rule for freedom of speech is that content-neutral regulations require only intermediate scrutiny, even if the regulatory structure allows for exemptions.[171] Indeed, local land use regulation almost always contains a system for allowing variances based on hardship, and courts have not suggested that this makes the zoning of bookstores, schools, meeting halls, performance venues, or theaters[172] subject to strict scrutiny.

It is even possible for some regulations lacking in general applicability to burden sincere communicative behavior and require no scrutiny at all under the Speech Clause. This arises because the Court has held that the Speech Clause only requires scrutiny where the claimant's conduct is "inherently expressive."[173] As the Court held in *FAIR*, combining conduct with words that explain its meaning is not sufficient for this purpose.[174] Accordingly, the Court did not even apply intermediate scrutiny to FAIR's claim to be exempt from admitting military recruiters to its buildings.[175]

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[164] *Id.* § 5.2(c).

[165] *Id.* § 5.2(b).

[166] *Id.* § 5.2(c).

[167] Price v. Garland, 45 F.4th 1059, 1075 (D.C. Cir. 2022).

[168] *See id.* at 1074; *see also* ISKCON of Potomac, Inc. v. Kennedy, 61 F.3d 949, 957 (D.C. Cir. 1995) ("[A]n underinclusive . . . regulation that is otherwise valid must be found to be constitutional so long as it does not favor one side of an issue and its rationale is not undermined by its exemptions.").

[169] *See, e.g.*, McCullen v. Coakley, 573 U.S. 464, 485 (2014).

[170] Shuttlesworth v. City of Birmingham, 394 U.S. 147, 153 (1969) ("[W]e have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places.").

[171] *See* Reed v. Town of Gilbert, 576 U.S. 155, 166 (2015).

[172] *Cf.* Renton v. Playtime Theaters, 475 U.S. 41 (1986) (applying intermediate scrutiny to a city zoning regulation affecting the location of adult movie theaters).

[173] Rumsfeld v. FAIR, 547 U.S. 47, 66 (2006).

[174] *Id.*

[175] *Id.* at 67.

FAIR did not make the argument that the federal law requiring equal treatment of military recruiters lacked general applicability, as that is not an element of Speech Clause analysis.[176] If the argument were available, however, FAIR might have pointed out that the Religious Freedom Restoration Act requires religious exemptions from federal laws, including the recruiting regulation in question, except in compelling circumstances.[177] Accordingly, federal law would have required an exemption for another school with religious reasons to refuse military recruiters.[178] The disparity under federal law between FAIR's request for an expressive conscientious exemption (which the Court gave no scrutiny) and the availability of religious exemptions to the same regulation (which would receive strict scrutiny) creates a failure of general applicability much like the failures the Court has found in free exercise cases.[179]

The Court has offered no justification for such differing standards in the treatment of underinclusive regulations affecting speech and religious conduct.[180] Where religious freedom is affected, the Supreme Court has explained that a regulation's failure to cover comparable non-religious conduct in relation to the government's interests is an indicator of potential religious bias on the part of the government.[181] Even if the government has no discriminatory purpose, underinclusiveness indicates "insufficient appreciation or consideration of the interests at stake."[182] For these reasons, it is reasonable to hold that where a law affecting religious freedom is significantly underinclusive, the usual conditions of judicial deference do not apply.

The same observations should apply to significantly underinclusive regulations affecting the freedom of speech. As in *Price v. Garland*, where the underinclusive regulatory structure showed that the government could permit expressive freedom without undermining important governmental objectives, regulating protected expressive behavior should be presumed unconstitutional.[183] Indeed, to fail to protect the

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[176] *See id.* at 53.

[177] 42 U.S.C. §§ 2000bb-1, 2000bb-2(1).

[178] *See id.*

[179] The Court's conclusion that FAIR's conduct was not protected by the Speech Clause because refusing military recruiters is not inherently expressive points to another divergence with Free Exercise Clause jurisprudence. *See FAIR*, 547 U.S. at 66. In *Fulton*, the Court did not ask whether refusing to certify same-sex couples for foster care is inherently religious conduct, but rather found it sufficient that the claimant considered its conduct to have religious significance. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1872, 1877 (2021). Whether such a requirement should be a prerequisite for scrutiny of speech and free exercise claims, treating such similar First Amendment claims differently in this respect is questionable.

[180] *See generally Fulton*, 141 S. Ct. 1868; *FAIR*, 547 U.S. 47.

[181] *See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 545–46 (1993) (The ordinances "'ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself'. . . . This precise evil is what the requirement of general applicability is designed to prevent.") (alternation in original) (citation omitted).

[182] S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 717 (2021) (Roberts, C.J., concurring).

[183] 45 F.4th 1059, 1074–75 (D.C. Cir. 2022).

freedom of speech in a comparable way to the free exercise of religion creates a biased structure to the First Amendment itself.

At the same time, courts should defer to reasonable justifications for different categories of regulatory treatment. Otherwise, this line of jurisprudence could lead to the use of strict scrutiny too often, where no presumption of improper governmental decision-making is warranted. Many, perhaps even most, regulations affecting speech and religion are arguably underinclusive in some respect, particularly to those who disagree with the underlying regulatory policies and to courts that are willing to substitute their policy judgments for those of elected officials. The Court's decision in *Tandon* illustrates these dangers, where the Court imposed an unreasonable burden on the government to justify a regulatory distinction that was religiously neutral on its face and plausibly correlated to the government's purpose of protecting health.[184] Analyzing a regulation for general applicability should not be a pretext for rigorously scrutinizing laws that courts do not agree with.

Tentative Recommendation: Courts should apply doctrines that have developed under free exercise jurisprudence for regulations that also lack general applicability to the freedom of speech, as well. Regulations that are significantly underinclusive or that contain systems of exemptions that lend themselves to discrimination should be subject to strict scrutiny if they burden religious or expressive conduct. At the same time, courts should defer to plausibly reasonable regulatory classifications so that this does not lead to the overuse of strict scrutiny.

D. Rights of Association

The freedom of speech and the free exercise of religion are not only individual rights, but also collective rights for those who join toward a common goal. The right to associate with others for First Amendment purposes is another area where speech and free exercise raise parallel jurisprudential challenges, and yet have diverged in their doctrine. Understanding these rights as parallel can improve the understanding and application of both, even if there are sound arguments in some cases for treating one differently than the other.

The Constitution does not protect an independent freedom of association, but the Supreme Court has appropriately recognized that the freedom of speech includes a right to associate with others for expressive purposes.[185] This is a significant component of the freedom of speech, as almost all influential cases involve association at some level. Association can significantly enhance the freedom of speech for individuals by facilitating communication and education both internally to groups

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[184] *See* Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021).

[185] *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").

and externally through resource-pooling and coordinated campaigns. Accordingly, the freedom of expressive association protects various facets of individual and group behavior, including rights of individuals to affiliate with or donate to expressive organizations, as well as rights of organizations to control their message, membership, educational practices, and representatives.[186] At the same time, the Supreme Court has often protected the freedom of expressive association under a flexible approach that, at times, is intrusive and can leave organizations subject to various limitations.

An example of the Supreme Court's flexible approach to the freedom of association can be found in *Roberts v. United States Jaycees*.[187] In *Roberts*, the Supreme Court held that it was constitutional for a state to apply public accommodation law to the membership policies of the Jaycees' organization, a charitable organization dedicated to fostering the growth of young men, so as to prohibit sex discrimination in its ranks.[188] Although the Jaycees did allow women as associate members, its policies prohibited women from having full membership with voting rights.[189] The Jaycees' claim of expressive association included the argument that allowing women as voting members could affect the direction of the organization and the positions it chose to take.[190] The Supreme Court, however, rejected this argument by finding it to be based on improper assumptions about the relative viewpoints and priorities that male and female members are likely to hold.[191] Remarkably, the Court substituted its own judgment about gender tendencies for that of the private organization, stating: "Although such generalizations may or may not have a statistical basis in fact with respect to particular positions adopted by the Jaycees, we have repeatedly condemned legal decisionmaking that relies uncritically on such assumptions."[192] The Court further held that even if public accommodation law would substantially interfere with the Jaycees' freedom of expressive association, the organization's interest was outweighed by the State's significant interest in expanding opportunities for women.[193]

The Court's weak treatment of expressive association in *Roberts* contrasts with the Supreme Court's treatment of religious associational freedom, particularly in its ministerial exemption cases.[194] By the same logic that the Speech Clause implies a freedom of expressive association, the Free Exercise Clause implies a right to

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[186] *See generally* Bezanson et al., *supra* note 129 (detailing various kinds of expressive association and their constitutional protection).

[187] 468 U.S. 609.

[188] *Id.* at 628–29.

[189] *Id.* at 613.

[190] *Id.* at 627–28.

[191] *Id.* at 628.

[192] *Id.*

[193] *Id.* at 628–29.

[194] *See* Kalvis Golde, *Christian School Renews Effort to Expand Religious Freedom Over Employment*, SCOTUSBLOG (Mar. 17, 2023, 5:45 PM), https://www.scotusblog.com/2023/03/christian-school-renews-effort-to-expand-religious-freedom-over-employment/ [https://perma.cc/T59J-8TYA].

associate for religious purposes, including a right for such religious organizations to choose their own leaders, members, teachers, and doctrines. And like expressive associations, religious associations sometimes are burdened by employment and public accommodation regulations in the exercise of these choices.[195]

The Supreme Court has fewer freedom of religious association cases as such, possibly because the freedom of expressive association provides overlapping protection. But in the case of a religious organization's selection of religious leaders and teachers, the Court's ministerial exemption doctrine operates as a super-freedom of religious association rule that has no parallel for speech. In *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, the Court held that a religious school was immune from a lawsuit under the Americans with Disabilities Act for allegedly firing a religious teacher on the grounds of her disability.[196] The Court did not inquire about the factual accuracy of the dismissed employee's claims, nor did it ask the organization to demonstrate that its action was justified on the basis of its religious teachings or religious mission.[197] Finally, the Court did not even apply strict scrutiny to the State's interest.[198] The Court simply held that churches have an absolute right to choose their ministers, and once it concluded that the ministerial exemption applied, that was the end of the inquiry.[199] The Court extended the principle in *Our Lady of Guadalupe School v. Morrissey-Berru* to teachers who did not formally have religious titles, holding that the ministerial exemption applies on the basis of whether the employee has significant religious duties.[200]

What could be the justification for providing significantly stronger protection for religious associations to choose their representatives than for non-religious expressive organizations? The Court's ministerial exemption cases imply two possible arguments, one that is quite weak and another that is serious but that may not explain the whole difference.

The weak argument is that the text of the First Amendment suggests extra protection for religious associations' selection of leaders and representatives. In *Hosanna-Tabor*, the Court dismissed the plaintiff's argument that the Court's expressive association standards should govern a church's selection of its ministers, stating "[t]hat result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers."[201] The problem with

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195 *See* Transcript of Oral Argument at 41, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (No. 99-699).

196 565 U.S. 171, 179 (2012).

197 *See generally Hosanna-Tabor*, 565 U.S. 171.

198 *See generally id.*

199 *See id.* at 188–90.

200 *See* 140 S. Ct. 2049, 2080 (2020).

201 565 U.S. at 189.

this textual argument is that the First Amendment actually says nothing about religious organizations.[202] It is reasonable, of course, to *infer* protection for religious organizations from both the Free Exercise Clause and the Speech Clause,[203] but the First Amendment does not include anything suggesting that the former inference is stronger or distinct from the latter. Nor would interpreting the Free Exercise and Speech Clauses as providing parallel, equivalent protections for freedom of association in this respect render the Free Exercise Clause superfluous, or even close to such, as there are many other applications of the Free Exercise Clause outside of the scope of this implied right of association where the Free Exercise Clause provides substantially different protection than what the Speech Clause provides.[204]

A potentially stronger argument for more rigorously protecting the rights of religious organizations to select their representatives, at least in some applications, is that the Establishment Clause imposes additional limitations on the adjudication of religious questions.[205] Employment claims often involve disputes over an employer's motives, which, in turn, often leads to a probing of sincerity and pretext.[206] In a case involving a religious employer who dismisses an employee for reasons relating to religion, there is a risk that a court would be drawn into adjudicating the reasonableness or correctness of the supposed religious views, which could turn courts into religious tribunals. This could have been a problem in the *Hosanna-Tabor* litigation, where the church employer reportedly had a religious justification for dismissing the teacher.[207] Without the ability to adjudicate that issue, and with the risk of even probing the church's sincerity, the Court's decision in favor of

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[202] *See* U.S. CONST. amend. I.

[203] One could also infer some private association rights from the Establishment Clause, which I address as a separate argument. For purposes of this textual argument, it is enough to note that the Establishment Clause's relationship to private freedom of association is also based on inference, even more distant than that of the Free Exercise Clause. The plain meaning of the Establishment Clause is aimed at the government's ability to establish religion and would not become superfluous by finding that private freedoms of religious association and expressive association are equivalent.

[204] For example, under any interpretation of the ministerial exemption, the Free Exercise Clause would continue to provide strong protection against religious discrimination, as well as protection from non-discriminatory burdens outside the scope of *Employment Division v. Smith* where the behavior would not qualify as speech. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2421 (2022). Given that the Speech and Free Exercise Clauses provide overlapping protection for many types of behavior, it is also natural that two clauses may provide redundant protection against certain types of governmental action. For example, Speech Clause and Free Exercise Clause protection is often redundant where the government attempts to regulate religious speech.

[205] *See* Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171, 188–89 (2012) (relying on the Establishment Clause in combination with the Free Exercise Clause, including is prior religious decisions cases, to support the ministerial exemption).

[206] *See id.* at 205 (Alito, J., concurring).

[207] *See id.* at 204–05. *But see* Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in* Hosanna-Tabor, 64 MERCER L. REV. 405, 409–15 (2013).

Hosanna-Tabor seems justified. The ministerial exemption may also be justified even where sincerity is not in question, as a court could be drawn into religious adjudication if it is required to weigh the strength or reasonableness of an organization's religious interest (as the *Jaycees*' Court did for speech) in selecting its leaders against competing governmental interests.[208]

A weakness with this justification for the ministerial exemption doctrine, however, is that the ministerial exemption does not depend on the existence of a religious question in the case. In *Hosanna-Tabor*, the Court stated: "The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful . . . is the church's alone."[209] In a case where there is no religious justification at issue, and the only applicable regulations are secular, any concern that a court would be drawn into establishing religion through adjudication is wholly absent.

This is not to say that the ministerial exemption is unjustified, but rather that the doctrine as framed by the Court resonates more directly and completely with Free Exercise Clause concerns than with Establishment Clause concerns. We should understand the ministerial exemption doctrine as holding that the free exercise of religion includes a right to form religious organizations with internal power to select the organization's leaders and teachers, even where such decisions conflict with religiously neutral governmental regulations. Put this way, the ministerial exemption doctrine is another exception to *Employment Division v. Smith*, and it ensures that individuals and communities have adequate freedom to practice religion according to the dictates of their own conscience.

If the ministerial exemption arises primarily from the Free Exercise Clause, courts should take seriously the argument that the First Amendment provides a parallel right under the Speech Clause for expressive organizations to choose their own leaders and representatives without probing inquiry. To be sure, the Supreme Court has upheld the rights of expressive organizations to choose their representatives in some cases,[210] but its standards for adjudicating these rights are less deferential,[211] allowing lawsuits potentially to influence organizations' speech and internal decisions.

Consider *Boy Scouts of America v. Dale*, where the Supreme Court upheld, by a five–four vote, the national scouting organization's constitutional right to dismiss a gay scoutmaster, which New Jersey courts had found violated state anti-discrimination

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[208] This is a double-edged argument for religious freedom, however, as it has also been used as a reason for courts to avoid granting individualized accommodations from generally applicable laws. *See* Emp. Div. v. Smith, 494 U.S. 872, 887 (1990) (noting inappropriateness of adjudicating the centrality of religious beliefs or the proper interpretation of doctrine).

[209] 565 U.S. at 194–95.

[210] *E.g.*, Cal. Democratic Party v. Jones, 530 U.S. 567, 586 (2000) (Kennedy, J., concurring); Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000).

[211] *See Dale*, 530 U.S. at 653, 659.

law.[212] In order to prevail in its expressive association claim, Boy Scouts introduced evidence that its teachings included a proscription against homosexual conduct that would be undermined if Dale were allowed to remain a scoutmaster.[213] The New Jersey courts, however, were not convinced that the Boy Scouts teachings were clear enough on this point,[214] and neither were four Justices of the Supreme Court.[215]

A majority of the Supreme Court deferred to the Boy Scouts, in part because it had spelled out a clear enough position against homosexuality in the course of litigation,[216] but even that probing inquiry seems to have come at a price to the Boy Scouts' expressive freedom and quite possibly steered the organization's public expression. What if, as seems likely, the Boy Scouts would have preferred to leave its admonition to be "morally straight"[217] open to interpretation with respect to homosexuality, as the Boy Scouts had sponsored members with differing views on this divisive subject?[218] This is consistent with evidence that the reason the Boy Scouts dismissed Dale as a scoutmaster had less to do with his private behavior and more to do with the fact that he made himself a public figure and was quoted in newspapers declaring that one can be openly gay and a scoutmaster.[219] If this is right, *Boy Scouts v. Dale* was ultimately a loss for the Boy Scouts' expressive freedom (it lost the ability to emphasize a general message of morality while choosing how much to say on the topic of homosexuality), even if it technically won the case. If the Speech Clause were understood to include the equivalent of a ministerial exemption for expressive organizations (a categorial right to choose their own leaders and representatives), the Boy Scouts would have been spared from this speech-coercive litigation over the meaning of its Scout Oath.

Treating expressive association and religious association as parallel freedoms may also provide guidance for defining the types of organizations qualified for strong protection versus others that must generally abide by employment and public accommodation regulations. The Supreme Court's ministerial exemption cases speak of protecting "churches" or alternatively "religious institutions" in the selection of their representatives;[220] the Court has not suggested that the ministerial

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[212] *See id.* at 659.

[213] *See id.* at 651–53.

[214] *See* Dale v. Boy Scouts of Am., 734 A.2d 1196, 1223–24 (N.J. 1999) ("We are not persuaded . . . that a 'shared goal[]' of Boy Scout members is to associate in order to preserve the view that homosexuality is immoral.") (alteration in original).

[215] *Dale*, 530 U.S. at 665–68 (Stevens, J., dissenting).

[216] *See id.* at 652–53.

[217] *See id.* at 650.

[218] *See id.* at 654–55.

[219] *See* Transcript of Oral Argument, *supra* note 195, at 9, 25 (indicating the Boy Scouts' practice was not to inquire into the sexual orientation of leaders, but that Dale drew objections within the organization by interviewing with newspapers and creating a reputation for himself).

[220] *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020).

exemption protects any organization with some religious component, which would be far more disruptive. Many private corporations and organizations could have some religious component, as owners may treat any business organization with religious purpose, and organizations not currently religious would be incentivized to add religion to their mission if this would exempt them from onerous regulations. Likewise, under the Speech Clause, it is not sustainable to extend strong expressive association protection to any organization that engages in some protected speech, or takes some political or ideological positions, as nearly all business corporations would qualify.

The problem of keeping First Amendment association rights within workable bounds points to a necessary distinction between organizations whose primary purpose relates to the exercise of First Amendment rights versus others that are primarily organized for commerce or other non-constitutional purposes. Though the line may be difficult to draw, the ministerial exemption inevitably requires it.[221] And if it is possible for religious organizations, it is possible to draw such a line for predominately expressive organizations.[222] This would likely provide a clearer justification than current expressive association case law for why some organizations should win expressive association claims while others should lose.

Tentative Recommendation: The freedom of expressive association should be applied with more deference to expressive organizations' claims concerning what would interfere with their message, in accordance with the Court's approach in religious association cases. At the same time, extending such deference to expressive associations may highlight the need for limitations on what may qualify as a predominately expressive or religious organization.

E. Public Employment

The Supreme Court's analysis in *Kennedy* also exposed an apparent anomaly between the application of these two rights.[223] The question concerns what level of scrutiny applies to government conditions restricting its employees' constitutionally protected behavior for speech and religious exercise respectively. Although avoiding a decision on this question, *Kennedy* suggested that current law points toward strict

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221 *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 635 (1984) (providing background on the difficulty of articulating such standards under the First Amendment).

222 Justice O'Connor instructively proposed such a line in her concurring opinion in *Roberts v. United States Jaycees*, which, unlike the majority, avoids second-guessing an expressive organization's protected viewpoints. *Id.* For Justice O'Connor, the Jaycees appropriately lost their expressive association claim because the organization was essentially a business networking organization engaged in commerce, with only limited involvement in public issue advocacy, and therefore did not have strong freedom of association rights. *Id.* at 638–40. Had the organization qualified as a predominately expressive association, she would have ruled in its favor. *See id.*

223 *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2426 (2022).

scrutiny if the prohibited behavior implicates the Free Exercise Clause, but only intermediate scrutiny under the Speech Clause.[224]

In *Kennedy*, a school district had disciplined a football coach for praying with the participation of student-athletes before football games after being instructed to stop.[225] The Court found that the coach's conduct was both religious and expressive, and that it was outside the scope of his official duties, so the school's instruction to cease praying implicated both his free exercise of religion and his freedom of speech.[226] The Court took the opportunity to emphasize how the Free Exercise and Speech Clauses work "in tandem" and point together to the same conclusion: to discipline Kennedy for such protected behavior is unconstitutional.[227]

The Court's analytical method of getting to that unified conclusion, however, awkwardly suggested a divergence.[228] For Kennedy's free exercise claim, the Court used the general applicability test of *Church of Lukumi Babalu Aye v. Hialeah* to determine that heightened scrutiny applies and noted that, under *Lukumi*, this "generally" means strict scrutiny.[229] When considering Kennedy's speech claim, however, the Court used the *Pickering-Garcetti* framework to determine that heightened scrutiny applies, and noted that under *Pickering*, this requires "a delicate balancing of the competing interests surrounding the speech and its consequences," which is commonly known as the *Pickering* balancing test.[230] Many consider *Pickering* a form of intermediate scrutiny,[231] but whatever one calls it, it is less rigorous than strict scrutiny.[232]

Apparently sensing the problem of differing levels of scrutiny for speech and free exercise in the public employment context, the Court avoided deciding what standard should apply to Kennedy's claim under either Clause. It found simply that the school district could not justify its actions under either possible standard, and so violated both the Free Exercise Clause and the Speech Clause.[233]

Indeed, it would be troubling if there were a stricter standard for free exercise claims arising from public employment than for speech claims. It would signal that religious freedom is the superior First Amendment right, and that the First Amendment even favors religious speech over non-religious speech in otherwise similar circumstances. Suppose a high school teacher publishes sufficiently disturbing material on the internet (say derogatory comments about students or salacious sexual

224 *See generally id.*
225 *See id.* at 2415–17.
226 *See id.* at 2433.
227 *See id.* at 2421.
228 *See generally id.*
229 *See* 508 U.S. 520, 531 (1993).
230 *Kennedy*, 142 S. Ct. at 2423.
231 *See id.* at 2426.
232 *See id.*
233 *See id.* at 2416; *see also id.* at 2433 (Thomas, J., concurring).

material),[234] such that a school district would be justified under *Pickering* in firing the teacher because it would disturb the school's learning environment. A different standard for free exercise protection would suggest that the teacher might still be protected, but *only* if the disturbing speech is also religious in nature; the Free Exercise Clause would in that case demand that the government satisfy strict scrutiny in order to take action. There is no apparent constitutional justification for incongruous standards favoring religious speech over non-religious speech in such a case; the state's interest is the same whether or not the material is religious, and the employee's off-duty behavior is *prima facie* protected by the First Amendment either way.

If there should be an equivalent standard for speech and religious exercise protections in public employment, which is preferable between *Lukumi*'s strict scrutiny and *Pickering*'s "delicate balance"?[235] In this case, the answer seems straightforward. Government agencies, public employees, and courts have relied on the *Pickering* test for decades, and in many varying circumstances, to establish a meaningful balance between employees' freedom of speech and legitimate governmental concerns.[236] To substitute strict scrutiny for all such claims previously governed by the *Pickering* standard (to bring speech into alignment with free exercise) would be highly disruptive and could undermine significant governmental objectives in unforeseen ways. On the other hand, as *Kennedy* shows, the *Pickering* scrutiny is plenty rigorous to protect an employee's religious freedom in situations where the government lacks clear and adequate justification, just as it provides meaningful protection for public employees' speech.[237]

This need not mean, however, that the threshold requirements for *Pickering*-level balancing should be precisely the same for speech and free exercise. Courts reach the *Pickering* balance for speech only where an employee's speech implicates "a matter of public concern."[238] The public concern element of the *Pickering* test can only be justified in relation to the Speech Clause's special concern for communication that has the potential to influence society on serious matters. In contrast, the Free Exercise Clause aims at a different set of behavior, including behavior that may be private and have no social or communicative element. To apply *Pickering*'s public concern requirement to Free Exercise claims would make no sense and would even deprive the Free Exercise Clause of any independent significance in public

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[234] *See* Craig v. Rich Twp. High Sch. Dist. 227, 736 F.3d 1110, 1113 (7th Cir. 2013) (allowing the school district to terminate school psychologist because of sexually provocative self-published book that would disrupt the learning environment and deter students from seeking the counselor's help); Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454, 257 (3d Cir. 2015) (allowing the school district to terminate a teacher because of blog posts making derogatory and hateful comments about students that would disrupt her duties as a teacher).

[235] *See Kennedy*, 142 S. Ct. at 2423.

[236] *See* David L. Hudson Jr., Pickering Connick *Test*, FREE SPEECH CTR. (Jan. 1, 2019), https://firstamendment.mtsu.edu/article/pickering-connick-test/ [https://perma.cc/6D43-TM75].

[237] *See Kennedy*, 142 S. Ct. at 2426.

[238] *See id.* at 2424.

employment claims. If there is a parallel to *Pickering*'s public concern requirement for free exercise, it is simply that the employee's conduct must be religious.

Tentative Recommendation: The Court should rely upon equivalent levels of scrutiny—based on the *Pickering* balance test—to scrutinize public employment conditions affecting either speech or free exercise. Nevertheless, the "matter of public concern" requirement of *Pickering* should not apply to Free Exercise claims. Instead, courts should ask simply whether the regulated conduct is religious.

F. Compelled Behavior

Stephanie Barclay and Mark Rienzi have argued that current free speech law protects individuals against compelled expressive behavior more stringently than current free exercise law protects against analogous compulsions affecting religion.[239] This claim is worth considering, and its validity naturally depends on what one considers analogous. Unlike Professors Barclay and Rienzi, I find the treatment of compelled behavior under current free speech and free exercise standards to be equivalent. In fact, to reinterpret the Free Exercise Clause as requiring heightened scrutiny or an exemption whenever a general regulation compels behavior in violation of one's religious beliefs would create a significant new anomaly.

It is worth separating two sorts of compelled behavior claims relating to religion that may arise under the First Amendment: (1) compelled religious behavior and (2) compelled behavior that violates one's personal religious tenets. There are seldom Free Exercise Clause cases in the first category.[240] Although it is natural to interpret the Free Exercise Clause as prohibiting compelled religious behavior (such as compelled participation in a religious ritual) in the same way that the Speech Clause prohibits compelled expressive behavior, these cases are few because the Establishment Clause also prohibits the government from compelling religious conduct.[241] Moreover, the Establishment Clause does so under a standard that is more sensitive than the Speech Clause (and presumably the Free Exercise Clause).[242] Government may violate the Establishment Clause, at least in some contexts, simply by creating an environment in which there is social pressure to participate in a prayer or religious observance.[243] Under the Speech Clause, by contrast, the government does not unconstitutionally compel expression, even involving school children, unless it imposes concrete penalties for opting out.[244]

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[239] Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1614–18 (2018).

[240] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992) (focusing an analysis of compelled prayer under the Establishment Clause).

[241] *See id.*

[242] *See id.*

[243] *Id.* at 586 (holding practice of prayer at school graduation ceremony unconstitutional under the Establishment Clause because of social pressure for audience to participate).

[244] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 635 n.16 (1943) (noting the

Professors Barclay and Rienzi are primarily concerned with religious compulsions of the second type, where religious believers are required by general laws, such as anti-discrimination laws, to affirmatively act in contradiction of their religious tenets.[245] Whereas under *Smith* the Free Exercise Clause generally allows government to refuse religious accommodation without heightened scrutiny, the Supreme Court's Speech Clause precedents, they argue, are more protective against similar compulsory violations of conscience.[246] They point to such cases as *Woolley v. Maynard*[247] and *West Virginia v. Barnette*,[248] where the claimants had both religious and speech-related reasons for refusing to obey compulsory regulations, and where the Court upheld their claims on freedom of speech grounds alone.[249]

This analysis overlooks an element of compelled speech jurisprudence that distinguishes it from the more rigorous religious exemption model many religious accommodationists would prefer[250]: it is that the compelled behavior must qualify objectively as expressing a message or as interfering with the actor's own inherently expressive behavior. It is not enough under Speech Clause precedents that a claimant subjectively feels that the compelled behavior would send a message that the claimant does not wish to send, or that the compulsion would strongly offend the claimant's conscience. In fact, the Supreme Court squarely rejected this interpretation in *Rumsfeld v. FAIR*, where the Court held government could require law schools to provide recruiting services to military employers notwithstanding the schools' strong objection to military policies concerning gay service members and their belief that their cooperation in recruiting would express that they see nothing wrong with such policies.[251] The Court rejected the law schools' compelled speech claim by finding, as a matter of law, that recruiting services are not inherently expressive behavior.[252] Accordingly, compliance with the Federal requirement to provide recruiting services for military employers would not express a message in and of itself, nor would it interfere with the law school's own expression.

In cases where the Supreme Court has held that government violated the compelled speech doctrine, it has made the opposite finding: that cognizable expression was at issue.[253] In *Barnette* and *Wooley*, the government sought to require individuals

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state may generally lead students to recite the Pledge of Allegiance and salute the American flag, provided that conscientious objectors may opt out).

[245] Barclay & Rienzi, *supra* note 239, at 1614–18.

[246] *Id.* at 1617–18.

[247] 430 U.S. 705 (1977).

[248] 319 U.S. 624.

[249] Barclay & Rienzi, *supra* note 239, at 1617–18.

[250] *E.g.*, *id.* at 1597–98 (arguing that the Religious Freedom Restoration Act may be justified as a correction to the Court's differing treatment of speech and free exercise, even though RFRA's categorical strict scrutiny approach goes far beyond free speech methodology).

[251] 547 U.S. 47, 64–70 (2006).

[252] *Id.* at 64–65.

[253] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634–35 (1943); Wooley v. Maynard, 430 U.S. 705, 713 (1977).

to use specific words or specific patriotic gestures for the purpose of promoting a governmental message.[254] The laws did not incidentally affect private expression; their whole point was to compel expression and even did so in a content-based manner.[255] There would be an analogous case under the Free Exercise Clause if, for example, government required school children to participate in a daily prayer ritual or required driver license applicants to be baptized. To require forms of conduct that are inherently religious, for the purpose of promoting religion, surely would violate the Free Exercise Clause (as well as the Establishment Clause) by the same logic that the compulsions in *Barnette* and *Woolley* violated the Speech Clause.

Another way the government can violate the compelled speech doctrine is by requiring additional expressive action as a condition of the claimant's own expressive conduct. In some cases, this may require the government to exempt claimants from general non-discrimination regulations, but the requirement remains that the relevant conduct must be inherently expressive. Thus, in *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*,[256] the Supreme Court held that it would be unconstitutional to apply state public accommodation law to a private parade such that the organizers would be required to allow a group representing gay, lesbian, and bisexual individuals to march in the parade. To support its conclusion that this application of law would violate the Speech Clause, the Court examined the history of parades as expressive activity and the context of the particular parade to determine that it qualified as inherently expressive conduct.[257] The Court also found that the private groups' participation in the parade, with accompanying banners and signs, would constitute inherently expressive behavior.[258]

It makes sense for the same principle to apply to the free exercise of religion, although the Court has not yet encountered such cases. What would be a comparable case of compelled religious exercise to *Hurley*? The compelled behavior would need to be inherently religious (that is, involving a form of behavior that is traditionally religious or objectively recognizable as religious). Such a case would occur, for example, if a state were to apply public accommodation law to the performance of religious rituals (say baptisms, sacraments, or religious weddings), thereby prohibiting organizations from discriminating in deciding whom may receive these. While such a concern may be far-fetched in the United States, this may be because states already understand that such an application of law would violate the Free Exercise Clause, notwithstanding *Employment Division v. Smith*. On the other hand, a comparable compelled religious exercise problem would not occur in cases such as *Masterpiece Cakeshop*, where businesses that serve the public are prohibited from discriminating among customers seeking non-religious services.[259]

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[254] *See Barnette*, 319 U.S. at 632–34; *Wooley*, 430 U.S. at 715.
[255] *See Barnette*, 319 U.S. at 631–33; *Wooley*, 430 U.S. at 716–17.
[256] 515 U.S. 557, 566 (1995).
[257] *See id.* at 568–70; *see also FAIR*, 547 U.S. at 63.
[258] *Hurley*, 515 U.S. at 568–70.
[259] *See generally* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018).

Tentative Recommendation: The Speech and Free Exercise Clauses should be interpreted as prohibiting compelled behavior in a parallel manner. As a general rule, the government may not compel an individual to perform an action that would objectively be understood as expressive or religious. The principle does not apply to behavior that is only expressive or religious from the actor's subjective perspective, as this could implicate any regulation with affirmative requirements, such as any application of anti-discrimination rules.

CONCLUSION: POSITIVE PLURALISM AND CALIBRATED JUDICIAL SCRUTINY

I began with Justice Barrett's suggestion to look to free speech jurisprudence to inform free exercise jurisprudence.[260] This analysis aims to show that the comparison is indeed useful and informative, and that it cuts both ways: speech jurisprudence also can benefit by looking to the free exercise of religion. The freedom of speech and the free exercise of religion serve complementary purposes in their protection of individual freedom of thought and conscience. Society also benefits from recognition of these rights, as they promote a pluralistic society, enhancing opportunities for all to learn and grow from each other. Where the freedom of speech and free exercise of religion are interpreted as parallel in their protections, this preserves the broad function of these freedoms as inclusive, inherent human rights, rather than promote the misunderstanding that they are mere privileges for particular interest groups.

Comparing the freedom of speech and the free exercise of religion is more likely to be constructive if one considers them in various applications within a framework that is sensitive both to their common aspirations and the parallel problems they raise for judicial scrutiny. It is easy to make facile comparisons between protections for speech and religion for purposes of justifying nearly any position. For example, Justice Alito relied on speech jurisprudence to support his argument for restoring the *Sherbert* test for religious freedom,[261] even though there is no rule comparable to *Sherbert* for speech, while Justice Scalia compared speech jurisprudence to support the opposite position in *Smith*.[262] Neither of the Justices gave serious consideration to how their respective positions would create new anomalies, or to how speech

[260] *See supra* Introduction.

[261] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1916–17 (2021).

[262] Emp. Div. v. Smith, 494 U.S. 872, 886 (1990) (whereas speech jurisprudence uses heightened scrutiny to produce "equality of treatment and an unrestricted flow of contending speech" to use it to create a private right to ignore generally applicable laws would create a "a constitutional anomaly"). In a similar facile manner, the concurrence in *Smith* relied on speech cases to support applying the *Sherbert* standard, *id.* at 902 (O'Connor, J., concurring) ("Our free speech cases . . . recognize that neutral regulations that affect free speech values are subject to a balancing, rather than categorical, approach."), as had the Court in *Sherbert v. Verner*, 374 U.S. 398, 404 n.5 (1963).

jurisprudence might adapt to the freedom of religion.[263] For those who are genuinely interested in reconciling these two areas of jurisprudence and finding common ground, we can do better.

I suggest several general lessons that may be drawn from a broader comparison of free speech and free exercise jurisprudence, which may serve as neutral principles for harmonizing them more closely.

First, while freedom from discrimination is a component of both freedoms, it is not sufficient. *Employment Division v. Smith* has appropriately been criticized for suggesting that government may enforce neutral secular regulations with indifference to how they affect religious freedom.[264] Indifference is not a guiding norm for the freedom of speech, nor should it be for the free exercise of religion.

Fortunately, the principle of indifference (or religion-blindness) has not guided the Supreme Court's enforcement of religious freedom since *Smith*.[265] While the Court has not formally overruled *Smith*, it has expanded its exceptions significantly in ways that suggest a more active, solicitous paradigm.[266] With credit to Paul Horwitz and John Inazu, let's call this positive pluralism.[267]

Positive pluralism suggests that government actors (indeed, all of us) should stretch to accommodate and value differences between groups and individuals on such deeply felt subjects as religion, politics, morality, and social progress, recognizing such differences as opportunities for growth and national strength.[268] We may not only live peacefully in a society with deep differences, in many ways we are better for it.[269] While pluralism does require limits to what is embraced or tolerated, the limits are intentionally wide, set with due appreciation for the significant social and individual benefits of practicing respect for diversity, even where this requires work, discomfort, and patience.[270]

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[263] In fairness, Justice Scalia did argue in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), that the Court should follow *Smith*'s lead for purposes of interpreting the Speech Clause, specifically by overruling the *O'Brien* test insofar as it protects expressive conduct, *id.* at 579 (Scalia, J., concurring). This only shows, however, that his comparison to speech jurisprudence in *Smith* was deliberately selective.

[264] *See, e.g.*, Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651, 686–88 (1991).

[265] *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019) ("The Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously . . . .").

[266] *See* Margaret Smiley Chavez, *Employing* Smith *to Prevent a Constitutional Right to Discriminate Based on Faith: Why the Supreme Court Should Affirm the Third Circuit in* Fulton v. City of Philadelphia, 70 AM. U. L. REV. 1165, 1175–81 (2021).

[267] Paul Horwitz, *Positive Pluralism Now*, 84 U. CHI. L. REV. 999 (2016) (reviewing JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE (2016)).

[268] *Id.* at 1001–02.

[269] *See id.* at 1016–18.

[270] *See id.* at 1016–17.

By this view, the Free Exercise Clause protects religious liberty as a positive good, a "lustre of our country,"[271] not merely as correction to government's tendency to target minorities. There is no better way to explain such cases as *Hosanna-Tabor*, *Tandon*, and *Fulton*, each of which protects religious liberty in the face of neutral, secular regulations, and, in doing so, requires government to do more than refrain from anti-religious discrimination.

The same applies to the freedom of speech. While all recognize that those who speak and express themselves must act within reasonable regulatory bounds, speech jurisprudence does not suggest that government may regulate with indifference to the value of speech.[272] As when government accommodates parades on city streets, creates new public forums, zones to accommodate expressive activities within land use schemes, or acts to facilitate communication on the internet and other technological mediums, government acts within the best of constitutional traditions when it expands the range of permissible opportunities for speech and encourages participation. In modern systems of pervasive regulation, we may even say it is affirmatively required to do so.[273]

Second, judicial enforcement of the First Amendment must often defer to other branches of government and their primary role in determining the costs and benefits of regulatory systems that serve as the background conditions for First Amendment liberty. It is one thing to recognize that the First Amendment requires government to appreciate the value of speech and religious freedom when regulating behavior; it is quite another for courts to take over measuring the costs and benefits of any regulation that affects the exercise of First Amendment liberty, which is all regulation. Pluralism allows individuals and groups to decide for themselves what conduct is religiously significant; it also means that they may decide what actions they value as expressive; but this should not mean that the First Amendment empowers courts to rigorously scrutinize the costs and benefits of regulation that interferes with someone's self-defined religious or expressive conduct.

The Court was therefore correct in *Smith* to reject the overzealous principle that strict scrutiny applies to any regulation that burdens religion.[274] The Court's observation in *Smith* that the law cannot sustain meaningful strict scrutiny for all regulatory

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[271] *See generally* JOHN T. NOONAN JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM (2000) (giving a positive historical account of religious liberty in America). Noonan's title draws from James Madison's *Memorial and Remonstrance Against Religious Assessments* (1785), wherein Madison advances various arguments for religious liberty, including that it accords with America's offer of asylum to the oppressed of the world, "promising a lustre to our country."

[272] *See* Horwitz, *supra* note 267, at 1008–10.

[273] *See* Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1117, 1143–50 (2005) (arguing that the First Amendment imposes an affirmative obligation on the government to provide public forums).

[274] Emp. Div. v. Smith, 494 U.S. 872, 878 (1990).

conflicts with religion has not been refuted.[275] As the Court stated, "[a]ny society adopting such a system would be courting anarchy."[276] True, we may trust that courts would not allow anarchy to ensue even under a general regime of strict scrutiny, but this leads inevitably to another problem that is only slightly less troubling: preferential enforcement of religious freedom and selective rewriting of regulations by the courts. A legal regime that *purports* to apply strict scrutiny to all regulatory conflicts with religion invites courts to decide, either case-by-case[277] or through pragmatic categorization,[278] which religious tenets it finds more sympathetic, and which regulations it finds to be unimportant enough to allow exceptions. In short, it places the Supreme Court in the role of managing the entire *corpus juris*—state and federal—and its relationship to the limitless varieties of religion. Even if courts would do a good job of crafting a sensible balance between religious liberty and all the regulatory policies that affect it, this interpretation of the Free Exercise Clause empowers courts far too much.

For the same reason, the Court has appropriately limited the range of heightened scrutiny under the Speech Clause, even where the issue is whether to apply the weaker *O'Brien* test. Courts do not apply *O'Brien*-level scrutiny to protect any action that an actor deems expressive from incidental regulatory burdens, but apply such scrutiny only to protect traditional modes of expression or conduct that conveys a concrete message in context.[279] While ideally the government should recognize potential value in all non-destructive forms of expression or conscientious action, and consider accommodating expressive conduct broadly where feasible, the Court's use of heightened scrutiny to force such accommodations is wisely more selective.

Third, courts may navigate effectively between the extremes of excessive judicial scrutiny or excessive deference through the use of well-calibrated threshold rules. Threshold rules are those that determine when courts should apply heightened scrutiny (or categorical treatment) to a given conflict, and if so, what level of scrutiny to apply.[280]

An effective threshold rule aims to do two things: (1) identify types of regulations that, in form or substance, indicate an unacceptable likelihood that the regulators did not give adequate weight to the constitutional interests at stake; (2) distinguish such

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[275] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876–77 (2021).

[276] *Id.*

[277] *E.g.*, Wisconsin v. Yoder, 406 U.S. 205, 209–13 (1972) (praising the Amish's values and way of life, even taking expert testimony on the subject, in the course of upholding their religious freedom claim under the compelling interest test).

[278] *E.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (finding the Free Exercise interests of Native Americans to access sacred lands be non-cognizable, even though the proposed government action "could have devastating effects on traditional Indian religious practices," because the matter concerned the government's use of its own land).

[279] *See supra* Section II.B.

[280] *See* John Galotto, *Strict Scrutiny for Gender, Via* Croson, 93 COLUM. L. REV. 508, 509 (1993).

regulations from the more general body of laws that reflect standard policy judgments to which courts should defer. Threshold rules operate as judicial heuristics in a system in which courts know they lack the tools or authority to assess every variable that is relevant to achieving the proper constitutional balance of regulatory order and individual liberty.[281] By relying on heuristic threshold rules, courts are able to correct government's more obvious abuses of regulatory power in relation to First Amendment norms while leaving primary regulatory authority to those who are elected to exercise it, and also reminding and incentivizing regulators to respect individual liberty and constitutional pluralism in the balance.[282] Reliance on clear, pre-established threshold rules has the additional advantage of checking judicial biases and giving consistency and predictability to the enforcement of First Amendment norms.

One of the more useful threshold rules in speech jurisprudence, for example, is the principle that content-based regulations of speech are presumptively subject to strict scrutiny.[283] When acting as a regulator of speech, there is seldom justification for the government to discriminate on the basis of content, even if it is allowed to act in other capacities to promote some ideas over others.[284] Content-based regulations typically reflect insufficient appreciation for the value of diverse speech, especially of speech that the government disagrees with, and so raises an unacceptable likelihood that government has over-regulated speech.[285] Understanding the threshold rule for content-based speech regulation as a judicial heuristic also shows why it is insufficient (it does not represent the whole of the meaning of the Speech Clause) for there are other forms of regulation that are likely to undervalue the freedom of speech. The same could be said to justify the free exercise rule that religiously discriminatory regulations are subject to strict scrutiny, and why it is insufficient.

The challenge, of course, for both the freedom of speech and the free exercise of religion, is to identify those additional threshold rules, beyond anti-discrimination rules, in a way that preserves the proper relationship between all branches of government. There is plenty to debate about what additional threshold rules are required to adequately protect the freedom of speech and the free exercise of religion, and what rules would expand the judicial role too much. As this analysis has shown both

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[281] *See* R. Randall Kelso, *Justifying the Supreme Court's Standards of Review*, 52 ST. MARY'S L.J. 973, 1027–28 (2021).

[282] *See id.*

[283] *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

[284] *See id.* at 172.

[285] As I have argued elsewhere, this rule does not reflect an ideal that government should be neutral or indifferent toward the marketplace of ideas (there are too many exceptions to the rule for this to be tenable, and there are too many ways in which government can positively influence the marketplace of ideas to make this desirable). Fee, *Speech Discrimination*, *supra* note 17, at 1136–48. Instead, it is a sound rule of judicial review because it catches regulations that reflect inadequate appreciation for the value of competing ideas in society and would threaten to stifle too much speech if allowed to go unchecked. *Id.* at 1169–70.

speech and free exercise jurisprudence include protections beyond anti-discrimination rules. What is difficult to justify, however, is why these rules do not more closely match. If a regulatory feature (such as a system of individualized exemptions) indicates the need for strong judicial review for Free Exercise purposes, presumptively it should justify the same level of judicial review for freedom of speech purposes.

The comparison I have offered reveals ways to protect speech and religious liberty in a more principled and inclusive manner by presumptively adopting parallel rules across both areas of jurisprudence. The comparison also provides a useful check against the excessive use of heightened scrutiny, or otherwise announcing strong First Amendment protections that cannot be sustained as broad neutral principles. A useful test for any proposed rule that protects speech or free exercise would be to ask whether the equivalent rule would be manageable for both spheres of First Amendment liberty.