RESPONSE

REPEALS OF RELIGIOUS ACCOMMODATIONS

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Can governments repeal religious accommodations? Because accommodations are voluntary, not mandated by the Constitution or other laws, they traditionally have been thought to be freely rescindable. However, a recent argument suggests that repeals of religious accommodations are presumptively invalid under the Free Exercise Clause because they target and burden believers. This argument is not completely inconceivable at a time when the Roberts Court is upending free exercise and nonestablishment law.

Yet implementing a presumption against repeals of religious accommodations would generate sharp contradictions. Rather than assessing the attractiveness of such a change, this Response examines those complexities. It investigates the proposed rule against religious anticlassification, the impact on animus doctrine, the application of the Tandon *rule, and six smaller issues. The conclusion suggests implications for judicial politics and for the shift in Supreme Court doctrine towards a new paradigm of religious freedom.*

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INTRODUCTION

Can governments repeal religious accommodations? Religious accommodations are voluntary exemptions from regulations—meaning that they are not compelled by the Constitution or any other law. Because they are freely given, they can be freely rescinded, you might think. That generally has been the supposition among courts and commentators.

Yet recently, an argument has surfaced that repeals of religious accommodations are presumptively invalid under the Free Exercise Clause.[1] Such repeals violate equality toward religion, on this view, and they burden believers. As a prediction of where the Supreme Court may be headed, this idea is not completely implausible. The Roberts Court recently has articulated new rules for free exercise and nonestablishment that improve the prospect of a presumption against repeals.

Politically, it might not be obvious that the Roberts Court's conservatives will move against repeals, which can work in both directions. Some prominent examples do have a liberal valence. California, Connecticut, Maine, and New York all recently eliminated their religious exceptions from vaccination requirements for school children. [2] While several of these provisions predate the Covid

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1. This Response was solicited as a response to a new article by Ronald Colombo arguing that repeals of religious accommodations should be presumptively unconstitutional. *See generally* Ronald J. Colombo, *The Repeal of Religious Accommodations—A Constitutional Analysis*, 73 AM. U. L. REV. 729 (2024). The piece is powerfully written and a pleasure to read.

2. S.B. 277, 2015 Leg., Reg. Sess. (Cal. 2015) (removing the exemption for existing vaccine requirements "based upon personal beliefs" but permitting future exemptions in line with the State Department of Public Health's allowance for medical reasons or personal beliefs); S.H.B. 6423, 2021 Gen. Assemb., Reg. Sess. (Conn. 2021) (eliminating exemption for students providing statements that an immunization "[would be or] is contrary to his or her religious beliefs"); 2019 Me. Laws 386 (amending a general

pandemic, they all were associated with liberal politics in one way or another.

Yet other recent repeals have a conservative connotation. Most notably, Oklahoma and West Virginia recently amended their religious freedom statutes to eliminate the possibility of religious exemptions from abortion bans.[3] State lawmakers specifically removed protection for pregnant people who had religious reasons for making reproductive decisions that violated the states' criminal laws concerning abortion. Oklahoma and West Virginia acted after lawsuits were filed across the country by people who were bringing just those kinds of religious freedom claims.[4]

That religious accommodations are ensnared in partisan politics is not particularly surprising. It makes sense that they are contested and

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exemption for philosophical or religious exemptions with a requirement that a parent or guardian—or the student if an adult—provide a statement from a licensed physician noting that they have explained the risks and benefits of immunization); Assemb. B. 2371, 2019 Gen. Assemb., Reg. Sess. (N.Y. 2019) (repealing public health law relating to vaccination exemptions for religious beliefs). Each of these recissions has been upheld. Love v. State Dep't of Educ., 240 Cal. Rptr. 3d 861, 864 (Cal. Ct. App. 2018) (holding that California's law repealing religious exemptions for vaccination requirements does not violate the free exercise of religion or California's constitutional right to education); We The Patriots USA, Inc. v. Conn. Off. of Early Childhood Dev., 76 F.4th 130, 135–36 (2d Cir. 2023) (affirming the dismissal of a First Amendment challenge to Connecticut's repeal of religious exemptions for vaccination requirements); F.F. v. State, 143 N.Y.S.3d 734, 741–42 (App. Div. 2021) (upholding New York's repeal of religious exemption from vaccination requirement for school children); *see also* We The Patriots USA, Inc. v. Hochul, 17 F.4th 266, 282–83 (2d Cir. 2021) (upholding an emergency rule that requires healthcare employees to be vaccinated against COVID-19, even though an earlier emergency rule had exempted religious objectors); Does 1–6 v. Mills, 16 F.4th 20, 29–35 (1st Cir. 2021) (upholding a regulation requiring healthcare workers to be vaccinated against COVID-19, even though an earlier version had exempted those with religious and philosophical objections).

3. W. VA. CODE § 35-1A-1(b)(2) (2023) ("[N]or may anything in this article [i.e., the state's RFRA] be construed to protect actions or decisions to end the life of any human being, born or unborn . . . ."); OKLA. STAT. ANN. tit. 63, § 1-745.39(J) (2022) ("[A] civil action under this section . . . shall not be subject to any provision of the Oklahoma Religious Freedom Act."). The Oklahoma statute was invalidated on other grounds. Okla. Call for Reprod. Just. v. State, 531 P.3d 117, 122 (Okla. 2023) (per curiam) (invalidating the statute under the due process provision of the state constitution).

4. *See, e.g.*, Individual Members of Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1, 233 N.E.3d 416, 427 (Ind. Ct. App. 2024) (claiming Indiana's abortion law violated Plaintiff's rights under the state's Religious Freedom Restoration Act, the Florida Constitution, and the U.S. Constitution). For a survey of caselaw, see Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299, 2301 n.5 (2023).

that policymakers have acted to grant—and rescind—them according to their electoral interests. It also stands to reason that conservatives are responding to repeals of vaccine accommodations by appealing to the Roberts Court.

As a normative matter, judicial suspicion of at least some repeals of religious accommodations seems warranted. Consider Florida's decision to amend its religious freedom statute after a Muslim woman claimed a right to wear a veil that covered her face in her driver's license photograph.[5] While any accommodation of the woman would have been discretionary—because it would not likely have been required by constitutional law[6]—the state's decision to repeal the exemption may have targeted Muslim practices impermissibly. After all, Freeman lost her lawsuit, making a statutory change seem superfluous and even spiteful.[7] Perhaps Florida's legislature simply wanted to ensure that its religious freedom statute was not misapplied in the future, or perhaps it did not know the outcome of the lawsuit by the time it acted, but just as possibly, it acted out of impermissible bias. In circumstances like these, scrutinizing repeals of religious accommodations looks justified. In many other situations, a presumption of invalidity will not be appropriate. So, work must be done to differentiate between justified and unjustified repeals.[8]

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5. Freeman v. Dep't of Highway Safety & Motor Vehicles, 924 So. 2d 48, 50, 54 (Fla. Dist. Ct. App. 2006) (ruling against the woman on the ground that she was not substantially burdened within the meaning of Florida's Religious Freedom Restoration Act). Florida's legislature amended the statute to remove protection in 2005, apparently in reaction to the lawsuit's filing. 2005 Fla. Sess. Law Serv. 37 (West).

6. Florida's requirement that all permanent licenses have photographs showing the faces of the drivers applied to everyone, according to the court. *Freeman*, 924 So. 2d at 57 ("The statute requires 'fullface' photographs on permanent licenses and there was no evidence that the Department ever made any exception to that requirement for anyone.").

7. *Id.* at 54.

8. In the existing literature, some have argued that repeals should virtually always be presumptively invalid, whereas others have argued that they should be invalidated only where the accommodations were required initially. *Compare* Colombo, *supra* note 1, at 796 ("Unless such a recission [of a religious accommodation] withstands strict scrutiny, any government action that treats religious conduct (and religious bases of conduct) differently from nonreligious conduct (and nonreligious bases of conduct) violates the First Amendment."), *with* Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 495 (2010) ("[L]egislatures should be as free to revoke religious exemptions as they are to deny them in the first instance."), *and* Mihir Khetarpal, *Permissive Exemptions and Entrenchment*, 85 U. PITT. L.

That constructive work is left undone in this Response, which instead highlights the contradictions raised by arguments against the constitutionality of repeals of religious accommodations. The objective here is not to defeat the argument against repeals but rather to understand this emergent strain of constitutional discourse.

Part I assesses the contention that repeals classify facially and impermissibly on the basis of religion, finding that it runs up against common legislative and regulatory practices that have been upheld by courts. Part II concerns whether repeals are unconstitutional when they are accompanied by antireligious statements by lawmakers, and it points out that intemperate statements go unquestioned in other lawmaking contexts that are religiously inflected. Part III turns to the theory that recissions of accommodations are presumptively invalid whenever they leave in place comparable exemptions, applying the new *Tandon* rule.[9] The Part explains that the rule should not apply to discretionary accommodations at all, by definition (because it would mean that they are constitutionally required initially, rendering them not discretionary), and it observes that any application would not be evenhanded. Part IV scrutinizes six smaller claims, namely: that repeals will be seen by reasonable observers as antireligious; that reliance interests support accommodations once they are given; that entrenching accommodations is necessary to protect religious minorities; that cementing them will not create perverse incentive effects; that the proposal is not as radical as it seems because repeals can satisfy strict scrutiny when they are sufficiently important; and that eliminating "play in the joints" between the religion clauses, but in one direction only, somehow qualifies as a form of neutrality.

The Conclusion acknowledges that internal contradictions are nothing new in constitutional law and that they may even be a fixed feature of Supreme Court doctrine in the United States. What is interesting about them is not simply that they exist, but what they teach us about judicial politics. To the degree that the Roberts Court seeks to harmonize its jurisprudence around accommodation repeals, it can be expected to do so by further strengthening free exercise and weakening nonestablishment. Such a development would move the

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REV. 27, 50 (2023) ("This Article considers whether a law that contains a RFRA carve-out is neutral and generally applicable. It concludes that it is both neutral and generally applicable. Accordingly, challenges to laws that exempt themselves from the applicable RFRA miss the mark.").

9. Tandon v. Newsom, 141 S. Ct. 1294, 1296, 1298 (2021) (per curiam).

doctrine further from a paradigm of neutrality and closer to a paradigm that favors religiosity.

I. ANTICLASSIFICATION

A straightforward way to criticize repeals of religious accommodations is to charge that they classify facially on the basis of a protected trait. Many repeals do apply by their terms only to religious beliefs and practices. So they are thought to draw a presumption of invalidity under a straightforward logic, just like classifications on the basis of race.[10]

For example, New York repealed the religious accommodation from its requirement that school children be vaccinated against specified illnesses.[11] It acted in response to outbreaks of measles that had occurred in the state, threatening herd immunity.[12] Or consider state decisions to remove exemptions from child welfare laws for faith healing.[13] Or recall that during the runup to *Obergefell v. Hodges*[14] in 2015, Indiana enacted a religious freedom restoration act.[15] Shortly thereafter, in response to criticism, it amended the law to remove protection for violations of civil rights laws.[16] All of these repeals could be understood to have been classifications on the basis of religion, insofar as they removed accommodations that were specific to religion.

The Supreme Court has long held that governments cannot single out believers for special disabilities. In *McDaniel v. Paty*,[17]

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10. *Cf.* Students for Fair Admissions, Inc., v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2161–62 (2023) ("Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies 'without regard to any differences of race, of color, or of nationality'—it is 'universal in [its] application.' . . . Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as 'strict scrutiny.'" (alterations in original) (citations omitted)).

11. Assemb. B. 2371, 2019 Gen. Assemb., Reg. Sess. (N.Y. 2019); *see also* Colombo, *supra* note 1, at 797 (arguing that the New York repeal classified on the basis of religion).

12. *See* F.F. v. State, 143 N.Y.S.3d 734, 737–38 (App. Div. 2021) (explaining the background to the repeal).

13. *See* Colombo, *supra* note 1, at 785–86 (describing the decisions of several states to remove religious exceptions from child endangerment laws).

14. 576 U.S. 644 (2015).

15. IND. CODE ANN. § 34-13-9-0.7 (2023).

16. Dale Carpenter, *Indiana to Exempt Civil Rights Protections in Its Religious Freedom Restoration Act*, WASH. POST (Apr. 2, 2015, 11:12 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/02/indiana-to-exempt-civil-rights-protections-in-its-religious-freedom-restoration-act.

17. 435 U.S. 618 (1978).

paradigmatically, the Court invalidated a Tennessee prohibition on clergy holding elected office.[18] The law's flaw was that it singled out individuals for a disability solely on the basis of their status as priests or ministers.[19]

Similarly, repeals might err simply by singling out beliefs, practices, or affiliations. In his provocative and intriguing article, for instance, Ronald Colombo argues:

> [O]ur touchstone in assessing [recissions of religious accommodations] must be that of equal treatment under the law. Unless such a recission withstands strict scrutiny, any government action that treats religious conduct (and religious bases of conduct) differently from nonreligious conduct (and nonreligious bases of conduct) violates the First Amendment.[20]

Elsewhere, he says similarly that "in a situation in which the only accommodation to a particular law is a religious accommodation, its repeal should be characterized as non-neutral regarding religion and thereby subject to strict scrutiny."[21] Religious classifications are suspect on this simple account.

Yet this theory strains against two longstanding features of religious freedom law. First, and most obviously, religious accommodations themselves classify on the basis of religion and yet are not thought to be constitutionally suspect for that reason. Frequently, if not invariably, voluntary accommodations extend to religion alone or even to a specific faith. The Religious Freedom Restoration Act applies only to religion,[22] while the peyote exemption from the federal drug laws applies only to people seeking to use peyote "in connection with the practice of a traditional Indian religion."[23] Some vaccination exemptions apply to all "beliefs" or all "philosophical" commitments,

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18. *Id.* at 626.
19. *Id.* at 626–27.
20. Colombo, *supra* note 1, at 796.
21. *Id.* at 802; *see also id.* at 797 ("Throughout the history of its Free Exercise jurisprudence, the Supreme Court has recognized that the lack of facial religious neutrality is deeply problematic.").
22. 42 U.S.C. § 2000bb-1(a) ("Government shall not substantially burden a person's exercise of religion . . . .").
23. *Id.* § 1996a(b)(1) ("Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State.").

in addition to religious beliefs as such.[24] But nothing turns on the difference because explicit classifications on the basis of religion raise no special concerns simply by virtue of the fact that they explicitly categorize on the basis of religion.

Anticlassification is presented as a rule of neutrality that applies evenhandedly. Consider this sentence from Colombo: "Throughout the history of its Free Exercise jurisprudence, the Supreme Court has recognized that the lack of *facial* religious *neutrality* is deeply problematic."[25] Yet voluntary accommodations do not trigger strict scrutiny when they are enacted.[26] Instead, the rule has been that voluntary religious accommodations are constitutional so long as they (1) lift a governmental burden, (2) "take adequate account of" burdens on nonbeneficiaries, and (3) are neutral among faiths.[27] To presume repeals of religious accommodations to be invalid, while presuming the initial accommodations to be valid, is not to maintain neutrality.

Second, repeals of voluntary *separationist* policies are not presumed to be invalid. States often impose prohibitions that go beyond what the Establishment Clause requires, especially regarding funding. For example, many state constitutions contain provisions that strictly

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24. *See, e.g.*, S.B. 277, 2015 Leg., Reg. Sess. (Cal. 2015) (authorizing immunization exemptions due to "personal beliefs"); 2019 Me. Laws 386 (allowing either "philosophical or religious" exemptions, as long as a physician's note is provided).

25. Colombo, *supra* note 1, at 797 (emphasis added).

26. Some argued essentially that Title VII's religious accommodation provision classified on the basis of religion, but they did not prevail. *See, e.g.*, Hardison v. Trans World Airlines, Inc., 527 F.2d 33, 43 (8th Cir. 1975) (rejecting an employer's claim that the accommodation for religious employees "is not neutral as between groups of religious believers and nonbelievers" because it accommodates "religious beliefs in a manner which results in privileges not available to a nonbeliever"), *rev'd*, 432 U.S. 63 (1977). Today, the EEOC suggests that employers can remove religious accommodations (that are no longer required) without discriminating on the basis of religion. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L [https://perma.cc/WJ9A-5A5V] (May 15, 2023) ("[A]n employer has the right to discontinue a previously granted accommodation if it is no longer utilized for religious purposes, or if a provided accommodation subsequently poses an undue hardship on the employer's operations due to changed circumstances.").

27. Cutter v. Wilkinson, 544 U.S. 709, 720 (2005).

prohibit tax funds from supporting religion.[28] Though these provisions have become constitutionally vulnerable under the Roberts Court,[29] no one has suggested that they could not be *repealed* by the state. And that consensus holds even though any such repeal would classify on the basis of religion, under the theory being examined here. In fact, recent Roberts Court decisions have invalidated such separationist policies without hesitating over any violation of neutrality.[30] Admittedly, it is hard to think of an example of a state repealing a voluntary separationist policy, let alone an instance that was challenged on constitutional grounds. Nevertheless, it would surprise almost everyone if such a challenge succeeded. And that further suggests that there is no anticlassification rule with regard to religion that applies evenhandedly.

If this observation is correct, it separates religious freedom jurisprudence from equal protection doctrine concerning race. In the latter context, the Roberts Court is actively working to construct a formal anticlassification model with respect to benign and invidious discrimination alike.[31] That is not the way the discourse is moving with respect to religious accommodations, where it is becoming unidirectional. Critics of religious repeals therefore cannot deploy the language of anticlassification without forfeiting some of its power.[32]

They might respond that classifications on the basis of religion are only suspect where they impose a burden on belief or practice. Repeals of religious accommodations are presumptively invalid, on this view,

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28. For example, the *Freeman* court notes that Florida not only has a voluntary religious freedom statute, it also has a voluntary nonestablishment provision. Freeman v. Dep't of Highway Safety & Motor Vehicles, 924 So. 2d 48, 54 n.7 (Fla. Dist. Ct. App. 2006) ("Article 1, section 3 of the Florida Constitution provides: . . . No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.").

29. *See, e.g.*, Carson v. Makin, 142 S. Ct. 1987, 2002 (2022) (invalidating Maine's exclusion of religious schools from a school funding program under the Free Exercise Clause).

30. *See, e.g.*, *id.* at 2002–04 (Breyer, J., dissenting) (explaining that the majority "nowhere mentions, and I fear effectively abandons" the longstanding notion of neutrality with regard to government and religion); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2262 (2020) (holding that a scholarship program that prevented religious schools from receiving state benefits available to other schools violated the Free Exercise Clause).

31. *See supra* text accompanying note 9.

32. Nor can they easily argue that strict scrutiny can be overcome, as it once regularly was in the context of affirmative action. *See infra* Part IV.

even if initial grants of religious accommodations are innocuous because they do not burden observance.[33]

Remember, though, that the issue here is whether repeals are invalid *simply because they classify on the basis of religion.* On any such account, a classification is problematic, whatever its effect on religious people, just as classifications are always suspect when it comes to race.[34] Anticlassification is framed as a neutrality theory, and that means it must apply evenhandedly. Liberty rights, by contrast, apply only against burdens,[35] but they are not at issue in this Part.

Realize too that identifying a burden depends on a difficult baseline determination that requires independent normative argumentation.[36] By definition, the accommodations at issue here are not demanded by the Constitution.[37] Removing them therefore could be seen as simply returning believers to a position everyone else occupies, relief from which no one has a claim of right. Critics who want to respond to the complaint that anticlassification must work in both directions by

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33. Sometimes Colombo emphasizes that repeals impose burdens, perhaps precisely to differentiate them from initial accommodations. *See, e.g.*, Colombo, *supra* note 1, at 733 ("[T]he act of recission unquestionably singles out religious conduct for circumscription—specifically imposing upon religious believers a burden . . . .").

34. Admittedly, constitutional law does not treat laws that prohibit discrimination on the basis of race as facially classifying. Nor does it think of laws that prohibit religious discrimination as classifying on the basis of religion. But religious accommodations do not simply prohibit explicit or intentional discrimination—they provide relief from general laws for religious practitioners. In that way, they are analogous to affirmative action policies or disparate impact protections for racial minorities. Not coincidentally, disparate impact provisions are coming under pressure for precisely this reason, because they could count as racial classifications. *See generally* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 494 (2003) ("Like affirmative action, a statute restricting racially disparate impacts is a race-conscious mechanism designed to reallocate opportunities from some racial groups to others. Accordingly, the same individualist view of equal protection that has constrained the operation of affirmative action might also raise questions about disparate impact laws."). That pressure is regrettable as a normative matter but easy to see as a predictive matter.

35. *See* Jess Zalph, Comment, *A Weighty Question: Substantial Burden and Free Exercise*, 25 U. PA. J. CONST. L. 953, 995 (2023) (asserting that in "general liberty cases" courts "evaluat[e] the substantiality of burdens").

36. *Cf.* Roderick M. Hills, Jr., *Federalism, Democracy, and Deep Disagreement: Decentralizing Baseline Disputes in the Law of Religious Liberty*, 69 ALA. L. REV. 913, 917 (2018) (identifying a baseline problem in determining what counts as religious coercion).

37. *Cf.* Colombo, *supra* note 1, at 733 (recognizing "the allure of characterizing [a repeal] as the mere restoration of a level playing field for both believers and non-believers" but resisting that characterization and finding that repeals always impose a burden).

pointing to the existence of a burden therefore will have to do some additional work to show that a repeal actually constitutes a burden.

Another difficulty with the anticlassification claim against repeals of religious exemptions is that it adopts an inconsistent view of what counts as a facial classification. If a state removes RFRA protection for a certain class of cases, does that qualify as a classification on the basis of religion? In Indiana, the RFRA carve-out does not itself mention religion, except as a remaining protected ground.[38] Nor do the RFRA repeals for abortions mention religion.[39] And in other contexts, courts do not consider religious exemptions from civil rights laws to classify on the basis of the relevant protected characteristic. For example, in *Burwell v. Hobby Lobby Stores, Inc.*,[40] the Court granted an RFRA exemption from a statute protecting women's reproductive health.[41] Yet no one argued that the RFRA exemption classified on the basis of gender. Nor did the exemptions for religious groups in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[42] *Fulton v. City of Philadelphia*,[43] or *303 Creative LLC v. Elenis*[44] classify on the basis of LGBTQ+ status.[45] So there is a serious question about whether many recissions of religious accommodations classify facially on the basis of religion.[46] Rightly or wrongly, statutory protections against discrimination are often limited by competing laws, and these limitations are not seen as classifications themselves on the relevant protected ground.

Ultimately, the anticlassification argument against repeals is difficult to sustain. Phillip Kurland famously argued that *all* religious classifications ought to be constitutionally suspect, and Mark Tushnet

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38. IND. CODE ANN. § 34-13-9-0.7(1) (2023) ("This chapter does not: authorize a provider to refuse to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service.").

39. *See, e.g.*, W. VA. CODE § 35-1A-1(b)(2) (2023) ("[N]or may anything in this article be construed to protect actions or decisions to end the life of any human being, born or unborn, including, but limited to, any claim or defense arising out of a violation of [the state's abortion ban].").

40. 573 U.S. 682 (2014).

41. *Id.* at 688–90.

42. 143 S. Ct. 2298 (2023).

43. 141 S. Ct. 1868 (2021).

44. 138 S. Ct. 1719 (2018).

45. *Masterpiece Cakeshop*, 138 S. Ct. at 1732; *Fulton*, 141 S. Ct. at 1882; *303 Creative*, 143 S. Ct. at 2321.

46. Of course, a repeal that removes a single religious accommodation could more easily be seen as classifying on the basis of religion, but so could the initial accommodations.

later endorsed the approach.[47] But that model has been difficult to sustain in face of the long tradition of legislating religion distinctively in the United States.[48] Religion blindness is simply not a form of neutrality that fits constitutional customs—at least not without a great deal of conceptual work, which the critics of repeals have not yet undertaken.

II. ANIMUS

Another theory offered is that repeals of religious accommodations are unconstitutional insofar as they are accompanied by expressions of religious hostility by lawmakers. This strategy leverages *Masterpiece Cakeshop*, where the Supreme Court found that the baker's free exercise rights were violated when members of the Colorado Civil Rights Commission made remarks that expressed "religious hostility" in the course of ruling against him.[49] More recently, the Court said (in dicta) that a plaintiff can "prove a free exercise violation by showing that 'official expressions of hostility' to religion accompany laws or policies burdening religious exercise," and that such laws are *per se* invalid.[50] So the holding in *Masterpiece* has evolved into a review that is stricter than strict scrutiny.

Sometimes repeals are accompanied by antireligious expressions, according to proponents of the approach. For example, plaintiffs challenging New York's repeal of its religious exemption from the vaccine requirement for school children pointed to statements made by state legislators while they were passing the repeal.[51] Five lawmakers

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47. PHILIP B. KURLAND, RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT 112 (1962) ("The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or impose a burden."); Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373, 402 (endorsing Kurland's anticlassification approach to the religion clauses but acknowledging that the Supreme Court is not likely to adopt it).

48. Until recently, it also ran up against the tradition of allowing lawmakers to separate church and state more vigorously than the Establishment Clause required. *See infra* text accompanying notes 112–14.

49. *Masterpiece Cakeshop*, 138 S. Ct. at 1724, 1729. The Court's characterization of those remarks as expressing hostility toward religion has been contested. Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 138–43 (2018).

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

51. Colombo, *supra* note 1, at 788–89.

made eleven statements that the plaintiffs took to be expressions of antireligious animus.[52] One lawmaker concluded the legislative session by saying, "[w]e've chosen science over rhetoric."[53] Several of the comments questioned the sincerity of religious objections to the measles vaccine, pointing out that no major religion opposed inoculation.[54] School officials were put in the difficult position of having to decide which objections were sincere.[55] Other remarks characterized religious objections as "ideological," "non-sensical," and "dangerous."[56]

Claims based on such remarks extend the *Masterpiece* theory beyond adjudication, where it was specifically applied in that case.[57] Justice Kennedy, writing for the majority, reasoned that the stray comments by members of the civil rights commission cast doubt on the judicial body's impartiality, to which the baker had a right.[58] Kennedy implied that his logic would not necessarily pertain to a legislature, which does

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52. F.F. v. State, 143 N.Y.S.3d 734, 740–41 (App. Div. 2021).

53. Petition for Writ of Certiorari at 10, F.F. v. State, No. 21-1003 (U.S. filed Jan. 10, 2022).

54. *Id.* at 10–11 ("Let me be clear: There is not one religious institution, not one single one that denounces vaccines. So, here we have a religious exemption pretending as if there is a religion out there that has a problem with the vaccines . . . Whether you are Christian, whether you are Jewish or Scientologist, none of these religions . . . have texts or dogmas that denounce vaccines. Let's as a state stop pretending like they do." (alteration in original)); *id.* at 11 ("[O]ur state's religious exemption currently allows some individuals and groups to pretend as if there are genuine religious reasons to opt-out when, in fact, every religion from Christianity to Islam to Judaism to Scientology has no issues whatsoever with immunization."); *id.* at 12 ("The problem is that most people in my opinion use [the religious accommodation] as an excuse not to get the vaccinations for their kids. There is nothing, nothing in the Jewish religion, in the Christian religion, in the Muslim religion . . . that suggests that you can't get vaccinated. It is just utter garbage." (alteration in original)).

55. *Id.* at 12 ("The goal should be to take religion out of the equation . . . . We can't put our public health officials or our school officials into that position of deciding if a religious belief is sincere or not. That is why we need to remove it altogether." (alteration in original)).

56. *Id.*

57. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1730 (2018) ("[T]he Court cannot avoid the conclusion that these statements [by members of the Civil Rights Commission] cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case. Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. In this case, however, the remarks were made in a very different context—by an adjudicatory body deciding a particular case." (citations omitted)).

58. *Id.* at 1724.

not have the same responsibility of neutrality toward particular parties.[59]

When it comes to other forms of discrimination such as racial or gender bias, moreover, the Court does not normally determine whether equal protection has been violated by asking only whether officials made discriminatory comments. Instead, it investigates whether a government decision was made "because of" discrimination, "not merely in spite of" it, taking into account multiple considerations.[60] Even if invidious discrimination is a motivating factor, the Court gives the government an opportunity to show that it would have taken the same action even absent that factor.[61] Only if the plaintiff can satisfy both those tests is strict scrutiny applied, ordinarily.[62] So the animus theory against religious repeals takes an anomalous rule from *Masterpiece* and extends it further, into lawmaking and mixed-motive analysis.

Another flaw afflicts the animus theory against repeals of religious accommodations. In *Masterpiece*, the Court purports to be articulating a "religious neutrality" approach to situations where the government is charged with having mixed motives.[63] Accordingly, the baker has a right to an adjudication that is not colored by religious hostility. For the *Masterpiece* doctrine to qualify as a neutrality rule, it must apply in a similar way to government comments advantaging religion as it does to those disadvantaging it.[64] However, today there is no realistic prospect that lawmakers' remarks praising observance will impair the

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59. *Id.* at 1730.

60. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (citation omitted)).

61. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977); *see also* Kendrick & Schwartzman, *supra* note 49, at 153 (noting that the *Masterpiece* Court did not follow its usual rule for mixed motives as articulated in *Arlington Heights*).

62. *See* Colombo, *supra* note 1, at 740.

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

64. *Cf.* Schwartzman & Schragger, *supra* note 4, at 2312 ("The present doctrinal rule can be stated as follows: When officials pass laws that are motivated by hostility to religion, then the Court will invalidate those laws, even if they were also justified on alternative, permissible grounds; but when officials pass laws motivated to advance religion, then the Court will simply defer to those laws.").

constitutionality of religious accommodations themselves.[65] Religious reasons can motivate religious accommodations when mixed with other motivations, but under the theory, religious reasons cannot motivate repeals of those same accommodations, even when mixed with nonreligious reasons. That asymmetry characterizes the constitutionality of religious reasons under the Free Exercise and Establishment Clauses, as they are being construed by the Roberts Court more generally.

There is a trenchant, recent example. After *Dobbs*, many states have opted to ban abortions at various stages of pregnancy before viability.[66] Several state legislative proceedings included comments by legislators indicating that the basis for their votes was theological.[67] A few comments demeaned and deprecated people who would elect to terminate their pregnancies on religious grounds.[68] Though

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65. Some people will interpret the overruling of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to end the secular purpose requirement for government action. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2449–50 (2022) (Sotomayor, J., dissenting) (noting that "the purposes and effects of a government action matter in evaluating whether that action violates the Establishment Clause" and arguing that the Court went too far by doing away with this standard in "overruling *Lemon* entirely").

66. *See* Schwartzman & Schragger, *supra* note 4, at 2303 (listing a number of state laws that went into effect post *Dobbs*).

67. One complaint outlines statements on the floor of the Missouri legislature in debates over the state's abortion ban:

> For example, the bill's lead sponsor, Representative Nick Schroer, explained that "as a Catholic I do believe life begins at conception and that is built into our legislative findings." One of the bill's co-sponsors, Representative Barry Hovis, stated that he was motivated "from the Biblical side of it, . . . life does occur at the point of conception." Another co-sponsor, Representative Ben Baker, stated: "From the one-cell stage at the moment of conception, you were already there . . . you equally share the image of our Creator . . . you are His work of art." Another supporter, Representative Holly Thompson Rehder, urged passage of H.B. 126 by exhorting her colleagues: "God doesn't give us a choice in this area. He is the creator of life. And I, being made in His image and likeness, don't get to choose to take that away, no matter how that child came to be. To me, life begins at conception, and my God doesn't give that option."

Petition for Injunctive & Declaratory Relief at 7, Blackmon v. State, No. 2322-CC00120 (Mo. Cir. Ct. Jan. 19, 2023) (alterations in original).

68. Schwartzman and Schragger report that Kentucky Representative Danny Bentley argued against a legislative accommodation from the state's abortion ban for Jewish women by saying that "Jewish women have only one sexual partner, that they 'ha[ve] less cancer of the cervix than any other race in this country or this world,' and that, for these reasons, 'the Jewish people' do not approve of abortifacients." Schwartzman & Schragger, *supra* note 4, at 2320 (alterations in original).

Establishment Clause lawsuits have been brought, they are unlikely to succeed in the Supreme Court.[69]

Writing in the reproductive freedom context itself, the Court has explained that a statute defunding abortions does not violate the Establishment Clause merely "because it 'happens to coincide or harmonize with the tenets of some or all religions.'"[70] Remarks by lawmakers that they were voting for religious reasons were not impermissible because "the fact that the funding restrictions . . . may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause."[71] As others have noted, the same reasoning is likely to be applied to abortion bans.[72] That lawmakers said they were motivated by theological reasons is not expected to be sufficient to invalidate the laws.[73] Yet comments reflecting antireligious sentiments are now sufficient to trigger heightened scrutiny, even when combined with sufficient, neutral reasons.

None of this is to say that animus toward religion should not be unconstitutional, or when it should be found to violate free exercise. It is not necessary to have an affirmative theory on those matters to appreciate the tensions in arguments concerning repeals of religious accommodations. To say that stray comments disfavoring religion are enough to invalidate repeals, but that stray comments favoring religion are insufficient to invalidate the initial enactment of accommodations (or other laws), is not to apply a theory of neutrality in any obvious sense.[74]

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69. *See* Schwartzman & Schragger, *supra* note 4, at 2301 n.5 (listing cases where plaintiffs have asserted free exercise and nonestablishment challenges against abortion restrictions).

70. Harris v. McRae, 448 U.S. 297, 319 (1980) (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

71. *Id.* at 319–20.

72. Schwartzman & Schragger, *supra* note 4, at 2306.

73. *Id.* at 2312.

74. Perhaps such a position falls within a meaning of neutrality that is not straightforward, such as Laycock's "disaggregated neutrality." Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1007–08 (1990). A better understanding is that disaggregated neutrality does not qualify as a form of neutrality at all.

III. *TANDON*

A third theory maintains that some repeals of religious accommodations are presumptively invalid under the *Tandon* rule.[75] In *Tandon v. Newsom*,[76] the Supreme Court held for the first time that the government draws strict scrutiny when it regulates religious actors while exempting comparable others.[77] This has come to be known as the "most-favored nation" or "equal value" rule.[78] It articulates one way in which a law can fail to be generally applicable and thus fall outside the main rule of *Employment Division v. Smith*.[79] At least as long as *Smith* remains governing law, the *Tandon* rule will continue to be important to the Roberts Court because it gives the Court latitude to grant religious exemptions in a wide variety of contexts—basically whenever a regulatory regime has preexisting exemptions or even a limited scope. *Tandon*'s comparability requirement, which holds that an extant exemption is comparable if it implicates the government's interest in the same way as the requested religious exemption, is malleable enough to be deployed in many contexts, as others have shown.[80]

Applied here, the *Tandon* rule will presume invalid any repeal of a religious accommodation that leaves in place a comparable exception. For example, New York's repeal of its religious accommodation from its school vaccination requirement left standing an accommodation for children with medical contraindications.[81] If the government's interest is defined at a high level of abstraction, such as protecting public health, there is no problem—accommodating medical objections is

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75. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).

76. 141 S. Ct. 1294 (2021) (per curiam).

77. *Id.* at 1296.

78. *See* Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2398–99 (2021) (explaining the notion that the government may not "regulate[] protected activities while exempting other activities" absent a compelling government interest); Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1, 49–50 (1990) (coining the term "most-favored nation" in this context).

79. Laycock, *supra* note 74, at 1, 49–50.

80. *See, e.g.*, Zalman Rothschild, *The Impossibility of Religious Equality*, 124 COLUM. L. REV. (forthcoming 2024) (manuscript at 37–38), https://ssrn.com/abstract=4737027 (noting flaws of comparability as a limiting principle); Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty*, 108 IOWA L. REV. 2237, 2241–42 (2023) (pointing out the "persistent imprecision in deciding what counts as comparable activity"); *see also* Lawrence G. Sager & Nelson Tebbe, *Salvaging* Tandon 15–16 (Sept. 3, 2024) (unpublished manuscript) (on file with author) (critiquing the Court's mechanical understanding of comparability).

81. Colombo, *supra* note 1, at 785.

consistent with that interest, whereas accommodating religious objections was determined not to be.[82] But if the government's interest is defined as preventing contagion, then it is implicated in the same way by the two exemptions.[83] Reasoning this way, some conclude that state repeals of religious exemptions from school vaccination requirements should draw judicial scrutiny.[84]

An immediate difficulty is that the argument falls outside the scope of the issue being discussed here. Repeals of religious accommodations are distinct and interesting precisely because they remove permissions that are *not* constitutionally compelled in the first place. By contrast, the upshot of this argument is that the government was required to grant an accommodation—and its failure to do so is what troubles the repeal, not anything independent. So, the claim here does not concern the removal of a *voluntary* religious accommodation.

Another inconsistency is that the *Tandon* rule is being applied unevenly and in a patterned way. At a high level, it applies to some rights and not others, even though its logic is more general.[85] Favored rights, such as free exercise and, to a lesser degree, free speech, are elevated to most-favored status by the novel equality rule, while disfavored rights, such as reproductive freedom and racial justice, are

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82. We The Patriots USA, Inc. v. Conn. Off. of Early Childhood Dev., 76 F.4th 130, 151 (2d Cir. 2023) ("We conclude that the . . . purpose [of the New York school vaccination requirement] is 'to protect the health and safety of Connecticut students and the broader public,' and that medical but not religious exemptions serve this interest." (citation omitted)); *see also* F.F. v. State, 143 N.Y.S.3d 734, 743 (App. Div. 2021) (describing how the state's interest in public health applies differently to religious and medical exemptions, though in the context of an equal protection discussion).

83. Colombo, *supra* note 1, at 769–73.

84. *See, e.g.*, *We The Patriots*, 76 F.4th at 165 (Bianco, J., concurring in part and dissenting in part) (reasoning that if the state's interest was preventing contagion then repealing the religious exemption but not the medical exemption was not generally applicable and concluding that further factfinding is necessary and therefore that the motion to dismiss should not be granted); Colombo, *supra* note 1, at 797–98 ("[W]hen this repeal is coupled with the persistence of other, nonreligious accommodations, a finding of non-neutrality with respect to religion is virtually assured."). Context suggests that Colombo is discussing general applicability here, not neutrality, even though he uses the latter term.

85. *See generally* Tebbe, *supra* note 78, at 2462–82 (specifying how the *Tandon* approach has been applied to some rights but not others).

neglected by it.[86] At a lower level, the *Tandon* rule seems to benefit some religious freedom claims and not others. For example, it was not applied in the travel ban case when it could have been.[87]

More telling in this context, the *Tandon* approach ought to protect those who have religious reasons for terminating their pregnancies despite criminal abortion bans. Recently, an Indiana appellate court ruled in favor of such plaintiffs on compatible grounds.[88] Yet it is predictable that the Roberts Court will not apply the most-favored-nation approach to rule for those seeking to terminate their pregnancies for theological reasons.[89]

That prediction applies equally to the constitutionality of *repeals* of religious accommodations for those seeking to exercise reproductive freedom in this way. Recall that Oklahoma and West Virginia have amended their laws to remove religious freedom protection for those who seek to end their pregnancies, or otherwise violate abortion bans, for religious reasons.[90] Even assuming that these states retain other exemptions, as seems likely considering that every state exempts people whose lives are endangered[91] and many states exempt the destruction of embryos as part of in-vitro fertilization,[92] states are

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86. *See id.* at 2460–62 (discussing the applicability of equal value to reproductive freedom); *id.* at 2458–60, 2474–75 (discussing the applicability of equal value to issues of racial justice); *see also* Rothschild, *supra* note 80, at 27–28, 28 n.145 (suggesting that courts have begun applying the equal value approach to the Second Amendment).

87. *See generally* Tebbe, *supra* note 78, at 2464–69 (arguing that the *Tandon* rule could have been applied in the travel ban case).

88. Individual Members of Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1, 233 N.E.3d 416, 459 (Ind. Ct. App. 2024). Although the court ruled for the women under the Indiana RFRA, it found that the state could not have a compelling interest in enforcing its abortion ban because it exempted IVF: "The Abortion Law exempts in vitro fertilization procedures from its scope, although there is the potential for life that might be destroyed in the process of this procedure. That broad exemption suggests any compelling interest by the State is absent at fertilization." *Id.* at 452 (citation omitted). That holding mirrors the logic of the *Tandon* rule.

89. *See* Schwartzman & Schragger, *supra* note 4, at 2302 (predicting that the Supreme Court will reject claims for religious exemptions from abortion bans, even though those claims are strong under *Tandon*).

90. *See supra* note 3.

91. *See* Schwartzman & Schragger, *supra* note 4, at 2321 ("[A]ll existing state laws include secular exceptions for when terminating a pregnancy is medically necessary to save the pregnant person's life. In some states, abortion laws also make exceptions for rape and incest, for certain fetal abnormalities, or for the health of the pregnant individual." (footnote omitted)).

92. *See id.* at 2328 n.171 (describing exemptions from abortion bans for in-vitro fertilization).

unlikely to be found to have violated free exercise when they remove the possibility of religious accommodations from abortion bans.

In sum, the *Tandon* template for considering repeals of religious accommodations turns out to be as troublesome as the other strategies. This assessment is independent of the attractiveness of the *Tandon* rule and of its applicability to some instances of religious repeals.

IV. SIX SMALLER ARGUMENTS

Six smaller arguments carry their own complexities.

A. Communicating Disparagement of Religion

First, repealing a religious accommodation is said to send a message of disparagement to people of faith.[93] It is of course true that a decision not to grant a religious accommodation can convey many meanings—the government may have been balancing several considerations, including its interests in regulating and fairness to others who also want to be excused. But removing an existing accommodation sends a sharper signal to those who benefit from it, according to this argument. Focusing on expressive impact makes it possible to distinguish initial refusals of religious accommodations from later repeals.

Colombo uses the example of the Bladensburg Cross to support the expressive claim.[94] In *American Legion*, the Court held that a large Latin cross standing on public land in Maryland did not violate the Establishment Clause.[95] Relying on the fact that the cross had been in place for decades, the Court reasoned that it no longer offended the Establishment Clause regardless of whether it had been constitutional at the time it was erected.[96] Moreover, and key here, the Court worried that any action the justices took to require the cross to be taken down

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93. Colombo, *supra* note 1, at 795 ("[C]onsider the message sent to people of faith when a religious accommodation is removed . . . . Would not the reasonable observer view this change in policy as reflecting a shift in the public's attitudes toward the affected individuals, their religious practices, their religious beliefs, religion in general, or all of the above?").

94. *Id.* at 795–96.

95. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2089 (2019).

96. *Id.* at 2085 ("These four considerations show that retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones.").

would be interpreted as hostile.[97] So the removal of a religious symbol can have a social meaning that differs from the meaning of a decision not to erect that symbol in the first place.

Cogent as this logic may seem, it actually has flaws. For one thing, the Roberts Court has rejected the endorsement test along with the *Lemon* test of which it was a part.[98] If that was not completely clear from *American Legion* itself,[99] it became obvious more recently, when the Court declared that it had "long ago abandoned *Lemon* and its endorsement" component.[100]

And if relying on the expressive religiosity of a government action is problematic in the Establishment Clause context, it must be equally problematic when it comes to the Free Exercise Clause. Partly, again, this is because the Court has emphasized that it is presiding over a regime of religious neutrality.[101] But beyond that, relying on the social meaning of repeals runs up against virtually the same critiques that dogged the endorsement approach in the nonestablishment context. Chiefly, the complaint has long been that the endorsement test is indeterminate, generating unclear answers to difficult constitutional questions. What a reasonable observer would perceive cannot be ascertained predictably or consistently.[102] Without embracing that critique, which is selective at best, it is easy to apply it in the opposite direction. Taking down a forty-foot Christian cross that stands on public land (in the middle of a busy intersection) could be seen as complying with the separation of church and state, or as attending to

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97. Justice Alito wrote for the majority that "its removal or radical alteration at this date would be seen by many not as a neutral act but as the manifestation of 'a hostility toward religion that has no place in our Establishment Clause traditions.'" *Id.* at 2074 (quoting Van Orden v. Perry, 545 U.S. 677, 704 (2005)); *see also id.* at 2084 ("[W]hen time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning.").

98. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022).

99. *See Am. Legion*, 139 S. Ct. at 2080–82 (setting out "the *Lemon* test's shortcomings", including the "daunting problems" involved in using the test in cases concerning government expression and rejecting "efforts to evaluate such cases under *Lemon*").

100. *Kennedy*, 142 S. Ct. at 2427.

101. *See, e.g.*, Carson v. Makin, 142 S. Ct. 1987, 2004 (2022) ("Although the Religion Clauses are, in practice, often in tension, they nonetheless 'express complementary values.' Together they attempt to chart a 'course of constitutional neutrality' with respect to government and religion." (citation omitted)).

102. *See Am. Legion*, 139 S. Ct. at 2081 nn.13–15 (collecting critiques of the *Lemon* test, including its endorsement interpretation, by courts and scholars).

religious minorities, or as promoting traffic safety, rather than as an instance of hostility toward religion, especially to a reasonable observer who is fully informed of the history and circumstances. Whether *removing the cross* expresses separationism or whether it instead conveys a message of religious hostility must be every bit as tricky to determine as whether *leaving the cross in place* sends a message of religious endorsement.

Considering those criticisms, it is hard to accept the argument that repealing a religious accommodation should always be seen as constitutionally infirm on the ground that it sends a message of disapproval to believers, even as a presumptive matter. If an endorsement approach is fatally indeterminate in the Establishment Clause context, then relying on expressive impact also must be indeterminate and thus impermissible in the Free Exercise Clause context.

B. Reliance

Repeals are said to differ from initial refusals of religious accommodations because beneficiaries come to rely on them in the interim. Of course, reliance does separate repeals from initial refusals in some sense, so you might think that it gives courts a reason to differentiate between taking away a right and refusing to grant it in the first place. Yet reliance of this sort was recently rejected as a consideration by the Supreme Court—and that was in the context of repealing a fundamental right, not an ordinary statutory accommodation, to which weaker reliance interests presumably attach. In *Dobbs*, the Court denied that people had come to rely on the abortion right in the relevant sense.[103] Justice Alito, writing for the majority, said that precedents "emphasize very concrete reliance interests, like those that develop in 'cases involving property and contract rights.'" [104] By contrast, women were asserting "a more intangible form of reliance," namely that they had come to organize their intimate and economic lives around the certainty that they would be able to terminate any pregnancies should contraception fail.[105] Alito held that assessing that kind of claim required an empirical judgment

103. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2276 (2022).
104. *Id.* at 2276 (citation omitted).
105. *Id.*

that courts were not equipped to make, namely an estimate of "the effect of the abortion right on society."[106]

Here, the claim is that religious accommodations are relied on in the intangible sense. The contention is that "some account ought to be made for the fact that lives will inevitably have been lived and organized pursuant to the understanding that these accommodations would remain in place."[107] That is similar to the kind of noneconomic interest that the *Dobbs* Court rejected as relevant.[108] Because recissions might apply to a wide range of regulations, it is difficult to discern much about the effect of repeals on people that invoke them across the full range of possible contexts. Even in particular cases, courts will struggle to assess the empirical effects of repeals on society, just as the Court struggled in *Dobbs*.[109] To be clear, Alito's approach to reliance is ungenerous and wrongheaded—and reliance does offer one reason why repeals of religious accommodations ought to raise constitutional concerns in some cases. But any attempt to leverage the reliance interest today will run up against the *Dobbs* Court's restrictive conception, at least as a matter of doctrine, if not in actual judicial practice. Again, that is a particular problem because the *Dobbs* Court was justifying the removal of a constitutional right, which is designed to be entrenched, while the reliance argument here is being applied to statutory and regulatory accommodations that are not constitutionalized, by definition.

C. Harm to Religious Minorities

Next, repeals are said to harm religious minorities. If there is sufficient political will to rescind an accommodation, the argument goes, then that alone is enough to show disadvantage on the part of religious groups who benefitted from the exemption but who have insufficient political power to preserve it.[110] This concern brings to

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106. *Id.* at 2277.

107. Colombo, *supra* note 1, at 794.

108. The similarity holds even though repeals of religious accommodations pertain to statutory or regulatory rights rather than constitutional ones.

109. "[A]ssessing the novel and intangible form of reliance endorsed by the *Casey* plurality . . . depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women." *Dobbs*, 142 S. Ct. at 2277.

110. "[C]an it really be the case that religious accommodations can be withdrawn if the group(s) they protect find themselves less popular than before?" Colombo, *supra* note 1, at 795.

mind the *Freeman* case, where Florida removed religious freedom protection for religious headgear in state identification photographs after Muslim women began taking their driver's license photos wearing religious head coverings.[111] In such situations, there is a legitimate worry that a religious minority is being targeted or disproportionately affected.

But the argument here goes much further—it maintains that *all* religious actors require countermajoritarian protection from repeals of accommodations:

> American society is increasingly turning away from religion and, concomitantly, its historical embrace of religious freedom . . . . [Allowing repeals] invites abuse, particularly of those religious groups and minorities that find themselves too unpopular to sustain an accommodation accruing to their benefit.[112]

It is unsurprising that repeals of religious accommodations are contested in legislative politics, at least sometimes. Yet it does not follow that repeals *always* should draw strict scrutiny because they *necessarily* affect groups subject to structural injustice or another form of systematic subordination.[113] A concern for religious minorities cannot drive a wholesale presumption against repeals.

D. Perverse Incentive Effects

There is a debate over whether invalidating repeals will create perverse incentive effects. Christopher Lund has argued that lawmakers considering religious accommodations in the future will hesitate if they know that any exception will be entrenched and effectively unrepealable.[114] Overall and over time, the result will be fewer accommodations, not more of them. In response, critics of repeals argue that political conditions have evolved so that the greater danger is that religious freedom will be restricted through removals of religious accommodations.[115] Religion is under attack, and advocates

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111. *See supra* text accompanying notes 5–8.

112. Colombo, *supra* note 1, at 804–05.

113. Relatedly, it has recently been argued that mainstream Christian groups do not require disparate impact protection, even though they should continue to receive presumptive protection against explicit or purposive targeting. Cécile Laborde, *Secular Rules and Indirect Discrimination Against Christians*, *in* DISCRIMINATION BY AND AGAINST RELIGION (Cécile Laborde, Micah Schwartzman, & Nelson Tebbe eds. forthcoming 2025) (manuscript at 6) (on file with author).

114. Lund, *supra* note 8, at 495.

115. Colombo, *supra* note 1, at 796.

need to respond by preserving whatever gains they are lucky enough to enjoy right now.[116] In other words, the benefits to religious interests of constitutionally entrenching accommodations outweigh any costs under current social conditions.[117]

From the perspective of conservative politics, this claim has a discernible logic. The Supreme Court is more receptive to religious freedom claims than Congress is today, so it should be given more power over accommodations. Its actions are unlikely to affect congressional decision-making, which is shaped more by partisanship than by worries about entrenchment. And because the Court is applying a rule of federal constitutional law, it will be able to review both federal and state legislative repeals, under this proposal.[118] Yet the claim that applying strict scrutiny to all repeals of religious accommodations will benefit conservative politics does not provide a good reason to adopt such a rule in all cases. And the view is hard to sustain under any other logic.

E. Application of Strict Scrutiny

The proposal to apply strict scrutiny to all repeals is argued to be less radical than it seems because strict scrutiny is survivable—it allows for the possibility that a repeal is narrowly tailored to a compelling state interest.[119] In a pandemic, for instance, the government has an opportunity to convince a court that the repeal of a religious exemption is necessary to support the public-health effectiveness of a vaccine requirement. But with respect to *Tandon* claims, which are perhaps the most plausible, this is not quite right. If a challenger can show that the government has accommodated other groups, even though they implicate its interests in the same way as the religious group that remains regulated, then it will predictably fail strict scrutiny.[120] A government policy that pursues a state interest with respect to believers, but not others, cannot be all that compelling, and

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116. *See supra* text accompanying note 112112.

117. *See* Colombo, *supra* note 1, at 803 (concluding that any repeal of religious accommodations necessarily involves non-neutrality with regard to religion, requiring strict scrutiny).

118. Martin v. Hunter's Lessee, 14 U.S. 304, 354–55 (1816).

119. *See* Colombo, *supra* note 1, at 793 n.389, 797, 801 (reassuring readers that strict scrutiny can be satisfied).

120. Colombo recognizes this, and comments that "the government would be hard-pressed to justify the removal of a religious accommodation in light of the continued recognition of another (or other) accommodation(s)." *Id.* at 802.

it is not narrowly tailored because it can and does admit exceptions. That is why the *Tandon* rule has been described as circular.[121] Wherever it is applied, strict scrutiny is fatal.[122]

F. Asymmetrical Play in the Joints

During the last religious freedom regime, which lasted from about 2000 until around 2020, the Court often described a "play in the joints" between nonestablishment and free exercise.[123] Lawmakers had discretion to craft policy in the interstice, whether by requiring greater separation than required by nonestablishment or by protecting religious freedom more strongly than did federal free exercise law. Governments regularly took advantage of that latitude, for instance by affirming state constitutional provisions that strictly prohibited tax dollars from flowing to religious organizations or by passing laws like the federal and state religious freedom restoration acts.[124] Both types of laws were regularly upheld.[125]

Now, the space between the two provisions is narrowing as the Supreme Court exercises judicial review more frequently in the area of religion. More troublingly, the Court is changing not only the size of the space between the clauses but also its shape. That is, play between the joints is narrowing, but much more in one direction than in the other. While separationist policies are repeatedly invalidated, religious accommodations continue to be upheld.[126]

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121. *See* Tebbe, *supra* note 78, at 2450–51 (arguing that strict scrutiny will almost always be found to be satisfied under *Tandon*).

122. Khetarpal observes that applying strict scrutiny to a RFRA carve out replicates the analysis that would obtain if RFRA applied. Khetarpal, *supra* note 8, at 73. For example, if Congress has a compelling interest in exempting the Equality Act from RFRA because its nondiscrimination interests are that strong, then Congress could simply have left RFRA in place. *Id.*

123. Locke v. Davey, 540 U.S. 712, 718 (2004) (citation omitted).

124. For example, Florida has both. *See supra* note 28.

125. *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 725–26 (2005) (upholding religious accommodations for prisoners practicing nontraditional religions so long as the accommodations do not override other substantial interests or become excessive); *Davey*, 540 U.S. at 725 (upholding Washington State's policy excluding devotional degrees from state scholarship funding). An important exception is the original Religious Freedom Restoration Act, which was invalidated as to the states. City of Boerne v. Flores, 521 U.S. 507, 511 (1997). But that ruling was based on Section 5 of the Fourteenth Amendment, not the Establishment Clause. *Id.* at 516–17, 536.

126. For an example of the latter, see *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2372–73, 2381, 2386 (2020) (upholding a provision

Arguments against repeals of religious accommodations exacerbate that asymmetry. To the degree such claims are successful, voluntary protections for free exercise will become fixed in statutory and administrative law. Meanwhile, voluntary separationist policies will remain vulnerable to repeal, for there is no realistic prospect that recissions of separationist policies will be seen as unconstitutional on the grounds that they violate the Establishment Clause itself.

CONCLUSION

Calls to entrench religious accommodations resonate with the judicial zeitgeist. They may prove prescient even though they strain against other tendencies in the constitutional law of free exercise and nonestablishment. For instance, and most fundamentally, applying a presumption of invalidity in one direction only—to repeals of religious accommodations but not to their enactment and not to repeals of separationist policies—pushes against the central principle in the Roberts Court's discourse on religious freedom, which is neutrality. To allow government policymaking discretion on matters of religion, but only in one direction, is not really to administer a neutrality model at all.

Of course, tensions in constitutional law are nothing new, and they may even be a fixed feature of judicial politics. But to the degree that the Roberts Court seeks to harmonize its jurisprudence around religious freedom, it should be expected to continue to move in the direction of stronger free exercise doctrine and weaker nonestablishment protection. That might mean that it starts to deemphasize the language of religious neutrality, slowly replacing it with a discourse of religious autonomy or even American religiosity.

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that exempts religious nonprofits from the contraception mandate, despite evidence of harm to women who lose coverage).