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God is a Woman: Feminism as a Religion Protected Under the Free Exercise Clause of the First Amendment

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GOD IS A WOMAN: FEMINISM AS A RELIGION PROTECTED UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

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INTRODUCTION

I trace the origin of my idea for this piece to the 2014 United States Supreme Court decision in *Burwell v. Hobby Lobby*.[1] The Court had just decided that a for-profit corporation could exercise religion and therefore that requiring a corporation to cover the cost of contraception for its employees violated the corporation's rights under the Religious Freedom Restoration Act.[2] The Court's decision made me wonder about the religious beliefs of Hobby Lobby's employees and why the corporation's "sincerely-held beliefs" were deemed more important than those of its workers.

Our courts seem willing to throw the weight of the law behind religion above all else. Just this last year, the Supreme Court ruled in favor of the baker in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, despite the fact that he had violated Colorado's neutral and generally-applicable Anti-Discrimination Act (the Act) by refusing to bake a wedding cake for a gay couple.[3] Like others of its kind, the Act was enacted by Colorado as a remedial measure designed to prevent precisely the type of discrimination committed by the baker in this case. However, because of a comment made by one of the members of the Colorado Civil Rights Commission while adjudicating the baker's case, the Court concluded that the Commission had treated the baker unfairly, and had demonstrated hostility toward his sincerely-held beliefs.[4] Therefore, it held that application of the Act to the baker in this case violated his right to the free exercise of his religion.[5] In *Masterpiece*, one commissioner's "disparaging" comment about the historical use of religion to justify discrimination was enough to outweigh the state's interest in preventing discrimination against

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

2. *See id*. at 2785.

3. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n., 138 S. Ct. 1719, 1740 (2018).

4. Amy Howe, *Opinion Analysis: Court Rules (Narrowly) for Baker in Same-Sex-Wedding-Cake Case [Updated]*, SCOTUSBLOG (June 4, 2018, 2:17pm), http://www.scotusblog.com/2018/06/opinion-analysis-court-rules-narrowly-for-baker-in-same-sex-wedding-cake-case/.

5. *Id*.

LGBTQ people.[6]

Hobby Lobby and *Masterpiece Cakeshop* highlight current tensions in the United States between Christian conservative groups and proponents of reproductive rights and LGBTQ rights.[7] A prominent example of this conflict is when medical providers refuse to provide certain types of healthcare based on their religious beliefs. Providers and institutions are given broad leeway for such refusals under what are commonly known as "conscience clauses" codified in state and federal laws.[8] Under many such conscience exemptions, entire hospitals, healthcare systems, clinics, or practice groups may refuse to provide treatment, information, or even referrals to patients based on the religious beliefs of the institution's owners or governing body.[9] These conscience exemptions almost exclusively protect institutions or individuals who *disapprove* of various types of reproductive healthcare (or other healthcare, such as certain end-of-life decisions).[10] The laws generally do not protect the religious values of doctors like Dr. Willie J. Parker, for example, who believes that he has a moral, ethical, and religious obligation to provide abortions.[11] They also do

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6. *See Masterpiece Cakeshop*, 138 S. Ct. at 1723, 1729, 1740. The commissioner pointed out that "[f]reedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the [H]olocaust . . . we can list hundreds of situations where freedom of religion has been used to justify discrimination," and stated that "to [him] it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others." *Id.* at 1729; *see also* Howe, *supra* note 4.

7. *See generally* Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839 (2014) (describing the "culture wars" between conservative religious leaders and individuals advocating in favor of contraception, abortion, and same-sex marriage, and proposing possible solutions).

8. *See* Sarah M. Stephens, *Freedom from Religion: A Vulnerability Theory Approach to Restricting Conscience Exemptions in Reproductive Healthcare*, 29 YALE J.L. & FEMINISM 93, 101 (2017). For example, in January 2018 the Health and Human Services Department proposed a new rule that would dramatically expand existing religious refusal provisions in a range of federal laws governing healthcare. *See* 83 Fed. Reg. 3880 (proposed Jan. 26, 2018) (to be codified at 45 C.F.R. pt. 88).

9. Stephens, *supra* note 8, at 106.

10. *Id*. at 111.

11. *Id*. (citing Willie J. Parker, *Why I Provide Abortions*, N.Y. TIMES (Nov. 18, 2015), https://www.nytimes.com/2015/11/18/opinion/why-i-provide-abortions.html). There is one federal statute, known as the Church Amendment, that does prevent medical facilities receiving certain federal funds from discriminating against an individual who provides (or refuses to provide) abortions. *See* Steph Sterling & Jessica L. Waters, *Beyond Religious Refusals: The Case for Protecting Health Care Workers' Provision of*

not protect the religious values and moral decision-making of the individuals *seeking* healthcare.

If the law is to shield religious beliefs closely and aggressively, it must do so in an even-handed way, rather than simply codifying certain well-known beliefs of majority religions.[12] In our current public discourse, religion has become almost synonymous with political conservatism and the backlash against the sexual revolution.[13] However, many Americans of all political persuasions are guided by deeply and sincerely-held moral, ethical, and religious beliefs, which have largely been left out of the religious freedom conversation.

As a Jew, Atheist, and Feminist, the *Hobby Lobby* decision led me to serious consideration of what protection the Constitution (or other laws) would provide for the moral and ethical beliefs that guide my own life. I sought to engage in a genuine discussion of what "religious freedom" should look like in an increasingly secular age.[14] For many women I know, Feminism provides a central set of values that do indeed guide their lives like a religion. In this Article, I argue that those beliefs should be protected like any other religion under the Free Exercise Clause of the First Amendment.

Section I of this article outlines the legal definition of religion used by United States courts. Section II defines Feminism, and gives a brief history of Feminism in the United States. Section III demonstrates how Feminism fits within each of the legal definitions of religion. Section IV provides examples of religious rights claims that might be brought by Feminists. Finally, Section V considers the problem of conflicting religious liberties, and proposes possible solutions.

Abortion Care, 34 HARV. J.L. & GENDER 463, 487-88 (2011).

12. This Article suggests that we reexamine the wisdom of allowing seemingly endless exemptions for religion in the law.

13. *See* Laycock, *supra* note 7, at 839.

14. According to the Pew Research Center, people who are religiously "unaffiliated" make up the third-largest "religious" group in the world. PEW RESEARCH CTR, THE CHANGING GLOBAL RELIGIOUS LANDSCAPE 8 (2017), http://assets.pewresearch.org/wp-content/uploads/sites/11/2017/04/07092755/FULL-REPORT-WITH-APPENDIXES-A-AND-B-APRIL-3.pdf. And while the United States remains relatively religious, my generation is considerably less religious than the generation before us. PEW RESEARCH CENTER, RELIGION AMONG THE MILLENNIALS 1 (2010), http://assets.pewresearch.org/wp-content/uploads/sites/11/2010/02/millennials-report.pdf. Academics have addressed the propriety of special religious liberties protections in a society with many nonbelievers, and have suggested that at the very least nonbelievers must be "integrated into the system of religious liberty." *See, e.g.*, Laycock, *supra* note 7, at 876.

I. DEFINING RELIGION

This section first explains the United States Supreme Court's definition of religion. Next, it outlines the definition of religion used by several United States Circuit Courts of Appeals. Finally, this section gives examples of non-traditional and non-theistic religions that have been recognized by the courts as qualifying for religious freedom protections.

A. The Seeger *and* Welsh *Definition of Religion*

The Supreme Court addressed the question of what constitutes religion in several cases decided in the 1960s and early 1970s. In *Torcaso v. Watkins*, decided in 1961, the Court struck down a Maryland statute requiring individuals to declare their belief in the existence of God in order to hold public office.[15] While the Court did not provide a definition of religion in *Torcaso*, the case established two important principles: first, that states cannot prefer religious believers over non-believers, and second, that the constitutional definition of religion includes non-theistic beliefs.[16]

The Supreme Court's current definition of religion came out of two cases involving conscientious objectors during the Vietnam War. In *United States v. Seeger*[17] and *Welsh v. United States*,[18] the Court considered a provision of the Secret Service Act that exempted from the military draft "those persons who by reason of their religious training and belief [were] conscientiously opposed to participation in war in any form."[19] The statute defined religion 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."[20] Although *Seeger* and *Welsh* were technically cases of statutory interpretation, they ultimately became constitutional holdings.[21]

In *Seeger*, the Court considered the claims of three men who had applied

15. 367 U.S. 488, 489 (1961).

16. *See id*. at 495.

17. 380 U.S. 163 (1965).

18. 398 U.S. 333 (1970).

19. *Seeger*, 380 U.S. at 164-65.

20. *Id*. at 165.

21. *See* Callahan v. Woods, 658 F.2d 679, 683 n.4 (9th Cir. 1981) ("Though it construed a statute rather than the Constitution itself, *Seeger* is often read as addressing constitutional limits inherent in the draft statute; the case is therefore applicable to First Amendment analysis generally."); *see also* Malnak v. Yogi, 592 F.2d 197, 207 (3d Cir. 1979) (referring to the selective service cases as constitutional cases that addressed the definition of religion).

for conscientious objector status and were denied. All three had asserted beliefs that led them to oppose war, but none professed belief in a "Supreme Being," as required by the Secret Service Act.[22] Mr. Seeger, for instance, stated that

> He preferred to leave the question as to his belief in a Supreme Being open, 'rather than answer 'yes' or 'no'; that his 'skepticism or disbelief in the existence of God' did 'not necessarily mean lack of faith in anything whatsoever'; that his was a 'belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.' He cited such personages as Plato, Aristotle and Spinoza for support of his ethical belief in intellectual and moral integrity 'without belief in God, except in the remotest sense.'[23]

The Supreme Court ruled unanimously in favor of all three *Seeger* plaintiffs. In doing so, the Court "embrace[d] the ever-broadening understanding of the modern religious community."[24] In its opinion, the Court quoted and discussed a range of writings from a variety of religious leaders: Protestant theologian, Dr. Paul Tillich; the Bishop of Woolwich, John A. T. Robinson; the Ecumenical Council; and "a leader in the Ethical Culture Movement," Dr. David Saville Muzzey.[25] The Court reasoned that the viewpoints of these leaders "demonstrate[d] very clearly the diverse manners in which beliefs, equally paramount in the lives of their possessors, may be articulated."[26]

Seeger recognized the difficulty of crafting a definition of religion that could encompass such a vast range of beliefs. The Court therefore came up with an "essentially . . . objective" test to determine whether a particular belief or set of beliefs constitutes religion: whether "the claimed belief occup[ies] the same place in the life of the [believer] as an orthodox belief in God holds in the life of one" clearly asserting religion.[27] The Court emphasized that, "[i]n such an intensely personal area . . . the claim of the [individual] that his belief is an essential part of a religious faith must be given great weight."[28] It also noted that "[r]eligious experiences which are as real as life to some may be incomprehensible to others," and explained

22. *See Seeger*, 380 U.S. at 166-70.
23. *Id*. at 166.
24. *Id*. at 180.
25. *Id*. at 180-84.
26. *Id*. at 183.
27. *Id*. at 184.
28. *Id*.

that the appropriate questions were whether a person's beliefs were "sincerely held," and "whether they [were], in his own scheme of things, religious."[29]

In *Welsh*, a divided Supreme Court applied the *Seeger* test to a conscientious objector who himself did not consider his beliefs religious. Welsh had crossed out the word "religious" on his Selective Service form, but stated that he "believe[d] that human life is valuable in and of itself," and that he therefore would "not injure or kill another human being."[30] Welsh stated that his belief was "not 'superior to those arising from any human relation,'" but was "essential to every human relation."[31] He asserted that he therefore could not "assume duties which [he felt were] immoral and totally repugnant."[32]

The Supreme Court held that Welsh's conscientious objector status should have been granted, even though Welsh himself did not characterize his beliefs as religious.[33] The Court went on to explain that, even if an individual's "deeply and sincerely [held] beliefs" were "purely ethical or moral in source and content," they would be considered religious if "those beliefs certainly occupy in the life of that individual a place parallel to that filled by God in traditionally religious persons."[34] Thus, because Welsh's beliefs "function[ed] as a religion in his life," the Court concluded that he was "as much entitled to a 'religious' conscientious objector exemption . . . as [was] someone who derive[d] his conscientious opposition to war from traditional religious convictions."[35]

Ten years after *Welsh*, the Supreme Court in *Thomas v. Review Board* provided further support for a broad, nuanced view of religion. *Thomas* upheld the right of a Jehovah's Witness to refuse to work building weapons because of his religious beliefs.[36] The plaintiff in that case was "struggling

29. *Id*. at 184-85.

30. Welsh v. United States, 398 U.S. 333, 343 (1970).

31. *Id*.

32. *Id*.

33. *Id*. at 341 (explaining that "[t]he Court's statement in *Seeger* that a registrant's characterization of his own belief as 'religious' should carry great weight . . . [did] not imply that his declaration that his views are nonreligious should be treated similarly," because most conscientious objectors were likely unaware of the Court's broad definition of religion).

34. *Id*. at 340.

35. *Id*.

36. *See* Thomas v. Review Bd., 450 U.S. 707, 707 (1981).

with his beliefs," and was not able to articulate them perfectly.[37] The plaintiff had shared his concerns with a co-worker and fellow Jehovah's Witness, who had advised him that the work in question was not "unscriptural."[38] Still, Thomas believed that his friend's view "was based upon a less strict reading of Witnesses' principles than his own," and nonetheless refused to do the particular work in question.[39]

In confirming the *Thomas* plaintiff's free exercise rights in this circumstance, the Supreme Court explained that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others," even others within the same religion, in order to be protected by the First Amendment.[40] The Court further stated that courts "should not undertake to dissect religious beliefs" because the believer might be "'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ."[41]

In sum, as is appropriate in a pluralistic society, Supreme Court jurisprudence has opened the door for constitutional recognition of a broad range of religious beliefs and moral codes of conscience. The "central consideration" as to whether an individual's beliefs are religious is "whether those beliefs play the role of a religion, and function as a religion" in the individual's life.[42]

B. The Third Circuit's Three-Factor Test for Recognizing Religion

The test articulated in *Seeger* and *Welsh* for religious beliefs has remained current since those cases were decided, and is generally followed by the United States Circuit Courts of Appeals. The Third Circuit, however, developed what it proposed as a more "objective" test in *Malnak v. Yogi*,[43] a similar version of which has been adopted by the Tenth Circuit as well.[44]

Malnak concluded that "the modern approach" to assessing religious beliefs should "look to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted

37. *Id*. at 715 (internal quotation marks omitted).
38. *Id*. at 711.
39. *Id*.
40. *Id*. at 714.
41. *Id*. at 715.
42. *See* Welsh v. United States, 398 U.S. 333, 339 (1970).
43. *See* Malnak v. Yogi, 592 F.2d 197, 199 (3d Cir. 1979).
44. *See* United States v. Meyers, 95 F.3d 1475, 1480 (10th Cir. 1996).

'religions.'"[45] The court outlined three "useful indicia" that are "basic to our traditional religions," and that are "related to the values that undergird the first amendment."[46] *Malnak* suggested that these indicia might be used by courts to assess whether a person's beliefs are "religious."

First, the court looked to whether a belief system grapples with and addresses "fundamental questions" such as "the meaning of life and death, man's role in the Universe . . . the proper moral code of right and wrong," and other such "imponderable questions."[47] Second, it examined whether the beliefs have a broad scope and comprehensive answers to ultimate questions.[48] The court explained that, like scientific theories, "moral or patriotic views are not by themselves 'religious,'" but that "if they are pressed as divine law or a part of a comprehensive belief-system that presents them as 'truth,' they might as well rise to the religious level."[49]

Third, and finally, *Malnak* assessed whether the asserted set of ideas has "any formal, external, or surface signs that may be analogized to accepted religions," such as "formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, [or] observance of holidays."[50] The Third Circuit noted, however, that "a religion may exist without any of these signs," and thus their absence cannot be determinative.[51] Indeed, the court cautioned that its three indicia would be "helpful" to courts in assessing whether a set of beliefs constitutes a religion, but that they "should not be thought of as a final 'test' for religion."[52]

C. Non-Theistic and Non-Traditional Religions Recognized by Courts

Our courts grant protection to "traditional," theistic religions far more often and more readily than to minority religions, particularly non-theistic religions. However, in *Torcaso v. Watkins*, the Supreme Court recognized, albeit in a footnote, that religions need not "teach what would generally be considered a belief in the existence of God" to qualify for First Amendment protection.[53] The Court gave examples of such non-theistic religions,

45. *See Malnak*, 592 F.2d at 207.
46. *Id*. at 207-10.
47. *Id*. at 208.
48. *Id*. at 209.
49. *Id*.
50. *Id*. at 209.
51. *Id*.
52. *Id*.
53. *See* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961).

including "Ethical Culture" and "Secular Humanism" among them.[54]

Further, numerous Circuit Courts of Appeals have recognized that non-traditional and non-theistic religions such as Satanism and Wicca qualify for protection under the Free Exercise Clause.[55] The Eight Circuit found that white supremacists associated with the Aryan Nation likely qualified for Free Exercise protections, explaining in its decision that "the fact that the notion of white supremacy may be, and perhaps usually is, secular . . . does not necessarily preclude it from also being religious in nature . . . ."[56] Finally, in *Kaufman v. McCaughtry*, the Seventh Circuit held that atheism qualifies as a religion under the Free Exercise Clause.[57]

As demonstrated in this section, the definition of religion used by our courts is far more expansive than the definition that would commonly be used by a layperson. Further, the constitutional definition of religion has been applied to a variety of belief systems not generally thought of to be religious. Thus, the fact that Feminism is not a traditional or theistic religion does not preclude its recognition under the Free Exercise Clause.

II. DEFINING FEMINISM

Like the label for any other belief system, the name "Feminism" applies to a broad range of particular beliefs and practices that stem from the central idea that men and women are equal and should be treated as such.[58] Just as most established religions have undergone significant changes throughout history and have broken out into different sects (for example, Christians have split into Roman Catholics, Protestants, and other denominations), Feminism has developed over time, and groups of Feminists conceptualize it

54. *Id*.

55. *See*, *e.g.*, Kunselman v. W. Reserve Local Sch. Dist., 70 F.3d 931 (6th Cir. 1995) (assuming that Satanism is a religion); Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373 (9th Cir. 1994) (assuming that Wicca is a religion); Dettmer v. Landon, 799 F.2d 929 (4th Cir. 1986) (holding that witchcraft is a religion).

56. *See* Wiggins v. Sargent, 753 F.2d 663, 667 (8th Cir. 1985).

57. *See* Kaufman v. McCaughtry, 419 F.3d 678, 682 (7th Cir. 2005) ("Atheism is, among other things, a school of thought that takes a position on religion, the existence and importance of a supreme being, and a code of ethics. As such, we are satisfied that it qualifies as [Plaintiff's] religion for purposes of the First Amendment claims he is attempting to raise."). The Supreme Court has also recognized constitutional protections for atheists under the Establishment Clause of the First Amendment. This is not dispositive of its view of Free Exercise claims by atheists, however, because the Court has held that the Establishment Clause also prohibits the government from favoring religion over *irreligion*.

58. CHIMAMANDA NGOZI ADICHIE, WE SHOULD ALL BE FEMINISTS 47 (2015).

differently.[59] Therefore, the Feminist historical events, ideals, and practices discussed herein are demonstrative, rather than comprehensive or exhaustive.

For the sake of clarity and comparison, the examples and analysis in this piece employ a relatively simplistic definition of Feminism, taken from Feminist Chimamanda Ngozi Adichie's *We Should All Be Feminists*: a Feminist is "a person who believes in the social, political, and economic equality of the sexes."[60]

This section offers a brief history of Feminist movements in the United States from the mid-nineteenth century to the present. It then describes a few of the most central beliefs and practices of Feminists.

A. A Brief History of Feminist Movements in the United States

Feminism as we think of it today began in Europe in the late eighteenth century, marked by literary works such as Mary Wollstonecraft's 1792 book, *A Vindication of the Rights of Woman*.[61] Feminism was fostered, in part, by the French Revolution of 1789.[62]

The first Women's Rights Convention in Seneca Falls, New York in 1848 is generally considered to mark the beginning of the organized Feminist movement in the United States.[63] Leaders of the Convention "rewrote the Declaration of Independence into their own Declaration of Sentiments, calling for full rights of citizenship for women . . . ."[64] The Declaration of Sentiments demanded equal access to education, jobs, and the right to vote. The Declaration also demanded that women be paid the same wages as men,

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59. *See, e.g.*, Karen Offen, *Defining Feminism: A Comparative Historical Approach*, 14 J. WOMEN CULTURE & SOC'Y 119, 123 (Autumn 1988).

60. ADICHIE, *supra* note 58, at 47.

61. ANTJE SCHRUPP, A BRIEF HISTORY OF FEMINISM 13-17 (2017); *Woman's Rights, in* FUNK & WAGNALLS NEW WORLD ENCYCLOPEDIA (2017). [hereinafter *Women's Rights*].

62. Schrupp, *supra* note 61, at 13, 17.

63. Offen, *supra* note 59 at 123; *see* Elle Covington, *On Women's Equality Day, A Very Brief Timeline of Feminist History in America*, BUSTLE (Aug. 26, 2015), https://www.bustle.com/articles/106524-on-womens-equality-day-a-very-brief-timeline-of-feminist-history-in-america (recognizing that "[w]e generally mark the beginning of the feminist movement in the United States as 1848," but extending the feminist historical timeline to include feminist acts by individual women starting in the 1630s).

64. *See generally* Covington, *supra* note 63; *see also* SCHRUPP, *supra* note 61, at 25-26.

which remains a central goal of the Feminist movement today.[65]

Scholars have used the metaphor of "waves" to describe different periods in the history of American Feminist movements.[66] While in many ways the label creates artificial and problematic divisions,[67] it can be helpful for demonstrating the ways in which Feminist beliefs and practices have evolved over the last two-hundred years.

The first "wave" of American Feminism focused on women obtaining the right to vote.[68] Starting in the late 1800s and early 1900s, a dedicated faction of American Feminists, known as suffragettes, fought a dramatic battle for women's right to vote.[69] They picketed the White House, were subjected to arrest and incarceration, and led prison hunger strikes in support of their cause.[70] Efforts by these suffragettes eventually lead to the ratification in 1920 of the Nineteenth Amendment to the United States Constitution, which gave women the right to vote.[71]

The second "wave" of American Feminism began in the mid-1960s, and focused on women's representation in the public sphere and on achieving legal equality with men.[72] During the 1960s, Feminists founded numerous organizations dedicated to advancing their values in society, including the National Organization for Women and the National Abortion and Reproductive Rights League.[73] During this time, Feminists also advocated for the passage of the Equal Rights Amendment to the United States Constitution, which sought to prohibit discrimination on the basis of sex.[74]

In 1963, Betty Friedan published her book, *The Feminine Mystique*, which described how women "were stifled in the home, undereducated, and treated as children."[75] In 1968, Alice Walker published her book, *The Color Purple*,

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65. *See generally* Covington, *supra* note 63.

66. *See* Amanda D. Lotz, *Communicating Third-Wave Feminism and New Social Movements: Challenges for the Next Century of Feminist Endeavor*, 26 WOMEN AND LANGUAGE 1, 2-3 (Spring 2003).

67. *See* SCHRUPP, *supra* note 61, at 79.

68. *Id*. at 39.

69. *See Women's Suffrage*, *supra* note 61.

70. *See* Covington, *supra* note 63.

71. *Id*.

72. *See* Lotz, *supra* note 66, at 3.

73. *Id*.

74. *See generally* Roberta W. Francis, *The History Behind the Equal Rights Amendment*, EQUAL RIGHTS AMENDMENT, https://www.equalrightsamendment.org/history (last visited Feb. 27, 2019).

75. *See* Covington, *supra* note 63.

which shared her experience of being a Black woman in a male-dominated society, and in light of a Feminist movement led and dominated by white women.[76] In 1971, Feminist leader, Gloria Steinem, founded *Ms*. magazine, which quickly became a platform for Feminists to spread their ideas to a wider and more diverse audience.[77] And in 1973, after years of advocacy on the subject by Feminist activists, the Supreme Court decided *Roe v. Wade*, which declared that, because the Constitution includes a fundamental right to private relationships between patients and doctors, states could no longer ban abortion.[78] The decision marked a significant victory for Feminists, who believe in women's right to control their own bodies and reproduction.[79]

The most recent or current era of Feminism, often referred to as the "third wave," began in the 1980s.[80] In the 1980s and 1990s, the formally organized and structured Feminist movement gave way to more individualized expressions of Feminism.[81] Women began defining their own versions of Feminism within the larger concept.[82] The 1990s were marked by women speaking out about issues that affected them on a personal level and that collectively hindered women's fight for equality.[83] Anita Hill spoke out about being sexually harassed by Clarence Thomas, who was nevertheless confirmed to the Supreme Court in 1991.[84] The "Riot Grrrl Manifesto" began a musical genre that called for the amplification of women's voices and addressed issues of violence against women.[85] In 1996, Eve Ensler's famous *Vagina Monologues* premiered, and the play would be performed on college campuses for two decades to follow.[86]

Beginning around the time of the *Roe v. Wade* decision, women of color advocating for reproductive freedom began to identify problems with the mainstream Feminist reproductive rights movement.[87] The "pro-choice"

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76. *Id*.

77. *Id*.

78. *See* Roe v. Wade, 410 U.S. 113, 115 (1973).

79. *Women's Suffrage*, *supra* note 69.

80. *See* Lotz, *supra* note 66, at 3-5.

81. Covington, *supra* note 63.

82. *Id*.

83. *Id*.

84. *Id*.

85. *Id*.

86. *Id*.

87. *See* Loretta Ross, *Understanding Reproductive Justice: Transforming the Pro-Choice Movement*, 36 OFF OUR BACKS 14, 16 (2006).

framework focused on the legality of abortion and privacy rights, but did not address the intersecting issues impacting communities of color.[88] Therefore, women of color developed a new conceptual framework around which to center their activism: Reproductive Justice.[89] Loretta Ross, co-founder of the Reproductive Justice organization SisterSong, defines Reproductive Justice as "the complete physical, mental, spiritual, political, social and economic well-being of women and girls, based on the full achievement and protection of women's human rights."[90]

Due to these efforts by women and Feminists of color, many third-wave Feminists have now begun to recognize the intersections of oppression based on sex, race, socio-economic class, sexual orientation, and gender-identity, among others.[91] As a result, many modern Feminists believe that women's liberation must necessarily also include efforts to combat oppression on the basis of other intersecting identities.[92]

Feminism has been an established collective system of belief and moral framework in the United States for over 150 years. While it is true that individual Feminists conceptualize the belief differently, Feminism has consistently stood for certain core principles, ideas about right and wrong, and about how humans should behave toward one another.

B. Core Feminist Beliefs and Practices

First and foremost, Feminists believe that women are equal to men, and should be treated as such. Feminists have consistently fought for equal pay, political power, access to education, and equality in domestic life, including the division of unpaid household labor and child rearing. Bodily autonomy is also a core Feminist belief, which has manifested itself in different

88. *Id.*

89. *Id.*; *see also* Kimala Price, *What is Reproductive Justice? How Women of Color Activists are Redefining the Pro-Choice Paradigm*, 10 MERIDIANS 42, 42 (2010).

90. *See* Ross, *supra* note 87, at 14; *see also What is Reproductive Justice?*, IF/WHEN/HOW, https://www.ifwhenhow.org/about/what-is-rj/ (last visited July 17, 2018) ("Reproductive justice will exist when all people can exercise the rights and access the resources they need to thrive and to decide if, when, and how to create and sustain their families with dignity, free from discrimination, coercion, or violence.").

91. *See* Lotz, *supra* note 66, at 3; *see* Ross, *supra* note 87, at 14 ("One of the key problems addressed by Reproductive Justice is the isolation of abortion from other social justice issues that concern communities of color: issues of economic justice, the environment, immigrants' rights, disability rights, discrimination based on race and sexual orientation, and a host of other community-centered concerns").

92. *See* Lotz, *supra* note 66, at 3.

practices and advocacy efforts. For example, Feminists believe that women deserve to be free from sexual harassment, unwanted sexual contact, and should be empowered to choose whether and when to have children—if they choose to have them at all. This belief in bodily autonomy has led Feminists to advocate for access to reproductive healthcare including contraception, abortion, and a range of birthing options.

Like generations of Feminists before them, many third wave Feminists have committed to living by Feminist principles in a way that permeates their everyday lives.[93] Core Feminist beliefs influence what jobs they take, what movies they watch, what relationships they enter into, how they raise their children, and how they behave toward others generally.[94] Although individual Feminists practice differently, and few would characterize it as such, Feminism qualifies as a religion under First Amendment jurisprudence because of how it operates in the lives of its adherents.[95]

III. FOR FREE EXERCISE PURPOSES, FEMINISM IS A RELIGION

Feminism is, for obvious reasons, generally thought of as a social and political movement, rather than as a religion. However, the Feminist movement is centered on core principles and ideas about morality and world order. Feminists attempt to live by a code of conduct that reflects their values and conforms with guidance from Feminist leaders and teachers. For many active members of the movement, Feminism involves holidays, rituals, and gatherings not dissimilar to religious worship.

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93. *See id*. at 6 (explaining that third wave feminism is applied at a personal level, so the individual is the site of self-determination). Because the legal definitions of religious belief are dependent on the place a belief occupies in the life of the holder, it is possible that Feminism might be a religion for some adherents, but not others.

94. For example, many Feminist parents start teaching their children at a young age about the absolute value of bodily autonomy and the mandate of consent as a prerequisite for physical contact. *See, e.g.*, Tanya Stabinsky, *12 Ways Parents Can Teach Their Children Consent*, EVERYDAY FEMINISM (Mar. 18, 2016), https://everydayfeminism.com/2016/03/parents-teach-children-consent/. Feminist parents also reject the notion of gendered toys or clothing, instead leaving the expression of gender identity fully open to their children. *See, e.g.*, Renee Davidson, *Put Down That Barbie! A (Non-Gendered) Gift Guide for Girls*, MS. (Dec. 13, 2012), http://msmagazine.com/blog/2012/12/13/put-down-that-barbie-a-non-gendered-gift-guide-for-girls/. *But see* Heather Wilheim, *Get Ready For The Feminist War On 'Gendered Toys'*, THE FEDERALIST (Dec. 17, 2014), http://thefederalist.com/2014/12/17/get-ready-for-the-feminist-war-on-gendered-toys/ (criticizing Feminist parenting practices).

95. *See* Welsh v. United States, 398 U.S. 333, 339-340 (1970) (noting that whether an individual adherent characterizes her beliefs as religious is not dispositive of whether those beliefs qualify as such for purposes of the First Amendment).

Further, regardless of whether Feminism would be considered a religion under a common understanding or colloquial definition of the concept, it fits within the more encompassing constitutional definition established by our courts. Feminism constitutes a religion under the Free Exercise Clause of the First Amendment using both the Supreme Court's *Seeger*/*Welsh* test and the *Malnak* test applied by the Third and Tenth Circuits.

As discussed in Section II, Feminism is like any other religion in that adherents hold varying beliefs within the framework, and practice their religion in different manners.[96] The Free Exercise Clause protects the beliefs and practices of individual adherents regardless of whether they are shared by other members of the same religion.[97] This Article does not unrealistically assume uniform practice among Feminists. Instead, because application of the *Seeger/Welsh* test requires examination of an individual claimant's beliefs, this section uses the example of one hypothetical practicing third-wave Feminist, Ruth, to demonstrate the ways in which Feminism might operate as a religion in the life of one such believer.[98] Application of the *Malnak* test, on the other hand, allows for a more generalized analysis of Feminism as a whole, in addition to examination of a specific adherent's beliefs.

This section first considers Feminism under the *Seeger/Welsh* test. Second, it analyzes Feminism using the *Malnak* test. Third, this section includes a brief discussion of Feminist Theology as a demonstration of the religious nature of Feminist beliefs. Finally, this section addresses the "slippery-slope" argument against recognizing non-traditional notions of religion under the First Amendment.

A. Feminism Qualifies as Religion under the Seeger/Welsh *Test*

Our hypothetical Feminist, Ruth, believes that the world will be better when women are allowed to achieve self-actualization, and are empowered to participate fully and equally in society. Therefore, she believes that it is

96. *See, e.g.*, ROXANE GAY, BAD FEMINIST xiii (2014) ("We don't all have to believe in the same feminism. Feminism can be pluralistic so long as we respect the different feminisms we carry with us . . . .").

97. *See* Thomas v. Review Bd., 450 U.S. 707, 715 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection . . . .").

98. It is also worth noting that a person need not be part of an organized group in order for her faith to be protected. *See* Vinning-El v. Evans, 657 F.3d 591, 593 (7th Cir. 2011). Therefore, even if Ruth's Feminism looks different from everyone else's, it may still qualify for religious freedom protections.

immoral to limit women to certain prescribed roles, jobs, or activities, and that to do so denies women's inherent value and human dignity. Further, she believes that in order for women to have true agency and ownership over their lives, they must be able to control their own bodies. Therefore, Ruth has a near-absolute belief in bodily autonomy. This belief is also shared by most Feminists and has been preached by many of the most influential Feminist leaders.[99]

In *Seeger* and *Welsh*, the Supreme Court addressed the particular belief that caused each plaintiff to object to military service. Under the Court's analysis, a person's belief is religious if it "occupies in the life of its possessor a place parallel to that filled by the God [in traditionally religious persons]."[100] For example, the Supreme Court found that Seeger's "belief in and devotion to goodness and virtue for their own sakes," which compelled him to refrain from participating in war, qualified as religious because it "imposed upon him a duty of conscience" akin to the type that would be communicated by a Supreme Being in theistic religions.[101] Therefore, the Court found that Seeger's belief occupied a place in his life similar to that filled by God in the lives of adherents to traditional religions.[102]

Similarly, Welsh believed in the inherent value of human life, which imposed upon him a moral duty to abstain from violence toward another person.[103] He held this belief "with the strength of more traditional religious convictions," such that his conscience "would give [him] no rest or peace if [he] allowed [himself] to become a part of an instrument of war."[104] The Supreme Court found that Welsh's objection to war was religious, in spite of the fact that his beliefs "[had] been formed by reading in the fields of history and sociology," and were "undeniably based in part on his perception of

99. *See, e.g.*, Sarah Begley, *Gloria Steinem on Playboy, Amy Schumer and When Not to Vote for Women*, TIME (Oct. 27, 2015, 8:28 AM), http://time.com/4085396/gloria-steinem-amy-schumer-playboy-book/; *What is Reproductive Justice?*, IF/WHEN/HOW, https://www.ifwhenhow.org/about/what-is-rj/ (last visited July 17, 2018); Wendy Lu, *17 Quotes About Reproductive Rights To Share On Facebook, Because Supporting Reproductive Health Care Is Everyone's Responsibility*, BUSTLE (Feb. 6, 2107), https://www.bustle.com/p/17-quotes-about-reproductive-rights-to-share-on-facebook-because-supporting-reproductive-health-care-is-everyones-responsibility-35427.

100. *See* United States v. Seeger, 380 U.S. 163, 176 (1965).

101. *See id*. at 166, 172.

102. *Id*.

103. *Id*. at 343.

104. *Id*. at 343-44 (internal quotation marks omitted).

world politics."[105]

Ruth's belief in bodily autonomy qualifies as religious under *Seeger*/*Welsh*. Ruth believes that to deny women bodily autonomy is to deny them basic human dignity, and views recognition of human dignity as a moral imperative. Ruth does not view her belief in bodily autonomy as being dictated by a supreme being. Rather, like Welsh's religious belief in the value of human life, Ruth's belief in the sanctity of women's bodies and the moral imperative of bodily autonomy is "not superior to those arising from any human relation," but is "essential to every human relation."[106] Thus, Ruth's beliefs impose upon her a moral duty to champion women's equality and to protect women's reproductive freedom, among other things.

Further, Ruth's strong conviction in the moral imperative of bodily autonomy is part of the broader teachings of Feminism. Although based in part on her understanding of history, sociology, and world politics, Feminism "function[s] as a religion" in Ruth's life.[107] Ruth strives to live her life in accordance with the principles of equality and universal human dignity, and makes decisions based on guiding Feminist tenets. While this leads Ruth to certain political positions and actions, it applies to an even greater extent in her personal decision-making and interpersonal relationships. For example, Ruth chooses her romantic partners carefully based on whether they will share her belief in gender equality, reproductive choice, and raising children without imposing prescriptive gender roles.[108]

Application to this hypothetical Feminist demonstrates that Feminism satisfies the *Seeger*/*Welsh* test for religion because it imposes moral duties upon adherents and functions as a religion in the lives of devout believers. Similarly, as described in the next section, Feminism satisfies the three-part test established by the Third Circuit in *Malnak*.

B. Feminism Qualifies as Religion under the Malnak *Three-Factor Test*

The Third Circuit's three-factor test focuses on the nature of religious beliefs, and the issues that they address. First, religions offer guidance on "[f]undamental and ultimate questions . . . having to do with, among other

105. *Id*. at 341-42 (internal quotation marks omitted).

106. *See id.* 343.

107. *See id*. at 339 (explaining that the "central consideration" as to whether beliefs are religious is "whether those beliefs play the role of a religion, and function as a religion" in the believer's life).

108. Compare Ruth to someone for whom it is important to marry within his or her own faith or to raise his or her children in the church.

things, life and death, right and wrong, and good and evil."[109] According to the Third Circuit, "above all else, religions are characterized by their adherence to and promotion of certain underlying theories of man's nature or his place in the Universe."[110] Feminism teaches that the subjugation of women is immoral. According to Feminist teachings, equal treatment of the sexes accords with the natural and inherent equality of men and women. In other words, men and women share equal place in the Universe, and "man's nature" is no different from woman's nature. Feminists aim to shed human constructs such as prescribed notions of gender and sex-based stereotypes for a more equitable and enlightened existence. Feminists have faith that a better world will exist when women share equal power with men in all aspects of their lives.[111]

Second, "[a] religion is not generally confined to one question or moral teaching . . . " but rather is a comprehensive belief system offering answers to multiple "ultimate questions."[112] At first glance, the simple belief that men and women are equal might appear to be an "isolated answer," of the type not considered to be religious under *Malnak*. However, from that core principle springs a myriad of other beliefs and practices, as discussed in Section II.A. This is particularly true for Feminists whose practice includes the more encompassing Reproductive Justice framework.[113]

Finally, the *Malnak* test considers whether a set of ideas has "any formal, external, or surface signs that may be analogized to accepted religions."[114] The Feminist movement has comprehensive theologies that have been

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109. *See* Africa v. Pennsylvania, 662 F.2d 1025, 1033 (3d Cir. 1981); *see also* Malnak v. Yogi, 592 F.2d 197, 208 (3rd Cir. 1979) (Adams, J., concurring).

110. *Africa*, 662 F.2d at 1033 (internal quotation marks and citation omitted). It is somewhat ironic, from the perspective of religious Feminism, that the court's definition of religion itself considers "man's" nature and "his" place in the Universe.

111. The idea of creating a better present world (as opposed to focusing on the afterlife) is undoubtedly among the chief pursuits of many traditional theistic religions as well. For example, Judaism teaches that believers are obligated to care for others, to work toward equal justice for everyone, and "to perfect the world under the rule of God." *See* RABBI JOSEPH TELUSHKIN, JEWISH LITERACY 560-64, 616-18 (rev. ed. 2001) (also explaining that the afterlife "is rarely discussed in Jewish life").

112. *See* Malnak v. Yogi, 592 F.2d 197, 209 (3d. Cir. 1979).

113. *See* discussion *supra*, Section II.A (discussing the Reproductive Justice movement).

114. *See Malnak*, 592 F.2d at 209 ("Such signs might include formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions . . . .").

developed and written about extensively by Feminist leaders and teachers. Feminists almost universally recognize certain texts as authorities on Feminist theology and practice.[115] Feminists have also developed a host of organizations devoted to proselytizing the movement's ideas.[116] Further, many Feminists commemorate and celebrate significant moments in the movement's history, such as the anniversary of the Supreme Court's decision in *Roe v. Wade*, the passing of the Nineteenth Amendment, and International Women's Day. Individual Feminists like Ruth attend such gatherings with other Feminists, where they find community, renew their commitment to live by their beliefs, and give money to organizations championing Feminist goals.[117] Ruth even tries to "convert" members of her own family who believe in traditional, limiting gender roles, who oppose reproductive freedom, et cetera. These "surface signs" are sufficiently analogous to those demonstrated by traditional religions to satisfy the *Malnak* test.

As a set of beliefs, ideas, and practices, Feminism meets all of the requirements of, and therefore qualifies as a religion under, the *Malnak* test. Because Feminism qualifies as a religion under both the *Seeger*/*Welsh* definition and the *Malnak* definition, Feminists are entitled to Free Exercise protections under the First Amendment. The existence of Feminist Theology lends further support to the conclusion that Feminism qualifies as a religion.

C. Feminist Theology

The religion of Feminism is not an exclusive one; Feminists may also be members of other faiths.[118] The Feminist Theology movement was

115. *See*, *e.g.*, Lauren Hubbard, *20 Essential Feminist Books to Read for Women's History Month*, HARPERS BAZAAR (Mar. 13, 2018), https://www.harpersbazaar.com/culture/art-books-music/g19412213/best-feminist-books-every-woman-must-read/.

116. *See, e.g.*, Susy Chavez Herrera, *Reproductive Justice Organizations Demand an End to Trump's 'Zero-Tolerance' Policy*, REWIRE (Jul. 9, 2018, 9:42am), https://rewire.news/article/2018/07/09/reproductive-justice-demand-an-end-to-trumps-zero-tolerance-policy/ (including a list of Reproductive Justice organizations as co-signatories); *see also* Hadley Mendelsohn, *8 Women's Rights Organizations Everyone Should Know About*, MYDOMAINE (May 18, 2018) https://www.mydomaine.com/womens-rights-organizations (discussing several prominent Feminist organizations).

117. Such Feminist gatherings can be analogized to church services in which church-goers find community with other like-minded individuals, renew their faith, and give money to their church.

118. The author would suggest that this quality is not as unique as we might suppose. While many devout religious believers would assert that religion is not "a buffet" from which beliefs may be picked and chosen, in reality, many individuals ascribe to some religious beliefs outside of their own particular faith organization or sect.

developed within religions such as Christianity, Judaism, Buddhism, and Islam by adherents who wanted to reconsider the traditions, practices, scriptures, and theologies of those religions from a Feminist perspective.[119] As one leader of the Feminist Theology movement characterized it,

> [t]he critical principle of feminist theology is the promotion of the full humanity of women. Whatever denies, diminishes, or distorts the full humanity of women is, therefore, appraised as not redemptive. . . . The uniqueness of feminist theology is not the critical principle, full humanity, but the fact that women claim this principle for themselves.[120]

The promotion of the full humanity of women is the central purpose of all Feminism.[121] The fact that Feminist Theology actively forces traditional theistic religions to reconcile with the core tenets of Feminism evidences the essential nature of the questions being addressed by Feminism generally, and its importance in the lives of adherents. In this way, the emergence and evolution of Feminist Theology supports the conclusion that Feminism is religious in nature.

D. Addressing the "Slippery Slope" Argument

As demonstrated in Sections III.A and B, Feminism fits within the broad constitutional definition for religion. Still, such a result is likely to give rise to a "slippery slope" counterargument, which might go something like this: if we recognize as religion what has historically been classified as purely a social or political movement, what is to stop people from asserting all kinds of political opinions or secular world views as religion when benefits them to do so? There are a few responses to this argument.

First, it is important to keep in mind that when assessing religious freedom claims, courts examine the sincerity of the claimant's belief, as well as the role that the belief plays in her life. In *Callahan v. Woods*, the Ninth Circuit directly addressed the concern that "[a] person seeking to advance a secular interest might, if frustrated in his pursuit, decide to mask the cause in

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119. *See generally* STANLEY J. GRENZ & ROGER E. OLSON, 20TH-CENTURY THEOLOGY: GOD & THE WORLD IN A TRANSITIONAL AGE (1997); *see also* Lisa Isherwood, *The Embodiment of Feminist Liberation Theology: The Spiralling of Incarnation*, 12 FEMINIST THEOLOGY 140 (2004).

120. Denise Ackermann, *Feminist Liberation Theology: A Contextual Option*, 62 J.THEOLOGY S. AFR. 14, 14-28 (1988) (citing R. R. REUTHER, SEXISM AND GOD-TALK 165 (1983)).

121. *See, e.g.*, Ross, *supra* note 87, at 14.

religious garb in order to bring it under First Amendment Protection."[122] *Callahan* pointed out that it is the job of trial courts to assess a claimant's testimony, and if her asserted beliefs are found to be insincere, to rule "[her] claims entitled to no special privilege."[123]

Second, the slippery slope problem is already implicated by existing religious freedom jurisprudence and by the nature of religious belief in general. The courts have conceded that moral, patriotic, or political beliefs may nonetheless be religious. In *Welsh*, for example, the Supreme Court agreed that Welsh's opposition to war "was undeniably based in part on his perception of world politics."[124] Nonetheless, it held that a person's deeply held beliefs should not be excluded from protection merely because they are "founded to a substantial extent upon considerations of public policy."[125]

Similarly, although a belief that is based on "purely secular considerations" will not be protected by the Free Exercise Clause,[126] where a belief is both secular and religious, the First Amendment "presumably protects the area where the two overlap."[127] In *Wiggins v. Sargent*, for example, the Eighth Circuit entertained the Free Exercise claim of a member of the Aryan Nation, and rejected the trial court's conclusion that "since the notion of white supremacy [is] secular, it could not also be religiously based."[128] Further, according to at least one Circuit Court, the First Amendment protects a belief that was purely secular when it arose, but which later takes on a religious significance in the life of the believer.[129]

Given that the law already recognizes such a broad and individualized definition of religion, the idea that Feminism qualifies as such does not raise a *new* slippery slope argument, but merely highlights an already-existing one. Rather than artificially limiting the definition of religion, which would undoubtedly result in further marginalization of minority religions, the better

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122. *See* Callahan v. Woods, 658 F.2d 679, 684 (9th Cir. 1981).

123. *Id*.

124. *See* Welsh v. United States, 398 U.S. 333, 342 (1970).

125. *See id*. at 342-43. The Court distinguished those whose opposition to war rested on "moral, ethical, or religious principle" from those whose opposition rested "solely upon considerations of policy, pragmatism, or expediency," and classified the latter as falling outside the scope of protected beliefs. *Id.*

126. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

127. *See* Wiggins v. Sargent, 753 F.2d 663, 666–67 (8th Cir. 1985) (citing Callahan v. Woods, 658 F.2d 679, 684 (9th Cir. 1981)).

128. *See id*. at 666-67.

129. *See* Callahan v. Woods, 658 F.2d 679,684-87 (9th Cir. 1981) (rejecting the idea "that a long-held secular belief invalidates First Amendment protection for a related but newly-alleged religious belief").

approach would be to limit the extent to which religion may be used as a shield against otherwise neutral laws promoting the general welfare.

There is, of course, much more to be said on this topic, which is beyond the scope of this Article. However, the proposed solution is simple enough: personal practice of religion is an essential liberty interest, and should be treated as such. But religion should not be allowed to expand so far beyond the personal that it becomes a tool for believers in traditional, majority religions to flout the laws, social norms, and expectations that govern our society—particularly at the expense of adherents of minority religions or of nonbelievers.

IV. RESPECTING THE FREE EXERCISE OF FEMINISM

A broad range of circumstances might implicate the constitutional Free Exercise rights of Feminists. Additionally, if Feminism is a religion under the Constitution, it almost certainly qualifies under statutes such as the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA), which establish heightened protections for religious practice beyond those of the Free Exercise Clause.[130] This section highlights several examples of situations in which a Feminist might assert a religious freedom claim either under the Constitution or relevant statute.

Many religious freedom cases involve claims by incarcerated persons that their right to practice their religion has been infringed upon by prison policies. Incarcerated individuals generally enjoy less protection of their civil liberties than free persons.[131] RLUIPA, however, states that "no government shall impose a substantial burden on the religious exercise of a[n incarcerated] person . . . even if the burden results from a rule of general applicability, unless the government demonstrates that . . . the burden on that

130. *See generally* Emp't Div. v. Smith, 494 U.S. 872 (1990) (holding that where a neutral law of general applicability infringes on the free exercise of religion, the law need only be rationally related to a legitimate state interest in order to pass constitutional muster); Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993) (applying only to the federal government and restoring the "compelling interest" strict scrutiny test that had been applied before *Smith* to religious freedom claimants "whose religious exercise [was] substantially burdened by government"); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc (2000) (applying strict scrutiny to land use and prison regulations that "impose[] a substantial burden on the religious exercise of a person").

131. *See* Turner v. Safley, 482 U.S. 78, 89 (1987) (holding that prison regulations infringing on constitutional rights are valid if they "are reasonably related to legitimate penological interests").

person" satisfies strict scrutiny.[132] RLUIPA defines "religious exercise" broadly to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[133] This definition suggests *at least* as inclusive a definition of religion as would be used under the First Amendment. Courts have also applied RLUIPA to several non-traditional religions, including a whites-only religious group[134] and a pagan inmate.[135]

One of the central tenets of Feminism is the right of women to control their bodies, and their reproduction in particular. This belief is evident in Feminist efforts to protect women's access to safe and legal abortions. While under the Fourteenth Amendment states may not enact laws that create an "undue burden" on free women's right to access abortion, many prisons and jails have healthcare policies that all but prohibit women from obtaining abortions, except in extremely limited circumstances.[136] Courts have generally analyzed challenges to restrictive prison policies regarding abortion under the Eighth Amendment right to healthcare for incarcerated persons.[137] However, for Feminists with a deeply held belief in bodily autonomy, access to abortion is a matter of religious practice. Therefore, an incarcerated Feminist being denied access to abortion could also bring a claim under the First Amendment or RLUIPA.

Similarly, Feminists outside the prison context could challenge laws restricting access to abortion under the federal RFRA or analogous state laws that have been passed in over twenty states. RFRA prohibits the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the government's action is the least restrictive means of furthering a compelling governmental

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132. 42 U.S.C. § 2000cc-1.

133. *Id.* § 2000cc-5. The text of RLUIPA states that it "shall be construed in favor of broad protection of religious exercise, to the maximum extent permitted by the terms of [the statute] and the Constitution." *Id*. § 2000cc-3.

134. *See* Murphy v. Mo. Dep't of Corr., 372 F.3d 979, 981 (8th Cir. 2004), *cert. denied* 543 U.S. 991 (2004).

135. *See* Coronel v. Paul, 316 F. Supp. 2d 868, 869-70 (D. Ariz. 2004).

136. *See Incarcerated Women's Abortion Access Limited by Varying Policies and Practices*, GUTTMACHER INST. (Mar. 9, 2009), https://www.guttmacher.org/news-release/2009/incarcerated-womens-abortion-access-limited-varying-policies-and-practices (citing Carolyn B. Sufrin, et al., *Incarcerated Women and Abortion Provision: A Survey of Correctional Health Providers*, 41 PERSP. SEXUAL & REPROD. HEALTH 6 (2009), https://www.guttmacher.org/sites/default/files/pdfs/pubs/psrh/full/4100609.pdf.

137. *See* Angela Thomas, Note, *Inmate Access to Elective Abortion: Social Policy, Medicine and the Law*, 19 HEALTH MATRIX 539, 555 (2009).

interest.[138] Therefore, even if a restriction on abortion access would otherwise be a neutral law of general applicability, and therefore not actionable under the First Amendment, a Feminist could challenge the law under RFRA as substantially burdening the exercise of her religion.

Feminists might also bring religious freedom claims challenging federal policies such as the Hyde Amendment, which was passed in 1976 as a direct reaction to the 1973 *Roe v. Wade* decision.[139] The Amendment prohibits federal funds, such as Medicaid funding, from being used to pay for abortion.[140] While individuals have no constitutional right to receive government benefits such as Medicaid, the government may not administer its benefits programs in a manner that violates the Constitution.[141] Therefore, the government's standard for providing Medicaid funds for low-income individuals' healthcare may not single out or exclude from coverage specific care in a way that discriminates against or limits the free exercise of religion. If Feminism qualifies as a religion, the Hyde Amendment would be akin to prohibiting Medicaid funding to cover bloodless medicine for Jehovah's Witnesses.

These examples demonstrate just a few of the ways in which Feminists might assert their right to religious freedom; undoubtedly there are countless other possible examples.

V. ADDRESSING CONFLICTS WITH OTHER RELIGIOUS BELIEFS

In the decades since *Roe v. Wade* was decided, Feminist beliefs have increasingly come into conflict with the beliefs of conservative religious groups and institutions, such as the Catholic Church.[142] These tensions have

138. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 (2014) (quoting 42 U.S.C. § 2000bb–1(a)).

139. *See* Hyde Amendment Codification Act, S. 142, 113th Cong. (2013); Alina Salganicoff, et al., *The Hyde Amendment and Coverage for Abortion Services*, HENRY J. KAISER FAMILY FOUNDATION: WOMEN'S HEALTH POLICY (Oct. 16, 2017), https://www.kff.org/womens-health-policy/perspective/the-hyde-amendment-and-coverage-for-abortion-services/.

140. Salganicoff, *supra* note 139 (stating that the amendment includes limited exceptions for when continuing the pregnancy would endanger the woman's life or when the pregnancy resulted from rape or incest).

141. *See* Sherbert v. Verner, 374 U.S. 398, 407-10 (1963) (holding that the state had violated the Free Exercise Clause when it denied unemployment benefits to a Seventh Day Adventist who had been fired for refusing to work on his Sabbath).

142. *See* Laycock, *supra* note 7, at 871 (describing religious backlash against the sexual revolution in the United States and ongoing conflicts between political liberalism and religious groups such as the Catholic Church).

been exacerbated since the 1993 passage of RFRA, which has been wielded by religious opponents of abortion, contraception, and same-sex marriage as legal protection for practices that discriminate against women and LGBTQ people.[143] Additionally, religious institutions, such as Catholic hospitals, have invoked RFRA and state "conscience clauses" when refusing to provide women with birth control or abortion care, and when refusing to abide by individuals' end-of-life wishes.[144]

Sections I.B and II.A, have identified the importance of bodily autonomy as a central Feminist belief, and have suggested that accessing birth control and abortion is one way in which Feminists exercise their religion. Making autonomous decisions about death and dying with dignity, including the decision to seek physician aid in dying,[145] might be another exercise of the religious belief in absolute bodily autonomy. The question that follows then is what happens when the religious freedom claims of respective parties come into conflict with one another.

Because the First Amendment only protects free exercise of religion from government interference, conflicts between religious believers only implicate constitutional rights when one or both parties involved in the conflict seeks the government's help to assert their religious freedom rights. For example, religious individuals and groups frequently ask the government to exempt them from laws that are otherwise applicable to everyone.[146] However, in some circumstances allowing for such an exemption might result in a burden on the free exercise of another's religion.

This section first addresses conflicts between the religious rights of individuals and those of organizations and institutions. Second, it considers

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143. *See id*. at 845.

144. *See* Maxine M. Harrington, *The Ever-Expanding Health Care Conscience Clause: The Quest for Immunity in the Struggle between Professional Duties and Moral Beliefs*, 34 FLA. ST. U. L. REV. 779, 780-82 (2007), https://scholarship.law.tamu.edu/facscholar/78; Stephens, *supra* note 8, at 98-103; Judy Stone, *Refusal (Conscience) Clauses—A Physician's Perspective*, FORBES (Jan. 22, 2018, 7:00am), https://www.forbes.com/sites/judystone/2018/01/22/refusal-conscience-clauses-a-physicians-perspective/#502b28834181.

145. Also commonly referred to as "physician-assisted suicide."

146. See, for example, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723-24 (2018), in which a baker argued that he was entitled to a religious exemption from Colorado's generally-applicable anti-discrimination law, and Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014), in which a craft store chain argued that it was entitled to an exemption from the birth control mandate applicable to all non-religious employers because of the religious convictions of its owners.

conflicts between the religious rights of individuals.

A. Conflicts with the Free Exercise Rights of Institutions

The Supreme Court case *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* presents an example of how the religious rights of institutions may come into conflict with the rights of individuals. *Amos* involved a challenge to Section 702 of the Civil Rights Act, which exempts religious organizations from the Act's prohibition on religious discrimination in employment.[147] The exemption was designed to protect the "autonomy" of religious organizations, thereby safeguarding their ability to conduct themselves in accordance with their doctrines.[148] In *Amos*, the plaintiff had been fired from his job as a building engineer for a church-run nonprofit because he was not a member of the Mormon Church.[149] The plaintiff argued that Section 702 violated the Establishment Clause by advancing religion—in this case, the religion of his employer.[150] Additionally, the plaintiff argued that the actions of his employer, sanctioned by Section 702 of the Act, imposed a burden on his own religious exercise because he was forced to choose between his employment and his beliefs.[151] Thus, the case "present[ed] a confrontation between the rights of religious organizations and those of individuals."[152]

The Supreme Court sided with the employer in *Amos*, and dismissed the plaintiff's claims. In a footnote, the Court explained that because "it was the Church . . . and not the Government, who put [the plaintiff] to the choice of changing his religious practices or losing his job," no violation of the plaintiff's Free Exercise rights had occurred.[153] In other words, the Court

147. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 330-31 (1987).

148. *Id*. at 341-42 (Brennan, J., concurring).

149. *Id*. at 330.

150. *Id*. at 331. The relationship between the Free Exercise and Establishment Clauses of the First Amendment is complex and is unfortunately outside the scope of this Article.

151. *See id*. at 337 n.15. This argument is similar to the winning argument in *Sherbert v. Verner*, where the Supreme Court held that the government had violated the Free Exercise clause by "forc[ing the plaintiff] to choose between following the precepts of her religion and forfeiting [unemployment] benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." 374 U.S. 398, 404 (1963).

152. *Amos*, 483 U.S. 327, at 340 (Brennan, J., concurring).

153. *Id*. at 337 n.15.

held that the government's action in creating an exception to the generally applicable Civil Rights Act was only an indirect cause of the burden on the plaintiff's religious freedom and was therefore insufficient government action on which to base a First Amendment claim.[154] Therefore, *Amos* held that the plaintiff's injury was not a constitutional one, and that he had no remedy at law.

This approach to addressing conflicts between the religious freedom rights of individuals and institutions might seem reasonable when given only enough consideration to merit a footnote. And indeed, the *Amos* approach would be reasonable in some limited contexts. For example, the result in that case would certainly have been justified if the plaintiff had been employed as a spiritual leader or minister for the church, rather than as a building engineer at a church-run gymnasium open to the public.[155] In fact, courts have recognized a common law "ministerial exception" under the Free Exercise Clause to exempt employers from otherwise generally applicable employment laws in precisely such circumstances.[156]

There are significant implications raised, however, by broad application of the *Amos* holding—government does not burden Free Exercise when it enables discrimination by providing religious exemptions in otherwise neutral antidiscrimination laws. Consider the example of Catholic hospitals, which are a major employer and provider of healthcare in the United States. In fact, as of 2016, one in six hospital beds in the country was in a Catholic hospital.[157] As religious entities, Catholic hospitals might claim the same type of exemption from employment discrimination laws that was at issue in *Amos*. If Catholic hospitals were to require that all of their doctors, nurses, and other staff prove affiliation with the Catholic Church, large numbers of healthcare workers would be faced with the same choice as the *Amos* plaintiff: to change their religious practices or be out of a job.[158] Still, under

154. *Id*. at 337.

155. *See id*. at 330.

156. *See* Petruska v. Gannon Univ., 462 F.3d 294, 299 (3d Cir. 2006) (describing itself as the eighth court to adopt the ministerial exception and explaining that the exception applies to "any claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions").

157. *See* JULIA KAYE, ET AL., AMERICAN CIVIL LIBERTIES UNION, HEALTH CARE DENIED: PATIENTS AND PHYSICIANS SPEAK OUT ABOUT CATHOLIC HOSPITALS AND THE THREAT TO WOMEN'S HEALTH AND LIVES 22 (2016), https://www.aclu.org/sites/default/files/field_document/healthcaredenied.pdf.

158. This burden would fall even more heavily on doctors and hospital staff in places where the Catholic hospital might also be the only hospital in the region. *See id*. at 24 (explaining that "[a]s of March 2016, there [were] 46 Catholic hospitals designated by

Amos they would be without legal recourse.[159]

Under *Smith*, the Free Exercise Clause does not require the government to include religious exemptions in neutral, generally-applicable laws, such as Title VII of the Civil Rights Act and other such anti-discrimination laws.[160] When government nonetheless chooses to allow religious groups, non-profit organizations, and corporations[161] to be exempted from laws that otherwise apply equally to everyone, it "privilege[s] institutional conscience over individual conscience," and fails to protect vulnerable individuals from discrimination by powerful entities.[162] The Free Exercise Clause was intended to protect minority religions from the tyranny of the majority.[163] When the government acts to insulate large organizations and powerful institutions from anti-discrimination laws, it unacceptably burdens the religious exercise of minority and non-traditional religions such as Feminism.[164]

B. Conflicts Between the Free Exercise Rights of Individuals

When two individuals assert conflicting religious freedom claims, they are

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the federal government as the 'sole community hospitals' for their geographic region").

159. A similar type of conflict might arise if a doctor like Dr. Parker, who performs abortions in part because of his moral convictions, were to work at a Catholic hospital. Parker, *supra* note 11. Catholic hospitals operate under certain rules issued by the U.S. Conference of Catholic Bishops, which prohibit them from providing certain services such as abortion. *See Sterling & Waters, supra* note 11, at 469-70. Jessica L. Waters writes a compelling exploration of how current "conscience-based employment protections" might protect health care professionals who seek to provide abortions, based on their own moral beliefs, at religiously affiliated medical institutions. *See id*. at 468. The legal position of the doctors Waters describes might be strengthened by a recognition of Feminism as a religion that espouses the moral imperative of bodily autonomy.

160. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521 (1993); *see also* Emp't Div.v. Smith, 494 U.S. 872, 879-80 (1990).

161. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014) (holding that for-profit corporations can "exercise religion" within the meaning of RFRA).

162. *See* Stephens, *supra* note 8, at 106.

163. *See* THE FEDERALIST NO. 51 (James Madison) (discussing protection of minority groups from total control by the majority).

164. *See* Stephens, *supra* note 8, at 115-20. Stephans argues a similar point in her piece on conscience exemptions for healthcare institutions and providers, specifically in the area of reproductive healthcare. She uses vulnerability theory to argue that a "vulnerable patient should not be forced to bear what may be significant costs of another's exercise of conscience." She also proposes a more balanced approach to conscience clauses that would better protect the rights of patients without eliminating some reasonably tailored exemptions for providers' religious beliefs.

arguably on more equal footing. Again, the First Amendment is only implicated if the government takes action. In cases involving conflicts between individuals, the correct outcome might depend on what the government is being asked to do. To illustrate this principle, consider the following example, based on events that took place at a pharmacy in Albuquerque, New Mexico.[165]

In June 2012, Susanne Koestner had just graduated from school with a degree in counseling, and was preparing to start a new job.[166] Because she and her husband were not ready to have children, Ms. Koestner sought to refill her birth control prescription at a local Walgreens pharmacy in Albuquerque.[167] However, when Ms. Koestner went to the pharmacy, she was told by the pharmacist on duty that he would not fill her prescription due to his religious beliefs.[168] Ms. Koestner's story is not unique; religiously-motivated refusals by healthcare providers have been in the news in recent years, and have been the subject of much public discussion.[169]

Now suppose a similar situation had happened to Ruth, a practicing Feminist. Since Ruth believes in bodily autonomy and the right of women to control their reproduction, her choice to prevent pregnancy through the use of contraception would be an exercise of her religion. The scenario then presents a conflict between Ruth's religious exercise and the pharmacist's religiously-motivated refusal to serve her at his place of employment. If no laws governed this exchange, the two parties would be at an impasse. It is unlikely that Ruth would be able to force the pharmacist to dispense her medication, and she would have no choice but to go elsewhere (as Ms. Koestner and other women like her have had to do in real life).

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165. *See* Elizabeth Chuck, *Can a Pharmacist Legally Deny a Patient a Prescription? It Depends.*, NBC NEWS (July 28, 2018, 8:25am), https://www.nbcnews.com/news/us-news/can-pharmacist-legally-deny-patient-prescription-it-depends-n894871.

166. *Id*.

167. *Id*.

168. *Id*.

169. *See, e.g.*, Marie Solis, *In These States, Pharmacists Can Refuse to Fill Your Prescription for Religious Beliefs*, BROADLY (June 25, 2018, 12:43pm), https://broadly.vice.com/en_us/article/a3amzp/in-these-states-pharmacists-can-refuse-to-fill-your-prescription-for-religious-beliefs; *see* Monica Busch, *A Michigan Pharmacist Allegedly Denied A Woman A Miscarriage Drug On Religious Grounds*, BUSTLE (Oct. 17, 2018), https://www.bustle.com/p/a-michigan-pharmacist-allegedly-denied-a-woman-a-miscarriage-drug-on-religious-grounds-12601052; Katherine Speller, *Pharmacist Allegedly Refuses to Fill A Teen's Birth Control Prescription*, BUSTLE (June 6, 2017), https://www.bustle.com/p/pharmacist-allegedly-refuses-to-fill-a-teens-birth-control-prescription-62451.

Of course, we live in a society of laws, which means that the government became involved in the conflict between Ms. Koestner and the pharmacist. Ms. Koestner filed a complaint against Walgreens under the New Mexico Human Rights Act (NMHRA), which states that public accommodations such as Walgreens must not discriminate on the basis of "race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap."[170] Ms. Koestner's complaint alleged that Walgreens had discriminated against her on the basis of sex.[171] However, in an identical situation, a Feminist such as Ruth could sue the pharmacist for discriminating against her on the basis of her religion because the pharmacist would have refused to fill her prescription based on the understanding that Ruth would use it to engage in religious conduct to which he objected—using birth control to prevent conception.

Because the NMHRA is a neutral law of general applicability,[172] the state would not violate the pharmacist's Free Exercise rights by requiring him to comply with the statutory mandate.[173] If the state were to carve out an exception to the NMHRA for the pharmacist or others like him, it would be choosing to place its weight behind the pharmacist's religious beliefs over those of Ruth and others like her. The United States Supreme Court likely would not take issue with the enactment of a religious exemption or "conscience clause" in the NMHRA.[174]

However, this piece argues that in such circumstances the law should protect Ruth and others who are asking only to be treated *the same* as everyone else, rather than providing individuals like the pharmacist with *special treatment* by making them above the law. This approach to such conflicts has particular merit in circumstances such as this one, where neutral laws of general applicability have been enacted precisely for the purpose of ensuring equal treatment.[175]

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170. *See* Chuck, *supra* note 165; N.M. STAT. ANN. § 28-1-7 (2004).

171. *See* Chuck, *supra* note 165.

172. *See* Elane Photography, LLC v. Willock, 309 P.3d 53, 75 (N.M. 2013) (holding that the NMHRA is a neutral law of general applicability).

173. In fact, several states have laws on the books that require pharmacists to provide medication to patients, regardless of any personal objection the pharmacist might have. *See* Chuck, *supra* note 165.

174. *See* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 337 n.15 (1987). Several states already have laws that explicitly allow pharmacists to refuse to dispense a medication based on religious reasons. *See* Chuck, *supra* note 165.

175. *See* Stephens, *supra* note 8, at 112 (explaining that vulnerability theory focuses

CONCLUSION

The argument put forward in this Article is in many ways more academic than it is practical, particularly given the current political trajectory of the courts. However, as the law recognizes more and more exceptions and allowances for individual "morals" and "conscience," it is imperative that we examine *whose* morals we are willing to protect, and whose we are not. In a pluralistic and dynamic society, "religious freedom" quickly becomes oppressive when it only protects certain limited and traditional notions of religion.

United States courts have repeatedly found that freedom of religion is one of the most important liberty guarantees in our Constitution. They have also found (or at least paid continuous lip-service to the idea) that individuals practicing non-traditional and non-theistic religions are entitled to the same protections as those practicing old, established, and "traditional" religions. The conclusion of this article is simple: Feminists, many of whom conduct their lives based on a comprehensive set of guiding principles and moral imperatives, deserve the same protection for their beliefs as persons practicing any other religion.

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on the societal institutions that have been created as a response to individual vulnerability); *State Public Accommodation Laws*, NAT'L CONF. OF STATE LEGISLATURES (July 13, 2016), https://perma.cc/86NK-4684. During the Civil Rights Era, the federal government passed the Civil Rights Act, one of the first public accommodation laws. All fifty states and the District of Columbia currently have anti-discrimination public accommodation laws that prohibit discrimination on the basis of race, sex, and religion, among other things. Courts have consistently held that these statutes should be construed broadly because they are designed to have remedial effect and to combat invidious discrimination. *Id.*