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The Free Exercise of Religious Identity

Lauren Sudeall Lucas

ABSTRACT

In recent years, a particular strain of argument has arisen in response to decisions by courts or the government to extend certain rights to others. Grounded in religious freedom, these arguments suggest that individuals have a right to operate businesses or conduct their professional roles in a manner that conforms to their religious identity. For example, as courts and legislatures have extended the right to marry to same-sex couples, court clerks have refused to issue marriage certificates to such couples, claiming that to do so would violate their religious beliefs. Similarly, corporations have refused, for reasons grounded in religious identity, to participate in health insurance plans that cover certain contraceptive devices.

While not always successful, these claims have typically been recognized by courts as claims of religious exercise under the Free Exercise Clause. This Article draws on past work suggesting that the law should protect the individual's right to define and pursue one's own identity within a more limited, internal sphere, but that law, and not identity, should govern relationships among individuals and groups in society. It argues that these claims might be viewed as analogous to other identity-based claims and, as a result, subjected to similar limitations.

The U.S. Constitution does and should protect the individual's ability to define one's own religious identity, engage in practices that reinforce that identity, and determine how one relates to the law (which may sometimes necessitate accommodation). It should not, however, be understood to protect identity when projected outward, onto non-identifying individuals or the government in its regulation of others. Thus, protective claims of religious identity, which aim to protect identity as a personal matter—exercised with an eye toward the individual or religious community—should fall within the ambit of the Free Exercise Clause. Projective claims of religious identity, however—those that attempt to impose one's identity on others, dictate how the law relates to non-identifying individuals, or conform the law or government practices to one's internal conception of identity—should not be cognizable as constitutional claims. The protective-projective distinction is consistent with underlying themes in the Court's free exercise jurisprudence and may help to cabin claims like those described above without minimizing the significance of religious identity.

AUTHOR

Lauren Sudeall Lucas is an assistant professor at Georgia State University College of Law.

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INTRODUCTION

In recent years, a particular strain of argument has arisen in response to protections that the courts or the government have extended to others. Grounded in religious freedom, these arguments suggest that individuals have a right to operate businesses or conduct their professional roles in a manner that conforms to their religious faith. For example, as courts and legislatures have extended the right to marry to same-sex couples, court clerks have refused to issue marriage certificates to such couples or to provide them with related services such as wedding photography, claiming that to do so would violate their religious beliefs.[1] In another context, corporations and other entities have refused, for reasons grounded in religious identity, to facilitate employment-based group health insurance plans that cover certain contraceptive devices.[2]

The parties in these cases have contended, among other things, that to act—or be compelled to act—in such a manner violates their right to free exercise of religion under the First Amendment.[3] The courts entertaining their claims have accepted the fact, without much discussion, that these are cognizable religious exercise claims.[4] Perhaps because courts are often hesitant to question the sincerity or validity of religious beliefs, they have focused their energies on the nature of the law at issue and its effect on religion, asking whether the law is neutral and generally applicable.[5] Alternatively, courts might concentrate on the nature of the resulting discrimination and its effect on others.[6]

In previous work, I have highlighted the dangers of conflating identity and law, arguing that while the formation and maintenance of identity is a highly personal and individualized endeavor, the law serves a very different purpose.[7] The law's primary role is to negotiate relationships among individuals and groups,

1. *See infra* Part III.C.
2. *See generally* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Little Sisters of the Poor Home for the Aged v. Sebelius, 134 S. Ct. 1022 (2014).
3. *See, e.g.*, *infra* Part III.C.
4. *Id.*
5. *Id.*
6. *Id.*
7. *See infra* Part I.A.

as well as between individuals or groups and the state.[8] While the U.S. Constitution protects a sphere of personal freedom to define and pursue one's identity,[9] it should not be understood to protect identity when projected externally and imposed on others, particularly when others' rights and possibly their identity may be affected as a result.[10] Indeed, that would undermine the very notion that every individual is free to define his or her own identity and to construct or adopt a set of values that accompany that identity. It may also interfere with proper operation of the law, which should turn not on individualized conceptions of identity, but on the values and other principles by which we as a society choose to structure legal relationships between individuals and the state.[11]

8. The Oxford English Dictionary defines "law" as "a rule or system of rules recognized by a country or community as regulating the actions of its members and enforced by the imposition of penalties." *Law*, OXFORD ENGLISH DICTIONARY (12th ed. 2011).

9. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015) ("The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."); *id.* at 2597 (holding that the liberties guaranteed by the Due Process Clause of the Fourteenth Amendment "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs"); Lawrence v. Texas, 539 U.S. 558, 574 (2003) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992))); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring) ("Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin."). Relatedly, William Marshall has argued that the First Amendment should be understood as "a source of freedom to seek ideas, rather than as a vehicle to protect the ideas one already has." William P. Marshall, *Religion as Ideas: Religion as Identity*, 7 J. CONTEMP. LEGAL ISSUES 385, 403 (1996). This view aligns with the idea that courts should protect the freedom to seek out and define one's own religious identity, but they should not protect the exercise of religious identity as described herein.

10. Here, I am referring not to exercises of identity that may be visible externally, such as wearing a turban; those types of expression are not projective in that they do not have any effect on how other individuals interact with one another or how the law applies to others. Instead, they are intended only to convey or signify something about the individual's identity to others. While the wearing of religious garb by some individuals may indirectly affect the identity formation of others, such a result is more akin to the downstream consequences that may arise from any action, no matter how small. As noted in note 200 and accompanying text, those types of consequences are not captured by the projective category.

11. *See* Lauren Sudeall Lucas, *Identity as Proxy*, 115 COLUM. L. REV. 1605, 1669 (2015) [hereinafter Lucas, *Identity as Proxy*] (explaining that identity "serve[s] to define one's place in the world and in relation to other individuals," while law "is a system designed to negotiate relationships between individuals and groups"); Lauren Sudeall Lucas, *Undoing Race? Reconciling Multiracial Identity With Equal Protection*, 102 CALIF. L. REV. 1243, 1291–92 (2014) [hereinafter Lucas, *Undoing Race?*] (arguing against conflation of identity and legal doctrine, given the different aims of each).

Because of their outward focus, the claims of religious freedom asserted in cases involving the refusal to issue marriage licenses to same-sex couples or to provide such couples with related wedding services constitute an improper exercise of religious identity. Within the realm of religion and the First Amendment, identity is and should be protected in the sense that individuals, either alone or as part of a community, can define their own religious identity, associate with others who share the same religious identity, and engage in practices that are fundamental to maintaining that identity. These may include practices that are visible to others or are performed in public, as long as they do not imply anything about the relationship between non-identifying individuals and the state. Individuals may need to engage in certain actions or rituals that are conveyed outward to maintain a distinctive identity. Yet when those acts involve attempts to impose one's identity on others or to displace legal mechanisms intended to effectuate the rights of others, identity has transgressed its necessary boundaries.

For example, in the case of the clerk who refuses to issue a same-sex marriage license, identity is serving an impermissible projective role. The clerk is utilizing her religious identity to obstruct operation of the law that allows same-sex individuals to be married and permits the state to recognize that legal relationship. By nature of her position, she facilitates the law's operation as applied to other individuals, but she is not one of the parties directly affected by the law,[12] nor does the law require her to engage in the objectionable practice herself, such as by marrying an individual of the same sex.[13] Although the law may run contrary to her religious identity, it does so only as it applies to others. The only direct effect on the clerk is a challenge to a particular aspect of her religious identity: her view of how other individuals should relate to one another.[14] The First Amendment does not, and should not, be interpreted to protect

12. *See* Douglas Laycock, *Afterword* to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 200 (Douglas Laycock et al. eds., 2008) ("Religious dissenters can live their own values, but not if they occupy choke points that empower them to prevent same-sex couples from living *their* own values. If the dissenters want complete moral autonomy on this issue, they must refrain from occupying such a choke point.").

13. In her dissent in *Hobby Lobby*, Justice Ginsburg emphasized this point, writing that "[t]he requirement [that companies provide certain insurance coverage] carries no command that Hobby Lobby . . . purchase or provide the contraceptives they find objectionable." Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2799 (2014) (Ginsburg, J., dissenting). This stands in contrast to other religious exercise claims, which contend that the law is either preventing the individual from practicing her religion or requiring the individual to herself engage in a practice that would undermine her religious identity.

14. While the religious objector is a party to the antidiscrimination laws implicated by the same-sex marriage clerk example, the claimants referenced herein and described in more detail in Part II.B do not appear to be objecting to the mere fact that individuals are members of a

the individual's ability to project her religious identity onto others, including the government, or to empower the claimant to construct the world—and relationships between other individuals—in such a way that it comports with her religious identity.

A more difficult example is presented by those who do not facilitate state action—as in the role of a court clerk—but instead wish to be exempted from antidiscrimination laws in the provision of private services (such as the photographer who refuses to photograph a same-sex wedding). As discussed in Part III.C, the primary issue with this sort of religious exemption—aside from the fact that the service provider is not being compelled to participate in the objected-to activity directly—is that it obstructs the proper operation of the law (antidiscrimination law) as applied to others (same-sex couples). This type of interference is distinguishable from the downstream consequences that may flow from any exemption an individual in society might seek[15]—including those that may present a larger problem in the aggregate or affect the ultimate effectiveness of a law's implementation. Here, religious identity operates directly to supersede law—not just for the individual, but also for others not claiming or desiring any exemption.

The aim of this Article is to distinguish inward-focused (protective) and outward-focused or other-regarding (projective) exercises of religious identity, arguing that protective exercises should be cognizable under the Free Exercise Clause, while projective ones should not. Though protective claims of religious identity often may be satisfied effectively through accommodation of the individual or a defined group, projective claims necessarily entail application to

sexual orientation minority, but instead specifically to the fact that they are seeking to be married. Moreover, in the example of the clerk working in the marriage licensing office, the only relevance of her role vis-à-vis the couple is that she is a facilitator of the couples' exercise of their right to be married.

15. An example of such a consequence may be the fear that if one employee is exempted on religious grounds from working for a weapons producer, and other employees seek a similar exemption, it may affect the overall ability to produce munitions needed for war. *See infra* note 201 and accompanying text. Another example, which has garnered much attention, is the concern that by seeking exemptions from vaccination laws, religious objectors increase the likelihood that non-religious objectors will contract certain diseases. Christopher Ogolla, *The Public Health Implications of Religious Exemptions: A Balance Between Public Safety and Personal Choice, or Religion Gone Too Far?*, 25 HEALTH MATRIX 257, 258–59 (2015) (observing that "religious groups' opposition to the use of condoms in the developing world has been associated with the increased spread of HIV and AIDS"); *id.* at 260 (noting concerns that "[e]xemptions—religious or otherwise—are dangerous and put individuals at risk for contracting potentially debilitating and deadly infectious diseases" (alteration in original) (quoting EVERY CHILD BY TWO, RELIGIOUS EXEMPTIONS FACT SHEET, http://www.vaccinateyourbaby.org/pdfs/religion_exemptions_fact_sheet.pdf)).

non-identifying individuals and may even infringe on their ability to exercise their own religious identity.

Part I of the Article provides some background on the relationship between law and identity, and religious identity in particular. Part I.A elaborates on the thesis regarding the proper relationship between law and identity that has emerged from my earlier work. It suggests that the same lens might be applied to the religious freedom context and may thus provide a foundation to delineate the boundary between law and religious identity. Part I.B explains what is meant by "religious identity" and how it not only defines the individual, but also helps the individual relate to the world. It also elaborates on the implications of allowing religious identity to be exercised externally as well as internally. Acknowledging that law and identity are co-constitutive, it emphasizes that certain uses of identity may not merely influence the law and its application to the individual, but also improperly interfere with the law's application to others.[16]

Part II explores the existing relationship between the courts and religious identity, including the courts' hesitance to define religious identity in an overly restrictive manner (as courts have become similarly hesitant to define other forms of identity, including race). Applying a threshold inquiry relating to the way in which identity is being exercised would eliminate the necessity for such inquiries in some cases.[17] Moreover, to the extent the U.S. Supreme Court has protected religious identity as distinct from religious practices or customs, it has done so primarily with regard to inward-focused exercises of religious identity.[18] Thus, much of existing Religion Clause jurisprudence is consistent with the thesis articulated in this Article.[19]

Part III demonstrates how the recently asserted free exercise claims highlighted at the outset of this Article, relating to same-sex marriage licenses and health insurance contraceptive coverage, might be understood through the protective-projective identity lens. Many of the claims made in earlier cases can be viewed as protective, meaning that the law is either compelling individuals to act

16. *See infra* notes 81–85 and accompanying text.

17. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 948 (1989) (explaining the author's assertion that the application of "a restrictive doctrine at the threshold of claims" diminishes the need for "inquiries into sincerity, religiosity, and state interest frequently demanded by current free exercise norms").

18. *See infra* Part III.A.

19. There is also potential in the protective-projective distinction to alleviate some of the tension between Free Exercise and Establishment Clause jurisprudence, as described in Part III.B. Both lines of jurisprudence might be seen (and thus reconciled) as prohibiting projective exercises of identity.

counter to their religious identity or preventing them from acting in compliance with it. In those cases, the law might be perceived as impermissibly entering the personal sphere and interfering with the individual's ability to pursue a religious identity even within the confines of that sphere—for example, if the law were to dictate where she must attend school or whom she must marry. While the claimants in the more recent cases also maintain that the law is requiring them to act in contravention of their religious identity, or that they are forced to be complicit in objectionable behavior, their claims are projective: The only harm they suffer directly is to the aspect of their religious identity that offers a specific conception of how the world should be. And more important to this Article's thesis, they are attempting to avoid complicity not just by exempting themselves from such activity, but also by displacing the law as it relates to others. By asserting their religious freedom, they are attempting to impose their own worldview or framework of religious identity on others or the government, and thus to project identity into the sphere of law.[20]

Religion is often touted as different from other bases of legal protection because it is specifically mentioned in, and thus explicitly protected by, the Constitution. But it is not clear, as others have argued, that religion should be treated as unique or as an anomaly with regard to its treatment under the law, even in light of its specific inclusion in the constitutional text.[21] Thus, in the religion context, as in other settings, the boundaries between law and identity should be carefully policed. To the extent these more recent claims of religious

20. Relatedly, Frederick Mark Gedicks has suggested that a primary reason for the controversy surrounding Indiana's Religious Freedom Restoration Act (RFRA) was the Act's protection of religious practices that impose costs on others in traditionally public spaces. Frederick Mark Gedicks, *Public, Private, Religious? Religious Freedom Restoration Acts in the U.S. States*, 3 QUADERNI COSTITUZIONALI 772, 772 (2015).

21. *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 6 (2007) (noting that the concept of "Equal Liberty . . . denies that religion is a constitutional anomaly, a category of human experience that demands special benefits and/or necessitates special restrictions"); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 559–60 (1998) ("The mere fact that a free exercise right is enumerated in the constitutional text does not mean that holders of the right are constitutionally entitled to be excused from complying with government action that incidentally burdens the right."); *see also* Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 639 (2015) (acknowledging that religion may deserve special treatment in the context of some laws, but exploring whether the same is true in the context of antidiscrimination laws, which aim to "dismantl[e] longstanding structures of dominance and subordination"). In this Article, I do not address the larger debate regarding whether religious rights should in fact be treated as unique or whether their explicit inclusion in the First Amendment suggests as much. I argue only that insofar as religious rights relate to identity, we might think of them as we do other constitutional rights.

exercise are projections of identity,[22] they should not be cognizable under the Constitution.

I. RIGHTS AND IDENTITY

Identity and the law—and rights in particular—have a complicated relationship.[23] While law and identity inevitably inform one another, they ultimately serve different purposes:[24] Identity might be conceived as the way in which one defines oneself and relates to the world (or to the law); in contrast, law is a mechanism for regulating relationships among individuals and groups, as well as between individuals or groups and the state.[25] In the context of identity-based jurisprudence, tension can arise when the law attempts to frame its regulation of society around a particular notion of identity—one that may not align with the individual's conception of identity. One way to reconcile this tension is to recognize the individual's authority over the definition and maintenance of identity within the individual or internal sphere, while simultaneously acknowledging the law's superiority in the external sphere (including the possible need to conceive of or use identity in a different manner than in the individual sphere).[26]

22. *See* Gedicks, *supra* note 20, at 774 (describing the use of state RFRAs to "justify a projection of religious values from the quintessentially private space of home, church, and family into quintessentially public spaces"); *see also* Robin Fretwell Wilson, *Bargaining for Religious Accommodations: Same-Sex Marriage and LGBT Rights After* Hobby Lobby, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 263 (Micah Schwartzman et al. eds., 2016) (noting that as specific religious freedom exemptions "move beyond private religious spaces, the number of states willing to enact a given exemption drops off—in part because of concerns about hardship to same-sex couples").

23. Earlier articles of mine have explored the nature of this relationship in the context of other identities, namely race and gender. *See, e.g.*, Lauren Sudeall Lucas, *A Dilemma of Doctrinal Design: Rights, Identity, and the Work-Family Conflict*, 8 FLA. INT'L U. L. REV. 379, 403–04 (2013) (explaining how a rights-based framework may have limited utility for and constrict identity formation or development); *see also* Lucas, *Identity as Proxy*, *supra* note 11 (arguing for an alternative to identity-based legal frameworks); Lucas, *Undoing Race?*, *supra* note 11 (discussing the relationship between multiracial identity and equal protection doctrine).

24. For an interesting discussion of how forcing religious disputes into the context of litigation may distort religious tradition, see M. Cathleen Kaveny, *Law, Religion, and Conscience in a Pluralistic Society: The Case of the Little Sisters of the Poor* (Bos. Coll. Law Sch. Legal Studies Research Paper Series, Research Paper No. 394) (manuscript at 10), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2756148 [https://perma.cc/BAZ3-BK8D] (suggesting that positions adopted for purposes of litigation are seen by some as "not to be taken seriously as actual statements of moral or theological beliefs").

25. *See* sources cited *supra* note 11.

26. *See infra* Part I.A.

In this Article, I consider how that general thesis about law and identity might apply in the context of religious freedom, in light of increased emphasis on the ability of religious identity to trump secular law.[27] In doing so, I operate from the premise that religious identity is worthy of protection, although I stop short of fully engaging in the debate of precisely how special such protection should be. Religious identity is distinguishable from other forms of identity not only because it is referenced explicitly (in some form) in the First Amendment, but also because it often also encompasses a distinct worldview and ideas of how individuals and groups (both internal and external to that identity) should relate to one another. Thus, the potential for conflict is even more explicit: If we bestow constitutional protection on religious identity, how are we to reconcile two competing visions—the religious and the secular—about how individuals should relate to one another?[28] The question of what it means to protect identity becomes even more complicated when the very notion of religious identity encompasses a view of how others should conduct themselves in society.

In this Part, I suggest that thinking about religious identity in the way we think about other forms of identity may provide a useful perspective on this dilemma.[29] Part I.A describes the larger thesis regarding the relationship between rights and identity that has emerged from my earlier work on race and gender, which is that identity is best understood as a personal phenomenon, while the law's primary focus should be on governing relationships between individuals. For that reason, we should be wary of conflating the notions of identity and law or allowing identity to serve too prominent a role in law. Part I.B explores in more detail the nature of religious identity and explains why there is inherent tension between religious identity and the role of law. Taken

27. *See* Douglas NeJaime & Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY (Susanna Mancini & Michel Rosenfeld eds.) (forthcoming 2017) (manuscript at 4) (on file with author) (describing the "spread and evolution of conscience claims in recent decades, in the United States").

28. As Winnifred Sullivan, a prominent scholar of religion and the law, has observed: "At a very profound level, religion competes with law—and also, perhaps more importantly, with science and a scientistic reading of law—for comprehensive explanation and control. Religion challenges the rule of law." WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM 155–56 (2005).

29. The treatment of religion in civil rights statutes supports the notion that we might think of religious identity as representative of who someone is and as similar to other types of identity, rather than just a collection of practices or beliefs detached from the individual. Title VII, which prohibits discrimination on the basis of multiple identities, including race, color, religion, sex, and national origin, is an example of such a statute. Civil Rights Act of 1964, 42 U.S.C. § 2000(e)(2) (2012).

together, these two Parts provide a foundation for distinguishing between permissible (protective) and impermissible (projective) uses of religious identity, as described in more detail in Part III.

A. Rights and Identity: Race and Gender

In my previous work, I explored the relationship between rights and identity, most often in the context of equal protection. In doing so, I addressed several situations in which individualized conceptions of identity conflict with the goals of a larger legal framework. In such situations, how can the need to allow individuals to define and manifest their own identity be reconciled with law's need to organize and structure legal relationships based on identity? One article I wrote in response to this question, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*,[30] attempted to reconcile the tension that may arise between multiracial persons striving for legal recognition of an individualized, self-descriptive notion of racial identity and a legal framework that uses broader, group-based notions of race to achieve structural racial equality.[31] The very notion of racial classification as something that should be internally driven[32] may be at odds with a legal framework focused on the ways in which race (as externally understood) serves as a force of subordination.[33]

The danger suggested by *Undoing Race* is that notions of race that are integral to individual identity will be appropriated by larger social movements to displace legal arguments grounded in an understanding of race as it has operated in the broader context of society.[34] This same danger is presented in more concrete form by the alignment between the multiracial movement and advocates of colorblindness.[35] In response, and to reconcile the tension described above, the article ultimately warns against conflating the "[individual's] interest in defining one's own identity and the state's interest in providing equal

30. Lucas, *Undoing Race?*, *supra* note 11.
31. *Id.* at 1280–84 (describing how group-based or anti-subordination approaches to equal protection may conflict with identity interests).
32. *Id.* at 1260 (describing multiracial advocacy groups' articulation of a right to claim a biracial or multiracial identity).
33. *Id.* at 1283 (contrasting multiracial identity's tendency to question race's hold on the individual with anti-subordination's view of race as a driving force of societal oppression).
34. *Id.* at 1246 (suggesting that, among other possible effects, an undue focus on multiracial identity may crowd out "discussions about the continued realities of racism" and "fuel the ideology of colorblindness").
35. *Id.* at 1259–63 (describing unexpected alliances between advocates for recognition of multiracial identity and political conservatives aiming to minimize or eliminate the use of racial and ethnic categories).

protection of the law."[36] In other words, there may be a need to conceive of identity differently when the state is attempting to implement a larger social or political goal, such as equal protection, than when the primary concern is the vindication of one's self-defined or self-assigned identity.[37]

For example, I suggested that the need for the individual to vindicate her own conception of her racial identity may be served by allowing the individual to designate her race as "multiracial" or to mark one or more races (such as "white" and "black") on the census form. At the same time, the government should not recognize identity-based harm in the state's decision to categorize the same individual as "black" for purposes of "determining which voting districts are majority-minority or measuring the racial achievement gap in the context of education policy."[38] In other words, in the context of the law, individual conceptions of identity should not be allowed to trump independently determined substantive goals. Similarly, courts adjudicating religious identity claims should be wary of instances in which individuals use their religious identity to displace laws intended to govern relationships among everyone in society, including non-believers.

For the reasons articulated in *Undoing Race*, and based on other harms that follow from an identity-based jurisprudence,[39] I have also suggested that identity may not be the best basis for equal protection jurisprudence and proposed an alternative framework.[40] In the context of equal protection, identity serves as a proxy for the reasons we find certain types of discrimination particularly pernicious—for example, the relationship to historical patterns of discrimination or a lack of political power. I have argued that the law should use those criteria, instead of relying on identity, as a means for distinguishing between permissible and impermissible forms of discrimination, rather than allowing identity to play that role.[41] By displacing identity from its traditional

36. *Id.* at 1292 ("The endeavor to define and shape one's identity as a person of multiracial heritage need not be equated with the way in which the Court has defined legal rights or entitlements under equal protection.").
37. *Id.* at 1296 ("[W]e should distinguish the means by which individuals are allowed to classify themselves and to structure their personal relationships from the question of how race is monitored by the state and how benefits will be distributed on the basis of race.").
38. *Id.* at 1298.
39. Lucas, *Identity as Proxy*, *supra* note 11, at 1618–34 (outlining doctrinal, individual, and societal harms that may result from an identity-based jurisprudence, including difficulties encountered in defining identity categories; the tendency to privilege a dominant-identity narrative; failure to distinguish among the experiences of subgroups within larger identity categories; and psychological and emotional harm that can result from being forced to identify in a particular way to lay claim to legal protection).
40. *Id.* at 1607–08.
41. *Id.* at 1608–09.

role in equal protection jurisprudence, such a framework is arguably more effective in achieving its substantive goals. And, more relevant for the purposes of this Article, this framework avoids using an internally focused, individualized tool (identity) to achieve the substantive goals of an externally oriented structure that must apply to all, regardless of their conception of identity (law). It emphasizes the need to distinguish between law and identity and highlights as relevant for legal analysis only those aspects of identity indicative of social or political dynamics, such as historical discrimination or political powerlessness.

Another aspect of the problematic relationship between rights and identity involves the negative effect that a rights-driven notion of identity may have on an individual in the gender context.[42] For some of the same reasons discussed above, there may be tension between certain rights-based approaches to gender equality and more individualized notions of how members of different genders should relate to one another, particularly within the context of a family juggling various tasks and responsibilities. For example, the rights framework may suggest that men and women should be treated and thought of as the same (formal equality), though there remain clear differences between the sexes in the realm of identity.[43] Ultimately, I concluded: "[T]he rights-based paradigm is not particularly instructive—and may actually be counterproductive—in thinking about how to actually structure one's life or reconceptualize one's identity after making the decision to have a child."[44]

Extrapolated to the relationship between law and identity as a more general matter, one might conceive of the above articles as coalescing in the following thesis: While the law should strive to protect the definition and maintenance of self-conceived identity, and allow individuals to play some role in dictating how they relate personally to the law, individualized notions of identity should be protected or enforced only insofar as they relate to the individual. Because the law's purpose is to govern relationships among individuals and groups, it may need to discard the vehicle of identity or utilize a different notion of identity—one tailored to meet its own externally focused ends.[45] While many of the legal issues posed by religious identity are distinct from those that arise in the context of race and gender, there is a common thread: Identity is a personal and often individual phenomenon, and allowing individual conceptions of

42. *See* Lucas, *supra* note 23, at 381.
43. *See id.* at 379.
44. *Id.* at 381.
45. As argued in *Identity as Proxy*, the law might eschew a basis in identity altogether, avoiding many of the problems discussed herein. *See* Lucas, *Identity as Proxy*, *supra* note 11, at 1607–09.

identity to play too large a role in the law may not only be harmful to identity, but also distort the law's ultimate purpose.

B. Law and Religious Identity

Working from the above premise—that we should be careful about conflating identity and the law given their divergent roles—there are still additional questions that arise in the context of religious identity. Religious identity is unique from categories like race and gender not only because it is referenced specifically within the First Amendment, but also because it often encompasses a specific notion or worldview of how other individuals should relate to one another, as described in Part I.B.1 below.[46]

Parts I.B.2 and I.B.3 explain why framing religion as a matter of identity causes problems in the legal context. For example, the fact that identity is nonnegotiable means that applying the identity lens to claims of religious freedom leaves little room for political compromise. Similarly, framing religious freedom claims as identity-based claims raises inevitable issues in the context of religious pluralism. In a pluralistic society, where many religious identities must coexist, identity's influence must be limited to the individual or community sphere; if religious identity is legally protected beyond that sphere, intractable conflict will inevitably result. If, however, a distinction is drawn between protective and projective identity claims, and only the protective identity claims are honored, these problems lessen.

1. The Nature of Religious Identity

Identities have been defined as "the fundamental bases upon which society, independent of the special and unique features of each individual, orders and arranges its members."[47] Alternatively, one might think of identity as "an individuals' sense of self, group affiliations, structural positions, and ascribed and achieved statuses."[48] Ultimately, identity serves as a link between

46. While an acknowledgment that race and gender identity are socially constructed may imply that they embody some notion of how individuals relate to one another (such as hierarchically), the embodiment of that notion in the formation of identity is distinct from the use of religious identity to explicitly project views about how individuals should conduct themselves.

47. Morris Rosenberg, *The Self-Concept: Social Product and Social Force*, *in* SOCIAL PSYCHOLOGY: SOCIOLOGICAL PERSPECTIVES 593, 601 (Morris Rosenberg & Ralph H. Turner eds., 1981).

48. Lori Peek, *Becoming Muslim: The Development of a Religious Identity*, 66 SOC. RELIGION 215, 216–17 (2005).

"the individual conception of self and the larger social structure within which the individual thinks and acts."[49] One author has written that "[r]eligious beliefs . . . form a central part of a person's belief structure, his inner self. They define a person's very being—his sense of who he is, why he exists, and how he should relate to the world around him."[50]

The role of religion in the formation of identity has largely been overlooked, with many social scientists focusing instead on gender, sexuality, race, and ethnicity as primary sources of identity.[51] Yet for many, religion plays a critical role in identity formation,[52] particularly given the increasingly important role it plays in society.[53] Religion serves as a vehicle through which individuals may adopt certain values; these values often serve as the "substantive cores of identit[y]"—it makes someone who he or she is.[54] Moreover, identity plays an important role in helping people make sense of the world and define reality.[55] One can see, then, how laws and policies that do not comport with that definition or worldview create internal tension for religious objectors.

Wendy Cadge and Lynn Davidman have observed that religious identity in the United States is a matter of both ascription and achievement, meaning that it is often viewed as a combination of something that is determined by birth and also the result of conscious choices made over the course of one's life.[56] To the extent some part of religious identity is seen as ascribed, it may be viewed as immutable and thus non-negotiable in the face of possible conflict. Others have argued that religious identity is primarily a matter of choice, and

49. *Id.* at 217.
50. Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1164 (1988).
51. Peek, *supra* note 48, at 217–18.
52. *Id.* at 219 ("[F]or many individuals religion remains an important organizing factor in the hierarchy of identities that compose the self."); *see also* C. MARGARET HALL, IDENTITY, RELIGION, AND VALUES: IMPLICATIONS FOR PRACTITIONERS 29 (1996) ("Because religious beliefs play a major role in defining human nature, as well as human identities, they exert particularly critical influences on individual and social behavior.").
53. Peek, *supra* note 48, at 219 (noting that membership in a religious organization can provide many secular material, psychological, and social benefits, such as community networks, economic opportunities, educational resources, and peer trust and support).
54. HALL, *supra* note 52, at 30.
55. *Id.* at 29–30.
56. Wendy Cadge & Lynn Davidman, *Ascription, Choice, and the Construction of Religious Identities in the Contemporary United States*, 45 J. SCI. STUD. RELIGION 23, 24 (2006); *see also* Nancy T. Ammerman, *Religious Identities and Religious Institutions*, *in* HANDBOOK OF THE SOCIOLOGY OF RELIGION 207 (Michele Dillon ed., 2003) (noting that religious identities are either "ascribed (collectivity-based) or achieved (individual)").

has become increasingly so in American society.[57] Religious identity can also be understood to align with culture, heritage, or ethnicity, though it may not necessarily do so.[58]

One aspect of religious identity is participating in holidays and rituals associated with a given religion.[59] Thus, religious identity is different from other types of identity in that it may require engagement in certain actions or practices.[60] This is why it is critical to religious identity that a member of a given religion be able to engage in such actions under the protections provided by the Free Exercise Clause. Identity may also refer to cultural affiliation.[61] Although some religious practices are observed in an individual capacity and others as part of a group, religious identity is often understood as the individual's decision to affiliate religiously with a group of other individuals, all of whom subscribe to a similar set of beliefs and practices.[62] Uniting that group is often a sense that "their community is in sole possession of the truth."[63] In this sense, religious identity is unique: It may be the only identity in the context of the law that openly purports to have a monopoly on the understanding of how individuals should relate to one another.[64]

57. Duane F. Alwin et al., *Measuring Religious Identities in Surveys*, 70 PUB. OPINION Q. 530, 534 (2006) ("[R]eligious identities are ultimately a matter of choice."); Cadge & Davidman, *supra* note 56, at 24 (noting "the current trend arguing that religion in the United States has dramatically changed from being based in ascription to being more a matter of personal choice").

58. Cadge & Davidman, *supra* note 56, at 27, 32–33 (describing the varied affiliations of individuals who identify as Buddhist and Jewish).

59. *Id.* at 28.

60. One's identity as a member of a given race, in contrast, will not necessarily affect or dictate one's actions. *But see* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000) (articulating observations about performative identity—instances in which individuals may feel pressure to act in certain ways to counteract negative assumptions about their identities).

61. Cadge & Davidman, *supra* note 56, at 35–36.

62. Alwin et al., *supra* note 57, at 534 (explaining that religious identities are often constructed by identifying with a single religious community). While individuals may not formally associate with religious organizations, they often still associate with a particular religious group. *See* Cadge & Davidman, *supra* note 56, at 35.

63. Alwin et al., *supra* note 57, at 534 (quoting JOHN P. HEWITT, DILEMMAS OF THE AMERICAN SELF 193 (1989)); *see also* JOHN H. BERTHRONG, THE DIVINE DELI: RELIGIOUS IDENTITY IN THE NORTH AMERICAN CULTURAL MOSAIC 47 (1999) (explaining that most religions claim to "tell the truth about reality").

64. This is aside from, of course, identities tied to political ideology. Unlike political identities, however, religion is often grouped with identities based on race, color, and sex. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000(e)(2) (2012).

In *The Politics of Recognition*, Charles Taylor links identity with, among other things, the notion of authenticity and the demand for recognition.[65] Authenticity suggests that each individual should live in a manner true to herself, while recognition suggests that others should be sensitive to the individual's quest for authenticity.[66] Thus, identity cannot be a wholly individualized phenomenon; it often involves, or requires, a response from others that affirms its existence.[67] Thus, as William Marshall has argued, individuals asserting religious freedom claims may do so to validate their religious identity as well as vindicate their legal arguments.[68]

Courts have increasingly treated religious freedom as a matter of identity, in the sense that it is integral to the very notion of who one is.[69] Noah Feldman has argued that, at least as to the Establishment Clause, the focus of the constitutional right to religious freedom has shifted from religious liberty to political equality,[70] thus likening religious identity to other forms of identity. As Feldman explains, the First Amendment was born out of motivation "to protect the individual from coercion at the hands of the state."[71] Over time, as the dangers from religious persecution have lessened[72] and doctrinal tendencies toward individualism have grown,[73] the primary concern has become preventing the exclusion of

65. Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 28 (Amy Gutmann ed., 1994).

66. *Id.* at 28, 38; *see also* Jeremy Waldron, *Cultural Identity and Civic Responsibility*, *in* CITIZENSHIP IN DIVERSE SOCIETIES 155, 157 (Will Kymlicka & Wayne Norman eds., 2000).

67. *See infra* note 218 and accompanying text.

68. *See infra* notes 136–137.

69. *See* Avigail Eisenberg, Religion as Identity (Aug. 4, 2014) (unpublished manuscript) (prepared for the 2014 Annual Meeting of the APSA), http://ssrn.com/abstract=1986713 [https://perma.cc/L5KT-GCAJ] (describing a shift in western democracies from treating religious freedom as a matter of choice to regarding it as a matter of identity); *see also supra* note 29 and accompanying text (discussing Title VII).

70. Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 676 (2002); *see also* EISGRUBER & SAGER, *supra* note 21, at 13 (advancing a concept of "Equal Liberty," which would require that "minority religious practices, needs, and interests must be as well and as favorably accommodated by government as are more familiar and mainstream interests"). Elsewhere, however, I have argued against approaches that focus on comparative treatment. *See* Lucas, *Identity as Proxy*, *supra* note 11, at 1663 (suggesting one problem with the comparative approach is that it allows solutions that withdraw benefits from all rather than provide them on an equal basis); *id.* at 1637 (describing Peter Westen's argument in *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982), that the comparative element of equal protection distracts from "the more important inquiry as to whether the underlying substantive right has been violated").

71. Feldman, *supra* note 70, at 675.

72. *Id.* at 675–76.

73. *See* Robert A. Holland, *A Theory of Establishment Clause Adjudication: Individualism, Social Contract, and the Significance of Coercion in Identifying Threats to Religious Liberty*, 80 CALIF.

religious minorities and easing the "psychological burdens of religious minority status."[74]

Similarly, Christopher Eisgruber and Lawrence Sager argue that the Constitution's underlying purpose in protecting religion was to ensure equality of treatment among individuals of different religions.[75] Because American jurisprudence often understands equality as treating people of different identities equally,[76] it is not surprising that an increased focus on equality in the context of religious freedom has resulted in greater emphasis on identity.[77] To the extent individuals of different religious backgrounds wish to exercise their right to religious freedom, it is no longer sufficient that they be protected from persecution or merely allowed to pursue the practice of their religion. Rather, they demand that their religious beliefs and worldviews be given adequate respect, even if that respect comes at a cost to others.[78]

As I have argued in the context of multiracial identity,[79] there are many reasons for maintaining a distinction between identity and law and, more specifically, for restricting identity's relevance to the internal sphere.[80] The most prominent among those reasons is the fact that law and identity serve different purposes. As described above, identity is a critical part of the individual, as it helps to define one's being and reason for existence, as well as the way in which one relates to the world. Law, in contrast, is intended to govern relationships among individuals and groups, and the way in which individuals and groups

L. REV. 1595, 1601 (1992) (describing the individualist tradition underlying constitutional protection of religious freedom). A parallel trend toward individualism has pervaded equal protection doctrine as well. *See, e.g.*, Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1282–83 (2011) (noting the relationship between individualism and colorblindness in the U.S. Supreme Court's equal protection jurisprudence).

74. Feldman, *supra* note 70, at 676.

75. EISGRUBER & SAGER, *supra* note 21, at 9 ("Missing from public discussion has been the idea that the Constitution expresses special concern for religion because and to the extent that religious difference inspires inequality in stature and reward, and accordingly, that the Constitution's fundamental religion-specific goal is that of opposing discrimination.").

76. Lucas, *Identity as Proxy*, *supra* note 11, at 1607.

77. *See* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2561 (2015) (describing the shift in religious freedom arguments from "speaking as a majority enforcing customary morality to speaking as a minority seeking exemptions based on religious identity"); *see also infra* Part III (discussing the plaintiffs' (religious objectors) claims, in which they emphasize how their beliefs are an integral part of who they are).

78. *See infra* Part III (examining plaintiffs' (religious objectors) views in individual cases).

79. *See infra* note 161.

80. Lucas, *Undoing Race?*, *supra* note 11, at 1297 (arguing that the state has a relevant role to play in policing external perception of racial identity, but it need not control internal perceptions of racial identity, where the risk of identity harm is greatest).

relate to the state. The values informing law will, by definition, often be distinct from those that inform identity.

Of course, law and identity are often co-constitutive: law informs the creation of identity, and identity inevitably informs development of the law.[81] As Eisgruber and Sager have observed: "The question is not *whether* the state should be permitted to affect religion or religion permitted to affect the state; the question is *how* they should be permitted to affect each other."[82] Yet the law does not exist solely to vindicate individual identity interests. Thus, in the context of race or gender and an antidiscrimination jurisprudence that is organized around identity categories, it may sometimes be necessary for a larger group to assume one common identity for purposes of mandating equal treatment.[83] Similarly, it may be necessary in the religion context to marginalize some aspects of religious identity in the interest of creating a coherent jurisprudence for a religiously pluralistic society. A response to this reality may be to create accommodations when necessary to preserve identity as exercised with a focus on the individual or group, but it need not mean that an individual of nonconforming religious identity can use identity to obstruct the law from operating as it should with respect to other individuals.

Some of the other reasons for maintaining a distinction between identity and the law may be more relevant to racial identity than they are to religious identity—for example, the argument that structuring doctrine around identity may force individuals to identify in a particular way in order to benefit from certain legal protections.[84] There are still negative consequences, however, that flow from allowing religious identity to serve as a driving force in the context of law.[85] Those consequences are discussed below, in Parts I.B.2 and I.B.3.

81. *See* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 9–11 (2006) (observing that identity and law are co-constitutive); Lucas, *Identity as Proxy*, *supra* note 11, at 1670 (same).

82. EISGRUBER & SAGER, *supra* note 21, at 7.

83. For this reason, I have argued elsewhere that it may be desirable to eliminate the role that identity serves in the equal protection context, instead substituting for identity the substantive values identity is intended to serve in that context. *See* Lucas, *Identity as Proxy*, *supra* note 11, at 1609.

84. Lucas, *Undoing Race?*, *supra* note 11, at 1293.

85. There may also be more at stake when protecting religious identity—in contrast to racial identity, for example—given the affirmative entitlements afforded by the First Amendment.

2. Identity as Non-Negotiable

In one recent and now famous (or infamous) case, a court clerk named Kim Davis in Rowan County, Kentucky filed a lawsuit against the governor of Kentucky, claiming that he violated her rights by insisting that Davis issue marriage licenses to same-sex couples, and thus act in a manner contrary to her religious beliefs.[86] Like many of the other litigants described in Part III.C, Davis indicated her Christian affiliation and involvement in her local church in her complaint.[87] She referred repeatedly to her religious conscience rights, and she explicitly stated that her compliance with her beliefs constituted "religious exercise" protected by the Constitution.[88] Davis further argued that Kentucky's marriage policies, which allow same-sex marriage, made it "impossible" for her to comply both with her religious beliefs and her role as clerk in administering such policies.[89]

It may be the attempt to tether these claims to identity itself that makes them so non-negotiable. As Daniel Weinstock has written: "[R]egardless of the actual intentions of the agents that put them forward, claims formulated in terms of identity convey the impression that their proponents are reluctant to compromise."[90] Weinstock defines identity arguments as those that "defend[] a position on a given political issue by invoking the consequences this position has for the identity of the individual or the group in question."[91] He further explains that such arguments are often made in terms of values and interests, and that when identity is invoked it functions as shorthand for these values and interests.[92]

Weinstock contends that identity arguments are problematic in the context of democratic debate because they transform normative discussion about political disagreements into "you should accept my position because it is central to my identity" arguments.[93] Moreover, identity arguments are not falsifiable

86. Verified Third-Party Complaint of Defendant Kim Davis at 2, Davis v. Beshear, No. 15-cv-00044-DLB (E.D. Ky. Aug. 4, 2015).
87. *Id.* at 7.
88. *Id.* at 11, 14, 16, 19.
89. *Id.* at 25.
90. Daniel Weinstock, *Is 'Identity' a Danger to Democracy?*, *in* IDENTITY, SELF-DETERMINATION AND SECESSION 15, 20 (Igor Primoratz & Aleksandar Pavković, eds., 2006). Weinstock later concludes: "If democracy requires compromise, and identity arguments make them more difficult to achieve, democratic institutions should seek to minimize the occurrence of such arguments." *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 22.

and thus, when used by individuals like the plaintiff above, they appear to offer only one possible solution.[94] As Jeremy Waldron has observed: "When I say that some issue is crucial to my identity, I present my view of that issue (my interests in it, my needs, my preferences) as both interpersonally and socially non-negotiable: I imply that accommodating my interests, needs, or preferences in this matter is crucial to respecting *me*."[95]

All of this begs the question whether religion is unique in its relation to identity. Does the Constitution recognize something special about religion that would or should make identity claims raised in that context more powerful than those raised in other contexts? This Article responds in the negative.[96] It suggests that the same limits I have applied to other identity-based claims should also apply to those made under the guise of the Religion Clauses: Individual or group conceptions of religious identity should not trump law in the external sphere.

3. Identity and Religious Pluralism

William Marshall suggests that the view of "religion as identity" is troubling because religious affiliation suggests the definition of outsiders.[97] Thus, this notion is as much about protecting the group against non-believers as it is about protecting the ability to associate with other believers. Given the exclusive nature of religious identity and its non-negotiable character, it can also be difficult to reconcile the protection of individual identity with societal pluralism, including religious pluralism. As noted in Part I.B.1, most religions claim to "tell the truth about reality,"[98] yet most would also posit that only one truth exists. The United States is undoubtedly a religiously pluralistic society. Because many religions claim a monopoly on the truth,[99] intractable conflicts will abound

94. Weinstock writes that an individual may perceive being asked to compromise an aspect of her identity as more harmful than being "asked merely to sacrifice one of her preferences or only partially realize one of her values." *Id.* at 21.
95. Waldron, *supra* note 66, at 158–59.
96. Eisgruber and Sager agree. *See* EISGRUBER & SAGER, *supra* note 21, at 11.
97. Marshall, *supra* note 9, at 397.
98. *See supra* note 63 and accompanying text.
99. I acknowledge the distinction between Protestant and other religious models or traditions. *See, e.g.*, SULLIVAN, *supra* note 28, at 8 (contrasting Protestant and Catholic models of church and state relations). For purposes of this Article, I have chosen not to emphasize this distinction, in part because the points made herein could be relevant to all models. To the extent some of the arguments made herein are more relevant to the Protestant tradition, it is likely fitting, given the focus on the First Amendment and dominance of that model in the United States. *Id.* at 7 ("[T]he modern religio-political arrangement has been largely,

if the law allows religious identity to radiate outward and influence an otherwise secular system of law.[100]

Jeremy Waldron presents a hypothetical scenario that can be altered slightly to demonstrate how multiple religious identities cannot govern simultaneously within the context of the law. He writes:

> Let me illustrate with a crude example. In response to the enduring question of what rules are to be set up to govern the organization of families and households, culture *A* may answer 'Polygyny', culture *B* may answer 'Polyandry', and culture *C* may answer 'Monogamy'. If the larger society *S* (which includes individuals who identify as *A*s, *B*s, and *C*s) opts for monogamy, then clearly it is opting for an answer which directly contradicts the answer given in *A* (not to mention the answer given in *B*). . . . My point is that these solutions are *rivals*: they constitute alternative and competing answers to what is basically the same question.[101]

Imagine a slight alteration to the above example:

> In response to the question of what legal regime is to be set up to govern marriage, religion *A* may answer 'polygamy,' religion *B* may answer 'one man-one woman,' and religion *C* may answer 'monogamy, without regard to sex.' If the larger society *S* (which includes individuals who identify as *A*s, *B*s, and *C*s) opts to allow any marriage between any two individuals (including same-sex marriage), then clearly it is opting for an answer which directly contradicts the answer given in *A* (not to mention the answer given in *B*). . . . My point is that these solutions are *rivals*: they constitute alternative and competing answers to what is basically the same question.

One clear distinction between the two examples is that the variation on the first example implicates the right to free exercise of religion, while there is no comparable constitutional right that protects the right to culture. One might also argue as this Article does, however, that cultural or identity-based aspects of religion are not entitled to protection when directed outside the internal sphere. Waldron ultimately suggests that, if available, the solution of

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although not exclusively, indebted, theologically and phenomenologically, to protestant reflection and culture. Particularly in its American manifestation." (footnotes omitted)).

100. NeJaime and Siegel explain that while accommodation may often be conceived of as a way to promote pluralism, "[e]xemption regimes that (1) accommodate objections to direct and indirect participation in actions of other citizens who do not share the objectors' beliefs, and (2) exhibit indifference to the impact of widespread exemptions on other citizens, do not promote pluralism; they sanction and promote the objectors' commitments." NeJaime & Siegel, *supra* note 27, at 3.

101. Waldron, *supra* note 66, at 161.

accommodation would be a reasonable one.[102] Accommodation does not directly address, however, claims made by individuals refusing to issue marriage licenses or provide wedding-related services. This is because the complainants in these cases are not seeking accommodation of their own behavior, but rather of their identity as it relates to others' behavior.

Under a regime that allows men and women to marry, individuals from group *B* can engage in behavior that aligns with their belief system. As to the *B*s, then, there is no issue with regard to liberty. But *S*'s decision to forge ahead with a scheme that adopts *C*'s view rather than *B*'s may trigger equality concerns (see Feldman's argument in Part I.B.1) or present a challenge to *B*s in that they are then forced to live within a society and conform to a legal regime that does not mesh with their own set of values or vision of how the rules should operate. Thus, it is not immediately clear how *S* would or could accommodate group *B*'s religious identity. As Waldron observes: "[I]f respect for an individual also requires respect for the culture in which his identity has been formed, and if that respect is demanded in the uncompromising and non-negotiable way in which respect for rights is demanded, then the task may become very difficult indeed . . . ."[103]

Imagine that a white supremacy group wishes to meet regularly and promote within the group the belief system that the white race is supreme to all other races. Suppose further that such a group sees nothing objectionable about engaging in behavior that discriminates against or denigrates members of a lesser race. They would likely harbor objections to the legal regime society has chosen, which includes antidiscrimination laws, affirmative action programs, and harsher penalties for crimes motivated by race. The ability of that group to associate and to select its own values may be protected as a constitutional matter, yet such a group would not be exempted from the hate crime laws simply because their view of what the rules should be conflicts with society's chosen view.

Assuming Eisgruber and Sager are correct that all claims based in religiosity clearly cannot claim complete immunity from compliance with the law,[104] a line delineating those that are worthy of protection from those that are unworthy must be drawn. In other words, the sole fact that clerk Kim Davis's objection

102. *Id.* at 162.

103. *Id.* at 160.

104. I agree with Eisgruber and Sager that the Free Exercise Clause cannot be understood to "give religiously motivated persons a presumptive right to disobey the law." EISGRUBER & SAGER, *supra* note 21, at 11. Yet that realization only returns us to the same basic inquiry: how to demarcate constitutional claims of religious freedom from those that are unconstitutional.

to issuing same-sex marriage licenses is grounded in religious belief cannot be sufficient to automatically earn her an exemption; otherwise, there would be no limit to such First Amendment arguments. One route is to assess or question the sincerity of her claim (which she emphasizes as well), while another is to delve within the religious faith at issue to determine how critical the belief or practice is to adhering to the faith. Such approaches would be objectionable given the personal nature of religious belief and its central role to the individual, as described in Part I.B.1. It would also likely offend those of the religious faith under scrutiny.

Another approach, adopted by many religious freedom restoration acts, is to ask whether the law imposes a substantial burden on a sincerely held religious belief (and whether it constitutes the least restrictive means of achieving its purpose).[105] The argument made here is not to focus on the nature of the religion, on the mere fact that religious belief is at issue, or on the extent to which religious belief is burdened; nor is it, as Eisgruber and Sager argue, to concentrate on Davis's treatment relative to those of other religious faiths. These are inquiries that may become necessary at some point, but this Article suggests that a preliminary threshold inquiry—focused on the way in which religion is being used—may render some claims infeasible from the outset. In other words, if one assumes that the sphere of activity protected by the First Amendment does not encompass projective claims of religious identity, the other inquiries are avoidable as to those claims.

II. THE COURTS AND RELIGIOUS IDENTITY

Because religious identity is such a deeply personal matter, courts have been hesitant to conscript too narrow a definition of religion. In the context of certain claims—for example, those relating to religious practices that, if not protected by the First Amendment, may otherwise be rendered illegal—the definition of religion is unavoidable. Yet the idea that identity is something that should be protected only within a more limited, individual realm is not an unfamiliar concept to the courts in the constitutional law context. Linking the treatment of identity with that of religious freedom may be one way to distinguish the protection provided to religion in earlier cases and also to create necessary boundaries for emergent religious freedom claims. This Part describes the judiciary's reluctance to define the specific contours of religion and its implicit acknowledgement, visible throughout the U.S. Supreme Court's jurisprudence,

105. *See generally* Gedicks, *supra* note 20.

that while identity requires protection as a personal matter, it may warrant less protection outside of that sphere.

A. Avoiding the Definition of Religious Identity

Although many commentators have argued that the courts should not define religion, the text of the First Amendment would seem to beg definition of the term.[106] Courts have struggled on this point, vacillating between broad and narrow definitions. When the Supreme Court began to address the definition of religion in the late nineteenth century, it indicated that "[t]he 'religion' valued by the First Amendment . . . was the sort of theistic belief widely recognized and long revered by mainstream America—and nothing more."[107] The Court's approach to religion was not only theistic, but focused more specifically on a mainstream Christian understanding of religion—revolving around the notion of a Creator who required obedience to his will and adherence to a particular sense of morality.[108]

As American religious life became increasingly diverse, the Court's conception of religion evolved to encompass a broader definition. In *United States v. Ballard*,[109] for example, the Court "offered the possibility that nontheistic faiths would be entitled to [F]irst [A]mendment protection . . . ."[110] In doing so, the Court appeared to emphasize "generic areas of religious belief—life after death, for example—rather than specific beliefs—faith in a supreme being, for example—that must be held in order for the belief system to be considered religious."[111] The Court's 1961 decision in *Torcaso v. Watkins*[112] further endorsed the notion that the Court had adopted a nontheistic definition of religion. In *Torcaso*, the Court included under its definition of religion "Buddhism, Taoism,

106. SULLIVAN, *supra* note 28, at 3 ("Courts need some way of deciding what counts as religion if they are to enforce these laws."); Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123, 145, 149 (2007) (noting that "a number of commentators have argued that religion should not, or even cannot, be defined by the courts" but also that, ultimately, "religion must be defined").

107. David D. Meyer, *Self-Definition in the Constitution of Faith and Family*, 86 MINN. L. REV. 791, 811 (2002).

108. Usman, *supra* note 106, at 167–68.

109. 322 U.S. 78 (1944).

110. Sherryl E. Michaelson, Note, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301, 322 (1984).

111. *Id.*

112. 367 U.S. 488 (1961).

Ethical Culture, Secular Humanism and others" that did not embrace "what would generally be considered a belief in the existence of God."[113]

In two cases arising from statutory interpretation of a conscientious objector provision,[114] the Court provided a more affirmative definition of religion. At issue in *United States v. Seeger*[115] was the constitutionality of a statutory provision defining "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."[116] The Court interpreted the U.S. Congress's decision to use the term "Supreme Being" rather than "God" to apply an inclusive approach toward all religions, while excluding political, sociological, or philosophical views.[117] Ultimately, the *Seeger* Court adopted the following test of belief "in a relation to a Supreme Being": "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[118] In *Welsh v. United States*,[119] another case interpreting the same provision, a plurality of the Court held that to qualify as a conscientious objector within the meaning of the statute, an objector need not believe in "God," but could instead possess "moral, ethical, or religious beliefs about what is right and wrong [that are] held with the strength of traditional religious convictions."[120]

In *Wisconsin v. Yoder*,[121] returning to the constitutional realm, the Court cast the definition of religious identity as unavoidable. In *Yoder*, the Court appeared to retreat from a more expansive view of religion, holding that a "way of

113. *Id.* at 495 n.11.
114. The statutory provision at issue—Section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. § 456(j)—exempted from service in the armed forces those who were opposed to participation in war based on their "religious training and belief." Welsh v. United States, 398 U.S. 333, 335 (1970); United States v. Seeger, 380 U.S. 163, 164–65 (1965). Although *Seeger* and *Welsh* involved construction of a statutory provision's terms, they "have had and continue to have a significant influence on how courts approach and understand what religion means for purposes of the First Amendment." Usman, *supra* note 106, at 172.
115. 380 U.S. 163 (1965).
116. *Id.* at 165 (alteration in original).
117. *Id.*
118. *Id.* at 166.
119. 398 U.S. 333 (1970).
120. *Id.* at 340 ("If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by . . . God' in traditionally religious persons.").
121. 406 U.S. 205 (1972).

life" would not necessarily be sufficient to amount to religious belief.[122] Chief Justice Burger wrote: "Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."[123] With regard to the Amish, the group at issue in the case, the Court concluded that their belief system was "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[124] Critical to the Court's assessment of the Amish faith was its reliance on the Biblical text, adoption by an organized group, longevity, and close connection to daily life.[125]

With this limited and uncertain guidance from the Supreme Court, lower federal and state courts have been left to provide more detailed direction as to what will constitute religion for purposes of the First Amendment.[126] As Jeffrey Usman has explained, courts have responded in varying ways to the "discussion of the existence of religion as internal or external, individualistic or communal . . . .":[127]

> First, [some courts make] a broad declaration . . . that religion may exist without any formal external or communal signs of traditional religions such as formal services, ceremony, presence of clergy, structure or organization, propagation efforts, holidays being observed, and other similar activities. Second, courts refuse to allow religion to become a limitless self-defining category or classification. Third, courts consider the sincerity of the religious belief of the party, which is sometimes termed the devotional component of the definition of religion. Fourth, the courts look to communal and external elements as proof of the sincerity of the person's belief. Fifth, even if this belief is sincerely held, many courts include these external and communal elements as factors in determining whether the belief is religious.[128]

122. *Id.* at 215 ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.").
123. *Id.* at 215–16.
124. *Id.* at 216.
125. *Id.*
126. Usman, *supra* note 106, at 173 ("None of these [U.S. Supreme Court] decisions offer a commanding pronouncement of what the law is, instead they serve only as loose guidance for the state courts and lower federal courts.").
127. *Id.* at 211.
128. *Id.*

Although courts have made many attempts to define religion, some of which are described above, others have concluded that "defining religion objectively is difficult or impossible."[129] As Justice Frankfurter observed in *West Virginia Board of Education v. Barnette*:[130] "Certainly this Court cannot be called upon to determine what claims of conscience should be recognized and what should be rejected as satisfying the 'religion' which the Constitution protects."[131] Although determining the definition of religion may be unavoidable, given the term's inclusion in the constitutional text and the need to ascertain when accommodation is required, there are other limits that can be imposed on its reach that relate to the way in which religion is used and protected regardless of its substantive definition.[132] The framework articulated in this Article, which distinguishes between claims that aim to protect identity as a personal matter (protective) and those that attempt to impose one's identity on others or the government, or dictate how the law relates to non-identifying individuals (projective), is one such example.

Aside from the difficulty in legally defining the notion of religion or religious identity is the reality that courts are not well positioned to police the boundaries of identity.[133] This may be particularly true in the realm of religion, which unlike race or gender is not often viewed as a legal construction, but may instead even be conceived of as a supernatural phenomenon.[134] While there exists much debate over how to study and understand the phenomenon of religion,[135] it remains inevitable that courts must play some part in deciding how to reconcile the role of religion with a secular system of laws.

129. SULLIVAN, *supra* note 28, at 1 (characterizing "[d]efining religion" and "[d]rawing a line around what counts as religion and what does not" as "very difficult"); Ashby D. Boyle, *Fear and Trembling at the Court: Dimensions of Understanding in the Supreme Court's Religion Jurisprudence*, 3 SETON HALL CONST. L.J. 55, 70 (1993).

130. 319 U.S. 624 (1943).

131. *Id.* at 658 (Frankfurter, J., dissenting).

132. *See, e.g.*, *infra* notes 171–175 and accompanying text (describing threshold inquiry framed around defining burden on religion in common law terms).

133. *See* Lucas, *Identity as Proxy*, *supra* note 11, at 1659–68; *see also* Robert A. Segal, *The Social Sciences and the Truth of Religious Belief*, 48 J. AM. ACAD. RELIGION 403, 404 (1980) (arguing that it is the role of the social sciences to "assess the truth of religious explanations of religious belief," and of philosophy and the natural sciences to "consider whether the reasons believers provide for holding their beliefs are valid reasons for holding them").

134. Segal, *supra* note 133, at 405 (explaining that some attribute their religious beliefs to a supernatural cause, such as experiencing God).

135. *See, e.g.*, Robert Segal, *Theories of Religion*, *in* THE ROUTLEDGE COMPANION TO THE STUDY OF RELIGION 75, 77 (John R. Hinnells ed., 2d ed. 2010) ("The key divide in theories of religion is between those theories that hail from the social sciences and those that hail from religious studies itself. Social scientific theories deem the origin and function of religion nonreligious. . . . By contrast, theories from religious studies deem the origin and function of

The fact that courts may not be the entity best suited to delineate the legitimate from the illegitimate within the religious realm has done little to prevent courts from engaging in this analysis, as they are often required to do so in entertaining religious freedom claims. In hearing such claims, the courts also play a role in legitimizing certain religions and delegitimizing others. As William Marshall has argued, "allowing religion to receive special constitutional protection directly enlists the judiciary as a vehicle to reinforce religious identity."[136] In other words, he suggests that those litigating religious freedom issues may be as motivated to do so by the opportunity to receive judicial recognition of their religious identity as they are by the opportunity to vindicate their legal claims.[137] Thus, there may be good reason to limit the instances in which the court is forced to resolve questions regarding religion or conflicts between the religious and the secular.

B. The Protection of Individual Identity

Much of the discussion about what the Religion Clauses protect has been defined by the belief-action dichotomy. Whether waged on historical or religious grounds, the primary question has been whether and to what extent the Clauses protect religious belief or conscience, or whether they were intended only to protect religious exercise in the more tangible form of physical action. To the extent the Religion Clauses focus on the interaction between the individual and the state,[138] infringement on both action and belief may be seen as problematic; indeed, at various points in time, the Court has concluded as much.

Early interpretations of religious freedom, as demonstrated by state constitutional provisions drafted in the wake of the American Revolution, "defined the scope of the free exercise right in terms of the conscience of the individual believer and the actions that flow from that conscience."[139] While religious opinion, expression of opinion, and religious practices were expressly protected, exercise was understood to refer to "action."[140] Michael McConnell has explained that an initial draft of the federal constitutional provision protecting religious

religion distinctively religious: the need that religion arises to fulfill is for the experience of God.").

136. Marshall, *supra* note 9, at 402.

137. *Id.* ("Religion clause litigation often appears more to be an attempt to receive judicial imprimatur than it is an effort to redress actual harms.").

138. *See* Michael W. McConnell, *The Origins and Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1416–20 (1990).

139. *Id.* at 1458–59.

140. *Id.* at 1459.

freedom referred to "rights of conscience" rather than the "free exercise of religion."[141] McConnell makes three important observations as to preference for the free exercise of religion construction over the rights of conscience language. First, he suggests that the choice to include "free exercise of religion" in lieu of the earlier considered "rights of conscience" suggests a leaning toward action rather than belief.[142] Second, he argues that "conscience" emphasizes individual judgment—perhaps based in or integral to identity—while "religion" is more likely to implicate organizational or institutional aspects of religious belief.[143] Last, a reference to "rights of conscience" could arguably extend to protect belief systems based in something other than religion—for example, economic theory, political ideology, or secular moral philosophy.[144]

One of the earliest cases to attempt a definition of religious exercise was *Reynolds v. United States*,[145] decided by the Supreme Court in 1878. At issue in *Reynolds* was whether members of the Mormon Church could be exempted from laws forbidding polygamy as a matter of free exercise.[146] In that case, the Court drew a sharp line between action, over which the legislature could exercise control, and opinion (or belief), over which it could not.[147] The freedom of belief has often been understood to mean that individuals cannot be compelled to accept a particular religious creed or form of worship.[148] Indeed, this would constitute an attempt to displace religious identity within the individual sphere, which would be problematic under current doctrine and under the framework proposed herein.

More recently, the Court has extended protection to religious action, perhaps in part because certain actions inform and help to define religious

141. *Id.* at 1488.
142. *Id.* at 1489 (noting that the dictionary at the time defined "exercise" to mean use, application, or practice, while "conscience" was more likely understood as referring to opinion or belief).
143. *Id.* at 1490.
144. *Id.* at 1491. Supreme Court jurisprudence has reinforced this distinction. For example, in *Wisconsin v. Yoder*, the Court held that "[a] way of life, however virtuous and admirable, may not be imposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief." Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).
145. 98 U.S. 145 (1878).
146. *Id.* at 166.
147. In *Reynolds*, the Court upheld the government's ability to criminalize polygamy, holding that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.*
148. *See* Braunfeld v. Brown, 366 U.S. 599, 603 (1961) ("Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden.").

identity.[149] For example, in *Wisconsin v. Yoder*, the State of Wisconsin "concede[d] that under the Religion Clauses religious beliefs are absolutely free from the State's control, but it argue[d] that 'actions,' even though religiously grounded, are outside the protection of the First Amendment."[150] The Court rejected this view, explaining that while states have the authority in some instances to regulate religious conduct to promote health, safety, or the general welfare, there are some other examples of religious conduct—such as forgoing work to observe the Sabbath[151]—that are beyond state control.[152]

The notion that the Constitution protects the individual's ability to define his or her own identity is not a novel one, nor is it unique to the religion context. In the context of race-based school assignment programs, Justice Kennedy wrote in *Parents Involved in Community Schools v. Seattle School District No. 1*:[153] "Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin."[154] More recently, in his opinion in *Obergefell v. Hodges*,[155] Justice Kennedy emphasized liberty's protection of "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[156] Although rooted in due process, the Court has emphasized this point in the context of the First Amendment as well, holding in *Roberts v. United States Jaycees*[157] that the Constitution protects "the ability independently to define one's identity that is central to any concept of liberty."[158]

One way to conceptualize the relationship between religion and identity in the context of the law is that law's impact on religion can and should affect only the individual's relationship to others in society, not the relationship between the individual and her religion. This is consistent with the Court's understanding that an individual must be able to define her own religious identity. To the extent that they are critical to achieving or maintaining that identity within

149. *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990) ("[T]he 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts.").
150. Wisconsin v. Yoder, 406 U.S. 205, 219 (1972).
151. *See* Sherbert v. Verner, 374 U.S. 398, 403–04 (1963).
152. *Yoder*, 406 U.S. at 220.
153. 551 U.S. 701 (2007).
154. *Id.* at 797 (Kennedy, J., concurring).
155. 135 S. Ct. 2584 (2015).
156. *Id.* at 2597.
157. 468 U.S. 609 (1984).
158. *Id.* at 619.

the internal sphere, beliefs and actions should be protected as well.[159] Yet this protection cannot be unbounded, and the fact that it has limits does nothing to disparage religious identity; it is merely the result of an inevitable conflict between the role of law and the realities of a religiously pluralistic society. As Michael McConnell has recognized, "A religious duty does not cease to be a religious duty merely because the legislature has passed a generally applicable law making compliance difficult or impossible."[160] One way of policing these boundaries is to ensure that law protects religious identity within the internal sphere, and thus creates accommodations to prevent encroachment on that realm, but stops short of allowing religious identity to dictate how the law should operate with regard to the rights of others.[161]

Justice Kennedy's opinion in *Obergefell*—setting forth a holding that clashes with certain religious beliefs—acknowledged and addressed the tension between religious identity and the law. Writing for the Court, Justice Kennedy addressed the role of religion in the wake of the ruling, which held that bans on same-sex marriage were unconstitutional. He emphasized that the ability to pursue and express those religious beliefs must be protected,[162] and that the opinion was in no way intended to disparage such beliefs.[163] Yet, he also suggested that when such "sincere, personal opposition becomes enacted law and public policy," it has transgressed its proper boundaries and impermissibly requires the state to privilege such beliefs over other legal principles, including the protection of liberty.[164] Some, including the dissenters in *Obergefell*, perceived the majority's opinion as diminishing the religious freedom rights protected by

159. *See infra* Part III.A (describing cases supporting this view in more detail).

160. McConnell, *supra* note 138, at 1512.

161. I have made this same argument in the context of multiracial identity and equal protection. *See* Lucas, *Undoing Race?*, *supra* note 11, at 1249. In that article, I argue that while the law should attempt when possible to accommodate multiracial individuals' desire to define their own unique racial identity, the ways in which multiracial individuals conceive of racial identity should not ultimately drive the law's use of racial categories in attempting to achieve racial equality.

162. Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015) ("[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.").

163. *Id.* at 2602 ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.").

164. *Id.* ("But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.").

the First Amendment, particularly in comparison to other legal rights such as those protected by the Due Process Clause of the Fourteenth Amendment.[165] One must at the very least acknowledge, however, that unlimited protection of both religious and substantive due process rights in this context would result in irreconcilable conflict. This Article proposes one means of reconciling these two sets of rights, which is to limit the protection of each to a specific realm. This would require the law to bend or accommodate as necessary when religion is exercised within the personal sphere, but fail to offer special protection to religious exercise when it purports not only to determine the path of the individual or religious community, but also to dictate how others in society (including those outside of the religious community) should relate to one another.

Looking beyond the United States to international law can provide a unique conception of the rights one might view as both included in and excluded from the First Amendment right to free exercise. The Universal Declaration of Human Rights of 1948 (UDHR) is one law that provides such insight. Article 18 of the UDHR articulates a right "to freedom of thought, conscience and religion."[166] This right consists of two components. The first protects the individual's "freedom to change his religion or belief," and the second protects "freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[167] As described by Russell Sandberg, the first right is internal, relates to thought and conscience, and protects "the right to hold a religion or belief and to change it."[168] In contrast, the second right is external and protects one's right to "manifest religion or belief in worship, teaching, practice, and observance."[169] Both of these rights—the inward-focused right to associate and

165. *Id.* at 2625 (Roberts, C.J., dissenting) ("Today's decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to 'advocate' and 'teach' their views of marriage. The First Amendment guarantees, however, the freedom to '*exercise*' religion. Ominously, that is not a word the majority uses." (first citing U.S. CONST. amend. I; and then citing *Obergefell*, 135 S. Ct. at 2607 (majority opinion)).

166. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 74 (Dec. 10, 1948); *see* Russell Sandberg, *Religion and the Individual: A Socio-Legal Perspective*, *in* RELIGION AND THE INDIVIDUAL: BELIEF, PRACTICE, IDENTITY 158, 159 (Abby Day ed., 2008).

167. G.A. Res. 217, *supra* note 166, at 74.

168. Sandberg, *supra* note 166, at 159.

169. *Id.*

identify with the religion of one's choice, and the sometimes outward-facing right to engage in meaningful practice and observance of that religion—are and should be protected under the First Amendment. Yet excluded from the UDHR's definition and from the approach advocated herein is the right to have one's identity legitimized or imposed on others through legal adoption or promotion. Indeed, the law's choice to promote one identity over others would counteract the Free Exercise Clause's indirect protection of religious pluralism.[170] It arguably runs afoul of the Establishment Clause as well.[171]

Although the Court has not addressed explicitly the notion of religion as identity, it has been hesitant to define what religion means to the individual and has emphasized in other contexts that the individual should be free to not only define, but also pursue, her own identity. Even so, as described in Part III, the Court has recognized that protection of identity cannot be limitless; many of the cases in which the Court has drawn limits around the exercise of religious identity track the protective-projective distinction advocated in this Article.

III. THE EXERCISE OF RELIGIOUS IDENTITY

As suggested in Part II, there must be some limit imposed on the reach of religious freedom (or religious identity) claims and, over time, the courts have made various attempts to impose distinctions between claims that will receive such protection and those that will fall outside of it. Ira Lupu has observed, for example, that the belief-action dichotomy once so central to free exercise jurisprudence has fallen away, giving rise instead to a framework focused on the extent to which government action burdens free exercise.[172] Less explored, Lupu noted, has been the character of government activity necessary to constitute a

170. Gedicks, *supra* note 20, at 775 ("It is no longer possible to accommodate conservative religious beliefs and practices—or, indeed, any religious beliefs and practices—in public life. In a social welfare society marked by radical religious pluralism, exempting believers from generally applicable laws enacted for the good of society inevitably imposes costs on others who believe and practice differently."); McConnell, *supra* note 138, at 1516 (describing religious pluralism as an "organizing principle of church-state relations"); *see also* John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587, 592 (2015) (describing "confident pluralism" as "rooted in the conviction that protecting the integrity of one's own beliefs and normative commitments does not depend on coercively silencing opposing views").

171. One might think of the Establishment Clause as prohibiting the state from facilitating the explicit promotion of one religious identity—including by allowing individuals of one religious identity to impose their beliefs on others. *See infra* notes 260–269 and accompanying text.

172. Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 939 (1989).

burden.[173] To the extent that a meaningful limit could be placed on what constitutes a burden, Lupu argued that the ability to apply "a restrictive doctrine at the threshold of claims" would diminish the need for "inquiries into sincerity, religiosity, and state interest frequently demanded by current free exercise norms."[174] Like Lupu's attempt to flesh out the meaning of what might constitute a burden on free exercise by drawing on common law principles,[175] this Article advocates for a threshold inquiry that would provide a mechanism for dismissing some claims "without seeming unreasonable or unsympathetic to values of religious liberty."[176] That inquiry focuses not on the character of the burden posed, but on the manner in which religious identity is being exercised. This Article ultimately argues that protective claims of religious identity should be deemed cognizable under the Free Exercise Clause, while projective claims of religious identity should fall outside of First Amendment protection.

Through an exploration of older and more recent free exercise claims, this Part attempts to demonstrate the delineation between protective and projective claims of religious identity. Protective claims of religious identity are those that attempt to protect and preserve religious identity within the personal sphere or as directed inward. Thus, individuals or groups raising such claims may seek necessary accommodations from generally applicable laws to ensure they can still act in accordance with their religious identity. In contrast, projective claims of religious identity are directed outward, focused on operation of the law as it relates to others. In such instances, the religious objector is attempting to impose her religious identity on others or to conform the law to her own sense of religious identity.

While this Article refers often to the exercise of identity within the individual sphere, the protective-projective distinction described herein applies just as readily in the context of group-based religious identity. Without delving into the broader question whether the Constitution protects group rights,[177] this Article acknowledges not only that groups serve as an important

173. *Id.* at 934. On one extreme would be the possibility that only criminal prohibitions of religious activity or government coercion leading to the violation of religious norms fall within the Clause's purview; on the other would be the possibility that any government action that "increases the expense, discomfort, or difficulty of religious life" could constitute an impermissible burden. *Id.* at 935.

174. *Id.* at 948.

175. *Id.* at 966 (proposing that "[w]henever religious activity is met by intentional government action analogous to that which, if committed by a private party, would be actionable under general principles of law, a legally cognizable burden on religion is present").

176. *Id.* at 948.

177. For a more thorough discussion on this point, see Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1002–03 (1983) (suggesting that

source of individual identity,[178] but also that a religious group may form its own distinct religious identity, which could provide a basis for a protective claim as described in Part III.A.[179]

Two caveats before proceeding: First, this Article does not claim that the protective-projective framework can be reconciled with all existing case law, nor is it intended to explain the outcome of every case. The below Subparts merely serve to highlight aspects of existing cases that align with the framework and to demonstrate how that framework might apply to more recent cases. Second, the protective-projective framework is not intended to be wholly dispositive, but rather to function as an initial part of a multistep inquiry. Even if the nature of the claim at issue is protective, it may still be that an important or compelling government interest justifies the suppression of religious exercise.[180] The distinction offers a means for siphoning off one group of claims as non-cognizable early on in the analysis, leaving for another day the difficult question of how to determine whether the remaining claims will ultimately be meritorious.

A. Protective Claims of Religious Identity

Protective claims are those that aim to preserve individuals' or groups' ability to define and pursue their religious identity within the confines of their own sphere. There are several examples throughout the Court's jurisprudence of claims that would be properly characterized as protective; while not all successful,

although the Constitution does not provide explicit textual support for group rights, certain constitutional provisions can be read to presume their existence).

178. *See* Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH L. REV. 47, 54 (suggesting that "groups constitute individual identity").

179. *See infra* notes 208–214 and accompanying text (discussing a group-based protective claim in *Hosanna-Tabor*). The constitutional right to freedom of association might also be perceived to support the notion that groups can form meaningful identities. *See* Garet, *supra* note 177, at 1006 (suggesting that groups have speech and association rights based on the First Amendment). Decided outside of the religion context, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), is instructive as to the larger question of group identity. In *Boy Scouts*, the Court recognized the organization's right to protect its own group identity by refusing to accept members who engaged in homosexual conduct. *Id.* at 644. In so holding, the Court emphasized that forcing the Boy Scouts to accept a member such as James Dale, a gay rights activist and the co-president of a gay and lesbian organization while in college, would fundamentally transform the group's identity from one that deemed homosexual conduct as immoral to one that condoned such activity. *Id.* at 653. The Court distinguished *Boy Scouts* from *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), finding that enforcement of the statutes under discussion in *Roberts* would not have had the same effect on the organization's identity. *Boy Scouts*, 530 U.S. at 657–58.

180. This Article does not take a position as to the level of scrutiny (for example, strict or intermediate scrutiny) that should be applied to such a claim.

they would overcome the threshold distinction—intended not as dispositive, but only as a screening mechanism—advocated in this Article.

One type of religious freedom claim often raised involves actors seeking to engage in religious behavior that, as a general matter, is illegal. One such example was the claim made by Alfred Smith in *Employment Division, Department of Human Resources of Oregon v. Smith*.[181] At issue in *Smith* was whether prohibition of the sacramental use of peyote in Native American religious rituals violated the Free Exercise Clause.[182] In *Smith*, Justice Scalia described the "exercise of religion" as encompassing "not only belief and profession but the performance of (or abstention from) physical acts," such as assembling with others to worship or imbibing sacramental wine.[183] While the religiosity of the act in question—the use of peyote—was not questioned, trouble arose because those seeking to engage in such religious activity were violating Oregon law that did not target religious practices, but instead placed a general ban on the possession of controlled substances.[184] Ultimately, the *Smith* Court rejected Smith's claim, holding that the First Amendment did not necessarily "bar[] application of a neutral, generally applicable law to religiously motivated action."[185]

Although unsuccessful in this case, Smith might be viewed as having properly raised a protective claim of religious identity: His goal was to engage in a ritual that was an important part of his religious identity as a member of the Native American Church.[186] Thus, he was attempting to seek an exemption from the law criminalizing such behavior in order to preserve his religious identity (as exercised in the context of his own ability to engage in the peyote-based ritual). Based on identity considerations alone—which, in the *Smith* case, might be outweighed by the law's more general need to police drug-related behavior[187]—Smith would have a viable claim, as he was attempting to

181. 494 U.S. 872 (1990).

182. *Id.* at 874. Smith had been dismissed from his job as a result of using peyote and subsequently denied unemployment compensation since his discharge was due to illegal drug use. *Id.*

183. *Id.* at 877.

184. *Id.* at 874 ("Oregon law prohibits the knowing or intentional possession of a 'controlled substance' unless the substance has been prescribed by a medical practitioner." (citations omitted)).

185. *Id.* at 881. In so holding, the Court distinguished other cases in which it had invalidated laws of a similar nature, contending that in those cases other constitutional protections—such as freedom of speech and the press—were implicated. *Id.*

186. *Id.* at 874.

187. An inquiry about whether that claim should outweigh the need for a consistently applied regulatory scheme would still ensue and Smith's claim would likely fail.

engage in a religious practice within a personal sphere of activity. Such protections would not extend, however, to a projective claim by Smith regarding others' use of peyote, or a more general claim about the statute's constitutionality aside from its application to his personal request for an exemption.

Wisconsin v. Yoder exemplifies another type of protective free exercise claim.[188] At issue in *Yoder* was whether the Amish could be compelled by state law to attend either private or public school until the age of sixteen.[189] By finding that a requirement of compulsory formal education would violate the respondents' right to free exercise of religion, the Court allowed the respondents to foster their religious identity within the confines of their own community. Chief Justice Burger's observation in *Yoder* that ordered liberty does not allow for "every person to make his own standards on matters of conduct in which society as a whole has important interests"[190] can be viewed as supporting a protective-projective distinction. While society has an interest in how individuals relate to one another and how the state manages individual behavior more broadly, it arguably has less of an interest in how one family or group of families chooses to educate their own children in accordance with their religious faith.[191] In other words, individuals should have leeway to make standards regarding conduct within the individual sphere, but such standards should not be endorsed or promoted as governing others' conduct. This is particularly so when society has valid reasons for constructing the law (and thus relationships between individuals and the state) in a particular way.[192] Thus, a better analog to current projective identity claims would involve a situation in which those of Amish faith had attempted to prevent others from attending public or private schools, objecting to the compulsory school law not as applied to them, but as a

188. 406 U.S. 205 (1972).
189. *Id.* at 207.
190. *Id.* at 215–16.
191. Erwin Chemerinsky and Michele Goodwin disagree with the Court's holding in *Yoder*, disputing that "denying education to children under sixteen is harmless." Erwin Chemerinsky & Michele Goodwin, *Religion Is Not a Basis for Harming Others*, 104 GEO. L.J. 1111, 1119 (2016) (reviewing PAUL A. OFFIT, BAD FAITH: WHEN RELIGIOUS BELIEF UNDERMINES MODERN MEDICINE (2015)). They acknowledge, however, that "*Yoder* is based on the Court's conclusion that exempting these children from the schooling requirement was *unlikely* to harm them." Chemerinksy & Goodwin, *supra*, at 1119. They also point out that, other than the employment benefit cases and *Yoder*, during this time period the Court never found another law to violate the Free Exercise Clause. *Id.* at 1122.
192. *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990) ("The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted)." (quoting Minersville Sch. Dist. Bd. of Ed. v. Gobitis, 310 U.S. 586, 594–95 (1940))).

universal matter by claiming that its very existence was contrary to their religious belief system.[193]

Similarly, in *Thomas v. Review Board of the Indiana Employment Security Division*,[194] the Court held that the State of Indiana could not deny unemployment benefits to an individual who terminated his employment because it interfered with the internal manifestation of his religious identity.[195] Eddie Thomas was a Jehovah's Witness who, upon the closing of his division of Blaw-Knox Foundry & Machinery Company and subsequent transfer to a department that produced turrets for military tanks, claimed "his religious beliefs prevented him from participating in the production of war materials."[196] Because all remaining divisions of Blaw-Knox were engaged in the production of weapons, Thomas quit, "asserting that he could not work on weapons without violating the principles of his religion."[197] The Court held that the Review Board's determination that such circumstances did not constitute good cause for termination of employment under Indiana's unemployment compensation statute violated Thomas's right to free exercise of his religion.[198] Thomas's request for accommodation related solely to the personal relationship between him and his faith; thus, being forced to choose between engaging in employment that would interfere with his internal conception of his religious identity and the inability to subsist was deemed unacceptable.[199]

Thomas's claim that his religious belief precluded him from producing weapons might be viewed as having a downstream (and possibly projective) effect in addition to a protective element. When he exempts himself from producing such weapons, that action inevitably has some effect on those who would use the weapons or have a different view about the morality of producing such

193. One might argue that the claim made in *Yoder* was not merely protective, in that the parents were themselves projecting their identity as patriarchs onto their children. While this may be true in some sense, for purposes of the argument made in this Article, I am considering the issues only from the perspective of those asserting the claim—here, the parents who refused to send their children to public or private school. For a discussion of whether children should be afforded rights of religious exercise, whether they should be able to make religious choices that conflict with those of their parents, and how the state should ascertain the religious views of children, see generally Emily Buss, *What Does Frieda Yoder Believe?*, 2 U. PA. J. CONST. L. 53 (1999).

194. 450 U.S. 707 (1981).

195. *Id.* at 720.

196. *Id.* at 709.

197. *Id.* at 710.

198. *Id.* at 712, 719.

199. *Id.* at 717 ("[N]ot only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable." (quoting Sherbert v. Verner, 374 U.S. 398, 404 (1963))).

weapons.[200] For purposes of a projective claim analysis, this Article and the framework suggested herein draw a distinction between the incidental or downstream costs that an exercise of religious identity may have (permissible), and those exercises that focus primarily on how non-identifying individuals relate to one another, whether or not that effect is intentional (impermissible). So while Thomas's action may have some effect on the ability of others to engage in the production of weapons or warfare if multiplied across many employees, the belief or aspect of identity on which he is acting does not encompass any notion of how other individuals must necessarily relate to each other or preclude other individuals from engaging in weapons production. In that sense, it functions as a true accommodation of the individual, and not as a means to displace law.[201]

Another way of thinking about Thomas's claim is that his belief itself might be perceived as both protective and projective. Thomas likely believes not only that he should not engage in such production, but also that it is, in fact, morally wrong. The question then becomes how he operationalizes that belief and whether he confines it to his own identity or attempts to impose it on others. The accommodation that Thomas sought and ultimately vindicated in this case allowed him to preserve his own religious identity by exempting him from action that would run contrary to that identity. Yet his exemption from the larger scheme—and from employment at the machinery company—does not impose that belief or understanding on others or conform industry standards to his belief system, even though it may be perceived as having an effect on others through decreased weapon production.

In *Holt v. Hobbs*,[202] decided in early 2015, the Court held that an Arkansas Department of Corrections policy that prohibited the petitioner from growing a half-inch beard in accordance with his Muslim faith violated the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[203]

200. Similarly, his exertion of the right to free exercise and subsequent right to obtain unemployment benefits may have some effects on the employer, however small or indirect.

201. It should be noted that this argument is not intended to preclude the involvement of religious identity in the public sphere or of religion's presence in a political democracy. For example, Thomas could protest weapons manufacturing and lobby the legislature to shut the plant down, all the while doing so on explicitly religious terms without running afoul of the protective-projective distinction. If the law itself changes as a result of the political process, the need to police the boundaries between identity and law with regard to that issue will dissipate.

202. 135 S. Ct. 853 (2015).

203. *Id.* at 867.

Setting aside the statutory context for the moment,[204] and looking instead at the nature of the claim asserted, the prisoner sought to grow a short beard in accordance with the dictates of his religious faith and was prohibited from doing so by existing Department policy.[205] Decided under the standard set forth by RLUIPA, the Court held that the Department's grooming policy substantially burdened Holt's exercise of religion and did not further the Department's compelling interest in preventing prisoners from hiding contraband (nor was it the least restrictive means of doing so).[206] While Holt's claim dealt with his external appearance, it can still be viewed as protective, because it deals solely with his personal manifestation of identity. In her concurrence, Justice Ginsburg highlighted this point, and contrasted the instant case with *Hobby Lobby*, noting: "Unlike the exemption this Court approved in *Burwell v. Hobby Lobby Stores, Inc.*, accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief."[207]

Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.[208] is another case that, conceived of in the group identity context,[209] is consistent with the notion of protecting identity within a more limited sphere. At issue in the case was a lawsuit brought against a member congregation of the Lutheran church by a church schoolteacher who claimed she had been fired in violation of the Americans with Disabilities Act (ADA).[210] Invoking the "ministerial exception," which had been recognized uniformly by the Courts of Appeals, the church claimed the suit was barred by the First Amendment, which protects from legal scrutiny the church's selection of its own religious ministers.[211] The Supreme Court upheld the inapplicability of the ADA to the church, holding that to conclude otherwise would interfere with the "internal governance of the church" and the "religious group's right to shape its own faith and mission through its appointments."[212]

204. The U.S. Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), and its sister statute, the Religious Freedom Restoration Act of 1993 (RFRA), to provide greater protection for religious liberty than was provided by the Court in *Smith*. *Id.* at 859–60.

205. The Court notes that petitioner believed his faith prohibited him from trimming his beard at all, but that the petitioner proposed the shorter beard as a "compromise" with prison regulations. *Id.* at 861.

206. *Id.* at 859.

207. *Id.* at 867 (Ginsburg, J., concurring) (citations omitted).

208. 132 S. Ct. 694 (2012).

209. *See supra* notes 177–179 and accompanying text.

210. *Hosanna-Tabor*, 132 S. Ct. at 701.

211. *Id.* at 701, 705.

212. *Id.* at 706.

Distinguishing *Hosanna-Tabor* from *Employment Division v. Smith*, the Court held that *Smith* "involved government regulation of only *outward* physical acts," while the employment decision at issue in *Hosanna-Tabor* "affect[ed] the faith and mission of the church itself."[213] This distinction highlighted the internal-external delineation suggested in this Article: The church's decision about who would be formally anointed to instruct others in the way of the church was viewed as fundamental to its religious identity and critical to the formation of that identity, yet the reach of this identity was limited to only those decisions affecting matters internal to the entity.[214] And while the church's invocation of the ministerial exception did affect the application of the ADA to others, the "other" at issue was an identifying individual and the church's action affected the application of the law to her only insofar as she was a part of and played an important role in the institution's own identity.[215]

All the cases described above demonstrate qualities of identity claims that might be categorized as protective. While not all of the religious claimants were successful, the protective-projective framework would at the very least render their claims cognizable—even if it would not be determinative of their ultimate constitutionality.[216]

213. *Id.* at 707 (emphasis added). For the reasons described above, and its outward nature notwithstanding, the claim in *Smith* would still be categorized as a protective, rather than projective, claim of religious identity.

214. Similarly, Frederick Mark Gedicks has argued that even when group rights do exist, they may be cabined to limit their effects on non-members. *See* Gedicks, *supra* note 178, at 60 ("[W]hen group autonomy or privacy would impose substantial costs on non-members, state regulation or other intervention is generally appropriate."); *id.* ("When group rights entail significant externalities . . . the state is justified in overriding group autonomy and group rights."). Federal regulations promulgated in the context of the Affordable Care Act (ACA) mirror this understanding to some degree. To be exempt from the contraceptive mandate, a "religious employer" must have as its purpose the inculcation of religious values, primarily employ persons who share the religious tenets of the organization, serve primarily persons who share the religious tenets of the organization, and be classified as a nonprofit organization. *See* 45 C.F.R. § 147.130(a)(1)(iv)(B) (2013). Setting aside the last requirement, which is unrelated, the first three requirements may be viewed as ensuring that the organization can fairly assert a religious identity and therefore the ability to protect that identity through the right to free exercise.

215. Like the *Yoder* case, *see supra* note 193, *Hosanna-Tabor* raises questions about the recourse for dissenting members of religious entities in the face of oppressive power dynamics or coercion. While I agree that such dynamics are problematic, the framework suggested in this Article is intended to function only as a threshold inquiry, not a dispositive one. It may be that such issues can be addressed through other means, if not through the protective-projective framework.

216. For example, a court might conclude (as did the *Smith* Court) that there is a need to prioritize certain legal relationships over the exercise of religious identity. In doing so, it might be seen as giving more weight to rights-based harm than identity-based harm. The Court explained in *Smith*, citing *Yoder* as one example, that "[t]he only decisions in which we have held that

B. Projective Claims of Religious Identity

More recent articulations of the free exercise right seem to tread a different ground than in the cases described in Part III.A. Instead of trying to use the Free Exercise Clause to carve out a protected space in the individual or personal sphere for the exercise of religious identity, these claimants argue for the protection of identity as exercised beyond that sphere and with regard to the rights of others.[217] Ultimately, the free exercise of identity in a projective fashion is an oxymoron, or at the very least incoherent; if one accepts the premise that identity is a personal phenomenon[218]—the individual or community's construction of a way of being, or adoption of a system of beliefs and values—to exercise it in a projective manner or to force it onto others is per se impermissible.[219]

For example, in the recent case of *Burwell v. Hobby Lobby Stores, Inc.*,[220] the respondents (Hobby Lobby) described not just a specific belief, but rather

the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . ." Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881 (1990). *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), discussed in Part I.B.2, was cited as another such example. Thus, if the only harm of an otherwise reasonable and generally applicable law is on religious identity, distinct from the exercise of other rights, an exemption may not be justified. This conclusion does not necessarily follow from the protective-projective distinction, but it is a further distinction that may be made within the realm of protective identity claims.

217. Frederick Mark Gedicks has suggested, for example, that the controversy over state RFRAs is less about whether religious liberty should be protected and more about where it should be protected. Gedicks, *supra* note 20, at 774. He suggests that the tension arises from the effort to "allow conservative Christian morals—a quintessential 'private' concern in contemporary liberal theory—to impose themselves on (i) those who do not share them, in (ii) spaces of American life such as housing, the for-profit workplace, and retail commercial businesses, which have been governed by 'public' values." *Id.*

218. This is not to suggest that the formation of identity is insulated from outside influence; indeed, such influence is often critical to identity formation. *See* JUDITH BUTLER, GIVING AN ACCOUNT OF ONESELF 30 (2005) (suggesting that self-recognition is defined through "proximate and living exchanges, in the modes by which we are addressed and asked to take up the question of who we are and what our relation to the other ought to be"); PAUL RICOEUR, ONESELF AS ANOTHER 3 (1992) (suggesting that the definition of self is intimately tied to the definition of otherness). Ultimately, however, the very definition of identity is the qualities, beliefs, and expressions that make a person or group different from others; to allow the identity of some to trample the identities of others through its adoption into law thus presents a threat to identity's integrity.

219. *See* Laycock, *supra* note 12, at 200 ("Religious dissenters can live their own values, but not if they occupy choke points that empower them to prevent same-sex couples from living *their* own values.").

220. 134 S. Ct. 2751 (2014).

a set of beliefs and values that guide the company's business decisions. In essence, the brief described an identity—albeit a corporate identity. In its brief filed in the Supreme Court, the corporation and its founders described a corporate identity steeped in religious values.[221] As a result, they engage in certain corporate behaviors—for example, closing all of their businesses on Sundays, refusing to sell liquor or other products (such as shot glasses) that may promote alcohol use, and providing cost-free access to religious counseling.[222] The owners also refused to provide health insurance to its employees that would cover drugs used to terminate a pregnancy or drugs and devices designed to prevent implantation of the embryo in the womb, which gave rise to the *Hobby Lobby* litigation.[223] The brief describes the decision to exclude such products from the company's health plan as "exercis[ing] their faith."[224]

In *Hobby Lobby*, the Court ultimately held that the Religious Freedom Restoration Act (RFRA) allowed Hobby Lobby, a closely held corporation, to deny its employees health coverage of contraception to which the employees would otherwise be entitled based on the religious objections of the company's owners.[225] Erwin Chemerinsky and Michele Goodwin have observed that "*Hobby Lobby* was the first time in American history that the Supreme Court found a substantial burden on free exercise of religion where a person is merely required to take action that might enable other people to do things that are at odds with the person's religious beliefs."[226]

The activities described in the Hobby Lobby owners' brief are not religious in nature; nor did the owners assert an inability to associate with or follow the Christian faith. Instead, their complaint seemed to be that the Affordable Care Act's (ACA's) contraceptive-coverage mandate prevented them from expressing their corporate religious identity through their business practices. One might then think of the right being articulated by Hobby Lobby as the right to project religious identity: that is, to bring the application of the law into line with one's conception of the world and the values that accompany it, even if that exercise of identity comes at the expense of others' ability to

221. Brief for Respondents, Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 546899, at *8–9 (explaining that the owners "organized their businesses with express religious principles in mind").
222. *Id.* at 8–9.
223. *Id.* at 9.
224. *Id.* at 31.
225. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).
226. Chemerinsky & Goodwin, *supra* note 191, at 1133. They also note that, "[m]ost importantly, *Hobby Lobby* was the first time in American history that the Supreme Court held that people, based on their religious practices, can inflict harm on others." *Id.* at 1134.

exercise their legal rights.[227] Yet as the Court has emphasized throughout its earlier cases, while individuals exercising religious identity should be afforded some protection from government action, they should not have the authority to dictate government policy or to control how these policies apply to others.[228] As Justice Kennedy wrote in his concurrence in *Hobby Lobby*, the accommodation of religious liberty may not "unduly restrict other persons, such as employees, in protecting their own interests."[229]

Two obvious distinctions regarding *Hobby Lobby* must be addressed here: 1) the novel question whether a privately-held corporation can assume a religious identity; and 2) the assertion of religious identity not in the context of the First Amendment, but under statutory law such as RFRA (in conjunction with RLUIPA's definition of "exercise of religion" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief"). As to the first point (and viewed through the lens of religious identity), the two corporations at issue—Conestega Wood and Hobby Lobby—were admittedly not religious organizations, but businesses formed "in accordance with [the] religious beliefs and moral principles"[230] of their founding members and intended to be run "in a manner consistent with Biblical principles."[231] Thus, the conduct of the businesses was at least one degree removed from concerns directly implicating identity: a restriction imposed on business conduct is not a harm to identity, but rather an obstacle to the owners' aim to run their business in accordance with their religious identity. In essence, then, the claim by the Conestega Wood and Hobby Lobby owners might be viewed as a direct request that the Court protect this specific instance of projective identity; such a

227. The Hobby Lobby owners' claim is distinguishable from the claim made by Alfred Smith in *Employment Division, Department of Human Resources v. Smith*. *See supra* Part II.A. The analysis in *Smith* is inapposite to the discussion here, which focuses not on the interaction between the state and the individual engaging in religious exercise, but instead on the nature of the exercise itself. This Article does not aim to propose an alternative framework to that posed by *Smith*, or any of the cases that follow in the same vein, but instead suggests a preliminary inquiry into whether the claim being made is a protective or projective claim of religious identity. A claim that falls into the protective category would potentially fall within the protection of the First Amendment—in which case courts may still require balancing against government interests. In contrast, those in the projective category would, by definition, fall outside the realm of constitutional protection and would not require further discussion.

228. See cases discussed later in this Part—for example, the Court's decision in *Roy*, which refused to allow a religious objection to the use of Social Security numbers to affect the government's ability to use those numbers in administering Aid to Families with Dependent Children (AFDC) or food stamps.

229. *Hobby Lobby*, 134 S. Ct. at 2787 (Kennedy, J., concurring).

230. *Id.* at 2764.

231. *Id.* at 2766.

claim would clearly be non-cognizable under the framework suggested in this Article. It is also distinct from claims like that made by the Lutheran church in *Hosanna-Tabor*, which aimed to preserve the integrity of the institution's religious identity.[232] The distinction between these two cases is less about the categorization of the two entities as church and corporation, given the Court's recognition in *Hobby Lobby* that corporations can assume a religious identity.[233] Instead, it refers to the fact that the church in *Hosanna-Tabor* was using identity to exercise control over its internal composition and those responsible for shaping institutional identity by instructing others about the church's core mission[234]—a protective use of religious identity. In contrast, the *Hobby Lobby* owners' use of religious identity was projective—attempting to impose the corporation's religious beliefs on others and control employees' personal access to contraceptives, which has no direct bearing on the religious identity of the corporation.

As to the fact that the owners in *Hobby Lobby* asserted claims based on RFRA as well as the First Amendment, and given RFRA's more general arguments about the proper relationship between identity and the law, this Article would apply the same framework to RFRA as it would the First Amendment. Viewed through the identity lens, the very premise of RFRAs, both state and federal, appears to be that the protection of religious identity necessarily and explicitly requires the subordination of secular law. Another way of thinking of them, in certain cases, might be as statutory accommodation of projective identity claims.[235] To the extent that RFRAs allow religious identity to act as a

232. While such a claim may seem similar in nature, for example, to the claim made by the Boy Scouts in *Boy Scouts v. Dale*, the claim in that case was ultimately based on the First Amendment right to expressive association; the owners of Conestoga Wood and Hobby Lobby made no such parallel claim (such as that there is a right to corporate association).

233. Ira C. Lupu & Robert W. Tuttle, *Religious Exemptions and the Limited Relevance of Corporate Identity*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 376, 392 (Micah Schwartzman et al. eds., 2016) (noting that after *Hobby Lobby* "corporate entities, including businesses, have the legal right to adopt and manifest a religious identity").

234. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 132 U.S. 694, 707–08 (2012) (explaining that the terminated employee at issue was elected by the congregation to fulfill core religious functions of the Church and that her "job duties reflected a role in conveying the Church's message and carrying out its mission").

235. Consider, for example, Indiana's RFRA, which allowed for-profit businesses to assert free exercise rights (in the same way as individuals or churches might). Also, consider the more general notion that an individual whose exercise of religion is substantially burdened may assert that violation (or impending violation) as a defense in court. One can certainly imagine projective exercises of identity—perhaps all of them—that would be substantially burdened by existing law governing the same substantive area.

"veto" of secular law,[236] rather than merely allowing individuals to avoid an obligation, they are inherently flawed.

Another case that provides a useful point for analysis and contrast of protective and projective claims is *United States v. Lee*.[237] In *Lee*, an Amish employer sought an exemption for himself and his employees from the collection and payment of Social Security taxes on the grounds that his religious faith prohibited participation in governmental support programs.[238] Both the court below and the Supreme Court accepted the plaintiff's contention that such behavior was prohibited by his religion.[239] The Court was unwilling, however, to provide any exemption beyond that which Congress had already granted to the self-employed. In explaining its decision, the Court wrote:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.[240]

The Court's reasoning in *Lee*—and the distinction drawn between the self-employed Amish and those of Amish faith who employ others—is reflective of and aligns with the arguments made in this Article. In essence, the Court suggests that those seeking an exemption in *Lee*—those who have accepted certain limits "on their own conduct as a matter of conscience and faith,"[241] or who have achieved a specific religious identity[242]—cannot act to assert that identity beyond the individual realm. Had the employer been self-employed, the claim could be articulated more simply: The government is compelling the individual to engage in behavior that directly contradicts his

236. *See* Ira Lupu & Robert Tuttle, *Symposium: Religious Opt-Outs or Religious Vetoes?*, SCOTUSBLOG (Dec. 15, 2015, 9:33 AM), http://www.scotusblog.com/2015/12/symposium-religious-opt-outs-or-religious-vetoes [https://perma.cc/6BAA-YM64] (arguing in the context of *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), that assertions of religious freedom should never "be allowed to function as a religiously motivated veto of a policy designed to protect others"); *id.* ("No proper conception of religious freedom can justify [such a great] degree of interference with democratically determined measures for advancing the public welfare.").

237. 455 U.S. 252 (1982).

238. *Id.* at 254–55.

239. *Id.* at 255, 257 ("We therefore accept appellee's contention that both payment and receipt of social security benefits is forbidden by the Amish faith.").

240. *Id.* at 261.

241. *Id.*

242. *See supra* note 56 and accompanying text (describing achieved religious identity as "the result of conscious choices made over the course of one's life").

religious faith. Unlike the self-employed individual who refuses to participate in the social security system, however, in this instance the employer's assertion of religious identity is "impose[d]" on his employees.[243]

Estate of Thornton v. Caldor,[244] decided in the context of the Establishment Clause, provides another demonstration of the Court's willingness to provide protection for protective claims of religious identity, while withholding such protection from claims that project individual identity onto others or require the public sphere to conform to individualized notions of identity. At issue in *Thornton* was a Connecticut statute that provided: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal."[245] The Court held the statute unconstitutional, drawing a distinction between the accommodation of identity in the individual case and a law that "imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates."[246]

Aside from the fact that the Connecticut statute "impermissibly advance[d] a particular religious practice"[247]—hence the violation of the Establishment Clause—it was also offensive in that it allowed the individual and his or her definition of religious identity to dictate others' actions (here, the employer's ability to dismiss those who cannot adhere to specific working conditions, including working on Saturday or Sunday).[248] While the pursuit of

243. *Lee*, 455 U.S. at 261.

244. 472 U.S. 703 (1985).

245. *Id.* at 706 (quoting CONN. GEN. STAT. § 53–303e(b) (1985)).

246. *Id.* at 709.

247. *Id.* at 710. Also problematic was the fact that the Connecticut statute required the state to "decide which religious activities may be characterized as an 'observance of Sabbath' in order to assess employees' sincerity." *Id.* at 708.

248. One might be inclined to see the Connecticut statute as protective in attempting to carve out, as a general rule, accommodation for individual observers of the Sabbath. The problem with the statute, in the Court's view, was its absolutist imposition of one particular accommodation across the board, without regard for the employer's interests or whether another type of accommodation might better suit those interests:

> The State thus commands that Sabbath religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath. The employer and others must adjust their affairs to the command of the State whenever the statute is invoked by an employee.
>
> There is no exception under the statute for special circumstances, such as the Friday Sabbath observer employed in an occupation with a Monday

religious identity is deserving of protection under the Religion Clauses, the Court emphasized that "[t]he First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."[249]

The Court's decision in *Bowen v. Roy*[250] also suggests that projective claims of religious identity are impermissible insofar as they require others to conform to individualized conceptions of identity. In *Bowen*, the Court rejected a claim by Native American parents that the government's insistence on using their daughter's social security number for purposes of administering its Aid to Families with Dependent Children and Food Stamp program would violate their religious beliefs.[251] The Court held that the federal government's use of the child's social security number did "not itself in any degree impair Roy's 'freedom to believe, express, and exercise' his religion."[252] The Court went on to explain: "Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices by refraining from

> through Friday schedule—a school teacher, for example; the statute provides for no special consideration if a high percentage of an employer's work force asserts rights to the same Sabbath. Moreover, there is no exception when honoring the dictates of Sabbath observers would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers. Finally, the statute allows for *no consideration as to whether the employer has made reasonable accommodation proposals.*

Id. at 709–10 (emphasis added). The last sentence in particular highlights the law's nature as projective—using the law's incorporation of religious identity to dictate the action of employers—and distinguishes it from personalized accommodations that would carve out space for the individual to pursue her own identity without altering the legal structure governing all businesses.

249. *Id.* at 710 (quoting Otten v. Baltimore & Ohio R.R. Co., 205 F.2d 58, 61 (2d Cir. 1953)).

250. 476 U.S. 693 (1986).

251. *Id.* at 695–98. The parents claimed that their religious beliefs required them to keep their daughter's "person and spirit unique" and that the "uniqueness of the Social Security number as an identifier, coupled with the other uses of the number over which she has no control" would "'rob the spirit' of [their] daughter and prevent her from attaining greater spiritual power." *Id.* at 696.

252. *Id.* at 700–01 (quoting 42 U.S.C. § 1996 (2012)). In concurrence, Justice Blackmun suggested that it might still be possible for the parents to have an "independent religious objection to their being forced to cooperate actively with the Government by themselves providing their daughter's social security number." *Id.* at 714 (Blackmun, J., concurring in part). Also concurring, Justice Stevens made a similar observation: "[A]s the Court demonstrates, an objection to the Government's use of a Social Security number, and a possible objection to 'providing' the number when the Government already has it, pose very different constitutional problems." *Id.* at 720 (Stevens, J., concurring in part and concurring in the result).

using a number to identify their daughter."[253] Thus, the case supports the proposition that while the Free Exercise Clause demands accommodation of religious identity within some limited sphere, it stops short of requiring others—including the government—to conform to that identity.

In that same vein follows the Court's opinion in *Lyng v. Northwest Indian Cemetery Protective Association*.[254] In *Lyng*, the Court held that the government did not violate the Free Exercise Clause by deciding to harvest timber and construct a road over the objection of certain Indian tribes, who claimed that the land at issue was sacred and had used such land for religious purposes.[255] Citing *Roy*, the Court found that the Clause "simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[256] The Court additionally observed that "[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures."[257] It expressed its hesitance to provide individual citizens with a "veto over public programs"[258] and distinguished the relief sought in *Lyng*—prohibition of

253. *Id.* at 699–700 ("[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." (citing Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring))). Justice Stevens also noted in concurrence that "the Free Exercise Clause does not give an individual the right to dictate the Government's method of recordkeeping." *Id.* at 716–17 (Stevens, J., concurring in part and concurring in the result).

254. 485 U.S. 439 (1988).

255. *Id.* at 441–42. Although certainly not intended, I acknowledge that this framework may inadvertently disadvantage religions that, by their nature, would be more likely to run afoul of the protective-projective distinction, such as those whose beliefs often, or are specifically intended to, transcend the individual being. In other words, some categories of religious expression—particularly non-Christian religions outside of the mainstream—may be marginalized by the more individualized notion of identity supported by the protective-projective framework. That phenomenon might give rise to independent equal protection concerns—an area that has been underexplored as it relates to religion. *See* Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 666 (2008) ("Challenges to discrimination based on religion are hardly ever brought under the Equal Protection Clause."). I acknowledge this presents a trade-off that, for some, may make the protective-projective framework untenable. I would also suggest, however, that any line drawn to cabin religious freedom claims will present problems for some; the question is not whether, but for whom. *See* text accompanying note 82.

256. *Id.* at 448 (citing *Roy*, 476 U.S. at 699).

257. *Id.* (citing *Roy*, 476 U.S. at 700).

258. *Id.* at 452.

government activity—from accommodation of religious practices like those engaged in by respondents.[259]

Although this Article has focused primarily on free exercise, there may be spillover effects related to other doctrinal areas. One example is the longstanding tension that has existed between the Free Exercise Clause and the Establishment Clause. Some have argued, for example, that in compelling the state to provide unemployment benefits to those who terminate employment for religious reasons, the Court is facilitating the establishment of religion.[260] The Court had earlier rejected this argument in *Sherbert v. Verner*,[261] holding that the extension of benefits under such circumstances "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."[262]

The dilemma is this: If the state refuses to provide benefits to a claimant like Eddie Thomas, who objects on religious grounds to participating in the production of weapons, it is prohibiting the free exercise of religion; yet in providing such benefits, it might also be seen as providing aid to religion in violation of the Establishment Clause.[263] In his dissent in *Thomas v. Review*

259. *Id.* at 454. For an interesting discussion of how *Roy* and *Lyng* contribute to jurisprudence and an understanding of "substantial burden" in particular that fundamentally misunderstands the nature of Native American religion, see Michael D. McNally, *From Substantial Burden on Religion to Diminished Spiritual Fulfillment: The San Francisco Peaks Case and the Misunderstanding of Native American Religion*, 30 J.L. & RELIGION 36, 36–37 (2015) (describing an en banc Ninth Circuit decision in which the production of artificial snow using treating sewage on a sacred mountain did not amount to a "substantial burden" for Native American communities alleging violation of RFRA because its sole effect was on their "subjective spiritual experience" and thus amounted merely to "diminished spiritual fulfillment" (quoting Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1113 (9th Cir. 2007))). Because the framework proposed in this Article focuses not on the question of burden or the degree of harm imposed but instead on the role played by one's exercise of religion, the distinction between religious freedom and supposed mere spiritual fulfillment is less relevant.

260. Indeed, the lower court in *Thomas v. Review Board of the Indiana Employment Security Division* had held that "awarding unemployment compensation benefits to a person who terminates employment voluntarily for religious reasons, while denying such benefits to persons who terminate for other personal but nonreligious reasons, would violate the Establishment Clause of the First Amendment." 450 U.S. 707, 713 (1981). Ultimately, the *Thomas* Court rejected this argument, citing *Sherbert v. Verner*, holding that Indiana's denial of unemployment compensation benefits to petitioner, a Jehovah's Witness who quit his job because his religious beliefs forbade participation in production of weapons, violated his First Amendment right to free exercise of religion. *Id.* at 719–20.

261. 374 U.S. 398 (1963).

262. *Id.* at 409.

263. *See* MICHAEL MCCONNELL, RELIGION AND THE CONSTITUTION 121 (2011) ("If there is a constitutional requirement for accommodation of religious conduct, it will most likely be

Board of the Indiana Employment Security Division,[264] Chief Justice Rehnquist argued that such "tension" was a result of interpreting each Clause too broadly.[265] He would have held, in contrast, that when a state has enacted a general statute designed to further the state's secular goals, the Free Exercise Clause does not require the state "to conform that statute to the dictates of religious conscience of any group."[266]

Viewed through the lens of protective and projective identity claims, the state's decision to provide Thomas with benefits may be easier to reconcile. Refusing to provide Thomas benefits would be akin to coercion and would impose on his individual ability to define and act in accordance with his own religious identity. By providing benefits, the state makes no statement with regard to the religious identity of others; it is merely allowing Thomas to protect his religious identity as exercised internally. It is relevant also that in deciding to terminate his employment, Thomas limited the exercise of his religious identity to the individual sphere. Unlike Kim Davis, the court clerk who refused to issue marriage licenses to same-sex couples, he made no attempt to conform the workplace to his religious identity or to impose his religious identity on others.

Another means of resolving the supposed tension referenced in *Sherbert* is by recognizing a common theme between the Free Exercise and Establishment Clauses: the notion that neither individuals nor the state can exercise religion or religious identity by imposing it on others.[267] William Marshall has argued, for example, that we might understand the Establishment Clause as proscribing "[g]overnment action that is perceived as furthering religious identity" and "[g]uarding against the state's being captured as a vehicle to promote religious identity."[268] Thus, a prohibition on projective religious identity claims would be in alignment with the Establishment Clause, as the Clause is opposed to the promotion or projection of one religious identity such

found in the Free Exercise Clause. Some say, though, that it is a violation of the Establishment Clause for the government to give any special benefit or recognition to religion. In that case, we have a First Amendment in conflict with itself—the Establishment Clause forbidding what the Free Exercise Clause requires.").

264. 450 U.S. 707 (1981).

265. *Id.* at 722.

266. *Id.* at 723.

267. *See* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions From the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 356–71 (2014) (emphasizing that religious externalities—the burden on third parties—is not just a free exercise problem, but a longstanding concern of the Establishment Clause problem as well).

268. Marshall, *supra* note 9, at 399.

that it infringes on the religious identities of others or obstructs others from exercising their legal rights.[269]

Under the protective-projective framework described in this Article, the cases discussed in this Part do more than attempt to define or pursue identity in the personal sphere. Instead, they provide examples of imposing identity onto other individuals, the government, or existing legal structures. Thus, these claims would not survive the threshold inquiry advocated herein and would be rendered non-cognizable under the First Amendment.

C. Application of the Protective-Projective Distinction

In recent years, the Court has demonstrated a willingness to legitimize claims that transgress the protective-projective distinction suggested by the Court's earlier religion jurisprudence. As Mary Anne Case has observed, the Court's recent cases have "vastly increased the ability of the religious to exert control over public governmental space and resources."[270] One response to this phenomenon might be to cabin such claims to the personal sphere, without casting judgment on the substance of the claim itself. If claims of religious identity attempt to dictate relationships between others or occupy the role of law, they should not warrant constitutional protection under the First Amendment.

One such claim was raised in the case of *Elane Photography, LLC v. Willock*,[271] decided by the New Mexico Supreme Court in 2013. In this case, Elane Photography refused to photograph a wedding ceremony between Vanessa Willock and Misti Collingsworth.[272] Willock subsequently filed a complaint with the New Mexico Human Rights Commission, claiming that the refusal constituted a violation of the New Mexico Human Rights Act (NMHRA), which protects against discrimination on the basis of sexual orientation.[273] In response Elane Photography argued, among other things, that the NMHRA violated its right to freely exercise its religion.[274]

269. This might appear to some as equivalent to the promotion or projection of secularism, to the exclusion of religious identity. While this Article does not find that categorization objectionable, the main intention is not to promote secularism over religious identity, but instead to prevent religious identity from overreaching.

270. Mary Anne Case, *Why "Live-and-Let-Live" Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463, 475 (2015).

271. Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013).

272. *Id.* at 59–60.

273. *Id.* at 58–60.

274. *Id.* at 60.

Elane Photography argued that it had not discriminated against the couple; instead, the business explained, it "did not want to convey through [the co-owner and lead photographer]'s pictures the story of an event celebrating an understanding of marriage that conflicts with [the owners'] beliefs."[275] In its brief on appeal from the adverse decision of the New Mexico Human Rights Commission, the company argued that it had never "refuse[d] to take photographs of people because of their sexual orientation."[276] The brief then went on to describe the owners and photographers' (the Huguenins) identity as Christians and the "strong moral and philosophical beliefs" that accompany that identity, including the beliefs that marriage should be defined as between a man and a woman and that "marriage defined as one man and woman is the best way to benefit, protect and enhance a society, its families and its individual members."[277]

What the Huguenins articulated is a definition of self, which by extension is a definition of their company identity, but also a vision for how the world should be—including a vision as to what types of romantic and legal relationships are appropriate. The brief also explained that due to their "moral, philosophical and religious beliefs about the definition of marriage, the owners and photographers of Elane Company will not photograph any situation that will communicate a view that contradicts or conflicts with the owners' beliefs about the definition of marriage."[278] Thus, the Huguenins wish to conduct their business in a manner that does not undermine or challenge their identity.

The court's discussion of this argument takes the religious objection at face value, and then focuses on the nature of the discrimination and its effect on the plaintiffs. The court characterized the company's argument as an "an attempt to distinguish between an individual's status of being homosexual and his or her conduct in openly committing to a person of the same sex" and holding that a status-conduct distinction in this context is untenable.[279] As to the free exercise claim specifically, the court found that the NMHRA was a neutral law of general applicability, and that Elane Photography had not adequately briefed the argument that its free exercise and compelled speech claims

275. *Id.* at 61.
276. Appeal From the Decision and Final Order of the New Mexico Human Rights Commission at 2, Elane Photography v. Willock, 309 P.3d 53 (N.M. 2013) (No. CV-2008-06632).
277. *Id.*
278. *Id.* at 3.
279. *Elane Photography*, 309 P.3d at 61. As a result, the court rejected as irrelevant Elane Photography's claim that it would photograph a gay person in a single-person portrait because that photograph would not reflect the client's sexual preferences. *Id.*

created a "hybrid-rights" situation that might render such a law unconstitutional.[280]

Instead of assuming the applicability of the Free Exercise Clause and then applying a *Smith*-type analysis or weighing the company's rights against that of the couple, the court might—under the framework described in this Article—have viewed Elane Photography's refusal as non-cognizable under the Free Exercise Clause. The right to free exercise entitles Elane Photography, as well as its owners and employees, to associate and identify with a religious faith that objects to same-sex weddings and other demonstrations of sexual preference. And it protects their ability to engage as individuals or with others of the same faith in customs and practices that are part of that religion. Yet what the owners seek in the instant case is something different: The aspect of identity for which they seek accommodation relates only to whether and how others' relationships are recognized by the law. While they have framed that belief as an aspect of their personal identity,[281] it is ultimately other-regarding and falls squarely within the realm of what law is intended to govern—the way in which others may permissibly relate.

To the extent that such individuals—or the corporation that they have created—wish to impose that value structure on others or displace the law in that realm, their actions constitute a projective exercise of religious identity and should not be protected by the First Amendment.[282] This is distinct from religious expression, which is a means of conveying one's own beliefs to others.[283] The exercise of religious identity exemplified by cases like *Elane Photography* is not merely the conveyance of one's ideas or values—for example,

280. *Id.* at 72–76; *see also supra* note 216 and accompanying text. The court spends a few lines debating whether Elane Company, as a limited-liability corporation, even has free exercise rights; finally, it proceeds by explaining that even if it does have such rights, they have not been violated here. *Elane Photography*, 309 P.3d. at 72–73.

281. What if it is critical to the formation and pursuit of one's personal identity that one impose that identity on others? Such a question clearly tests the boundaries of the protective-projective framework. For the framework to remain effective, it must necessarily adopt a more individualized definition of identity—arguably, a definition in line with the Supreme Court's view of identity, *see* LUCAS, *Undoing Race?*, *supra* note 11, at 1284–85, 1288—that would define such a claim as inherently projective and thus non-cognizable.

282. This is not to suggest that the Huguenins should be forced to take such pictures, only that to the extent they wish to engage in the wedding photography business, they will have to comply with the law—including its antidiscrimination provisions—and cannot be exempted from it on the basis of religion.

283. Also distinguishable is the case of individuals or groups for whom proselytizing is a critical part of their religion and, subsequently, of their religious identity. Nothing in the framework suggested in this Article would prevent those individuals from expressing their faith or attempting to convert others. That is distinct, however, from legally imposing one's beliefs on others or attempting to structure the world in which others operate.

perhaps it would be permissible for Elane Photography to hang a poster espousing such values in its store—but goes further by obstructing the way in which the law relates not just to them, but also to others.[284]

To contrast this type of claim with those described as protective in nature, one might compare the Huguenins' claim to Yoder's claim. Yoder believed it would contradict his religious identity (and, arguably, that of his children—see the caveat in note 193) to send his children to public or private school. The Huguenins argue that it would contradict their religious identity to serve same-sex couples, given their belief that such relationships are immoral. Yoder's claim does not necessarily imply anything generally about the soundness or appropriateness of a formal education requirement and, more important, his claim does not dictate how it should apply to others. In contrast, while the Huguenins' claim is also framed as one based on religious identity, the belief or aspect of identity they are purporting to protect focuses specifically on how others relate to one another. In that sense, their claim—or use of religious identity—is other-regarding rather than internally focused (such as concentrating on the way in which one educates oneself or one's children or on the types of relationships one chooses to enter).

In some ways, it may be difficult to distinguish the Huguenins' claim from Yoder's: Both parties could be viewed as seeking an opt-out that reflects a critique of how other people relate. In Yoder's case, for example, the request for an exemption may be just as much a critique of compulsory formal education as it is a means of protecting the Amish tradition. And, in both cases, one might argue that the only effect on others is indirect, or a result of downstream consequences. While allowing an unlimited number of exemptions would imperil access to services, as a practical matter the same-sex couple can simply hire another wedding photographer, and the formal education system will still

284. With credit to Jules Epstein, it is interesting to consider the following hypothetical and how it would be treated under the protective-projective framework: What if a Muslim witness in a criminal trial wears a burqa, which obscures her face and makes it difficult for the judge to fully observe her demeanor? Assuming it is viewed as part of her religious tradition, does her personal decision to wear the burqa (and to seek an accommodation toward that end) impose on other actors involved in the trial or on the criminal justice system more generally such that it should be deemed projective? This hypothetical is demonstrative of the reality that every framework used to limit religious freedom claims will create a gray area and result in hard questions. Rather than try to avoid those questions, which are inevitable regardless of approach, we should ensure that the framework chosen results in the *right* hard questions—in other words, those questions that are truly difficult to resolve as a substantive matter and not those that are unclear as to result only because of how the inquiry is structured.

govern most children without any noticeable impact.[285] In that sense, *Elane Photography* does present perhaps the greatest test of the protective-projective framework. The most relevant distinction between the two—and a determinative one, in the context of this framework—is the fact that the Huguenins' claim aims to protect belief as it relates to the activity of others. In doing so, it effectively interferes with the application of the law not just to the Huguenins themselves (as an exemption or opt-out should), but to others as well. The protection provided by antidiscrimination laws like the NMHRA that would otherwise apply to same-sex couples like Willock and Collingsworth is eviscerated by the Huguenins' exercise of their religious freedom.[286] In contrast, Yoder's claim creates no similar problem: There is no parallel legal protection that is displaced in light of Yoder being granted an exemption.

The identity-based nature of the claims described here is distinct from, but shares some similarities with, the complicity-based conscience claims described by Douglas NeJaime and Reva Siegel.[287] According to NeJaime and Siegel, some of the recent religious free exercise claims described above—such as the refusal to provide contraceptive coverage within health insurance plans—are complicity-based conscience claims. They view the claimants in cases such as *Hobby Lobby* as contending that the provision of insurance coverage "would make them *complicit* with employees who might use the insurance to purchase forms of contraception that the employers viewed as sinful."[288] Similarly, those who oppose same-sex marriage for religious reasons claim that any involvement in such a union, whether it entails officiating the ceremony or baking a

285. As in the case of *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), the mere existence of downstream consequences that will ultimately have a minor systemic impact or effect on others is distinguishable from those actions that directly affect others. *See supra* note 200 and accompanying text.

286. The notion that religious exemptions are less palatable in the context of antidiscrimination is not a novel one. For example, in cases like *Loving v. Virginia*, 388 U.S. 1 (1967), and *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Supreme Court has refused to allow "religious exemptions to obviate anti-discrimination law." Shannon Gilreath & Arley Ward, *Same-Sex Marriage, Religious Accommodation, and the Race Analogy* (Wake Forest Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 2748565, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748565 [https://perma.cc/U8PH-B4BB]. As Gilreath and Ward note, laws "aimed at the inequality harms of inferiority and 'exclusion'" are more directly undermined by religious exemptions that tolerate or facilitate discrimination. *Id.*

287. NeJaime & Siegel, *supra* note 77, at 2516; *see also* Kaveny, *supra* note 24, at 20 (noting a "distinction between laws which require agents themselves to commit what they believe to be wrongdoing, and laws which require them to be somehow connected to the wrongful acts of other persons").

288. NeJaime & Siegel, *supra* note 77, at 2518.

wedding cake, makes them complicit in sinful conduct.[289] While the focus on identity described here is distinct from the notion of complicity, the two are related: One reason that complicity may be problematic is because of the implication that one's actions reflect back on one's own identity. Yet, as NeJaime and Siegel agree, there must be some limit on what will be protected under the guise of such claims.

NeJaime and Siegel explain that complicity-based conscience claims concern third-party conduct and are also "claims about how to live in a community with others who do not share the claimant's beliefs, and whose lawful conduct the person of faith believes to be sinful."[290] Thus, they "support accommodating claims for religious exemption, but only on the condition that their accommodation does not impair attainment of major societal goals or inflict targeted material or dignitary harms on other citizens."[291] This approach therefore focuses primarily on the effects of accommodation, rather than the manner in which identity is being exercised. While the first part of the statement—impairment of major societal goals—is reflective of concerns motivating the protective-projective framework (namely, that identity will be used to obstruct operation of the law as applied to others), the second part of the statement diverges by focusing purely on the harm inflicted rather than the role identity is playing.

It may be that the types of claims articulated in the context of contraceptive coverage and same-sex marriage present unique concerns about third-party harm.[292] Erwin Chemerinsky and Michele Goodwin have argued, in a different context, that "people should not have the right to inflict injury on

289. *Id.* at 2560–63. NeJaime and Siegel explain how the same reasoning may extend to justify the refusal to provide health insurance that covers employees' same-sex spouses. *Id.* at 2563. Marty Lederman has pointed out that the governments in question in such cases often "do not choose to challenge the sincerity of the ever-evolving theories of complicity." Posting of Marty Lederman, lederman.marty@gmail.com, to conlawprof@lists.ucla.edu (Sept. 8, 2015, 6:29 PM) (on file with author).

290. NeJaime & Siegel, *supra* note 77, at 2519.

291. NeJaime & Siegel, *supra* note 27, at 3–4; *see also* Nelson Tebbe et al., *When Do Religious Accommodations Burden Others?*, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY (Susanna Mancini & Michel Rosenfeld eds.) (forthcoming 2017) (manuscript at 2–4) (defending and attempting to define the metric of third-party harm as a means for assessing the legality of religious accommodations, which the authors argue must reference substantive and normative values).

292. *See* NeJaime & Siegel, *supra* note 77, at 2519; *see also id.* at 3 ("[W]e call for special scrutiny of [complicity-based conscience claims] because of their distinctive capacity to harm other citizens.").

others in the name of free exercise of religion."[293] They argue that many of the cases in which the Court protected the free exercise of religion can be distinguished from cases like *Hobby Lobby* because, in those cases, no one was hurt.[294] Basing the constitutionality of one's action on the harm experienced by others raises a number of other questions, however, such as: What type or degree of harm will justify the restriction of others' rights—must it be material or physical harm, or is emotional or psychological harm sufficient?[295] Ultimately, the question of how religious identity is being exercised—whether is it oriented inward, aimed solely at preserving the individual's identity, or whether is it other-regarding, focused on how others relate to each other or to the government—may be more objective and also more tractable because it does not require the same types of subsequent judgments.[296]

What would an identity-based framework make of the argument by such a claimant that certain laws force her to be complicit in others' immoral behavior or force her to engage in action that may cause others to perceive her identity in a different or inaccurate way? There must be some limit to this line of argument—otherwise society would be unable to construct a secular legal system capable of effectively governing the relationships among individuals and groups.[297] One such limit might be to characterize certain religious beliefs as falling inside or outside the substantive realm of constitutionally protected religious exercise—for example, by challenging the validity or credibility of an individual's substantive religious belief. Arguably, that approach would be more offensive to the notion that each individual should be able to define and pursue his or her own religious identity. Another limiting principle, as suggested above,

293. Chemerinsky & Goodwin, *supra* note 191, at 23 ("As a normative matter, we believe that the freedom of one person ends when it inflicts an injury on another."). In their essay, which is a review of Paul Offit's book BAD FAITH: WHEN RELIGIOUS BELIEF UNDERMINES MODERN MEDICINE (2015), they focus primarily on parents' invocation of religious freedom to deny critical medical care to their children. *Id.* at 2–3.

294. *Id.* at 30.

295. Ultimately, NeJaime and Siegel would recognize both dignitary and material harm. NeJaime & Siegel, *supra* note 77, at 2566.

296. It is also possible, unless harm is interpreted in a fairly broad manner, that a claim based on harm could be undermined by the availability of reasonable alternatives. For example, if a same-sex couple can obtain a cake at any other bakery, arguably there is no material harm and some might question whether the dignitary harm resulting from the anomalous decision by one baker to refuse service is sufficient to define a constitutional violation.

297. *See* Brief for the Federal Respondent at 14, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171 (2011) (No. 10-553), 2011 WL 3319555 at *14 (arguing that the petitioner's request for a categorical ministerial exception "would critically undermine the protections of the ADA and a wide variety of other generally applicable laws").

might recognize only those claims that do not impose substantial harms or burdens on third parties.[298]

To the extent such claims are grounded in or are manifestations of religious identity, a third approach—and the one that is the focus of this Article—might concentrate on how identity operates in the context of the claim. To the extent the Huguenins seek an exemption from existing law that governs relationships between individuals, they are relying on identity not only to justify differential treatment of themselves, but also to displace a legal framework with competing ends. In the case of Kim Davis, the county court clerk, the case is even clearer: Not only is she attempting to project an aspect of religious identity that relates to others, she is doing so as a government employee whose role is to facilitate operation of the law. In refusing to issue marriage licenses to same-sex couples, her use of religious identity to obstruct the application of the law to others could not be more explicit.

Concerns about third-party harm are not the primary focus of the protective-projective distinction. The question of how individuals can live in a community with those who have different beliefs is a common concern; one way of responding to that concern may be not to selectively allow accommodations depending on their effect, but instead to maintain boundaries around the operation of identity and the operation of law. The individual should retain control over her identity within the internal sphere, and the Constitution should enable her ability to do so; yet in the external sphere, the protection of her identity cannot trump forces that properly govern relationships among individuals and groups.[299]

Under the framework described in this Article, individuals and groups can permissibly use identity to enforce their ability to conduct their own lives or organizational missions in a certain way—for example, to observe the Sabbath or follow a specific diet. But when they attempt to impose their identity on others or to interfere with the law's ability to govern others (and therefore

298. For a discussion of the difficulties inherent in assessing third-party harm in the religion context, see generally Christopher C. Lund, *Religious Exemptions, Third-Party Harms and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375 (2016) (discussing, inter alia, issues regarding the magnitude, likelihood, and significance of third-party harm).

299. Enforcement of the protective-projective framework need not be limited to the courts. It is also possible that the framework could be implemented through non-judicial means, by structuring the decisions of private actors who influence the political feasibility of such laws. For example, private entities have helped to facilitate gubernatorial vetoes of religious liberty laws that infringe on the rights of sexual minorities by refusing to invest or hold events in such states. *See, e.g.*, Jonathan M. Katz & Erik Eckholm, *Laws Blocking Gay Rights Efforts Bring a Backlash in Two Southern States*, N.Y. TIMES, April 6, 2016, at A13, http://www.nytimes.com/2016/04/06/us/gay-rights-mississippi-north-carolina.html.

indirectly impose their identity on others), such use should not give rise to a constitutional claim. The first example falls solidly within the realm of that which identity is intended to protect: self and organizational definition in the internal sphere. Under the second formulation, identity begins to encroach on the realm of law, which governs the external sphere and relationships among individuals and groups.

To contrast the two: Seeking an accommodation to observe the Sabbath would be permissible, but requiring all employers to follow such a policy would not. Requiring that all students be served the same meal, preventing some students from adhering to a kosher diet, would not be permissible, nor would mandating that the school adhere to kosher guidelines for all meals served to all students. Yet a school could not permissibly refuse to provide some accommodation for an individual student following a kosher diet. The line drawn is not unlike the line regarding multiracial identity: Multiracial individuals should be allowed to conceive of their racial identity as they wish on an individual level within the internal sphere, yet they must cede when required to the law's need to conceive of their race in a more generalized manner for purposes of constructing government policy.[300] And while the multiracial view of racial identity may suggest a world in which racial boundaries are more fluid, that should not trump the law's ability to deconstruct barriers grounded in racial identity that remain quite rigid.[301] While adherents to a specific religious identity are free to pursue that identity in the personal sphere, and must be allowed accommodation where necessary to do so, such identity cannot be used to conform the law to individual ends.

Consider, as an example, the claim made by Christopher Peterson in *Peterson v. Wilmur Communications, Inc.*[302] Peterson was a member of the World Church of the Creator and adhered to a belief system called "Creativity," the "central tenet of which is white supremacy and the belief that 'what is good for white people is the ultimate good and what is bad for white people is the ultimate sin.'"[303] Peterson claimed that his employer demoted him on the basis of his religious beliefs in violation of Title VII after a local newspaper ran an article

300. *See supra* note 38 and accompanying text.

301. Lucas, *Undoing Race?*, *supra* note 11, at 1294–96, 1300–01 (warning against using identity as a driving force for legal frameworks and contending that the state's ability to ensure equal protection should not be confined by any individual's conception of his or her racial identity).

302. 205 F. Supp. 2d 1014 (E.D. Wis. 2002).

303. Jane M. Ritter, *The Legal Definition of Religion: From Eating Cat Food to White Supremacy*, 20 TOURO L. REV. 751, 754 (2004) (quoting *Peterson*, 205 F. Supp. 2d at 1016). Ritter notes that the Creativity doctrine is captured in "two written texts, one of which is titled *The White Man's Bible*." *Id.*

interviewing Peterson about his beliefs.[304] In evaluating his claim, the district court assumed the task of determining whether Peterson's beliefs amounted to "religion," ultimately concluding that Creativity did in fact "function" as a religion for Peterson and that his beliefs in the religion were "sincerely held."[305] Thus, an employer could not discriminate against Peterson for harboring such beliefs or affiliating himself with Creativity. Doing so might be seen as infringing on Peterson's right to adhere to a specific set of religious beliefs, which may be an integral component of his religious identity. This is in line with a protective view of religious identity, as the employer's action—which penalized Peterson for his religious beliefs—was aimed at Peterson's ability to exercise his identity within the internal sphere. He was also being treated differently because of his identity, a harm that has obviously been found cognizable in other contexts, like race and gender.[306]

Imagine, however, that Peterson wished to object on religious grounds to his employer's decision to close the office in observation of Martin Luther King Day. The harm for Peterson in such an example would be based on his ability to project his religious identity on others: His employer's action in honoring the holiday would have no effect on how his religious identity is exercised internally. The reason such a decision might be offensive to Peterson is because it contradicts the principles of Creativity, yet this Article suggests that Peterson should not find support in the Religion Clauses to defend his right to impose his religious beliefs on others.

CONCLUSION

Identity is a complicated and personal endeavor. In that respect, religious identity shares much in common with other forms of identity. Thus, in the context of legal claims based on religious identity, similar boundaries should be maintained around the relative roles of identity and law. When individuals or groups attempt to protect the definition or pursuit of their own identity within the internal sphere, the law should help them do so; when, however, they attempt to use identity to co-opt or displace the role of law outside of that realm, the law should resist and the Constitution should not enable them. Recognizing the limited reach of religious identity can avoid the necessity for a more intrusive role on the part of law in defining and interpreting identity itself and help to reconcile the preservation of religious identity with the realities of a religiously pluralistic society.

304. *Id.*
305. *Peterson*, 205 F. Supp. 2d at 1019, 1022.
306. *See, e.g.*, *supra* note 29 and accompanying text (discussing Title VII).