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Religious Rights in Historical, Theoretical, and International Context: Hobby Lobby as a Jurisprudential Anomaly?

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Religious Rights in Historical, Theoretical, and International Context: *Hobby Lobby* as a Jurisprudential Anomaly?

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ABSTRACT

The United States has a long and complicated history concerning religious rights, and the U.S. Supreme Court's recent decision in Burwell v. Hobby Lobby Stores, Inc. *has done little to clear up the jurisprudence in this field. Although the decision will doubtless generate a great deal of commentary as a matter of constitutional and statutory law, the better approach is to consider whether and to what extent the majority and dissenting opinions reflect the fundamental principles of religious liberty. Only in that context can the merits of such a novel decision be evaluated free from political and other biases.*

This Article undertakes precisely that analysis by placing Hobby Lobby *into a wider historical, theoretical, and international setting so as to determine whether the decision to grant a commercial corporation a religious accommodation is consistent with the rationales underlying religious rights. The discussion considers the work of key theorists in this field while also contemplating relevant principles of international and comparative constitutional law. In so doing, the Article seeks to determine whether the Supreme Court has remained true to established principles of religious liberty or whether* Hobby Lobby *has made the United States an outlier in this important field of law.*

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> I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other. If this be not done, there can be no end put to the controversies that will be always arising . . . .
>
> – John Locke[1]

I. INTRODUCTION

The Founders of the United States were well-versed in political philosophy and held the work of John Locke in particularly high esteem, particularly in the field of religious rights.[2] Locke's experience with the violence and deprivation generated by nearly a century's worth of religious warfare in Europe provided wise counsel to those charged with creating a workable government for a religiously pluralist society, and his insights are as relevant today as they were when they were first written.[3]

The United States is again in need of such wisdom, given the controversy surrounding the Supreme Court's recent decision in *Burwell v. Hobby Lobby Stores, Inc.*[4] The case was subject to extensive commentary before it was heard by the Court,[5] and the

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1. JOHN LOCKE, A LETTER CONCERNING TOLERATION 18 (Prometheus Books 1990).

2. *See* W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 2:1 (2013) (discussing Founding period); Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 728 (2013) (describing philosophy at Founding); *see also* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (Basic Books 2008); MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION (Oxford Univ. Press 1978). Debate exists about the extent to which the Founders, the Framers, and subsequent authorities intended to or did incorporate various political theories into U.S. law. *See* Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 699–700 (2013) (discussing political theory through U.S. history); Andrew C. Spiropoulos, *Tocqueville and the American Amalgam*, 11 GEO. J.L. & PUB. POL'Y 103, 104–05 (2013) (describing U.S. political amalgam).

3. *See* LOCKE, *supra* note 1, at 18 (describing approach to religious rights); Robert Dowd, *Religious Diversity and Violent Conflict: Lessons From Nigeria*, 38 FLETCHER F. WORLD AFF. 153, 153–65 (2014) (discussing catalysts for religious violence in contemporary society); Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 ME. L. REV. 23, 25 (2010) (arguing that First Amendment jurisprudence should remain rooted in tolerance).

4. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

5. *See* Emily J. Barnet, Hobby Lobby *and the Dictionary Act*, 124 YALE L.J. F. 11 (2014) (describing use of Dictionary Act); Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraceptive Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 346 (2014) (opposing use of accommodation in *Hobby Lobby*); Alan J. Meese & Nathan B. Oman, Hobby Lobby, *Corporate Law, and the Theory of the Firm: Why For-Profit Corporations are RFRA*

coming months and years will doubtless see a similar onslaught of debate about issues ranging from the majority's characterization of a closely held corporation as a "person" for purposes of religious rights to the proper interpretation and application of the pre-Smith jurisprudence to matters asserted under the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[6] Unfortunately, these discussions may never provide a truly conclusive answer about the propriety of the decision, given the novelty of the plaintiffs' claim and the high degree of politicization surrounding the accommodation in question. However, there may be another way to assess the legitimacy of the decision.

For example, it may be useful to consider the historical context in which religious liberties arose so as to determine whether and to what extent *Hobby Lobby*'s newly enunciated rule is consistent with both the purposes of religious rights as well as past practices.[7] This type of methodology is in no way foreign to the five members of the majority, although they were unusually reticent about discussing historical issues in *Hobby Lobby* itself.[8] Instead, it was Justice Ginsburg, writing for the four dissenters, who raised the most

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Persons, 127 HARV. L. REV. F. 273 (2014) (supporting plaintiffs' position); Thomas E. Rutledge, *A Corporation Has No Soul—The Business Entity Law Response to Challenges to the PPACA Contraceptive Mandate*, 5 WM. & MARY BUS. L. REV. 1 (2014) (opposing plaintiffs' position); *see also* John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 828 (2014) (discussing arguments for religious rights); Zoë Robinson, *What is a "Religious Institution"?*, 55 B.C. L. REV. 181, 184 (2014) (defining religious institutions); Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 983–84 (2013) (discussing religious institutionalism); Nelson Tebbe, *Associations and the Constitution: Four Questions About Four Freedoms*, 92 N.C. L. REV. 917, 938 (2014) (debating Inazu); Spencer Churchill, Note, *Duty or Dignity? Competing Approaches to the Free Exercise Rights of For-Profit Corporations*, 37 HARV. J.L. & PUB. POL'Y 1171, 1172 (2014) (discussing rights of commercial corporations).

6. *See* 42 U.S.C. §§ 2000bb–1–4; 42 U.S.C. §§ 2000cc–1–5; *Hobby Lobby*, 134 S. Ct. at 2751; Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER (forthcoming 2015) (suggesting *Hobby Lobby* is too vague to conform to the requirements of the rule of law). RFRA and RLUIPA were said to restore the scope of religious rights in the United States to what they were prior to the U.S. Supreme Court decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), *superseded by statute*. *Hobby Lobby*, 134 S. Ct. at 2760–61.

7. *See generally Hobby Lobby*, 134 S. Ct. 2751.

8. *See id.* at 2759. The majority opinion was written by Justice Alito, who was joined by Justices Scalia, Kennedy, and Thomas as well as Chief Justice Roberts. *See id.* at 2751. All of these men are usually quite fond of arguments based on history and original intent. *See* Balkin, *supra* note 2, at 669–72 (discussing historical arguments on Supreme Court). However, the majority here relied heavily on the Dictionary Act without contemplating the broader context of the dispute or the circumstances generating the underlying legal principles. *See Hobby Lobby*, 134 S. Ct. at 2769; *see also* Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 255 (2010) (noting that Justices Scalia, Alito, and Thomas are all extremely likely to rely on the Dictionary Act).

pressing questions about the history and purpose of religious liberties.[9]

Although Justice Ginsburg limited her historical analysis to Blackstone and early Supreme Court precedent, various commentators, most notably Michael McConnell, have advocated a wider historical and jurisprudential analysis of religious rights so as to take into account the philosophical underpinnings of the nation and the reliance of both the Founders and the Framers on legal and political principles enunciated by writers such as John Locke.[10] Indeed, McConnell has written that "the idea of religious freedom as our first freedom – both in chronological and logical priority" requires historical and theoretical analyses that "go far beyond the deliberations of the First Congress in 1789."[11]

Other norms, including those that arise as a theoretical, comparative, and international matter, may also be relevant to the *Hobby Lobby* analysis, as suggested by Justice Kennedy in his concurring opinion.[12] Indeed, some commentators have found recent

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9. *See Hobby Lobby*, 134 S. Ct. at 2796–97 (Ginsburg, J., dissenting). The majority opinion referred to Justice Ginsburg's historical analysis only in a passing footnote. *See id.* at 2770 n.23.

10. *See id.* at 2796 n.17 (Ginsburg, J., dissenting); Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1244 (2000) [hereinafter McConnnell, *First Freedom*] (advocating a wider analysis); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1413–14 (1990) [hereinafter McConnell, *Origins*] (describing the need for a historical approach to this issue); Ethan Bercot, Note, *Forgetting to Weight: The Use of History in the Supreme Court's Establishment Clause*, 102 GEO. L.J. 845, 848 (2014) (discussing historical arguments in religious rights cases).

11. *See* McConnell, *First Freedom*, *supra* note 10, at 1244.

12. *See Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring) (placing the debate in the U.S. constitutional and jurisprudential context). Recent years have seen an increasing interest in religious rights as a matter of international and comparative law. *See, e.g.*, NORMAN DOE, LAW AND RELIGION IN EUROPE: A COMPARATIVE INTRODUCTION (2011) (discussing religious rights in Europe); KRISTINE KALANGES, RELIGIOUS LIBERTY IN WESTERN AND ISLAMIC LAW: TOWARD A WORLD LEGAL TRADITION (2012) (comparing religious rights in different legal systems); Peter G. Danchin, *The Emergence and Structure of Religious Freedom in International Law Reconsidered*, 23 J.L. & RELIGION 455, 456 (2007-2008) (discussing religious rights under international law); Derek H. Davis, *The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, 2000 BYU L. REV. 217, 224–36 (2002) (describing religious rights in international context). While this Article does not take a position on the question of whether and to what extent the United States should or does comply with international law in the area of religious liberty, it is nevertheless useful to put the U.S. approach into an international and comparative context. *See* Alain A. Levasseur, *Foreign Precedents in Constitutional Litigation*, 62 AM. J. COMP. L. 515, 520–25 (2014) (advocating internationalist approach to U.S. law); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1230–38 (1999) (discussing benefits of comparative constitutional law); *see also* Joint Submission to the United Nations Human Rights Committee Concerning Religious Freedoms of Indigenous Persons Deprived of their Liberty in the United States of America, 109th Sess., Oct.

efforts by the U.S. Supreme Court to place its jurisprudence within an international and comparative context to be extremely useful in identifying whether and to what extent certain constitutional rights "might [be] open for reconsideration . . . based on their disequilibrium with international values."[13] A similar type of approach may be useful here as a means of overcoming certain "blind spots" or biases regarding these issues.[14]

The aim of this Article, therefore, is to assess the legitimacy of the *Hobby Lobby* decision not through statutory or similar analyses but instead through detailed consideration of the majority opinion from a historical, theoretical, international, and comparative context.[15] In so doing, the Article intends to determine whether and to what extent the majority opinion either falls within currently established standards involving religious rights or appropriately extends the scope of religious liberty to include this particular claim. This latter analysis will be conducted by a review of the various purposes of religious rights to determine the extent to which the majority opinion can be said to fulfill one or more or those goals.

The structure of the Article is as follows. The discussion begins by putting religious rights into historical, international, and comparative context. This analysis is found in Part III, which begins by providing a historical overview of the development of religious rights and the conflicts that those rights were initially intended to address. This Part then describes the basic parameters of the three types of religious liberties—nondiscrimination on the basis of religion, freedom of religious belief, and freedom of religious practice—from a comparative and international perspective and considers whether and to what extent the majority opinion in *Hobby Lobby* meets the relevant standards.[16]

14–Nov. 1, 2013 (submitted Sept. 3, 2013) [hereinafter Submission to the U.N.], *available at* http://www.nativeamericanbar.org/wp-content/uploads/2012/04/Joint-Submission-Indigenous-Prisoners-Religious-Freedoms-in-the-United-States-Report-to-the-Human-Rights-Committee-109th-Session.pdf [http://perma.cc/ENA5-BBP2] (archived Feb. 15, 2015) (discussing U.S. compliance with international human rights instruments).

13. *See* Roger P. Alford, Roper v. Simmons *and Our Constitution in International Equipoise*, 53 UCLA L. REV. 1, 3 (2005) (discussing Eighth Amendment rights). Scholars have promoted comparative constitutional law for precisely this purpose, including in the area of religious liberties. *See* RELIGION, RIGHTS, AND SECULAR SOCIETY 4–6 (Peter Cumper & Tom Lewis eds., 2014) (advocating a comparative approach); John Bell, Book Review, *Religion, Rights, and Secular Society*, 73 CAMBRIDGE L.J. 211, 212–13 (2014) (discussing comparative analysis concerning religious liberties).

14. *See* Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U. L. REV. 553, 579–80 (2007) (noting Vicki Jackson's view that matters of individual liberties and "those that engender 'deep controversy over internal norms'" may be particularly suitable for comparative constitutional analysis).

15. *See generally Hobby Lobby*, 134 S. Ct. 2751.

16. *See id.*

In undertaking this analysis, consideration is given to the law of both the United Kingdom and the Republic of Ireland, two countries that share a common legal and historical heritage with the United States.[17] Ireland and the United Kingdom are also relevant to this analysis because they can be legally or culturally characterized as "Christian nations" to approximately the same extent as the United States, despite an increasing amount of religious pluralism within their national borders.[18]

Part III of this Article concludes that the religious accommodation granted by the majority in *Hobby Lobby* exceeds the scope of religious liberty in its currently recognized form and is therefore presumptively improper.[19] However, that is not the end of the discussion, since religious rights can change and evolve over time, and it is possible that *Hobby Lobby* simply represents one of these types of quantum leaps forward.[20]

The Article therefore moves to a theoretical analysis, beginning in Part IV, which describes a variety of rationales that have been used to justify religious rights. The discussion considers five separate but interrelated concerns, including the desire to promote civil peace, minimize alienation, further personal autonomy, promote self-definition, and further the search for truth. This Part also considers the possibility that religious liberty can and should be supported not as a matter of theory but simply as a pragmatic arrangement.

Part V contains a similar type of analysis regarding theories advocating the restriction or elimination of religious rights. Here, the discussion considers claims that religious liberty violates the principle of neutrality, benefits religious beliefs over other ethical beliefs, allows religious persons to become a law unto themselves, and encourages improper scrutiny of religious beliefs.

Each of the theories presented in Parts IV and V is also considered in light of the majority, concurring, and dissenting opinions in *Hobby Lobby* to determine whether and to what extent

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17. Ireland and the United Kingdom are both common law countries, like the United States. However, each jurisdiction has adopted its own unique approach to religious liberties, as discussed throughout this Article. *See* S.I. Strong, *Christian Constitutions: Do They Protect Internationally Recognized Human Rights and Minimize the Potential for Violence Within a Society? A Comparative Analysis of American and Irish Constitutional Law and Their Religious Elements*, 29 CASE W. RES. INT'L L.J. 1 *passim* (1997) (undertaking a detailed comparative analysis of the United States and Ireland).

18. The extent to which the United States is a "Christian nation" has been much debated. *See* Steven K. Green, *Understanding the "Christian Nation" Myth*, 2010 CARDOZO L. REV. DE NOVO 245, 246–47 (discussing historical understanding of U.S. religious-legal culture); Michael V. Hernandez, *A Flawed Foundation: Christianity's Loss of Preeminent Influence on American Law*, 56 RUTGERS L. REV. 625, 626 (2004) (analyzing religious influences in U.S. law).

19. *See generally Hobby Lobby*, 134 S. Ct. 2751.

20. *See id.*

the individual rationales are reflected in the various opinions.[21] If the majority opinion is consistent with one or more of the theories supporting religious rights, then the decision may be an appropriate extension of existing legal standards. If, however, those theories align more closely with the views of the dissent, then the majority may be said to have gone too far in granting this particular accommodation. The converse is true with respect to theories supporting the limitation of religious rights: to the extent that those principles are reflected in the dissenting opinion, then the majority will be considered to have exceeded the proper bounds of religious liberty.

This type of methodology eliminates the need to include a separate section detailing the facts and analysis reflected in *Hobby Lobby*.[22] Instead, readers are assumed to be generally familiar with the case and its core holding that a for-profit corporation may claim exemptions from generally applicable laws, particularly those relating to the provision of certain contraceptives under the Patient Protection and Affordable Care Act (PPACA),[23] on the basis of the corporation's religious beliefs and practices, as defined by the religious beliefs and practices of the corporate shareholders.[24]

One of the key issues in *Hobby Lobby* involved the question of whether a closely held commercial corporation could be considered a "person" within the context of various statutes involving religious liberties.[25] However, questions about who constitutes a "religious person" for the purpose of a religious accommodation have traditionally focused on the definition of religion rather than that of personhood.[26] Although *Hobby Lobby* does not discuss the definition of religion (presumably because the faith tradition involved in the case—Christianity—has been universally considered to be a religion in the U.S. legal tradition), matters relating to the definition of religion have affected religious rights analyses in a variety of important and relevant ways.[27]

As a result, it is useful to undertake a brief analysis of the theoretical and practical concerns surrounding the definition of religion so as to demonstrate why the Supreme Court's conclusions regarding the personal status of a closely held corporation is so problematic as a matter of religious liberties law.[28] This discussion also demonstrates why the decision in *Hobby Lobby* could have more

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21. *See generally id.*
22. *See generally id.*
23. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 42 U.S.C.).
24. *See Hobby Lobby*, 132 S. Ct. at 2759, 2783.
25. *See id.* at 2758–59.
26. *See id.*
27. *See id.*; Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 HOFSTRA L. REV. 309, 363–77 (1994) (discussing difficulties in defining religion).
28. *See Hobby Lobby*, 134 S. Ct. at 2793–97 (Ginsburg, J., dissenting).

significant ramifications than the majority realized.[29] These matters are taken up in the following Part as a preliminary matter.

II. PRELIMINARY ISSUES RELATING TO THE DEFINITION OF RELIGION AND RELIGIOUS PERSONS

A. *Theoretical Concerns*

Jurists have long struggled with the definition of religion, since categorizing people or organizations as "religious" not only provides them with certain legal protections (for example, conscientious objector status during war time or tax breaks for an organization) but also imposes burdens on the state by requiring it, for example, to forgo services or revenues to which it would otherwise be entitled.[30] The challenge, therefore, is to find "a definition which is sufficiently narrow (in order to be meaningful) and at the same time broad enough (in order to avoid the bias against unconventional religions)."[31] When expanding the definition of religion, courts and legislatures must avoid "undermin[ing] the legitimacy of the routine State regulations in the areas previously (that is to say, before the definitional extension) held 'secular.'"[32]

This need for a narrow-yet-broad definition is particularly acute in the United States due to the conflicting demands of free-exercise claims (which require a broad definition of religion to accommodate individual needs) and nonestablishment claims (which require a narrow definition to avoid improper burdens being placed on governmental actions).[33] The often irreconcilable nature of these competing demands has led some commentators, including, at one time, Laurence Tribe, to suggest that courts should use multiple definitions of religion, depending on the type of claim made.[34]

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29. *See id.* at 2783 (considering floodgates arguments); *see also id.* at 2802–03 (Ginsburg, J., dissenting).

30. *See* David Little, *Studying "Religious Human Rights": Methodological Foundations*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 45, 49–52 (Johan D. van der Vyver & John Witte, Jr. eds., 1996) (describing consequences of religious characterization); Wojciech Sadurski, *On Legal Definitions of "Religion,"* *in* LAW AND RELIGION 297, 297 (Wojciech Sadurski ed., 1992) (discussing ramifications of characterizing acts as religious); C.G. Hall, *"Aggiornamento": Reflections Upon the Contemporary Legal Concept of Religion*, 28 CAMBRIAN L. REV. 7, 10 (1997) (discussing benefits and burdens of acts as defined as religious).

31. *See* Sadurski, *supra* note 30, at 303.

32. *See id.* at 297–98.

33. *See id.* at 297 (describing difficulties of U.S. jurisprudence).

34. *See* Ben Clements, *Defining "Religion" in the First Amendment: A Functional Approach*, *in* LAW AND RELIGION, *supra* note 30, at 310–11 ("Tribe has now

Experts in ethics and the philosophy of religion can offer little assistance in this task, since the debate over the definition of religion is just as active in those fields. Early formulations focused on belief in a spiritual being or beings before moving to an emphasis on the need for transcendence.[35] Sociologist Emile Durkheim brought about a less content-oriented approach to defining faith by looking primarily at the functional characteristics of religion rather than specific beliefs and practices.[36]

Later movements emphasized the psychological aspect of faith. For example, a typical psycho-functional definition of religion would "maintain[ ] that any system of belief and practice that addressed humanity's fundamental existential concerns was ipso facto religion, regardless of the content of those systems."[37] Paul Tillich was among the most influential of this school of theorists, claiming that "[r]eligion, in the largest and most basic sense of the word, is ultimate concern."[38] Tillich's test eventually found approval in judicial quarters, most prominently in the U.S. Supreme Court's decision in *United States v. Seeger*, which involved the grant of conscientious objector status to persons whose beliefs were broadly "religious," though not attached to any particular denomination or formal creed.[39]

Some scholars claim that the legal test for what constitutes religion should be subjective and focus primarily on whether the adherent believes and states that a certain belief pattern is a religion.[40] Other commentators require an objective element.[41] For some people, "belief in God or gods as a focus of reverence and worship is no longer essential," an approach that allows Buddhism, Taoism, and other non-deist faiths to be considered religions.[42] Indeed, some scholars claim that a belief system no longer needs to deal comprehensively with "all the inexorable questions relating to

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rejected the dual approach . . . ."). Multiple definitions of religion can raise suspicions of arbitrariness as well as the potential for discrimination.

35. *See* Brian C. Wilson, *From the Lexical to the Polythetic: A Brief History of the Definition of Religion*, *in* WHAT IS RELIGION?, *in* ORIGINS, DEFINITIONS, AND EXPLANATIONS 141, 144–48 (Thomas A. Idinopulos & Brian C. Wilson eds., 1998) (describing history of definition of religion).

36. *See id.* at 151 (discussing Durkheim).

37. *See id.*

38. *See* PAUL TILLICH, THEOLOGY OF CULTURE 7–8 (1959); *see also* Wilson, *supra* note 35, at 153 (discussing Tillich). For a discussion of the potentially startling consequences of this definition, see Timothy Macklem, *Reason and Religion*, *in* FAITH IN LAW: ESSAYS IN LEGAL THEORY 69, 77 (Peter Oliver et al. eds., 2000).

39. *See* 380 U.S. 163, 187 (1965); Hall, *supra* note 30, at 25 (discussing conscientious objectors).

40. *See* Jonathan Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, *in* LAW AND RELIGION, *supra* note 30, at 67, 78 (describing subjective test for religion).

41. *See* Hall, *supra* note 30, at 11 (discussing objective test for religion).

42. *See id.* at 14, 30–32.

man's existence and place in the universe," but merely with some of those issues.[43]

This latter approach has been criticized by a number of commentators, including Bette Evans, who notes that

> [i]f religion is defined by the function of the belief system rather than by its content, then any ultimate system of values should qualify for [legal] protection. By this characterization, one whose ultimate set of personal values is music, football, or the Democratic party might well have a legitimate religious claim.[44]

However, Evans's conclusion erroneously appears to equate intensity of sentiment with the function of the belief system. Indeed, her criticism would appear more apt if it were of the psychological, rather than functional, approach to religion.[45]

Nontheism and atheism involve slightly different issues. John Locke advocated discrimination against atheists because they were seen as less trustworthy and more likely to bring about civil disorder than religious believers.[46] Michael McConnell believes that granting atheists conscientious objector status makes little sense, since "unbelief entails no obligations and no observances . . . . [B]elief in the nonexistence of God does not in itself generate a moral code."[47] However, Douglas Laycock believes it inappropriate to delve into the substance of different religious beliefs and would instead protect nontheism by virtue of its being related to the types of beliefs that are traditionally held to be religious.[48] Laycock also believes that transcendence for the nontheist may be found in natural law or principles of equality.[49]

These theoretical discussions are extremely illuminating when considered in the context of the debate about the status of closely held corporations in *Hobby Lobby*.[50] For example, any court or commentator who takes the view that the definition of religion is to be defined through subjective or functional means will likely conclude that a corporation—which cannot think or act for itself—cannot be "religious" and therefore cannot be a religious person in need of legal

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43. *See id.* at 11.

44. Bette Novit Evans, *Contradictory Demands on the First Amendment Religion Clauses: Having It Both Ways*, 30 J. CHURCH & STATE 463, 469 (1988); *see also* Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 659–60 n.35 (1990) (criticizing broad definition of religion).

45. *See* Macklem, *supra* note 38, at 81 (concluding the psychological approach to religious freedom is "undernourished").

46. *See* LOCKE, *supra* note 1, at 64 (opposing religious rights for atheists).

47. Douglas Laycock, *Religious Liberty As Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 334 (1996) [hereinafter Laycock, *Religious Liberty*] (quoting Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 10–11).

48. *See* Laycock, *Religious Liberty*, *supra* note 47, at 335 (advocating functional approach to religious rights).

49. *See id.* at 336 (justifying functional approach to religious rights).

50. *See Hobby Lobby*, 134 S. Ct. at 2751.

protection.[51] Those who define religion through objective factors, such as the verbal assertion of a particular credo, will probably take the opposite view.[52] Indeed, this distinction appears to be implicit in the majority and dissenting opinions in *Hobby Lobby*.[53]

Theoretical difficulties relating to the definition of religion are exacerbated in *Hobby Lobby* as a result of the request to extend the religious beliefs of the shareholders to the corporation itself.[54] While the propriety of this move can be analyzed as a matter of corporate law,[55] the more intriguing and perhaps more fundamental question is whether and to what extent the attribution of the shareholders' belief system to the corporation works under the law relating to religious liberties. In addition to problems relating to the manner in which religion is defined (i.e., as an objective or subjective, functional, or psychosocial matter), concerns arise with respect to the means of ascertaining the content of the religious claim of a corporation.

This issue has not been discussed with any frequency, since most courts and commentators have assumed that the holder of the beliefs in question is the same person who is asserting the religious claim.[56] The dissent in *Hobby Lobby* notes that defining religious beliefs by reference to the owners of a business entity would appear to give rise

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51. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part) ("[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their 'personhood' often serves as a useful legal fiction. But they are not themselves members of 'We the People' by whom and for whom our Constitution was established."); *see also Hobby Lobby*, 134 S. Ct. at 2794 (Ginsburg, J., dissenting). The majority makes much of the claim that "[w]hen rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people," meaning the shareholders, officers, and employees. *See id.* at 2768. However, the majority does not discuss the effect of its ruling on the religious or other rights of the employees, while the dissent does. *See id.* at 2791 ("[W]ith respect to free exercise claims no less than free speech claims, '[y]our right to swing your arms ends just where the other man's nose begins.'" (citations omitted)). Furthermore, the majority fails to take into account the fact that other legal persons have been denied status as a person under the U.S. Constitution. *See* Argentina v. Weltover, 504 U.S. 607, 619 (1992) (suggesting that a foreign state may not be a person within the meaning of the due process provisions of the U.S. Constitution); South Carolina v. Katzenbach, 383 U.S. 301, 323–24 (1966) (noting that a U.S. state is not a person under the U.S. Constitution).

52. *See Hobby Lobby*, 134 S. Ct. at 2764–66 (citing plaintiff corporations' mission statements). Of course, a verbal assertion, without more, is insufficient to establish a religious right. *See id.* at 2798 (Ginsburg, J., dissenting) (noting need for substantive analysis).

53. *See id.* at 2764–66 (focusing on objective elements); *id.* at 2794 (Ginsburg, J., dissenting) (focusing on subjective elements).

54. *See id.* at 2768–75.

55. *See id.* at 2794–97 (Ginsburg, J., dissenting); Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2626 (2008) (noting commercial shareholders are deemed to have no religious perspective); Rutledge, *supra* note 5, at 24–40.

56. One known exception exists. *See* Quinn's Supermarket v. Att'y Gen., [1972] I.R. 1 (Ir.); *see also infra* notes 165–69 and accompanying text.

to few, if any, theoretical issues in cases involving sole proprietorships and religious organizations, given the close identity between the legal and natural persons involved.[57] However, commercial corporations, even those that are closely held, give rise to different and potentially significant issues, since those organizations are not created to fulfil a religious purpose and involve a number of persons who may or may not share the same religious perspectives.[58] Although the majority in *Hobby Lobby* attempts to sidestep the issue as merely a practical concern, citing the availability of corporate voting mechanisms and state law, religious rights were never intended to be available to persons whose commitment to a particular religious belief or practice only exists with a 51 percent degree of certainty.[59] Thus, Justice Ginsburg appears to have the better understanding of religious liberties with respect to this issue.[60]

The majority in *Hobby Lobby* also fails to consider how the religious rights of the dissenting shareholders would be affected by a rule allowing a commercial corporation to adopt certain religious beliefs by majority rule.[61] Although one solution might be to require consensus before a religious right could be asserted on the part of a corporate entity, that method provides little relief as a theoretical matter, since there will still be situations where some shareholders' desire to assert a religious claim may be thwarted by other shareholders. While freedom of religious practice is often circumscribed by reference to the rights of others, the "others" in question have not traditionally been defined as constituent members of the religion in question.[62] Furthermore, freedom of religious belief (which is what is primarily at issue in questions relating to the definition of religion) is not subject to third-party concerns.[63] Given these jurisprudential paradoxes, the majority rule in *Hobby Lobby* seems ill-advised.[64]

B. *Practical Concerns*

The theoretical debate about the definition of religion has certain practical implications for national and international legal systems which must identify, with some degree of clarity, which persons are

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57. *See Hobby Lobby*, 134 S. Ct. at 2796–97 (Ginsburg, J., dissenting).

58. *See id.* at 2797 n.19 (Ginsburg, J., dissenting).

59. *See id.* at 2774–75. Although this issue could be determined as a question of sincerity of belief, that is a practical rather than theoretical solution. *See infra* notes 88–110 and accompanying text.

60. *See Hobby Lobby*, 134 S. Ct. at 2797 n.19 (Ginsburg, J., dissenting).

61. *See id.* at 2774–75; *see also infra* notes 258–60 and accompanying text (concerning third parties' religious rights).

62. *See infra* notes 219–36 and accompanying text.

63. *See infra* notes 193–212 and accompanying text.

64. *See Hobby Lobby*, 134 S. Ct. at 2759.

eligible for protection under the law.[65] As a result of the underlying theoretical issues, most international organizations, including the United Nations, the European Commission of Human Rights (European Commission), and the European Court of Human Rights (European Court), avoid defining the term religion whenever possible.[66]

Despite these difficulties, a few useful standards exist. One of the most helpful comes from the United Nations Human Rights Committee, which has construed Article 18 of the International Covenant on Civil and Political Rights (ICCPR),[67] one of the core documents of the international human rights canon, as

> protect[ing] theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact they are newly established, or represent minorities that may be the subject of hostility by a predominant religious community.[68]

Another fundamental human rights instrument, the Universal Declaration of Human Rights (Universal Declaration), is also considered to embrace a broad definition of religion.[69] However, that document does not provide protection for beliefs of a nonreligious character, such as "political, cultural, scientific, or economic [beliefs],

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65. The following discussion refers to a number of instruments that the United States has not signed or ratified. However, the standards contained in these documents are relevant to this discussion to the extent they demonstrate the existence (or not) of an international consensus regarding the definition of religion.

66. *See* Peter Cumper, *The Protection of Religious Rights Under Section 13 of the Human Rights Act 1998*, [2000] PUBLIC LAW 54, 261 [hereinafter Cumper, *Section 13*] (discussing international approach to defining religion); Natan Lerner, *Religious Human Rights Under the United Nations*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 30, at 79, 131 [hereinafter Lerner, *Religious Human Rights*] (describing international organizations' method of defining religion).

67. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 52 (Dec. 16, 1966) [hereinafter ICCPR]. The United States has signed and ratified the ICCPR. *See* ICCPR, Dec. 19, 1966, 999 U.N.T.S. 717, 6 I.L.M. 368 (entered into force Mar. 23, 1976, and ratified by the United States June 8, 1992).

68. Human Rights Comm., General Comment Adopted by the Human Rights Committee under Article 40, paragraph 4, of the International Covenant on Civil and Political Rights, 1, U.N. Doc. CCPR/C/21/Rev. 1/Add. 4, (Sept. 27, 1993). In adopting this definition, the Human Rights Committee appears to recognize both positive (right to believe) and negative (right not to believe) aspects of religion. *See id.*; Little, *supra* note 30, at 50 (discussing positive and negative religious rights).

69. *See* G.A. Res. 217 (III) A, U.N. GAOR, 2d Special Sess., Supp. No. 2, at 72, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]; *see also* Lerner, *Religious Human Rights*, *supra* note 66, at 131. The United States has signed and ratified the Universal Declaration. *See* Universal Declaration, *supra*.

all of which are entitled to protection according to law but do not belong to the sphere normally described as religion."[70]

National legal systems find it equally difficult to define religion. For example, the United Kingdom does not have a single statutory or common law definition of religion and instead handles the matter piecemeal through legislation such as the Charities Act 1993[71] and the Places of Worship Registration Act 1855.[72] In many ways, this approach is similar to that advocated at one time in the United States by Laurence Tribe, although the technique appears to have been adopted because of certain practical concerns relating to the absence of a written constitution in the United Kingdom rather than as a theoretical preference.[73]

Questions relating to the definition of religion have arisen from time to time in the United Kingdom but were addressed most recently in late 2013, in *R v. Registrar General of Births, Deaths and Marriages*, which held that "a place of meeting for religious worship" under the Places of Worship Registration Act 1855 included a chapel of the Church of Scientology.[74] In that case, the Supreme Court of the United Kingdom[75] held that

> [t]here has never been a universal legal definition of religion in English law, and experience across the common law world over many years has shown the pitfalls of attempting to attach a narrowly circumscribed meaning to the word. There are several reasons for this: the different contexts in which the issue may arise, the variety of world religions, developments of new religions and religious practices, and developments in the common understanding of the concept of religion due to cultural changes in society. While the historical origins of the

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70. *See* Lerner, *Religious Human Rights*, *supra* note 66, at 131.

71. *See* Charities Act, 1993, c. 10 (U.K.) (involving questions of whether an entity operates for the advancement of religion); *see also* Barralet v. Att'y-Gen. [1980] 1 W.L.R. 1565 (Eng.) (concerning predecessor statutes).

72. *See* Places of Worship Registration Act, 1855, 18 & 19 Vict., c. 81, § 2 (Eng.) (requiring registration of "place[s] of meeting for religious worship," at which time certain benefits may accrue); *see also* R v. Registrar Gen., *ex parte* Segerdal, [1970] 2 Q.B. 697 (Eng.) (discussing the Places of Worship Registration Act).

73. *See* CATHERINE ELLIOTT & FRANCES QUINN, ENGLISH LEGAL SYSTEM 2 (2013-2014); Sadurski, *supra* note 30, at 311 ("Tribe has now rejected the dual approach . . . ."); *see also supra* note 34 and accompanying text. Although the United Kingdom does not have a written constitution, several documents, ranging from the Magna Carta of 1215 to the Human Rights Act 1998, are sometimes considered constitutional in nature. *See* David Feldman, *The Nature and Significance of "Constitutional" Legislation*, 129 L.Q.R. 343, 347 (2013) (discussing constitutional legislation in the United Kingdom).

74. *See* R. v. Registrar Gen. of Births, Deaths and Marriages, [2013] UKSC 77 [65] (appeal taken from Eng.) (Toulson, J.S.C.); *see also* Places of Worship Registration Act, 1855, 18 & 19 Vict., c. 81, § 2 (Eng.).

75. In 2009, the United Kingdom created a new national Supreme Court, which took over the judicial functions of the House of Lords, which had previously been the highest court in the land. *See* Supreme Court, http://supremecourt.uk (last visited Mar. 22, 2015); *see also* Constitutional Reform Act, 2005, c. 4, § 23 (Eng.) (creating supreme court).

> legislation are relevant to understanding its purpose, the expression "place of meeting for religious worship" in section 2 of the [Places of Worship Registration Act] has to be interpreted in accordance with contemporary understanding of religion and not by reference to the culture of 1855. It is no good considering whether the members of the legislature over 150 years ago would have considered Scientology to be a religion because it did not exist.[76]

Irish courts have also had occasion to consider the definition of religion, which might presumably be affected by the distinctly Christian nature of the Irish Constitution.[77] However, Irish courts and legislators have not limited the definition of religion to the Christian faith and have instead extended protection to polytheistic and nontheistic faith traditions as well as atheism.[78]

Although most commentators view the Irish approach as unproblematic from a theoretical perspective, the statutory definition of religion in Ireland is narrower than it is in parts of the United Kingdom, including Northern Ireland.[79] This distinction could create some practical difficulties in cross-border matters.[80]

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76. R v. Registrar Gen. of Births, Deaths, and Marriages, [2013] UKSC 77, [34] (Toulson, J.S.C.).

77. Pro-Christian language is found in article 44(1), which indicates that "[t]he State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion." Ir. Const., 1937, art. 44(1). Although the Constitution Review Group recommended in 1996 that Article 44.1 be deleted because it could "give rise to misunderstandings and cause needless offence to . . . religious minorities and non-believers," that recommendation has not yet been implemented. Constitution Review Group, Report 357 (1996), available at https://www.constitution.ie/Documents/Constitutional%20Review%20Group%201996.pdf. Potentially problematic language is also found in the preamble, which states

> In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,
>
> We, the people of Eire,
>
> Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,
>
> . . .
>
> Do hereby adopt, enact, and give to ourselves this Constitution.

IR. CONST., 1937, pmbl.

78. *See* Corway v. Indep. Newspapers Ltd [1999] 4 I.R. 484, 502–03 (Ir.) (Barrington, J.) (extending definition of religion); McGee v. Att'y Gen. [1974] I.R. 284, 316–17 (Ir.) (Walsh, J.) (expanding concept of religious liberties); J.M. KELLY, THE IRISH CONSTITUTION 1098–99 (Gerard Hogan & Gerry Whyte eds., 1993) (discussing development of religious liberty in Ireland). However, Ireland does require the president and judiciary to take oaths demonstrating some kind of religious belief. *See* IR. CONST., 1937, arts. 12(8), 34(5)(1).

79. *See* Oonagh B. Breen, *Different Paths, Same Destination: Emerging Issues for Northern Ireland Charities Operating in the Republic of Ireland*, 50 IRISH JURIST 70, 93, 97 (2013) (identifying differences in English and Irish statutory regimes); *see also* FRANCIS X. BEYTAGH, CONSTITUTIONALISM IN CONTEMPORARY IRELAND: AN AMERICAN PERSPECTIVE 161 (1997) (discussing Irish legal principles relating to

Extensive litigation about First Amendment concerns has resulted in a complicated and sometimes conflicting jurisprudence regarding the legal definition of religion in the United States.[81] One time-tested formulation was identified in *United States v. Seeger* and holds that religion is "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God."[82] Although this statement was generated by a case that involved a federal statute rather than the U.S. Constitution, this concept is often considered to approximate the constitutional standard in the United States, although that point is debated to this day.[83]

In determining whether the appropriate standard has been met, U.S. courts investigate whether the beliefs are sincerely held and "based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."[84] This approach has consistently been held to grant nonreligious belief systems, such as atheism, the same protections that are afforded to positive religions on the grounds that "the First Amendment embraces the right to select any religious faith or none at all."[85] While this may come very close to protecting "merely" ethical beliefs, U.S. courts have claimed the ability to distinguish between the two.[86]

The *Seeger* approach has the advantage of lessening the risk of discrimination against nontraditional faiths, since it is a functional, rather than content-oriented, approach.[87] It also appears consistent

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religion); JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND 558 (1992) (describing Irish law concerning religion).

80. *See* Breen, *supra* note 79, at 93, 97 (identifying problems with disconnect between English and Irish law).

81. *See* U.S. CONST. amend. I; Jesse H. Choper, *Defining "Religion" in the First Amendment*, *in* LAW AND RELIGION, *supra* note 30, at 337–39 (discussing U.S. First Amendment jurisprudence); Feofanov, *supra* note 27, at 319 (discussing religious rights in the United States); Brian M. Murray, *The Elephant in* Hosanna-Tabor, 10 GEO. J.L. & PUB. POL'Y 493, 520–23 (2012) (discussing recent U.S. jurisprudence); Nomi Maya Stolzenberg, *Theses on Secularism*, 47 SAN DIEGO L. REV. 1041, 1041 (2010) (analyzing problems of First Amendment law); John Sexton, Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1064 (1978) (proposing a definition of religion). Some U.S. commentators attempt to differentiate between freedom of religion and freedom of conscience. *See* Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1460 (comparing constituent elements of religion and belief).

82. 380 U.S. 163, 176 (1965).

83. *See id.*; Murray, *supra* note 81, at 520–23 (discussing *Seeger* test); Sexton, *supra* note 81, at 1064 (noting importance of *Seeger* test); *see also* Welsh v. United States, 398 U.S. 333, 335 (1970).

84. *Seeger*, 380 U.S. at 175; *see also* Hall, *supra* note 30, at 25–26 (discussing U.S. courts generally).

85. Wallace v. Jaffree, 472 U.S. 38, 53 (1985).

86. *See Welsh*, 398 U.S. at 342–44 (granting conscientious objector status to those opposed to war on moral, ethical, or religious beliefs).

87. *See Seeger*, 380 U.S. at 175–76.

with the standards enunciated under international law and in other national systems.[88] However, the *Seeger* test also includes certain subjective elements, such as sincerity.[89] While this feature was initially adopted to avoid the possibility that any belief can be categorized as religious merely on the speaker's whim,[90] it is somewhat problematic in contexts such as *Hobby Lobby*, which involve a non-natural person.[91]

Interestingly, and perhaps tellingly, the majority in *Hobby Lobby* sidestepped the sincerity requirement, suggesting that such an analysis would require a determination about the reasonableness or truth of the underlying religious claims.[92] However, Justice Ginsburg noted that

> [religious] beliefs, however deeply held, do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between "factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature," which a court must accept as true, and the "legal conclusion . . . that [plaintiffs'] religious exercise is substantially burdened," an inquiry the court must undertake.[93]

It is unclear whether the majority's disinclination to evaluate the sincerity of the corporations' religious beliefs was based on theoretical or practical concerns.[94] However, both those objections would appear to be met by evaluating the religious sincerity of a religious entity (as opposed to its owners or shareholders) by considering the form taken by the organization.[95] Such an approach would also comply with the issues identified by *Seeger*, namely the possibility that a party could use religion to mask an objection that was based on other political or moral grounds.[96]

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88. *See* Meese & Oman, *supra* note 5, at 289 (discussing *Seeger* test in international and comparative context); *supra* notes 30–64 and accompanying text.

89. *See Seeger*, 380 U.S. at 175–76; Hall, *supra* note 30, at 28–30.

90. *See* Hall, *supra* note 30, at 27–30; Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 954–57 (1989) [hereinafter Lupu, *Where Rights Begin*] (noting pros and cons of a sincerity element).

91. *See Hobby Lobby*, 134 S. Ct. at 2794 (Ginsburg, J., dissenting); *see also supra* notes 40–41 and accompanying text.

92. *See Hobby Lobby*, 134 S. Ct. at 2778, 2798 n.21; Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 64 (2013) (discussing sincerity element in religious rights analysis).

93. *See Hobby Lobby*, 134 S. Ct. at 2798 (Ginsburg, J., dissenting).

94. *See id.* at 2778.

95. *See id.* at 2795–97 (Ginsburg, J., dissenting); *see also supra* notes 57–60 and accompanying text (regarding distinctions between natural persons, sole proprietorships, and religious organizations, on the one hand, and commercial entities, on the other).

96. *See Seeger*, 380 U.S. at 175–76; Lupu, *Where Rights Begin*, *supra* note 90, at 954–57 (discussing strengths and weaknesses of various approaches to religious rights).

Reliance on the form adopted by the organization in question would not only make sense as a means of overcoming theoretical issues relating to whether the claim in question could be considered religious,[97] it would also provide key insights into the sincerity element. For example, commercial corporations enjoy several benefits not available to religious nonprofits, such as the ability to engage in lobbying efforts and campaign for political candidates that support particular positions, be they religious or political.[98] Perhaps even more importantly, commercial incorporation allows individual shareholders to escape personal liability for the acts of the corporation.[99] These benefits lead Justice Ginsburg to "ask why the separation [between shareholders and the corporation] should hold only when it serves the interest of those who control the corporation," but perhaps the better question is whether the benefits accruing to commercial organizations suggest a lower degree of religious sincerity than exists with respect to religious nonprofits.[100] Indeed, that higher level of dedication to noncommercial concerns is precisely what motivates legislatures to provide religious organizations with exemptions from certain generally applicable laws, such as those relating to the standards of employment or payment of taxes.[101]

A similar type of distinction is evident in the law and theory regarding sincerity in natural persons. For example, Anthony Bradney defines religious persons as "obdurate believers," meaning individuals "who do not see their religion as being private or peripheral."[102] Bradney highlights the "unyielding nature of [these believers'] faith," which distinguishes it from the relatively low level of religious dedication demonstrated by others in society.[103]

This distinction would also appear relevant to the discussion about the religious rights of commercial corporations, including those that are closely held. For example, although the controlling shareholders of a commercial corporation may have some religious, ethical, or philosophical beliefs that they wish to be reflected in their business dealings, the decision to incorporate as a commercial corporation suggests that various other motivations also exist.[104] Religious nonprofits, on the other hand, reflect the kind of higher

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97. *See supra* notes 50–64 and accompanying text.

98. *See Hobby Lobby*, 134 S. Ct. at 2771.

99. *See id.* at 2797 (Ginsburg, J., dissenting).

100. *See id.*

101. *See id.* at 2795–97 (Ginsburg, J., dissenting); *see also* I.R.S. Publication 557 29 (Rev. Oct. 2013), *available at* http://www.irs.gov/pub/irs-pdf/p557.pdf (noting sincerity of belief of the religious organization is critical to the organization's obtaining tax-exempt status).

102. Anthony Bradney, *Faced by Faith*, *in* FAITH IN LAW: ESSAYS IN LEGAL THEORY, *supra* note 38, at 89, 90 [hereinafter Bradney, *Faced by Faith*].

103. *See id.*

104. *See* Ralph Nader, *Legislating Corporate Ethics*, 30 J. LEGIS. 193, 197 (2004) (discussing the Social Venture Network); *see also Hobby Lobby*, 134 S. Ct. at 2770–71.

dedication that is evident in Bradney's "obdurate believers," since the primary, if not exclusive, purpose behind the creation of those organizations is to further the religious beliefs and facilitate the religious practices of the shareholders.[105] Thus, analyses based on the use of the different corporate forms can be used to mirror the longstanding jurisprudence regarding the availability of religious exemptions for natural persons.

Focusing on the corporate form also provides a useful and coherent answer to some of the other issues raised in *Hobby Lobby*, including those that involve economic concerns.[106] For example, "many economists are distrustful of merely verbalized preferences and insist instead on revealed preferences – preferences that people are willing to vindicate by giving up something in return."[107] Applying this methodology to the facts in *Hobby Lobby* would not only provide a clear and easily identifiable rule for lower courts to follow, it would be consistent with longstanding law and practice in the area of religious rights.[108] For example, Michael McConnell has noted that religious "accommodations are designed to alleviate a burden, not to bestow a benefit."[109] Thus, in a number of cases, the state imposes a commensurate cost on the person asserting his or her religious rights, such as requiring conscientious objectors to military duty to undertake alternative forms of public service.[110]

The final practical implication that must be considered involves the way in which the broad definition of religion under U.S. law interacts with the facts in *Hobby Lobby*.[111] Justice Ginsburg suggested that the decision in *Hobby Lobby* can and likely will open the door to numerous other types of lawsuits, an observation that

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105. *See* Bradney, *Faced by Faith*, *supra* note 102, at 90. Notably, religious nonprofits can receive protection for religiously motivated actions even if those actions do not fall within the standard definition of a religious practice. This is a key way for legal systems to provide protection for religiously motivated acts without having to undertake more detailed inquiries into the centrality or sincerity of the acts in question.

106. The majority relied heavily on the claim that the refusal of a religious exemption would place a significant economic burden on the plaintiff corporations and, by extension, their shareholders. *See Hobby Lobby*, 134 S. Ct. at 2759. However, the majority appears to have inflated the amount of economic harm by refusing to offset the amount of the penalties by the savings associated with lower insurance premiums, despite the fact that some experts suggested that the savings would have been extensive and might even have offset the amount of the penalties in their entirety. *See id.* at 2759, 2776.

107. Louis Michael Seidman, *Political and Constitutional Obligation*, 93 B.U. L. REV. 1257, 1266 (2013).

108. *See Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting).

109. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 735 (1992) [hereinafter McConnell, *Accommodation*]; *see also* Seidman, *supra* note 107, at 1266–67 (discussing purpose of religious rights).

110. *See* Seidman, *supra* note 107, at 1266–67.

111. *See Hobby Lobby*, 134 S. Ct. at 2759.

appeared prophetic given that the Supreme Court relied on *Hobby Lobby* only days after it was issued to grant an extremely rare emergency injunction to a liberal arts college making a similar type of claim.[112] Indeed, the majority appears to have created a floodgate scenario that will be difficult for lower courts to address.[113]

This discussion describes some of the reasons why the decision in *Hobby Lobby* is so problematic as a matter of religious rights.[114] However, this analysis has focused only on preliminary issues relating to the definition of religion. It is also necessary to consider how *Hobby Lobby* measures up to various core questions about religious liberty.[115] Those matters are addressed in the following Parts.

III. RELIGIOUS RIGHTS IN HISTORICAL, THEORETICAL, AND INTERNATIONAL CONTEXT

The preceding discussion regarding the definition of religion suggests that the majority in *Hobby Lobby* would have been well served by a more thorough historical understanding of the nature and function of religious rights.[116] However, it is also necessary to consider religious liberties in light of contemporary circumstances, as the Supreme Court of the United Kingdom has noted.[117]

As anyone who reads the newspapers knows, religio-political conflict is an issue all over the world. Martha Nussbaum has suggested that recent events have generated a climate of fear regarding the possibility of religiously motivated violence and resulted in an increase in religious intolerance in the United States and elsewhere.[118] Certainly it is true that the world has seen some high-profile acts of religious violence, which has led to a number of restrictions on religious beliefs and practices, particularly those that

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112. *See id.* at 2802–05 (Ginsburg, J., dissenting); *see also* Wheaton College v. Burwell, 134 S. Ct. 2806 (2014).

113. *See Hobby Lobby*, 134 S. Ct. at 2802–05 (Ginsburg, J., dissenting) (noting that the majority decision provides "[n]ot much help . . . for the lower courts bound by today's decision").

114. *See generally id.*

115. *See generally id.*

116. *See id.* at 2795–97 (Ginsburg, J., dissenting).

117. *See* R v. Registrar Gen. of Births, Deaths and Marriages, [2013] UKSC 77 [35] (Toulson, J.S.C.).

118. *See* MARTHA C. NUSSBAUM, THE NEW RELIGIOUS INTOLERANCE: OVERCOMING THE POLITICS OF FEAR IN AN ANXIOUS AGE 13 (Harvard Univ. Press 2012) [hereinafter NUSSBAUM, INTOLERANCE] (discussing tenor of contemporary religious rights analyses).

are associated with the faith tradition (Islam) that is most popularly believed to be associated with religious violence.[119]

Unfortunately, many of these measures have failed to learn from history and therefore fail to take into account the likelihood that the restrictive measures in question will themselves lead to religious conflict.[120] Furthermore, many of those who would limit certain types of religious persons, beliefs, or practices seem unaware of the fact that virtually all faith groups—including Christianity—are capable of religious violence.[121]

Originally, religious rights were established as a means of minimizing the likelihood of religious violence, particularly violence at the hands of disgruntled religious minorities.[122] Over time, the theoretical justification for religious liberty has changed in a number of key regards.[123] Other important shifts have also taken place, including with respect to the definition of religious majorities and religious minorities.

At this point, the characterization of a particular person or group as a religious minority appears to be very much in the eye of the

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119. *See infra* notes 180–86 and accompanying text. For example, countries as diverse as France and the United States have prohibited religious persons from wearing certain types of clothing, most notably burkas and hijabs. *See* NUSSBAUM, INTOLERANCE, *supra* note 118, at 104–11 (discussing religious clothing issues in the United States); Ioanna Tourkochoriti, *The Burka Ban: Divergent Approaches to Freedom of Religion in France and the United States*, 20 WM. & MARY BILL RTS. J. 791, 848 (2012) (noting that burka bans may lead to violence in the future); Brian M. Murray, Note, *Confronting Religion: Veiled Muslim Witnesses and the Confrontation Clause*, 85 NOTRE DAME L. REV. 1727, 1737–40 (2010) (discussing religious garb under U.S. law); S.I. Strong, *Muslim Veils Aren't a Hindrance to Court Proceedings*, EXAMINER (D.C.) (Sept. 9, 2009) [hereinafter Strong, *Veils*] (discussing religious clothing of witnesses and parties). The United Kingdom has also been struggling with issues regarding religious dress. *See* NUSSBAUM, INTOLERANCE, *supra* note 118, at 104 (discussing British law concerning religious clothing). *See generally* Eoin Daly, *Restrictions on Religious Dress in French Republican Thought: Returning the Secularist Justification to a Rights-Based Rationale*, 30 DUBLIN U. L.J. 154 (2008) (identifying religious clothing issues in contemporary Britain).

120. *See* Tourkochoriti, *supra* note 119, at 848 (describing connections between religious rights and religious conflict).

121. Indeed, historians have long noted that "[o]f all the great world religions past and present, Christianity has been by far the most intolerant." PEREZ ZAGORIN, HOW THE IDEA OF RELIGIOUS TOLERATION CAME TO THE WEST 1 (2003), *as quoted in* Gordon A. Christenson, *"Liberty and the Exercise of Religion" in the Peace of Westphalia*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 721, 722 (2013).

122. *See* LOCKE, *supra* note 1, at 18 (justifying religious rights as means of keeping the civil peace).

123. *See infra* notes 270–393 and accompanying text. For example, religious liberties are now sometimes viewed as providing the means by which a religious majority or a significantly sized religious minority can impose its worldview on others. *See* Dowd, *supra* note 3, at 154 (discussing Nigeria); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 798–99 (1997) ("Forceful resistance is unreasonable: it would mean attempting to impose by force their own comprehensive doctrine that a majority of other citizens who follow public reason, not unreasonably, do not accept.").

beholder. For example, while the shareholders in *Hobby Lobby* may view themselves as a beleaguered religious minority living in a world that fails to reflect or respect their religious principles, members of other faiths tend to see the shareholders as members of a privileged religious majority seeking an even broader scope of protection for their religious beliefs and practices.[124] Indeed, members of other religious traditions often find their religious beliefs and practices burdened in far more direct ways than payment of insurance premiums for a type of medical treatment that may never be sought by a third-party employee.[125]

Traditionally, religious rights focused on concerns about actual violence. While the United States has not usually experienced that particular type of religious conflict, there are those whose language appears to promote such measures. Thus, statements by Louisiana Governor Bobby Jindal, a self-proclaimed "evangelical Catholic," that members of the Democratic Party are "waging wars against religious liberty and education and . . . that a rebellion is brewing in the U.S. with people ready for 'a hostile takeover' of the nation's capital," could be seen as more than a rhetorical call to arms, particularly given various types of religious revolutions seen elsewhere in the world.[126]

Friction between religious people and those of another (or no) faith may injure individuals or society even if violence is not immediately threatened. For example, a party may experience various types of emotional or psychological harm as a result of others' religious practices.[127]

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124. *See Hobby Lobby*, 134 S. Ct. at 2764–66 (2014); *see also* T. Jeremy Gunn, *But This is Our Country: Religion, Identity, and the Culture Wars*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 1–3 (2006) (discussing issues of self-perception).

125 *See Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting); Submission to the U.N., *supra* note 12, at 9–11 (discussing burdens on Native Americans); Strong, *Veils*, *supra* note 119 (discussing burdens on religious minorities in U.S. courts); Sami Hasan, Comment, *Veiling Religion in the Force: The Validity of "Religion-Neutral Appearance" as an Employer Interest*, 9 UCLA J. ISLAMIC & NEAR E. L. 87, 89 (2009-2010) (regarding burdens on various religious minorities). Members of certain minority faiths, such as Judaism and Islam, also find themselves the victims of hate crimes. *See* SPECIAL RAPPORTEUR ON FREEDOM OF RELIGION OR BELIEF, RAPPORTEUR'S DIGEST ON FREEDOM OF RELIGION OR BELIEF 87 (2011) (containing excerpts of reports presented to the United Nations Commission on Human Rights from 1986 to 2011), *available at* http://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf.

126. Tom Hamburger, *Bobby Jindal, Raised Hindu, Uses Christian Conversion to Woo GOP for 2016 Run*, WASH. POST (May 12, 2014), http://www.washingtonpost.com/politics/bobby-jindal-raised-hindu-uses-christian-conversion-to-woo-gop-base-for-2016-run/2014/05/12/c446fa34-d989-11e3-8009-71de85b9c527_story.html [http://perma.cc/V7DZ-PGRZ] (archived Feb. 22, 2015); Connor Radnovich, *Jindal: People Ready for "Hostile Takeover" of DC*, TPM NEWS (June 22, 2014, 4:32 PM), http://talkingpointsmemo.com/news/jindal-hostile-takeover [http://perma.cc/7CVN-G8VD] (archived Feb. 22, 2015).

127. *See* Pleasant Glade Assembly of God v. Shubert, 264 S.W.3d 1, 5 (Tex. 2008) (involving various tort claims against former pastor); William Drabble, Note, *Righteous Torts:* Pleasant Glade Assembly of God v. Shubert *and the Free Exercise*

All of these examples suggest that "the question of how to square religious liberty with the public good" is as important today as it was in the time of Locke's time.[128] However, as shall be seen, the way in which these religious issues now arise may differ from the classic or historical model.

A. *The Historic Importance of Religious Rights*

The debate concerning the proper relationship between the state and religion has ancient roots, with demands for freedom of belief "preced[ing] every other in the history of the struggle for human rights and fundamental freedoms."[129] International protection of religious groups dates back at least to "the signing of the Peace of Westphalia in 1648, which modified the rule of *cuius regio eius religio* and started to pay attention to religious rights."[130] Following World War I, international protection for religious rights focused on the group aspects of the right, although that trend was reversed after the collapse of the League of Nations and the horrors of World War II, when the new international order began to emphasize individual, rather than group, rights.[131]

Protection for religious rights also exists as a matter of domestic law. However, the shape and scope of national laws on religious liberty have varied depending on the political stability of the jurisdiction in question, the historical relationship between church and state in that legal system, and the amount of religious pluralism within each society.[132] Nevertheless, comparative studies suggest that it is possible to identify a modern understanding of religious rights that is broadly consistent across national boundaries.

Defense in Texas, 62 BAYLOR L. REV. 267, 275–77 (2010) (discussing religious rights defense to torts). English courts recently sidestepped the need to balance the religious rights of a religious Hindu who sought to be cremated on a funeral pyre against offense to the sensibilities of the public. *See* R. (Ghai) v. Newcastle City Council [2010] EWCA Civ. 59 [39], [2011] Q.B. 591 (Eng.) (deciding the matter on statutory grounds); *see also* Peter Cumper & Tom Lewis, *Last Rites and Human Rights: Funeral Pyres and Religious Freedom in the United Kingdom*, 12 ECCLESIASTICAL L.J. 131, 151 (2010) (noting the argument for protection was stronger under statutory law than international human rights law).

128. *See* Marci A. Hamilton, *Religious Institutions and the No-Harm Doctrine*, 2004 BYU L. REV. 1099, 1102 (2004); *see also* LOCKE, *supra* note 1, at 18 (discussing tension between religious and secular groups).

129. *See* PAUL SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 324 (1983); *see also* Lerner, *Religious Human Rights*, *supra* note 66, at 83.

130. *See* Lerner, *Religious Human Rights*, *supra* note 66, at 83.

131. *See id.* at 84–85 (discussing history of religious rights).

132. *See* W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 30, at 1, 2 (analyzing basis for religious rights); Lerner, *Religious Human Rights*, *supra* note 66, at 82–86 (discussing historical approach to religious rights).

B. *Current Approaches to Religious Rights–Constituent Elements*

The contemporary understanding of religious liberties differentiates between three basic principles: (1) freedom of religious belief, which is generally considered absolute; (2) freedom of religious practice, which is subject to a variety of limitations primarily based on public welfare, morality, and the rights of others and can, in some instances, be limited to specific practices directly related to religion (such as teaching, practice, or worship); and (3) nondiscrimination on the basis of religion.[133] These three elements are evident in both international law and domestic law, including the law of the United States.[134]

The following discussion considers the content and purpose of each of the three principles of religious liberty in detail. The analysis then evaluates whether and to what extent the various concepts are reflected in *Hobby Lobby* to determine the degree to which the Supreme Court's reasoning is consistent with international consensus on each of these points.[135]

1. Nondiscrimination on the Basis of Religion

The principle of nondiscrimination on the basis of religion is a direct extension of Locke's notion of toleration, which posits that no one should be detrimentally affected by virtue of his or her religious beliefs and practices.[136] However, "mere" toleration is often

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133. *See* FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT 6–7 (Kevin Boyle & Juliet Sheen eds., 1997) (identifying constituent elements of religious rights); Choper, *supra* note 81, at 337–39 (describing aspects of religious rights); Durham, *supra* note 132, at 31–35 (considering function of religious rights); Johan D. van der Vyver, *Introduction: Legal Dimensions of Religious Human Rights: Constitutional Texts*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 30, at xi, xlv (comparing aspects of religious rights); JOHN WITTE, JR. & M. CHRISTIAN GREEN, *The American Constitutional Experiment in Religious Human Rights: The Perennial Search for Principles*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 30, at 497, 516–17, 521, 525 (identifying component elements of religious liberty); Silvio Ferrari, *The New Wine and the Old Cask: Tolerance, Religion and the Law in Contemporary Europe*, 10 RATIO JURIS 75, 78–79 (1997) (comparing rationales for religious rights); Little, *supra* note 30, at 47, 55–58 (noting basis for religious rights); S.I. Strong, *Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and the Potential for Violence*, 19 MICH. J. INT'L L. 109, 181 (1997) (outlining types of religious liberties).

134. However, empirical studies suggest that wholesale compliance with the enunciated standards does not exist anywhere in the world, including in the United States. *See* FREEDOM OF RELIGION AND BELIEF, *supra* note 133 (discussing comparative compliance with international standards); *see also* Submission to the U.N., *supra* note 12 (discussing the U.S.'s lack of compliance with international standards).

135. *See* Hobby Lobby, 134 S. Ct. 2751.

136. *See* LOCKE, *supra* note 1, at 27, 63–64 (excluding atheists and those who would give members of their faith special privileges from his scheme of protection).

considered an insufficient means of protecting individuals from state interference, since toleration constitutes "a revocable concession rather than a defensible right."[137]

Most modern nation-states therefore typically recognize an explicit right to nondiscrimination on the basis of religion.[138] Indeed, Michael McConnell has written that the concept has become "an indispensable element in a regime of religious liberty," since without such protections "the religious decisions of the people will be distorted."[139]

Several international human rights instruments require nondiscrimination on the basis of religion. For example, Article 2 of the Universal Declaration states, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . religion."[140] Similar language is found in Article 2 of the ICCPR and Article 14 of the European Convention on Human Rights (European Convention).[141] The Charter of Fundamental Rights of the European Union (E.U. Charter) also addresses this issue, noting in Article 20 that "[e]veryone is equal before the law" and prohibiting discrimination based on religion or belief in Article 21.[142] These instruments, which are widely ratified, reflect the current mainstream of human rights jurisprudence.[143]

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137. Daniel J. Boorstin, *The Founding Fathers and the Courage to Doubt*, *in* JAMES MADISON ON RELIGIOUS LIBERTY 207, 209 (Robert S. Alley ed., 1985); *see also* STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 73–74 (Oxford Univ. Press 1995) (citing Philip Kurland's distinction between toleration and religious freedom); Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 730 (1997) (attributing the same idea to James Madison).

138. *See* Lerner, *Religious Human Rights*, *supra* note 66, at 85 (noting comparative acceptance of principle of nondiscrimination); Little, *supra* note 30, at 47 (discussing adherence to principle of nondiscrimination).

139. McConnell, *Accommodation*, *supra* note 109, at 733 n.212.

140. Universal Declaration, *supra* note 69, art. 2.

141. *See* European Convention on Human Rights and Fundamental Freedoms, art. 14, 4 November 1950, 213 U.N.T.S. 221 [hereinafter European Convention]; ICCPR, *supra* note 67, art. 2. Similar protections are couched in equal protection terms in Article 7 of the Universal Declaration and Article 26 of the ICCPR. *See* ICCPR, *supra* note 67, art. 26; Universal Declaration, *supra* note 69, art. 7.

142. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1 [hereinafter E.U. Charter]; *see also* Council Directive 2000/78/EC of 27 November 2000 (establishing a general framework for equal treatment in employment and occupation), 2000 O.J. (L 303) 16 (prohibiting "any direct or indirect discrimination based on religion or belief" except to "prevent or compensate for disadvantages").

143. There are currently 168 states parties to the ICCPR. *See Status of Treaties*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Mar. 22, 2015) [https://perma.cc/BA7Z-GGWU] (archived Mar. 17, 2015). Forty-seven states have ratified or acceded to the European Convention. *See Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUROPE TREATY OFFICE, http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=15/08/2014&CL=ENG (last visited Mar. 22, 2015) [http://perma.cc/X7G7-HH58]

The most comprehensive and explicit language concerning nondiscrimination on the basis of religion or belief is found in the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Declaration on Discrimination).[144] Although the Declaration on Discrimination constitutes a form of "soft law" and therefore has no binding force,[145] the instrument is nevertheless considered highly persuasive in the field of religious liberties.[146]

As its name suggests, the Declaration on Discrimination specifically prohibits discrimination based on religion.[147] Discrimination, along with intolerance, is defined as "any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis."[148]

Discrimination on the basis of religion is also prohibited as matter of national law, although different countries do so in different manners. For example, the United Kingdom, as an established state, historically provided the Church of England with certain protections and benefits not shared by other faiths.[149] As a result, the country

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(archived Feb. 22, 2015). The E.U. Charter is binding on the twenty-eight member states of the European Union and will be binding on any future member states. *See* E.U. Charter, *supra* note 142, art. 51; *EU Member States*, EUROPEAN UNION, http://europa.eu/about-eu/countries/member-countries/index_en.htm (last visited Mar. 22, 2015) [http://perma.cc/8632-Y85Q] (archived Feb. 22, 2015).

144. *See* G.A. Res. 36155, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/55, at 171 (Nov. 25, 1981) [hereinafter Declaration on Discrimination]. The United Nations has also adopted various resolutions on the elimination of all forms of religious intolerance. *See* G.A. Res. 50/183, U.N. Doc. A/RES/50/183 (Mar. 6, 1993); G.A. Res. 48/128, U.N. Doc. A/RES/48/128 (Dec. 20, 1993).

145. *See* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons From Congressional Practice*, 61 STAN. L. REV. 573, 594–99, 624–25 (2008) (discussing soft law from a U.S. perspective); Andrew Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 222 (2010) (discussing soft law from an international perspective).

146. *See* FREEDOM OF RELIGION AND BELIEF, *supra* note 133, at 5 (noting persuasive power of Declaration on Discrimination); Lerner, *Religious Human Rights*, *supra* note 66, at 114 (contextualizing Declaration on Discrimination); Donna J. Sullivan, *Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L L. 487, 488 (1988) (discussing impact of Declaration on Discrimination).

147. *See* Declaration on Discrimination, *supra* note 144, art. 2(1).

148. *Id.* art. 2(2); *see also* Sullivan, *supra* note 146, at 501–06 (discussing definition of discrimination).

149. *See* Peter Cumper, *Religious Liberty in the United Kingdom*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 30, at 205, 217–19 [hereinafter Cumper, *Religious Liberty*] (discussing religious rights under British law); St. John A. Robilliard, *Religion, Conscience and Law*, *in* LAW AND RELIGION, *supra* note 30, at 265–67 (describing religious liberty in Great Britain). Although some jurists believe that a country with an established faith must experience religious discrimination on some level, other experts disagree. *See* Durham, *supra* note 132, at 15–25 (considering whether religious discrimination must exist in an

has experienced a certain amount of religious discrimination over the years, particularly in certain geographic regions (most notably Northern Ireland)[150] and in certain subject matter areas (such as immigration,[151] blasphemy,[152] and the status of the monarch and high-ranking public officials[153]).

However, the principle of religious nondiscrimination has been established for decades as a matter of statutory law in a number of

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established state); John F. Wilson, *Church and State in America*, *in* JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 137, at 97, 105 (considering effects of an established faith).

150. Northern Ireland has a long history of sectarian strife and discrimination against Roman Catholics, with Catholics at one time experiencing unemployment rates at approximately two-and-a-half times that of Protestants. *See* Cumper, *Religious Liberty*, *supra* note 149, at 232–33 (describing history of discrimination in Northern Ireland). The government responded by enacting specific legislation, particularly in the area of employment, prohibiting discrimination on the basis of religion and making it a criminal offence to incite religious hatred. *See, e.g.*, Northern Ireland Act 1998, c. 47, §§ 6, 24, 68–78, 98; Fair Employment (Northern Ireland) Act 1989, c. 32, §§ 49–55; Northern Ireland Act 1998 (Designation of Public Authorities) Order 2001/1294 (Explanatory Note) ¶ 1; Northern Ireland Act 1998 (Designation of Public Authorities) Order 2001/1787 (Explanatory Note) ¶ 1; Employment and Treatment (Northern Ireland) Order 1998/3162, art. 2; Prevention of Incitement to Hatred Act (Northern Ireland) 1970, ch. 24; COMMISSION FOR RACIAL EQUALITY, LAW, BLASPHEMY AND THE MULTI-FAITH SOCIETY: REPORT OF A SEMINAR ORGANISED BY THE COMMISSION FOR RACIAL EQUALITY AND THE INTERFAITH NETWORK OF THE UNITED KINGDOM 13 (1990) (discussing status of religious discrimination in Northern Ireland); Cumper, *Religious Liberty*, *supra* note 149, at 232–33 (noting religious-legal issues in Northern Ireland); *see also* ICCPR, *supra* note 67, art. 20(2) (prohibiting incitement of religious hatred).

151. *See* R v. Sec'y of State for the Home Dep't, *ex parte* Moon, The Times 8 December 1995. The U.K. lifted its ban on the immigration of Scientologists in 1980. *See* James T. Richardson, *Minority Religions, Religious Freedom, and the New Pan-European Political and Judicial Institutions*, 37 J. CHURCH & STATE 39, 52–54 (1995) (discussing treatment of Scientologists under British law). Notably, discrimination in the area of immigration was at one time condoned by the Court of Justice of the European Community (as it then was). *See* Van Duyn v. Home Office, Case 41/74 [1975] 1 C.M.L.R. 1 (discussing immigration of Scientologists under European law).

152. At one point, the Court of Appeal refused to extend the common law crime of blasphemy (which has recently been repealed by statute) to cover non-Christian faiths. *See* Criminal Justice and Immigration Act 2008, ch. 4, § 79 (Eng.); R v. Chief Metro. Stipendiary Magistrate, *ex parte* Choudhury [1991] 1 Q.B. 429 (CA) (Eng.); *see also* Choudhury v. United Kingdom, App. No. 17439/90 12(4) HUM. RTS. L.J. 172, 172 (1991) (finding no "link between freedom from interference with the freedoms of Article 9 para. 1 of the [European] Convention and the applicant's complaints"); COMMISSION FOR RACIAL EQUALITY, *supra* note 150, *passim* (discussing blasphemy law in Great Britain); SEBASTIAN POULTER, ETHNICITY, LAW AND HUMAN RIGHTS: THE ENGLISH EXPERIENCE 62 (1999) (discussing *Choudhury*).

153. As a matter of law, the monarch may not be or marry a Roman Catholic, although the prohibition on marriage has been under debate and may shortly be removed. *See* Act of Settlement, 1700, 12 & 13 Will. 3, c. 2 (Eng.); Bob Morris, *Succession to the Crown: Possible Untoward Effects?*, 15 ECCLESIASTICAL L.J. 186, 186 (2013) (discussing Succession to the Crown Bill 2012). Similarly, the office of Lord Chancellor only became open to Roman Catholics in the mid-1970s. *Compare* Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical Functions) Act, ch. 25, § 1 (1974) (Eng.), *with* Roman Catholic Relief Act, 1829, 10 Geo. 4, c. 7, § 12 (Eng.); *see also* Cumper, *Religious Liberty*, *supra* note 149, at 211.

areas.[154] Furthermore, the Court of Appeal stated clearly in 1991 that "no distinction between institutions of the Christian church and those of other major religions would now be generally acceptable."[155] Even more critically, the United Kingdom's legal position regarding religious discrimination has changed radically with the enactment of the Human Rights Act 1998, which applies directly to public authorities.[156] According to the Human Rights Act 1998, parties involved in disputes in domestic courts in the United Kingdom may expressly rely on many of the provisions found in the European Convention, including Article 14, which prohibits discrimination on the basis of religion.[157] Perhaps unsurprisingly, the adoption of the Human Rights Act 1998 has led to a significant increase in the number and diversity of claims involving religious liberties.[158] In construing the various rights, British courts are to take into account decisions from the European Court involving relevant provisions of

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154. *See* Hall, *supra* note 30, at 20. For a survey of some of the relevant legislation, see Satvinder S. Juss, *The Constitution and Sikhs in Britain*, 1995 B.Y.U. L. REV. 481, 506–16 (1995).

155. *See* Bumper Dev. Corp. v. Comm'r of Police of the Metropolis [1991] 1 W.L.R. 1362, 1372 (CA) (Eng.) (involving legal standing of a Hindu temple); *see also* Neville Estates v. Madden [1962] Ch. 832, 853 (Eng.) (stating that "between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none"). Interestingly, *Bumper Development* stands for the proposition that certain legal persons (in this case, a Hindu temple) have standing to bring a legal claim, which is an issue that is somewhat similar to that considered in *Hobby Lobby*. *See Bumper Dev.*, [1991] 1 W.L.R. at 1373; Lloyd v. Sec'y of State for Transport [2006] EWHC 315, [70] (QB) (Eng.) (discussing the legal status of automobiles versus religious organizations, including temples); *see also Hobby Lobby*, 134 S. Ct. at 2759. However, the temple in *Bumper Development* was a religious organization, unlike the corporations in *Hobby Lobby*. *See id.*; *Bumper Dev.*, [1991] 1 W.L.R. at 1372–73.

156. *See* Human Rights Act, 1998, ch. 42, §§ 6, 22(6) (Eng.); Cumper, *Section 13*, *supra* note 66, at 254 (discussing applicability of Human Rights Act). The indirect horizontal effect of the Act to private entities was established by the Court of Appeal in *Douglas v. Hello!* [2005] EWCA (Civ) 595, [2001] Q.B. 967 (Eng.). For a discussion of the horizontal applicability of the Act, see ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (Oxford Univ. Press 1996); Nicholas Bamforth, *The Application of The Human Rights Act 1998 to Public Authorities and Private Bodies*, 58 CAMBRIDGE L.J. 159 (1999); Murray Hunt, *The "Horizontal Effect" of the Human Rights Act*, [1998] PUBLIC LAW 423.

157. *See* European Convention, *supra* note 141, art. 14; Human Rights Act, 1998, ch. 42, § 13, sch. 1 (Eng.).

158. *See, e.g.*, Bull v. Hall, [2012] UKSC 73 (Eng.) (regarding religious rights of hotel keepers); R. (*In re* Williamson) v. Sec'y of State for Educ. & Emp't [2005] UKHL 15 [9–10] (Eng.) (Lord Bingham of Cornhill) (concerning biblical injunction regarding corporal punishment in schools); Raabe v. Sec'y of State for the Home Dep't [2013] EWHC (Admin.) 1736 (Eng.) (regarding employment concerns); R. (Eunice Johns and Owen Johns) v. Derby City Council, [2011] EWHC (Admin.) 375 (Eng.) (regarding religious liberties of foster parents).

the European Convention.[159] Interestingly, the European Court has also seen an increase in religious claims in recent years.[160]

Ireland also prohibits discrimination on the basis of religion, with the Irish Constitution specifically stating that "[t]he State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status."[161] Interestingly, Ireland is in some ways more protective of religious liberty than other jurisdictions, since Irish constitutional protections can, in proper circumstances, address both public and private acts.[162]

Some concerns about the potential for religious discrimination could be raised with respect to the pro-Christian language found in the Irish Constitution.[163] However, the Irish Supreme Court held in *Quinn's Supermarket Ltd. v. Attorney General* that these provisions do not limit the benefits of the state to those professing Christian beliefs.[164]

Quinn's Supermarket involved a claim by the plaintiff supermarket that a statutory exemption from Sunday trading laws allowing Jewish shopkeepers to remain open on Sunday constituted a form of religious discrimination.[165] In deciding this matter, the Supreme Court of Ireland was faced with an issue very similar to that

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159. *See* Human Rights Act, 1998, ch. 42, § 2 (Eng.) (noting applicability of the European Convention in United Kingdom); *see also* European Convention, *supra* note 141.

160. *See, e.g.*, Church of Jesus Christ of Latter-Day Saints v. United Kingdom, Case No. 7552/09, ECHR (discussing legal status of a Mormon temple); Eweida v. United Kingdom, 57 E.H.R.R. 8 (ECHR) (2013) (concerning clothing requirements in employment); Juma Mosque Congregation v. Azerbaijan, App. No. 15405/04, (2013) 57 E.H.R.R. SE5 (ECHR) (2013) (concerning registration of a religious congregation); Jehovah's Witnesses of Moscow v. Russia, 53 E.H.R.R. 4 (ECHR) (2011) (regarding registration of a religious community); Hasan & Chaush v. Bulgaria, 2000-XI Eur. Ct. H.R. 117 (2000) (concerning a change in leadership among Bulgarian Muslims); Jónatas E.M. Machado, *Freedom of Religion: A View from Europe*, 10 ROGER WILLIAMS U. L. REV. 451, 472–73 (2005) (discussing cases from the European Court).

161. IR. CONST., 1937, art. 44(2)(3); *see also id.* arts. 40(6)(1)(1), 44(2)(2); Eoin Daly, *Religious Discrimination Under the Irish Constitution: A Critique of the Supreme Court Jurisprudence*, 7 CORK ONLINE L. REV. 28, 28–44 (2008) [hereinafter Daly, *Irish Constitution*] (discussing Irish jurisprudence on religion).

162. *See* BEYTAGH, *supra* note 79, at 126 (discussing scope of religious liberties in Ireland); Hunt, *supra* note 156, at 428–29 (describing effect of religious rights laws in Ireland). Those constitutional provisions that begin with the words "the State" are least likely to apply to private discrimination. *See* Siobhán Mullally, *Equality Guarantees in Irish Constitutional Law – The Myth of Constitutionalism and the "Neutral State," in* IRELAND'S EVOLVING CONSTITUTION, 1937–97: COLLECTED ESSAYS 154–55 (Tim Murphy & Patrick Twomey eds., 1998) (analyzing Irish Constitution). Some of the provisions concerning religion include this formulation and some do not. *See* IR. CONST., 1937, arts. 40(b)(1)(i), 44 (discussing religious rights).

163. *See* IR. CONST., 1937, pmbl., art. 44; *see also supra* note 77 (quoting the relevant language).

164. *See* Quinn's Supermarket v. Att'y Gen., [1972] I.R. 1, 15, 23–24 (Walsh, J.) (Ir.); *see also* Daly, *Irish Constitution*, *supra* note 161, at 41 (discussing views of G.W. Hogan).

165. *See Quinn's Supermarket*, [1972] I:R. at 15, 23, 24 (Walsh, J.) (Ir.).

involved in *Hobby Lobby*, namely the ability of a corporation to claim a violation of its religious rights.[166] Notably, the Irish Supreme Court came to the opposite conclusion as the U.S. Supreme Court, holding that

> the plaintiff could not rely upon Article 40.1 [of the Irish Constitution] as it was a body corporate and was therefore incapable of coming within the ambit of a provision which related solely to "human persons." It was held that "this guarantee refers to human persons for what they are in themselves rather than to any lawful activities, trades or pursuits which they may engage in or follow." Furthermore, the plaintiff had not suffered any "disabilities . . . on the ground of religious belief, profession or status" because any such disability suffered would have to relate to the religious belief, profession or status of the plaintiff, which, as a body corporate, was incapable of having a religious affiliation.[167]

The Court in Quinn's Supermarket also had to deal with the apparent conflict between two core principles of religious liberty: nondiscrimination on the basis of religion and free exercise of religion.[168] In deciding how to resolve that issue, the Supreme Court of Ireland focused on the historical context of the right in question—a technique also advocated by Justice Ginsburg in *Hobby Lobby*—as well as the purpose of the particular provision as a whole.[169]

In general, there is little case law arising under Article 44 of the Irish Constitution, a phenomenon which Gerard Hogan believes "is ample proof of the absence of any overt discrimination or favoritism on the part of the State in religious matters."[170] Going forward, Ireland is unlikely to adopt any discriminatory measures, since its status as a Member State of the European Union and a signatory of the European Convention requires it to respect various types of

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166. *See id.*; *see also Hobby Lobby*, 134 S. Ct. at 2759. Some people may see parallels with *McGowan v. Maryland*, 366 U.S. 420 (1961), which also dealt with Sunday-opening laws, but *McGowan* specifically stated that

> appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. In fact, the record is silent as to what appellants' religious beliefs are. Since the general rule is that "a litigant may only assert his own constitutional rights or immunities," we hold that appellants have no standing to raise this contention.

McGowan, 366 U.S. at 429–30 (citations and footnote omitted).

167. Daly, *Irish Constitution*, *supra* note 161, at 30 (footnotes omitted) (quoting from *Quinn's Supermarket*, [1972] 1 I.R. 1).

168. *See* Daly, *Irish Constitution*, *supra* note 161, at 31 (describing tension in *Quinn's Supermarket*).

169. *See id.* (adopting historical approach); *see also Hobby Lobby*, 134 S. Ct. at 2796–97 (Ginsburg, J., dissenting).

170. *See* G.W. Hogan, *Law and Religion: Church-State Relations in Ireland From Independence to the Present Day*, 35 AM. J. COMP. L. 47, 73 (1987); *see also* IR. CONST., 1937, art. 44.

European case law concerning religious liberties, even if the decisions are not directed to Ireland specifically.[171]

In many ways, the U.S. approach is not so different from that reflected in other jurisdictions. Although the U.S. Constitution does not explicitly prohibit discrimination on the basis of religion,[172] the general principle of nondiscrimination contained in the Equal Protection Clause of the Fourteenth Amendment is usually considered a sufficient safeguard against religious discrimination.[173] Furthermore, the U.S. Supreme Court explicitly prohibited religious discrimination in *Everson v. Board of Education* by forbidding passage of "laws which aid one religion, aid all religions, or prefer one religion over another."[174]

However some commentators see a discrepancy between policy and practice. For example, Stephen Carter views cases such as *Bob Jones University v. United States*[175] as demonstrating a tendency by the federal government to control unpopular religious practices through taxation policies.[176] Because small religious groups cannot operate their schools and colleges without the substantial tax relief given to them as charitable institutions, threatening to change their tax status can result in a change to religious practices.[177]

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171. *See* European Convention on Human Rights Act (Act No. 20/2003) (Ir.), *available at* http://www.irishstatutebook.ie/2003/en/act/pub/0020/index.html [http://perma.cc/SZ53-JHCC] (archived Feb. 23, 2015) (describing status of the European Convention in Ireland); Grainne de Burca, *The Domestic Impact of the EU Charter of Fundamental Rights*, 49 IRISH JURIST 49, 50–54, 56–57 (2013) (discussing the national effect of the E.U. Charter and the European Convention in Ireland); Katherine Lesch Bodnick, Comment, *Bringing Ireland Up to Par: Incorporating the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 26 FORDHAM INT'L L.J. 396, 397 (2003) (discussing religious rights in Ireland). However, some commentators see legislation regarding religious education as discriminatory in nature. *See* Daly, *Irish Constitution*, *supra* note 161, at 36 (noting discrepancies in religious rights); *see also* Employment Equality Bill 1996 (Ir.); *In re* Article 26 and the Employment Equality Bill 1996 [1997] 2 I.R. 321 (Ir.) (describing scope of Employment Equality Bill 1996).

172. *But see* MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 15 (1997) (claiming both clauses of the First Amendment require nondiscrimination).

173. *See* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the law."); *see also id.* art. IV, § 2 ("The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.").

174. 330 U.S. 1, 16 (1947).

175. 461 U.S. 574 (1983) (holding federal policy not unconstitutional).

176. *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 147, 150–52 (1994) (discussing *Bob Jones University*). The case involved federal attempts to require Bob Jones University, which opposed inter-racial dating and marriage on religious grounds, to adopt racially neutral admission policies or risk losing its religious tax exemption. *See id.* (discussing *Bob Jones University*); *see also Bob Jones University*, 461 U.S. at 574.

177. *See* CARTER, *supra* note 176, at 147, 150–52 (describing effect of tax policies on religious institutions).

Other, more direct, means of discrimination also exist. For example, *Church of Lukumi Babalu Aye v. Hialeah* involved an attempt by the city of Hialeah, Florida, to curtail animal sacrifice by Santeria practitioners through the passage of facially neutral animal cruelty laws.[178] Although the U.S. Supreme Court struck the laws in question as being unconstitutional, the case demonstrates that religious discrimination exists in U.S. legal and popular culture, despite statements to the contrary.[179]

One recent example of religious discrimination involves attempts to adopt legislation limiting state courts' ability to rely on anything other than U.S. state or federal law as a means of blocking the influence of Shari'a law in the domestic U.S. context.[180] Thirty-three U.S. states have tried to adopt legislation of this nature, with five such laws having been successfully enacted.[181]

Perhaps the best-known of these provisions involved a proposed amendment to the Oklahoma state constitution indicating that

> [t]he Courts provided for in subsection A of this section, when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States *provided the law of the other state does not include Sharia Law*, in making judicial decisions. The courts shall *not look to* the legal precepts of other nations or cultures. Specifically, the courts *shall not consider international law or Sharia Law*. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.[182]

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178. *See* 508 U.S. 520, 524 (1993).

179. *See id.*

180. *See* Michael Kirkland, *Under the U.S. Supreme Court: Islamic Law in U.S. Courts*, UPI, May 19, 2013, http://www.upi.com/Top_News/US/2013/05/19/Under-the-US-Supreme-Court-Islamic-law-in-US-courts/64481368948600/ [http://perma.cc/E924-SM7S] (archived Feb. 23, 2015) (discussing Save Our State amendment and similar provisions).

181. *See* John R. Crook, *Tenth Circuit Upholds Injunction Barring Oklahoma Anti-Sharia, Anti-International Law Constitutional Amendment*, 106 AM. J. INT'L L. 365, 365 (2012) (discussing Save Our State amendment); Aaron Fellmeth, *U.S. State Legislation to Limit Use of International and Foreign Law*, 106 AM. J. INT'L L. 107, 107–17 (2012) (outlining attempts to outlaw Shari'a law in U.S. courts); David L. Nersessian, *How Legislative Bans on Foreign and International Law Obstruct the Practice and Regulation of American Lawyers*, 44 ARIZ. ST. L. J. 1647, 1652–53 (2012) (discussing ramifications of anti-Shari'a laws); John T. Parry, *Oklahoma's Save Our State Amendment and the Conflict of Laws*, 65 OKLA. L. REV. 1, 1 (2012) (describing effect of Oklahoma legislation).

182. Awad v. Ziriax, 670 F.3d 1111, 1117–18 (10th Cir. 2012); *see also* Awad v. Ziriax, 966 F. Supp. 2d 1198, 1207 (W.D. Okla. 2013) (providing for permanent injunction).

This provision was judicially enjoined in federal court on First Amendment grounds and is therefore invalid in its current form.[183] However, commentators have suggested that some of these laws may be upheld if they can be drafted in a way that does not affect religious liberties.[184] If enforced, these laws could have a significant impact on U.S. law and society, for although most commentators have focused on the effect these provisions would have in state courts,[185] the substantive standards would also apply in federal courts hearing cases in diversity.[186]

Although the principle of nondiscrimination was not discussed directly in *Hobby Lobby*, the issue did arise by implication.[187] For example, Justice Ginsburg noted that the rule enunciated by the majority would allow religious claims to be treated differently than other types of moral claims and "'be perceived as favoring one religion over another,' the very 'risk the Establishment Clause was designed to preclude.'"[188] Allowing some corporations to refuse to participate

183. *See Awad*, 966 F. Supp. 2d at 1207 (providing for permanent injunction); Crook, *supra* note 181, at 365 (discussing *Awad* case).

184. *See* U.S. CONST. amend. I; Martha F. Davis & Johanna Kalb, *Oklahoma and Beyond: Understanding the Wave of State Anti-Transnational Law Initiatives*, 87 IND. L.J. SUPP. 1, 13 (2011) (discussing viability of anti-Shari'a statutes); Penny M. Venetis, *The Unconstitutionality of Oklahoma's SQ 755 and Other Provisions Like It That Bar State Courts From Considering International Law*, 59 CLEV. ST. L. REV. 189, 215 (2011) (concluding anti-Shari'a statutes are unconstitutional); Jay Wexler, *Government Disapproval of Religion*, 2013 B.Y.U. L. REV. 119, 145 (2013) (analyzing anti-Shari'a legislation).

185. *See* Davis & Kalb, *supra* note 184, at 9–15 (discussing effect of anti-Shari'a statutes); Fellmeth, *supra* note 181, at 113–17 (analyzing effect of anti-Shari'a legislation); Venetis, *supra* note 184, at 201–16 (considering ramifications of legislation barring Shari'a law from U.S. courts).

186. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938); S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 91–92 (2014) (noting the ways in which state law affects enforcement of foreign judgments in U.S. federal courts).

187. *See Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring); *id.* at 2789 n.6, 2805 (Ginsburg, J., dissenting). For example, although the majority in *Hobby Lobby* spent a significant amount of time discussing the financial ramifications associated with not allowing the religious exemptions to stand, the majority did not consider the possibility of any market distortion that might arise as a result of allowing plaintiffs' claims. *See id.* at 2759, 2769–72, 2776–77. The majority also refused to consider arguments relating to the possibility of offsetting the penalty payments with saved insurance costs. *See id.* at 2776. Finally, the majority also did not consider the various tax benefits that plaintiffs could receive if they reorganized as a religious nonprofit or the fact that nonprofit organizations may engage in commercial activity that is unrelated to their primary (tax exempt) purpose. *See* Diane L. Fahey, *Taxing Nonprofits Out of Business*, 62 WASH. & LEE L. REV. 547, 549–50 (2005) (discussing commercial activities of religious entities); Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1165 n.219 (2011) (noting religious entities may engage in commercial behavior). Thus, the claim by the majority that denying plaintiffs' claim would rob the shareholders of any ability to participate in the commercial life of the country is not well-supported. *See Hobby Lobby*, 134 S. Ct. at 2783.

188. *Hobby Lobby*, 134 S. Ct. at 2789 n.6, 2805 (Ginsburg, J., dissenting) (citations omitted).

fully in the PPACA could also provide them with a commercial or other market advantage over corporations who are required to comply with all of the terms of the PPACA.[189] Notably, this type of commercial benefit was prohibited by the Supreme Court in *Tony and Susan Alamo Foundation v. Secretary of Labor*,[190] a case involving a not-for-profit religious organization that funded itself largely from commercial activities. In that case, the Court held that

> the Foundation's businesses serve the general public in competition with ordinary commercial enterprises, and the payment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of "unfair method of competition" that the [Fair Labor Standards] Act was intended to prevent, and the admixture of religious motivations does not alter a business's effect on commerce.[191]

These observations suggest the need for a full-fledged law and economics analysis of the effect of *Hobby Lobby*, although that analysis is beyond the scope of the current Article.[192] Nevertheless, as this discussion has shown, the decision gives rise to a number of problems under the principle of religious nondiscrimination.

2. Freedom of Religious Belief

Nondiscrimination constitutes only one element of religious liberty. Traditionally, states have also protected freedom of religious belief. Many theologians and legal scholars believe that freedom of religious belief is the most important aspect of religious liberty,[193]

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189. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 42 U.S.C.) (2010); *Hobby Lobby*, 134 S. Ct. at 2776–77, 2780–81 (discussing the various benefits associated with being seen to provide health insurance, even without full contraceptive coverage, since that coverage will be provided at the insurers' cost).

190. 471 U.S. 290, 299 (1985).

191. *Id.* (citations omitted).

192. *See Hobby Lobby*, 134 S. Ct. at 2751; *see* Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 1–2 (1989) (considering religious rights from a law and economics perspective).

193. *See* LOCKE, *supra* note 1, at 18 (noting critical importance of freedom of religious belief); Michael E. Dyson, *"God Almighty Has Spoken From Washington, D.C.": American Society and Christian Faith*, 42 DEPAUL L. REV. 129, 131 (1992–1993) ("[T]he most important distinction is not between conduct and mere belief, but between freedom of conscience and the coercion to believe."); McConnell, *First Freedom*, *supra* note 10, at 1250–53 (noting that freedom of conscience is at the heart of liberal democracy). *But see* Michael J. Baxter, *"Overall the First Amendment Has Been Good for Christianity" – Not!: A Response to Dyson's Rebuke*, 43 DEPAUL L. REV. 425, 428 (1994) (challenging Dyson). Interestingly, some commentators believe that freedom of conscience is no longer at the heart of First Amendment jurisprudence in the United States. *See* René Reyes, *Common Cause in the Culture Wars?*, 27 J.L. & RELIGION 231, 231–32 (2011–2012) (considering relationship between freedom of conscience and First Amendment jurisprudence); *see also* Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 CARDOZO

and the protection has shifted over time from "mere" toleration of diverse religious beliefs to a legal right, just as in cases involving nondiscrimination on the basis of religion.[194]

Because belief by itself seldom threatens the state or the social order, most legal systems grant religious belief absolute protection. Thus, Article 18 of the Universal Declaration provides that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief . . . ."[195] Similar language is found in Article 18(1) of the ICCPR,[196] Article 9(1) of the European Convention,[197] and Article 10 of the E.U. Charter.[198]

The Declaration on Discrimination also grants individuals the "freedom of thought, conscience and religion."[199] Although that document does not include a definition of religion or belief, the *travaux préparatoires* suggest that both nontheistic and atheistic beliefs are entitled to protection.[200] Other international instruments on religious rights are also considered to protect atheism.[201]

L. REV. 1755, 1756–57 (2011) (discussing First Amendment jurisprudence in the wake of *Employment Division v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993 ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in Hobby Lobby*, 134 S. Ct. at 2751); René Reyes, *Justice Souter's Religion Clause Jurisprudence: Judgments of Conscience*, 43 CONN. L. REV. 303, 306 (2010) (noting Justice Souter consistently protected freedom of belief during his tenure on the Supreme Court); Nadine Strossen, *Religion and the Constitution: A Libertarian Perspective*, 2005 CATO SUP. CT. REV. 25–33 (2005–2006) (discussing libertarian versus egalitarian rights analyses).

194. *See* LOCKE, *supra* note 1, at 27, 32, 55–56 (outlining early views regarding religious rights).

195. Universal Declaration, *supra* note 69, art. 18.

196. *See* ICCPR, *supra* note 67, art. 18(1). Article 18(2) of the ICCPR goes on to state that "[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." *Id.* art. 18(2).

197. *See* European Convention, *supra* note 141, art. 9(1) ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others . . . .").

198. *See* E.U. Charter, *supra* note 142, art. 10. The E.U. Charter notes that, "[i]n so far as this Charter contains rights which correspond to rights guaranteed by the [European Convention], the meaning and scope of those rights shall be the same as those laid down by the said Convention." *Id.* art. 52(3).

199. Declaration on Discrimination, *supra* note 144, art. 1.

200. *See* Sullivan, *supra* note 146, at 518 (discussing working papers from Declaration on Discrimination); *see also* Lerner, *Religious Human Rights*, *supra* note 66, at 115 (describing scope of protection in Declaration on Discrimination).

201. *See* CAROLYN EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS 53 (Oxford Univ. Press 2001) (discussing protection of atheism in the European Convention); FREEDOM OF RELIGION AND BELIEF, *supra* note 133, at 5 (comparing treatment of atheists around the world); Peter W. Edge, *Current Problems in Article 9 of the European Convention on Human Rights*, 1996 JURID. REV. 42, 43 (considering atheism under the European Convention); Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of*

Although the international standard regarding freedom of religious belief is relatively clear, national provisions are somewhat more problematic. For example, Article 44 of the Irish Constitution states that "[f]reedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen."[202] As the provision currently stands, freedom of conscience would appear to be restricted by reference to public order and morality, although no court appears to have ever explicitly addressed the point.[203] However, the Supreme Court of Ireland has held that atheism is included within these protections.[204]

The situation is more complicated in the United Kingdom, particularly with respect to whether atheism is protected as a religious belief, since certain early judicial statements suggested that only theistic beliefs could be considered religious in England and Wales.[205] However, some legislation, most notably the Oaths Act 1978, gave special consideration to atheists.[206]

The advent of the Human Rights Act 1998 means that freedom of religious belief in the United Kingdom is strongly influenced by the principles enunciated in Article 9 of the European Convention.[207] Since the European Court has stated that Article 9 of the European Convention covers atheism, British courts will likely do so as well going forward.[208]

The United States is another jurisdiction that is said to provide absolute protection to the freedom of religious belief, which includes

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Women: An Analysis Under the United Nations Charter, 35 COLUM. J. TRANSNAT'L L. 271, 342 (1997) (considering atheism under the U.N. Charter).

202. IR. CONST., 1937, art. 44.

203. *See id.* The Constitution Review Group recommended in 1996 that the restrictive language be dropped with respect to religious belief, although that proposal has not yet been implemented. *See* CONSTITUTION REVIEW GROUP, *supra* note 77, at 358 (proposing elimination of certain language); G.F. Whyte, *Discerning the Philosophical Premises of the Report of the Constitution Review Group: An Analysis of the Recommendation on Fundamental Rights*, 2 CONTEMP. ISSUES IR. L. & POL. 216, 220 (1998) (noting recommendations of the Constitution Review Group have not been adopted).

204. *See* McGee v. Att'y Gen., [1974] I.R. 284, 316–17 (Ir.).

205. *See* Barralet v. Att'y Gen., [1980] 3 All E.R. 918, 924 (Dillon, J.) (Eng.) ("[I]t is natural that the court should desire not to discriminate between beliefs deeply and sincerely held . . . . But I do not see that that warrants extending the meaning of the word 'religion' so as to embrace all other beliefs and philosophies."); R v. Registrar Gen., *ex parte* Segerdal [1970] 2 Q.B. 697, 708 (Lord Denning, M.R.) (Eng.) (noting that a place of worship must be one where people come together "to do reverence to God. It need not be the God which the Christians worship . . . but it must be reverence to a deity," although Buddhist temples constituted an exception).

206. *See* Oaths Act 1978, ch. 19, § 4(2) (Eng.).

207. *See* European Convention, *supra* note 141, art. 9; Human Rights Act 1998, ch. 42, art. 9 (Eng.); *supra* note 156 and accompanying text.

208. *See* Angeleni v. Sweden, App. No. 10491/83, 51 Eur. Comm'n H.R. Dec. & Rep. 41 (1986); EVANS, *supra* note 201, at 55; *supra* note 156 and accompanying text.

atheism.[209] The right is jurisprudentially based on the Free Exercise Clause of the First Amendment to the Constitution and the U.S. Supreme Court's holding in *Cantwell v. Connecticut*.[210]

Freedom of religious belief per se was not specifically discussed in *Hobby Lobby*.[211] However, this component of religious liberty is respected under both the majority and the dissenting approaches.[212]

3. Freedom of Religious Practice

Of the three basic religious rights, freedom of religious practice has proven to be the most difficult as both a theoretical and a practical matter and is, of course, at the heart of the *Hobby Lobby* case.[213] Although Locke believed that his principles of toleration sufficiently addressed the problem of the "just bounds" between religious and temporal affairs,[214] conflicts still arise between a religious actor's rights, interests, and duties, on the one hand, and the rights, interests, and duties of the state or other individuals, on the other.[215]

To some extent, these problems may be the result of the traditional distinction between religious belief and practice, which a

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209. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 52–53 (1985) (protecting atheists); United States v. Seeger, 380 U.S. 163, 185–86 (1965) (protecting conscientious objectors); Torasco v. Watkins, 367 U.S. 488, 495–96 (1961) (discussing religious beliefs of government officials); Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) (considering religious beliefs of Jehovah's Witnesses); Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713, 728–31 (1993) (discussing status of freedom of religious belief in the United States); Joseph Grinstein, Note, *Jihad and the Constitution: The First Amendment Implications of Combating Religiously Motivated Terrorism*, 105 YALE L.J. 1347, 1356 (1996) (discussing belief-behavior dichotomy). Marci Hamilton has claimed that there are only four cases where the U.S. Supreme Court has found a violation of the right to freedom of belief. *See* Hamilton, *supra*, at 728–31 (analyzing U.S. First Amendment jurisprudence); *see also* Wooley v. Maynard, 430 U.S. 705, 707–08 (1977) (regarding Jehovah's Witnesses who objected to license plates carrying New Hampshire's slogan, "Live Free or Die"); Torcaso v. Watkins, 367 U.S. 488, 489–90 (1961) (regarding a Maryland statute requiring political candidates to declare their belief in God); United States v. Ballard, 322 U.S. 78, 81–82 (1944) (regarding a jury instruction that required jurors to consider the validity of the defendants' religious views); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 626–29 (1943) (discussing flag salutes).

210. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."); *Cantwell*, 310 U.S. at 304; *see also* Reynolds v. United States, 98 U.S. 145, 162 (1879) (providing basis for freedom of religious belief); Lupu, *Where Rights Begin*, *supra* note 90, at 938 (discussing genesis of freedom of religious belief in the United States).

211. *See Hobby Lobby*, 134 S. Ct. at 2778; *see also id.* at 2798–99, 2805.

212. *See id.* at 2778; *id.* at 2798 (Ginsburg, J., dissenting) (discussing *Bowen v. Roy*, 476 U.S. 693 (1986)).

213. *See id.* at 2759.

214. LOCKE, *supra* note 1, at 18.

215. *See Hobby Lobby*, 134 S. Ct. at 2787, 2790–91, 2801–02 (Ginsburg, J., dissenting); *see also id.* at 2787 (Kennedy, J., concurring).

number of commentators find unworkable.[216] This principle was perhaps most cogently expressed by Ronald Dworkin, who took the view that some actions that are nonreligious on their face nevertheless contain an element of religious or moral choice such that the actions are inseparable from the beliefs that inspire them.[217] As a result, many of the controversies that Locke hoped to resolve still exist, despite (or perhaps because of) current formulations of the right to religious practice.[218]

The precise manner in which states implement the right to religious practice is more complex than it is with respect to nondiscrimination on the basis of religion and freedom of religious belief. When considering this issue, it is important to distinguish between two separate elements. The first, which involves the scope of protection given to religious practices as a matter of law, is relatively easy to describe. The second, which involves the identification of the type of religious practices that merit protection, is much more difficult. Each of these concerns is discussed separately.

a. Scope of Protection Given to Religious Practices

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216. *See* RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1994) (discussing belief-behavior dichotomy); Durham, *supra* note 132, at 27, 30 (considering distinction between religious belief and practice); Hall, *supra* note 30, at 22–23 (analyzing freedom of belief and practice); Phillip E. Hammond & Eric M. Mazur, *Church, State, and the Dilemma of Conscience*, 37 J. CHURCH & STATE 555, 561 (1995) (claiming the distinction has been abandoned by the U.S. Supreme Court); Lupu, *Where Rights Begin*, *supra* note 90, at 938 (discussing genesis of belief-behavior dichotomy); Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 840 (1995) (considering belief-behavior distinction under U.S. law); *see also* Valsamis v. Greece, App. No. 21787/93, 24 Eur. H.R. Rep. 294 (1996) (considering belief-behavior dichotomy under the European Convention); Emp't Div. v. Smith, 494 U.S. 872 (1990), *superseded by statute*, RFRA, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in Hobby Lobby*, 134 S. Ct. at 2751. The reasoning is similar to that used in U.S. free-speech cases, wherein courts give special protection to acts that are deemed symbolic and therefore communicative. *See* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 105–06 (Oxford Univ. Press 1994) (considering communicative acts); Choper, *supra* note 81, at 338 (claiming "most rituals, rites, or ceremonies of religious worship – such as fasting, confessing, or performing a mass – that may be denominated as constituting 'action' rather than 'belief' or 'expression,' fall squarely within the protection the Court has afforded to nonverbal 'symbolic speech'"); Mark Tushnet, *The Constitution of Religion*, *in* LAW AND RELIGION, *supra* note 30, at 205, 217 nn.57–58 [hereinafter Tushnet, *Religion*] (considering scope of freedom of religious practice); Weiss, *supra* note 40, at 83-84 (claiming, in particular, that the majority opinion in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), appeared to rely on free-speech rationales); William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, *passim* (1983) (analogizing free speech and freedom of religious practice).

217. *See* DWORKIN, *supra* note 216, at 15, 26, 150, 157–59 (considering nature of religious acts).

218. *See, e.g.*, FREEDOM OF RELIGION AND BELIEF, *supra* note 133 (providing empirical data on how religious liberties fare globally).

Unlike the right to religious belief, the right to practice religion is not absolute. Instead, religious practices are typically limited by reference to some external right or interest. Thus, for example, Article 29 of the Universal Declaration states that

> [i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.[219]

Other international instruments contain similar limitations, with the ICCPR stating in Article 18(3) that the "[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[220] Article 9(2) of the European Convention contains substantially similar language,[221] while the E.U. Charter requires that, "[s]ubject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."[222]

The Declaration on Discrimination also limits the right to manifest one's religion to situations which do not threaten "public safety, order, health or morals or the fundamental rights and freedoms of others."[223] This instrument is unusual, however, in that it contains a list of religious practices that are guaranteed protection, including, inter alia, the freedom to worship and assemble, to establish charitable institutions, to make and use items for use in religious rituals, to write and publish on religious matters, to teach, to solicit funds, to train and appoint religious leaders, to observe religious holidays and days of rest, and to communicate with others regarding religious matters.[224]

The international human rights documents that safeguard religious practices do so on both an individual and group level. For example, Articles 18 of the Universal Declaration, 18(1) of the ICCPR, 9(1) of the European Convention, and 10(1) of the E.U. Charter grant everyone the right "to manifest his religion or belief in teaching, practice, worship and observance," recognizing that the right can be exercised "either alone or in community with others and in public or

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219. Universal Declaration, *supra* note 69, art. 29. The substantive right to religious practice, which contains no limiting language, is found in Article 18. *See id.* art. 18.

220. ICCPR, *supra* note 67, art. 18(3).

221. *See* European Convention, *supra* note 141, art. 9(2).

222. E.U. Charter, *supra* note 142, art. 52(1).

223. Declaration on Discrimination, *supra* note 144, art. 1.

224. *See id.* art. 6; NATAN LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW 84 (1991) (considering constituent elements of religious practice).

private."[225] The ICCPR also states in Article 27 that "persons belonging to [religious and other] minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[226]

Domestic means of protecting religious practice differ little from the international human rights approach. For example, the Human Rights Act 1998 essentially requires the United Kingdom to use the same standard for protection as the European Convention, which protects the

> [f]reedom to manifest one's religion or beliefs . . . subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[227]

Religious groups receive special consideration under the Human Rights Act 1998.[228] Thus, "[i]f a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right."[229]

Ireland also subjects the practice of religion "to public order and morality."[230] However, as Francis Beytagh has noted, "how 'morality' would qualify the practice of religion is somewhat confusing."[231] No further light can be shed on this language as a matter of Irish law, since no cases appear to have been decided under this provision.[232]

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225. E.U. Charter, *supra* note 142, art. 10(1); ICCPR, *supra* note 67, art. 18(1) (varying language slightly); European Convention, *supra* note 141, art. 9(1); Universal Declaration, *supra* note 69, art. 18(1).

226. ICCPR, *supra* note 67, art. 27.

227. European Convention, *supra* note 141, art. 9; *see also* Human Rights Act 1998, ch. 42, art. 9, sch. 1, (Eng.). In this regard the Act does not differ significantly from the common law standards applied prior to 1998. *See* Cumper, *Religious Liberty*, *supra* note 149, at 228–29 (discussing religious liberty under English common law). *But see* Malory Nye, *Minority Religious Groups and Religious Freedom in England: The ISKCON Temple at Bhaktivedanta Manor*, 40 J. CHURCH & STATE 411, 415 (1998) (claiming there are "no clear legal protections for religious practice" in England).

228. *See* Human Rights Act 1998, ch. 42, § 13 (Eng.).

229. *Id.*; *see also* Cumper, *Section 13*, *supra* note 66, at 260–65 (considering religious liberty under the Human Rights Act 1998).

230. IR. CONST., 1937, art. 44(2)(1).

231. BEYTAGH, *supra* note 79, at 161. Laws based on morality are jurisprudentially difficult in any context. *See* S.I. Strong, *Justice Scalia as a Modern Lord Devlin: Animus and Civil Burdens in* Romer v. Evans, 71 S. CAL. L. REV. 1, 3–4, n.7 (1997) (discussing basis of morality legislation); S.I. Strong, Romer v. Evans *and the Permissibility of Morality Legislation*, 39 ARIZ. L. REV. 1259, 1268 (1997) (discussing justifications for morality legislation).

232. The Constitution Review Group recognized the problems associated with limiting the practice of religion based on morality. *See* CONSTITUTION REVIEW GROUP,

However, the language in Article 44(2)(1) is substantially similar to that found in Article 9(2) of the European Convention, which suggests that any Irish court considering this issue in the future could look to European jurisprudence for guidance.[233]

The United States also subjects religious practice "to regulation for the protection of society."[234] For example, in *Wisconsin v. Yoder*, a case concerning the withdrawal of Amish children from state education before the age of sixteen, the U.S. Supreme Court held that "activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare."[235] Other U.S. Supreme Court cases have held that the Constitution was not intended "as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society."[236]

b. Definition of Religious Practices

Describing the legal parameters of the freedom of religious practice is relatively easy. However, defining precisely what constitutes a "religious practice" deserving of protection is much more difficult, particularly in light of the claim that some acts that are nonreligious on their face may nevertheless contain an element of religious or moral choice such that the behaviors cannot be considered separable from the beliefs that inspire them.[237]

Traditionally, only so-called core activities such as worship, observance, practice, and teaching were considered religious practices as a matter of law.[238] However, the realities of contemporary society have made it necessary to expand the list of recognized religious

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supra note 77, at 357–59; Whyte, *supra* note 203, at 220–22 (discussing Constitution Review Group analysis).

233. *See* IR. CONST., 1937, art. 44(2)(1); European Convention, *supra* note 141, art. 9(2); European Convention on Human Rights Act (Act No. 20/2003) (Ir.), *available at* http://www.irishstatutebook.ie/2003/en/act/pub/0020/index.html [http://perma.cc/SZ53-JHCC] (archived Feb. 23, 2015). Case law in this field is growing. *See* European Court of Human Rights, HUDOC (search under article 9–2); *see also supra* note 160 and accompanying text.

234. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

235. 406 U.S. 205, 220 (1972).

236. Davis v. Beason, 133 U.S. 333, 342 (1890) (involving belief-orientated qualifications placed on suffrage). However, *Davis* is not necessarily good law with respect to its key holding regarding restrictions on voting. *See* Romer v. Evans, 517 U.S. 620, 634 (1996) (discussing voting restrictions).

237. *See* DWORKIN, *supra* note 216, at 15, 26, 150, 157–59 (discussing nature of religious acts). In many ways, the issues are similar to those that arise with respect to the definition of religion. *See supra* notes 29–115 and accompanying text.

238. *See, e.g.*, Declaration on Discrimination, *supra* note 144, art. 1(1); ICCPR, *supra* note 67, art. 18; European Convention, *supra* note 141, art. 9; Universal Declaration, *supra* note 69, art. 18.

practices,[239] and a number of additional activities are described as religious practices in the Declaration on Discrimination.[240] Thus, that instrument states,

> In accordance with article 1 of the present Declaration, and subject to the provisions of article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:
>
> (a) To worship or assemble in connexion with a religion or belief, and to establish and maintain places for these purposes;
>
> (b) To establish and maintain appropriate charitable or humanitarian institutions;
>
> (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
>
> (d) To write, issue and disseminate relevant publications in these areas;
>
> (e) To teach a religion or belief in places suitable for these purposes;
>
> (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
>
> (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
>
> (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
>
> (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.[241]

Although the catalogue of practices remains relatively short, this list considerably expands the definition of what constitutes a protectable religious practice.[242] However, the analysis cannot stop here, since parties can and do assert claims regarding behaviors that are not specifically described in the Declaration on Discrimination.[243]

To some extent, these types of novel claims can be brought because the Declaration on Discrimination is not in any way binding as a matter of national or international law.[244] However, these claims

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239. Some commentators have suggested that the traditional concept of religious practices reflect a Christian perspective and that religious liberties law must change to take into account the realities of other faith traditions. *See* Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 CARDOZO L. REV. 1907, 1914–15 (2011) (discussing religiously pluralist societies).

240. *See* Declaration on Discrimination, *supra* note 144, art. 6.

241. *Id.*

242. *See supra* note 238 and accompanying text.

243. *See* Declaration on Discrimination, *supra* note 144, art. 6.

244. *See id.*; *see also supra* notes 145 and accompanying text.

also arise because an increasing number of people support the view that a religious claim or practice should be defined simply as "one which asks for adherence on the grounds of religious truth, or one which is defined or spoken by its author as religious."[245] Because the emphasis in this definition is on the nature of the underlying motivation rather than the nature of the act itself, legal claims are now being made with respect to behaviors that do not fall within the standard rubric of a recognized religious practice.[246]

Applying this definition to *Hobby Lobby* yields some intriguing analytical issues.[247] The first question, which was largely ignored by both the majority and the dissent, involves the proper identification of the religious practice in question. The assumption in *Hobby Lobby* appears to have been that the relevant act was the desire not to participate fully in the PPACA.[248] However, the decision to organize as a commercial corporation rather than a religious nonprofit appears to be equally relevant to this particular dispute, particularly since (1) the relief sought (nonpayment of the costs in question) was available under the alternate corporate form and (2) the act of creating a religious organization is protected as a recognized religious practice.[249] Furthermore, reorganization as a religious nonprofit would allow the shareholders to fulfil their alleged religious desire to provide health insurance for their employees without the need to provide access to contraception that the shareholders find objectionable.[250]

Given these features, the decision to organize as a commercial corporation rather than a religious nonprofit could very well be seen as a waiver of the right to object to the contraceptive mandate on religious grounds.[251] Although most discussions of waiver in the context of First Amendment claims appear to focus on issues relating to freedom of speech and freedom of the press rather than freedom of religious belief or practice, there does not appear to be any theoretical

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245. Weiss, *supra* note 40, at 78. The majority in *Hobby Lobby* suggests that this approach is the only possible way to avoid determinations as to the truth of the underlying claim, but that allegation is incorrect. *See Hobby Lobby*, 134 S. Ct. at 2778; *see also id.* at 2798 n.21 (Ginsburg, J., dissenting).

246. *See* Weiss, *supra* note 40, at 78 (discussing breadth of recent religious rights claims); *see also* DWORKIN, *supra* note 216, at 15, 26, 150, 157–59 (discussing nature of religious acts).

247. *See Hobby Lobby*, 134 S. Ct. at 2751.

248. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 42 U.S.C.) (2010); *Hobby Lobby*, 134 S. Ct. at 2759.

249. *See* Declaration on Discrimination, *supra* note 144, art. 6(b); *Hobby Lobby*, 134 S. Ct. at 2763.

250. *See Hobby Lobby*, 134 S. Ct. at 2763, 2776.

251. The majority alluded to this principle, although it did not discuss it at length. *See id.* at 2759.

reason why parties cannot waive their religious rights.[252] A full discussion of that issue is unfortunately beyond the scope of the current Article, but the analysis of the religious practice claimed to be at issue here (i.e., nonprovision of health insurance that would provide access to certain types of contraceptives) is fulsome enough for current purposes.

The first point to recognize is that this activity does not qualify as an established form of religious practice.[253] The majority in *Hobby Lobby* attempts to sidestep concerns associated with the novelty of the claim by framing the issue as one of "exercise of religion," rather than "practice of religion," based on the relevant statutory language and stating that "'the exercise of religion' involves 'not only belief and profession but the performance of (or abstension from) physical acts' that are 'engaged in for religious reasons.'"[254] Given the breadth of this definition, it is unsurprising that the majority concludes that "[b]usiness practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition."[255]

In many ways, the majority's test appears to be reducible to mere religious motivation, even though that approach was specifically rejected by Congress during the enactment of RFRA.[256] Furthermore, international and comparative authorities agree that religious motivation by itself cannot give rise to a cognizable religious right, since "no system could countenance the right of anyone to believe anything and to be able to act accordingly."[257]

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252. *See* Michael Rhea, Comment, *Denying and Defining Religion Under the First Amendment:* Waldorf Education *As A Lens for Advocating a Broad Definitional Approach*, 72 LA. L. REV. 1095, 1117–18 (2012) (discussing waivers of religious rights); John Robinson, Note, *Neither "Ministerial" Nor an "Exception": The Ministerial Exception in Light of* Hosana-Tabor, 37 HARV. J.L. & PUB. POL'Y 1151, 1155–62 (2014) (considering possibility of waiver of religious rights); Bradford S. Stewart, Comment, *Opening the Broom Closet: Reorganizing the Religious Rights of Wiccans, Witches, and Other Neo-Pagans*, 32 N. ILL. U. L. REV. 135, 188–89 (2011) (analyzing nature of religious rights); Michael G. Weisberg, Note, *Balancing Cultural Integrity Against Individual Liberty: Civil Court Review of Ecclesiastical Judgments*, 25 U. MICH. J.L. REFORM 955, 980–86 (1992) (describing nature of various rights).

253. *See, e.g.*, Declaration on Discrimination, *supra* note 144, arts. 1(1), 6; ICCPR, *supra* note 67, art. 18; European Convention, *supra* note 141, art. 9; Universal Declaration, *supra* note 69, art. 18.

254. *See Hobby Lobby*, 134 S. Ct. at 2770 (citing *Employment Division v. Smith*, 494 U.S. 872, 877 (1990), *superseded by statute*, RFRA, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in Hobby Lobby*, 134 S. Ct. at 2751).

255. *See Hobby Lobby*, 134 S. Ct. at 2770.

256. *See id.* at 2798 (Ginsburg, J., dissenting) (distinguishing between a religious belief or practice and the conclusion that a religious right exists and discussing Senator Kennedy's proposal regarding RFRA).

257. Grainger PLC v. Nicholson, [2010] I.C.R. 360, [26] (Burton, J.) (Eng.) (quoting Malcolm D. Evans, *Religious Liberty and Non-Discrimination, in* NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES 119, 131 (Tita Loenen & Paulo R. Rodrigues eds., 1999)); *see also* McConnell, Origins, *supra* note 10, at 1461–66 (noting limits of religious rights); *supra* notes 219–36 and accompanying text.

Because Justice Ginsburg identified a number of ways in which the accommodation requested by the plaintiffs affected the rights of others, the dissent in *Hobby Lobby* appears to be more in accord with international and comparative standards than the majority.[258] In particular, Justice Ginsburg focused on the ways in which the majority approach infringed on the religious rights of others.[259] For example, her opinion noted that

> allowing a religion-based exemption to a commercial employer would "operat[e] to impose the employer's religious faith on the employees." No doubt the Greens and Hahns and all who share their beliefs may decline to acquire for themselves the contraceptives in question. But that choice may not be imposed on employees who hold other beliefs.[260]

The importance of religious rights suggests that the best approach is one that does not involve the clash of those particular values. Interestingly, framing the relevant question as involving the shareholders' decision to incorporate as a commercial corporation would avoid a clash of religious rights.[261] Such a technique seems to be much preferred to the current situation, both as a matter of theory and practice.

The majority approach in *Hobby Lobby* exhibits a number of other problems.[262] For example, none of the traditional types of religious practices (worship, observance, practice, and teaching) reflect the type of attenuation seen in *Hobby Lobby*, either as a structural matter (i.e., as between the natural person holding the underlying religious belief and the entity purporting to engage in the religious act) or as a factual matter (i.e., as between the entity

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258. *See Hobby Lobby*, 134 S. Ct. at 2787, 2790–91, 2801–02 (Ginsburg, J., dissenting) (discussing various third-party rights); *see also id.* at 2787 (Kennedy, J., concurring) (noting that the exercise of religion may not "unduly restrict other persons, such as employees, in protecting their own interests the law deems compelling").

259. *See id.* at 2787, 2790–91, 2801–02 (Ginsburg, J., dissenting) (discussing statutory rights as well as an employee's right not to have an employer's religious beliefs imposed upon him or her). Justice Ginsburg also specifically referred to Justice Jackson's observation that "the limitations which of necessity bound religious freedom . . . begin to operate whenever activities begin to affect or collide with liberties of others or of the public." *Id.* at 2801 (Ginsburg, J., dissenting) (quoting *Price v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., dissenting)).

260. *Hobby Lobby*, 132 S. Ct. at 2804 (quoting *United States v. Lee*, 455 U.S. 252, 261 (1981)).

261. For example, if shareholders decide to incorporate as a for-profit organization, then they would be seen as waiving the ability to make a religious claim on behalf of the corporation. However, in that situation, the employees' religious rights would be respected. Alternatively, if the shareholders decided to incorporate as a religious nonprofit, then they would retain their ability to right to make a religious claim on behalf of the corporation. In that case, the employees would waive their rights to make religion-based claims against the corporation. Although each scenario involves one party having to relinquish certain rights, the parties do so with full prior knowledge. Furthermore, this approach eliminates the possibility of conflicting religious claims.

262. *See Hobby Lobby*, 134 S. Ct. at 2759.

making the religious claim and the entity making the decision to engage in the religiously offensive act).[263] The expanded list of religious practices found in the Declaration on Discrimination also involves activities that exhibit a much more direct connection between the religious person and the relevant behavior, both as a structural and factual matter.[264]

Furthermore, the only other case known to have addressed the religious rights of a corporation, *Quinn's Supermarket Ltd. v. Attorney General*, specifically rejected the approach adopted by the majority in *Hobby Lobby*.[265] Instead, the Supreme Court of Ireland in *Quinn's Supermarket* adopted a view of religious rights that was consistent with the dissenting opinion in *Hobby Lobby*.[266]

As this discussion has shown, the majority in *Hobby Lobby* appears to be distinctly out of step with the international and comparative understanding of religious liberty.[267] However, the majority decision might still be considered acceptable if it can be shown that the newly enunciated rule falls within one or more of the rationales supporting the existence of religious rights, since the decision could then be said to represent a logical extension of established norms.[268] The following section considers that proposition by evaluating the theoretical justifications supporting religious rights and considering the extent to which the majority and dissenting opinions in *Hobby Lobby* can be said to reflect those particular norms.[269]

IV. THEORETICAL JUSTIFICATIONS SUPPORTING RELIGIOUS RIGHTS

Over the years, courts and commentators have developed a wide range of theories supporting the protection of religious rights.[270]

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263. *See, e.g.*, ICCPR, *supra* note 67, art. 18; European Convention, *supra* note 141, art. 9; Universal Declaration, *supra* note 69, art. 18; *see also Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting). The acts at issue in *Hobby Lobby* are also much more attenuated that actions considered in *Thomas v. Review Bd. Of Indiana Emp't Sec. Div.*, 450 U.S. 707 (1981). *See Hobby Lobby*, 134 S. Ct. at 2778.

264. *See* Declaration on Discrimination, *supra* note 144, arts. 1(1), 6.

265. *See Hobby Lobby*, 134 S. Ct. at 2759; Quinn's Supermarket Ltd. v. Att'y Gen., [1972] I.R. 1 (Ir.) (holding that a commercial corporation cannot profess religious beliefs and therefore cannot assert religious rights); *see also* Daly, *Irish Constitution*, *supra* note 161, at 30 (discussing *Quinn's Supermarket*).

266. *See Hobby Lobby*, 134 S .Ct. at 2805–06 (Ginsburg, J., dissenting); *Quinn's Supermarket*, [1972] I.R. 1; *see also* Daly, *Irish Constitution*, *supra* note 161, at 30 (discussing *Quinn's Supermarket*).

267. *See Hobby Lobby*, 134 S. Ct. at 2759.

268. *See* McConnell, *First Freedom*, *supra* note 10, at 1244 (discussing nature of religious liberties).

269. *See Hobby Lobby*, 134 S. Ct. at 2751.

270. *See* SMITH, *supra* note 137, at 63–71 (discussing justifications for religious rights); Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?*, *in* ARTICLES

Unfortunately, the indiscriminate and sometimes conflicting use of various rationales has resulted in a body of jurisprudence that can at times appear disturbingly *ad hoc*.[271] This problem is particularly acute in the United States, where the unique structure of the First Amendment has generated constitutional tests, which often lack internal consistency.[272]

Problems can also arise as a result of the need to balance individual religious demands against other rights and interests, which may be both fundamental and incommensurable.[273] Some commentators believe that these traits make it impossible to conduct a determination of religious rights fairly and impartially.[274] Fortunately, other commentators have taken the view that such analyses are indeed possible.[275] Indeed, a number of models currently exist to assist with the task of balancing competing rights and interests.[276]

OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 74, 83–87 (James Davison Hunter & Os Guinness eds., 1990) [hereinafter Sandel, *Freedom of Conscience*] (describing rationales for religious liberty).

271. *See* Nye, *supra* note 227, at 411 (identifying conflicts in religious rights theory); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 596–97 (2014) (considering difficulties relating to religious rights).

272. *See* Berg, *supra* note 137, at 693–94 (discussing inconsistencies in First Amendment jurisprudence); Edge, *supra* note 201, at 44 (outlining conflicting principles in religious liberties); Nye, *supra* note 227, at 413 (noting problems of U.S. approach to religious rights); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1769 (1995) [hereinafter Sunstein, *Incompletely Theorized*] (considering challenges of First Amendment law). For example, commentators have long recognized an inherent conflict between the two clauses of the First Amendment to the U.S. Constitution. *See* Berg, *supra* note 137, at 702 (noting tension between Establishment Clause and Free Exercise Clause); Underkuffler-Freund, *supra* note 216, at 982 (considering conflicts in First Amendment jurisprudence).

273. *See* J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 331 (1969) (weighing various rights); McConnell, *Accommodation*, *supra* note 109, at 736 (considering rights of various parties); Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943) (discussing relative weights of various rights); West, *supra* note 271, at 597 (considering rights balancing under U.S. law).

274. *See* A. BRADNEY, RELIGIONS, RIGHTS AND LAWS 8 (Leicester Univ. Press 1993) (identifying problems with weighing religious rights); Lupu, *Where Rights Begin*, *supra* note 90, at 950 (discussing rights balancing in religious context); McConnell & Posner, *supra* note 192, at 46, 51 (undertaking a law and economics approach to religious rights); Sunstein, *Incompletely Theorized*, *supra* note 272, at 1748 (noting problems of weighing incommensurable rights).

275. *See* CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 101 (Oxford Univ. Press 1997) (suggesting a method of weighing incommensurable rights); William J. Aceves, *Predicting Chaos? Using Scenarios to Inform Theory and Guide Practice*, 45 VA. J. INT'L L. 585, 607–09 (2005) (proposing approach to balance rights); Virgílio Alfonso Da Silva, *Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision*, 31 OXFORD J. LEGAL STUD. 273, 286, 301 (2011) (discussing balancing tests).

276. Some models promote the maximization of rights while others focus on the protection of the "minimum core" of a particular constitutional concern. *See* Margaux J. Hall & David C. Weiss, *Human Rights and Remedial Equilibration: Equilibrating*

One of the more helpful approaches has been identified by Cass Sunstein, who advocates the creation of "a highly disaggregated picture of the consequences of legal rules, a picture that enables the judge to see the various goods at stake."[277] Each situation is then placed into context so as to avoid making decisions in the abstract.[278]

This Article adopts Sunstein's approach by deconstructing the rationales underlying religious rights and determining whether and to what extent those rationales describe the majority and dissenting opinions in *Hobby Lobby*.[279] This type of analysis is perhaps the only way to evaluate the relative merits of the opinions in this dispute.

Close examination of the literature and case law in this field suggests that most authorities rationalize religious liberty on the basis of five separate but interrelated concerns. Thus, religious rights are considered theoretically justifiable to the extent they promote civil peace, minimize alienation, further personal autonomy, promote self-definition, or further the search for truth. Some commentators believe it impossible to identify any overarching theoretical construct but would nevertheless support religious liberty as a prudential arrangement. Each of these propositions will be discussed in more detail below and then considered in light of *Hobby Lobby* to determine whether and to what extent the majority decision reflects each particular principle.[280]

A. *Religious Rights Promote Civil Peace*

The best-known rationale supporting religious liberty holds that protection of religious beliefs and practices promotes civil peace.[281] Although this justification was first enunciated during the time of Locke,[282] contemporary theorists also recognize the role that religious rights play in encouraging social stability, particularly in cases

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Socio-Economic Rights, 36 BROOK. J. INT'L L. 453, 469, 489–90 (2011) (analyzing various methods of balancing rights).

277. SUNSTEIN, FREE MARKETS, *supra* note 275, at 99. Sunstein's suggestion accords with his belief in the value of incompletely theorized agreements, which focus on pragmatic agreements without delving unnecessarily into underlying and potentially divisive jurisprudential principles. *See* Cass R. Sunstein, *Constitutional Agreements Without Constitutional Theories*, 13 RATIO JURIS 117, 117 (2000) [hereinafter Sunstein, *Agreements*] (advocating a pragmatic approach to constitutional law).

278. SUNSTEIN, FREE MARKETS, *supra* note 275, at 101.

279. *See generally Hobby Lobby*, 134 S. Ct. 2751.

280. *See generally id.*

281. *See* VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 1143 (Foundation Press 1999) (discussing rationale for religious rights); LOCKE, *supra* note 1, at 18 (stating religious freedom is based on need for civil peace); SMITH, *supra* note 137, at 106–09 (describing basis for religious liberty).

282. *See* LOCKE, *supra* note 1, at 18 (describing rationale behind religious freedom).

involving a potential conflict between civil and religious duties.[283] The thought is that respecting religious liberties minimizes the possibility of civil disobedience because those who would otherwise feel religiously compelled to act contrary to the particular law are allowed to follow the dictates of their conscience.[284] Protecting religious liberty is also believed to encourage people to adopt religious values and practices that support social order.[285]

This justification for religious rights views religious actors as more of a threat to the state than persons who are motivated only by political concerns. This conclusion is apparent in statements by Christopher Eisgruber that "three features – resistance to persuasion, cohesiveness, and resistance to compromise – make religious factions an especially virulent threat to the vigor of republican politics."[286] David Rapoport similarly argues that while any dissatisfied citizen can resort to civil disobedience, religious persons or groups may be more likely to do so because "[a]ll major religions have enormous potentialities for creating and directing violence."[287] Rapoport also believes that "[w]hen a religious justification is offered for a cause which might otherwise be justified in political or economic terms, the struggle is intensified and complicated enormously."[288] Nations that provide protection for religious beliefs and practices thereby minimize the number of conflicts between the individual and the state.

The scope and intent of these sort of protections are also embodied in Michael McConnell's definition of the "accommodation" of religious belief and practice as involving "government laws or policies that have the purpose and effect of removing a burden on, or facilitating the exercise of, a person's or an institution's religion."[289] An accommodation can also be described as an exemption from a generally applicable rule and can be used to refer to any action that is intended to give effect to individuals' religious claims, desires, demands, or interests.[290]

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283. *See, e.g.*, JOHN A. RAWLS, POLITICAL LIBERALISM xvii–xix (1996) [hereinafter RAWLS, POLITICAL LIBERALISM] (tying religious liberty to civil peace).

284. *See id.* (linking civil order and religious freedom).

285. *See* SMITH, *supra* note 137, at 101–04 (discussing effect of religious liberty).

286. Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347, 372–73 (1995).

287. David C. Rapoport, *Comparing Militant Fundamentalist Movements and Groups*, *in* FUNDAMENTALISMS AND THE STATE: REMAKING POLITIES, ECONOMIES, AND MILITANCE 429, 446 (Martin E. Marty & R. Scott Appleby eds., 1996).

288. *Id.*; *see also* MARK JUERGENSMEYER, THE NEW COLD WAR? RELIGIOUS NATIONALISM CONFRONTS THE SECULAR STATE 156, 198 (1993) (discussing problems of religious violence); Eisgruber, *supra* note 286, at 372–73 (noting issues relating to religious conflict).

289. McConnell, *Accommodation*, *supra* note 109, at 686.

290. *See id.* at 687 (defining a religious accommodation).

Not everyone agrees that religious accommodations promote civil peace. Ellis West, for example, believes that granting religious accommodations actually increases "ill will and divisiveness" by provoking jealousy in those who do not receive similar benefits.[291] John Garvey has identified a different problem with rationales based on social order. He notes that the civil peace rationale assumes that "we can only have civil peace through religious freedom," when in fact "there are other ways of avoiding strife: repression is one of them. Unless freedom has some other good points, there is no reason to prefer it to repression."[292] Therefore, Garvey suggests that society must justify religious liberty on grounds other than the desire to promote civil peace.[293]

Garvey's point is valid, but only to the extent that repressive measures effectively quash all dissent.[294] While such tactics may prevail in the short term, it is unlikely that they can withstand internal and, in an era of global concern over human rights, external pressure toward moderation in the long run. Indeed, international responses to recent attacks by members of the Islamic State of Iraq and Syria (ISIS) and the Boko Haram suggests that widespread acts of religiously motivated violence will not go unaddressed.[295]

Turning to *Hobby Lobby*, the members of the majority did not seem to be thinking about avoiding social unrest when they decided to allow three closely held corporations to refuse to provide health insurance that included coverage for certain contraceptives.[296] Instead, most of the majority's analysis focused on the corporations' economic rights and their ability to participate in commercial society.[297] Although a number of commentators have taken the view, with Montesquieu, that entities that are commercially engaged are unlikely to engage in violent actions because of the negative effect such behavior would have on their business interests, the shareholders of the plaintiff corporations could still engage in commercial activities if the corporations were not granted this

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291. West, *supra* note 271, at 602.

292. John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 291 (1996) [hereinafter Garvey, *Anti-Liberal*].

293. *See generally id.* (identifying grounds for religious liberty).

294. *See id.* at 291 (noting limits of religious repression).

295. *See* ASSOCIATED PRESS, *Boko Haram Kidnaps 100 People, Most of Them Freed*, USA TODAY (Aug. 15, 2014, 2:57 PM), http://www.usatoday.com/story/news/world/2014/08/15/boko-haram-kidnaps-100-people-most-of-them-freed/14121489/ [http://perma.cc/788P-V5PS] (archived Feb. 24, 2015) (discussing religiously oriented kidnappings in Nigeria); Helene Cooper et al., *Obama Allows Limited Airstrikes on ISIS*, N.Y. TIMES, Aug. 8, 2014, at A1 (discussing religious violence in Syria and Iraq).

296. *See Hobby Lobby*, 134 S. Ct. at 2759.

297. *See id.* at 2759, 2783. Although the majority alludes to various additional "benefits . . . of operating as corporations," the majority does not discuss what those benefits are other than the ability to lobby and support political candidates. *See id.* at 2767, 2771. Obviously, these are political, not religious, benefits and therefore outside the scope of religious liberties law.

particular accommodation.[298] Furthermore, the shareholders could engage in commercial activities if the shareholders were organized as a religious nonprofit.[299] Thus, the majority decision in *Hobby Lobby* does not appear to be based in a desire to promote civil peace.[300]

B. *Religious Rights Minimize Alienation*

A second rationale supporting religious rights involves the desire to minimize religious people's alienation from wider society. Numerous commentators have claimed that religious people are excluded from the political realm by virtue of the secular nature of many Western states.[301] However, religious rights are seen as assuaging religious people's fear of being "second class citizens" and minimizing any sense of alienation that religious people may feel.[302] This justification is often linked to the concern about civil peace, in that extreme alienation may lead to "destabilizing, antisocial activity, including violence."[303]

Christopher Eisgruber and Lawrence Sager view the problem of alienation as associated with the "predominance of groups in religious practice," since "[i]t is the group identity of the faithful that mobilizes

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298. *See* Robert Howse, *Montesquieu on Commerce, Conquest, War, and Peace*, 31 BROOK. J. INT'L L. 693, 693 (2006) (discussing Montesquieu's connection between civil order and commercial practices); *see also* Timothy L. Fort, *The Times and Seasons of Corporate Responsibility*, 44 AM. BUS. L.J. 287, 324 (2007) (suggesting that imposition of corporate leaders' religious views does not lead to peace or constitute good business). Although the majority suggests the penalties for nonprovision of the relevant health coverage would be prohibitive in nature, experts suggested otherwise. *See Hobby Lobby*, 134 S. Ct. at 2759, 2776.

299. *See* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 299 (1985) (discussing a religious nonprofit's commercial activities); Fahey, *supra* note 187, at 547 (noting nonprofits may engage in commercial activities so long as they pay the necessary taxes).

300. *See Hobby Lobby*, 134 S. Ct. at 2759.

301. *See* CARTER, *supra* note 176, *passim* (discussing religious views in the public market of ideas); John H. Garvey, *Introduction: Fundamentalism and Politics*, *in* FUNDAMENTALISMS AND THE STATE: REMAKING POLITIES, ECONOMIES, AND MILITANCE, *supra* note 287, at 13, 15, 17 (discussing perceptions of religious views in public debate).

302. *See* John L. Esposito, *Political Islam and U.S. Foreign Policy*, 20 FLETCHER F. WORLD AFF. 119, 125 (1996) (discussing effect of religious rights); Steven D. Smith, *Unprincipled Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 497, 499 (1996) [hereinafter Smith, *Unprincipled*] (discussing purpose of religious rights).

303. CARTER, *supra* note 176, at 129 (quoting Frederick Mark Gedicks); *see also* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 121 (Richard D. Heffner ed., 1956) (discussing need for religious liberty); McConnell, *Accommodation*, *supra* note 109, at 693 (discussing purpose of religious rights); Edmund L. Pincoffs, *Comments: Honderich on Violence*, *in* ISSUES IN LAW AND MORALITY: PROCEEDINGS OF THE 1971 OBERLIN COLLOQUIUM IN PHILOSOPHY 37, 44–46 (Norman S. Care & Thomas K. Trelogan eds., 1973) (discussing link between violence and violation of religious principles); Rapoport, *supra* note 287, at 446–47 (considering religiously oriented conflict).

pity, distrust, or even hatred for those who are not believers."[304] While Eisgruber and Sager see alienation as arising from the beliefs espoused by the religious group, alienation can also arise as a result of actions taken by the religious majority that lead minority religious believers to perceive themselves as being invisible in their own societies.[305]

Members of religious minorities are often more closely attuned to these sorts of issues than members of religious majorities, since those who adhere to majority religious beliefs often overlook the extent to which those values and practices are reflected in existing legal norms.[306] For example, laws concerning marriage and national days of rest typically reflect the majority's religious beliefs, thus creating the potential for conflict with the values and practices of minority faiths.[307] Labeling the majority's practices as "merely" cultural belittles their symbolic importance and ignores the very real burdens that fall on those whose beliefs and practices differ.[308]

Some types of alienation are experienced regardless of whether the beliefs in question are part of a majority or minority religious tradition. For example, framing religiously motivated decisions as "unreasonable"[309] or "non-rational"[310] tends to alienate religious persons of all faiths.

The concern about alienation appears most relevant to individuals or groups who wish to exist within the larger society. Alienation appears to be less of an issue for people like the Amish, who prefer to opt out of the wider social sphere and create their own religious communities.

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304. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248–49 (1994).

305. *See id.*

306. *See* Ferrari, *supra* note 133, at 80, 82, 86; Asher Maoz, *Religious Human Rights in the State of Israel*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, 349, 377; McConnell, *Accommodation*, *supra* note 109, at 721; Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 207, 216 (1992). For examples of specific case law, see Reynolds v. United States, 98 U.S. 145 (1878) (regarding polygamy); Quinn's Supermarket Ltd. v. Att'y Gen. [1972] I.R. 1 (Ir.) (regarding religious days of rest); Ahmad v. United Kingdom, App. No. 8160/78, 4 Eur. H.R. Rep. 126 (1981) (regarding timing of prayers); Stedman v. United Kingdom, App. No. 29107/95, 23 Eur. H.R. Rep. C.D. 168 (1997) (regarding religious days of rest).

307. *See* Ferrari, *supra* note 133, at 82 (noting effect of discrepancies between majority and minority religious practices; Maoz, *supra* note 306, at 377 (considering hidden burdens placed on religious minorities).

308. *See* Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 978–79, 987–88 (2010) (noting effect of complying with majority practices).

309. RAWLS, POLITICAL LIBERALISM, *supra* note 283, at 61–62.

310. BASIL MITCHELL, LAW, MORALITY, AND RELIGION IN A SECULAR SOCIETY 123 (1967); *see also* Michael Stokes Paulsen, *Is Religious Freedom Irrational?*, 112 MICH. L. REV. 1043 (2014) (debating Brian Leitner).

Although alienation could be a relevant concern in *Hobby Lobby*, it is unclear whether granting the religious accommodation will make those shareholders feel less alienated from wider society.[311] The objectionable forms of contraception will still be available and employees who wish to use those forms of contraception will still be allowed to do so. While the religious shareholders may feel some small victory in being able to opt out of a policy initiative with which they disagree, it is not clear whether and to what extent that accommodation will make them feel more a part of larger society, particularly since they can also achieve their desired ends either by deciding not to provide health insurance with this particular coverage or by reincorporating as a religious nonprofit.

The alienation analysis hearkens back to a point that was previously made about the proper identification of the religious act in *Hobby Lobby*.[312] The shareholders here, having chosen not to associate as a religious organization, want to obtain the same benefits as a religious organization.[313] The decision to band together as a religious association is protected as a core religious liberty precisely in order to minimize concerns about alienation.[314] Allowing nonreligious (i.e., commercial) entities to invoke the special protections granted to religious organizations does not achieve the same ends and can indeed create ill-will in other members of society, as discussed further below.[315] Furthermore, concerns about alienation do not appear to be relevant in *Hobby Lobby* to the extent that this rationale is based on concerns about breaches of the peace, for the reasons described above.[316] As a result, the majority opinion in *Hobby Lobby* does not appear justifiable under the alienation rationale, although this is admittedly a close call.[317]

C. *Religious Rights Further Personal Autonomy*

A third rationale supporting religious rights involves the desire to further the exercise of personal autonomy. Although independent religious choice can be characterized as inherently or intrinsically worthy of protection, it can also be framed in more instrumental terms.[318] For example, it has been said that religious liberty helps

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311. *See Hobby Lobby*, 134 S. Ct. 2751, 2764–66.

312. *See id.* at 2751; *see also supra* notes 248–62 and accompanying text.

313. *See Hobby Lobby*, 134 S. Ct. at 2782.

314. *See supra* notes 130–31 and accompanying text.

315. *See infra* notes 432–52 and accompanying text.

316. *See Hobby Lobby*, 134 S. Ct. at 2751; *see also supra* notes 296–300 and accompanying text.

317. *See Hobby Lobby*, 134 S. Ct. at 2759.

318. *See* LOCKE, *supra* note 1, at 19–20, 55–56 (describing benefits of religious liberty); Joseph Boyle, *The Place of Religion in the Practical Reasoning of Individuals and Groups*, 43 AM. J. JURIS. 1, 21 (1998) (noting how religious rights benefit

avoid certain socially detrimental behaviors (such as civil disorder) that may result from the coercion of religious belief and practice.[319] Furthermore, a number of theorists believe that most attempts to override choices made pursuant to individual religious belief will ultimately fail.[320]

Legal theories based on personal autonomy are also consistent with certain religious doctrines, particularly those faith traditions that hold freedom of choice to be an integral part of the religious experience.[321] However, legal theory and religious doctrine do not always align so closely. For example, adherents of religious traditions that emphasize conformity of behavior, rather than free religious choice, may be less inclined to rely on autonomy as a rationale for religious liberty.[322]

Legal theories endorsing personal autonomy rely implicitly on the liberal separation of public and private spheres of life, where personal preferences, including religious preferences, are relegated to the private realm of life.[323] Thus, religious traditions that do not recognize any kind of distinction between public and private acts may not find autonomy to be a useful basis for a claim for religious rights.[324]

John Garvey has expressed some concerns about the autonomy rationale based on his belief that such theories make "assumptions about human nature . . . that are inconsistent with convictions that many religious people hold."[325] He would therefore consider reversing the common assumption that theorists must "assume the agnostic viewpoint" and would instead ask "agnostics to assume the religious viewpoint."[326]

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individuals and society); Garvey, *Anti-Liberal*, *supra* note 292, at 284 (discussing advantages of religious freedoms).

319. *See* LOCKE, *supra* note 1, at 19–20, 55–56 (describing benefits of religious liberty); Boyle, *supra* note 318, at 21 (noting how religious rights benefit individuals and society); Garvey, *Anti-Liberal*, *supra* note 292, at 284 (discussing advantages of religious freedoms).

320. *See* LOCKE, *supra* note 1, at 19–20, 55–56 (describing benefits of religious liberty); Boyle, *supra* note 318, at 21 (noting how religious rights benefit individuals and society); Garvey, *Anti-Liberal*, *supra* note 292, at 284 (discussing advantages of religious freedoms).

321. *See* Garvey, *Anti-Liberal*, *supra* note 292, at 284–85 (discussing advantages of religious freedoms).

322. *See id.* (discussing advantages of religious freedoms).

323. *See* Tushnet, *Religion*, *supra* note 216, at 236 (discussing public-private dichotomy).

324. *See* DWORKIN, *supra* note 216, at 15, 26, 150, 157–59 (characterizing the nature of religious acts).

325. Garvey, *Anti-Liberal*, *supra* note 292, at 290; *see also* Esposito, *supra* note 302, at 128 (discussing religious worldview).

326. Garvey, *Anti-Liberal*, *supra* note 292, at 290; *see also* Esposito, *supra* note 302, at 128 (noting perspective of religious persons).

The autonomy rationale is also problematic from the perspective of religious traditions that permit compulsion of religious belief[327] or that forbid adherents from exiting the faith.[328] In these cases, respecting one person's religious beliefs and practices results in the violation of another person's religious beliefs and practices. Since a robust reading of religious liberty includes both a positive element (i.e., the affirmative right to exercise one's religious beliefs and practices) as well as a negative element (i.e., the defensive right not to be required to engage in religious beliefs and practices that are contrary to one's own beliefs and practices), the principle of autonomy cannot be relied upon to provide a definitive answer in all circumstances.[329]

Considering these principles in the context of *Hobby Lobby* yields some interesting results.[330] The shareholders of the various corporations appear on first glance to be claiming an autonomy-based right, in that they do not wish to be required to participate in an act (the use of certain types of contraceptives) that is contrary to their religious beliefs.[331] Although this would initially appear to be a clear example of a negative religious liberty (i.e., the desire not to be forced to act in a way contrary to one's religious beliefs), the analysis runs into several problems. First, the link between the religious person and the act in question (use of a particular contraceptive) is extremely attenuated, as Justice Ginsburg noted, with two separate breaks in the relevant chain of decision making.[332] The claim is also being made through the vehicle of a corporation rather than by the religious person him or herself, even though the earlier decision to incorporate as a commercial entity could itself be characterized as religious in nature.[333] These types of practical and theoretical breaks in proximity diminish the force of the autonomy rationale in this case.

Second, the corporate shareholders' concerns about being forced to undertake actions contrary to their religious beliefs can be met in

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327. *See, e.g.*, AUGUSTINE, THE POLITICAL WRITINGS OF ST. AUGUSTINE 202–03 (Henry Paolucci ed., 1962) (discussing compulsion of religious belief).

328. *See* Special Rapporteur of the Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, *Study of Discrimination in the Matter of Religious Rights and Practices*, 25, U.N. Doc. E/CN.4/Sub.2/200/Rev.1 (1960) (considering problems if exit is not allowed).

329. *See* Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761, 762 (2012) (considering positive and negative aspects of liberty).

330. *See generally Hobby Lobby*, 134 S. Ct. 2751.

331. *See id.* at 2759. The corporations' participation is, of course, somewhat attenuated, but that is the essence of the claim. *See id.*

332. *See id.* at 2799 (Ginsburg, J., dissenting) ("It is doubtful that Congress, when it specified that burdens must be "substantia[l]," had in mind a linkage thus interrupted by independent decisionmakers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed.").

333. *See id.* at 2759; *see supra* notes 251–52 and accompanying text (discussing waiver of religious rights).

equal measure by a claim from the corporate employees that they do not wish to be required to adhere to someone else's religious beliefs and practices.[334] Although the decision to use a particular type of contraceptive is seldom framed in religious terms, many women, alone or in conjunction with their partners, consider whether and to what extent a particular type of contraception is consistent with their religious beliefs.[335] Thus, there are religious rights to be considered on both sides of the equation, as noted by Justice Ginsburg in her dissent.[336]

Given this tension between different religious rights, it is impossible to conclude that the majority in *Hobby Lobby* relied on the autonomy rationale in any way.[337] Instead, the concept of religious autonomy is much more fully enunciated in the dissenting opinion.[338] As a result, it is necessary to consider whether the majority holding can be justified on other grounds.

D. *Religious Rights Promote Self-Definition*

A number of commentators claim that legal systems protect religious beliefs because those beliefs "are 'important to a person's sense of whom [sic] she is' and define a person's very being."'[339] Religious rights therefore promote self-definition, particularly an individual's ability to identify with a religious group.[340] Gidon Sapir

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334. *See Hobby Lobby*, 134 S. Ct. at 2787, 2790–91, 2801–02 (Ginsburg, J., dissenting) (discussing statutory rights as well as an employee's right not to have an employer's religious beliefs imposed upon him or her).

335. The assumption by many people seems to be that any woman who uses contraception is areligious or anti-religious. In fact, many religious women use or support the use of contraception. *See* RACHEL K. JONES & JOERG DREWEKE, COUNTERING CONVENTIONAL WISDOM: NEW EVIDENCE ON RELIGION AND CONTRACEPTIVE USE 3–8 (Haley Ball ed., 2011), *available at* http://www.guttmacher.org/pubs/Religion-and-Contraceptive-Use.pdf [http://perma.cc/JV73-58WE] (archived Mar. 23, 2015) (discussing religious women's views on contraception).

336. *See Hobby Lobby*, 134 S. Ct. at 2787, 2790–91, 2801–02 (Ginsburg, J., dissenting).

337. *See id.* at 2759.

338. *See id.* at 2794 (Ginsburg, J., dissenting); *see also id.* at 2785 (Kennedy, J., concurring).

339. *See* William P. Marshall, *Religion as Ideas: Religion as Identity*, 7 J. CONTEMP. LEGAL ISSUES 385, 391–92 (1996) [hereinafter Marshall, *Ideas*] (quoting Stephen D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 202 (1991), and Daniel Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1115, 1164–65 (1988)); *see also* Edge, *supra* note 201, at 49 (discussing religious belief in terms of self-definition); Grinstein, *supra* note 209, at 1363–64 (characterizing religion as self-defining act).

340. *See* Marshall, *Ideas*, *supra* note 339, at 386 (noting collective aspects of religious rights). A wide-ranging and lively debate exists about the legitimacy and extent of group rights, although that issue is beyond the scope of this Article. *See, e.g.*, NEUS TORBISCO CASALS, GROUP RIGHTS AS HUMAN RIGHTS: A LIBERAL APPROACH TO MULTICULTURALISM (Francisco J. Laporta et al. eds., 2006) (defining group rights); THE

relates the idea of self-definition to autonomy, noting that "if we cherish the ability of people to exercise their freedom to choose, we must also protect their societal culture [including their religious culture] from structural debasement or decay, because cultural membership is a prerequisite for individuals to exercise their capacity for choice and self-reflection."[341]

Self-definition therefore bears some similarity to personal autonomy but gives special emphasis to the collective element of religious rights. If one views "rights of religious autonomy" as Laurence Tribe does (i.e., as including both choices about religion per se and about dress, reproduction, livelihood, and how one is to live),[342] then the right to self-definition may be subsumed within the autonomy rationale. However, separating autonomy from self-definition is a useful analytical step, since domestic and international law both emphasize the collective aspect of religious liberty.[343] These laws may have evolved as a continuation of earlier approaches that formulated religious rights as group, rather than individual, rights,[344] but they may also reflect the fact that religious persons have never conceded the importance of protecting the communal elements of practicing their faith.[345]

As attractive as this approach may appear, proponents of a group rights approach to religious liberties experience a number of practical difficulties in identifying how the group is to define its boundaries and who has the power to decide doctrinal differences.[346] In addition, as Mark Tushnet has noted, most constitutional models have trouble "filtering a group right interest through an individual rights model."[347]

RIGHTS OF MINORITY CULTURES (Will Kymlicka ed., 1995) (discussing attributes of group rights); Tabatha Abu El-Haj, *Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 ARIZ. L. REV. 53 (2014) (considering group rights theory in constitutional context); Symposium, 4 CAN. J.L. & JURISPRUDENCE 215 (1991) (discussing various aspects of group rights theory).

341. *See* Gidon Sapir, *Religion and State – A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 626 (1999).

342. *See* Garvey, *Anti-Liberal*, *supra* note 292, at 275 (characterizing LAURENCE H. TRIBE, CONSTITUTIONAL LAW 1154–301 (1988)).

343. *See* Robinson, *supra* note 5, at 206–07 (noting collective element of religious rights); *see also supra* notes 130–31 and accompanying text.

344. *See* Lerner, *Religious Human Rights*, *supra* note 66, at 83–85 (discussing history of religious liberty).

345. *See* CARTER, *supra* note 176, at 141–42 (discussing parameters of religious rights claims); Robinson, *supra* note 5, at 206–07 (noting collective aspects of religious liberty).

346. *See* Green, *supra* note 18, at 261 (noting problems with group rights); James W. Nickel, *Group Agency and Group Rights*, *in* ETHNICITY AND GROUP RIGHTS: NOMOS XXXIX 235, 238, 241 (Ian Shapiro & Will Kymlicka eds., 1997) (discussing challenges of group rights theory); *see also* Maoz, *supra* note 306, at 363 (discussing group rights in context of Israeli religious rights).

347. Tushnet, *Religion*, *supra* note 216, at 238; *see also* Gerard V. Bradley, *Church Autonomy in the Constitutional Order—The End of Church and State?*, 49 LA.

It cannot be denied that self-definition, either on the individual or collective level, constitutes an important aspect of personhood. Nations that limit religious people's ability to fulfill this side of themselves risk alienating those people from greater society and thus increase the possibility of social unrest.[348] In this way, concerns about personal autonomy, self-definition, and alienation constitute specific means of achieving the broader goal of civil peace. Since civil peace is an eminently proper state goal, so too are furthering autonomy and self-definition as a means to that end.

Unfortunately, concerns about self-definition do not appear to have been considered by the majority in *Hobby Lobby*.[349] Indeed, the most important aspect of self-definition, namely the right to form religious groups, was entirely absent from the discussion, since neither the plaintiff corporations nor their shareholders claimed that their right to form a group was infringed in any way.[350] To the contrary, the shareholders faced a wide variety of choices on how they might choose to align their interests and could very well have formed a religious nonprofit, which is the type of group that is most often at issue in theories regarding self-definition.[351]

It might be possible to argue that the denial of the plaintiffs' claim in *Hobby Lobby* would affect some type of associational right because the shareholders would then have to reincorporate themselves as a nonprofit organization if they wanted to fall within the religious exception to the contraceptive mandate.[352] However, that argument is largely unpersuasive because the shareholders would not be barred from associating with one another but would simply have to choose between the benefits and burdens associated with two different types of corporate entities.

As a result, the majority in *Hobby Lobby* does not appear to have relied on this particular rationale to justify its novel approach to religious rights.[353] To the contrary, self-definition appears to be much more fully considered in the dissent, which discusses the principle of religious autonomy in the group context when differentiating between commercial corporations and religious nonprofits.[354]

L. REV. 1057, 1064 (1989) (discussing group rights issues); Marshall, *Ideas*, *supra* note 339, at 386 (discussing group rights as self-definition).

348. *See supra* notes 281–317 and accompanying text.

349. See *Hobby Lobby*, 134 S. Ct. at 2759.

350. However, Justice Ginsburg discusses this aspect of religious rights. *See id.* at 2794 (Ginsburg, J., dissenting).

351. The ability to form a religious group is protected by numerous human rights instruments, most particularly the Declaration on Discrimination. *See* Declaration on Discrimination, *supra* note 144, art. 6.

352. *See Hobby Lobby*, 134 S. Ct. at 2759.

353. *See id.* Those aspects of self-definition that are related to concerns about personal autonomy, alienation, and civil peace have already been discussed previously. *See supra* notes 281–338 and accompanying text.

354. *See Hobby Lobby*, 134 S. Ct. at 2794 (Ginsburg, J., dissenting).

E. *Religious Rights Further the Search for Truth*

The final theoretical justification for religious rights involves the proposition that religious liberty should be protected because it furthers the search for truth. The assumption here is that freedom of religion fosters discovery and debate in the same way that freedom of speech fosters greater understanding of politics and science.[355] As Joseph Boyle writes,

> [p]olitical society is morally obliged to create the social space for people to fulfil their obligation to seek the truth in religious matters and live accordingly. It cannot do this if political life is conducted as if a certain outcome of this inquiry – whether a particular type of belief or nonbelief – were correct.[356]

The need to protect individual conceptions of truth is particularly important in the area of religion because some faith traditions hold that violations of religious obligations lead to punishment after death.[357] Therefore, John Garvey believes that the pursuit of religious truth should be granted even greater protection under the law than the pursuit of other types of truth, since the harm suffered "is more serious (loss of heavenly comforts, not domestic ones) and more lasting (eternal, not temporary)."[358] Because religious truth is beyond human understanding and no one can say which religious tradition is correct, everyone must enjoy the ability to search for truth equally.[359]

Interestingly, this aspect of religious liberty is often implemented in an uneven manner. For example, some commentators believe that many jurisdictions have a tendency to support and protect liberal religions, which are defined as those faiths that "accept the liberal position that the governments must be impartial among all philosophically reasonable religions," while simultaneously disfavoring or discriminating against illiberal religions, which are defined as those faiths that insist "that the government endorse or

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355. *See* Clark, *supra* note 273, at 336 (discussing freedom of religion as a search for truth); Garvey, *Anti-Liberal*, *supra* note 292, at 286 (noting religious liberty promotes the search for truth); *see also* FISH, *supra* note 216, at 124 (discussing expressive acts); Marshall, *Ideas*, *supra* note 339, at 392–93 (discussing religion in the context of identity).

356. Boyle, *supra* note 318, at 22.

357. *See* A DICTIONARY OF COMPARATIVE RELIGION 518 (S.G.F. Brandon ed., 1970) (defining purgatory); Clark, *supra* note 273, at 337 (noting some violations of religious edicts have effect after death); Garvey, *Anti-Liberal*, *supra* note 292, at 286 (discussing ramifications for the afterlife).

358. Garvey, *Anti-Liberal*, *supra* note 292, at 287.

359. *See* LOCKE, *supra* note 1, at 19, 29, 55–56 (noting religious liberty promotes search for truth); Eisgruber, *supra* note 286, at 349 (noting inability to know which faith tradition is correct).

favor their particular creed as the one truth faith."[360] Some jurisdictions also adopt an illiberal approach to religion by mandating a particular religious faith and criminalizing any deviation from the politically prescribed norm.[361]

Although the latter group of legal systems might seem to take the more problematic approach to religious rights, commentators have recognized that "liberalism's disapproval of illiberal religions is necessarily a rejection of these illiberal religions as theologically unsound."[362] As Michael Sandel notes in his discussion of the way in which liberalism brackets, or sets aside, certain moral and religious questions in relation to politics,

> If . . . there really were such a thing as witches, then it would surely be less reasonable to bracket theology and metaphysics . . . . The more we are convinced that those who believe in witches are deluded, the greater our confidence in the case for bracketing the controversy about the existence of witches. To this extent, the political argument against witch-hunts is parasitic on (some degree of confidence about) the theological and metaphysical arguments.[363]

Therefore, discriminating against a particular faith because it does not accept certain liberal political tenets reflects a judgment about the legitimacy of the underlying religious doctrine.[364]

Although promoting the search for religious truth is a laudatory aim, some commentators worry that a broad definition of religious rights encourages commitment to belief systems that are inconsistent with the liberal democratic state.[365] Ira Lupu, for example, claims that certain faiths "make intense demands for obedience by

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360. Edward B. Foley, *Religion and the Public Schools After* Lee v. Weisman*: Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963, 973–74 (1993).

361. For example, North Korea only permits state-supported forms of Christianity. *See* Aldir Guedes Soriano, *Liberal Democracy and the Right to Religious Freedom*, 2013 BYU L. REV. 581, 600 (2013) (discussing religious rights in North Korea). Sudan recently sentenced a woman to death for apostasy relating to her conversion to Christianity from Islam, although she was eventually allowed to leave the country. *See* Giselda Vagnoni & Khalid Abdel Azis, *Death Row Christian Woman Flies Out of Sudan*, REUTERS (July 24, 2014 8:50 AM), http://www.reuters.com/article/2014/07/24/us-sudan-christian-convert-idUSKBN0FT0T020140724 [http://perma.cc/J283-B5DE] (archived Feb. 24, 2015) (discussing religious rights in Sudan).

362. *See* Foley, *supra* note 360, at 974.

363. Michael J. Sandel, *Judgmental Toleration*, *in* NATURAL LAW, LIBERALISM, AND MORALITY: CONTEMPORARY ESSAYS 107, 108–09 (Robert P. George ed., 1996) [hereinafter Sandel, *Toleration*].

364.. *See* Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 612 (1993) (suggesting how some analyses presuppose the truth of certain religious beliefs).

365. *See* McConnell, *Accommodation*, *supra* note 109, at 738 (discussing effect of broad religious accommodations).

adherents," which can "undermine rather than mutually reinforce habits of mind necessary for democratic decisionmaking."[366]

This position contradicts the notion that religion deserves special protection because it encourages civic virtue and promotes peace[367] as well as political theories that hold that religion, of itself, is a basic or intrinsic good.[368] The idea that religion, taken seriously, is a danger to individuals and society is also problematic on the grounds that it takes as its underlying and unspoken premise the idea that religion cannot be true.[369] Such a position also faults religion for its central tenet that something more important than the temporal order exists. If religion were true, there would be no reason to deny its claims to allegiance and indeed every reason not to do so. If one adheres to the notion that religious truth cannot be objectively ascertained, then one cannot prejudge the content of various claims or limit them arbitrarily, as Michael Sandel has so eloquently noted.[370]

If religious rights are meant to further the search for truth, then all types of religious beliefs must be respected to avoid making choices among equally valid (or potentially valid) claims to truth. Because other types of beliefs do not carry the same ramifications that religious beliefs do (i.e., those that carry over beyond this lifetime into the eternal), they therefore do not invoke the same need for protection.

Applying this analysis to *Hobby Lobby* is somewhat problematic for the majority because truth-based rationales for religious liberties are based largely on concerns about the ability to spread information about the religion in question.[371] These concerns are taken into

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366. *See* Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 597–98 (1991); *see also* SMITH, *supra* note 137, at 102 (discussing anti-liberal beliefs); McConnell, *Accommodation*, *supra* note 109, at 738–39 (discussing effect of broad religious accommodations).

367. *See* DE TOCQUEVILLE, *supra* note 303, at 48 (suggesting religious liberty promotes civic order); SMITH, *supra* note 137, at 101 (discussing possibility that religious freedom encourages peace); *see also supra* notes 281–300 and accompanying text.

368. Theorists holding these views range from John Rawls, who includes freedom of conscience among the six basic goods contained within his theory of justice, to John Finnis, who holds freedom of religion to be "self-evidently good" within his theory of natural law and natural rights. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 85–86, 89–90, 98 n.IV.2, 410 (H.L.A. Hart ed., 1980); *see also* JOHN RAWLS, A THEORY OF JUSTICE 61 (1971) [hereinafter RAWLS, A THEORY OF JUSTICE] (listing freedom of conscious as a basic good). Thus, commentators who argue that Rawls's work improperly excludes religious belief from the public sphere base their criticisms on a faulty premise. *See* Michael V. Hernandez, *Theism, Realism, and Rawls*, 40 SETON HALL L. REV. 905, 905–06 (2010) (suggesting Rawls does not give due weight to religious concerns).

369. *See* Sandel, *Toleration*, *supra* note 363, at 108–09 (analyzing the bracketing of discussions about witches).

370. *See id.*

371. *See generally Hobby Lobby*, 134 S. Ct. 2751.

account in traditional formulations of religious rights by protecting the right to proselytize, teach, form religious associations, and change one's religious affiliation.[372] Not only is there nothing in the facts outlined in *Hobby Lobby* that suggests any of these types of interests are at stake, but the majority never even raises these types of concerns.[373] Furthermore, refusing to allow a commercial corporation to avoid paying for certain types of health insurance does not appear to affect the search for religious truth in any way. Therefore, the majority opinion cannot be based on this particular justification.

Some concerns could arise as a result of the majority's suggestion that the approach advocated by the dissent improperly chooses between differing notions of religious truth.[374] However, the dissent demonstrates how its approach avoids any truth-based distinctions or limitations on religious belief.[375]

F. *Religious Rights Constitute a Prudential Arrangement*

Most commentators, regardless of their legal and philosophical outlook, support a principled approach to religious liberties and therefore adopt one of the theoretical frameworks described above as a means of justifying religious rights.[376] However, some analysts believe that the conflicting jurisprudence in this area of law makes it impossible to generate a single principled approach to religious rights and therefore conclude that a compromise or modus vivendi may be all that can be achieved in the area of religious liberty.[377] Other observers go even farther and claim that religious rights themselves are the cause of many religio-political controversies, since religious rights encourage litigiousness by suggesting that such matters can and should be "decided on the basis of abstract constitutional principles rather than by compromise and accommodation."[378]

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372. *See supra* notes 283–342 and accompanying text.

373. *See Hobby Lobby*, 134 S. Ct. at 2759.

374. *See id.* at 2778.

375. *See id.* at 2798 (Ginsburg, J., dissenting); *see also id.* at 2798–99 (citations omitted) (noting that although a party "may not accept" the state's conclusions about the use of certain data, "for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference").

376. *See* FINNIS, *supra* note 368, at 89–90 (discussing importance of religious liberty in natural rights theory); RAWLS, POLITICAL LIBERALISM, *supra* note 283, at 142–50 (claiming his theory of the overlapping consensus is not a mere *modus vivendi*); *see also* George Klosko, *Rawls's Argument From Political Stability*, 94 COLUM. L. REV. 1882, 1890 (1994) (analyzing Rawls's philosophy).

377. *See* SMITH, *supra* note 137, at 59–61, 100 (noting conflicting jurisprudence in this field); Smith, *Unprincipled*, *supra* note 302, at 501–02 (describing various views regarding religious liberty); *see also* Miriam Galston, *Rawlsian Dualism and the Autonomy of Political Thought*, 94 COLUM. L. REV. 1842, 1858 (1994) (discussing possibility of a *modus vivendi*).

378. *See* Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, *in* LAW AND RELIGION, *supra* note 30, at 175, 189.

One way around this particular problem is to rely on Cass Sunstein's notion of incompletely theorized agreements.[379] Sunstein's proposition is relatively simple and is based on the notion that "people can often agree on constitutional practices, and even on rights, when they cannot agree on constitutional theories."[380] His method allows people to agree on "both abstract principles and particular outcomes without resolving large-scale issues of the right or the good."[381]

While Sunstein's approach reflects a number of pragmatic benefits, extensive use of incompletely theorized agreements could be particularly dangerous in cases involving religious rights, since "[r]eligion is a matter on which people, judges included, tend to have gut feelings that often look inarticulate but nevertheless can powerfully affect their outlooks."[382] Therefore, "[c]ase by case, intuitive judgments about such matters are likely to be unacceptably subjective . . . [and] give too little attention to the position of religious minorities."[383] Furthermore, it is often necessary in this field to at least attempt to identify some overarching principles to avoid problems of arbitrariness.[384]

Hobby Lobby's departure from existing principles and precedent in the area of religious liberty could be considered to constitute a type of incompletely theorized agreement.[385] However, the majority opinion has not generated a universally acceptable constitutional practice or approach to religious rights, as required under Sunstein's proposal.[386] Indeed, the majority's approach appears likely to generate a great deal of future litigation.[387] Therefore, the majority approach cannot be justified as a pragmatic solution to the problem at hand.

G. *Interim Conclusions*

The preceding analysis suggests that the majority decision in *Hobby Lobby* cannot be justified on any of the grounds commonly

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379. *See* Sunstein, *Agreements*, *supra* note 277, at 117 (discussing incompletely theorized agreements).

380. *See id.* (emphasis omitted).

381. *See id.* at 121.

382. *See* Berg, *supra* note 137, at 701.

383. *Id.* (citations omitted).

384. *See* LON L. FULLER, THE MORALITY OF LAW 38–39 (1964) (noting need to avoid arbitrary laws); *see also* Berg, *supra* note 137, at 694, 703 (writing in the context of U.S. constitutional law).

385. *See Hobby Lobby*, 134 S. Ct. at 2787, 2794–95 (Ginsburg, J:, dissenting) (noting the majority decision was an anomaly in several regards).

386. *See* Sunstein, *Agreements*, *supra* note 277, at 117, 121 (discussing incompletely theorized agreements).

387. *See Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting).

used to rationalize religious rights.[388] Although the best argument involves the claim that the majority was attempting to minimize alienation by its grant of a religious accommodation in this case, closer examination suggests a lack of fit between the type of activity at issue in *Hobby Lobby* and the purpose of the alienation rationale.[389] As a result, the majority's decision to provide commercial corporations with this sort of religious accommodation does not appear to be a warranted extension of existing law.

This conclusion is further supported by the fact that the dissenting opinion is relatively closely aligned with several acknowledged principles of religious liberty, particularly those relating to personal autonomy, self-definition, and the search for truth.[390] As the preceding discussion shows, there are times when the rationales supporting religious liberty can be used to deny a request for a religious accommodation.

This section has considered the various rationales used to justify religious liberties in an effort to determine whether the majority opinion in *Hobby Lobby* could be considered a legitimate extension of existing religious rights.[391] The conclusion in this case is that *Hobby Lobby* was unwarranted.[392] However, there are those who might need further persuasion. Therefore, the following section will consider various theoretical justifications supporting the limitation of religious rights. If any of these rationales can be said to apply to the situation in *Hobby Lobby*, then that would provide additional support for the conclusion that the majority in *Hobby Lobby* exceeded the proper bounds of religious liberty.[393]

V. THEORETICAL JUSTIFICATIONS LIMITING RELIGIOUS RIGHTS

Although religious liberty is considered fundamental in many legal systems, a number of theorists have proposed that such rights should be limited rather than expanded. Numerous rationales have been advanced in support of this proposition, including the claims that religious rights violate the principle of neutrality, benefit religious beliefs over other ethical beliefs, allow religious persons to become a law unto themselves, and encourage improper scrutiny of religious beliefs. Each of these perspectives will be considered separately and in light of *Hobby Lobby* to determine whether the

388. *See id.* at 2759–85.
389. *See id.*; *see also supra* notes 311–17 and accompanying text.
390. *See Hobby Lobby*, 134 S. Ct. at 2787–2806 (Ginsburg, J., dissenting).
391. *See id.* at 2759.
392. *But see id.*
393. *See id.* at 2798 (Ginsburg, J., dissenting).

majority should have adopted a more restrained approach to religious rights.[394]

A. *Religious Rights Violate the Principle of Neutrality*

One of the most well-known criticisms of religious rights holds that accommodations for religious believers "violates the principle of neutrality toward religion."[395] Although much of the commentary advocating neutrality arises within the context of U.S. constitutional law, which requires state neutrality toward religion,[396] support for the principle of neutrality can also be justified on other grounds. For example, Michael Sandel favors a neutral approach towards religious practices and belief on an instrumental basis, claiming that neutrality helps foster religion, avoid civil strife, and support individual freedom.[397]

Not everyone agrees that concerns about neutrality should lead to the limitation of religious rights. For example, Michael McConnell believes that criticisms based on neutrality rest on "the false claim that all accommodations are an affirmative inducement or subsidy for religion."[398] He notes, with others, that although religious accommodations may violate formal neutrality (which holds that states should base policy decisions on purely secular grounds), they do not violate substantive neutrality.[399]

Theorists like McConnell elevate substantive neutrality over formal neutrality because the latter only addresses persecution of or overt discrimination against religion and therefore does not provide adequate protection for religious beliefs and practices.[400] At best, formal neutrality requires "mandatory indifference to the impact of

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394. *See generally id.*

395. West, *supra* note 271, at 600; *see also* McConnell, *Accommodation*, *supra* note 109, at 727 (discussing neutrality in religious rights jurisprudence). The principle has also been framed as violating the principle of neutrality between religious and nonreligious persons. *See* Daly, *Irish Constitution*, *supra* note 161, at 34 (discussing Irish case law). Indeed, some commentators see courts as more inclined to protect the freedom to religion than the freedom from religion. *See id.* at 41 (discussing the jurisprudence of the Irish Supreme Court).

396. *See, e.g.*, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 215 (1963); Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (forbidding the state to "pass laws which aid one religion, aid all religions, or prefer one religion over another").

397. *See* Sandel, *Freedom of Conscience*, *supra* note 270, at 84–85.

398. McConnell, *Accommodation*, *supra* note 109, at 727.

399. *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1003 (1989–1990) [hereinafter Laycock, *Neutrality*] (discussing various types of neutrality); McConnell, *Accommodation*, *supra* note 109, at 689, 691–92, 729 (considering neutrality in context of religious rights jurisprudence); Sapir, *supra* note 341, at 588–90 (analyzing neutrality from a theoretical perspective).

400. *See* McConnell, *Accommodation*, *supra* note 109, at 691 (differentiating between types of neutrality).

government action on the religious lives of the people," while at worst it "leaves protection of religious freedom to legislative grace."[401] Substantive neutrality, on the other hand, "minimizes government's influence on the religious choices of citizens,"[402] and acts to "lift burdens on minorities."[403] Therefore, these commentators have concluded that protecting substantive neutrality furthers religious persons' interests more than formal neutrality does.[404]

Religious people also have concerns about neutrality and often perceive a number of existing laws as being "anti-religious."[405] This position is based on the belief that the term "neutrality" masks substantive liberal values, which are alien to these persons' religious beliefs.[406] The claim in this case is that no system of justice is truly neutral: instead, all are based on some underlying value such as fairness or equality.[407]

Michael Sandel would agree with this formulation, for he recognizes that issues such as abortion

> cannot be neutral with respect to . . . moral and religious controversy. [They] must engage rather than avoid the comprehensive moral and religious doctrines at stake. Liberals often resist this engagement because it violates the priority of the right over the good. But the abortion debate shows that this priority cannot be sustained.[408]

In fact, trying to avoid decisions regarding competing conceptions of the good is often pointless, since there are many equally compelling yet competing conceptions of rights.[409]

John Rawls has said that "that the term *neutrality* is unfortunate[, because] some of its connotations are highly misleading,

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401. *Id.* at 693; *see also* Laycock, *Neutrality*, *supra* note 399, at 999–1011 (discussing types of neutrality).

402. Berg, *supra* note 137, at 732.

403. Abner S. Greene, Kiryas Joel *and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 59 (1996).

404. *See* Berg, *supra* note 137, at 732 (discussing effect of religious neutrality); Greene, *supra* note 403, at 59 (distinguishing between types of neutrality); McConnell, *Accommodation*, *supra* note 109, at 691 (analyzing ramifications of different approaches to neutrality).

405. *See* RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 25 (1984).

406. *See* Michael W. McConnell, *"God is Dead and We Have Killed Him!": Freedom of Religion in the Post-Modern Age*, 1993 BYU L. REV. 163, 163 (1993) (parsing concept of neutrality); Steven D. Smith, *The Restoration of Tolerance*, 78 CALIF. L. REV. 305, 313–29 (1990) (analyzing neutrality in religious realm).

407. *See, e.g.*, RAWLS, A THEORY OF JUSTICE, *supra* note 368, at 11 (advocating "justice as fairness," where equality acts as the dominant value).

408. Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1778 (1994).

409. *See* Smith, *supra* note 406, at 315–16 (discussing various approaches to religious rights); *see also* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 203–04 (1998) (noting impossibility of "bracketing" justice).

[while] others suggest altogether impracticable principles."[410] Thus, the concept of neutrality can be defined as reflecting everything from an intentional indifference to or intentional non-interference with religion on the one hand to intentional egalitarianism or de facto establishmentarianism on the other.[411]

This debate suggests that "neutrality" is an inherently empty concept and cannot be used to limit religious rights. All choices violate strict neutrality in some respect, just as all theories of religious freedom adopt some perspective (be it religious or secular) at the expense of other perspectives.[412] The only possible conclusion is that while it is possible to minimize the effect a policy has on other viewpoints, it is impossible to eliminate that effect altogether.[413]

Since neutrality cannot be used to limit religious rights, it cannot be used to justify either the majority or the dissent in *Hobby Lobby*.[414] Furthermore, none of the justices appear to have raised the issue, so it does not appear to have been considered as a possible justification for any of the opinions in the case.[415]

B. *Religious Rights Benefit Religious Beliefs Over Other Ethical Beliefs*

Another major reason for limiting religious rights is based on the idea that states should not privilege religion over other ethical or moral codes because religious beliefs are not the only beliefs that are (1) strongly held and (2) integral to a person's identity.[416] For example, Christopher Eisgruber and Lawrence Sager would give equal regard to all "deep concerns," whether those concerns are religious in nature or not.[417]

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410. RAWLS, POLITICAL LIBERALISM, *supra* note 283, at 1996; *see also* L. Scott Smith, *"Religion-Neutral" Jurisprudence: An Examination of its Meanings and End*, 13 WM. & MARY BILL RTS. J. 841, 842 (2005) [hereinafter Smith, *Religion-Neutral*] (analyzing concept of religious neutrality).

411. *See* Smith, *Religion-Neutral*, *supra* note 410, at 846–95 (discussing various types of religious neutrality).

412. *See* SMITH, *supra* note 137, at 63, 67–68 (concluding the concept of neutrality does not exist).

413. *See* Laycock, *Neutrality*, *supra* note 399, at 1004–07 (advocating the use of a balancing test to weigh the relative impact of different policies).

414. *See generally Hobby Lobby*, 134 S. Ct. 2751.

415. *See id.* The dissent did discuss the principle of nondiscrimination, although that concept is not precisely the same as neutrality. *See id.* at 2805 (Ginsburg, J., dissenting); *see also id.* at 2786 (Kennedy, J., concurring).

416. *See* Eisgruber & Sager, *supra* note 304, at 1253 n.22, 1255 (discussing rationales for religious liberty); William P. Marshall, *In Defence of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 320–21 (1991) [hereinafter Marshall, *Defence*] (discussing various types of religious, moral, and ethical codes); McConnell, *Accommodation*, *supra* note 109, at 727 (considering justifications for religious accommodations).

417. Eisgruber & Sager, *supra* note 304, at 1283.

The question therefore arises as to why it is appropriate to prefer one type of belief (religious belief) over other belief systems.[418] In considering this issue, critics focus not only on theoretical issues but also on the practical difficulties associated with distinguishing a religious claim from a merely ethical claim.[419] Another potential problem involves the likelihood that focusing on religion *per se* primarily benefits organized faiths while ignoring more individualized belief systems.[420]

One of the standard explanations for benefitting religious beliefs over other ethical beliefs is that violation of religious belief and practices can result in increased violence.[421] This conclusion is also consistent with the U.S. Supreme Court decision in *Cantwell v. Connecticut*, which held that

> [t]he essential characteristic of . . . [religious] liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish.[422]

Another common claim reason for benefitting religious beliefs over other types of beliefs is that violations of religious beliefs can result in long-lasting spiritual harm.[423] This phenomenon suggests that choices between different ethical beliefs can be legitimately made at the political level, whereas the inability and impropriety of choosing between different versions of religious truth require states to give religious beliefs special protection.[424]

Inquiries regarding the potential for enduring harm to a person's spiritual status are of course difficult to carry out, both practically and philosophically, since they include both a subjective element (i.e., what do these particular plaintiffs believe and how strongly do they

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418. *See* West, *supra* note 271, at 598–99 (weighing different belief systems).

419. *See* Lupu, *Where Rights Begin*, *supra* note 90, at 957–60 (comparing religious and other types of beliefs).

420. *See* Daly, *Irish Constitution*, *supra* note 161, at 31 (considering organized religion versus individualized belief systems).

421. *See supra* notes 281–300 and accompanying text. Concerns about religious violence have been discussed previously and have been found inapplicable in the context of the *Hobby Lobby* dispute. *See generally Hobby Lobby*, 134 S. Ct. 2751.

422. *See* Cantwell, *supra* note 209, at 310.

423. *See supra* notes 357–58 and accompanying text.

424. *See supra* notes 357–59 and accompanying text.

believe it) as well as an objective element (i.e., how central is this belief or practice to the tenets of the faith tradition in question).[425]

In *Hobby Lobby*, the majority took the view that some sort of negative effect on enduring spiritual matters existed, based on the facial allegations of the shareholders of the plaintiff corporations.[426] The dissent, on the other hand, believed that the use of the corporate form as well as the indirect and speculative nature of the decision to use the contraceptives in question made the legal and, perhaps, religious effect too attenuated to merit the relief requested.[427]

Despite these brief allusions to the nature of the religious act, both the majority and the dissent sought to avoid any direct inquiries into the impact of this particular religious claim on a believer's spiritual status.[428] This type of deferential approach appears highly appropriate in situations where the activity in question constitutes a recognized religious practice.[429] However, those who have expressed concern about elevating religious beliefs over other sorts of ethical beliefs may find blanket deference problematic in situations where the religious act falls outside the standard list of religious practices, since those activities may seem more akin to the kinds of ethical activities that are not given special protection under the law than to the kinds of religious activities that are granted legal accommodations.

The preceding suggests that both the majority and the dissent in *Hobby Lobby* recognized the practical and jurisprudential difficulties associated with distinguishing between ethical and moral beliefs, although both opinions also recognized that the United States had long ago made a policy decision to give religious beliefs and practices special status in the law.[430] As a result, neither the majority nor the dissent can be said to be better than the other when it comes to this

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425. *See* Lupu & Tuttle, *supra* note 239, at 1917 (considering eternal effects of religious acts); Priscilla J. Smith, *Who Decides Conscience? RFRA'S Catch-22*, 22 J.L. & POL'Y 727, 728–29 (2014) [hererinafter Smith, *Catch-22*] (discussing types of religious harms); *see also* Emp't Div. v. Smith, 494 U.S. 872, 885, 890 (1990), *superseded by statute, as recognized in Hobby Lobby*, 134 S. Ct. 2751. The majority held that RFRA, as amended by the RLUIPA, does not include a centrality test, although commentators have suggested that centrality is a necessary part of the analysis. *See* 42 U.S.C. §§ 2000bb–1–4; 42 U.S.C. §§ 2000cc–1–5; *Hobby Lobby*, 134 S. Ct. at 2762, 2778; *see also* Smith, *Catch-22*, *supra*, at 728–29 (discussing centrality under RFRA); Steven C. Seeger, Note, *Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act*, 94 MICH. L. REV. 1472, 1474–75 (1997) (considering centrality concerns under RFRA).

426. *See* Hobby Lobby, 134 S. Ct. at 2762.

427. *See id.* at 2799 (Ginsburg, J., dissenting).

428. *See id.* at 2805 (Ginsburg, J., dissenting); Smith, *Catch-22*, *supra* note 425, at 728–29.

429. *See supra* notes 238–42 and accompanying text.

430. *See Hobby Lobby*, 134 S. Ct. at 2751.

particular issue. Therefore, it is necessary to look elsewhere to evaluate the propriety of the decision in *Hobby Lobby*.[431]

C. *Religious Rights Allow Religious Persons to Become a Law Unto Themselves*

The third theoretical objection to religious rights holds that granting religious accommodations can allow the faithful to become a law unto themselves.[432] Numerous commentators, including Christopher Eisgruber and Lawrence Sager, have noted that if religious beliefs and practices are given full sway, "the faithful would be licensed to do as their faith require[d], with little regard for the consequences as seen from the vantage of secular society."[433] Chaos would ensue, since "the demands of one faith would ultimately extend so far as to come into sharp conflict with the requirements of other religions, and some mechanism, presumably secular, would have to arbitrate."[434] As a result, some limits are necessary.[435]

The difference in attitude between those who support religious rights and those who oppose them may stem from a difference in perspective. For example, persons who seek to limit the availability or scope of religious liberties typically view religious claims as attempting to "expand [religious persons'] sphere of influence or power."[436] Persons who provide broad support for religious liberties characterize religious claims as defensive in nature and view religiously devout persons as attempting to staunch what is seen "as a disastrous erosion of their status and control"[437] by resisting "laws that restrict their own religious observance."[438] This dichotomy appears to exist in *Hobby Lobby*, with the majority adopting the latter perspective and the dissent embracing the former.[439]

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431. *See id.*

432. *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 885 (1990), *superseded by statute, as recognized in Hobby Lobby*, 134 S. Ct. 2751; Reynolds v. United States, 98 U.S. 145, 162–63 (1878); Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589, 593 (2000) (considering religious harms to others).

433. Eisgruber & Sager, *supra* note 304, at 1257.

434. *Id.*

435. *See id.* at 1258–60 (discussing the need to limit religious rights).

436. Ehud Sprinzak, *Three Models of Religious Violence: The Case of Jewish Fundamentalism in Israel*, *in* FUNDAMENTALISMS AND THE STATE: REMAKING POLITIES, ECONOMIES, AND MILITANCE, *supra* note 287, at 462, 466; *see also* John H. Garvey, *Fundamentalism and American Law*, *in* FUNDAMENTALISMS AND THE STATE: REMAKING POLITIES, ECONOMIES, AND MILITANCE, *supra* note 287, at 28, 41 [hereinafter Garvey, *Fundamentalism*] (discussing limits on religious liberty).

437. Sprinzak, *supra* note 436, at 466.

438. Garvey, *Fundamentalism*, *supra* note 436, at 39, 41; *see also* MATTHEW C. MOEN, THE CHRISTIAN RIGHT AND CONGRESS 90 (1989) (discussing scope of contemporary religious claims).

439. *See generally Hobby Lobby*, 134 S. Ct. 2751.

Expansive claims of religious liberty are often seen as problematic to the extent such assertions blur the distinction between public and private concerns and infringe on non-believers' religious and other rights.[440] However, defensive claims of religious liberty are typically seen as consistent with various religiously oriented goals such as self-definition and personal autonomy.[441] John Rawls, who supports liberty of conscience but defines it restrictively, classifies demands for religious rights as self-interested attempts to achieve special governmental favor for persons of one particular religious "persuasion."[442] However, to the extent that a religious accommodation for one faith can and should be applied equally to other faiths, Rawls's objection is not apt.[443]

As a result, opponents to religious rights often perceive religious people as seeking inappropriate and/or unnecessary benefits that are denied to others. Part of this hostility to religious rights may stem from a belief that religion does not merit special treatment, particularly in comparison to other ethical beliefs.[444] Alternatively, there may be concerns that the request for religious accommodation is fabricated simply as a means of avoiding a law that is politically unpopular for other reasons.

This latter possibility certainly seems relevant in *Hobby Lobby*, given the highly politicized debate over the PPACA.[445] The situation is further exacerbated in this particular case because the activities in question do not fall into the recognized list of standard religious practices and because the religious injury is extremely attenuated, both structurally (because of the use of the corporate form) and factually (because of the intervening decisions of the employee and her doctor).[446] Concerns about religious persons becoming a law unto themselves are also evident in the dissent's discussion about the

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440. *See* MOEN, *supra* note 438, at 90 (discussing problems with contemporary religious claims); Garvey, *Fundamentalism*, *supra* note 436, at 41 (analyzing nature of recent demands for religious accommodation).

441. *See* MOEN, *supra* note 438, at 90 (discussing problems with contemporary religious claims); Garvey, *Fundamentalism*, *supra* note 436, at 41 (analyzing nature of recent demands for religious accommodation).

442. RAWLS, POLITICAL LIBERALISM, *supra* note 283, at 24. In fact, accommodation may be more accurately described as a means of safeguarding religious rituals and distinctive religious practices that would be protected as a matter of course in a society where the believers' faith constituted the majority, rather than minority, religious tradition.

443. *See id.* (citing problems with religious accommodations).

444. *See supra* notes 416–31 and accompanying text.

445. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 42 U.S.C.) (2010); *Hobby Lobby*, 134 S. Ct. at 2759; Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1418 (2013) (discussing the "political maelstrom" regarding the PPACA).

446. *See Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting).

number of future cases and the need to establish and retain a comprehensive national policy regarding health insurance.[447]

Although the majority attempts to assuage concerns about the breadth of its decision by claiming that its holding is limited to the facts of the case, the dissent addresses issues relating to every religious person's becoming a law unto his or herself much more comprehensively and realistically than the majority.[448] In fact, Justice Ginsburg appeared to be somewhat prophetic, given that the Court relied on *Hobby Lobby* only days after it was issued to grant an extremely rare emergency injunction to a liberal arts college.[449] As a result of these factors, the dissent in *Hobby Lobby* appears to have the better argument on this particular issue.[450] Thus, it could be said that the majority has gone too far in granting this particular accommodation.[451]

D. *Religious Rights Result in Improper Scrutiny of Religious Beliefs*

Another factor used to justify the limitation of religious rights involves fears about the state becoming improperly involved in the scrutiny of religious beliefs. This impropriety may occur in several ways.[452]

First, courts might have to evaluate the sincerity of a religious believer's request for accommodation in order to weed out unscrupulous people who feign religious belief to gain the benefits granted to religious believers.[453] Michael McConnell rebuts that concern by noting that, "[b]ecause accommodations are designed to alleviate a burden, not to bestow a benefit, the incentives to feign religious belief are reduced – and it is precisely the cases in which the incentives are strong that the government is most likely to be able to

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447. *See id.* at 2802–05 (Ginsburg, J., dissenting).

448. *See id.* at 2782–83; *id.* at 2802–06 (Ginsburg, J., dissenting).

449. *See id.* at 2751; *see also* Wheaton College v. Burwell, 134 S. Ct. 2806, 2807 (2014).

450. *See Hobby Lobby*, 134 S. Ct. at 2787–806 (Ginsburg, J., dissenting).

451. Interestingly, several members of the majority have cited this precise concern and the need to trust to the political process in other cases where they have ruled against a religious accommodation. *See* Emp't Div. v. Smith, 494 U.S. 872 (opinion written by Justice Scalia and joined by Justice Kennedy, among others who are no longer on the Court).

452. *See* Marshall, *Defence*, *supra* note 416, at 310–11 (discussing improper scrutiny of religious beliefs); McConnell, *Accommodation*, *supra* note 109, at 735 (noting need to scrutinize religious beliefs in accommodation cases).

453. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 176 (1965); EVANS, *supra* note 201, at 58 (discussing sincerity in religious rights analyses); West, *supra* note 271, at 603 (considering sincerity issues). Some commentators view sincerity as an appropriate factor in a test for religious rights. *See* Lupu, *Where Rights Begin*, *supra* note 90, at 953–57 (supporting sincerity requirements).

establish a compelling interest in not having to make accommodations."[454]

Second, courts and commentators worry that religious accommodations will require the state to inquire into the content of a person's religious beliefs.[455] Not only would such inquiries foster increased state involvement in matters of conscience (an undesired end, to the extent that one believes that separation of church and state protects both religion and the state),[456] they would also force courts and legislatures to decide what constituted a religious claim under different faith traditions. For example, Ira Lupu believes that if the state takes the view that "government-created burdens on more central aspects of a religion constitute greater intrusions, and therefore require a higher degree of justification, than burdens on more peripheral features," then the court will be faced with the "spectre of religious experts giving conflicting testimony about the significance of a religious practice, with the state's decisionmaker authoritatively choosing among them."[457]

Although most states have managed to avoid these problems through restricted definitions of religion, requiring the state to decide what a proper religious accommodation is, based on an independent evaluation of the content of religious beliefs, carries a high potential for discrimination, particularly in cases involving new or disfavored religions.[458] Furthermore, some people may be in favor of a particular religious accommodation when it benefits their belief system but not when the same protection is extended to religious traditions that are viewed with suspicion.[459]

None of the justices in *Hobby Lobby* looked into the sincerity or the content of beliefs held by the shareholders of the plaintiff

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454. *See* McConnell, *Accommodation*, *supra* note 109, at 735. Opinions may vary as to whether a particular accommodation provides a benefit or lifts a burden. *See supra* notes 436–39 and accompanying text.

455. *See* Lupu, *Where Rights Begin*, *supra* note 90, at 958–59 (noting need for content-based inquiries).

456. *See, e.g.*, JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 137, *passim* (discussing James Madison's views in particular); Michael W. McConnell, *Religion and Its Relation to Limited Government*, HARV. J.L. & PUB. POL'Y 943, 952 (2010) (discussing connections between religion and government). James Madison wrote that separation of church and state led to the protection of religion as much as of the state. *See* Ralph L. Ketcham, *James Madison and Religion – A New Hypothesis*, *in* JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 137, at 175, 189 (discussing James Madison); van der Vyver, *supra* note 133, at xxv (noting views of James Madison and Thomas Jefferson).

457. *See* Lupu, *Where Rights Begin*, *supra* note 90, at 958–59; *see also* Clark, *supra* note 273, at 361–62 (discussing problems of competing religious interpretations).

458. *See* Bradney, *Faced by Faith*, *supra* note 102, at 92–103 (discussing court scrutiny of minority religious practices); *see also supra* notes 30–115 and accompanying text.

459. Thus, some people may favor granting a religious objection to a corporate entity that is said to hold Christian beliefs while wishing to deny the same accommodation to a corporation espousing Islamic beliefs.

corporations, so this issue did not arise in this particular dispute.[460] However, it would appear that content-based inquiries become increasingly tempting the farther one moves away from conventional religious practices (i.e., teaching, worship, organization, etc.). This phenomenon is particularly true in legal systems that give precedence to religious motivation in the religious rights determination, since it may be considered necessary to evaluate the content of the religion in question in order to distinguish between religious motivations and political or ethical motivations.[461]

Although the majority in *Hobby Lobby* accused the dissent of veering dangerously close to this sort of suspect inquiry, the majority also appears to run the risk of impropriety as a result of its emphasis on the importance of religious motivation to the near exclusion of any other factor.[462] Although all of the justices agreed that it is both unseemly and inappropriate for a court to evaluate the content of religious beliefs and practices, the dissent appears to have taken the better approach by balancing religious motivation with the effect of the accommodation on other persons or society.[463]

VI. CONCLUSION

In the months preceding and following its hearing at the U.S. Supreme Court, *Burwell v. Hobby Lobby Stores, Inc.* has generated a great deal of controversy in both the legal and lay communities.[464] Not only does the dispute involve a number of novel questions that are extremely interesting to lawyers qua lawyers, it also addresses various concerns that affect individuals and society at a deep and fundamental level.[465] As a result, it is unsurprising that the case generated a sharp division among the members of the Supreme Court.

The difficulty with cases such as these is that there is often insufficient common ground to allow objective analysis of the competing viewpoints. However, disputes involving religious liberties may in some ways be more susceptible to independent analysis simply because these issues have been discussed and debated for

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460. *See Hobby Lobby*, 134 S. Ct. at 2775; *id.* at 2805–06 (Ginsburg, J., dissenting).

461. *See supra* notes 256–57 and accompanying text.

462. *See Hobby Lobby*, 134 S. Ct. at 2778; *see also id.* at 2798 (Ginsburg, J., dissenting).

463. *See id.* at 2778; *see also id.* at 2798 (Ginsburg, J., dissenting). *But see* Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 502–03, 538–40 (2005) (arguing that the type of inquiries courts make are largely appropriate).

464. *See generally Hobby Lobby*, 134 S. Ct. 2751.

465. *See supra* notes 5–6 and accompanying text.

centuries. As a result, there is a great deal of historical, theoretical, and comparative data concerning the accommodation of religious beliefs and practices in civil society.

While many of the theories relating to religious rights can at times appear contradictory, several are also mutually reinforcing. Thus, issues relating to alienation and the furtherance of personal autonomy, self-definition, and the search for religious truth often relate back to problems associated with keeping the civil order. However, observers should not conclude that religious liberty can be reduced to a single concern about civil order, since such an approach would rob the debate about religious rights of its depth and complexity. Instead, these so-called subordinate principles should be viewed as providing independent support for religious liberty as well as describing more particular means of furthering the ultimate goal of preserving the peace.

This Article has considered the propriety of *Hobby Lobby* from a variety of perspectives so as to determine whether the majority opinion can be considered an appropriate exercise of judicial power. Parts II and II of this Article focused on the history of religious rights and identified the various international and comparative standards that apply in this area of law. That analysis demonstrated that the grant of a religious accommodation to a commercial corporation seeking to avoid the provision of health insurance coverage for certain types of contraception exceeds the bounds of religious liberty, as recognized historically and under national and international law. As a result, the decision in *Hobby Lobby* can be considered presumptively improper.[466]

However, this Article also recognized that there are times when the existing law can be legitimately extended to cover novel situations. In cases where the facts outpace the law, it is necessary to return to first principles and consider the theoretical justifications for particular laws and policies so as to determine whether the decision in question is consistent with the purposes and goals of religious liberty. Therefore, this Article continued its analysis of *Hobby Lobby* by considering these types of theoretical issues in Parts IV and V to see whether the majority decision could be justified by reference to one of these rationales.[467] Although this inquiry was difficult, given the complexity of the jurisprudence in this field, ultimately this Article concluded that the majority decision in *Hobby Lobby* could not be justified on theoretical grounds.[468]

Religious liberty is an extremely complicated and thought-provoking area of law. Lines are finely drawn, and debate often ensues about whether a court or legislature acted properly. Numerous

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466. *See Hobby Lobby*, 134 S. Ct. at 2759.
467. *See supra* Parts IV–V.
468. *See supra* Part IV.

commentators will doubtless debate the propriety of *Hobby Lobby* from a statutory, constitutional, and political perspective in the coming years.[469] Other issues may also be discussed, such as the extent to which the Supreme Court was influenced by the fact that the religious claim was based on a particular interpretation of Christianity, which is typically considered to be the majority religion in the United States.[470] There are numerous examples where a minority religion has not fared as well at the hands of U.S. courts and legislatures,[471] and it is unclear whether the majority in *Hobby Lobby* would have adopted the same approach had the commercial corporation in question had espoused Islamic, Native American, or Santerian values.[472]

As this Article has shown, the need to "distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other" did not end with Locke.[473] Instead, courts and legislatures must constantly reassess the delicate balance between the needs of religious individuals and the needs of contemporary society. Sometimes, as in *Hobby Lobby*, the request for religious accommodation exceeds the scope of existing law and theory.[474] However, such cases are nevertheless vital to the proper functioning of our legal system, since they reinforce the need to understand the role that religious liberty plays in the United States as a matter of history and theory.

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469. *See generally Hobby Lobby*, 134 S. Ct. 2751.

470. *See id.* at 2765–66.

471. *See supra* note 18 and accompanying text.

472. *See generally* Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993); Emp't Div. v. Smith, 494 U.S. 872 (1990), *superseded by statute, as recognized in Hobby Lobby*, 134 S. Ct. at 2751; *see also* NUSSBAUM, INTOLERANCE, *supra* note 118, at 104–05 (discussing contemporary views of minority faiths in the United States); *supra* notes 119, 180–86 and accompanying text (regarding anti-Shari'a legislation and regarding Islamic dress in court). A number of minority faiths combine commercial and religious elements in a way that may seem unusual to those who are more familiar with the Christian faith. *See* Michael A. Helfand, *Fighting for the Debtor's Soul: Regulating Religious Commercial Conduct*, 19 GEO. MASON L. REV. 157, 157–59 (2011) (discussing Jewish and Islamic practices); Simon Hooper, *UK Aims to Become Centre for Islamic Finance*, AL JAZEERA (Nov. 1, 2013), http://www.aljazeera.com/indepth/features/2013/10/uk-aims-become-centre-islamic-finance-201310319840639385.html [http://perma.cc/S93U-SUZD] (archived Feb. 25, 2015) (discussing Islamic practices). Interestingly, several members of the majority highlighted the need to trust to the political process in another case involving a request from a religious minority for a religious accommodation, using language that could have applied with equal vigor to the dispute in *Hobby Lobby*. *See* Smith, *supra*, at 809; *see also Hobby Lobby*, 134 S. Ct. at 2759.

473. LOCKE, *supra* note 1, at 18.

474. *See generally Hobby Lobby*, 134 S. Ct. 2751.

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