LIBERAL JEWS AND RELIGIOUS LIBERTY

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The Supreme Court's new religious liberty jurisprudence has dramatically expanded the circumstances in which religious objectors can claim exemption from general legislative enactments. Thus far, most of the claimants who've taken advantage of these doctrinal innovations have been conservative Christians seeking to avoid liberal policy initiatives (on matters like COVID-19 restrictions, vaccines, or LGBTQ inclusion). This emerging jurisprudence, as well as the rhetoric from legal and political elites regarding religious liberty, has generally acceded to the conflation of religiosity with conservatism. Liberal Jews challenge this conflation, as they offer an example of a religious community whose spiritual commitments tend to align with progressive rather than conservative politics.

Nominally, the new religious liberty doctrine should also provide protections to more liberal Jewish denominations that may seek relief from conservative statutory enactments, such as restrictive abortion laws following Dobbs. Assuming that this outcome is undesirable for conservative legal elites, the question for them becomes how to justify locking liberal Jews out while ensuring conservative Christians remain protected. To this end, jurists may find tempting a modern version of Christian supersessionism—the claimed entitlement of Christians to authoritatively declare who and what truly counts as Jewish. An ascendent form of antisemitism, increasingly mainstream in conservative political circles, insists that authentic Judaism is only that which is compatible with conservative Christian commitments, and so seeks to delegitimize liberal Jews (which is to say, most Jews) as not counting as actual Jews. Where this delegitimization is successful, seemingly blatant exclusion, marginalization, or hatred of (most) Jews can be removed from the ambit of religious liberty or antisemitism, since the targets are not recognized as religious Jews in the first place, and so cannot claim access to the expansive protections given to religious practitioners.

 The author is grateful to Rachel Bayefsky, Jim Oleske, Elizabeth Reiner Platt, Laura Portuondo, Micah Schwartzman, Joseph Singer, and participants at the second annual Law vs. Antisemitism Conference, the Lewis & Clark Law School faculty colloquium, the University of Chicago Legal Scholarship workshop, the Loyola University Constitutional Law Colloquium, and the 2023 Law and Religion Roundtable at the University of Virginia for their helpful feedback and encouragement.

Introduction

The past few years have seen an emboldened Supreme Court effectuate a sea change across a host of constitutional law doctrines. Among the most prominent shifts has occurred in the Court's Free Exercise Clause[1] and Religious Freedom Restoration Act (RFRA)[2] jurisprudence, where the Court has been aggressive in granting mandatory accommodations for religious objectors who claim that various state and federal laws (particularly those centered on stemming the COVID-19 pandemic, but also laws seeking to protect LGBTQ equality and reproductive rights) violate tenets of their faith. The same period has also witnessed a striking rise in public antisemitism[3] and anti-Jewish exclusion.[4] The Anti-Defamation League (ADL) reported that the rate

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[1] U.S. Const. amend. I.

[2] 42 U.S.C. § 2000bb.

[3] This article relies on the "Nexus" definition of antisemitism, which defines antisemitism as "includ[ing] negative beliefs and feelings about Jews, hostile behavior directed against Jews (because they are Jews), and conditions that discriminate against Jews and significantly impede their ability to participate as equals in political, religious, cultural, economic, or social life." The Nexus Document: Understanding Antisemitism at Its Nexus with Israel and Zionism, The Nexus Task Force 1 (2021), https://israelandantisemitism.com/wp-content/uploads/2023/05/The-Nexus-Document-5-27-23.pdf [https://perma.cc/9FJS-VR2L]. An important feature of the Nexus definition is that, rather than being limited solely to cases of actions motivated by express discriminatory intent or malign attitudes towards Jews, it encompasses the broader set of *social conditions* which significantly obstruct Jewish equal participation in the major spheres of social life. In this, the Article is aligned with the broader scholarly critique on discriminatory intent requirements as the *sine qua non* of "discrimination." *Compare* Washington v. Davis, 426 U.S. 229, 246–48 (1976) (concluding that racial discrimination exists only when there is a "discriminatory purpose" behind a given enactment), *with* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. Chi. L. Rev. 935, 938 (1989) (arguing that the discriminatory intent requirement fails to fully encompass the concept of discrimination).

[4] *See, e.g.*, Lisa Hagen, *Antisemitism Is on the Rise, and It's Not Just About Ye*, NPR (Dec. 1, 2022), https://www.npr.org/2022/11/30/1139971241/anti-semitism-is-on-the-rise-and-not-just-among-high-profile-figures [https://perma.cc/CS7B-DS87]; Marin Cogan, *Antisemitism Isn't New. So Why Did 2022 Feel Different?*, Vox (Dec. 22, 2022), https://www.vox.com/culture/23519717/antisemitism-hatred-jews-violence [https://perma.cc/D9WK-WCF6].

of antisemitic incidents in the United States—including assaults, harassment, and vandalism—reached an all-time high in 2021 and continued to rise in 2022.[5] But raw numbers are only part of the story. There is also the larger sense that antisemitism is creeping into the mainstream of American politics—no longer the province of fringe cranks, but rather present amongst prominent elected officials and significant cultural figures. Political and legal protections that American Jews long have taken for granted now no longer feel quite as secure.[6] From Elon Musk[7] to Kanye West[8] to Donald Trump,[9] antisemitism has seemingly never since the McCarthy Era been closer to levers of American social and political power.[10]

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[5] Press Release, Anti-Defamation League, ADL Audit Finds Antisemitic Incidents in United States Reached All-Time High in 2021 (Apr. 25, 2022), https://www.adl.org/resources/press-release/adl-audit-finds-antisemitic-incidents-united-states-reached-all-time-high [https://perma.cc/FY4Y-VQPL]; ANTI-DEFAMATION LEAGUE, AUDIT OF ANTISEMITIC INCIDENTS 2022, at 5 (Mar. 22, 2023), https://www.adl.org/sites/default/files/pdfs/2023-03/ADL-2022-Audit-of-Antisemitic-Incidents-2021.pdf [https://perma.cc/M37M-MTDC]. The ADL began tracking this data in 1979. *Id.*

[6] *See* Michelle Boorstein & Isaac Arnsdorf, *Overt U.S. Antisemitism Returns with Trump, Kanye West: 'Something is Different*,' WASH. POST (Oct. 27, 2022), https://www.washingtonpost.com/religion/2022/10/27/antisemitism-kanye-trump-adidas-jews [https://perma.cc/N7E5-3AH7] (quoting one Jewish commentator as saying it is "like we're coming back from a 50-year vacation"); Isaac Weiner, *Responding to the* Dobbs *Decision: American Jews & Religious Freedom*, SOURCES, Spring 2023, https://www.sourcesjournal.org/articles/responding-to-the-dobbs-decision-american-jews-religious-freedom [https://perma.cc/V2SU-VMCR] (suggesting that recent judicial trends should prompt a larger reassessment in the Jewish community regarding whether legal protections for religious liberty will actually provide protection to Jews).

[7] *See* Matthew Medsger, *Elon Musk Goes Full Pepe, Tweeting Frog Image ADL Says Is Used by Alt Right*, BOS. HERALD (Nov. 28, 2022), https://www.bostonherald.com/2022/11/28/elon-musk-goes-full-pepe-tweeting-frog-image-adl-says-is-used-by-alt-right [https://perma.cc/DJ4L-J4FJ] (describing Elon Musk's use of the Pepe the Frog meme, identified by the Anti-Defamation League as a symbol appropriated by white supremacist and antisemitic groups). Since Musk took over Twitter, the social media app has seen a surge in new antisemitic and bigoted content as prior bans for hate speech were reversed. *See* Ben Samuels, *Report: Antisemitic Posts Spike on Twitter Since Elon Musk Takeover*, HAARETZ (Dec. 2, 2022), https://www.haaretz.com/us-news/2022-12-02/ty-article/.premium/antisemitic-posts-spike-on-twitter-since-musk-takeover/00000184-d34f-dc50-adc4-ffefed220000 [https://perma.cc/MKZ7-EK3K].

[8] *See* Aja Romano, *Kanye West's Antisemitic Spiral, Explained*, VOX (Dec. 2, 2022), https://www.vox.com/culture/23400851/kanye-west-antisemitism-hitler-praise [https://perma.cc/5EQL-EHPR].

[9] For Trump's long history of antisemitic remarks and actions, see Aaron Blake, *Trump's Long History of Trafficking in Antisemitic Tropes*, WASH. POST (Oct. 17, 2022), https://www.washingtonpost.com/politics/2022/10/17/trump-history-antisemitic-tropes [https://perma.cc/9XWE-JC4W] (chronicling President Trump's use of antisemitic tropes and his criticism of American Jews for being insufficiently supportive).

[10] *See* Michelle Goldberg, *Antisemitism's March Into the Mainstream*, N.Y. TIMES (Nov. 28, 2022), https://www.nytimes.com/2022/11/28/opinion/antisemitism-trump-nick-fuentes.html [https://perma.cc/68E4-XW9L] (arguing that while, for many years,

At first blush, the first trend may appear to be a welcome bulwark against the second.[11] Increased precarity of Jews' social and political standing is matched by robust new protections given to religious communities under the new free exercise regime.[12] The new free exercise framework, inaugurated by the Court in cases like *Burwell v. Hobby Lobby*,[13] *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[14] *Tandon v. Newsom*,[15] and *Fulton v. City of Philadelphia*[16] is, in concept, open to religious claimants of all denominations. Consequently, if the rise in antisemitic sentiment manifests in legal intrusions that burden or degrade Jewish religious faith or practice, the new free exercise protections will be available as a welcome shield.

Yet the assumption that the new free exercise regime will protect Jews remains largely untested.[17] Most (albeit not all) of the prominent claims that have fed into this new free exercise jurisprudence thus far have been distinct in that they (a) have been brought by Christians and (b) are conservative-coded (that is, they challenge or seek exemption

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antisemites "have lacked status in America," today "anti-Jewish bigotry, or at least tacit approval of anti-Jewish bigotry, is coming from people with serious power: the leader of a major political party, a famous pop star, and the world's richest man").

11 *See generally* Asma T. Uddin, *Religious Liberty Interest Convergence*, 64 Wm. & Mary L. Rev. 83 (2022) (arguing that the enhanced religious liberty protections promulgated by the Supreme Court will redound to the benefit of minority religious groups under conditions of heightened political and racial polarization).

12 By "new free exercise regime," I mean to group together developments both in First Amendment Free Exercise Clause doctrine as well as in related statutes, like RFRA.

13 573 U.S. 682, 694–95 (2014) (holding that a private corporation owned by Christians was entitled to an exemption from the Affordable Care Act's mandate requiring coverage of contraceptive health care).

14 138 S. Ct. 1719, 1736–37 (2017) (finding religious animus motivated the refusal of Colorado's civil rights commission to allow a Christian baker to withhold service to a gay couple seeking a wedding cake for their marriage reception).

15 141 S. Ct. 1294, 1297 (2021) (holding that California's rules limiting "gatherings" during the COVID-19 pandemic discriminated against religious services).

16 141 S. Ct. 1868, 1882 (2021) (holding that Philadelphia's refusal to exempt a Catholic adoption agency from rules prohibiting anti-gay discrimination violated the Free Exercise Clause because the city retained the theoretical authority to grant exemptions at its discretion).

17 Historically, Jews have tended to prefer protecting religious liberty via strict Church-State separation as opposed to affirmative state efforts to promote Jewish or "Judeo-Christian" values and practices. *See, e.g.*, Alan Mittleman, *Jews and Separationism*, 8 J.L. & Religion 291, 291 (1990) (finding that eighty-three percent of Rabbis preferred enacting a "high wall of separation between church and state" to government taking "special steps to protect the Judeo-Christian heritage"). The Jewish community is still determining how best to adjust to the Supreme Court's increasingly emphatic rejection of this approach, as seen in cases like *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022) and *Carson v. Makin*, 142 S. Ct. 1987 (2022). Weiner, *supra* note 6 (describing the uncertainty in the Jewish community regarding how to proceed "within this changed legal landscape").

from rules that are generally associated with political liberalism).[18] The judiciary has not had much occasion to demonstrate that it will provide similar protection to Jews, whose religious liberty claims will often take the form of liberal challenges to conservative policy initiatives. And the very fact that antisemitism is mainstreaming—in particular, the form of antisemitism which denigrates Jews for being liberal and thus (supposedly) inauthentically religious—itself provides rationalizations which may justify declining to include at least liberal Jews (which is to say, most Jews) under the expansive umbrella of new free exercise protections. Indeed, far from representing an aberration or disjuncture from the new free exercise doctrine, appealing to this form of antisemitism and leveraging it to justify anti-Jewish exclusion may well be necessary for the doctrine to function at all.[19]

In this Article, I situate liberal Jews' religious liberty claims against both the legal turn towards robust religious liberty protections and resurgent conservative Christian nationalism. The latter two trends may seem to operate at cross-purposes insofar as liberal religious actors—which Jews typically are—could seemingly leverage the new religious liberty shields to ward off threatening conservative policy initiatives. However, I suggest that an emergent architecture of contemporary antisemitism—one which systematically degrades the validity and legitimacy of liberal Jews as Jews—will reconcile the Court's broad religious liberty doctrine with the ambition to specifically promote conservative Christian ideology, effectively cabining the former doctrine so that its protections are limited to the "right" (conservative and Christian) sort of claimants. Jews can secure protection in this doctrine, but only within a framework of shared "Judeo-Christian" values that effectively renders Jewish claims illegible except to the extent that they harmonize with conservative Christian commitments. Even as the Court superficially announces heightened protection for "religion" generally, the underlying normative motivation for its doctrine is saturated with and dependent upon the rejection of liberal Jews as valid religious claimants.

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[18] Richard Schragger & Micah Schwartzman, *Religious Freedom and Abortion*, 108 Iowa L. Rev. 2299, 2335 (2023) ("It is notable that free exercise victories thus far in the Roberts Court have mostly benefited religious conservatives, whatever their denomination, and the most high-profile cases have involved resisting antidiscrimination, public accommodation, equal access, and public health laws.").

[19] I do not here discuss how the new free exercise may accommodate or lock out other religious minorities, including (potentially) liberal Christians. *See infra* note 241. Some of the mechanisms of exclusion discussed below (such as the emphasis on traditional forms of religious "duty") likely can be applied across many religious groups. Others (such as the new supersessionism) are specific to patterns of Christian antisemitic domination.

As a result, it is unlikely that liberal Jews' religious liberty claims will meet much success, notwithstanding the federal judiciary's exceptionally broad and generous application of religious liberty protections for conservative Christian claimants. More bluntly: The denigration of liberal Jews is a *necessary* part of the new religious liberty discourse. Far from being accidental or coincidental, the rise of this form of antisemitic denigration does essential work in providing the justificatory architecture that can cabin the new free exercise doctrine. By delegitimizing liberal Jews as valid religious claimants, this form of denigration ensures that the sweeping immunities granted to the preferred Christian caste from liberal regulation do not provide similar protections to liberal claimants seeking relief from conservative policy priorities.

For our purposes, "liberal Jews" encompasses two distinct, though overlapping, categories.

- Non-Orthodox Jews (e.g., Reform, Conservative,[20] or Reconstructionist Jews).[21]
- Politically liberal Jews—those who identify as (broadly) left-of-center in their politics.

These two categories are by no means synonymous. There are politically liberal Orthodox Jews, and there are politically conservative non-Orthodox Jews. Nonetheless, there is a large and widening gap within the Jewish community that follows these two delineations: Non-Orthodox Jews (who comprise the vast majority of American Jews)

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[20] Somewhat confusingly, "Conservative" Judaism is the name of a particular Jewish denomination that is the second largest, by number of adherents, in the United States. "Conservative" here does not relate to any political affiliation; rather, it references a desire to "conserve" Jewish tradition while nonetheless accommodating modernity. *Conservative Judaism: How the Middle Became a Movement*, My Jewish Learning, https://www.myjewishlearning.com/article/conservative-judaism-how-the-middle-became-a-movement [https://perma.cc/NPM7-UMVE]. Like most non-Orthodox Jews, Conservative Jews are in fact overwhelmingly left-of-center in their political preferences—roughly seventy percent identify as Democrats. *See* Pew, Jewish Americans in 2020, at 10 (2021), https://www.pewresearch.org/religion/wp-content/uploads/sites/7/2021/05/PF_05.11.21_Jewish.Americans.pdf [https://perma.cc/Y8AD-EHWZ].

[21] I prefer "liberal" here to alternatives like "less observant" or "less religious" because the latter wrongfully suggests that Orthodox strains of Judaism are necessarily more authentic or purer in their religiosity than their non-Orthodox peers—a position surely not accepted by many adherents of non-Orthodox denominations. For a general account of differences and debates between Orthodox and non-Orthodox denominations, see Ammiel Hirsh & Yosef Reinman, One People, Two Worlds: A Reform Rabbi and an Orthodox Rabbi Explore the Issues That Divide Them (2003). Note that the very project of such a book was controversial in some Orthodox circles, as many argued that even agreeing to "debate" with a Reform Rabbi risked conferring "legitimacy" on the latter. *See* Yitzchok Adlerstein, Book Review, Jewish Action, Spring 2003, https://jewishaction.com/books/reviews/2003-one-people-two-worlds [https://perma.cc/CJ5U-FPLC] (summarizing the debate and ultimately defending the Orthodox Rabbi's participation in the project).

are overwhelmingly politically liberal; the Orthodox Jewish minority, by contrast, is increasingly politically conservative.[22] This divergence has begun to expand beyond issues that may be thought of as having a distinctively "Jewish" character (like American policy towards Israel) to more general matters of political contestation. For example, while American Jews overwhelmingly support increased gun control initiatives, the Orthodox Jewish community has begun rallying in favor of loosening restrictions on firearms access.[23] That said, it is important to recognize that these are distinct categories, and their boundaries are not fixed. When Chochmat Nashim, an Orthodox Jewish women's rights group, criticized other Orthodox Jewish groups for praising the *Dobbs* ruling, it did so on the basis of accusing the latter of prioritizing "secular law over the Torah."[24]

Part I provides an overview of the judiciary's new free exercise jurisprudence, which has expanded its protections dramatically over the past decade. Many of the cases which have ushered in this expansion have been brought by Christian claimants generally challenging liberal-coded policies. The *Dobbs* decision, however, has prompted commentators to consider whether Jews and other liberal religious denominations can leverage this doctrine to their own benefit. These arguments have substantial technical merit under the formal parameters of the new free exercise. Nonetheless, few seem convinced that the conservative court will actually extend analogous protections to liberal Jews. This suggests that the new free exercise will, and in many ways must, find limits that justify continuing to provide protections to conservative Christians while denying them to liberal Jews.

Part II explores the challenge liberal Jews present to the presumptive linkage between religiosity and conservatism. This connection is

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[22] *See* Pew, *supra* note 20, at 10 (showing that, while over seventy percent of Jews identify as Democrats or Democratic-leaning, seventy-five percent of Orthodox Jews identify as Republican or Republican-leaning).

[23] *See* Jacob Henry, *An Orthodox Jewish Gun Club Takes Aim at NY Gov. Hochul's New Gun Control Package*, N.Y. Jewish Wk. (July 21, 2022), https://www.jta.org/2022/07/21/ny/an-orthodox-jewish-gun-club-takes-aim-at-hochuls-new-gun-control-package [https://perma.cc/JHP4-FXCL] (challenging Governor Hochul's gun control legislation on behalf of an Orthodox Jewish gun club in New York State).

[24] *Chochmat Nashim Statement on the Overturning of* Roe v. Wade, Chochmat Nashim (June 29, 2022), https://www.chochmatnashim.org/chochmat-nashim-statement-on-the-overturning-of-roe-v-wade [https://perma.cc/D2ZQ-CXBG] ("When Orthodox Jews support state bans and restrictions on abortion, they put secular law over the Torah . . . ."); *see also* Ron Kampeas, *Leading Orthodox Groups Cheered the End of* Roe v. Wade. *Many Orthodox Women are Panicking*, Jewish Tel. Agency (June 30, 2022), https://www.jta.org/2022/06/30/politics/leading-orthodox-groups-cheered-the-end-of-roe-v-wade-many-orthodox-women-are-panicking [https://perma.cc/D4NN-KWUZ] (exploring the polarized response within the broader Orthodox Jewish community to the overturning of *Roe v. Wade*).

largely implicit, but is omnipresent in judicial and popular discourse about religious liberty. By naturalizing the supposedly inherently conservative quality of true religious observance, this discourse serves to occlude the invariably partial and biased application of religious liberty protections by functionally denying the possibility of a liberal religious order. At the same time, it constructs the threats to religious liberty as emanating solely from a liberal political order viewed as inherently antagonistic to religious life. Yet the general liberalism of the American Jewish community offers an image of a religious community whose spiritual commitments are predominantly progressive in character and whose religious practice is most liable to be threatened by conservative policy initiatives. While it is often assumed that Jewish religious difference is most pronounced among Orthodox Jews, with liberal Jews being more assimilated and thus less in need of specialized religious liberty protections, this assumption implicitly imagines Orthodox Jews to be more authentically religious precisely because they fit better within the model of religiosity embodied by conservative Christianity—ironically, itself a form of assimilation. The assumption that where Jews are liberal, Jews are assimilated fails to take seriously the possibility that liberal Jews are liberal *as* Jews, not in spite of it, and that liberal Judaism can be distinctively *religious* and in need of religious protections precisely because it diverges from conservative Christian paradigms. The liberal Jewish example thus destabilizes and denaturalizes core presumptions that justify the new religious liberty jurisprudence as putatively neutral even as it in practice has only thus far and likely will only in the future provide protection to a particular, favored sort of religious adherent. The liberal Jewish case therefore poses a serious challenge to the conceptual underpinnings and practical vitality of the new free exercise jurisprudence.

Part III concludes by exploring what I term "the new supersessionism," whereby Christians claim an authoritative entitlement to declare what authentic Judaism is over and against the views of actual Jews. The new supersessionism dissipates the impact of the liberal Jewish critique by denying that liberal Jews actually count as Jewish. The claimed entitlement of Christians to declare who and what is and is not Jewish represents a semi-secularized outgrowth of classic theological supersessionism.[25] This has grown increasingly prominent in public discourse as many conservative Christians seek to harmonize their professed love for "Jews" (in concept) with their deep antipathy for the flesh and

[25] Supersessionism, also known as replacement theology, is the belief that God's covenant with the Jewish people has been superseded by the arrival of Christ, who represents the natural completion of Jews' historical arc. *See infra* notes 242–51 and accompanying text.

blood Jews whose actual religious and political practices are in conflict with conservative Christian beliefs and priorities.[26] Conservative legal advocates, searching for a mechanism to dismiss liberal Jewish claims without disturbing the basic architecture of the new free exercise, have seized on this line of logic to portray liberal Jews as regularly or perhaps even inherently insincere in their putatively religious commitments, and thereby incapable of asserting legitimate religious liberty claims. If liberal Jews are not recognized as Jewish, then the failure of the new free exercise to protect liberal Jewish religious liberty claims can be excused as simply dispensing with insincere opportunism, ensuring that religious liberty protections are reserved only for those recognized as truly devout—that is, solely for those whose beliefs comport with conservative Christianity.

I
The Limitless Expanse of the New Free Exercise Jurisprudence

Over the past decade, the Supreme Court has radically extended the scope of religious liberty protections. The most prominent cases associated with this expansion have been brought by conservative Christian claimants attacking liberal-coded policies—for example, antidiscrimination protections for LGBTQ citizens, or pandemic restrictions aimed at stemming the spread of COVID-19. Critics have alleged that the new free exercise regime is almost impossibly sweeping in its expanse, providing nearly carte blanche protection to any religious claimant seeking exemption from laws they claim burden their religious practice. The *Dobbs* decision, however, may test this expanse by potentially teeing up a liberal religious liberty challenge to newly permissible abortion restrictions. While many conservative commentators have been dismissive of the vitality of such challenges, I argue that, precisely because of the doctrine's wide sweep, the religious commitments of many liberal Jews are obstructed by these restrictions in a way that should be facially cognizable under the new free exercise doctrine. To the extent it seems unlikely that the current judiciary will actually vindicate *these* sorts of religious liberty claims, the Jewish case challenges the putative neutrality of the doctrine and foregrounds its practical function to provide protections only to the favored in-group (conservative Christians), while continuing to bind lesser outgroups (like liberal Jews).

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[26] *See* David Schraub, *On Loving "Jews" and Hating Jews*, AJS Persps., Spring 2020, at 23 (analyzing how conceptual love for "Jews" can paradoxically foster real-world antisemitic attitudes).

A. Conservative Free Exercise After COVID-19

The COVID-19 pandemic witnessed a revolution in the Supreme Court's Free Exercise Clause and religious freedom jurisprudence. The rise of the so-called "most-favored-nation" theory of religious liberty,[27] coupled with an extremely broad understanding of "comparable" exceptions, meant endorsement of a near-limitless expanse of mandatory religious exemptions under the Free Exercise Clause. While the full flowering of this doctrine has not yet gained a decisive Court majority,[28] it has considerable backing in the high court and has been regularly applied by lower court judges seeking to instantiate radical expansions of religious liberty protections.[29]

Prior to the COVID-19 pandemic, the prevailing First Amendment rule for nearly thirty years had been announced in *Employment Division of Oregon v. Smith*.[30] Where a law's impact on an adherent's religious practice is not intended but is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[31] The rule, in other words, forbade anti-religious targeting, while acknowledging that in some (perhaps many) circumstances, laws will "incidentally" burden religious practices without running afoul of the Constitution. For the next several decades, the courts adjudicated Free Exercise claims with little partisan acrimony.[32]

While relatively straightforward to apply, the *Smith* rule met controversy. Only a few years after *Smith*, Congress passed the Religious Freedom Restoration Act by overwhelming bipartisan majorities[33]

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[27] The "most-favored-nation" approach to religious liberty treats as suspect laws whose prohibitions contain secular exemptions without providing equivalent exemptions to any "comparable" religious activity. *See* Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J. L. & Lib. 699, 708 (2022); *infra* notes 47–56 and accompanying text.

[28] For example, the Supreme Court did not overturn a vaccine mandate on shadow docket review in *Does 1–3 v. Mills*, 142 S. Ct. 17 (2021), albeit over vigorous dissent by three Justices, *id.* at 18 (Gorsuch, J., dissenting), alongside a concurrence from two others suggesting that their position was based not on rejecting the substantive merits of the challenge but on the "extraordinary" nature of shadow docket relief, *id.* (Barrett, J., concurring).

[29] *See infra* notes 74–80 and accompanying text.

[30] 494 U.S. 872 (1990).

[31] *Id.* at 878.

[32] *See* Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 Notre Dame L. Rev. 1371, 1374 (2013) (finding no statistical difference in Democratic- versus Republican-appointed judges in likelihood of upholding Free Exercise claims during the period of 1996 to 2005); Sepehr Shahshahani & Lawrence J. Liu, *Religion and Judging on the Federal Courts of Appeals*, 14 J. Empirical Legal Stud. 716, 731 (2017) (same for 2006 through 2015).

[33] *See* Suzanna Sherry, *Justice O'Connor's Dilemma: The Baseline Question*, 39 Wm. & Mary L. Rev. 865, 866 (1998) ("In 1993, Congress . . . enacted RFRA by an overwhelming bipartisan vote.").

in an express effort to undo the *Smith* rule and restore more expansive protections for religious liberty associated with cases like *Sherbert v. Verner*.[34] And in its initial form, much of the pushback against the *Smith* rule concentrated on its deleterious impact on religious *minorities*,[35] who were assumed to be especially vulnerable to having religious practices unintentionally impeded by facially neutral legislation.[36]

The onset of the COVID-19 pandemic, however, brought a new series of challenges to general public health mandates.[37] Just as they did for all aspects of daily life, the health restrictions used to arrest the spread of the pandemic imposed genuine burdens on the normal exercise of religion, which often includes suddenly dangerous and circumscribed practices like large public gatherings for prayer, joint song, meal-sharing, and intimate interpersonal contact.[38] Unfortunately, the

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[34] 374 U.S. 398, 402–03 (1963) (holding that the Free Exercise Clause required South Carolina exempt a Saturday-Sabbath observer from a requirement that she be willing to work on Saturdays in order to be eligible for unemployment benefits). The Court wasted little time striking down RFRA's enforceability against state governments in *City of Boerne v. Flores*. 521 U.S. 507, 511 (1997) (holding that RFRA exceeded Congress's enforcement power under section 5 of the Fourteenth Amendment).

[35] *See, e.g.*, Fraternal Order of Police Newark v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999) (ruling in favor of Muslim police officers who were forced to shave their beards by departmental policy that had secular exemptions); Blackhawk v. Pennsylvania, 381 F.3d 202, 204 (3d Cir. 2004) (ruling in favor of a Native American plaintiff seeking an exemption from fee and permitting requirements for possessing bears he used in religious rites). Both of these opinions were authored by then-Judge Alito.

[36] *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1136 n.117 (1990) ("Most legislators are unaware of the problems of minority religions, and many (though not all) minority religions are poorly positioned to defend their own interests."); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. Rev. 221, 227 (1993) (identifying as one of "the symbolic consequences of *Smith*" the "widespread impression that religious minorities simply have no constitutional rights anymore"). This critique is not groundless; there are good reasons to provide special solicitude to *minority* religious freedom claims challenging putatively neutral laws that do not extend to religions well-represented in the majority. Since "[l]awmakers are . . . more likely to notice when majority practice might be implicated in a law," they are less likely to pass even "neutral" laws which burden majority religions. David Schraub, *When Separation Doesn't Work: The Religion Clause as an Anti-Subordination Principle*, 5 Dart. L.J. 145, 152–53 (2007). The corollary is that, where such burdens *are* imposed on the majority, we can have greater confidence that the legislature did fully consider the religious liberty significance. By contrast, religious minorities (in addition to being more likely targets of outright prejudice) may systematically face unreasonable impingements on their faith because the legislature was unaware of the threatened religious practice in the first place, or was ill-positioned to accurately conceptualize "the burden a law places on an uncommon or unfamiliar religious practice and fairly weigh that against the interests the proposed law is meant to achieve." *Id.* at 153.

[37] *See* Jiwong Kong, Note, *Safeguarding the Free Exercise of Religion During the COVID-19 Pandemic*, 89 Fordham L. Rev. 1589, 1592 (2021) (noting that "Christian denominations" are the originators of "the significant majority of COVID-19 religious exemption cases").

[38] *Id.* at 1594–96.

burdens on religious practice were augmented by the growth of conspiracies contending that the pandemic was exaggerated, invented, or a government plot.[39] Many of these conspiracies found a home in conservative religious establishments which formed the vanguard of resistance to these new government rules.[40] Initially, legal observers assumed these objections would be easily shunted aside[41]: The ability of the government to compel adherence to public health guidance (including vaccination mandates) during a pandemic (and indeed, under "normal" public health conditions) was long thought to have been decisively resolved.[42] But the Supreme Court, in a series of thinly-reasoned "shadow docket" opinions, was largely receptive to this resistance and repeatedly struck down state health and safety regulations on religious liberty grounds.[43]

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[39] *See* Joanne M. Miller, *Psychological, Political, and Situational Factors Combine to Boost COVID-19 Conspiracy Theory Beliefs*, 53 Can. J. Pol. Sci. 327, 329 (2020) (finding that a "striking percentage" of respondents endorse conspiracy theories about COVID-19 and that such endorsement is more common amongst Republicans and independents than Democrats).

[40] *See, e.g.*, Tom Porter, *How the Evangelical Christian Right Seeded the False, Yet Surprisingly Resilient, Theory that Vaccines Contain Microchips*, Bus. Insider (Sept. 24, 2021), https://www.businessinsider.com/how-evangelical-right-pushed-microchip-vaccine-conspiracy-theory-2021-9 [https://perma.cc/KZ59-83AG] (suggesting that some Christian resistance to the COVID-19 vaccine stems from broader skepticism of science insofar as it is thought to conflict with Biblical literalism); Elizabeth Dwoskin, *On Social Media, Vaccine Misinformation Mixes with Extreme Faith*, Wash. Post (Feb. 16, 2021), https://www.washingtonpost.com/technology/2021/02/16/covid-vaccine-misinformation-evangelical-mark-beast [https://perma.cc/EV7Y-9DEX] (tying Christian opposition to the COVID-19 vaccine to the view that the vaccine is the "mark of the beast" associated with the Christian end of days).

[41] *See, e.g.*, Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 Yale L.J. F. 1106, 1108–09 (2022) ("Until 2021, every free exercise challenge to a vaccine mandate in federal or state court had been straightforwardly rejected in favor of the government's public-health initiative. Courts often seemed baffled at the mere suggestion that religious freedom could be imagined as freedom to opt out of a vaccine mandate."); Debbie Kaminer, *Vaccines in the Time of COVID-19: How Government and Businesses Can Help Us Reach Herd Immunity*, 2020 Wisc. L. Rev. Forward 101, 113 ("Religious opponents of mandatory vaccination laws frequently argue that these laws interfere with their right to the free exercise of religion under the First Amendment to the United States Constitution. This is legally incorrect. . . . Mandatory vaccination laws . . . are certainly neutral laws of general applicability.").

[42] *See* Jacobson v. Massachusetts, 197 U.S. 11, 29–30 (1905) (upholding a mandatory vaccination policy as a valid state initiative to arrest a smallpox epidemic); Zucht v. King, 260 U.S. 174 (1922) (upholding a general requirement that public school students, as a condition of enrollment, submit to mandatory vaccination); *see also* F.F. *ex rel.* Y.F. v. New York, 114 N.Y.S.3d 852, 867 (N.Y. Sup. Ct. 2019) ("The courts addressing this question have uniformly concluded that compulsory vaccination laws without religious exemptions are constitutional, regardless of whether rational basis or strict scrutiny applies . . . ."); Klaassen v. Tr. of Ind. Univ., 7 F.4th 592, 593 (7th Cir. 2021) (concluding that, after *Jacobson*, "there can't be a constitutional problem" with vaccination mandates).

[43] *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020) (per curiam) (holding that New York's COVID-19 restrictions likely violated the Free Exercise Clause by excessively limiting religious service attendance); Tandon v. Newsom,

As *Smith* had not (and to date has not) been overturned, these opinions sought to redefine what counted as a "generally applicable" law.[44] Instead of looking for religious targeting, the Court began to treat the presence of *any* sort of exception or exemption in a law or regulation as rendering it not "generally applicable." So, for example, if a law generally forbade large "gatherings" but maintained an exemption for grocery shopping, it was no longer "generally applicable." Rather, failing to grant a parallel exemption for church services was prima facie evidence of religious discrimination.[45] Since virtually all laws treat *some* categories of conduct differently from others, the net effect was a sub silentio nullification of *Smith*.[46]

What functionally replaced *Smith* was a rule sometimes dubbed "most-favored-nation status," meaning that religious claimants must be treated as well as whichever class of conduct faces the lightest level of restrictions in a statutory scheme.[47] If the law allows even one comparable circumstance where a large "gathering" can be held, or an organization can discriminate, or a vaccine can be declined, then any actor desiring a similar exemption for religious reasons must be granted one as well.

Tandon v. Newsom is illustrative.[48] *Tandon* involved a California COVID-19 regulation that forbade "gatherings" in private homes exceeding more than three "households." The Court, without full briefing or argument, enjoined the rule as applied to religious groups who wished to hold larger services in homes. Although the California rule did not mention or even (apparently) contemplate religious "gatherings," because the state still allowed *some* larger gatherings in public spaces such as restaurants or hair salons, the Court concluded that the law

141 S. Ct. 1294, 1297 (2020) (finding California's limit on religious home gatherings during COVID-19 to be likely unconstitutional, asserting that the State must treat religious exercise as favorably as comparable secular activities); *see also* Alexander Gouzoules, *Clouded Precedent:* Tandon v. Newsom *and Its Implications for the Shadow Docket*, 70 Buff. L. Rev. 87, 105–07 (2022) (noting the ambiguous precedential status of these opinions given their pronouncement via the shadow docket).

[44] *See* Emp. Div. v. Smith, 494 U.S. 872, 878 (1990) (establishing principle that neutral and generally applicable laws do not violate the Free Exercise Clause).

[45] *See infra* notes 48–51 and accompanying text (discussing *Tandon v. Newsom*).

[46] *See* James M. Oleske, Jr., *Free Exercise (Dis)honesty*, 2019 Wisc. L. Rev. 689, 694 ("Given that 'virtually all laws . . . contain many secular exemptions,' this interpretation of the selective-exemption rule would effectively overrule *Smith* in a great number of situations." (quoting Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. Rev. 1465, 1540 (1999))); *see also* Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. Rev. 167, 173 ("If a law with even a few secular exceptions isn't neutral and generally applicable, then not many laws are.").

[47] The term was coined by Douglas Laycock, during the pendency of the *Smith* litigation. Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 49.

[48] 141 S. Ct. 1294 (2020).

likely constituted impermissible religious targeting.[49] "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[50] The Court was unmoved by Justice Kagan's observation in dissent that public gatherings in places like restaurants or salons, which tend to involve briefer interactions, better ventilation, and which can more easily accommodate enforcement of mask mandates, are not "comparable" activities to religious services occurring inside private homes.[51]

Given the broad parameters of what counts as a "comparable" activity, the conceptual problem with this approach has been obvious since its inception: the risk of near-anarchy.[52] What *doesn't* qualify for an exemption under this framework? Consider the nadir of the slippery slope: the case of ritual human sacrifice.[53] Are there "exemptions" to the "generally-applicable" rule against homicide? Yes, there are. As Eugene Volokh notes, "[e]ven the bans on intentional homicide have exceptions—execution of a lawful sentence, killing in war, police killing of a dangerous fleeing felon, killing in self-defense or in defense of another, and disconnecting life-sustaining equipment at a patient's request."[54] The existence of these exemptions would, under the Court's logic, seemingly demand that a religious practitioner whose sincerely-held beliefs include ritual human sacrifice receive mandatory First Amendment accommodation, lest "religious" reasons for homicide be treated less favorably than the least-restrictive secular rationale.[55] Andy Koppelman has accordingly argued that the implications of the Court's ever more extreme articulations of "most-favored-nation" status "are so anarchic that the Court cannot possibly pursue them to the limits of their logic."[56] Yet this has stopped neither the Court as a whole nor individual Justices from appealing to extraordinarily expansive notions

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[49] *Id.* at 1297.

[50] *Id.* at 1296.

[51] *Id.* at 1298 (Kagan, J., dissenting).

[52] *See* Emp. Div. v. Smith, 494 U.S. 872, 888 (1990) (arguing that a society which adopts strict scrutiny for all laws impinging on conduct a given actor believes is religiously commanded "would be courting anarchy," a danger which "increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them").

[53] *See* Reynolds v. United States, 98 U.S. 145, 166 (1878) ("Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?").

[54] Volokh, *supra* note 46, at 1540.

[55] *See* Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty*, 108 Iowa L. Rev. 2237, 2290–93 (2023).

[56] *Id.* at 2237.

of free exercise in individual cases where favored litigants challenge liberal policy initiatives.

For example, in *Fulton v. City of Philadelphia*,[57] the Supreme Court unanimously held that where a city allows itself complete discretion to exempt whomever it wants from an otherwise generally applicable antidiscrimination rule, it violates the First Amendment not to provide that exemption to religious claimants.[58] Later that year, Justice Gorsuch relied on *Fulton* to argue in dissent that because Maine permitted medical exemptions to its COVID-19 vaccine mandate, it was therefore required to provide religious exemptions as well.[59] Just as *Fulton* enabled city administrators to engage in case-by-case consideration of individual claims to be exempt from the general rule, Justice Gorsuch argued that the Maine legislation likewise permits "individualized exemptions . . . but only if they invoke certain preferred (nonreligious) justifications."[60]

Justice Gorsuch's argument conflates the existence of any exemption with "individualized exemptions." Virtually all laws have "exemptions" of some variety or another. The death penalty represents an exemption to laws prohibiting homicide; surgery represents an exemption to laws prohibiting bloodletting. What makes an exemption regime "individualized" is where any person can present themselves as worthy of an exemption from the general rule based on a case-by-case, holistic assessment of their personal circumstances.[61]

Philadelphia's exemption policy was truly "individualized" in character: the relevant city decision-maker was given carte blanche authority to consider any and all factors in a presumably all-things-considered, holistic analysis of an organization's request for exemption.[62]

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57 141 S. Ct. 1868, 1882 (2021).

58 *See id.* at 1872–73.

59 Does 1–3 v. Mills, 142 S. Ct. 17, 19 (2021) (Gorsuch, J., dissenting) (arguing that, by permitting medical exemptions to its COVID-19 vaccine mandate, Maine had created a system of "individualized exemptions" which required it to provide religious exemptions as well).

60 *Id.*

61 For example, *Sherbert v. Verner* involved a general rule that applicants for unemployment benefits must not have "failed . . . to accept available suitable work when offered him by the employment office or the employer," along with a generic exemption available to any applicant who showed (undefined) "good cause" for not accepting the work opportunity. 374 U.S. 398, 400–01 (1963).

62 *Fulton*, 141 S. Ct. at 1878 (noting that Philadelphia's policy permits exemptions at the "sole discretion" of a city administrator); *see also* Bowen v. Roy, 476 U.S. 693, 708 (1986). *Bowen*, which is the doctrinal origin point for viewing a system of "individualized exemptions" as raising heightened First Amendment hackles, presented this as a *limiting* feature of free exercise claims. Only those situations where the state creates a system for individualized, case-by-case exemptions does the failure to grant a religious exemption in "an instance of religious hardship suggest[] a discriminatory intent." *Id.*

This is a far cry from Maine's policy, which did not permit this sort of individualized review but instead allowed exemptions for only a narrowly delineated set of cases previously defined by statute.[63] But Zalman Rothschild concludes that Justice Gorsuch's argument flows naturally out of a more fundamentalist reading of the *Fulton* ruling, where *Fulton* stands for the proposition that "*any* amount of discretion regarding *any* potential exemption for *any* category of persons renders *any* law without religious exemptions presumptively unconstitutional. And the sheer *availability* of a secular-based exemption—even if only theoretical—compels the conclusion that withholding religious exemptions is not necessary, thereby guaranteeing the government regulation cannot meet strict scrutiny."[64] A similar instinct motivated at least one court to argue that even exemptions for activities necessary to the preservation of human life trigger an automatic requirement that religious exemptions be offered as well, on the theory that the state cannot prioritize "life-sustaining" over "soul-sustaining" activities.[65] The very idea that protecting human life is more important than maintaining access to in-person worship services "arguably embeds a contested value judgment about what is essential to human flourishing."[66] "[P]eople must nourish their souls as well as their bodies. Indeed, to valorize the physical over the spiritual may not adequately express everyone's priorities."[67] Here, too, we see how the new free exercise jurisprudence easily can and has generated a functionally "anarchic" regime whereby religious objectors are entitled to automatic exemption from nearly any law.[68]

The COVID-19 pandemic jurisprudence has shown that the new free exercise doctrine has surged past the limits even its proponents believed would operate as constraints.[69] What had been a

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63 Me. Rev. Stat. Ann. tit. 22, § 802(4-B) (West 2021) (allowing medical exemptions where a doctor or medical professional provides written notification that taking the vaccine would be medically inadvisable for a given patient).

64 Rothschild, *supra* note 41, at 1130.

65 *See* Roberts v. Neace, 958 F.3d 409, 414 (6th Cir. 2020); *see also* Josh Blackman, *The "Essential" Free Exercise Clause*, 44 Harv. J. L. & Pub. Pol'y 637, 671–73 (2021) (arguing that the "life-sustaining" versus "soul-sustaining" distinction treats in-person worship "as a trifling convenience"). While not using the "life-sustaining" versus "soul-sustaining" language, other courts have found that the presence of medical exemptions in a statute compels the authorization of religious exemptions as well. *See* U.S. Navy Seals 1–26 v. Biden, 578 F. Supp. 3d 822, 838 (N.D. Tex. 2022); Doster v. Kendall, 596 F. Supp. 3d 995, 1016 (S.D. Ohio 2022); Air Force Officer v. Austin, 588 F. Supp. 3d 1338, 1351 (M.D. Ga. 2022).

66 Caroline Mala Corbin, *Religious Liberty in a Pandemic*, 70 Duke L.J. Online 1, 16.

67 *Id.* at 17.

68 *See supra* notes 56–58 and accompanying text.

69 *See* Rothschild, *supra* note 41, at 1133–34 (arguing that the view, "adopted by some of free exercise's staunchest supporters," that the new free exercise doctrine will still permit

relatively sleepy area of constitutional law (at least in its doctrinal manifestations),[70] unaffected by partisan divisions,[71] became a bitterly divided arena where Republican- and Democratic-appointed judges almost entirely diverged in their assessment of the law. In COVID-19 cases, one study found that Democratic-appointed judges sided with the government one hundred percent of the time against Religion Clause challenges, while Republican-appointed judges favored religious claimants sixty-six percent of the time.[72] For Trump-appointed judges, the difference was even starker: an eighty-two percent win rate for Religion Clause challengers against government COVID-19 regulations.[73]

The Supreme Court's expansive understanding of religious liberty has emboldened conservative lower court judges to further use the new free exercise doctrine as a sword to attack policies they disfavor. Following the Supreme Court's invitation, lower courts have begun cutting a bloody swath through established statutory law by concluding that essentially *any* law or policy they wished to enjoin was not "generally applicable" or otherwise constituted religious targeting. The following five examples are illustrative of this pattern.

- In Texas, a district court judge held that Title VII's antidiscrimination provisions were unconstitutional as applied to those who wish to discriminate for religious reasons since the law exempts small businesses and therefore is not "generally applicable."[74]
- In Washington, D.C., a district court judge held that the D.C. rules permitting minors to be vaccinated without parental consent were unconstitutional because the rules had slightly different reporting requirements for situations in which the parents had sought a medical versus a religious exemption from vaccination rules, rendering the law not generally applicable.[75]

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upholding critically necessary government regulations such as "measures to stem a deadly pandemic" in the face of First Amendment challenges "has already been decisively refuted").

70 Again, this is separate from the broader *political* backlash and scholarly controversy over *Smith*, which was extensive. *See supra* notes 32–36 and accompanying text.

71 *See supra* note 32 (describing previous decades where Free Exercise claims did not attract significant partisan disagreement).

72 Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. 1067, 1083 (2022).

73 *Id.*

74 Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 613 (N.D. Tex. 2021) (concluding that Title VII's prohibition on sex discrimination is not "generally applicable" since it does not apply to small businesses with fewer than fifteen employees). That same judge more recently enjoined rules requiring businesses to cover medication which prevents HIV transmission where those business believed coverage would make them "complicit" in "facilitat[ing] and encourag[ing] homosexual behavior" against their religious principles. Braidwood Mgmt. v. Becerra, No. 4:20-cv-00283-O, 2022 U.S. Dist. LEXIS 161052, at *53–55 (N.D. Tex. Sept. 7, 2022).

75 Booth v. Bowser, 597 F. Supp. 3d 1, 24–28 (D.D.C. 2022).

- In Florida, a district court judge enjoined the Navy from enforcing its vaccine requirements against a warship commander, and likewise blocked the Navy from removing him from his post.[76] The result was the effective impounding of a multi-billion-dollar vessel since the Navy refused to deploy the ship with the recalcitrant officer in command.[77]
- Also in Texas, a different district court judge granted a religious exemption to Naval personnel who objected to taking the COVID-19 vaccine because the Navy permits vaccine exemptions for the "comparable secular activit[ies]" of "refusing the vaccine for medical reasons or participation in a clinical trial."[78]
- In Kansas, a district court judge held that a school-teacher had the right under the Free Exercise Clause to ignore a school district policy which forbade teachers from disclosing a student's preferred pronouns to that student's parents without the student's consent.[79] The "exceptions" which allegedly rendered the policy not "generally applicable" were (a) complying with federal law; (b) inadvertent disclosures; and, (c) the ability of administrators to respond to a direct question by the parents regarding their child's transgender status.[80]

These cases demonstrate the potential reach of the new free exercise jurisprudence—what Elizabeth Sepper aptly dubs "Free Exercise Lochnerism."[81] In effect, these cases represent a vision of religious liberty granting comprehensive immunity to conservative and conservative-aligned interests from the general sweep of the nation's laws, even in such seemingly fundamental arenas as antidiscrimination, public health, and national defense. If, as Frank Wilhoit memorably put it, much of what passes for modern conservative thinking rests on the proposition that "[t]here must be in-groups whom the law protects but does not bind, alongside out-groups whom the law binds but does not

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[76] Navy Seal 1 v. Austin, 586 F. Supp. 3d 1180, 1205 (M.D. Fla. 2022).

[77] Geoff Ziezulewicz, *Destroyer Can't Deploy Because CO Won't Get COVID Vaccine, Navy Says*, Navy Times (Mar. 8, 2022), https://www.navytimes.com/news/your-navy/2022/03/08/destroyer-cant-deploy-because-co-wont-get-covid-vaccine-navy-says [https://perma.cc/Y52T-GAUQ].

[78] U.S. Navy Seals 1–26 v. Biden, 578 F. Supp. 3d 822, 838 (N.D. Tex. 2022).

[79] Ricard v. USD 475 Geary Cnty., No. 5:22-cv-04015-HLT-GEB, 2022 U.S. Dist. LEXIS 83742 (D. Kan. May 9, 2022).

[80] *Id.* at *14–16.

[81] Elizabeth Sepper, *Free Exercise Lochnerism*, 115 Colum. L. Rev. 1453 (2015). The *Lochner* decision, striking down a maximum-hours law for bakers on the grounds that it impinged the "liberty of contract" protected by the Fourteenth Amendment, became the namesake of a "*Lochner* era" where courts aggressively policed state and federal economic regulations that interfered with libertarian free market priors. *See* Lochner v. New York, 198 U.S. 45 (1905).

protect,"[82] the new free exercise doctrine represents a near crystalline embodiment of the first part of the maxim. But this very sweep also presents a problem: If everything qualifies for an exemption under the new framework, what happens when liberal religious adherents start making these claims in cases where they seek to circumvent conservative policy initiatives? Put differently, having successfully ensured that the law did not bind the religious groups the new free exercise doctrine was meant to protect, how can the Court and the conservative movement nonetheless ensure that the religious groups they do not wish to protect still remain bound?[83]

To some extent, the paradox can be resolved by nothing more complicated than inconsistent application. This was a notorious feature of the original *Lochner* era as well—courts would invalidate congressional antitrust laws when they were used to break up economic monopolies while eagerly applying those same antitrust laws to bust nascent union activity.[84] And today as well, the Court's new, muscular free exercise protections have already seen disparate application depending on the faith seeking protection.[85] Searching

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[82] Frank Wilhoit, Comment to *The Travesty of Liberalism*, Crooked Timber (Mar. 21, 2018), https://crookedtimber.org/2018/03/21/liberals-against-progressives/#comment-729288 [https://perma.cc/EV25-CPPD]. Wilhoit is a classical musical composer; the quote does not come from the American political scientist of the same name. *See* Henry Grabar, *The Pithiest Critique of Modern Conservatism Keeps Getting Credited to the Wrong Man*, Slate (June 3, 2022), https://slate.com/business/2022/06/wilhoits-law-conservatives-frank-wilhoit.html [https://perma.cc/S6PW-AMY6].

[83] In a similar vein, Jamelle Bouie identifies the bivalent meaning of "freedom"—it can mean both "freedom from domination" but also "freedom to dominate." Frequently, empowered groups understand their "freedom" as demanding both conditions be satisfied—freedom is the condition both of being free from the domination by others, and also being unconstrained in the ability to dominate those seen as lesser. Jamelle Bouie, *What Does "White Freedom" Really Mean?*, N.Y. Times (Dec. 17, 2021), https://www.nytimes.com/2021/12/17/opinion/freedom-liberty-racial-hierarchies.html [https://perma.cc/9APT-PNFR]. Extrapolating, we could say that some Christians may not consider the freedom to practice their own faith as sufficient to possess true religious freedom. They will not be fully free as Christians unless they are licensed to dominate—bind—the Jews and other non-Christians who reside within their communities. *Cf.* Burwell v. Hobby Lobby, 573 U.S. 682, 690–91 (2014) (holding that Christian corporations have a religious freedom right to deny contraceptive coverage to their employees); Braidwood Mgmt. v. Becerra, No. 4:20-cv-00283-O, 2022 U.S. Dist. LEXIS 161052, at *53–55 (N.D. Tex. Sept. 7, 2022) (holding that Christian corporations have a religious freedom right to deny anti-HIV medication to employees in order to avoid being "complicit" in endorsing homosexuality).

[84] *Compare* United States v. E.C. Knight Co., 156 U.S. 1 (1895) (concluding that federal antitrust laws could not constitutionally apply to manufacturing), *with* Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925) (permitting the application of federal antitrust laws to sanction a union strike).

[85] *See* Russell K. Robinson, *What Christianity Loses when Conservative Christians Win at the Supreme Court*, 2021 Sup. Ct. Rev. 185, 186 (arguing that discrepancies in how the Court treated religious liberty claims in cases like *Masterpiece Cakeshop*, as opposed to

scrutiny upon the bare "whiff" of hostile motives against Christianity, for instance, is coupled with cavalier indifference to obvious animus targeting Muslims.[86] But even seemingly obvious religious favoritism still inevitably generates a justificatory theoretical architecture. And given the prevalence of conservative rhetoric which situates their religious-liberty defenses as a matter of protecting *Judeo-Christian* values,[87] the prospect of the new religious liberty jurisprudence crashing into a wave of liberal Jewish religious-liberty requests represents a threat that demands a response.

B. Liberal Jews Strike Back? Religious Exemptions from Abortion Restrictions

It is sometimes assumed that Jews are the paradigm of a minority group that generally has been the beneficiary of modern liberal legal protections.[88] Jews are sometimes seen as the "out-group that's in," a perception which itself is tied to broader stereotypes of Jewish power which struggle—the history of antisemitic marginalization

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Trump v. Hawaii, "call into question the Court's own neutrality on questions of religion"). *Compare* Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729 (2018) (describing statements such as "[f]reedom of religion and religion has been used to justify all kinds of discrimination throughout history" as evincing "clear and impermissible hostility toward" the plaintiff's Christian religious beliefs), *with* Trump v. Hawaii, 138 S. Ct. 2392, 2417 (2018) (declining to find statements such as "Islam hates us" and demanding a "total and complete shutdown of Muslims entering the United States" as sufficiently demonstrating impermissible religious animus against Muslims).

86 *See* Robinson, *supra* note 85, at 205–13. *Compare* Dunn v. Ray, 139 S. Ct. 661 (2019) (dissolving a lower court injunction which blocked Alabama from prohibiting a Muslim cleric from being present during the execution of a Muslim inmate under a rule which allowed only Christian ministers to be present during an execution), *with* Ramirez v. Collier, 142 S. Ct. 1264 (2022) (upholding the claim of a Christian inmate who contended that a Christian minister must be allowed to "lay hands" on him during his execution).

87 *See infra* notes 260–68 and accompanying text.

88 *See, e.g.*, Robinson, *supra* note 85, at 212 ("As suggested by *Roman Catholic Diocese* (which involved Catholic and Jewish parties), the Court also is receptive to claims brought by Jewish litigants."). The mismatch between the assumption that Jews enjoy heightened levels of judicial solicitude, and a reality of minimal protection, is not limited to the United States. In the United Kingdom, commentators cited the protection of Jews under statutory antidiscrimination protections to argue that groups such as Muslims and Sikhs should receive similar coverage, overlooking the fact that Jews had never actually won a case under the relevant statute. *Compare* Nasar Meer, *Semantics, Scales and Solidarities in the Study of Antisemitism and Islamophobia*, 36 Ethnic & Racial Studs. 500, 508–11 (2013) ("In the UK Jewish minorities have long been considered an ethnic or racial group for the purposes of Race Relations legislation, and therefore theoretically protected by law in a way that Muslims have not." (citation omitted)), *with* Didi Herman, An Unfortunate Coincidence: Jews, Jewishness, and English Law 126–29 (2011) (noting the contrast between the "lack of success" Jews enjoyed under British antidiscrimination law and the "generic rhetoric about Jews" positing them as antidiscrimination success stories).

notwithstanding—to envision Jews as truly oppressed or vulnerable.[89] Contrary to this assumption, Jews historically have had markedly little success in pressing free exercise claims before the Supreme Court.[90] In the present day, Jewish religious-accommodation demands may diverge from the cases the Court has considered thus far in that they often will present challenges to high-profile conservative, rather than liberal, political programs. Most prominently, the salience of Jewish liberal claims rose dramatically in the wake of the Supreme Court's *Dobbs* opinion,[91] overturning *Roe v. Wade*[92] and enabling states to categorically ban abortion.[93] While different Jewish denominations take different views on abortion, virtually all agree that Jewish religious law does not just permit but sometimes requires abortion in certain circumstances.[94] The prospect of Jews challenging new, draconian anti-abortion restrictions on religious liberty grounds[95] is only the most prominent example

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89 David Schraub, *White Jews: An Intersectional Approach*, 43 Ass'n Jewish Studs. Rev. 379, 391–92 (2019) ("To the extent Jews are even recognized as marginalized, they are taken as a model of legislative and social protection—the out group that's in."); Brenda Cossman & Marlee Kline, *"And if Not Now, When?": Feminism and Anti-Semitism Beyond Clara Brett Martin*, 5 Can. J. Women & L. 298, 314 (1992) (arguing that, even in the context of discussions about antisemitism, Jews frequently "are recognized as *only* the privileged, the powerful, the oppressors"); *see* Meer, *supra* note 88, at 508 (conceding that Jews have historically been discriminated against but arguing that "from the vantage point of a supranational Europe, Jewish minorities are 'in'").

90 *See* Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. Pa. J. Const. L. 222, 251 (2003) ("In free exercise exemption cases at the Supreme Court level, the numbers are even more striking: while members of small Christian sects sometimes win and sometimes lose such free exercise claims, non-Christian religious outsiders never win."); David Schraub, *Privileged Yet Unequal: An Essay on the Anglo-American Legal Principle of 'Jews Lose,'* Tablet Mag. (Jan. 22, 2015), https://www.tabletmag.com/sections/news/articles/jews-lose [https://perma.cc/F2BW-3JVJ]. Things may have changed slightly over the past few years—Orthodox Jewish litigants were involved in some of the successful religious liberty claims brought by the Catholic Church against COVID-19 restrictions, see Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63 (2020) (per curiam)—but the vast majority of Free Exercise Clause victories before the Supreme Court have come from Christian litigants.

91 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); *see* Daniel Arkin, *In Wake of* Roe *Reversal, Some American Jews See Attack on Religious Liberty*, NBC News (June 27, 2022), https://www.nbcnews.com/news/us-news/wake-roe-reversal-american-jews-see-attack-religious-liberty-rcna35473 [https://perma.cc/PYP4-PKUR] (noting heightened distress among many Jewish leaders regarding the religious liberty threats posed by the *Dobbs* decision).

92 410 U.S. 113 (1973).

93 *Dobbs*, 142 S. Ct. at 2284 (holding that abortion restrictions at any phase of pregnancy receive only minimal, rational basis review).

94 *See infra* note 112 and accompanying text (noting the consensus of religious authority that Jewish law in certain circumstances requires abortion).

95 *See, e.g.*, Verified Complaint, Pomerantz v. Florida, No. 2022-14373-CA-01 (Fla. Cir. Ct. Aug. 1, 2022), https://fingfx.thomsonreuters.com/gfx/legaldocs/gkvlgomaepb/FloridaRabbis.pdf [https://perma.cc/4EYW-DSXM]; Second Amended Complaint,

of conservative legislative priorities potentially being stymied by the new free exercise jurisprudence.[96]

Abortion regulations offer an immediate and high-profile arena where liberal Jews' religious liberty interests challenge a deeply valued conservative policy priority. The Supreme Court's *Dobbs*[97] decision was wildly unpopular with American Jews—a full eighty-two percent disapproved of the ruling, with seventy-four percent disapproving strongly.[98] But beyond political disagreement, the abortion restrictions *Dobbs* permits also sharply conflict with many Jews' understanding of their religious duties regarding abortion. Almost immediately after *Dobbs*, one synagogue filed a lawsuit challenging abortion restrictions in Florida, claiming that they interfere with Jewish religious liberty, and

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Generation to Generation, Inc. v. Florida, No. 2022 CA 000980 (Fla. Cir. Ct. Aug. 9, 2022), https://www.ldorvador.org/wp-content/uploads/2022/08/LDVD-Second-Amended-Complaint-Final-08092022.pdf [https://perma.cc/W3X4-VKWG]; Class Action Complaint, Anonymous v. Indiv. Members of Med. Licens. Bd., No. 49D01-2209-PL-031056 (Marion Cnty., Ind. Super. Ct. Sept. 8, 2022), https://www.aclu-in.org/sites/default/files/field_documents/complaint_to_file.pdf [https://perma.cc/5QG2-URUJ]; Complaint, Sobel v. Cameron, No. 22-CI-005189 (Jefferson Cnty., Ky. Cir. Ct. Oct. 6, 2022), https://htv-prod-media.s3.amazonaws.com/files/sobel-complaint-against-cameron-1665079005.pdf [https://perma.cc/EL9B-5QGE]; *see also* Harry Bruinius & Henry Gass, *Can Abortion Be a Question of Religious Liberty? These Faiths Say Yes*, Christian Sci. Monitor (Aug. 1, 2022), https://www.csmonitor.com/USA/Politics/2022/0801/Can-abortion-be-a-question-of-religious-liberty-These-faiths-say-yes [https://perma.cc/C5B6-UETW].

96 Other possibilities could include physicians who believe they are religiously obligated to provide gender-affirming healthcare to trans patients notwithstanding new state prohibitions, see Jackie Hajdenberg, *Missouri Jewish Leaders Advocate for Trans Rights at State Legislature*, Jewish Tel. Agency (Feb. 3, 2022), https://www.jta.org/2023/02/03/united-states/missouri-jewish-leaders-advocate-for-trans-rights-at-state-legislature [https://perma.cc/5CZA-DXKA], religious schools which may believe that they are religiously obligated to pursue racial diversity in their admission practices even if the Supreme Court prohibits affirmative action programs, see Brief of Georgetown University et al. as Amici Curiae Supporting of Respondents at 33–36, Students for Fair Admissions v. Univ. of N.C., 143 S. Ct. 2141 (2023) (No. 21-707) (arguing that the Free Exercise Clause protects the rights of religious universities to engage in affirmative action programs), or Jewish congregations asserting a religious obligation to harbor undocumented immigrants fleeing persecution, Jonathan Zasloff, *Sanctuary, Civil Disobedience, and Jewish Law*, 40 Shofar, no. 3, 2022, at 121–22 (arguing that, in some circumstances, Jewish law requires synagogues to shelter and conceal an undocumented immigrant's presence from government immigration authorities where disclosure would subject the immigrant to a likelihood of persecution).

97 142 S. Ct. 2228 (2022).

98 *September 2022 National Survey of Jewish Voters*, Jewish Electorate Inst. (Sept. 15, 2022), https://www.jewishelectorateinstitute.org/september-2022-national-survey-of-jewish-voters/#:~:text=61%25%20of%20Jewish%20voters%20are,decision%20to%20overturn%20Roe%20v [https://perma.cc/UNZ9-XNQ5]. For context, seventy percent of Jewish respondents planned to vote Democratic in 2022, seventy-seven percent thought American gun laws were "not restrictive enough," seventy-one percent feel at least somewhat attached to Israel, and sixty-eight percent support America reentering the Iran nuclear deal. *Id.* It is arguable that support for abortion rights is the single most unifying issue area for American Jewry.

several other cases have since been filed raising similar arguments.[99] While some of these cases likely face serious ripeness and justiciability issues, a lower court in Indiana has already ruled in favor of a group of Jewish plaintiffs who sought to enjoin abortion limits based on a state-level RFRA.[100] It is only a matter of time before the conflict between draconian government limits on abortion care and what many Jewish doctors and patients perceive as their deeply-felt religious principles is squarely presented.

How might such claims fare under the new free exercise regime? In this Section, I sketch Jewish religious views on abortion to show how they diverge significantly from the more familiar conservative Christian understanding of the abortion issue. Far from adopting an uncompromising view that "life begins at conception" and that abortion is consequently murder, Jewish law allows for and at times even requires abortion in circumstances where it might be outlawed under a post-*Dobbs* regime. Given that, the next question is whether Jews who claim a religious liberty interest in securing abortion services can stake a viable religious liberty claim. The answer, it seems, should often be yes under the "most-favored-nation" theory of religious liberty, at least in any state which provides *any* exemptions to an overall abortion ban. The logic of the new free exercise jurisprudence demands that if a state allows abortion for any secular reason (e.g., in cases of imminent threat to life, or in cases of rape), it must allow it for religious reasons as well.[101]

There is a rich literature detailing and debating Jewish legal perspectives on abortion, which can only be briefly overviewed here. Y. Michael Barilan, for instance, identifies the unifying theme of the fractured Rabbinic authorities on abortion as respecting the moral decisionmaking of those immediately affected by a pregnancy—that is, the views of the mother and her loved ones. Jewish law, Barilan contends, provides "significant legal and moral leeway to the mother and those around her, allowing intimate deliberations and casuistic reasoning on

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[99] *See supra* note 95.

[100] *Med. Licens. Bd.*, No. 49D01-2209-PL-031056, slip op. at 27, 43 (Marion Cnty., Ind. Super. Ct. Dec. 2, 2022), https://interactive.wthr.com/pdfs/order-granting-preliminary-inj-rfra-proposed-order-no-motion.pdf [https://perma.cc/9W8P-2TLB] (enjoining abortion restriction under section 34-13-9-8 of the Indiana Code), *appeal docketed*, No. 22A-PL-02938 (Ind. Ct. App. Dec. 9, 2022). The court noted that Indiana's state-law RFRA "largely tracks the language" of the federal RFRA and consequently Indiana courts have "freely cited cases applying . . . the federal RFRA in interpreting Indiana's RFRA." *Id.* at 27.

[101] For perspectives on this question, *compare* Schragger & Schwartzman, *supra* note 18, at 2302, *and* Caroline Mala Corbin, *Religious Liberty for All? A Religious Right to Abortion*, 2023 Wisc. L. Rev. 475, 478 (expressing sympathy to the position that there can be a religious liberty interest in abortion rights), *with* Josh Blackman, Howard Slugh & Tal Fortgang, *Abortion and Religious Liberty*, 27 Tex. Rev. L. & Pol. 441 (2023) (expressing skepticism).

a case-by-case basis . . . ."[102] Rather than develop comprehensive legal regimes that definitively declare when abortion is permitted, forbidden, or mandated, "*halakhic* rulings on abortion demonstrate[] the centrality of personal emotional response and moral judgment of the woman."[103] Under this view, Jewish law certainly does not view abortion as unimportant or of minor moral consequence. It is of exceptional importance as a matter of religious law—but its importance is expressed only in the context of recognizing the case-specific moral judgment of the pregnant woman.

Barilan's view is not the only perspective, of course. From an Orthodox Jewish perspective, J. David Bleich's canvassing of abortion law in Halakhic literature tends to come to relatively conservative conclusions, but even he concedes that "[v]irtually all authorities agree that [Jewish law] does not merely sanction but deems mandatory" abortions in cases where the continuation of the pregnancy threatens the life of the mother.[104] By contrast, Daniel B. Sinclair argues that the treatment of abortion as a form of homicide in Jewish thought is a "modern" innovation that breaks from classical Rabbinic and Biblical authorities which decisively rejected that abortion was a form of homicide.[105] Sinclair suggests that the ascendance of the former principle represents an assimilation of Jewish thought into "Hellenist-Christian" approaches.[106] In one striking 1964 opinion by Rabbi Moses Jonah Zweig, for example, the argument was made that Jewish law must adopt a strict attitude against abortion because a more lenient approach would conflict with the views of secular jurists and physicians, as well as "the Church."[107] More recently, Joshua Shanes identified the shift in Orthodox Jewish approaches to abortion—both in terms of endorsing more restrictive legal rules as well as the relative political and theological importance assigned to the issue itself—as reflective of "the evangelicalization of Orthodoxy," part of "Orthodox work to solidify an alliance with the

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[102] Y. Michael Barilan, *Her Pain Prevails and Her Judgment Respected—Abortion in Judaism*, 25 J. L. & Religion 97, 98 (2009).

[103] *Id.*

[104] J. David Bleich, *Abortion in Halakhic Literature*, Tradition, Winter 1968, at 72, 87. In other cases, Rabbi Bleich notes diversity of opinion amongst Jewish authorities but does list some authorities who likewise permit abortions in cases of threats to maternal physical health, *id.* at 94–96, and psychiatric health, *id.* at 101–02. *See also* Tomas J. Silber, *Abortion: A Jewish View*, 19 J. Religion & Health 231 (1980).

[105] Daniel B. Sinclair, *The Legal Basis for the Prohibition on Abortion in Jewish Law*, 15 Isr. L. Rev. 109, 109 (1980) ("The recent trend in Rabbinic literature to categorise abortion as a form of homicide, proscribed by Biblical law, seems to constitute a break with the classical Rabbinic view, according to which abortion is neither homicide, nor directly prohibited in . . . the Bible and the Talmud.").

[106] *Id.* at 118–19.

[107] *Id.* at 125 n.127.

Christian right" that has effectuated a dramatic change in how Orthodox Jews approach the issue of abortion over the past fifty years.[108]

My purpose here is not to adjudicate what is the "correct" Jewish view on abortion rights. There are diverse views within and across major Jewish denominations and for First Amendment purposes none can be deemed more or less authoritative than another.[109] Suffice to say that at least some articulations of Jewish religious law take a far more liberal perspective on abortion issues than is envisioned by more restrictive states. Does this create a religious liberty claim for an exemption from these abortion restrictions? To be sure, it is not enough to show that Judaism *permits* abortion in circumstances where it is prohibited by law. I know of no law in Judaism that demands that only wedge shapes qualify as "sliced," but this would not mean Jews have a religious liberty entitlement to ignore federal regulations regarding the proper labeling of canned peaches.[110] Sherry Colb makes a similar observation with respect to littering:

> My religion might permit littering, while an ordinance of my municipality prohibits littering. The existence of the ordinance does mean that I must refrain from littering notwithstanding the absence of any religious prohibition within my religion on the behavior. I would almost certainly fail if I were to argue that I am entitled to an exemption from the prohibition against littering because my religion allows me to litter. So long as my religion does not *require* me to litter, I can obey my religious rules and comply with the local ordinance at the same time. No conflict.[111]

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[108] Joshua Shanes, *The Evangelicalization of Orthodoxy*, Tablet Mag. (Oct. 12, 2020), https://www.tabletmag.com/sections/belief/articles/evangelicalization-orthodox-jews [https://perma.cc/E2ZN-5CJW]. In Israel, the data suggests that the level of Orthodox Jewish hostility to abortion compared to more liberal Jews has remained stable since the 1970s. *See* Larissa I. Remennick & Amir Hetsroni, *Public Attitudes Toward Abortion in Israel: A Research Note*, 82 Soc. Sci. Q. 420, 430 (2001) (finding little change in the "distribution between prochoice and prolife camps mapped out in the mid-1970s"). But even in Israel, abortion remains broadly available and the overall levels of anti-abortion sentiment are considerably lower than found in America, suggesting that a broader inclination towards pro-choice positions remains operative there. *Id.* at 422 ("[Since the 1970s,] most Israeli women have had access to safe medical abortions."); *id.* at 428 ("Overall, Israeli Jews appear to be more on the prochoice side than Americans . . . ."). Further, any gap in position between Ashkenazi and Sephardic or Mizrahi Jews independent of religiosity or socio-economic status appears to be vanishing. *Id.* at 429.

[109] *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976) (noting the "general rule that religious controversies are not the proper subject of civil court inquiry" and prohibiting secular courts from reviewing the propriety of a religious institution's own determinations regarding the requirements of its faith).

[110] *See* 21 C.F.R. § 145.170(a)(2)(iii)(e) (2023) (defining "slices" in the context of labeling peaches as "consisting of peeled pitted peaches cut into wedge-shaped sectors").

[111] Sherry F. Colb, *Are Religious Abortions Protected?*, Justia (June 7, 2022), https://verdict.justia.com/2022/06/07/are-religious-abortions-protected [https://perma.cc/QYY3-GZQW].

The theoretical permissibility of abortion in Jewish law does not, on its own, demonstrate that Jews' religious rights are impinged upon in cases where abortion is proscribed by secular law. But this does not mean that Jews can never level a religious freedom challenge against an abortion statute. The most obvious instance where Jewish religious rights could be threatened are in certain circumstances Jewish authorities hold that abortion is not just *permissible* but a *duty*. As Rabbi Bleich notes, it is widely accepted in Jewish law that abortion is *obligatory* in circumstances where a mother's life is threatened.[112] A state law which either does not contain a life exception, or (more likely) whose "life" exception is narrower than that which prevails under Jewish law, would interfere with the realization of this duty.[113]

Another significant, though often overlooked, arena where abortion restrictions place a clear burden on religious liberty is in the limitations they place on doctors or other medical professionals.[114] A Jewish doctor who endorses the liberal Jewish perspective on abortion could feel religiously *obligated* to perform the procedure in circumstances where the pregnant person has made clear their individual judgment that an abortion is necessary.[115] While the patient may be exercising their discretionary judgment, the doctor would not: They would feel a quite traditional and straightforward religious obligation to perform the procedure. Laws or policies which forbid them from performing the procedure would thus represent a significant religious burden. Elizabeth Sepper has written persuasively about this lacuna in the discourse on "conscience protections": The overwhelming focus

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[112] *See* Bleich, *supra* note 104, at 87; *see also* David M. Feldman, Marital Relations, Birth Control, and Abortion in Jewish Law 275 (1968).

[113] For example, doctors in Louisiana have already testified that the state's highly circumscribed exemptions for allowing abortions have forced them to deliver non-viable fetuses in fashions which needlessly place the mother's life in danger. *See* Kylie Cheung, *Louisiana Woman Is Forced Carry Headless Fetus to Term or Travel to Florida for Legal Abortion*, Jezebel (Aug. 16, 2022), https://jezebel.com/louisiana-woman-is-forced-carry-headless-fetus-to-term-1849418243?rev=1660670854431 [https://perma.cc/R9PX-VSAJ] (describing testimony from a doctor about a patient's delivery of a nonviable fetus).

[114] This may be of especially important significance given the propensity of legal bans on abortion to exempt the pregnant person from liability, but to impose it on the doctor. *See, e.g.*, Protecting Pain-Capable Unborn Children from Late-Term Abortions Act, S. 8480, 117th Cong. (2022) (proposing a federal abortion ban which would largely prohibit abortion after fifteen weeks, but specifically exempts the pregnant woman from prosecution).

[115] This derives directly from Barilan's view that what Judaism demands of implicated others, upon learning that a woman desires an abortion, is that "her pain prevails and her judgment [is] respected." Barilan, *supra* note 102, at 97; *see infra* notes 125–39 and accompanying text (explaining how one understanding of the Jewish law on abortion demands that decisions on abortion be channeled through individualized, deliberative judgment, the conclusions of which command deference).

on permitting doctors or hospitals to refrain from participating in generally permitted procedures which violate their conscience has obscured the parallel case of the doctors whose conscience demands that they *do* perform a given procedure that either law or policy seeks to prohibit.[116] Conscience protections for institutions can accordingly impinge on "conscience protections" for individual doctors—as in the case of a Jewish doctor at a Catholic hospital, where one would likely see very different views about what "conscience" compels them to do regarding abortion.[117]

But on a deeper level, the Jewish case may challenge a more fundamental assumption regarding the nature of religious obligations: namely, that religious obligations are intrinsically illiberal and stand at odds with autonomous free choice. For many, a religious obligation is necessarily the antithesis of individual free choice; one has a religious obligation if and only if one is compelled to make a particular decision (e.g., to eat or refrain from eating certain foods, or to participate or not participate in a given medical procedure). Religious obligations, under this view, represent limits on personal autonomy. If one is not compelled to take or abjure a particular substantive act, there is no religious obligation at all. A person who does not feel religiously *compelled* to take a certain, particular action cannot "allege that the law prevents them from complying with the dictates of their own religious persuasion, since their religions do not purport to lay down any such dictates."[118] And so in the abortion context, the argument would go, unless there is a religious obligation *to* have an abortion (that is, it would represent a violation of religious duty to carry the pregnancy to term—as in the case identified by Rabbi Bloch where the mother's life is threatened), then there is no religious obligation whatsoever.[119]

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116 *See* Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1515–16 (2012).

117 Steven Resnicoff suggests that, insofar as Jewish law typically prohibits aiding or strengthening a third party engaged in an act which violates Jewish law, rules which require a Jewish actor to assist or encourage another to get an abortion which the Jewish actor believes is forbidden under Jewish law "would very heavily impede the practice of Judaism." Steven H. Resnicoff, *Family Planning and Government Regulation: Jewish Law Perspectives*, 15 DEPAUL J. HEALTH CARE L. 15, 22–23 (2013). He does not extend this to the parallel case, where a state law which forbids a Jewish actor from assisting in or encouraging an abortion that he believes is religiously required would presumably present an equally burdensome imposition on Jewish religious liberty. *See id.*

118 *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 174 (1992) (describing plaintiffs in Utah who brought suit regarding abortion rights).

119 *See* Colb, *supra* note 111 ("If one wanted to have a chance of prevailing on a 'religious abortion' claim, one would have to assert that one's religion *requires* one to have an abortion rather than that it merely *allows* one to have one."); McConnell, *supra* note 118, at 174 (distinguishing between circumstances where "the pregnant woman's

Yet examples from Jewish law indicate that it is perfectly plausible for a religious obligation to take the form of *respecting* an individual's free choice. Consider Barilan's account of how Jewish law treats abortion.[120] He suggests that what Jewish law requires is respect for a woman's *judgment* as to whether she wishes to proceed with a pregnancy. Her freedom to choose is what is religiously compelled; not being able to follow through with her free choice represents a failure to discharge the demands of her faith. In this, McConnell is simply wrong in suggesting that a belief that a given issue is delegated to one's personal autonomous judgment automatically falsifies any claim of religious obligation. His framework takes a particular presumption influenced by certain (predominantly Christian) religious traditions and mistakenly assumes that it applies to all (legitimate) religious denominations, effectively excluding much of the American Jewish tradition in the process.[121]

Indeed, some Jews view a fundamental (philosophical) liberalism as an essential tenet of Judaism.[122] One Jewish respondent in a focus group identified the "best part about being a Reform Jew is that it stresses the most important part of Judaism. It stresses free choice. Free choice is the basis of Judaism."[123] For many, "American liberal values" have been merged into "the perceived boundaries of Jewish meaning

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religion *requires* her to get an abortion" versus ones where "plaintiffs claim that the decision whether to have an abortion is an issue of religiously-informed conscience" only because their religious beliefs leave decisions about abortion to an individual's personal autonomous judgment).

120 Barilan, *supra* note 102 and accompanying text.

121 *See* Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. Ill. L. Rev. 463, 486 n.95 (arguing that McConnell's framework "discriminates among religions" because it "would only grant religious exemptions to members of hierarchical, authoritarian religions which impose on their adherents absolute rules of conduct dictated by an all-powerful God" while denying them "to members of religions that grant individuals a relatively free moral will"). On the development of distinctively liberal (or "heterodox") Jewish conceptions of Jewish law, see generally Laynie Soloman & Russell G. Pearce, *"Nothing About Us Without Us": Toward A Liberatory Heterodox Halakha*, 37 Touro L. Rev. 1769 (2022).

122 Orthodox Jews have also, on occasion, appealed to the notion that Jewish law requires freedom of choice in a given contested scenario as an argument for why the Free Exercise Clause prohibits being subjected to a secular court order. *See* Aflalo v. Aflalo, 685 A.2d 523, 530 (N.J. Super. Ct. 1996) (suggesting that a court order requiring a husband to grant his wife a *get*, or Jewish writ of divorce, impedes free exercise because a *get* by its nature must be freely given and thus one compelled via court order could not qualify); *see also* Shiva Falsafi, *Religion, Women, and the Holy Grail of Legal Pluralism*, 35 Cardozo L. Rev. 1881, 1910–11 (2014) ("Generally, the defendant husband argues that because, under Jewish law, the *get* has to be granted voluntarily, an order of specific performance [to grant a *get*] interferes with his prerogative to choose to give or withhold a *get*.").

123 Jonathan D. Sarna, *The Cult of Synthesis in American Jewish Culture*, 5 Jewish Soc. Studs. 52, 74 (1998).

and identity."[124] While this is in part a reflection of modernity's influence, it also has deep roots in the most basic way Jews orient to religiosity and religious obligation. Far from experiencing religious obligation as a matter of passive acquiescence to divine dictates, for many Jews religious observance comes through a dialogic confrontation in which individual reason and judgment are not just valid but indispensable elements that channel how we relate to religious law and even divinity itself. In such a confrontation, the God of the Hebrew Bible is not an implacable force: God instead "reacts, defers, experiences defeat, demonstrates emotion, and projects himself as a parent . . . ."[125] Meanwhile, Jewish religious interpretation is famously *not* tethered to unquestioned obedience to divine will.[126] The Jew, Harold Schulweis argues, "openly resists being shoved downward in the balancing between him and his God. It is the unprecedented struggle in which the Jew asserts nothing less than his moral equality with his Father."[127] In this, Jews echo some of the most revered figures of the Hebrew Bible whose holiness came precisely from *not* unquestionably accepting divine decree. From Abraham "standing yet before the Lord" to plead the case of innocents in Sodom and Gomorrah,[128] to the entirety of the book of Job,[129] it is no small thing that the very term "Israel" translates to "one who wrestles with God."[130]

And here the difference between individual choice about abortion and about canning peaches becomes evident: it is entirely reasonable that Judaism, as a religion, would take a different view about the

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124 *Id.* (quoting Sylvia Barack Fishman, *Negotiating Both Sides of the Hyphen: Coalescence, Compartmentalization and American Jewish Values*, *in* THE RABBI LOUIS FEINBERG MEMORIAL LECTURE IN JUDAIC STUDIES (1996)).

125 JAMES A. DIAMOND, JEWISH THEOLOGY UNBOUND 14 (2018).

126 *Id.* at 186 ("[The Rabbi's] role is shot through with a hermeneutical freedom that is the flip side of the political freedom God originally obtained for Israel."). Indeed, a very famous Talmudic story "ends with God laughing that 'my children have overcome me' after a majority of Rabbis overrule several direct divine interventions in favor of their consensus understanding regarding interpreting a particular purity law." David Schraub, *Our Divine Constitution*, 44 LOY. U. CHI. L.J. 1201, 1239 n.157 (2013) (reviewing ROBERT A. BURT, IN THE WHIRLWIND: GOD AND HUMANITY IN CONFLICT (2012)).

127 Harold M. Schulweis, *Suffering and Evil*, *in* GREAT JEWISH IDEAS 197, 198 (Abraham Ezra Millgram ed., 1964).

128 Schraub, *supra* note 126, at 1208 ("[Abraham] 'stood yet before the Lord'—actually, God stood before him—and neither cowered nor flinched. He did not reflexively defer to God's authority. Instead, he challenged God on the grounds that there may be innocents in the city . . . ."); *see Genesis* 18:22–24.

129 In the eponymous book, Job "challenges God with relentless tenacity, escalating his rhetoric again and again," Schraub, *supra* note 126, at 1222, and ultimately secures "as close to an open admission of guilt from God as we can find anywhere in the text of the Hebrew Bible." BURT, *supra* note 126, at 167.

130 Schraub, *supra* note 126, at 1219; *see Genesis* 32:28 (giving the name "Israel" to Jacob because he has "striven with God and with men, and ha[s] prevailed").

importance of respecting individual judgment on a matter as personal and fraught as reproductive health care, while not assigning similar valuation to personal preferences regarding the proper labeling of fruits and vegetables. Judaism likely does not, under any denomination, create a religious obligation to respect individual judgments in any and all cases.[131] But it might well demand respect for individual judgments on matters of reproductive autonomy.

The idea of (philosophically) *liberal* religious obligations—that is, an *obligation* that stems from following one's own personal *judgment*—may become clearer upon breaking down what constitutes a religious obligation in the first place. Frequently, a religious obligation is contingent on the existence of certain factual premises. So, for example, a Jewish woman may not always feel religiously obligated to immerse herself in a *mikveh* (ritual bath) every day, but rather specifically after certain factual predicates have been established (for example, seven days after menstruation).[132] Her obligation to enter the *mikveh* is generated by a factual predicate (the last time she menstruated). A Catholic woman might not generally oppose vaccinations, but only those specific vaccines derived from fetal stem cells.[133] Her religious obligation only comes into existence upon establishment of a particular fact about the development of the vaccine.

Much like entering a *mikveh* or avoiding a vaccine, nobody suggests that a pregnant person is religiously obligated to have an abortion in any pregnancy. So the operative question is: what factual predicates do generate such an obligation? One answer, reflected in the view of Bleich, could be "when the pregnancy is life-threatening."[134]

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131 What to do with a religion that does make such a claim—that individual judgment must be respected in any and all cases? Perhaps this is the terminus of Justice Scalia's warning in *Smith*, that if "the 'compelling interest' test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded," and that "[a]ny society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them." Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 888 (1990). While we perhaps can cross that bridge if and when we come to it, it is equally plausible to say that this risk is inherent in the hyper-expansive new Free Exercise Clause, and illustrates how the doctrine simply cannot work without discriminatorily excluding some sorts of religious belief and practice from its ambit.

132 *See, e.g.*, Margaret A. Holub, *Immersion and Transformation: A Community Explores the Mikveh*, Liturgy, July 2012, at 14, 14 (noting the religious tradition where women do not touch their husbands while they are menstruating and for seven days following, at which point they immerse themselves in a *mikveh* and are ritually "cleansed").

133 *See* Mark M. Gray, *US Adult Catholics Attitudes About Vaccination*, 1 Rev. for Religious 285, 286 (2021) (detailing Catholic attitudes about whether vaccines are permissible in circumstances where they were developed through embryonic stem cell research).

134 *See* Bleich, *supra* note 104, at 74.

But another answer, found in the view of Barilan, could also be "when the pregnant woman, in her considered judgment, concludes that an abortion is necessary for her own well-being."[135] Once that judgment is made and that fact is established, the abortion in such a case is just as religiously "obligatory" as is one mandated by health considerations. Conceptually speaking, these are not distinct cases—they merely articulate different factual predicates before the obligation is triggered (a fact about health, or a fact about autonomous judgment). But if one accepts the general proposition that all religious groups should equally be able to claim protections for conduct they deem religiously obligatory, there is no reason why a Jewish religious obligation that hinges on the latter fact should be given less protection than one that hinges on the former.

To be sure, understandings of religious conscience that emphasize *choice* rather than *obligation* can be contentious. Robert George, for instance, harshly criticizes the "autonomy" view of conscience as a "writer of permission slips," viewing it as inferior to the "duty" view where conscience serves as a "stern monitor" compelling us to take acts we might otherwise prefer to avoid.[136] I believe that George is shortsighted in conflating the autonomy view with pure licentiousness—this fails to credit how the Jewish perspective (as articulated by Barilan) is one that values *considered judgment and deliberation* over matters with significant moral and personal stakes.[137] But regardless of who has the better of the philosophical argument, it is dubious—given the strict constitutional requirement of neutrality as between different religious credos—that law could privilege the former sort of religious obligation over the latter without admitting to naked favoritism towards preferred religious models. In this context, the willingness of conservative legal advocates to press for this highly particular and sect-specific understanding of religious obligation should be seen as a pivot towards express Christian preferentialism, for which the conflation of conservative Christianity and religiosity provides the barest fig leaf.

This should suffice to establish a genuine *religious* burden on Jews who, based on their religious scruples, believe that they need an abortion

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135 *See* Barilan, *supra* note 102, at 104.

136 Robert P. George, Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism 112–13 (2013) (suggesting that conscience, properly understood, grants only a "right to do what one judges oneself under an obligation to do, whether one welcomes the obligation or must overcome a strong aversion to fulfill it").

137 *See* Angela C. Carmella, *Progressive Religion and Free Exercise Exemptions*, 68 Kan. L. Rev. 535, 543 (2020) ("To say that religious exercise is indeterminate or discretionary is not to say that it is undertaken lightly, or by mere whim or preference. In many cases, the religious individual experiences her 'choice' as deeply as those whose faith mandates highly particularized rules and requirements.").

under circumstances where it is proscribed by state law. The deference given to the pregnant woman who concludes she needs an abortion is under the Jewish view (at least as articulated by Barilan) not a matter of subjective whim, but rather is baked into the core deliberative process that governs how Judaism insists abortion decisions be regulated. And even if one resists the conclusion that a patient whose religious scruples entitle her to choose to have or not have an abortion has a genuine religious *obligation* being impinged upon, the *Dobbs* decision still authorizes significant traditional burdens on religious conscience imposed both on the pregnant person (in cases where Jewish law holds that an abortion is not discretionary but is obligatory)[138] and on Jewish medical professionals (who likewise might perceive themselves as facing a non-discretionary obligation to assist a person whom they know has come to the considered judgment that she requires an abortion).[139]

Of course, establishing a burden on the free exercise of religion is only half the battle. In order to claim a constitutional entitlement to a religious exemption, one must also demonstrate that the laws in question are not "generally applicable."[140] But, given the Court's new free exercise jurisprudence, this should be a simple task. Most anti-abortion statutes are riddled with exemptions—for example, in order to protect a mother's life, or in cases of rape or incest.[141] The willingness to grant

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138 *See supra* notes 112–13 and accompanying text.

139 *See supra* notes 114–16 and accompanying text.

140 It is worth noting that *Tandon* took this question in reverse order, and upon finding that the law was not "generally applicable," did not ask whether the burden on religion was substantial or not. Tandon v. Newsom, 141 S. Ct. 1294, 1296–97 (2021). So it is possible that *Tandon* implies that laws which lack general applicability—under *Tandon*'s expansive understanding of that concept—are impermissible regardless of whether the burden on religion is substantial or not. I thank Jim Oleske for this observation.

141 *See, e.g.*, La. Rev. Stat. Ann. § 40:1061.6(B) (2016) (detailing life, rape, and incest exemptions to Louisiana's ban on public funding of abortion); S.C. Code Ann. § 44-41-650 (2023) (setting exceptions to rape and incest for fetuses under twelve weeks in South Carolina); Ind. Code Ann. § 16-34-2-1 (exempting abortions resulting from rape and incest up to ten weeks after fertilization and abortions necessary to save the life of the mother up to twenty weeks) (2022); *see also* Schragger & Schwartzman, *supra* note 18, at 2321 (noting that, "despite efforts by some conservative politicians and activists who favor categorical abortion bans" every state level abortion statute contains at least some "secular exemptions"). Hence, while it's true that some Jewish religious liberty objections could, consistent with the current doctrine, potentially be thwarted by eliminating all exemptions or by specifying that pregnant women rather than doctors face liability for procuring an abortion, political constraints have thus far channeled anti-abortion political programs in a different direction. *See* Mary Harris, *Can Congress Do Anything to Save Reproductive Rights?*, Slate (May 26, 2021), https://slate.com/news-and-politics/2021/05/supreme-court-roe-v-wade-abortion-texas-mississippi-arkansas.html [https://perma.cc/CBG4-9MFX] (identifying the common rhetorical trope from anti-abortion activists who say "we don't want to punish women who terminate—we want to punish the abortionists").

these secular exemptions to abortion bans throws into question the refusal to grant such exemptions to religious claimants.

Conservative opponents of extending accommodations in the abortion case challenge this conclusion. They suggest that the state's "compelling interest" in protecting fetal life would allow an abortion ban to satisfy strict scrutiny even in those cases where the law does substantially burden religious exercise.[142] The ability of state-imposed burdens on religious practice to survive constitutional review if they are narrowly tailored to a compelling governmental interest is well-established.[143] However, the conclusion that abortion bans automatically would fall inside this carve-out moves too quickly past important developments in the new free exercise jurisprudence, developments which sharply circumscribe how states can successfully proffer a "compelling state interest." In particular, judicial advocates of the new free exercise have been exceptionally skeptical regarding claims of a compelling interest in circumstances where the relevant statutory provision contains non-religious exemptions.

In *Little Sisters of the Poor v. Pennsylvania*, Justice Alito suggested that courts should be reluctant to "exercise [their] own judgment" on what governmental interests are compelling.[144] Instead, courts can typically look to whether Congress or the relevant state legislature has, by its own conduct and statutory scheme, treated the asserted interest as a "compelling" one.[145] In particular, the presence of exemptions to an otherwise generally applicable law undermines the notion that the

142 *See, e.g.*, McConnell, *supra* note 118, at 174 n.259 (raising the question of "[w]hether the state's interest in protecting fetal life in cases in which the life of another human being would thereby be threatened is 'compelling'"); Howard Slugh & Tal Fortgang, *Abortion Arguments That Misinterpret Judaism*, Nat'l Rev. (June 22, 2022), https://www.nationalreview.com/2022/06/jewish-arguments-against-pro-lifers-misunderstand-judaism [https://perma.cc/M38L-V78Y] (discussing how "[a] state is allowed to burden an adherent's religious exercise if the state has a 'compelling interest' to do so and there are no alternative, less restrictive means of furthering that interest" and concluding that "[s]tates have a compelling interest in protecting the lives of unborn children for a variety of reasons, whether you think that abortion is murder or merely ends 'potential life'").

143 *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (suggesting that "[o]nly the gravest abuses, endangering paramount interests" could "give occasion for [a] permissible limitation" on the free exercise of religion (first alteration in original) (citation omitted)); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) ("[A] law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests.") (citations omitted).

144 140 S. Ct. 2367, 2392 (2020) (Alito, J., concurring).

145 *See id.* ("We can answer the compelling interest question simply by asking whether *Congress* has treated the provision of free contraceptives to all women as a compelling interest.").

interest in question is one of "the highest order."[146] If the interest is so "compelling," how come the government allows it to be flouted in other cases? In *Fulton v. City of Philadelphia*, the Court used similar language to explain why exemptions to the city's antidiscrimination rules undermined the "compelling" nature of the antidiscrimination interest: "The creation of a system of exceptions . . . undermines the City's contention that its nondiscrimination policies can brook no departures."[147] As the Fifth Circuit put it, "underinclusiveness . . . is often regarded as a telltale sign that the government's interest in enacting a liberty-restraining pronouncement is not in fact 'compelling.'"[148]

The Supreme Court has stated that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue."[149] So, for example, in the context of COVID-19 rules, church services and grocery stores are "comparable" insofar as both present a risk of heightening exposure to COVID-19.[150] Meanwhile, "a law cannot be regarded as protecting an interest 'of the highest order,'" the Court has written, "when it leaves appreciable damage to that supposedly vital interest unprohibited."[151] So, for example, when a district court in Texas granted a religious exemption to Navy servicemembers who did not wish to take a COVID-19 vaccine, it did so on the grounds that "the Navy is willing to grant exemptions for non-religious reasons. Its mandate includes carveouts for those participating in clinical trials and those with medical contraindications and allergies to vaccines."[152] Such unvaccinated servicemembers pose the same risk to combat-readiness and deployability—the government's asserted compelling interest in requiring vaccination—as do those unvaccinated for religious reasons.[153]

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146 *Id.* (quoting *Lukumi*, 508 U.S. at 547); *see also* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006) ("RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.'" (alteration in original) (quoting 42 U.S.C. § 2000bb-1(a))).

147 141 S. Ct. 1868, 1882 (2021).

148 BST Holdings, LLC v. Occupational Safety & Health Admin., 17 F.4th 604, 616 (5th Cir. 2021).

149 Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021).

150 *See* Koppelman, *supra* note 55, at 2267.

151 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. at 546 (citations omitted).

152 U.S. Navy Seals 1–26 v. Biden, 578 F. Supp. 3d 822, 837 (N.D. Tex. 2022); *see also* Doster v. Kendall, 54 F.4th 398, 423 (6th Cir. 2022) (noting that "the Air Force appears to freely grant medical and administrative exemptions from its vaccine mandate").

153 *See Navy Seals*, 578 F. Supp. 3d at 837 ("Because these categories of exempt servicemembers are still deployable, a clinical trial participant who receives a placebo may find himself ill in the high-stakes situation that Defendants fear."); *Doster*, 54 F.4th at 423–24 (arguing that medical and administrative exemptions undermine the Air Force's purported

Hence, the willingness to carve out an exemption for the former sort of personnel undermines the "compelling" nature of the government's claimed interest as applied to the latter.

The same logic, however, applies with equal force in the abortion context. *Dobbs* underscored (and *Roe*, for what it's worth, appeared to concur) that protecting fetal life is an important if not compelling interest.[154] But the state's interest in protecting fetal life is not impinged to any lesser degree by an abortion performed following rape or incest, or for health reasons, than it is by an abortion done for religious reasons.[155] In all cases, the fetal life is terminated. That the state permits the interest in protecting fetal life to be overridden in the former set of cases, under the Court's logic, "undermines the [government's] contention that its [anti-abortion] policies can brook no departures."[156] And even state laws which limit exemptions solely in cases where the mother's life is endangered still might not qualify as generally applicable, on the theory that the state cannot prioritize "life-sustaining" over "spirit-sustaining" activities.[157] In short, under the new doctrine sincerely-held Jewish beliefs about abortion plausibly entitle Jewish patients seeking an abortion to claim a religious exemption from state anti-abortion bans.

In theory, the ability of some Jews to garner exemptions from anti-abortion statutes should be no more troublesome than the ability of some Christians to obtain exemptions from vaccine mandates. In practice, it is highly unlikely that conservatives will be sanguine about the former prospect notwithstanding their fervent demand that the

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compelling interests in health and military readiness to the same degree as do religious exemptions).

154 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261 (2022); *see* Roe v. Wade, 410 U.S. 113, 163 (recognizing "the State's important and legitimate interest in potential life," which becomes "compelling" at the point of viability).

155 *See* Anonymous v. Indiv. Members of Med. Licens. Bd., No. 49D01-2209-PL-031056, slip op. at 37 (Marion Cnty., Ind. Super. Ct. Dec. 2, 2022), https://interactive.wthr.com/pdfs/order-granting-preliminary-inj-rfra-proposed-order-no-motion.pdf [https://perma.cc/9W8P-2TLB] (noting that Indiana's anti-abortion statute "explicitly allows abortions in circumstances that the State acknowledges constitute the 'killing' of an 'innocent human being': for example, where the pregnancy is the result of rape or incest and where the fetus is viable but will not live beyond three months after birth"), *appeal docketed*, No. 22A-PL-02938 (Ind. Ct. App. Dec. 9, 2022); Schragger & Schwartzman, *supra* note 18, at 2322 (observing that the danger to "fetal life is the same, whether a patient decides to terminate a pregnancy for powerful secular reasons or to act in accordance with their religious convictions"); Corbin, *supra* note 101, at 505 ("[T]he government's goal of promoting potential life is as undermined by allowing exceptions for physical health (the secular reason) as they are by allowing exceptions for spiritual health (the religious reason).").

156 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021).

157 *See supra* notes 65–67 and accompanying text.

latter accommodation be honored.[158] In this context, there is a pressing need to create a justificatory architecture that can explain why liberal Jewish claimants are not entitled to the expansive protections offered by the new free exercise jurisprudence. In the following Sections, I will suggest that such justifications can be found in an emergent species of antisemitic discourse which degrades the authenticity and validity of liberal Jews as Jews. This form of antisemitism is becoming increasingly prominent and shades of it have already been leveraged as a means of explaining away the need for providing free exercise protections to liberal Jews.

II
Delinking Religiosity and Conservatives: The Jewish Challenge

Accounts of Jewish difference, and of threats of antisemitism that emerge from that difference, have often overlooked the specific status of liberal Jews. The presumption has been that liberal Jews, compared to their Orthodox peers, are more assimilated into the broader currents of American life and that this assimilation makes them comparatively less threatened by antisemitism which is presumed to concentrate on Jewish differentiation. This presumption, however, overlooks particular arenas where liberal Jews are in fact particularly marked by difference, while Orthodox Jews have, in a sense, "assimilated." Where Orthodox Judaism has begun to converge in its political and social practices with conservative Christianity, the remaining theological and ritualistic differences may be overlooked or deemed acceptable. At the same time, this convergence renders liberal Jewish divergence from these conservative Christian political norms especially salient. Liberal Jewish difference, insofar as it sounds in political and moral registers, threatens conservative Christian power—and its claimed monopoly over what religiosity and religious freedom mean in the American context—in a way that Orthodox theological and ritualistic difference may not.

A. Orthodox Jewish Assimilation and Liberal Jewish Difference

Jews have often sought to assimilate into the American mainstream, and the mainstream, in turn, has demanded assimilation from Jews. As Wendy Brown argues, "to be brought into the nation, Jews had to be

158 *See* Koppelman, *supra* note 55, at 2285 (concluding that no "member of the Court will pursue [this variant of Free Exercise] to the limits of its logic. They are not anarchists. Instead, I confidently predict that they will cheat, allowing the state to pursue interests that they, in their entirely unconstrained discretion, deem worthy").

made to fit, and for that they needed to be transformed, cleaned up, and normalized, even as they were still marked as Jews."[159] And as a religious minority, Jews will always be "tempted to assimilate Judaism into alien and even inimical philosophies and theologies" that characterize the surrounding cultures within which they live.[160] The assumption often has been that Orthodox Jews, whose practices most visibly diverge from the American Christian mainstream, are accordingly the most vulnerable to being excluded insofar as they fail to meet the demands of this assimilationist impulse.[161] Liberal, non-Orthodox Jews, by contrast, are assumed to be able to move about relatively freely in secular society and so face comparatively fewer threats predicated on prejudice against or failure to accommodate Jewish difference.[162]

There is plenty of truth to the conventional wisdom. It is, however, incomplete. While at one level the distinctive garb and appearance of Orthodox Jews may make it easier to mark them as outsiders to the American Christian norm, at another level, Orthodox Jews fit comfortably into the assimilationist paradigm insofar as "the most acceptable form of Jewish difference [has been] Jewishness defined as religious

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159 Wendy Brown, Regulating Aversion: Tolerance in the Age of Identity and Empire 53 (2006).

160 *See* Byron L. Sherwin, Studies in Jewish Theology: Reflections in the Mirror of Tradition 10 (2007) ("[T]he Jewish thinker may remain oblivious to the 'cultural conditioning' absorbed from his or her geographical environment, and may be led to articulate a theology of Judaism in a manner that does not cohere with authentic Jewish thought or with the inherent vocabulary of Jewish theological discourse."). I do want to push back on Sherwin somewhat. I do not believe that Jewish practices influenced by modernity or other external sources are necessarily any less Jewish. For example, I noted above how some portions of modern Orthodox Jewish thought on abortion appears to be influenced by broader Christian trends and in that way is "assimilationist," *see supra* notes 121–24 and accompanying text, but this does not make the Orthodox Jewish beliefs any less authentically Jewish. Orthodox Jews and liberal Jews alike are entitled to develop, modify, and make alterations to their beliefs and traditions based on encounters with external ideologies and communities, and Orthodox Jews and liberal Jews have done and will continue to do exactly that. In other words, while Orthodox Jews cannot claim to represent a superior iteration of Judaism by reference to representing a purer or untainted Jewish essence—their Judaism is just as "tainted" as anyone else's—such impossible purity is non-germane to establishing whether something is authentically Jewish or not. There is no "essential" Judaism that exists unaffected by external influences. Certainly, the process of negotiating *how* and *when* to incorporate and reject external influences into a broader Jewish corpus is a sensitive and often contentious project. But ultimately, Judaism is as it does—Judaism is the product of the collective and ongoing choices of Jews who understand themselves to be thinking and behaving Jewishly. *Cf.* Richard Rorty, Consequences of Pragmatism 31 (1982) ("[T]here is nothing deep down inside us except what we have put there ourselves.").

161 *See infra* note 196 and accompanying text.

162 *See* Robert P. Amyot & Lee Sigelman, *Jews Without Judaism?: Assimilation and Jewish Identity in the United States*, 77 Soc. Sci. Q. 177, 178 (1996) (associating "the lessening of overt anti-Semitism and the lowering of traditional barriers to Jewish assimilation").

difference . . . the notion that [Jews] simply go to a different 'church.'"[163] Understood as a "quirky Protestant sect,"[164] the superficial distinctiveness of Orthodox Jews may nonetheless be easily incorporated into broader American understandings of devout religiosity.[165] Meanwhile, while liberal Jews are often indicted for allegedly abandoning their Jewish character in a bid to assimilate into American society, a different type of "assimilationism" may be occurring amongst Orthodox Jews. Increasingly, Orthodox Jews are consciously detaching themselves from the majority of the American Jewish community in order to align more closely with politically conservative Evangelical Christians.[166] In some cases, what appears to be Jewish differentiation may, in a different register, be a form of assimilation.[167]

Orthodox Jews are far more likely to identify as conservative than other Jews and "resemble white Evangelical Christians on several key

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[163] Laura Levitt, *Impossible Assimilations, American Liberalism, and Jewish Difference: Revisiting Jewish Secularism*, 59 Am. Q. 807, 807–08 (2007); *see also* Adam Bellos & David Graizbord, *"American Jews Think They Are Christians Without Jesus,"* Jewish News Syndicate (Aug. 3, 2022), https://www.jns.org/american-jews-think-they-are-christians-without-jesus [https://perma.cc/VZ83-4SWT] ("American Jews . . . have internalized that they are Christians without Jesus. What defines them is something called Judaism and that is a religion in the Christian sense of the term." (ellipses in original)).

[164] Stephen Matthew Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 Iowa L. Rev. 833, 858 (1996) ("Many Christians seem to consider Judaism to be merely a quirky Protestant sect . . . .").

[165] For example, in his dichotomy between "Christians" and "pagans," Steven D. Smith attempts to locate "devout" Jews into the former category while implicitly relegating the "non-devout" to the latter. Steven D. Smith, Pagans and Christians in the City: Culture Wars from the Tiber to the Potomac 13 (2018); *see also* George, *supra* note 136, at 5–6 (describing himself as, "on the most divisive moral issues," making "common cause with devout Jews, Muslims, and other people of faith," suggesting that the Jewish majority which does not align with his conservative Christian orientation are not "devout"). Commenting on this move, Richard Schragger and Micah Schwartzman write, "[w]e are not entirely clear on what 'devout' means here, but the suggestion seems to be that politically conservative, Orthodox Jews believe in transcendent religion, while politically liberal, Reform Jews are partly (or mostly?) pagan." Richard Schragger & Micah Schwartzman, *Jews, Not Pagans*, 56 San Diego L. Rev. 497, 511 (2019).

[166] *See* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 360 (2001) ("In recent years, . . . Orthodox Jews have begun to assert views at odds with those of liberal Jews and consistent with those of evangelical Protestants and conservative Catholics, especially on abortion, gay rights, and public prayer.").

[167] For example, Shaul Magid provocatively argues that the masculinist "muscle Jew" ethos of Meir Kahane and his Jewish Defense League (JDL) actually was a means of assimilating Judaism into mainstream American Protestantism. Shaul Magid, Meir Kahane: The Public Life and Political Thought of an American Jewish Radical 12 (2021) ("[W]hat Kahane may have thought was an exercise in difference was in fact an exercise in assimilation. . . . In one regard, then, we can say that the JDL may have been one of the most *assimilated* groups in American Judaism at the time.").

cultural and political indicators."[168] Even as far back as the 1960s, one saw glimmers of this alignment. For example, most Jews praised the Supreme Court's decision in *Engel v. Vitale*,[169] which barred officially mandated sectarian (in effect, given American religious demographics, Christian) prayer in school. But Rabbi Immanuel Jakobovits, then based in New York but who later would become Chief Rabbi of the British Commonwealth, complained bitterly of the "alliance between teachers of Judaism and the spokesmen of atheism or secularism who secured and applauded the verdict."[170] Jews must "abandon[] their dogmatic resistance to manifestations of religion in public life" and instead promote the resurgence of a religious—in practice, Christian—voice occupying the public square.[171] The commitment to a unified front of conservative religiosity can even result in the downplaying of antisemitic violence precisely because it is alleged to be primarily a concern of the liberal Jews. Writing in *Mishpacha*, an Orthodox Jewish weekly, Yonoson Rosenblum argued that "if one's only connection to being Jewish is a Jewish last name, one's chief fear might be of a neo-Nazi going through the local phone directory in search of Jewish names."[172] However, for those Jews who are "concerned about the ability to live as an identifiable Jew in the United States," Rosenblum contends that "Critical Race Theory" is a "far greater" danger.[173] At the furthest extreme one even hears Jews outright declaring support for "Christian nationalism."[174]

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168 Eric Cohen, *Jewish Conservatism: A Manifesto*, Commentary (May 2017), https://www.commentary.org/articles/eric-cohen/jewish-conservatism-manifesto [https://perma.cc/3ZDZ-GCKR]; *see also* Shanes, *supra* note 108 (arguing that Orthodox Judaism has become increasingly influenced by, and turned towards, Evangelical Christianity based on shared right-wing political agendas).

169 370 U.S. 421 (1962).

170 Mark Braham, *Culture and Civilisation: Perils of Banishing Religion from Society*, Nat'l Civic Council (Mar. 18, 2006), https://ncc.org.au/uncategorized/2643-culture-and-civilisation-perils-of-banishing-religion-from [https://perma.cc/JLX5-F8XS].

171 *Id.*

172 Yonoson Rosenblum, *Wokeness Is Coming for Us*, Mishpacha (Nov. 4, 2020), https://mishpacha.com/wokeness-is-coming-for-us [https://perma.cc/SJ85-DVXF].

173 *Id.* Rosenblum does not deny the existence of antisemitic violence. But he treats it as largely fringe and marginal, in contrast to his fusillade against "Critical Race Theory," which he views as mainstream and dangerous for reasons that are predominantly political in character. *Id.* ("The greatest threat going forward is an ideology that explicitly rejects the liberal order in which American Jews have flourished. And unlike neo-Nazis and white supremacists, who exist at far edge of American society, this anti-liberal ideology, . . . has made deep inroads into the main institutions of American life.").

174 Right-wing commentator and Republican congressional candidate Laura Loomer, in the course of declaring herself to be a "proud Jewish woman" (refuting a report that she had converted to Christianity), also stated "I'm in support of the Christian nationalist movement." Will Sommer, *Laura Loomer Attacks Opponent for His Age—in Famously Elderly District*, Daily Beast (Aug. 5, 2022), https://www.thedailybeast.com/

The argument that "Critical Race Theory" is more of a threat to Jews than neo-Nazi attacks may be absurd. But if there is a kernel of truth to Rosenblum's argument, it is that different branches of Judaism are vulnerable to antisemitism in different ways. For example, it is often posited that Orthodox Jews are more vulnerable to antisemitic street crime and harassment than other Jews because they are more "visible."[175] But non-Orthodox or liberal Jews can be vulnerable in different ways: to the extent that their religious practice diverges more sharply from public conceptions of what "counts" as religious—conceptions generally drawn from Christian models[176]—non-Orthodox Jews are more at risk of having their status as Jews be denigrated or denied.[177] Likewise, liberal Jews can be presented as harbingers of destructive social or political forces (such as Bolshevism, socialism, or "cultural Marxism") that mark them specifically as dangers to the polity in a way that Orthodox Jews may not share.[178] Finally, liberal Jews can be attacked for disturbing

laura-loomer-attacks-opponent-for-his-age-in-famously-elderly-district [https://perma.cc/SJ2B-4VXD]. At least one Jew, Yoram Hazony, was among the drafters of "National Conservatism: A Statement of Principles," which expressly declares that in states with a Christian majority "public life should be rooted in Christianity and its moral vision, which should be honored by the state and other institutions both public and private." Will Chamberlain, Christopher DeMuth, Rod Dreher, Yoram Hazony, Daniel McCarthy, Joshua Mitchell, N.S. Lyons, John O'Sullivan & R.R. Reno, *National Conservatism: A Statement of Principles*, Edmund Burke Found., https://nationalconservatism.org/national-conservatism-a-statement-of-principles [https://perma.cc/N5ME-SCBM]. While the document promises Jews and other religious minorities some degree of protection "in the observance of their own traditions, in the free governance of their communal institutions, and in all matters pertaining to the rearing and education of their children," these protections do not appear to extend to matters of public or civic equality. *Id.*

175 Liam Stack, *'Most Visible Jews' Fear Being Targets as Anti-Semitism Rises*, N.Y. Times (Feb. 17, 2020), https://www.nytimes.com/2020/02/17/nyregion/hasidic-jewish-attacks.html [https://perma.cc/SW6V-3CGP]; *see also* Ayal Feinberg, *Explaining Ethnoreligious Minority Targeting: Variation in U.S. Anti-Semitic Incidents*, 18 Persps. Pol. 770, 776 (2020) (suggesting that "distinguishability" is a key factor which enhances a minority group member's vulnerability to being targeted in a hate crime).

176 The Court has historically been alert to the possibility that the dominant models of what "counts" as religious may not cover non-orthodox or unfamiliar faiths. *See* Follett v. Town of McCormick, 321 U.S. 573, 577 (1944) ("The protection of the First Amendment is not restricted to orthodox religious practices . . . .").

177 *See infra* notes 273–81 and accompanying text.

178 On "cultural Marxism" as an antisemitic conspiracy theory, see, for example, Joan Braune, *Who's Afraid of the Frankfurt School?: "Cultural Marxism" as an Antisemitic Conspiracy Theory*, J. Soc. Just. 1 (2019) (explaining how the "cultural Marxism" concept trades on antisemitic tropes). On charges of "Bolshevism" being used to generate antisemitic hysteria, see Sharman Kadish, *Jewish Bolshevism and the "Red Scare" in Britain*, 34 Jewish Q. 13 (1987); Paul Hanebrink, A Specter Haunting Europe: The Myth of Judeo-Bolshevism (2018) (explaining how the fusion of Jewishness into Communism was encouraged by, and helped facilitate the continuation of, antisemitic tropes). On the overall centrality of antisemitic conspiracy theories to white supremacist and far-right ideologies, see Eric K. Ward, *Skin in the Game: How Antisemitism Animates White Nationalism*,

Christian assumptions about the very nature of religiosity—stubbornly evidencing diversity where many Christian advocates wish to posit uniformity.[179] Just as Orthodox Jews may gain protection insofar as they "assimilate" into dominant Christian paradigms, liberal Jews may stand out for refusing to model their religiosity in a fashion that comports with prevailing Christian practice, and be hated for it.[180]

For these reasons, the religious liberty interests of all Jews will not always perfectly overlap.[181] Differences in the social positioning of liberal versus non-liberal, or Orthodox versus non-Orthodox, Jews materially distinguish how they relate to a host of important public policy positions. On church-state separation, for instance, "there has long been a strong impulse among the most prominent American Jewish institutions to advocate for robust—and at times, unyielding—separationism."[182] That said, this impulse may obscure important divisions among Jews. Orthodox Jews who largely send their children to private religious academies may favor loosening limits on state funding of religious institutions, while non-Orthodox Jews, whose children are more likely to attend public schools,[183] may be more concerned about weakening rules about inserting religion into public classrooms.[184]

Pol. Rsch. Assocs. (June 29, 2017), https://politicalresearch.org/2017/06/29/skin-in-the-game-how-antisemitism-animates-white-nationalism [https://perma.cc/9RLB-A5EX] (explaining how antisemitism is a central animating force of contemporary white nationalism); Eric K. Ward, *Skin in the Game Revisited*, 27 Lewis & Clark L. Rev. (forthcoming 2023).

179 Consider the discussion above regarding Robert George's attack on "autonomy" models of conscience, which he wishes to present as antithetical to proper religious orientations even as such views have considerable purchase in Jewish religious thought. *See supra* notes 136–37 and accompanying text; *infra* notes 225–30 and accompanying text.

180 *See infra* notes 221–31 and accompanying text (citing examples of antisemites who purport to distinguish Orthodox Jews, whom they deem acceptable, from liberal Jews, who they condemn as toxic to the polity and to society).

181 It is accordingly far too simple to uncomplicatedly assert that "believers of both majority and minority faiths (or no faith) have the same interest in broad religious freedom protections." *See* Uddin, *supra* note 11, at 124 (suggesting that this shared interest will motivate a cross-religious coalitional alignment in favor of expansive religious liberty protections). While religious liberty in the abstract certainly matters to persons of all faith traditions, the way that liberty is operationalized will often be a source of controversy.

182 Michael A. Helfand, *Jews and the Culture Wars: Consensus and Dissensus in Jewish Religious Liberty Advocacy*, 56 San Diego L. Rev. 305, 312 (2019).

183 *See* Mordechai Besser, *A Census of Jewish Day Schools in the United States, 2018–19*, Avi Chai 10 (Aug. 2020), https://avichai.org/wp-content/uploads/2019/11/AVI-CHAI-Census-2018-2019-v3.pdf [https://perma.cc/S7JC-WF5F] (finding that only a "small proportion" of non-Orthodox Jewish children attend Jewish day schools, while the vast majority of Jewish day school attendees come from different branches of Orthodox Judaism).

184 *See* Ron Kampeas, *The 2021 Supreme Court's Jewish Issues: Abortion, Church-State Separation, a Painting Stolen by Nazis – and the Court Itself*, Jewish Tel. Agency (Oct. 7, 2021), https://www.jta.org/2021/10/07/politics/the-2021-supreme-courts-jewish-issues-abortion-church-state-separation-a-painting-stolen-by-nazis-and-the-court-itself [https://perma.cc/274G-WE69] (discussing the Anti-Defamation League's filing of a brief

Consider the recent *Kennedy v. Bremerton School District* decision,[185] upholding the right of a high school football coach to engage in public prayer with his students on the fifty yard line following his team's games, in the face of an Establishment Clause challenge. While many Orthodox Jewish groups praised the *Kennedy* decision for abandoning the more demanding *Lemon* test[186] (which hindered the allocation of public funds to sectarian, including private Jewish, schools),[187] non-Orthodox and liberal Jewish organizations, whose members are more likely to attend predominantly Christian public schools and so be directly victimized by the new avenues for religious coercion *Kennedy* opened up,[188] assailed the ruling.[189] The Central Conference of American Rabbis (a Reform body) expressed these concerns well:

> Members of the CCAR have often counseled young people in the communities we serve who have been "invited" to participate in Christian prayer at public schools, often in connection with athletics. For decades, young people in our communities have told us that "invitations" like Coach Kennedy's are coercive, and that when they decline to participate, student athletes face consequences—from their coaches, from their peers, or both. Those consequences have ranged from reduction in playing time, to social isolation, to anger, and even to violence. . . . Whenever a state employee leads a public prayer, inviting students to participate, they are establishing a state religion, contrary to our Constitution's First Amendment.[190]

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supporting the state in *Carson v. Makin*, 142 S. Ct. 1987 (2022), while the Orthodox Union supported the Christian private schools in the same case).

185 142 S. Ct. 2407 (2022).

186 *Id.* at 2427 (asserting that the Court "long ago abandoned *Lemon*"); *see* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (identifying a three-part test for Establishment Clause cases including whether the challenged statute has a secular purpose, whether its principal effect is to advance or inhibit religion, and whether it fosters excessive entanglement with religion).

187 *See* Ron Kampeas, *Leading Orthodox Group Praises Reversal of Standard in Supreme Court Ruling on Football Coach's Prayer*, Jewish Tel. Agency (June 28, 2022), https://www.jta.org/2022/06/28/politics/leading-orthodox-group-praises-supreme-court-ruling-on-football-coachs-prayer [https://perma.cc/3EXY-CHP2] (discussing Agudath Israel of America's praise of the *Kennedy* decision for abandoning *Lemon*, even as they expressed "concern about and opposition to denominational public prayer and the proselytization in schools.").

188 *See* Mitchell Bard, *American Jews and the International Arena (April 2017 – July 2018): The Gap Between American and Israeli Jews Widens as the Gap Between Governments Narrows*, *in* 118 American Jewish Yearbook 2018, at 215, 232 (Arnold Dashefsky & Ira M. Sheskin eds., 2019) ("[T]he overwhelming majority of Jews attend public schools.").

189 *See* Ron Kampeas, *Supreme Court Decision on Coach's Prayer Throws Doubt on a 30-Year-Old Victory for a Jewish Family*, Jewish Tel. Agency (June 27, 2022), https://www.jta.org/2022/06/27/politics/supreme-court-decision-on-coachs-prayer-throws-doubt-on-a-30-year-old-victory-for-a-jewish-family [https://perma.cc/G45M-KFTY] (discussing opposition to *Kennedy* from the Anti-Defamation League and American Jewish Committee).

190 Lewis Kamrass & Hara E. Person, *Central Conference of American Rabbis Statement on Public Prayer by Public School Officials*, Cent. Conf. of Am. Rabbis (June 29, 2022),

Gun control sees similar divides. Jews overwhelmingly support heightened restrictions on guns and gun ownership, viewing the proliferation of guns as a threat given the prevalence of antisemitic violence that has culminated in numerous mass shootings targeting Jewish institutions.[191] Easy access to firearms clears the path for violent antisemites to reprise mass atrocities such as those which occurred in Poway, Colleyville, and Pittsburgh.[192] But conservative Jews see these incidents of antisemitic violence and instead demand greater access to firearms as a means of self-defense against these very same threats.[193] When the only authentic religiosity is conservatism, it is easy to see how these "religious liberty" concerns could be used to bolster the conservative Jewish minority pro-gun position, thwarting—under the guise of allyship to the Jewish community—the very set of policies that most Jews believe are necessary to preserve their safety in contemporary America.[194]

In short, differentiations among Jews raise the possibility that the elevation of certain types of discourse may simultaneously alleviate antisemitic burdens endured by one subclass of Jews while exacerbating those faced by another. In practice, where Christianity is the unstated norm by which other religions are measured,[195] the gradual convergence of Orthodox Jewish beliefs and practices with conservative Christianity—which only further accentuates the *divergence* of non-Orthodox Jewish beliefs from conservative Christianity—bolsters the religious liberty claims of the former while imperiling those of the latter. As Russell Robinson writes, there is "a hierarchy in which people who identify with

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https://www.ccarnet.org/central-conference-of-american-rabbis-statement-on-public-prayer-by-public-school-officials [https://perma.cc/2XYN-VN8V].

191 *See AJC 2018 Survey of American Jewish Opinion*, Am. Jewish Comm. (June 10, 2018), https://www.ajc.org/news/survey2018 [https://perma.cc/W7SX-4ZF9] (reporting that seventy percent of American Jews agree that it is more important to "control gun ownership" than it is to "protect the rights of Americans to own guns," with only twenty-five percent believing the opposite).

192 *See* Ari Freilich & Ariel Lowrey, *How America's Gun Laws Fuel Armed Hate*, Giffords L. Ctr. To Prevent Gun Violence (May 23, 2022), https://giffords.org/lawcenter/report/how-americas-gun-laws-fuel-armed-hate [https://perma.cc/5G4H-4WRF] (explaining how lax gun laws facilitate violent antisemitism and other hate crimes).

193 *See* Henry, *supra* note 23. An Orthodox Jewish congregation has already challenged New York's recently passed law which bans handgun possession in "any place of worship or religious observation." N.Y. Penal Law § 265.01-e(2)(c) (LexisNexis 2023); *see* Complaint, Goldstein v. Hochul, No. 22-cv-08300, 2023 WL 4236164 (S.D.N.Y. June 28, 2023).

194 *Cf.* David Schraub, *The Distinctive Political Status of Dissident Minorities*, 114 Am. Pol. Sci. Rev. 963 (2020) (arguing that members of minority groups who dissent from the collective consensus of their group ought not be used to discharge general obligations by the majority to engage with the minority group writ large).

195 *See* Caroline Mala Corbin, *Justice Scalia, The Establishment Clause, and Christian Privilege*, 15 First Amend. L. Rev. 185, 202 (2017).

Christianity enjoy greater judicial protection than those who practice a minority religion."[196] Jews *can* be protected and even win cases under this vision, but only to the extent that their particular religious claims happen to resonate or otherwise align with a broader conservative Christian project.[197] Indeed, it is notable that while Robinson contends that the Supreme Court "is receptive to claims brought by Jewish litigants,"[198] his sole example is *Roman Catholic Diocese v. Cuomo*, a COVID-19 case where the position of Orthodox Jews was aligned with claims being made by conservative Christians.[199] It is far from clear that this "receptivity" to Jewish religious liberty claims will extend to cases where the Jewish claimants proffer arguments that are disconnected from or even antithetical to conservative Christian priorities. In fact, when Jews do present religious liberty claims alone, the historical pattern has been one of consistent defeat.[200] This trend will inevitably redound to the disadvantage of liberal Jewish claimants, whose assertions of religious liberty are likely to diverge rather than converge with dominant Christian conservative priorities.

B. Religion as Conservatism

By and large, the discourse surrounding the new free exercise jurisprudence has paid little attention to situations where presumptively liberal religious minorities' religious exercise is burdened by conservative Christian preferences. The Jewish couple blocked from adopting a child by a Christian agency,[201] or the non-Christian doctor forbidden

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196 Russell K. Robinson, *Justice Kennedy's White Nationalism*, 53 U.C. Davis L. Rev. 1027, 1069 (2019).

197 *See* Uddin, *supra* note 11, at 157 (arguing that a shared interest in expansive religious liberty protections can motivate conservative Christian actors to protect conservative religious minorities); *see also* James M. Oleske, Jr., Lukumi *at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 Animal L. 295, 314 (2013) (noting how the Becket Fund, a conservative-leaning religious liberty organization, vigorously litigated on behalf of a Santaria priest seeking to engage in animal sacrifice because the case presented a "nearly ideal vehicle in which to press for a broad interpretation of . . . the selective-exemption rule" it generally favored for RFRA and free exercise claims) (citing Merced v. Kasson, 577 F.3d 578 (5th Cir. 2009)).

198 Robinson, *supra* note 85, at 212 ("As suggested by *Roman Catholic Diocese* (which involved Catholic and Jewish parties), the Court also is receptive to claims brought by Jewish litigants.").

199 141 S. Ct. 63 (2020) (per curiam); *see also* Yeshiva Univ. v. YU Pride All., 143 S. Ct. 1, 1 (2022) (declining to grant emergency relief from an order "requiring the University to treat an LGBTQ student group similarly to other student groups in its student club recognition process," but only because the university still had available avenues for expedited state court relief).

200 *See* Feldman, *supra* note 90, at 251; *see generally* Schraub, *supra* note 89.

201 *See* Rutan-Ram v. Tenn. Dep't of Child.'s Servs., No. 22-80-III (Ch. Ct. Tenn. June 27, 2022), https://www.au.org/wp-content/uploads/2022/06/2022-06-27-order-granting-motion-

from treating patients consistent with the dictates of their faith by Catholic hospital rules,[202] have not loomed large in the public eye. Instead, we have seen widespread conflation of religiosity with conservative ideological proclivities, with cases regarding COVID-19 vaccines or pronoun usage dominating the discourse.[203]

In one particularly prominent example, Fifth Circuit Judge James Ho, in a florid opinion defending the grant of a preliminary injunction blocking United Airlines from enforcing its vaccine mandate, regaled readers with an alleged wave of "woke" corporations threatening employees who hold conservative religious convictions with "the loss of one's soul."[204] Under a "new model of capitalism," corporations no longer care about their bottom-line profits—they simply seek to enforce progressive orthodoxy at the expense of beleaguered conservative religious employees.[205] Quoting Vivek Ramaswamy's book *Woke, Inc.*,

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to-dismiss.pdf [https://perma.cc/LRU8-AR4U] (dismissing a suit by Jewish adoptive parents who were blocked from adopting a child by a Christian adoptive agency working under a state contract); Jonathan Mattise, *Judges Dismiss Jewish Couple's Suit Alleging Adoption Bias*, AP News (July 5, 2022), https://apnews.com/article/religion-lawsuits-tennessee-nashville-58900a55eb9344d4a51143325fa609c3 [https://perma.cc/LLV4-V8R8].

202 *See generally* Sepper, *supra* note 116 (explaining how conscience protections often fail to protect liberal religious doctors who work at conservative religious institutions).

203 U.S. Navy Seals 1–26 v. Biden, 578 F. Supp. 3d 822, 838 (N.D. Tex. 2022) (enjoining COVID-19 vaccine requirements as against military personnel with religious objections). *Compare* Louise Melling, *When Did Religious Belief Become an Excuse to Discriminate?*, Wash. Post (Sept. 7, 2022), https://www.washingtonpost.com/opinions/2022/09/07/supreme-court-religious-right-antidiscrimination-laws [https://perma.cc/C5QX-KJFL] ("U.S. courts are flooded with cases brought by institutions claiming their right to religious freedom entitles them to refuse to comply with anti-discrimination laws."), *with* Thomas Jipping, *Since When Does Freedom from Discrimination Require Destroying Religious Freedom?*, Heritage Found. (Sept. 13, 2022), https://www.heritage.org/religious-liberty/commentary/when-does-freedom-discrimination-require-destroying-religious-freedom [https://perma.cc/QK6M-Z55N] ("Laws prohibiting discrimination on the basis of sexual orientation or gender identity exist against that backdrop [of the right to freely exercise religion], not the other way around.").

204 Sambrano v. United Airlines, 45 F.4th 877, 881 (5th Cir. 2022) (Ho, J., concurring in denial of rehearing en banc).

205 *See id.* at 883. Judge Ho cites to a cavalcade of conservative media sources bemoaning "cancel culture" and alleged hegemonic progressive dominance over corporate institutions. *See id.* (citing Vivek Ramaswamy, Woke, Inc.: Inside Corporate America's Social Justice Scam 18–19 (2021); Douglas Blair, *12 People Canceled by the Left After Expressing Conservative Views*, Heritage Found. (Sept. 20, 2021), https://www.heritage.org/progressivism/commentary/12-people-canceled-the-left-after-expressing-conservative-views [https://perma.cc/8NP4-4SZL]; Mark A. Kellner, *Former Atlanta Fire Chief, Fired for Views on Marriage, to Aid Other 'Cancel Culture' Victims*, Wash. Times (Oct. 8, 2021), https://www.washingtontimes.com/news/2021/oct/8/kelvin-cochran-ex-atlanta-fire-chief-fired-views-m [https://perma.cc/8BG8-75VV]; Adam Sabes, *Columbia University Employees Can Be Dismissed for Using Wrong Pronouns*, Fox News (Nov. 8, 2021), https://www.foxnews.com/us/columbia-university-employees-wrong-pronouns-fired [https://perma.cc/LFH7-EUL4]; Bianca Quilantan, *Legal Fights over Pronouns May Thwart Cardona's Plan*

Judge Ho concluded that we live in the era of "the Goldman Rule . . . . *The guys with the gold get to make the rules*."[206] Several commentators flagged this passage—substituting the Jewish-coded name "Goldman" for "Golden" to speak of wealthy elites' ability to manipulate and control the rules to the detriment of ordinary Americans—as at least raising the specter of antisemitism.[207]

Justice Alito expressed this position in (slightly) more temperate tones in a recent speech on "religious liberty" at Notre Dame.[208] He argued that:

> There's also growing hostility to religion, or at least the traditional religious beliefs that are contrary to the new moral code that is ascendant in some sectors. The challenge for those who want to protect religious liberty in the United States, Europe and other similar places, is to convince people who are not religious, that religious liberty is worth special protection.[209]

Religion is quietly equated with "traditional" (politically conservative) religious beliefs.[210] The possibility that *liberal* religious adherents

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to Help Trans Students, Politico (May 25, 2022), https://www.politico.com/news/2022/05/25/biden-protect-trans-students-00034488# [https://perma.cc/U3LE-3ZK4]; Audrey Conklin, *Southwest Flight Attendant Awarded $5M After Firing over Abortion Stance*, Fox Bus., (July 15, 2022), https://www.foxbusiness.com/politics/southwest-flight-attendant-awarded-5m-after-firing-over-abortion-stance [https://perma.cc/TQ9V-B5DB]).

206 *Id.* (quoting Ramaswamy, *supra* note 205, at 18).

207 *Compare* Blake Emerson (@BlakeProf), Twitter (Aug. 19, 2022, 6:39 PM), https://twitter.com/BlakeProf/status/1560758355630915584 [https://perma.cc/6NX8-QXC9] ("Doesn't really matter if he meant to be antisemitic. It is, and there's a reason this kind of rhetoric is bubbling up now."), Blake Emerson (@BlakeProf), Twitter (Aug. 20, 2022, 6:32 PM) https://twitter.com/BlakeProf/status/1561118930755719168 [https://perma.cc/L6BV-8DGN] ("Linking the surname 'Goldman' to people who use their money for power trades in old anti-Jewish stereotypes. My family changed its name because of crap like this."), *and* Josh Block (@JoshABlock), Twitter (Aug. 19, 2022, 9:55 AM) https://twitter.com/JoshABlock/status/1560626535882788870 [https://perma.cc/28NN-TDEX] ("This reflects incredibly poor judgment, especially in an opinion about alleged threats to religious liberty."), *with* Eugene Volokh, *Ramaswamy, Ho, and Goldman*, Volokh Conspiracy (Aug. 20, 2022), https://reason.com/volokh/2022/08/20/ramaswamy-ho-and-goldman [https://perma.cc/6Y4L-QJ8A] (defending Judge Ho and expressing "surprise[e]" at the existence of a controversy).

208 *See* Josh Blackman, *Justice Alito Speaks On Religious Liberty*, Volokh Conspiracy (July 27, 2022) [hereinafter Blackman, *Justice Alito Speaks On Religious Liberty*], https://reason.com/volokh/2022/07/28/justice-alito-speaks-on-religious-liberty [https://perma.cc/8JBT-7V99] (citing Josh Blackman, *2022 Religious Liberty Summit U.S. Supreme Court Justice Samuel Alito*, Otter.ai (July 28, 2022), https://otter.ai/u/x6q_WAB6BGMqQl_7kdcFhzNxy7M [https://perma.cc/L5T6-Y947] (transcribing speech)).

209 *Id.*

210 The merger of "religious" and "Christian" is also made explicit when Justice Alito recounts an anecdote where a small child reportedly did not recognize who the man on a cross was at a museum—"a harbinger," Alito said, "of what may lie ahead for our culture." *Id.* As Margaret Talbot observes, "[e]ven as an anecdote, this doesn't do quite the work that Alito seems to think it does. Maybe the boy was Muslim or Jewish"—a possibility

might have distinctive religious liberty claims, or face distinctive religious liberty threats, that are not just different from but sometimes orthogonal to those of their conservative brethren, is not acknowledged. For Justice Alito, it almost seems incoherent.

Consider an otherwise strange digression in Justice Alito's speech, where he levels a seemingly unrelated complaint about "foreign leaders" who spoke out against his *Dobbs* opinion.[211] After this dig, Alito segued back into his core thesis that "if we are going to win the battle to protect religious freedom, in an increasingly secular society, we will need more than positive law."[212] But what does this have to do with *Dobbs*? The link is between political conservatism and religiosity; backlash against the former is inherently backlash against the latter. As Russell Robinson argues, the "religious" in "religious liberty" is interpreted by a (conservative, often Evangelical) Christian paradigm, to the exclusion of other modalities of religious belief or practice.[213]

The aforementioned pattern of "assimilation" by the Orthodox and conservative Jewish minority into dominant Christian political value structures underscores and accentuates the continued difference and distinctiveness of the Jewish liberal majority from these same Christians. It also corresponds with a broader trend where divides among the religions are said to be fading in the face of the overriding need of a united religious front against "pagan" society.[214] Jonathan Fox and Lev Topor hypothesize that we may be witnessing a "religious realignment" where "traditional hatred of the religious other" is being replaced by "an alliance across religions among

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which either did not occur to Justice Alito or does not seem relevant to his prediction of the cultural decline of religiosity. Margaret Talbot, *Justice Alito's Crusade Against a Secular America Isn't Over*, New Yorker (Aug. 28, 2022), https://www.newyorker.com/magazine/2022/09/05/justice-alitos-crusade-against-a-secular-america-isnt-over [https://perma.cc/LJ9H-7M5T].

211 Blackman, *Justice Alito Speaks On Religious Liberty*, *supra* note 208.

212 *Id.*

213 *See* Robinson, *supra* note 85, at 187 (arguing that there has been a "conflation of 'Christian' and 'evangelical' in the broader culture"); Laura Desfor Edles, *Contemporary Progressive Christianity and Its Symbolic Ramifications*, 7 Cultural Socio. 3, 4 (2013) ("[T]he rise of the 'Christian right' has resulted in the virtual equation of Christianity with political conservatism in the public sphere."). I would complete the loop here and argue that it is not just Christianity that has become equated with political conservativism, but genuine religiosity as well.

214 *See* Smith, *supra* note 165, at 13 (positing that "our current cultural struggles" pit "traditional Catholics and evangelicals and devout Jews," along with Mormons and "perhaps a few Muslims," against "paganism"). Schragger & Schwartzman trace this Christian/pagan dichotomy earlier to T.S. Eliot, and it has been popular amongst Christian conservative thinkers ever since. *See* Schragger & Schwartzman, *supra* note 165, at 497–98.

those who still consider themselves religious against the encroachment of secularism."[215] This "alliance" can engender strange bedfellows. Consider the case of Adolf Stoecker, the Lutheran pastor and politician who is "credited" for "put[ting] antisemitism on the map in Germany."[216] Stoecker purported to distinguish between Orthodox Jews, whom he claimed to find unobjectionable, and the "modern" Jew, whom he deemed to be dangerous revolutionaries out to destroy the German nation.[217] More recently, Eric Cohen's "manifesto" of Jewish conservatism argues that "traditional Jews, Christians, and other faith communities now face a shared cultural and political threat" from the application of church-state separation, which promotes "progressive mores (such as same-sex marriage, gender fluidity, and sexual liberation) by force of law."[218]

The "religious realignment" story vision offers a distinctly modern opportunity for an alliance amongst (some) Jews and Christians—a "Judeo-Christian" unity taking precedence over theological disagreements.[219] Yet this unity is by necessity only partial, as Jews will often find that their particular religious commitments do not correspond to the presumptive battle lines assigned to the "religious" versus the "secular." In practice, which camp Jews are identified as residing in will largely track whether their *practical* social and political demands adhere to or diverge from how the religious majority (Christians) demarcates the religious-secular divide. It is entirely possible for Jews, even in expressing their religious values, to be interpreted as falling on the "secular"

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215 Jonathan Fox & Lev Topor, Why Do People Discriminate Against Jews? 89 (2021).

216 1 Antisemitism: A Historical Encyclopedia of Prejudice and Persecution 525 (Richard S. Levy et al. eds., 2005).

217 *See* John C. Fout, *Adolf Stoecker's Rationale for Anti-Semitism*, 17 J. Church & State 47, 52 (1975). It would be a mistake to fully credit Stoecker's self-proclaimed tolerance for Orthodox Judaism: Although the focus of his disdain was on Reform Jews, he did have demonstrably negative views towards the Orthodox as well. *See* D.A. Jeremy Telman, *Adolf Stoecker: Anti-Semite with a Christian Mission*, Jewish Hist., Sept. 1995, at 93, 105 (1995).

218 Cohen, *supra* note 168.

219 Ben Shapiro, criticizing a New York Times article exposing severe shortcomings in the secular educational offerings of Hasidic private schools, suggested that attacks on Hasidic Jews should be seen as an extension of attacks on Evangelical Christianity. *See* Ben Shapiro (@benshapiro), Twitter (Sept. 13, 2022, 8:01 AM), https://twitter.com/benshapiro/status/1569657469827178496 [https://perma.cc/5WFU-RVVP] ("The media's new war on Hasidic Jewry is merely a metastasized version of the old culture war against evangelical Christians: anyone who rejects the predations of Left-wing pseudo-morality must be targeted."). It is notable once again that this "war" aligns conservative Hasidic Jews with conservative Evangelical Christians against their more liberal Jewish compatriots (including liberal reformers within the Hasidic and Orthodox Jewish communities).

side of this schism.[220] Yet precisely because the "religious" alliance against the "secular" only retains coherence via the obfuscation of liberal Jewish life—either ignoring its existence outright or denigrating it as not "truly" religious—it resonates with the newly ascendant conservative vision of religious liberty, which tends to fuse politically conservative ideological positions into the very concept of religiosity itself. In this way, protection of conservatism is embedded into the fundamental definition of religious liberty.

Historically, Christian efforts to present a binary choice between a "Christian" and "pagan" or "secular" society have placed Jews in the camp of the pagans.[221] And the "defense" rendered against claims that this assignment is antisemitic tends to argue that the Jews who adopt these "pagan" or "free-thinking" qualities are inauthentically Jewish—a denigration of the Jewish character of Jews. Stoecker, the leading voice of late nineteenth century German antisemitism, contended that modern Reform Judaism was "no religion at all; a true Jew had to accept the 'orthodox' Judaism of the Old Testament."[222] The (non-Orthodox) Judaism of modernity was not a religion but an "anti-religion," an "irreligious power, . . . which struggles bitterly with Christianity everywhere."[223] T.S. Eliot likewise "clarified" his condemnation of "free-thinking Jews" by saying that "[b]y free-thinking Jews, I mean Jews who have given up the practice and belief of their own religion, without having become Christians or attached themselves to any other dogmatic religion."[224] As Jews detach themselves from "traditional practices" in the diaspora, Eliot contended, Judaism ceases to be Jewish and instead "tends to become a mild and colourless form of Unitarianism."[225] Robert George likewise derides the "autonomy" notion of conscience—the model that, as noted above, is central to the manner in which many if not most American Jews conceptualize their Jewish *religious* practice[226]—as a "counterfeit" attributable to the "liberal ideology that is dominant . . . in the contemporary secular intellectual culture."[227] While not speaking directly about Jews, it seemingly does not even occur to George that liberal or autonomy-promoting

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220 *See* David Schraub, *Book Review*, 64 J. Church & State 333, 335 (2022) (reviewing Fox & Topor, *supra* note 215) (suggesting that "in secularizing societies religious actors may lash out against Jews as supposed harbingers of modernism and cosmopolitan values").

221 *See* Schragger & Schwartzman, *supra* note 165, at 498.

222 Fout, *supra* note 217, at 59.

223 Telman, *supra* note 217, at 106.

224 Christopher Ricks, T.S. Eliot and Prejudice 44 (1988).

225 *Id.* at 45.

226 *See supra* notes 122–30 and accompanying text.

227 George, *supra* note 136, at 111–12. Note the title of George's book: "Conscience and Its Enemies: Confronting the Dogmas of *Liberal Secularism*."

value schemas can even possibly be a component of a genuine religious life, effectively shunting most Jews into the "secular" camp.

Eliot and George seemingly cannot conceive of the possibility that Jewish distance from the norms of dogmatic Christianity is not a function of "free-thinking Jews" having abandoned Jewishness, but rather stems from their continued embrace of it.[228] Christopher Ricks labels the latter possibility "disconcerting" for someone of Eliot's views,[229] and the reason is clear: Once it is accepted that a religious tradition, like Judaism, can be authentically religious *and* promote the norms and values typically associated with political liberalism, the easy binary where support for "religion" uniformly stands opposed to encroaching public liberalism falls apart.[230]

In short, liberal Jews are simultaneously "religious" and yet frequently are politically aligned with the hated "secularists." In this context, the question no longer becomes *whether* Jews are different from Christians, but *which* differences are thought to matter—and why. Previously, the crucial "differences" demarcating Jewish vulnerability may have been matters of liturgy or theology (e.g., the Saturday Sabbath or the lack of belief in Christ's divinity)—differences perhaps most acutely noticeable amongst Orthodox Jewish practitioners. And it is possible, in accord with Fox and Topor's view, that those distinctions may be fading in salience. But far from ushering in an era of Jewish equality, we are instead simply seeing antisemitic discourse shift in terms of which sorts of Jewish difference it finds most offensive. Instead of liturgy, the relevant Jewish differences triggering antisemitism are centered around certain political and ideological markers (such as support for reproductive freedom or a secular public square).[231] These differences, in turn, are most obviously registered amongst the liberal Jews, and so as the significance of these differences grows, so too does the comparative vulnerability of the liberal Jews.

In the current age, many Jewish political priorities—even as they stem from Jewish religious commitments—lie along issues that are

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228 *See* Ricks, *supra* note 224, at 45 (suggesting that it is wrong to assume "the moral habits and conventions of Judaism are not retained by free-thinking Jews," but rather that they "strongly and even disconcertingly are").

229 *Id.*

230 *See* Carmella, *supra* note 137, at 538 ("The sheer existence of increasingly visible progressive religion disrupts the entrenched polarized narratives of 'religious conservatives' and 'secular liberals.'").

231 Consider *Kelly v. Metro-North Commuter Railroad*, No. 87 Civ. 5817 (JFK), 1989 U.S. Dist. LEXIS 15025, at *7 (S.D.N.Y. Dec. 18, 1989), where the prime piece of evidence demonstrating the defendant's antisemitic religious animus towards a (traditionally-observant Orthodox) Jewish employee was a statement that "the lousy liberal Jews [were] ruining the company and the United States."

coded as anti-religious precisely because "religion" has been so totally subsumed into a particular vision of Christian conservatism. Abortion, as noted above, is one such example. Right-wing activists have certainly noticed Jews' prominent role in defending abortion access, and have not responded kindly.[232] At least for those who do not explicitly present themselves as Jew-haters, Jews' generally pro-choice beliefs are frequently cast by these (typically non-Jewish) activists as betrayals of their *Judaism*. One Christian anti-abortion activist, in a chapter titled "Pro-Abortion Jews and the New Holocaust," complained that:

> It is obvious to anyone who has studied the abortion movement . . . that a large number of Jews who are disloyal to the teachings of Judaism more or less lead the abortion movement. . . . It is high time that someone remind these pro-abortionists that there is a holocaust going on that dwarfs even the horrible Jewish one, taking 50 million lives every year, worldwide.[233]

Permitting prayer in public schools is another example of a policy initiative widely seen as a "religious" priority even as many Jews, for straightforward religious liberty reasons, oppose it. As Justice Sotomayor noted in her *Kennedy* dissent:

> [The Court's decision] elevates one individual's interest in personal religious exercise, in the exact time and place of that individual's choosing, over society's interest in protecting the separation between church and state, eroding the protections for religious liberty for all. Today's decision is particularly misguided because it elevates the religious rights of a school official, who voluntarily accepted public employment and the limits that public employment entails, over those of his students, who are required to attend school and who this Court has long recognized are particularly vulnerable and deserving of protection. . . . As much as the Court protests otherwise, today's decision is no victory for religious liberty.[234]

Focusing on the entitlement of religious majority members to pray in school plainly obscures the religious liberty interests of religious

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[232] *See* Andrew Lapin, *Nick Fuentes, White Nationalist with GOP Ties, Says 'Jews Stood in the Way' of* Roe v. Wade*'s End*, Jewish Tel. Agency (June 29, 2022, 10:33 AM), https://www.jta.org/2022/06/29/united-states/nick-fuentes-white-nationalist-with-gop-ties-says-jews-stood-in-the-way-of-roe-v-wades-end [https://perma.cc/T2TK-5JG7]; Carol Mason, Killing for Life: The Apocalyptic Narrative of Pro-Life Politics 38–41 (2002) (tracing the commonplace view amongst white supremacists that Jews are responsible for why abortion exists in America).

[233] Michael Cooper, *Debate on Role Played By Anti-Abortion Talk*, N.Y. Times (Jan. 15, 1995), https://www.nytimes.com/1995/01/15/us/debate-on-role-played-by-anti-abortion-talk.html [https://perma.cc/285N-ZNX8] (quoting Paul Marx, Confessions of a Prolife Missionary: The Journeys of Fr. Paul Marx 268 (1988)).

[234] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2453 (2022) (Sotomayor, J., dissenting).

minorities in avoiding coercion and discrimination. Accordingly, the understandable Jewish objections to permitting public school prayer should prevent laws or judicial decisions that are protective of prayer in school from being flatly declared to be victories for "religious liberty" writ large. Yet despite their position stemming from obvious religious liberty concerns, Jewish opposition to prayer in school has not done much to alleviate the public coding of the issue as one of religious liberty versus public secularism. Consequently, to the extent Jews oppose public school prayer, their position in the "religious" versus "secular" or "pagan" divide will typically be deemed to be the latter—notwithstanding the religious character of their objections.

The way we speak of religion, in the context of who garners protections from the new free exercise jurisprudence, is accordingly beset by a near-total conflation of religiosity and conservatism. Where this discourse dominates, liberal Jews present a challenge to the prevailing norm on ideological, conceptual, and political levels.

• Ideologically, liberal Jews support policies and programs that are often bitterly opposed by conservative Christians, such as reproductive freedom or church-state separation. If liberal Jews qualify as religious and so can benefit from the bountiful protections of the new free exercise jurisprudence, important conservative policy priorities may suddenly be placed under threat. Politicians and judges who may have been eager to offer "exemptions" to LGBTQ antidiscrimination rules may be far less excited at the prospect of new abortion restrictions being evaded.[235]

• Conceptually, liberal Jews muddle the border between the "religious" and the "secular." The assumption that "religiosity" corresponds to a particular (conservative) Christian vision of religious values will often be incorrect. For example, debates on matters of trans equality overwhelmingly frame the controversy as one of "religious" viewpoints demanding strict adherence to inalterable, chromosomally determined sex/gender divides pitted against "secular" antidiscrimination protections for trans individuals.[236] This outlook is Christian-centric; it does not take into account the distinctive perspectives Jews

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[235] *See* Koppelman, *supra* note 55, at 2248 ("One reason for treating religious claims more skeptically than secular ones is that the former can be hard to contain, especially if they involve an exemption that is desirable for secular reasons.").

[236] *Compare* Patrick Parkinson, *Gender Identity Discrimination and Religious Freedom*, 38 J.L. & Religion 10, 30 (2023) (presenting a conflict between the transgender movement and religious beliefs), *with* Laura Portuondo & Claudia E. Haupt, *The Limits of Defining Identity in Religion-Gender Conflicts: A Response to Patrick Parkinson*, 38 J.L. & Religion 38, 44 (2023) (arguing that the existence of this conflict, even if it does exist, does not itself establish whose interests must yield).

and other non-Christian religions may have on the relationship between chromosomal sex and gender.[237] It is no accident that in Alabama, the two doctors staffing the only clinic providing gender-affirming care to trans youth are Jewish and Muslim.[238] If there are "religious" actors on either side of, say, trans equality debates, then those who oppose trans inclusion can no longer inherently claim superior protection due to "religious" commitments (and must in fact reckon with the possibility that *their* position may, at times, interfere with religious freedom).[239]

- Finally, on a political level, conservative Christians have labored hard to present themselves as guardians of the Jewish people in the fight against antisemitism. This title of allyship has generally been self-bestowed, but has become a central feature of the "Judeo-Christian" frame where Jewish interests are assumed to be encompassed by Christian-led political campaigns. By presenting Christian political initiatives and values as "Judeo-Christian," Christian conservatives claim a "patina of diversity" even as their projects are often actively hostile to Jewish political interests.[240] Increased visibility of liberal Jews, which likewise will increase the visibility of the obvious political divides between Jews and conservative Christians, destabilizes the already fraught coherency of "Judeo-Christian" and undermines the ability of conservative Christians to claim that they do indeed stand in this position of alliance with Jews.

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237 The Talmud discusses at least eight different gender categories, cognizant of the possibility that some individuals will either not clearly fall under traditional sex rubrics, or will transition (whether naturally or by human intervention) across categories in their lifetime. *See* Rachel Scheinerman, *The Eight Genders in the Talmud*, My Jewish Learning, https://www.myjewishlearning.com/article/the-eight-genders-in-the-talmud [https://perma.cc/9QUX-2CYB]. Though the Talmudic discussions of course do not map precisely onto modern debates and understandings of gender, they have laid a foundation for the development of strongly trans-inclusive Jewish liturgy and practices. *See generally* Balancing on the Mechitza: Transgender in the Jewish Community (Noach Ezmira ed. 2010).

238 *See* Nora Berman, *A Muslim and a Jew Face the Bible Belt: Meet the Only Two Doctors in Alabama Providing Gender-Affirming Care to Trans Youth*, Forward (June 23, 2022), https://forward.com/opinion/507291/the-only-two-doctors-in-alabama-providing-gender-affirming-care-to-trans-youth [https://perma.cc/TMY8-96ZT] (offering the perspectives of both doctors on how Jewish and Islamic law and values inform their work).

239 For example, one can easily imagine more liberal Jewish beliefs and practices on trans issues generating religious-liberty objections to the new wave of conservative legislation that seeks to legally enshrine traditional conservative beliefs regarding sex as official state orthodoxy. *See, e.g.*, Okla. Stat. tit. 63, §§ 1-311, -13, -16, -21 (2021) (prohibiting birth certificates from being promulgated or amended to include any information on sex other than "male" or "female"); Okla. Stat. tit. 70, § 1-125 (2022) (defining sex, for purposes of school restroom usage, as "the physical condition of being male or female based on genetics and physiology, as identified on the individual's original birth certificate" and requiring that all restrooms be either exclusively male or exclusively female).

240 Schraub, *supra* note 89, at 398.

To all three of these challenges—the ideological, conceptual, and political—a growing number of conservative Christians have found a single, deft response: the denigration of liberal Jews. If liberal Jews can be erased—either pushed out of the public eye or denied as genuine or authentic specimens of Judaism—then the challenge of liberal Jews disappears with it. Ideologically, the ability of liberal Jews to challenge conservative policy priorities on religious liberty grounds is neutered insofar as they no longer count as "religious"; conceptually, the synonymity of "religious" and "conservative" (and "liberal" and "pagan") is restored; and politically, the "Judeo-Christian" alliance is reinstated as between Christians and only the Jews who count as Jews. It is unsurprising, then, that as the new paradigm of religious liberty has ascended, we have also seen the rise of a new antisemitism that primarily takes the form of furious and vitriolic attacks on liberal Jews *as Jews*.[241]

III
Degrading Liberal Jews

The challenge facing conservative proponents of the new free exercise regime is to provide limiting principles which enable it to continue to serve its *Lochner*-esque deregulatory function for conservative religious adherents while not opening a similar door for their liberal peers. Jews, a predominantly liberal religious group in America, represent an especially stark iteration of this challenge. One way of neutralizing this threat, however, is by undermining the authenticity of these Jews as Jews in the public eye. If liberal Jews—despite representing the majority of Jews—do not count as "true" religious Jews, then the objections they raise to conservative policy initiatives can be desacralized and safely removed from the ambit of the new free exercise. Long-standing antisemitic premises, deeply embedded in Christian relationships with Jews, stand ready to assist this involuntary, externally imposed reformation of what counts as truly Jewish.

A. The New Supersessionism

1. Better Jews than the Jews

Theologically speaking, supersessionism (also known as "replacement theology") is an element of traditional Christian thought which holds that the arrival of Christ "supersedes" God's covenant with the

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[241] Though beyond the scope of this article, these concerns often also apply to progressive Christians as well, for whom the conflation of "Christian" with a particular, right-wing iteration of Christianity can be profoundly marginalizing. *See* Robinson, *supra* note 85, at 213–14.

Jewish people.[242] The Jewish covenant is replaced by Christ's universal covenant with mankind and accordingly negates any further distinct role for Jews in history. Because supersessionism is held to represent the proper conclusion of Jews' historical and religious arc, it allows Christians to seize the patrimony of Judaism for itself—for example, by claiming authoritative rights to interpret the Jewish Bible (retitled as the Old Testament).[243] In this way, Christians are able to dictate what Judaism *is* over and against the beliefs of most Jews—often in ways that lack significant resonance with or even are antithetical to how most Jews understand their own Judaism.[244] Susannah Heschel describes the phenomenon in stark terms:

> Christianity colonized Judaism theologically, taking over its central theological concepts of the Messiah, eschatology, apocalypticism, election, and Israel, as well as its scriptures, its prophets, and even its God, and denying the continued validity of those ideas for Judaism. Indeed, no other major world religion has colonized the central religious teachings and scriptures of another faith and then denied the continued validity of the other, insisting that its own interpretations are exclusive truth. Through the Christian doctrine of supersessionism, Judaism came to function in Christian theology as the other whose negation confirms and even constitutes Christianity.[245]

Theological supersessionism instantiates a presumption amongst Christian thinkers that Judaism effectively accomplished its mission by

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242 *See, e.g.*, Matthew Tapie, *Christ, Torah, and the Faithfulness of God: The Concept of Supersessionism in "The Gifts and the Calling,"* 12 STUDS. CHRISTIAN-JEWISH RELS., no. 1, 2017, at 3–4 (2017).

243 *See* RICHARD L. RUBENSTEIN, AFTER AUSCHWITZ: HISTORY, THEOLOGY, AND CONTEMPORARY JUDAISM 70 (2d ed. 1992) (noting that "because of the overwhelming numerical and cultural predominance of Christianity as a world religion, the Christian reading of Scripture came to carry far greater weight and influence" than Jewish interpretations).

244 Historically, Christian polemicists argued that Jewish women are not really Jews because they are not circumcised. Mary R. D'Angelo, *Why Aren't Jewish Women Circumcised?*, 99 JEWISH Q. REV. 558, 559–60 (2009). More recently, one prominent Christian pastor contended that the authentic "Israel" of the modern era is not the Jewish people but rather "a universal community of people who share the dream of God's kingdom in which all ethnic distinctions between Jew, Greek and Arab are overcome by the justice and love of Jesus Christ." Kalman J. Kaplan & Paul Cantz, *Israel: 'Occupier' or 'Occupied'? The Psycho-Political Projection of Christian and Post-Christian Supersessionism*, 20 ISR. AFFS. 40, 48 (2014) (citation omitted). Unsurprisingly, most Jews would take significant issue with the proposition that Israel no longer is related to Jews but is a universal collective united by Christ's love. *See* D.G. Myers, *Jews Without Memory: "Sophie's Choice" and the Ideology of Liberal Anti-Judaism*, 13 AM. LITERARY HIST. 499, 520–21 (2001) (condemning the "theological" demand that Jews "opt out of their covenant with the Jewish God" and "embrace an impartial morality").

245 Susannah Heschel, *Christ's Passion: Homoeroticism and the Origins of Christianity*, *in* MEL GIBSON'S BIBLE: RELIGION, POPULAR CULTURE, AND "THE PASSION OF THE CHRIST" 99, 100 (Timothy K. Beal & Tod Linafeldt eds., 2006).

birthing Christ and is now vestigial.[246] In the words of Daniel Boyarin, "Christianity is for Paul and all of his followers simply the correct understanding of Torah."[247] This presumption is threatened insofar as Judaism continues to live and evolve in the modern era. If Jews continue to exercise autonomous judgment that diverges from Christian precepts, it suggests that Jews remain relevant in history and can potentially challenge Christianity's ability to authoritatively declare the meaning of the Hebrew Bible as a harbinger of Christ.[248]

In the modern era, supersessionism can be supplemented by, but by no means requires, this same theological grounding.[249] Shorn of express theological foundations, supersessionism "describes a situation where one entity, by virtue of its supposed superiority, comes to occupy a position that previously belonged to another, the displaced group becoming outmoded or obsolete in the process."[250] Hence, antisemitic supersessionism still can draw off a general cultural belief that Jews are just unevolved Christians stuck in amber from the time of Christ,[251] or an entitled patrimony that assumes Christians are fully capable of declaring what it means to be "Jewish," without reference to express claims about the continued relevance of Jews' covenantal relationship with God.

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246 *See* Stephen M. Feldman, Please Don't Wish Me a Merry Christmas: A Critical History of the Separation of Church and State 18 (1997) ("Christianity, according to this myth [of supersessionism], reforms and replaces Judaism. The myth therefore implies, first, that Judaism needs reformation and replacement, and second, that modern Judaism remains merely as a 'relic.'" (citation omitted)).

247 Daniel Boyarin, *The Subversion of the Jews: Moses's Veil and the Hermeneutics of Suppression*, Diacritics, Summer 1993, at 16.

248 *See* Esther Menn & Krister Stendahl, *Law and Gospel*, *in* Covenantal Conversations: Christians in Dialogue with Jews & Judaism 42, 47 (Darrell Jodock ed., 2008) (noting how medieval Christians recognized that "Judaism as a thriving reality with a living legal tradition was problematic for Christian theology" and responded by ordering "public burnings of the Talmud and other Jewish literature").

249 *See* George Yaakov Kohler, *The Birth of Modern Jewish Theology: Reactions to Bruno Bauer's Secular Supersessionism*, 28 J. Hist. Mod. Theology 1, 2 (2021) (identifying Bruno Bauer's "secularized version of the old Christian doctrine of supersessionism" as "the theory that Christianity not only replaced Judaism historically, but also substituted all that was once a Jewish contribution to religious progress and general culture with its own, Christian values," because of which "Judaism eventually became expendable, futile and thus obsolete").

250 Terence L. Donaldson, Supersessionism in Early Christianity, 2009 Canadian Society of Biblical Studies Presidential Address, *in* 69 Can. Soc'y Biblical Studs. Bull. 1, 9 (2009).

251 Marianne Moyaert offers a striking example in the form of Christians who perform Seders as a putative window into the life of Jesus. These adaptations—which usually closely mimic contemporary Orthodox Jewish traditions—assume "that *today's Jewish tradition is more or less the same as that to which Jesus adhered*," which in turn depends upon the view "that Judaism is an almost ahistoric tradition frozen in time." Marianne Moyaert, *Christianizing Judaism? On the Problem of Christian Seder Meals*, *in* Is There a Judeo-Christian Tradition? 137, 155 (Emmanuel Nathan & Anya Topolski eds., 2016).

Deeply rooted in antisemitic patrimony is the perceived entitlement of non-Jews to talk authoritatively about Jews without knowing about Jews.[252] This entitlement is, to borrow from Charles Mills, a combination of non-Jews affirmatively misinterpreting the meaning of Jewishness and "the assurance that this set of mistaken perceptions will be validated."[253] Hence, the core of supersessionism, whether in theological guise or not, is the ability of non-Jews to possess, as against actual Jews, a superior entitlement to declare what Jewishness is. The famous declaration by the Austrian antisemite and Vienna Mayor Kari Lueger, "I decide who's a Yid," is a stark example.[254] In the modern era, examples surrounding abortion also unsurprisingly loom large. Consider Darren Bailey, the 2022 Republican candidate for Governor of Illinois, who courted controversy by declaring the Holocaust "doesn't even compare" to the evil of abortion.[255] Refusing to apologize, Bailey simply declared: "The Jewish community themselves have told me that I'm right. All the people at the Chabads that we met with and the Jewish rabbis they said, '[n]o, you're actually right.'"[256] He doubled down despite the fact that his position actually generated nearly wall-to-wall condemnation from the Jewish community (including an express disavowal from Chabad).[257] Bailey, a non-Jew, sought to authoritatively

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252 Schraub, *supra* note 89, at 398 (arguing that "Jews exist in a liminal space where they are (assumed to be) sufficiently familiar to stand fully 'known'"); *see generally* David Schraub, *The Epistemic Dimension of Antisemitism*, 15 J. Jewish Identities 153 (2022) (identifying an "epistemic dimension" of antisemitism that denigrates Jews in their capacity as knowers and testifiers of information, particularly regarding their own experience).

253 Charles W. Mills, The Racial Contract 18 (1997).

254 Richard J. Evans, The Coming of the Third Reich 43 (2004). Lueger made this statement in response to criticisms that there was an inconsistency between his publicly professed antisemitism and his private friendships with certain Viennese Jews; a contradiction resolved by Lueger simply declaring that the Jews he liked were not actually Jews at all. In the spirit of the old saw "a philosemite is an antisemite who loves Jews," the modern iteration—where the hated Jews are *denied* to be Jews and the few acceptable Jews deemed the only actual Jews—flips Lueger's pattern but fundamentally replicates it. *See infra* notes 273–75 and accompanying text.

255 Jacob Kornbluh, *GOP Nominee for Illinois Governor Doubles Down on Holocaust Analogy*, Forward (Aug. 9, 2022), https://forward.com/fast-forward/513788/darren-bailey-gop-illinois-abortion-holocaust [https://perma.cc/YFS8-NZXD].

256 *Id.*

257 *Id.* The article quotes a Chabad representative specifically denying Bailey's claim of support from his organization. *Id.* ("We don't know who he met with and his comments do not reflect our position."); *see also* Danny Connolly, *Bailey in 2017: Abortion 'Doesn't Even Compare' to Holocaust*, WCIA (Aug. 2, 2022), https://www.wcia.com/news/bailey-in-2017-abortion-doesnt-even-compare-to-holocaust [https://perma.cc/7Q6C-CMZ7] (detailing condemnations of Bailey's remarks from the Springfield Jewish Federation and the President Emeritus of the Illinois Holocaust Museum & Education Center); Tina Sfondeles, *Bailey Tries to Explain Past Holocaust Remark After It Is Denounced as 'Deeply Disturbing,' Antisemitic and 'Disqualifying*,' Chi. Sun-Times (Aug. 2, 2022), https://chicago.suntimes.com/elections/2022/8/2/23289746/

declare what Jews truly believed on abortion in open defiance of the actual Jews in his community.

Sometimes, things are more brazen still. At the start of 2022, an all-Christian group of United States Members of Congress made waves when they announced the formation of a congressional "Caucus for the Advancement of Torah Values."[258] The caucus, as Noah Berlatsky wrote, represents a self-appointed set of Christians who arrogated to themselves the power to declare "who is a good Jew and a bad Jew, who is oppressed and who is the oppressor. They, of course, are standing with, and even in place of, the oppressed."[259] Just as contemporary Jews are vestigial to the meaning of the "Old Testament" under theological supersessionism, contemporary Jews are equally dispensable in declaring what constitutes "Torah values" under the new supersessionism.

Discourses about "Judeo-Christian" values represent another especially prominent example.[260] Nominally presenting a *shared* history that unites Christian and Jew,[261] loose talk of "Judeo-Christian" values,

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bailey-holocaust-denounce-antisemitic-abortion-pritzker-jewish-adl-defamation-democrats-republican [https://perma.cc/4PB8-5YUU] (detailing condemnation of Bailey's remarks from the Anti-Defamation League and others). When Bailey was explicitly asked, at a candidate debate, to name the Jewish leaders who allegedly told him his comparison of abortion to the Holocaust was correct, he expressly declined to do so. *See* Reid J. Epstein, *In Illinois Governor's Debate, Bailey Tries to Put Pritzker on Defensive*, N.Y. Times (Oct. 7, 2022), https://www.nytimes.com/2022/10/07/us/politics/pritzker-bailey-illinois-debate.html [https://perma.cc/Z35X-U7J5].

258 Noah Berlatsky, *A Christian-led Caucus 'Protecting' Jewish Values? No Thanks*, NBC News THINK (Jan. 21, 2022), https://www.nbcnews.com/think/opinion/christian-led-caucus-protecting-jewish-values-no-thanks-ncna1287802 [https://perma.cc/YX8E-XFCA].

259 *Id.*

260 The phrase "Judeo-Christian" first appeared in a Supreme Court case in *United States v. Seeger*, 380 U.S. 163, 189 (1965) (Douglas, J., concurring) ("Long before the birth of our Judeo-Christian civilization the idea of God had taken hold in many forms."). It gained greater prominence in *Marsh v. Chambers*, where the Supreme Court upheld legislative prayer that was allegedly "in the Judeo-Christian tradition" as against Establishment Clause challenge. 463 U.S. 783, 793 (1983). The chaplain in *Marsh* characterized his prayers, somewhat contradictorily, as both "nonsectarian" and "Judeo-Christian," and had dropped explicit references to Christ following complaints from a Jewish legislator. *Id.* at 793 n.14. At least one court, however, has read *Marsh* as licensing explicit sectarian discrimination in favor of traditional monotheistic religions. *See* Simpson v. Bd. of Supervisors, 404 F.3d 276, 286–87 (4th Cir. 2005) (upholding a decision to exclude Wiccans from a program inviting local clergy to deliver invocations before the county board of supervisors, on the grounds that only "monotheistic" congregations were eligible for inclusion).

261 The history of "Judeo-Christian," as a public concept, begins in earnest during World War II and the subsequent Cold War era, where it was used both to distinguish supposedly religious and religiously-tolerant America from secular and oppressive fascists and communists, as well as offer a means of integrating Jews into a broader vision of American religious pluralism. *See* K. Healan Gaston, Imagining Judeo-Christian America: Religion, Secularism, and the Redefinition of Democracy 1–2 (2019) ("[Scholarly interpreters] have argued that Judeo-Christian rhetoric served as a powerful tool of liberal inclusion from the late 1930s until the 1970s, when religious conservatives

heritage, or tradition more frequently is indistinguishable from claims about "Christianity."[262] For example, in arguing against permitting openly gay individuals to serve in the military, then-Representative Duncan Hunter contrasted the Israeli army, which allows gay individuals to serve, from the American armed forces on the grounds that American soldiers (but presumably not Israeli soldiers) "have Judeo-Christian values."[263] An even more striking instance came from then-Representative Katherine Harris, who, after announcing her categorical opposition to electing candidates who were not "Christians" to higher office, defended herself by insisting that she was merely expressing "her deep grounding in Judeo-Christian values."[264]

It may seem perplexing that "Judeo-Christian" in practice has become synonymous with "Christian." But from a supersessionist perspective, this elision is not just rational but demanded.[265] "Judeo" adds nothing to "Judeo-Christian" because Jews are presumed to add nothing beyond that already encompassed by Christianity.[266] Supersessionism

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began to appropriate it . . . ."). Yet Jewish commentators always were uneasy with the concept, viewing it as frequently dismissive of Jewish distinctiveness and an attempt to launder Christianity under a "fig leaf" of Jewish inclusion. James Loeffler, *The Problem with the "Judeo-Christian Tradition,"* The Atl. (Aug. 1, 2020), https://www.theatlantic.com/ideas/archive/2020/08/the-judeo-christian-tradition-is-over/614812 [https://perma.cc/DSU9-6XA3] ("After thousands of years of persecution and missionizing, some American Jews viewed their 'Judeo' hyphen as little more than a fig leaf masking an unabashedly Christianist agenda."). *See generally* Arthur A. Cohen, The Myth of the Judeo-Christian Tradition (1969); Jacob Neusner, Jews and Christians: The Myth of a Common Tradition (1990).

262 *See* Schraub, *supra* note 89, at 397 ("To exemplify how Jewishness is erased within the conceit of 'Judeo-Christian,' first ask what is considered the 'traditional Judeo-Christian view' on abortion or the death penalty; then ask which Jewish sources and texts are typically used to arrive at that answer.").

263 Ken Stone, *Ex-Congressman Duncan Lee Hunter Denies Liking LGBT Troops, Being 'Woke*,*'* Times of San Diego (Dec. 16, 2021), https://timesofsandiego.com/politics/2021/12/16/ex-congressman-duncan-lee-hunter-denies-liking-lgbt-troops-being-woke [https://perma.cc/F27V-ZMQV].

264 *Rep. Harris' Comments on Religion Draw Criticism in Florida*, Pride Source (Aug. 31, 2006), https://pridesource.com/article/20035 [https://perma.cc/ZY6C-93HW] (noting the backlash to Harris's statement that "[i]f you're not electing Christians, then in essence you are going to legislate sin"); *see also* Loeffler, *supra* note 261 (quoting former Commissioner of Education Earl McGrath as suggesting that American public schools must uphold the "'ideals of the Judeo-Christian conception of life' to build a 'truly Christian, democratic community'").

265 Feldman, *supra* note 246, at 18 ("For Christians, the concept of a Judeo-Christian tradition comfortably suggests that Judaism progresses into Christianity—that Judaism is somehow completed in Christianity. The concept of a Judeo-Christian tradition flows from the Christian theology of supersession . . . . Any current vitality within Judaism is encompassed in its supposedly improved version, Christianity.").

266 *See* Kyle Langvardt, *The Lawless Rule of the Norm in the Government Religious Speech Cases*, 20 Wash. & Lee J. C.R. & Soc. Just. 405, 412 n.34 (2014) ("The notion of a 'Judeo-Christian tradition' nevertheless comes across as vaguely patronizing toward Jews

makes Jews a disposable element of discourse about Jews.[267] As the "Caucus for the Advancement of Torah Values" makes clear, this form of supersessionism typically styles itself as acting in defense of or even in admiration of Jews. Precisely because it does elevate and valorize some Jews, non-Jews who engage in this behavior furiously denounce any allegations that it is antisemitism.[268] How can one claim antisemitism when the purported perpetrators are so vocal in their professed love for Jews?

The use of purported allyship as a defense against antisemitic conduct is a species of what Rachel McKinnon terms "allies behaving badly"—"respond[ing] poorly to constructive criticism" and instead reflexively refuting such criticism "by referencing their status as 'really' an 'ally.'"[269] But even in concept, fair feeling towards particular Jews (or ideas about Jews) should not and cannot be used to falsify inferences of antisemitism. After all, even seemingly clear instances of antisemitic discrimination need not directly target all Jews. The Supreme Court has long noted that there is no legal "license to discriminate against some . . . on the basis of [protected class membership] merely because [one] favorably treats other members of the . . . group."[270] This is recognized in the context of discrimination against more traditionally-observant Jews:

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whose faith does not incorporate specifically Christian theology; the implication seems to be that Judaism itself is a now-superseded step toward the development of Christianity."); M.J.C. Warren, *Why 'Judeo-Christian Values' Are a Dog-Whistle Myth Peddled by the Far Right*, Yahoo! Finance (Nov. 7, 2017), https://finance.yahoo.com/news/why-apos-judeo-christian-values-095257573.html [https://perma.cc/KX9P-H27F] ("[T]he phrase 'Judeo-Christian' erases Judaism by implying that Christian values are Jewish values.").

267 *See* Moyaert, *supra* note 251, at 156 (concluding that Christian Seders are "a form of trespassing" in that "they take and redefine a ritual practice that belongs to the heart of the religious life of Jewish tradition"). As a result, Moyaert points out, "[o]nce again Christians are in control: a Jewish ritual is used to enhance Christian tradition without much concern for what that ritual means for Jewish communities today. Since Jews are typically not present during such Christians Seders, once again Christians are writing Jews out of their own story." *Id.* at 156–57.

268 *See, e.g.*, David Schraub, *There Is No Position on Israel That Absolves or Excuses Your Anti-Semitism*, Tablet Mag. (Aug. 28, 2017), https://www.tabletmag.com/sections/news/articles/there-is-no-position-on-israel-that-absolves-or-excuses-your-anti-semitism [https://perma.cc/48JF-MPXG] (collecting examples of public figures using their "pro-Israel" commitments as a shield against domestic antisemitism allegations); David Schraub, Opinion, *Pro-Israel Positions Don't Excuse Antisemitism in America*, Jerusalem Post (Aug. 15, 2019), https://www.jpost.com/diaspora/pro-israel-positions-dont-excuse-antisemitism-in-america-opinion-598670 [https://perma.cc/3N4U-A5FV] ("For all their protestations that they are friends and allies of the Jews, . . . American conservatives continue to demand that they be graded on a massive curve, where a few nice words about Israel earns them a complete get-out-of-antisemitism-free card in America.").

269 Rachel McKinnon, *Allies Behaving Badly: Gaslighting as Epistemic Injustice*, *in* The Routledge Handbook of Epistemic Injustice 167, 172 (Ian James Kidd, José Medina & Gaile Pohlhaus, Jr. eds., 2017).

270 Connecticut v. Teal, 457 U.S. 440, 455 (1982).

When Justice Scalia astutely observed that a "tax on wearing yarmulkes is a tax on Jews,"[271] Justice Stevens noted the essential corollary that "the fact that many Jews do not wear yarmulkes . . . would not prevent a finding that the tax . . . targeted a particular class."[272] That liberal Jews may remain in the good graces of the anti-yarmulke discriminator does not make the discrimination against those Jews who wear yarmulkes any less antisemitic. But the reverse is true as well: One can harbor and act upon negative attitudes towards liberal Jews, while professing naught but admiration for non-liberal Jews, and still be guilty of antisemitism.

The fundamental problem is that the "Jewishness" purportedly admired by supersessionists is a Jewishness of the non-Jewish imagination.[273] They love "Jews" insofar as Jews are envisioned to be foot soldiers in the war against secularism or eager harbingers of Christ's return.[274] That Jews—actual Jews—frequently will not deign to stay in roles crafted by non-Jews generates confusion, followed by disdain or even hatred.[275] "Love for 'Jews' yields hatred for Jews."[276] Still, the importance of this self-conceptualization of Jewish allyship cannot be undersold. Successfully denying the Jewish status of liberal Jews enables the circle to be squared: Non-Jews who hate most Jews can nonetheless present themselves as, and believe themselves to be, the most stalwart defenders of Jews, because the Jews they detest—the majority of American Jews—do not actually count as Jews.

Once it becomes accepted that Christians have superior claim over Jews to declare who and what counts as Jewish, there can be no surprise when Christians begin denying or denigrating the Jewishness of some Jews, precisely because the Jews in question take up positions that offend their values as *Christians* (and so, under the supersessionist lens, are presumptively betrayals of Judaism). True Jewish devotion, paradoxically enough, will be measured by the degree to which Judaism comports with Christian standards. Such attacks have become almost commonplace in circumstances where liberal Jews occupy prominent political spaces. Speaking of Jewish financier George

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271 Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993).

272 *Id.* at 325 n.51 (Stevens, J., dissenting).

273 *See* Schraub, *supra* note 26, at 22.

274 *Id.* ("Many people love 'Jews'—that is, the concept of 'Jews' they've constructed for their own purposes. They envision a particular role that 'Jews' are assigned to play, and so long as Jews stay in that role we may genuinely be loved."). To be clear, others may love "Jews" in a similar fashion even as the particular image of "Jews" they've constructed differs—for example, imagining Jews as noble martyrs for universalist humanism. Such persons typically also react with dismay or anger when actual Jews do not follow the script they've written. *See id.*

275 *Id.* at 23.

276 *Id.*

Soros, Rudy Giuliani sneered: "Soros is hardly a Jew. I'm more of a Jew than Soros is."[277] Among Giuliani's reasons for why Soros, a Holocaust survivor, should not "count" as Jewish is the claim that "he doesn't go to church."[278] Then-candidate for Pennsylvania governor Josh Shapiro, a Kosher-observant Jew who has been very public about the importance of his Jewish identity, nonetheless saw his Jewishness denigrated by a non-Jewish advisor to his opponent Doug Mastriano, who argued that Shapiro is "at best a secular Jew" because he allegedly supports "gender surgery for minors" and "abortion rights."[279] Former Arizona Congressman J.D. Hayworth responded to a controversy where he favorably quoted antisemitic remarks from Henry Ford by sending campaign surrogates to speak before a local synagogue. The surrogates proceeded to lecture the Jews in attendance that Hayworth, an Evangelical Christian, "is a 'more observant Jew'" than those present because of his opposition to abortion.[280] When much of the synagogue's audience stormed out in disgust, another surrogate remarked "[n]o wonder there are anti-Semites."[281]

This line of argument has migrated into popular discourse. Lenny Dykstra, a former Major League Baseball All-Star turned right-wing provocateur, attacked the Jewish judge who approved the Mar-a-Lago search warrant by telling his fans, "I hope you all weren't expecting that the synagogue where go-ahead-and-raid-Trump Judge #BruceReinhart is on the board of trustees is one where the congregation keeps kosher, observes the sabbath, etc."[282] Judge Reinhart's synagogue was forced to cancel Shabbat services after a deluge of antisemitic threats.[283] Down in the minor leagues, the Boston Red Sox released prospect Brett Netzer

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277 Daniel Victor, *Rudy Giuliani Says He's 'More of a Jew' Than George Soros*, N.Y. Times (Dec. 24, 2019), https://www.nytimes.com/2019/12/24/us/politics/rudy-giuliani-george-soros-jewish.html [https://perma.cc/E4ZX-3ZQ8].

278 *Id.* (quoting Giuliani as saying, "I probably know more about—he doesn't go to church, he doesn't go to religion—synagogue").

279 Katie Glueck, *In a Race Rife With Antisemitism Concerns, Mastriano Adviser Calls Shapiro 'At Best a Secular Jew*,' N.Y. Times (Oct. 21, 2022), https://www.nytimes.com/2022/10/21/us/politics/jenna-ellis-josh-shapiro-jewish.html [https://perma.cc/Q4R7-MUQL].

280 Casey Newton, *Hayworth Spokesman Has a Record*, Ariz. Republic, Oct. 24, 2006, at B9.

281 *Id.*

282 *Former NY Met Lenny Dykstra Attacks Jewish Judge Who Approved Trump Search Warrant, on Twitter*, St. Louis Jewish Light (Aug. 9, 2022), https://stljewishlight.org/top-story/former-ny-met-lenny-dykstra-attacks-jewish-judge-who-approved-trump-search-warrant-on-twitter [https://perma.cc/6CWW-XM6L].

283 Joshua Zitser, *Synagogue of Jewish Judge Who Signed Off FBI Search Warrant into Trump's Mar-a-Lago Home Cancels Sabbath Service Following Antisemitic Abuse*, Bus. Insider (Aug. 13, 2022), https://www.businessinsider.com/mar-a-lago-raid-jewish-judges-synagogue-cancels-sabbath-service-2022-8 [https://perma.cc/A57D-PPRK].

after a series of antisemitic, racist, and homophobic comments targeting a Jewish Red Sox executive, Chaim Bloom, for his support of the Black Lives Matter movement and the LGBTQ community.[284] Netzer, who is not Jewish, admitted to the racism and homophobia, but insisted that the antisemitism charge went "too far" because Bloom's liberal political beliefs render him "an embarrassment to any [T]orah-following [J]ew."[285]

2. *Jewish Participation in Anti-Jewish Denigration*

Unfortunately, some Jews who dissent from the American Jewish community's wide liberal consensus have encouraged this form of degradation. While Cohen argues that "no Jewish friends of Jewish unity should stand idly by as their fellow Jews are treated as illegitimate,"[286] the resurgent Jewish right has been at the forefront of attempting to challenge the legitimacy of their liberal Jewish brethren—ironically suggesting that most Jews are not "real Jews."[287]

There is a long history of liberal Jews embarrassing non-liberals who desire to assimilate or incorporate into conservative institutions. We've recounted some cases already. Rabbi Zweig's insistence that Jews must alter their religious judgments on the permissibility of abortion in a more anti-abortion direction in order to accommodate the views of Christian religious and medical authorities is one example.[288] Rabbi Jakobovits's fulmination against Jews' "alliance" with secularists to remove sectarian prayer from public schools is another.[289] One more

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284 *See* Jacob Gurvis, *Red Sox Release Minor Leaguer After Social Media Attacks on Jewish Executive Chaim Bloom*, Jewish Tel. Agency (Feb. 28, 2022), https://www.jta.org/2022/02/28/sports/red-sox-release-minor-leaguer-after-social-media-attacks-on-jewish-executive-chaim-bloom [https://perma.cc/9RWA-T98F].

285 *Id.* Bloom is in fact "a Shabbat-observant Jewish day school graduate." *Id.*

286 Cohen, *supra* note 168.

287 While I focus on America, it is worth noting that in Israel there is widespread public discrimination against liberal Jewish denominations, culminating recently in a riot by Orthodox Jews who disrupted a Conservative Jewish religious ceremony at the Western Wall and vandalized their prayer books. *See* Zvika Klein, *Violence Breaks Out at Western Wall After Boy Blows Nose on Siddur Page*, Jerusalem Post (June 30, 2022), https://www.jpost.com/israel-news/article-710866 [https://perma.cc/2JPU-3QDQ]. Deborah Lipstadt, the U.S. Special Envoy tasked with monitoring antisemitism worldwide, condemned the riot as an instance of antisemitism (to no small amount of controversy, as the perpetrators were also Jewish). *See* Andrew Lapin, *Harassment at a Western Wall Bar Mitzvah Renews the Fight Over Prayer Spaces in Israel*, Jewish Tel. Agency (July 7, 2022), https://www.jta.org/2022/07/07/israel/harassment-at-a-western-wall-bar-mitzvah-renews-the-fight-over-prayer-spaces-in-israel [https://perma.cc/2SKM-V3GT]. On the question of whether the appellation "antisemitic" was properly applied to this attack, I responded as follows: "Is it antisemitic to attack Jews engaging in Jewish ritual at a Jewish holy site? When you phrase it that way, the answer is clearly yes." *Id.*

288 *See supra* note 107 and accompanying text.

289 *See supra* notes 170–71 and accompanying text.

historical example will suffice: the case of Rabbi A. Bruce Goldman, who in 1969 was terminated from his chaplain position at Columbia by the university's Jewish Advisory Board for supporting abortion rights, supporting the right of unmarried students to cohabitate, and protesting against the Vietnam War.[290] In part, Goldman's critics disputed whether his positions were compatible with Jewish values. For example, several Orthodox Rabbis wrote a letter contesting Goldman's views on abortion and pre-marital sex as antithetical to Jewish teachings.[291] But partially, Goldman was controversial because the iteration of Judaism he promoted and represented did not mesh well with efforts to present Judaism as fundamentally non-threatening to and aligned with dominant (Christian) power structures. Goldman's critics said that his harsh criticisms of Columbia policymakers "did not help the Jewish image" and "put us at a disadvantage" in an era where Columbia had only just recently begun welcoming Jewish students in large numbers (the speaker here said Columbia had "bent over backwards to allow so many Jewish students to enter").[292] And Goldman's defenders in the Jewish student body likewise situated his dismissal as part of a larger practice of deemphasizing Jewish progressivism as a means of kowtowing to non-Jewish power:

> The Goldman case cannot be considered an isolated and far-out incident involving the paranoia of a bunch of self-hating Jews faithfully ass-licking their WASP masters. . . . [It] is unfortunately a microcosm of the American Jewish community as a whole. The self-serving behavior of the [Jewish Advisory Board], its eagerness to sell out to the WASP power structure, its paranoia, is illustrative of the behavior of the American Jewish establishment. . . .[293]

Yet in recent years, this sort of policing of Jewish authenticity—paradoxically by the conservative *minority* against the liberal *majority*—has grown increasingly ruthless. Conservative commentator Dennis Prager argues that "[l]eft-wing Jews are ethnically"—notice the modifier stands in implicit contrast to "religiously"—"Jewish, but their values derive from leftism . . . ."[294] Daniel Greenfield savaged left-wing "radical activists with Jewish last names who collaborate with hate."[295]

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290 *See* Michael E. Staub, Torn at the Roots: The Crisis of Jewish Liberalism in Postwar America 1–4 (2002).

291 *Id.* at 2.

292 *Id.* at 1.

293 *Id.* at 3.

294 Dennis Prager, *Left-Wing Jews – A Jewish and American Tragedy*, Investor's Bus. Daily (Nov. 6, 2018), https://www.investors.com/politics/columnists/left-wing-jews-dennis-prager [https://perma.cc/MC8M-ZLZN].

295 Daniel Greenfield, *Jews and Jewish Anti-Semites Collide in California*, Jewish Press (June 11, 2019), https://www.jewishpress.com/indepth/opinions/

David Horowitz argued that "[s]ecular Jews have substituted liberalism for Judaism."[296] Ben Shapiro has been especially pronounced in this discourse, publicly deriding Reform Judaism as allegedly not seeing "Jewish identity in a serious way, as central."[297] In Shapiro's estimation, "when people self-identify as Jews in the United States, that doesn't actually mean that they do anything that has anything to do with Judaism; it means that their last name ends in 'berger,' 'stein' or something [similar]."[298] He identifies specific political issues that would, in his mind, contravene liberal Jews' claims to authentic Jewish identity, suggesting that if Jews are more supportive of same-sex marriage, trans inclusiveness, and abortion, than of the State of Israel, "I have serious questions about how you think about yourself as a Jew . . . . [T]here are a lot of people [with Jewish last names] who fundamentally reject nearly all Jewish values and are secular leftists – and so they vote like secular leftists."[299]

It is unfortunate but not especially surprising that right-wing Jews would turn on their liberal brethren in this way. Politically conservative Jews are what I have elsewhere called "dissident minorities": "members of marginalized groups who dissent from a consensus group position on matters seen as critical to their group's collective liberation."[300] And dissident minorities often have an incentive to denigrate or discredit the validity of their peers—the majority of their minority—in order to enhance their own political power and prestige.[301] Put simply: A political discourse attuned to the concerns of American Jews as a whole will, based on the overall political demographics of American Jewry, recognize that Jews largely favor liberal values. This, of course, runs

jews-and-jewish-anti-semites-collide-in-california/2019/06/11 [https://perma.cc/G25N-KQ86].

296 David Horowitz (@horowitz39), Twitter (Oct. 30, 2018, 9:49 PM), https://twitter.com/horowitz39/status/1057449462044352512 [https://perma.cc/UXK6-MZTR].

297 Zvika Klein, *Ben Shapiro: Reform Judaism Does Not See Jewish Identity as Important*, Jerusalem Post (July 21, 2022), https://www.jpost.com/diaspora/article-712699 [https://perma.cc/R8Q3-DEDU].

298 *Id.*

299 *Id.*; *see also* Bruce Abramson & Jeff Ballabon, *Jews Are Leaving the Democrat Party and Are Key to Republican Success*, Fox News (Jan. 6, 2023), https://www.foxnews.com/opinion/jews-are-leaving-democrat-party-are-key-republican-success [https://perma.cc/V5M2-A3LK] ("Most political discussions about the 'Jewish Vote' focus on the wrong Jews. The overwhelming Democratic preference of the stereotypical mainstream American Jew derives from them having assimilated. Largely urban/inner suburban, affluent, and college educated, their vote is entirely unlinked to them being Jews.").

300 Schraub, *supra* note 194, at 963; *see id.* at 964 & n.2 (identifying American Jewish Trump supporters as "dissident minorities" against a broader Jewish liberal consensus).

301 *See id.* at 969 (noting circumstances where dissident minorities are incentivized "to promote practices that have the effect of excluding their (non-dissident) group-mates" (emphasis omitted)).

counter to the political interests of the minority of conservative Jews. But if conservative Jews can successfully undermine the legitimacy of liberal Jews as Jews, they can co-opt the broader social concern for all "Jews" and redirect it towards themselves (as the sole remaining representatives of authentic Jewry).

Yet despite (or because of) its immediate political utility for the conservative Jewish minority, this gambit inevitably accentuates antisemitic threats that concentrate on the liberal Jewish majority. Consider the rhetorical trope deployed by Greenfield and Shapiro, as well as Rosenblum in the Orthodox magazine *Mishpacha*, of denigrating liberal Jews as merely having a "Jewish last name."[302] It is not at all surprising or accidental that this language migrated to non-Jewish conservative commentator Stephen Crowder when he defended Kanye West's antisemitic tirades by arguing that there is "a conversation to be had about secular humanists with Jewish last names in Hollywood exploiting people . . . ."[303] There is more than just a rhetorical echo here. The "secular humanists with Jewish last names" formulation accepts the invitation of Shapiro and his conservative Jewish compatriots to simply not count liberal Jews as Jews. This allows Crowder to elide the fact that his and West's targets are, indeed, Jews, and preserves a veneer of "Judeo-Christian" allyship even in the course of legitimating antisemitism of the most vicious variety.

In short, intra-Jewish debates and disputes about proper or normative Jewish ideology are often deeply connected to wider social controversies relating to the role of Jews in society. In the thick of these controversies, liberal Jews will often be at a disadvantage even where they command the support of a majority or plurality of Jews, insofar as their opponents within the Jewish community can leverage non-Jewish vectors of social power to elevate their dissident opinions into a new orthodoxy. While liberal Jewish opinions would have little trouble being seen as "Jewish" in an America where American *Jews* were largely in control of the meaning of Jewishness, supersessionist tendencies give non-Jews an undue and outsized influence over what is seen as normative Jewish belief. Paradoxically, the public meaning of "Jewish" in this context may frequently bear little relationship to what Jewishness means to the median American Jew where such meanings run counter to *Christian* religious orthodoxy.

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302 Greenfield, *supra* note 295; Klein, *supra* note 297; Rosenblum, *supra* note 172.

303 *Steven Crowder on YouTube: "Is There a Disproportionate Number of People with Jewish Last Names in Higher Banking? That's an Argument That Can Be Made,"* Media Matters (Nov. 29, 2022), https://www.mediamatters.org/steven-crowder/steven-crowder-youtube-there-disproportionate-number-people-jewish-last-names-higher [https://perma.cc/9V3Z-KWVW].

B. Finding the Limits of the New Free Exercise

As noted at the outset,[304] conservative advocates of the new free exercise regime have been beset with anxiety that liberal religious claimants might be able to leverage the same doctrinal innovations to thwart conservative policy priorities. While such advocates present themselves as protecting religious liberty interests from being corrupted by unscrupulous progressive activists seeking to pervert and undermine religious liberty doctrine,[305] in reality it is the new hypertrophic religious liberty jurisprudence that now demands repeated ad hoc alterations in order for it to serve its ultimate function of providing protection to conservative Christians while locking out Jews and other liberal religious minorities. The most straightforward alteration to gerrymander out liberal Jews is to simply be explicit in removing challenges to conservative policy priorities (such as abortion restrictions) from the ambit of religious liberty protections[306]—these religious commitments, apparently, do not count.[307] But many of the advocates of the new free exercise wish to at least nominally cloak the Jewish exclusion inside the existing doctrinal structure. Among the most promising tools in the conservative arsenal to arrest such liberal claims is denigrating or denying their validity as genuinely *religious* in nature. If the claims or claimants in question do not qualify as genuinely or sincerely religious, then the courts can easily dismiss them without disturbing the new free exercise architecture that

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304 *See supra* Section I.B.

305 Josh Blackman, for instance, characterizes Jewish religious liberty claims for reproductive rights as a continuation of the alleged "epicycles" that beset abortion jurisprudence in the pre-*Roe* era, an "ad hoc nullification machine" that distorted numerous unrelated doctrines in service of maintaining abortion rights. Josh Blackman, *End the Epicycles of* Roe, Volokh Conspiracy (Nov. 2, 2021) (citation omitted), https://reason.com/volokh/2021/11/02/end-the-epicycles-of-roe [https://perma.cc/4Y6P-FX8U]; *see also* Blackman, Slugh & Fortgang, *supra* note 101, at 404 (arguing that, after *Dobbs*, efforts to use religious liberty provisions to protect abortion rights are a similar form of "ad hoc nullification" targeting "religious freedom").

306 West Virginia's recently enacted state-level RFRA, for instance, expressly excludes coverage of any claims asserting a right to an abortion. W. Va. Code § 35-1A-1(b)(2) (2022) (excluding from religious liberty protections "actions or decisions to end the life of any human being, born or unborn"). Indeed, many pro-life religious organizations initially opposed passage of RFRA unless it was amended to expressly exclude religious liberty claims protecting abortion rights. *See* Brian Bolduc, *The Church and the RFRA*, Nat'l Rev. (Feb. 17, 2012), https://www.nationalreview.com/2012/02/church-and-rfra-brian-bolduc [https://perma.cc/SJK5-RXKM] (noting opposition to RFRA from both the U.S. Conference of Catholic Bishops and the National Right to Life Committee "unless it excludes these kinds of claims").

307 *Cf.* David Baddiel, Jews Don't Count (2021) (arguing that, with respect to many commonly accepted values and frameworks regarding governing or relating to diverse communities, Jews and Jewish interests are systematically excluded and held not to "count").

favors Christian claimants advancing conservative policy priorities.[308] The law continues to protect those whom it does not wish to bind, and bind those whom it does not wish to protect.[309]

Conservative groups and advocates who have pushed the judiciary's aggressive free exercise jurisprudence have already begun to pivot in this direction. The Becket Fund, a conservative legal advocacy group which boasts of its protection of religious liberty of all faiths "'from A to Z', from Anglicans to Zoroastrians,"[310] notably departed from that position in the face of liberal Jews challenging newly enhanced abortion restrictions promulgated after *Dobbs*. After a group of Jewish plaintiffs successfully won a lower court injunction based on a state-level RFRA,[311] Becket filed an amicus brief urging that these religious liberty claims be rejected on appeal.[312] Despite the fact that the plaintiff's articulation of Jewish religious principle is entirely standard within mainstream American Jewry,[313] Becket strikingly argued that the Jewish litigants were "insincere" in their assertions of religious belief and their claims should be rejected on that basis.[314] Indeed, while Becket briefly asserted that Indiana's law should satisfy strict scrutiny,[315] the *bulk* of its

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308 *See* Ramirez v. Collier, 142 S. Ct. 1264, 1291–92 (2022) (Thomas, J., dissenting) (suggesting that a death row inmate's claimed religious need for a pastor audibly praying and "laying hands" on him during his execution was insincere and an "abusive" attempt at delaying his execution).

309 *See* Wilhoit, *supra* note 82.

310 *Our Mission*, Becket Fund, https://www.becketlaw.org/about-us/mission [https://perma.cc/JE2D-TCXV].

311 *See* Anonymous v. Indiv. Members of Med. Licens. Bd., No. 49D01-2209-PL-031056, slip op. at 27, 43 (Marion Cnty., Ind. Super. Ct. Dec. 2, 2022), https://interactive.wthr.com/pdfs/order-granting-preliminary-inj-rfra-proposed-order-no-motion.pdf [https://perma.cc/9W8P-2TLB] (enjoining abortion restrictions under section 34-13-9-8 of the Indiana Code), *appeal docketed*, No. 22A-PL-02938 (Ind. Ct. App. Dec. 9, 2022).

312 Proposed Amicus Curiae Brief of the Becket Fund for Religious Liberty in Support of Appellants, Indiv. Members of Med. Licens. Bd. v. Anonymous, No. 22A-PL-02938 (Ind. Ct. App. Jan. 18, 2023) [hereinafter Becket Fund Indiana Brief], https://becketnewsite.s3.amazonaws.com/20230118184008/Individual-Members-v.-Anonymous-Planitiff-Amicus-Brief.pdf [https://perma.cc/2TE3-5DZW].

313 *See supra* Section I.B.

314 Becket Fund Indiana Brief, *supra* note 312, at 3 ("[T]he court below failed to consider evidence that Plaintiffs' beliefs are insincere. Plaintiffs have not shown that their beliefs are truly held."); *see id.* at 10–18 (arguing that the plaintiffs were insincere because they did not challenge pre-*Dobbs* abortion restrictions that were present in Indiana).

315 *Id.* at 18–21 (suggesting that Indiana's law is narrowly tailored to a compelling interest in protecting "innocent life"). Becket does not address the fact that the new free exercise doctrine, of which it is among the most vocal champions, measures the importance of the state's interest by the degree to which the exemptions "leave[] appreciable damage to that supposedly vital interest unprohibited." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (citation omitted); *see supra* notes 142–48, 154–58 and accompanying text (discussing how this doctrinal feature applies to abortion restrictions which almost inevitably leave significant domains where fetal life is allowed

brief—half of its substantive argument—is spent denigrating the sincerity of the liberal Jewish belief.[316] By attacking liberal Jews as opportunistic and fictitious in their assertion of religious principle, groups like Becket are able to avoid disturbing the underlying architecture of the new free exercise while still blocking its extension to liberal believers challenging conservative policy initiatives.

The refusal to credit liberal Jewish beliefs as sufficiently religious, or sometimes even genuinely and authentically Jewish at all, has a regrettably long pedigree amongst conservative legal commentators. As far back as 1992, Michael W. McConnell sought to distinguish religiously-mandated decisions regarding abortion from the case of persons whose religious beliefs insisted that abortion decisions must be left to individual conscience—the former, but not the latter, could claim Free Exercise Clause protections.[317] And the implicit denigration and diminishment of liberal Jewish religious priorities was already present—McConnell referred specifically to "*Orthodox Jews* . . . [who] believe that an abortion is mandatory if necessary to save the mother's life,"[318] even though this belief is likely just as salient for non-Orthodox Jews as well. Here, too, there is an implicit downgrading of the status of liberal Jewish claimants—an Orthodox Jewish claim "counts" in a way that a more liberal Jewish claim does not.

More recently, Josh Blackman has been the most overt and aggressive proponent of limiting the religious liberty of liberal Jews, expressing his "worry that [progressive free exercise] claims will irreparably set back the religious liberty movement."[319] Progressive litigants, Blackman argues, "are prepared to gerrymander the Free Exercise Clause and

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to be terminated). This omission is especially noteworthy given Becket's reliance on this exact language in other religious liberty cases featuring conservative Jewish plaintiffs demanding exemption from liberal antidiscrimination rules. *See, e.g.*, Reply in Support of Motion for Stay at 7–8, YU Pride All. v. Yeshiva Univ., 180 N.Y.S.3d 141 (N.Y. App. Div. 2022) (No. 2022-02726), NYSCEF No. 12 (arguing in favor of Yeshiva University's right to an exemption from New York antidiscrimination statutes that prohibit it from banning a queer, mostly Jewish, student organization).

316 The brief spends nine pages insisting on alleged insincerity from the Jewish plaintiffs, compared to six pages on standing concerns, less than three pages on strict scrutiny analysis, and a single page on various policy objections (which include the worry that plaintiffs "could bring insincere claims and win relief without having their credibility assessed in court"). *See generally* Becket Fund Indiana Brief, *supra* note 312.

317 *See supra* notes 118–19 and accompanying text.

318 McConnell, *supra* note 118, at 174 (emphasis added).

319 Josh Blackman, *The Progressive Free Exercise Clause*, Volokh Conspiracy (Aug. 2, 2022) [hereinafter Blackman, *The Progressive Free Exercise Clause*], https://reason.com/volokh/2022/08/02/the-progressive-free-exercise-clause [https://perma.cc/4FMF-MWJ2]; *see also* Blackman, Slugh & Fortgang, *supra* note 101 (noting the authors' "pragmatic concern" about a world where RFRA and free exercise protections encompassed abortion rights).

RFRA to fit every facet of the progressive agenda."[320] The "gerrymander" language is especially notable, since on its face it appears as if liberal Jews are doing nothing more than seeking to claim their fair share of a doctrinal bounty the Court has already announced. It is the proponents of the new free exercise who are committed to gerrymandering—with various degrees of explicitness—liberal Jews out of the putative protections promised by the doctrine.[321] But what makes these religious liberty claims "gerrymandered" is the assumption that they are not the product of genuine religious commitments at all. Rather, they are opportunistic "pivot[s] to find arguments that will work with a conservative Court."[322] Like other defenders of the new free exercise, the assumed merger of conservatism and religiosity makes liberal religious liberty claims inherently suspect.[323] Such a position displays a palpable disrespect towards liberal Jews and their genuinely held religious commitments.[324]

Elsewhere, however, Blackman appears to make the perceived inauthenticity of liberal Jewish belief central to a far more ambitious claim: he suggests a *categorical* rejection of liberal Jews' religious liberty claims on the grounds that they can *never* be made with sincerity. In part, Blackman bases his argument on a contention discussed above—that the only cognizable religious liberty claims are those where religious doctrine *compels* rather than *permits* a certain course of action (distinguishing, in the Jewish case, circumstances where abortion is religiously *obligated* from circumstances where it is merely *allowed* under Jewish law).[325] The reason we have religious exemptions is to accommodate "those who actually face that intractable choice between a higher power and civil law."[326] Persons who do not perceive themselves as religiously

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320 Blackman, *The Progressive Free Exercise Clause*, *supra* note 319 (citing instances of free exercise claims being used to support abortion rights and affirmative action initiatives, and predicting they will be used to buttress environmental claims as well).

321 *See supra* notes 305–07 and accompanying text.

322 Blackman, *The Progressive Free Exercise Clause*, *supra* note 319 (concluding, after laying out a series of potential progressive invocations of free exercise values, that "[i]f you sense some sarcasm in my tone, you're very perceptive").

323 *See supra* notes 208–12 (discussing Justice Alito's conflation of conservativism and religiosity); *supra* notes 224–29 (same, for T.S. Eliot).

324 *See* Dahlia Lithwick & Micah Schwartzman, *Is the Religious Liberty Tent Big Enough to Include the Religious Commitments of Jews?*, Slate (June 22, 2022), https://slate.com/news-and-politics/2022/06/do-proponents-of-religious-liberty-really-intend-to-dispute-the-religious-commitments-of-jews.html [https://perma.cc/5LGB-3HT5] ("As practicing Jews, we could pause here to comment on how disrespectful and disparaging it is when legal pundits describe our religious commitments as fickle and shifting by the moment.").

325 *See supra* notes 118–22 and accompanying text.

326 Josh Blackman, *Why Protect Religious Conscience?*, Volokh Conspiracy (June 22, 2022), https://reason.com/volokh/2022/06/22/why-protect-religious-conscience [https://perma.cc/YUP7-9BUV].

obliged to undertake a certain action do not face this choice and should not receive protection.[327]

But Blackman actually takes this argument considerably further. He suggests that liberal (non-Orthodox) Jews can *never* make a claim for religious obligation because—in contrast to Orthodox Jews—they allegedly do not treat Jewish religious law as binding.[328] Consequently, if they later turn to the judiciary and complain that their religious beliefs require them to undertake or refrain from a given activity, they cannot be sincere, for they do not actually believe in religious obligations in the first place.[329] This is so even granting, as Blackman (unlike the Becket Fund) does, that the liberal Jews' religiously-motivated beliefs are not in fact opportunistic but are perfectly sincere: they are not akin to "the draft dodgers who miraculously discovered the virtues of Quakerism."[330] The problem is that their religious beliefs allegedly do not fit a particular *template* of religiosity—one with a particular metaphysical stance towards questions of religious duty and practice.

The most immediate problem with Blackman's formulation is that it is wrong as a matter of law. Both the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA)—the two key federal religious liberty statutes—expressly reject the notion that religious exercise is only protected when it is "compelled by, or central to, a system of religious belief."[331] And courts have long warned against adjudications of religious

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[327] *Id.* ("Those who do not actually think a higher power imposes some obligations on their lives—that religion is only internal, aspirational, cultural, or traditional—do not fit within the paradigm that has historically justified granting exemptions from civil laws.").

[328] Josh Blackman, *Tentative Thoughts on the Jewish Claim to a "Religious Abortion,"* Volokh Conspiracy (June 20, 2022) [hereinafter Blackman, *Tentative Thoughts*], https://reason.com/volokh/2022/06/20/tentative-thoughts-on-the-jewish-claim-to-a-religious-abortion [https://perma.cc/BTX8-33H4] ("One of the biggest differences between Orthodox Judaism and Reform Judaism turns on the treatment of Jewish Law, known as *Halakha*. Orthodox Jews tend to view *Halakha* as binding. Reform Jews tend not to."). After reading a draft of this article, Blackman publicly disavowed this stance and now claims that "reform or progressive or liberal Jews . . . can state sincere free exercise claims for religious freedom, regardless of whether they deem Jewish law as binding or not." Josh Blackman, *Some Less-Tentative Thoughts on Abortion and Religious Liberty, One Year Later*, Volokh Conspiracy (May 12, 2023) [hereinafter Blackman, *Less-Tentative Thoughts*], https://reason.com/volokh/2023/05/12/some-less-tentative-thoughts-on-abortion-and-religious-liberty-one-year-later [https://perma.cc/EM8U-VZ6G].

[329] *See* Blackman, *Tentative Thoughts*, *supra* note 328 ("A Jew who treats the prohibition on work on the Sabbath as [only] aspirational . . . could not credibly allege a substantial burden—or more precisely, such an allegation could not be sincere."). *Contra* Blackman, *Less-Tentative Thoughts*, *supra* note 328.

[330] Blackman, *Tentative Thoughts*, *supra* note 328.

[331] 42 U.S.C. § 2000cc-5(7)(A) (defining "religious exercise" for the purposes of RLUIPA as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief"); 42 U.S.C. § 2000bb-2(4) (adopting the same definition for RFRA).

sincerity that demand precise, systematic, or even wholly coherent and consistent schemas of belief or practice before conceding that a proffered religious belief is in fact religious.[332] Religion is rarely so neat, and liberal religious adherents as much as more traditionalist peers are equally entitled to have points of ambiguity, inconsistency, backsliding, or ambivalence.[333]

But Blackman's mistake of law cannot be divorced from the attitudinal disdain towards liberal Jews as Jews who can potentially stake religious freedom claims. In contrasting liberal Jews with their Orthodox brethren, Blackman merges two separate characteristics: the frequency and consistency with which a person abides by a given religious tenet, and that person's metaphysical belief about whether said tenet is in fact *compelled* or is merely "internal, aspirational, cultural, or traditional."[334] So he compares "those Jews who treat the rules of Kashrut as binding," for whom "there is absolutely a substantial burden on free exercise," with "those Jews who treat the rules of Kashrut as advisory or perhaps aspirational, *and routinely eat non-Kosher foods*," for whom "there probably is not a substantial burden on free exercise."[335] Likewise, he compares a "Jew who, in keeping with *Halakha*, never works on the Sabbath," who "could credibly allege a substantial burden," with a "Jew who treats the prohibition on work on the Sabbath as aspirational, *and always works on the Sabbath* . . . ." The latter "could not credibly allege a substantial burden—or more precisely, such an allegation could not be sincere."[336]

This merger has consequences. Certainly, it is true that a Jew who up until the moment of litigation does not appear to care about a given Jewish ritual practice may be adjudged insincere if he or she suddenly

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[332] *See, e.g.*, Interest of C.C., 877 S.E.2d 555, 565 (Ga. 2022) (warning that courts should be reluctant to "afford[] more than a little weight to evidence that [religious claimants] were inconsistent in visibly living out their religious beliefs"); Friedman v. Clarkstown Cent. Sch. Dist., 75 F. App'x 815, 819 (2d Cir. 2003) (acknowledging that "religious beliefs may develop over time and that people may transgress religious beliefs that are nonetheless sincerely held"); Ackerman v. Washington, 16 F.4th 170, 181 (6th Cir. 2021) ("RLUIPA's sweep is not limited to reasonable or even orthodox beliefs—the reasonable and the unreasonable, the orthodox and the idiosyncratic all enjoy protection."); *see also* Welsh v. United States, 398 U.S. 333, 339 (1970) (confirming that sincere religious beliefs "need not be confined in either source or content to traditional or parochial concepts of religion" and can include "convictions which some might find 'incomprehensible' or 'incorrect'").

[333] *See* Grayson v. Schuler, 666 F.3d 450, 454 (7th Cir. 2012) ("[A] sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigal sons?").

[334] Blackman, *supra* note 326. *Contra* Blackman, *Less-Tentative Thoughts*, *supra* note 328.

[335] Blackman, *Tentative Thoughts*, *supra* note 328 (emphasis added). *Contra* Blackman, *Less-Tentative Thoughts*, *supra* note 328.

[336] Blackman, *Tentative Thoughts*, *supra* note 328 (second emphasis added). *Contra* Blackman, *Less-Tentative Thoughts*, *supra* note 328.

claims it as a religious scruple.[337] But this possibility is not germane to Blackman's conceptual argument, which is not about consistency but about the metaphysical status of how a religious claimant perceives the nature of their religiosity.[338] Combined with the gratuitous notion that the liberal claimant *always* flouts the putative religious commitment, this reasoning serves to present insincerity and non-commitment as an inherent feature of liberal Jewish practice: Those who do not adopt Orthodox views of the binding nature of Halakha *never* care about the tenets of their faith.[339]

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337 *See* Dobkin v. District of Columbia, 194 A.2d 657, 659 (D.C. 1963) (rejecting a religious freedom claim from a Jewish litigant whose court date was set during the Jewish Sabbath upon finding that he regularly worked on Sabbath and did not register any objection to the timing of his hearing until after the fact).

338 In *United States v. Seeger*, the Supreme Court treated as separate the question of "whether the beliefs professed . . . are sincerely held and whether they are, in [the plaintiff's] own scheme of things, religious." 380 U.S. 163, 185 (1965). The *Seeger* Court took a self-consciously expansive view on the question of what qualifies as a "religious" belief. *Id.* at 180–84. A narrower understanding of "religious", such as that advocated by Blackman, would circumvent the sincerity inquiry by denying that the relevant beliefs—even if held "sincerely"—qualify as religious in the first instance.

339 Under his new position, Blackman suggests that the key questions for assessing the sincerity of a religious claimant are (a) whether the belief is newly-arrived at or has been consistently held and (b) whether the claimant holds many religious obligations or whether the claim at issue is the sole putatively religious belief held by the claimant. Blackman, *Less-Tentative Thoughts*, *supra* note 328; Blackman, Slugh & Fortgang, *supra* note 101. Both prongs of this approach are meant to suss out the opportunistic claimant whose claims are not genuinely religious in character. While Blackman frames this as a clarification of his earlier position in *Tentative Thoughts*, it is in fact a significant reversal. The former criterion is a substantial shift because a key feature of Blackman's original position was precisely to challenge religious liberty claims when they were by stipulation sincerely and consistently held. *Compare* Blackman, *Tentative Thoughts*, *supra* note 328 (conceding that his targets are not akin to "the draft dodgers who miraculously discovered the virtues of Quakerism"), *with* Blackman, Slugh & Fortgang, *supra* note 101, at 465 ("A close analogue may be the military draft. During the Vietnam War, many young men who were drafted suddenly discovered a new pacifist faith that would provide the basis for a conscientious objection."). The latter criterion, likewise, would not do significant work unless, consistent with the obloquies discussed above, one believes that a substantial portion of liberal Jews lack meaningful ties to any cohesive Jewish ideology or practice beyond their "last names." *See supra* notes 295–99 and accompanying text. Certainly, this would not cover the immediate target of Blackman's original post, Congregation L'Dor Va-Dor and its Rabbi, Barry Silver, who clearly have imbricated themselves into a version of Jewish life, belief, and practice beyond the immediate opportunism of abortion litigation. *See* Blackman, *Tentative Thoughts*, *supra* note 328. Unfortunately, Blackman cannot resist returning back to the view where non-Orthodox Jewish practice is only valid to the degree it mirrors orthodoxy. *See* Blackman, Slugh & Fortgang, *supra* note 101 (suggesting courts ask whether Jewish claimants abide by any of the 613 commandments traditionally thought to be prescribed by the Torah). But there are other ways of demonstrating that one's attachment to Jewish beliefs is more than just an opportunistic one-off—consider evidence that the abortion-rights plaintiff also abides by a perceived Jewish religious obligation to help shelter immigrants. *See* Zasloff, *supra* note 96 (arguing that, in some circumstances, Jewish law requires synagogues to shelter and conceal an undocumented immigrant's

In reality, under Blackman's formula, the Jew who *always* (or nearly always) keeps a form of Kosher also has no ability to claim a substantial burden on religious practice if they do not specifically conceive of their practice as instantiating a comprehensively binding Halakhaic obligation.[340] Blackman may think no such Jews exist, for the world is divided into the Orthodox Jews (who, being bound by Halakha, genuinely seek to live out Jewish religious commitments), and non-Orthodox, liberal Jews (who could not care less about these commitments save for when they opportunistically seek to "gerrymander" a constitutional claim into existence). But speaking as exactly the sort of Jew whose existence is occluded here—one who does not and does not attempt to fully keep the traditional rules of Kosher, but who has abjured pork and shellfish his entire life (and once protested in the office of his elementary school principal when tickets for a school raffle were made contingent on purchasing a ham and cheese sandwich)—I can say with decisive certainty that a rule which forced me to eat bacon absolutely would be taken as a substantial burden on my religious practice as a Jew.[341] Do I view not eating pork as "obligatory"? I'm not sure how to answer that; I do not think that anything "bad" would happen to me if I did, or that I am failing in some duty owed to another or to God.

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presence from government immigration authorities where disclosure would subject the immigrant to a likelihood of persecution). In short: If liberal Jews are equal as Jews, then the markers of practices and beliefs common to *liberal Jews* must normally suffice to demonstrate religious sincerity. And, notwithstanding the false and injurious insistence that liberal Jews lack any cohesive Jewish identity beyond their last name, it is highly likely that many if not most persons who actively identify as liberal Jews will be able to demonstrate a cohesive Jewish religious outlook that guides and informs their practice, so long as they are permitted to make said demonstration by reference to characteristics of liberal Judaism.

340 In yet another post, Blackman obscures this distinction. Remarking on Justice Scalia's observation that "[a] tax on wearing yarmulkes is a tax on Jews," Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993); *see supra* notes 271–72 and accompanying text, Blackman asks whether "a Jewish person who *never* wears a yarmulke [could] seek an exemption from the tax[.] [W]ould his free exercise rights be substantially burdened? Merely being a Jew does not necessarily entail *some obligation* to actually wear a yarmulke." Josh Blackman, *Status, Conduct, and the Yarmulke Tax*, Volokh Conspiracy (July 12, 2022) (second emphasis added), https://reason.com/volokh/2022/07/12/status-conduct-and-the-yarmulke-tax [https://perma.cc/7856-7AUW]. It is likely that a Jew who *never* wears a yarmulke would lack standing to challenge a tax he does not pay. But many Jews wear yarmulkes at least periodically—myself included—without viewing it as a comprehensive *obligation*. The false dichotomy between those who perceive a traditional religious obligation (who thereby wear yarmulkes), and those who do not perceive such an obligation (who allegedly never do) once again serves to erase the behavior of what is likely to be most American Jews.

341 *See* Weiner, *supra* note 6 ("[T]here is no contradiction between our failure to observe [Kosher] strictly, and our sense that we should enjoy a right not to be forced to eat a ham-and-cheese sandwich. Religious commitments are often flexible and improvisatory, but that doesn't make them any less meaningful or sincere.").

Such questions really have little bearing on how I understand my relationship to religious ritual and practice. And yet, I am quite sure how I feel *as a Jew* when placed in a situation where the only dietary options are clearly and flagrantly non-Kosher.[342]

Unfortunately, the power of supersessionism is precisely to make what I feel as a Jew irrelevant to the public and juridical understanding of what Jewishness means. The ascendance of antisemitic narratives denying and denigrating the authenticity of liberal Jews as Jews helps bolster and support a parallel legal imperative, questing for rationales that can justify excluding liberal Jews. As the former grows more mainstream, the latter becomes easier to justify. The doctrinal result is that the new free exercise can be safely cabined, continuing to provide free reign to conservative Christian litigants without having to yield to liberal Jewish claims. The social result is the further proliferation of degrading and hostile treatment towards liberal Jews that will frequently cloak itself in the mantle of love for "Jews."[343]

Conclusion

Commenting on the terrifying sweep of the federal judiciary's new free exercise jurisprudence, Andy Koppelman bluntly declared that no "member of the Court will pursue [this variant of free exercise] to the limits of its logic. They are not anarchists. Instead, I confidently predict that they will cheat, allowing the state to pursue interests that they, in their entirely unconstrained discretion, deem worthy."[344] I agree. But all but the most brazen cheaters nonetheless search for ways to cloak their manipulations inside the rules of the game. Indeed, this is one of the central perils that besets the very project of legal legitimacy: "the *non-obviousness* of what decisions are and are not examples of 'just following the law.' Even to educated observers steeped in the legal tradition, the lawful and lawless ruling may look remarkably alike."[345]

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342 While I was in college, I took a trip on Sun Country Airlines where the in-flight meal was a cheeseburger. I asked the attendant if they had any plain hamburgers, which they did not. I suggested that they should consider adding a few to their offerings, since some Jewish (or, for that matter, lactose intolerant) individuals do not eat cheeseburgers, to which the attendant dismissively replied "Well, we can't have *everything*." David Schraub, *A Jew in Sun Country*, Debate Link (Sept. 13, 2007), https://dsadevil.blogspot.com/2007/09/jew-in-sun-country.html [https://perma.cc/R5UK-M7DF]. For what it is worth, as hungry as I was—and despite not being someone who fits Blackman's template of an Orthodox Jew who believes in the "binding" nature of Halakha—I did not eat the cheeseburger.

343 *See* Schraub, *supra* note 26, at 22–23.

344 Koppelman, *supra* note 55, at 2285.

345 David Schraub, *Sadomasochistic Judging*, 35 Const. Comment. 437, 446 (2020) (reviewing Richard H. Fallon, Jr., Law and Legitimacy in the Supreme Court (2018)); *see id.* at 447 ("Even . . . the rancid, racist lawlessness we associate with [the Jim Crow

So, what will be the legitimating ideology that metabolizes the liberal Jews' challenge to the new free exercise jurisprudence? An ascendant species of antisemitism—one which persistently denigrates the status of liberal Jews as Jews; one that loves "Jews" even as it hates Jews. By denying the authenticity of Jews and suggesting that they do not count as Jews where their behavior diverges from prevailing "Judeo-Christian" (which is to say, Christian) paradigms, liberal Jews can be excluded from the realm of legitimate (or sincere) religious claimants. This same exclusion also serves as a fictive (but no less powerful) falsification of the claim that a welter of antisemitic conspiracy theorizing—"replacement theory," "cultural Marxism," or fanciful Soros plots—are in fact cases of antisemitism, since the Jews endangered and victimized by these theories are, of course, not real Jews. Cherry-picking the minority of Jews aligned with the dominant conservative Christian vision enables an upside-down world where "allyship" with Jews scarcely necessitates any engagement with the Jewish community as it is actually constituted.[346] At the extreme, the median American Jew (politically liberal, including in her religious commitments) is rendered irrelevant, if not an outright threat, to the popularly conceived "Jew" (assumed to be an adjunct to conservative Christianity).

That this behavior echoes historical Christian supersessionism is no accident. It flows directly from long-standing Christian entitlements, where part of the patrimony of Christianity was precisely to declare what Judaism truly is. Under conditions of Christian hegemony, not only Jewish rights but the very concept of Judaism itself extended precisely as far as Christians permitted. Even as modernity partially secularized this entitlement, it did not undo the underlying power dynamic.

Nominally, the prerogatives of the new free exercise carry no particular political valence. In practice, the new free exercise has carried on its wings an ascendant Christian nationalism that makes few pretensions about restoring and retrenching the long-standing entitlements of the "religious" as against illegitimate "secular" encroachments. Recognizing liberal Jews as validly and authentically religious would significantly change the tenor of this restoration. It would break down the borders between those the law is meant to bind, but not protect, and those

South] was not typically marked on the body of the text. Cases involving Black litigants that came before southern courts in fact look exceedingly normal in their manner of presenting evidence, citing precedents, and working through legal reasoning.").

346 *See* Schraub, *supra* note 194, at 971–72 (noting the obligation majorities have to interact with social minority groups as they actually constitute themselves, and articulating the problem of "tokenization" when such majorities seek to evade that obligation by only engaging with "dissident minorities" whose views happen to echo the majority's preferences).

the law is meant to protect, but not bind.[347] But the new free exercise cannot work that way; it cannot universalize all into the favored class. Its proponents need a way to lock the Jews—or at least the liberal Jews, which is to say the majority of the Jews—out. Fortunately for the new free exercise proponents, they do not lack for options. The history of Christian supersessionism, and the presently rising antisemitic denigration of liberal Jews, offer ample opportunity to ensure that those the law is meant to bind continue to be bound even as favored others bask in the luxuriant freedom of free exercise protection without limits.

347 *See* Wilhoit, *supra* note 82.