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ARTICLES

FREE EXERCISE STANDING: EXTRA-CENTRALITY AS INJURY IN FACT

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INTRODUCTION

As American society and culture evolve, religious traditionalists find themselves increasingly anxious and put-upon.[1] It is not easy moving from steward to mere fellow traveler, resigning one's dominion over the most intimate affairs of neighbors less enamored with sectarian dogmas. For the deposed lawgiver, psychic trauma results not from the tragic end of his hero story, but from the cruel irrelevance of his will—its slide from sovereign edict to sad, insistent noise, mere prattle.[2] In

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[1] *See* ROBERT P. JONES, THE END OF WHITE CHRISTIAN AMERICA 40 (2017) ("Today, many white Christian Americans feel profoundly anxious.").

[2] *See* Betty Glad, *Why Tyrants Go Too Far: Malignant Narcissism and Absolute Power*, 23 POL. PSYCHOL. 1, 16 (Mar. 2002) (citation omitted) (summarizing psychological explanations for tyrannical behavior, and noting, citing numerous theories, that the tyrannical leader "makes claims for recognition and deference, and is enraged when it is not forthcoming"). The tyrant's "control over his political environment may be used to win support for the grandiose visions of self. He can command an unusual deference of those in his inner circle and orchestrate worship." *Id.* at 25. "[E]ven loneliness can be countermanded by commands for company at any time of the night or day." *Id.* at 26.

a society where women largely make their own reproductive choices[3] and same-sex couples may get married,[4] religious traditionalists are quite obviously not making the rules anymore.

So the movement to preserve traditional marriage and limit access to abortion, grounded though it is in our nation's Goliathan religious and cultural traditions,[5] nonetheless styles itself these days as the biblical David—the putative prey set up against bad odds, armed to take on towering depravity with nothing more than God's Word tucked in its sling.[6] In the legal realm, and particularly on a Supreme Court of the United States that now consists mostly of conservative Christians,[7] this morphing in posture from aggressor to victim has birthed a new paradigm under which constitutional free exercise is no longer a promise to oppressed sects or the secular minority that they may practice or abstain from religious rites and beliefs as they see fit. It is, rather, a prophylaxis guarding the religious majority against the insult of abiding outgroups and iconoclasts.[8] As I have explained

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[3] *See* Brendan T. Beery, *Tiered Balancing and the Fate of* Roe v. Wade*: How the New Supreme Court Majority Could Turn the Undue-Burden Standard into a Deferential* Pike *Test*, 28 KAN. J.L. & PUB. POL'Y 395, 395 (2019) ("The proposition that a woman has an unenumerated constitutional right to terminate a pregnancy, at least before the point of fetal viability, won the day in 1973. But, as 2018 fades into 2019, no judicial precedent is more endangered than the one that has evolved in a triumvirate of cases: *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Whole Woman's Health v. Hellerstedt* . . . ." (citations omitted)).

[4] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

[5] *See* JONES, *supra* note 1, at 39–40 (referring to "white Protestantism" as "arguably the most powerful cultural force in the history of our country").

[6] *See id.* at 43–44 ("There is much at stake for the country in whether [white evangelical Christians] retreat into disengaged enclaves, band together to launch repeated rounds of what the sociologist Nathan Glazer has called 'defensive offensives'—in which a formerly powerful majority recasts itself as a beleaguered minority in an attempt to preserve its particular social values—or find a way to integrate into the new American cultural landscape.").

[7] *See* Julie Zauzmer, *As Trump Picks Kavanaugh for the Supreme Court, Evangelicals Rejoice: 'I Will Vote for Him Again'*, WASH. POST (July 9, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/07/09/as-trump-picks-a-supreme-court-justice-evangelicals-rejoice-i-will-vote-for-him-again (noting that "this cadre of evangelical voters . . . have received what they wanted — two nominations, enough to create a five-members conservative majority on the court").

[8] *See* Greg Sargent, *The Walls Around Trump Are Crumbling. Evangelicals May Be His Last Resort.*, WASH. POST (Jan. 2, 2019), https://www.washingtonpost.com/opinions/2019/01/02/walls-around-trump-are-crumbling-evangelicals-may-be-his-last-resort/ (statement of Robert Jones, CEO & founder of the Public Religion Research Institute) ("[President Trump's proposed border wall] embodies a white evangelical view of the world 'as a dangerous battleground' made up of 'chosen insiders and threatening outsiders' . . . .").

elsewhere, under the emerging Supreme Court majority, free exercise will not be about freedom *to*—it will be about freedom *from*.[9]

Whenever free exercise, legally, is to be applied in a prophylactic sense—when it is to function effectively to protect believers, and particularly adherents to prevailing majoritarian belief systems—courts have to find some cognizable harm in believers' plight and inability to conform the world around them to their own codes of behavior. After all, Article III of the United States Constitution excludes any matter that is not a case or controversy from federal court jurisdiction.[10] One is entitled to judicial relief, therefore, only if one has standing—if one has been injured in some concrete way.[11] To have standing in a constitutional case against the government, a litigant must have suffered an injury in fact fairly traceable to the conduct of the government where the injury is redressable by a court.[12]

If I am a believer in scriptures and holy books and the rightness of my own reading of them, what am I to say about my new station—an unhappy place where, although I need not conform my beliefs or religious behaviors to anyone else's liking, I must nonetheless suffer an awareness about my orbit of people and practices anathema to my own personal constitution? What is the harm attendant to the irrelevance of my will? What is the harm attendant to merely existing in a society where lesbian, gay, bisexual, transgender ("LGBT") rights must be abided and honored, or where other people may use contraceptive methods that I might call "abortifacients"? What is the harm *to me*? That I am aghast?

In a sense, as it turns out, that is the harm. As the Supreme Court takes up its station as custodian of traditional Judeo-Christian values and gives voice to conservative casualties of areligious insensitivity, such emotional harm will likely also constitute the "injury in fact" required to confer on a litigant legal standing to challenge secular governments' laws and policies.

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[9] *See* Brendan Beery, *Prophylactic Free Exercise: The First Amendment and Religion in a Post-Kennedy World*, 82 ALB. L. REV. 121, 122 (2018).

[10] *See* U.S. CONST. art. III, § 2; *see also* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 471–75 (1982).

[11] *See* Allen v. Wright, 468 U.S. 737, 751 (1984), *abrogated by* Lexmark Intern., Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

[12] *See id.*

In light of this situation, the standing doctrine applied in some lower courts will have to yield to a new reality. In a recent case, *Nikolao v. Lyon*, the Sixth Circuit Court of Appeals opined that a plaintiff in a free exercise case has suffered an injury in fact only if "the state compels her 'to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief forbidden or required by one's religion.' "[13] This conceptualization would be so, however, only if the exercise of religion were regarded as dynamic—as involving, in other words, "things like expressing belief, praying, gathering for worship services, [and] participating in rituals and sacraments and rites."[14] If, on the other hand, the constitutional promise of free exercise entitles believers to a safe space—a space within which they are free from entangling themselves with the areligious choices of their fellow citizens—then this conception of injury will not do.[15]

Part I of this Article surveys standing doctrine generally and tackles the problem of psychic insult—what might fairly, in some cases, be characterized as hurt feelings—as an injury. Part II addresses the special problems of finding concrete and palpable injuries in religion cases, noting that it is more difficult to identify such injuries in Establishment Clause cases than in free exercise cases. When free exercise is viewed as dynamic and kinetic, free exercise injuries are discernible and concrete: they occur when a person is forced to participate in religious undertakings or express beliefs against his or her will, or when a person is forced to abstain from participating in religious undertakings or expressing his or her beliefs. When free exercise is viewed as prophylactic, on the other hand, the alleged injuries become much more ethereal and abstruse: a person may be injured, under this view, by a mere psychic insult.

Part III discusses why religious traditionalists, and particularly Christian conservatives in the United States, see extra-centrality as a concrete injury. It is in the nature of evangelism that non-adherents be evangelized; non-adherents are thus viewed as accessorial, and their participation in believers' mission to correct and convert is therefore a component of believers' free exercise of religion. This view of the believer as central and all others as accessorial engenders the perception of

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[13] 875 F.3d 310, 316 (6th Cir. 2017) (quoting Mozert v. Hawkins Cty. Bd. of Educ., 827 F.2d 1058, 1066 (6th Cir. 1987)).

[14] Beery, *supra* note 9, at 122.

[15] *See id.* at 128–35.

extra-centrality and irrelevance as injury. And of course the loss of power by conservative Christians may itself be experienced as a concrete and palpable injury. So too the tendency of Christians to see themselves as persecuted contributes to the perception of concrete and palpable injuries, even where secularists see mere governmental neutrality. Part IV explains why the coercion standard elucidated in *Nikolao* cannot likely survive a new paradigm under which a majority of the Justices on the Supreme Court take a prophylactic view of free exercise and regard the extra-centrality of traditional Judeo-Christian norms in American life as a concrete and palpable injury.

I. STANDING DOCTRINE GENERALLY AND THE PROBLEM OF HURT FEELINGS

Standing doctrine is famously manipulated by judges who, however much they claim merely to generate mechanical outputs after sorting inputs through neutral and rigid interpretive models,[16] are, after all, mere humans with their own agendas and policy preferences.[17] As Professor Richard Pierce explains, "[a] lawyer would [say that a] plaintiff has standing to sue a defendant if the defendant caused the plaintiff to suffer a legally cognizable and judicially redressable injury . . . ."[18] A political scientist, on the other hand, would say that "standing depends on the degree of congruence between the political and ideological goals of the plaintiff and those of the judges who answer the standing question."[19] Be that as it may, courts generally view hurt feelings as the quintessence of an abstract or generalized non-justiciable "injury."[20]

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[16] *See* Joseph Kimble, *What the Michigan Supreme Court Wrought in the Name of Textualism and Plain Meaning: A Study of Cases Overruled, 2000–2015*, 62 WAYNE L. REV. 347, 354–55 (2017) (noting that while advocates claim that textualism is "fair to all sides because they know the interpretive 'rules,' or canons, from the outset" there is "strong evidence that many times in the real world of decision-making, [the canons] are put to ideological ends").

[17] *See generally*, Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999) (asserting that standing law is largely dependent upon the political agenda of the deciding judges).

[18] *Id.* at 1742.

[19] *Id.*

[20] *See* Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 40 (1976) ("Insofar as these organizations seek standing based on their special interest in the health problems of the poor their complaint must fail. Since they allege no injury to themselves as organizations, and indeed could not in the context of this suit, they can establish standing only as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right."); O'Shea v.

In *Allen v. Wright*, widely regarded as the leading Supreme Court authority on standing,[21] the parents of African American children alleged that the Internal Revenue Service ("IRS") fostered a de facto segregated school system after *Brown v. Board of Education*[22] by failing to enforce its own rules, under which the IRS should have revoked the tax-exempt status of private schools that discriminated on the basis of ethnicity.[23] The parents alleged that the existence of a segregated school system sent a message to African American children that having to function within such a system caused "stigmatic injury, or denigration."[24] As to this claim of injury, the Court stated, "If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating . . . regardless of . . . location . . . ."[25] The Court fretted that, for example, "[a] black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine. Recognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.' "[26]

State courts may apply standing rules that are stricter or looser than the rules governing Article III standing in federal courts.[27] Nonetheless, "[a]n overwhelming majority of states apply

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Littleton, 414 U.S. 488, 494 (1974) (citation omitted) ("Abstract injury is not enough. It must be alleged that the plaintiff has 'sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or conduct."); Sierra Club v. Morton, 405 U.S. 727, 739 (1972) ("It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. But a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the [Administrative Procedures Act].") (alteration in original). I tell students to consider whether the problem is of the sort one might discuss with one's spiritual advisor, psychotherapist, or bartender. If it is, then it might not be the proper subject for adjudication.

[21] *See* John Harrison, *Legislative Power, Executive Duty, and Legislative Lawsuits*, 31 J. L. & POL. 103, 135 (2015).

[22] 347 U.S. 483 (1954).

[23] Allen v. Wright, 468 U.S. 737, 746 (1984), *abrogated by* Lexmark Intern., Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

[24] *Id.* at 754.

[25] *Id.* at 755–56.

[26] *Id.* at 756 (quoting United States v. SCRAP, 412 U.S. 669, 687 (1973)).

[27] *See* Paul J. Katz, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and the Reverse-*Erie *Analysis*, 99 NW. U. L. REV. 1315, 1345–46 (2005)

some type of constitutional standing doctrine," and many have adopted standards similar to the standing rules applied in federal courts.[28] Consider, merely as an example, *American Family Association of Michigan v. Michigan State University Board of Trustees*, a case in which I participated as coauthor of an amicus brief.[29] In that case, the American Family Association of Michigan claimed that its mission was "to promote the welfare of children through the promotion and preservation of the traditional family in our society."[30] The Association challenged a university policy under which medical benefits were provided to the same-sex partners of some university employees.[31] As to the Association's claim of injury, the Michigan Court of Appeals stated, "Plaintiff asserts that defendant's benefits policy advances an interest contrary to plaintiff's mission and that the policy is 'at odds with that which plaintiff seeks to promote.' "[32] In reference to that claim of injury, the court stated, "Plaintiff essentially complains that defendant's benefits policy is an affront to the values that plaintiff and its members espouse and promote. Accordingly, plaintiff has not established that it suffered a concrete and particularized, actual or imminent injury distinct from that of the citizenry at large . . . ."[33]

In both federal and state courts, then, jurists tend to eschew claims of injury reflecting some amorphous sense of psychic upset, even when those feelings accompany an injustice as palpable as racial discrimination. One scholar has noted that the Supreme Court's reticence to recognize stigmatic harm as a cognizable injury might, in some circumstances, be short-sighted:

> In brief, stigma is a mark of disgrace imposed on individuals who possess a characteristic or trait that society views as deeply discrediting. This mark spoils the social identity of its bearer and reduces him "from a whole and usual person to a tainted, discounted one." Stigma invites discrimination and prejudice against the stigmatized, poses threats to their self-esteem, and creates self-doubt that can diminish their abilities, thus

(explaining that state courts may apply standing rules that are stricter or looser than federal standing rules even when applying federal law).

[28] Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 349, 353 & n.14 (2015–2016).

[29] 739 N.W.2d 908, 910 (Mich. Ct. App. 2007).

[30] *Id.*

[31] *See id.*

[32] *Id.*

[33] *Id.* at 915–16.

> confirming the very stereotypes that help generate stigma in the first place. These injuries are as significant and concrete as other injuries the Court has recognized. Moreover, these harms distinguish the stigmatized individual from a concerned bystander who merely seeks to vindicate value interests.[34]

It is especially puzzling that Justice O'Connor, who authored the Court's *Allen* opinion, was so dismissive of stigmatic harm as a cognizable injury in the context of racial discrimination. Justice O'Connor, after all, "wrote that governmental endorsement of religion is impermissible because it 'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.' "[35] But as will be discussed immediately below, Justice O'Connor's more accommodating approach to standing in religion cases might have to do with how difficult it can be to identify a concrete injury in some of those cases.

II. STANDING IN RELIGION CASES

As I have summarized elsewhere,

> There are two religion clauses in the Constitution. The first is the Establishment Clause, which is widely understood as enjoining governmental entanglement with religion, endorsement of religion, or coercion. According to the Supreme Court, the principle undergirding the Establishment Clause is neutrality: the government may not favor religion over non-religion, non-religion over religion, or one religion over another.
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> The second is the Free Exercise Clause, which is also understood, as a matter of the political philosophy prevailing at the time [of] the Constitution's drafting, as requiring the government to be neutral as to religion—as to its *existence* and its *exercise* in the lives of citizens: "[The] history [of the union of church and state] prompted John Locke to urge toleration and stress the necessity of distinguishing 'the business of civil government from that of religion' and establishing clear boundaries between them."[36]

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[34] Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 422 (2007) (citations omitted).

[35] *Id.* at 437 (quoting Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring)).

[36] Beery, *supra* note 9, at 123–24 (alterations in original) (quoting Priests for Life v. U.S. Dep't of Health and Human Servs., 808 F.3d 1, 4 (D.C. Cir. 2015) (Brown, J., dissenting from denial of rehearing en banc)).

It is not hard to see how governmental interference in the free exercise of religion might result in a concrete and palpable injury: being forced to participate in or refrain from some prayer, rite, sacrament, or expression of belief goes well beyond the merely hypothetical or speculative, and well beyond the realm of merely hurt feelings. But what is the injury in the typical Establishment Clause case—when the government gives aid to religious schools,[37] displays a creche on public property,[38] or merely permits the recitation of a prayer before a public-school football game?[39] The issue of standing in Establishment Clause cases has befuddled courts for decades,[40] and as discussed below, the issue of standing in Free Exercise Clause cases is becoming something of a hash, too.

A. Establishment

"[T]he concept of injury for standing purposes is particularly elusive in Establishment Clause cases."[41] Cases arising under the Establishment Clause often fall into one or more of three categories: cases involving governmental aid, money or materials, provided to religious organizations;[42] religious displays on public property;[43] or some kind of prayer, religious instruction, or promotion of religion in public schools.[44] Of the two religion clauses, it is easier to see the difficulty in articulating an injury in establishment cases:

> Several of the Court's Establishment Clause cases might . . . be understood as resting, at least implicitly, on stigmatic harm. In many Establishment Clause cases, the plaintiff argues that his tax dollars are being improperly used to support an establishment of religion. The injury in these cases is the plaintiff's loss of money . . . . But in many religious display cases the challenged conduct . . . costs no money . . . .

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[37] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 801 (2000).

[38] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 670–71 (1984).

[39] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000).

[40] *See* Saladin v. City of Milledgeville, 812 F.2d 687, 691 (11th Cir. 1987).

[41] *Id.*

[42] *See, e.g.*, *Mitchell*, 530 U.S. at 801.

[43] *See, e.g.*, Allegheny Cty. v. Am. Civil Liberties Union, 492 U.S. 573, 578–79 (1989); *Lynch*, 465 U.S. at 670–71.

[44] *See, e.g.*, *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 294; Lee v. Weisman, 505 U.S. 577, 580 (1992), Edwards v. Aguillard, 482 U.S. 578, 580–81 (1987).

> If the plaintiffs in these cases are not complaining about the loss of tax dollars, what exactly is their injury? Some lower courts have held that a plaintiff is injured if he has altered his conduct to avoid seeing an offensive religious display. Other courts have held that a plaintiff is injured if he is forced to confront an offending display as part of his regular routine, even if he does not alter his conduct to avoid the display. The Supreme Court has not embraced either approach, although it has hinted that a plaintiff who wishes to challenge a religious display must encounter the display on a regular basis.
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> In the absence of an explanation from the Court, some scholars suggest the answer can be found in the endorsement test, first articulated by Justice O'Connor . . . . "The Establishment Clause," Justice O'Connor wrote, "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." She then wrote that governmental endorsement of religion is impermissible because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."
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> O'Connor's discussion of endorsement was directed to the merits of the case, not the issue of standing. But it sheds light on her view of the injury in religious display cases. Plaintiffs in these cases are harmed, she implies, because the government's endorsement of religion casts them as outsiders, as second-class citizens not deserving of the same consideration given to adherents. Though not described as stigmatic harm, this injury sounds very much like the denigration alleged by the African American parents in *Allen*. . . .
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> The Court has never formally linked the endorsement test to the issue of standing. But a majority of the Court has adopted O'Connor's test as one way to determine whether government action violates the Establishment Clause. Thus, one might conclude that standing in religious display cases rests, at least in part, on the stigmatic harm inflicted by governmental endorsement of religion.[45]

[45] Healy, *supra* note 34, at 436–38 (first quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J. concurring); then quoting *id.* at 687–88).

The difficulty in articulating a concrete injury in Establishment Clause cases may be the genesis of the taxpayer-standing rule articulated in *Flast v. Cohen*.[46] As a general matter, a person does not have standing to challenge a federal governmental law or policy merely because that person is a taxpayer.[47] Taxpayer status indicates the presence of a generalized rather than particularized grievance.[48] In *Flast*, the plaintiffs alleged that they had standing as taxpayers to challenge a federal program under which books and material were provided to religious schools.[49]

In a somewhat tortured exercise, the Court carved out an exception to the general prohibition against federal taxpayer standing when a plaintiff taxpayer demonstrates that she is challenging an exercise of congressional taxing and spending—rather than its regulatory power more broadly—and when a logical nexus between taxpayer status and the challenged law can be established by showing a distinct textual limitation on Congress's power to tax and spend.[50] The Court held that the plaintiffs in *Flast* had met this test.[51] First, the Court noted that they challenged a congressional spending program rather than Congress's broad authority to regulate.[52] Second, as a historical matter, the Court concluded that the Establishment Clause was intended to limit Congress's authority to spend taxpayers' money on religion and thereby force taxpayers to participate in religious establishment.[53]

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[46] 392 U.S. 83, 102–03 (1968).

[47] *See* Massachusetts v. Mellon, 262 U.S. 447, 487 (1923).

[48] *See id.*

[49] *See Flast*, 392 U.S. at 85–86.

[50] *See id.* at 103.

[51] *Id.*

[52] *Id.*

[53] *Id.*

> James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

Id. (quoting 2 JAMES MADISON, THE WRITINGS OF JAMES MADISON 186 (Gaillard Hunt ed., 1901)).

Indulging this kind of contortionism bespeaks the difficulty in identifying a concrete injury when the government promotes religion.[54] Since the promotion of religion is not a zero-sum enterprise where help to one necessarily comes at the demonstrable and particularized expense of another,[55] one struggles to see where any person might allege a concrete injury in such cases. That being so, courts would rarely if ever get at the issue; and if courts want to get at the issue, they will have to undertake the legal fictions and machinations characterized by the *Flast* decision in search of some cognizable injury. As Professor Thomas Healy noted in his incisive article, *Stigmatic Harm*, finding an injury is even more difficult in cases involving public displays,[56] and the same might be said for prayer in schools.[57] Really, what is one to say when one sues to challenge a religious display or a religious incantation? *It bothered me terribly*?[58]

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[54] *See* Mark C. Rahdert, *Forks Taken and Roads Not Taken: Standing To Challenge Faith-Based Spending*, 32 CARDOZO L. REV. 1009, 1017–18 (2011) (citations omitted). Professor Rahdert explains:

> The difficulties the Court has encountered in standing law have been particularly vivid in cases involving the Establishment Clause. . . . Each major period of establishment jurisprudence has been marked by vigorous judicial debate over the proper limits of standing in cases addressing the relations of religion, church and state. Sometimes the Court has rejected standing on controversial Establishment Clause questions. At other junctures, it has loosened the knots of standing law to enable establishment challenges that might otherwise evade resolution. At times it has treated the Establishment Clause as a special case, calling for unique (and more generous) standing rules. At others it has insisted on treating establishment matters by the same rules that apply elsewhere, albeit with the same indeterminacy. In most periods, a coherent approach to standing in establishment matters has eluded the Court's grasp.

Id. (citations omitted).

[55] An example of a zero-sum enterprise is when an affirmative action program intended to promote opportunities for ethnic minorities sometimes necessarily requires the exclusion of a non-minority individual from a certain job or a seat at a certain school. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307–08 (1978).

[56] Healy, *supra* note 34, at 436–38 (citations omitted).

[57] *See generally* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

[58] *See* Rahdert, *supra* note 54, at 1018–19. Professor Rahdert notes:

> One of the most persistent sources of controversy concerns the relative roles of tangible "pocket-book" and intangible "psychic" injury in conferring Establishment Clause standing. Some Justices, notably including Justice Jackson . . . and Justice Scalia . . . , have suggested that the absence of significant discernible and reasonably direct pecuniary or other tangible harm ought to counsel heavily against Establishment Clause standing. Yet in other situations, such as its public school prayer decisions, the Court has treated non-pecuniary psychic harm as a sufficient ground for jurisdiction,

If the Establishment Clause is more about the government refraining from its own participation in religion and the Free Exercise Clause is more about the government abstaining from interference in the religious beliefs and practices of individuals under the government's jurisdiction, it would seem that the latter would engender injuries far more concrete than the former, making it easier to find a plaintiff with standing to sue for an alleged free exercise violation. In *Flast*, the Court stated that "standing requirements will vary in First Amendment religion cases depending upon whether the party raises an Establishment Clause claim or a claim under the Free Exercise Clause."[59] But the Court applied its taxpayer-nexus exception only in the context of the Establishment Clause: "We have noted that the Establishment Clause of the First Amendment does specifically limit the taxing and spending power conferred by Art. I, [§] 8. Whether the Constitution contains other specific limitations can be determined only in the context of future cases."[60]

The Court's reticence to wade into the shallows of free exercise with its new taxpayer-standing doctrine likely resulted from its understanding that such intellectual gymnastics would not be necessary for a plaintiff who might allege, for example, that the government had either made her pray a prayer that she did not want to pray or made her abstain from a prayer that she did want to pray. There is nothing ethereal or abstruse about the injury in such a case; the injury is, rather, palpable and easily discernible.

B. Free Exercise

As it turns out, however, courts are flirting with a much looser standard for standing in Free Exercise Clause cases even as they tighten up those standards with regard to the Establishment

> though the Justices have sometimes debated whether or not such harm needs to approach coercion. The Justices have also debated the degree to which the source of psychic harm and the directness of its mode of operation matter. These judgments influence the Court's willingness to consider taxpayer standing, since they affect the degree to which the taxpayer's relatively symbolic pecuniary harm can be buttressed by appeals to intangible psychic injury. In general, the broader the role of psychic harm, the less the presence or absence of pocketbook injury should matter. Debates over the status of taxpayers in Establishment Clause litigation consequently become, in effect, coded debates about the kinds of degrees of intangible harm the Establishment Clause is meant to redress.

Id. (citations omitted).

[59] Flast v. Cohen, 392 U.S. 83, 102 (1968).

[60] *Id.* at 105.

Clause. As to the Establishment Clause, when the Supreme Court made the turn from the more liberal Warren era to the more conservative Rehnquist era,[61] it narrowed the scope of the *Flast* exception to the general prohibition against taxpayer standing by explicitly stating that the *Flast* exception applied to only appropriations of funds by the legislative branch.[62]

To that end, in *Valley Forge Christian College v. Americans United for Separation of Church and State*, the Court held that taxpayers lacked standing to challenge the transfer of a large and valuable tract of land to a Christian college by a federal executive agency.[63] The lesson was well learned, and when President George W. Bush created an "Office of Faith-Based Initiatives," the office and its satellite offices in federal agencies were empowered not to appropriate funds, but to assist religious organizations in their efforts to qualify for federal money.[64] Once again, the Supreme Court held that no mere taxpayer had standing to challenge the expressly faith-friendly program.[65]

In Establishment Clause cases under the conservative majority on the Court, then, a plaintiff must allege a concrete and particularized injury. Furthermore, "the psychological consequence presumably produced by observation of conduct with which one disagrees" does not constitute "an injury sufficient to confer standing under Art. III."[66] And if that means that no one has standing, that would seem to suit the Court. In *Valley Forge Christian College*, the Court stated, "[t]he assumption that if [certain parties] have no standing to sue, no one would have standing, is not a reason to find standing."[67]

Justice Gorsuch, with Justice Thomas joining him, recently illuminated the likely way forward for the Court in Establishment Clause cases. In his concurring opinion in *American Legion v. American Humanist Association*, Justice Gorsuch wrote:

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[61] *See* Frank B. Cross, et al., *Warren Court Precedents in the Rehnquist Court*, 24 CONST. COMMENT. 3, 8 (2007) ("One might expect the relatively conservative Rehnquist Court to make limited use of the relatively liberal Warren Court precedents.").

[62] *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 478–79, 481 (1982).

[63] *Id.* at 479–80.

[64] *See* Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 593–95 (2007).

[65] *See id.* at 608–09.

[66] *Valley Forge Christian Coll.*, 454 U.S. at 485.

[67] *Id.* at 489 (first alteration in original) (internal quotation marks omitted) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974)).

> The [American Humanist] Association claims that its members "regularly" come into "unwelcome direct contact" with a World War I memorial cross . . . "while driving in the area." And this, the Association suggests, is enough to allow it to insist on a federal judicial decree ordering the memorial's removal.[68]

Somewhat derisively, Justice Gorsuch continued, "Maybe, the Association concedes, others who are less offended lack standing to sue. Maybe others . . . who come into contact with the memorial too infrequently lack standing as well. But . . . its members are offended enough—and with sufficient frequency—that they may sue."[69] Justice Gorsuch then stated, consistently with the Court's apparent view in *Valley Forge Christian College*, "[t]his 'offended observer' theory of standing has no basis in law."[70]

At the same time, in Free Exercise Clause cases,[71] conservative federal judges have gone so far as to find a substantial burden where the government has required no more than that an employer provide health insurance plans to employees that include contraceptive coverage,[72] or that employers may opt out of providing such coverage by filing a form.[73]

This new paradigm, a narrower view of Establishment Clause standing and a broader view of free exercise standing—at least a free exercise injury—is consistent with a federal judiciary that is inclined to see a robust role for religion, and particularly the religious beliefs and practices associated with conservative Christianity, in public life.[74] Such an attitude would, naturally,

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[68] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2098 (2019) (Gorsuch, J., concurring) (quoting Am. Humanist Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n, 874 F.3d 195, 203 (4th Cir. 2017), *rev'd and remanded sub nom.* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019)).

[69] *Id.* (citations omitted).

[70] *Id.*

[71] Some of these cases arise under the Religious Freedom Restoration Act ("RFRA"), which, like the First Amendment itself, requires judicial intervention when a government "substantially burdens the exercise of religion." Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 690 (2014).

[72] *See id.* at 691–92.

[73] *See generally* Priests for Life v. U.S. Dep't of Health and Human Servs., 772 F.3d 229, (D.C. Cir. 2014), *vacated*, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (per curiam)).

[74] *See* Katherine Stewart, Opinion, *Whose Religious Liberty Is It Anyway?*, N.Y. TIMES (Sep. 8, 2018), https://www.nytimes.com/2018/09/08/opinion/kavanaugh-supreme-court-religious-liberty.html. Stewart wrote:

> In answer to [Senator Ted] Cruz's invitation to discuss "religious liberty," Judge Kavanaugh spoke movingly about the suffering of those who were prevented from bringing their religion into "the public square." But he had next to nothing to say about the benefits that have flowed . . . from the many

lead one to limit access to courts for those who see some difficulty with the government promoting favored religious beliefs while providing access to those who see secular laws as burdening favored religious beliefs. This attitude also reflects a shift in the way judges define free exercise, as will be discussed more thoroughly below; whereas free exercise was once seen as dynamic in nature, it is now seen as prophylactic.[75] A free exercise injury, therefore, may now be alleged not only by someone claiming active interference in her beliefs or practices, but also by someone claiming that her participation in the secular social compact is itself injurious when secular laws fail to accommodate her religious sensibilities.[76]

1. When Free Exercise is Dynamic

There was a time, particularly when Justice Scalia was interpreting the law, when suspicions about free exercise claims running amok led the Supreme Court to take a narrow view of the Free Exercise Clause's reach. For example, when adherents to a Native American religion claimed a free exercise right to use peyote as part of their religious rites and rituals,[77] the Court, with Justice Scalia writing for the majority, stated:

> But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would

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> landmark decisions that have prevented religious groups from using the power of the state to impose their views. He endorsed the appeal to "history and tradition" in justifying the mixing of religion and government functions, but showed no awareness that such appeals invariably confer privilege on those religions best able to claim this history for themselves. He celebrated recent rulings that establish the right of religious groups to participate in "public programs," but failed to note that the concerns those rulings raise have to do with the use of taxpayer funds by religious groups whose beliefs are not universally shared – and whose discriminatory practices are at odds with laws that apply to the rest of the nonprofit (and for-profit) world. . . . Judge Kavanaugh's disdain for the separation of church and state will matter in decisions that go well beyond the usual battlegrounds in the culture war.

Id.

[75] *See* Beery, *supra* note 9, at 128–35.

[76] *See* Stewart, *supra* note 74 ("Let's call it by its true name: religious privilege, not religious liberty. Today's Christian nationalists want the ability to override the law where it conflicts with their religious beliefs, and thus to withdraw from the social contract that binds the rest of us together as a nation.").

[77] Emp't Div. v. Smith, 494 U.S. 872, 874, 878 (1990).

> be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.
>
> [The religious objectors] in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.[78]

Under this view, the Free Exercise Clause is violated only when the government intentionally targets certain beliefs because of their religious nature or when the government manifestly interferes with one's religious practices or abstentions because of their religious nature. In the same vein, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court struck down an

[78] *Id.* at 877–78 (second alteration added).

ordinance that was plainly directed against religious practices in that it barred the practice of animal sacrifice, *but only when undertaken in the context of a religious ritual of some kind*.[79]

This view of free exercise makes sense. Were the Court to indulge a broader view, one that accommodates objections to laws or policies that do not target activities or beliefs based on their religiosity, the attendant mischief would be easy to imagine: a person claiming, while being cited for speeding, that she must travel at least ninety miles per hour to commune with the almighty; or a person claiming immunity from arson statutes on the basis of his fire worship; or, of course, the likely rampant emergence of a widespread religious objection to paying taxes.

And this narrower view of the Free Exercise Clause's reach comports with the common understanding of the word exercise:

> There seems some confusion about the word *exercise*. Exercise means "the act of bringing into play or realizing in action." It is "[a]n activity carried out for a specific purpose." To exercise something is to engage in "the use of something." "If you exercise something such as your authority, your rights, or a good quality, you use it or put it into effect." The exercise of something cannot, by definition (it would seem), be passive or inert. The exercise of something is, rather, active and kinetic—it is dynamic.[80]

Indeed, the further back one goes in search of the meaning of the word "exercise," the more dynamic "exercise" seems to be. According to the 1828 American Dictionary of the English Language, exercise meant:

> In a general sense, any kind of work, labor or exertion of body. Hence, (1) Use; practice; the exertions and movements customary in the performance of business; as the *exercise* of an art, trade, occupation, or profession [or] (2) Practice; performance; as the *exercise* of religion [or] . . . (10) Act of divine worship. . . .[81]

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[79] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535–36, 547 (1993).

[80] Beery, *supra* note 9, at 125 (quoting *Exercise,* MERRIAM-WEBSTER DICTIONARY (online ed.), https://www.merriam-webster.com/dictionary/exercise (last visited Oct. 9, 2019)); *Exercise*, OXFORD LIVING DICTIONARIES (online ed.), https://en.oxford dictionaries.com/definition/exercise (last visited Oct. 9, 2019); *Exercise*, CAMBRIDGE ENG. DICTIONARY (online ed.), https://dictionary.cambridge.org/us/dictionary/english/ exercise (last visited Oct. 9, 2019); *Exercise*, COLLINS ENG. DICTIONARY (online ed.), https://www.collinsdictionary.com/us/dictionary/english/exercise (last visited Oct. 9, 2019)).

[81] *Exercise*, WEBSTER'S DICTIONARY 1828 (online ed.), http://webstersdictionary 1828.com/Dictionary/exercise (last visited Oct. 9, 2019).

So the government, when the term free exercise is properly understood, need not accommodate believers' every sensitivity; it must, rather, keep out of their business when they undertake religious activities or put their religious rites and rituals to use. The exercise of religion is not passive; it requires exertion and the practice or performance of religious acts—acts of worship or expressions of belief. If this is what free exercise means, then a free exercise injury would result only from a governmental law or policy that requires, in some concrete and palpable way, that individuals either perform and practice religious acts anathema to their beliefs and consciences or that they abstain from the practice and performance of acts of worship or expressions of belief. Certainly, there is no room here for "injuries" grounded in the mere application of secular laws intended to promote the general welfare.

2. When Free Exercise is Prophylactic

Nonetheless, the Court, particularly with Justice Kavanaugh now among its number, is drifting toward the view that the Free Exercise Clause, rather than vindicating the individual's right to practice and perform her religion and to undertake acts of worship consistent with her beliefs, additionally functions as a prophylaxis shielding the believer,[82] even in her religious latency, from having to participate in a society where her beliefs are not accommodated by the government.[83]

In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court ruled that the federal government, under the Affordable Care Act ("ACA"),[84] could not require that employers provide employees with health-insurance coverage that, in turn, provided contraceptive coverage.[85] Writing for the Court, Justice Alito avoided the question of standing, but noted, "If the owners comply with the HHS mandate, they *believe* they will be facilitating abortions . . . ."[86] Justice Alito did not state that the owners actually *would* be facilitating abortions. Rather, it was enough of

[82] Indeed, Justices Alito, Gorsuch, Kavanaugh, and Thomas recently signaled a willingness to revisit *Employment Division v. Smith*. *See* Erwin Chemerinsky, *Chemerinsky: Supreme Court's Recent Actions are Telltale Signs of Its Future Direction*, ABA J. (Feb. 7, 2019), http://www.abajournal.com/news/article/chemerinsky-courts-recent-actions-offer-taste-of-the-future/ (last visited Oct. 9, 2019).

[83] *See generally* Beery, *supra* note 9.

[84] 42 U.S.C. § 18001 (2018).

[85] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–91 (2014).

[86] *Id.* at 691 (emphasis added).

an injury to implicate free exercise rights—in this case, under RFRA[87]—merely to allege that the owners *believed* that they may be complicit in the sins of third parties.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Supreme Court invalidated a provision in the Missouri Constitution that barred the state from providing public aid to religious organizations.[88] Pursuant to Missouri's anti-establishment constitutional provision, Trinity Lutheran Church was denied permission to participate in a state-run scrap-tire program under which aid recipients could repave surfaces on their property with tar made from recycled tires.[89] Missouri argued that its constitutional ban on government entanglement with religious organizations did "not *prohibit* the Church from engaging in any religious conduct or otherwise exercising its religious rights" and therefore did "not meaningfully burden the Church's free exercise rights."[90] But the Court, per Chief Justice Roberts, held that Missouri's anti-establishment provision "punished the free exercise of religion" by putting would-be aid recipients to the choice whether to give up the aid or give up their religious natures.[91] The Court went so far as to opine that Missouri's provision would require Trinity Lutheran Church to "*renounce* its religious character."[92] Under this view of free exercise, religious adherents are "shielded even from the insult of state neutrality."[93]

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, a bakery shop owner refused to design a cake for a same-sex couple's wedding in defiance of a Colorado civil rights law that required him to do so.[94] "The Court, per Justice Kennedy . . . wagged its finger at the Colorado Civil Rights Commission and gave it a stern talking-to about impartiality and respect, holding merely that . . . the state had been partial in its dealings with the cake maker."[95] But how did the cake maker have

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[87] 42 U.S.C. § 2000bb (2018).

[88] 137 S. Ct. 2012, 2017, 2024–25 (2017).

[89] *Id.* at 2017.

[90] *Id.* at 2022.

[91] *Id.* at 2021–22 (citing McDaniel v. Paty, 435 U.S. 618, 626 (1978)).

[92] *Id.* at 2024 (emphasis added).

[93] Beery, *supra* note 9, at 131 (citing *Trinity Lutheran Church*, 137 S. Ct. at 2027 (Sotomayor, J., dissenting)).

[94] 138 S. Ct. 1719, 1723, 1725 (2018).

[95] *See* Beery, *supra* note 9, at 121 (citing *Masterpiece Cakeshop*, 137 S. Ct. at 1729–31).

standing to challenge a neutral anti-discrimination law on free exercise grounds to begin with? The law did not require the cake maker to undertake a religious exercise or to refrain from one any more than any civil rights law that governs the conduct of business people who do business with the public. It was only because the cake maker's *religious* sensibilities were in play that he could have had standing despite the lack of any discernible interference in religious activities or targeting of religious beliefs.

Oddly enough, LGBT Americans do not always enjoy similar consideration when their *secular* sensibilities are offended. In *Barber v. Bryant*, LGBT citizens challenged a Mississippi law that permitted discrimination against LGBT people on religious grounds.[96] Under the law, the state was not permitted to take adverse action with regard to tax treatment, benefits, or employment when an individual acted in accordance with certain religious convictions in opposition to same-sex relationships and marriage.[97] The Fifth Circuit Court of Appeals held that the plaintiffs, who were "religious leaders who do not agree with the [beliefs protected by the Mississippi law], . . . gay and transgender persons who may be negatively affected by [the law], and . . . other persons . . . who do not share the . . . beliefs [protected under the law],"[98] had failed to show any more than stigmatic harm, and therefore lacked standing.[99]

So it seems that one's angst is a concrete and palpable injury as long as it is religious angst and not secular angst. This is why I have suggested elsewhere that advocates for secular causes should reframe their arguments in religious terms—that even atheism and agnosticism should be characterized as "*beliefs about religion*."[100] The Court in recent cases seems singularly unconcerned with beliefs around establishment and free exercise that are not religious in nature.[101]

Burwell, *Trinity Lutheran Church*, and *Masterpiece Cakeshop* were decided when Justice Kennedy was still on the Supreme Court. Justice Kennedy, although he often voted with conservatives on the Court on religious matters, did voice some

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[96] 860 F.3d 345, 350–51 (5th Cir. 2017).

[97] *See id.* at 350–52.

[98] *Id.* at 351.

[99] *Id.* at 353.

[100] *See* Beery, *supra* note 9, at 152–54 (quoting Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 736–37 (2014) (Kennedy, J., concurring)).

[101] *Id.*

concern about the implications of the Court's implicit conclusion that state neutrality was itself such an insult that it constitutes a free exercise injury:

> Justice Kennedy, although he concurred [in *Trinity Lutheran Church*], was discernably disquieted over the potential reach of the decision, claiming (hoping?) that the opinion "does not have the breadth and sweep ascribed to it by the respectful and powerful dissent," and stating, as an aside, that free exercise means "the right to express . . . beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community. But in a complex society and an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult."[102]

But Justice Kennedy has been replaced by Justice Kavanaugh, who seems to be a proponent of the prophylactic view of free exercise. In *Priests for Life v. U.S. Department of Health and Human Services*, the United States Court of Appeals for the District of Columbia Circuit considered whether the ACA violated employers' free exercise rights by requiring any employer wishing to opt out of the mandatory-contraceptive-care provision of the law to do so by filing a form.[103] Then-Judge Kavanaugh dissented from an order denying to rehear the case en banc and noted that many religious adherents who were subject to the opt-out provision of the ACA "bitterly objected to this scheme" because it would "make[] them complicit in providing coverage for contraceptives, including some that they believe operate as abortifacients" and make the employers "complicit in the scheme" created by the ACA.[104]

Then-Judge Kavanaugh wrote that "under *Hobby Lobby*, the regulations substantially burden the religious organizations' exercise of religion because the regulations require the organizations to take an action contrary to their sincere religious beliefs (submitting the form) or else pay significant monetary penalties."[105] This rationale is the prophylactic approach to free exercise:

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[102] *Id.* at 133 (quoting *Burwell*, 573 U.S. at 736–37 (2014) (Kennedy, J., concurring)).

[103] *See generally* 772 F.3d 229 (D.C. Cir. 2014), *vacated*, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (per curiam)).

[104] Priests for Life v. U.S. Dep't of Health and Human Servs., 808 F.3d 1, 15 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[105] *Id.*

> [I]t is a substantial burden on the exercise of religion to cause a religious believer the pique of having to submit to a bureaucratic certification that would allow the believer to opt out of having to comply with a neutral and even-handed law that would, allegedly, entangle the believer in the areligious private choice of an employee to access contraceptives under an insurance policy written and administered by a third-party insurance carrier.[106]

The Supreme Court's new majority seems squarely of a mind to hold that in free exercise cases, unlike in establishment cases, a plaintiff—particularly if the plaintiff is Christian[107]—may plead a cognizable injury just by averring psychic insult, assuming that the psychic insult is grounded in religious dogmas.[108]

The question arises why the Court, which more and more reflects conservative Christian orthodoxy in its membership,[109] sees state neutrality as to religion or mere compliance with neutral secular edicts in and of themselves ethereal and unremarkable components of participation in the social compact, as such grave injuries.

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[106] Beery, *supra* note 9, at 134 (citation omitted).

[107] Islam, for example, has engendered little sympathy from the Supreme Court in its recent decisions. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2408–09, 2418–19 (2018) (declining to place dispositive weight on anti-Muslim statements made by the President in public, and instead deferring to the judgment of President Donald J. Trump in barring entry into the United States of individuals from several predominantly Muslim nations); *see also* Dunn v. Ray, 139 S. Ct. 661, 661–62 (2019) (Kagan, J., dissenting) (vacating a stay of execution in the case of a Muslim prisoner who, unlike Christian prisoners in the Alabama prison system, was denied the presence of a spiritual advisor of his choice during his execution); *see also* Stewart, *supra* note 74 ("If your religion or deeply held moral beliefs include the view that all people should be treated with equal dignity, then this religious liberty won't do anything for you. If you're a taxpayer who helps to fund your local hospital, a patient who keeps it in business, or a professional who works there, then your sincerely held religious and moral conviction that all people are entitled to equal access to the best medicine that science can provide and the law permits won't stand a chance against a Catholic bishop's conviction that some procedures are forbidden by a higher authority.").

[108] The new Supreme Court Justice also seems enamored with corporate religiosity: "Judge Kavanaugh's record shows he also has a special place in his heart for the mystical belief systems of corporations. He endorsed the *Hobby Lobby* decision, which allowed that corporation to use its religious beliefs to deny birth control coverage to its employees." Stewart, *supra* note 74.

[109] *See* Katie Kelaidis, *How a Catholic Majority SCOTUS Fulfilled an Evangelical Dream*, REWIRE.NEWS (July 23, 2018, 2:13 PM), https://rewire.news/religion-dispatches/2018/07/23/how-a-catholic-majority-scotus-fulfilled-an-evangelical-dream ("[I]t seems hard to accept as coincidence that the current Court's demographics began to take shape in the 1980s, a decade that marked the arrival of the religious right to the highest levels of political power.").

III. INSULT AS INJURY

Conservative Christians have long wanted to make their mark on the federal judiciary,[110] and certainly they have succeeded.[111] So to understand the Supreme Court majority's views about religion and psychic insult as a concrete injury, one must understand the worldview and perspectives of religious conservatives more broadly.

In the free exercise cases discussed above, federal judges found cognizable harm even in injuries that seemed to fall far short of the stigmatic harm alleged in *Allen v. Wright*.[112] Being denied tire tar or having to file a form is a far cry from existing in a racially segregated school system or being tagged with a badge of inferiority—being made to feel an outsider, a "discrete and insular" minority set out of the body politic as the weak are culled from a herd.[113] Stigmatic harm of the sort alleged in *Allen* at least combines psychic insult with the more palpable harm of class discrimination and maltreatment. The injuries alleged in *Burwell*, *Trinity Lutheran Church*, *Masterpiece Cake Shop*, and *Priests for Life* did not even have that going for them; they involved psychic harm alone, decoupled from any claim of societal ostracization or degradation.

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[110] *See* David A. Bosworth, *American Crusade: The Religious Roots of the War on Terror*, 7 BARRY L. REV. 65, 76–77 (Fall 2006) (citations omitted) ("While the Republican Party controlled two branches of the federal government, Christian nationalists turned their attention to the judiciary . . . pressur[ing] politicians to appoint their ideological allies to the judiciary . . . .").

[111] *See* Ann Southworth, *Lawyers and the Conservative Counterrevolution*, 43 L. & SOC. INQUIRY 1698, 1698 (2018) ("The US conservative legal movement is flourishing. Conservatives and libertarians exercise considerable influence on law and policy through an infrastructure of organizations, lawyers, and financial patrons. They have developed a deep bench of highly credentialed lawyers who hold prominent positions in law firms, advocacy organizations, think tanks, universities, and government. Republican administrations have drawn on that pool to make judicial appointments, which has significantly improved conservatives' prospects for success in the courts."); *see also* Alexander Burns & Jonathan Martin, *Michael Cohen's Testimony Opens New Phase of Political Turbulence for Trump*, N.Y. TIMES (Mar. 1, 2019), https://www.nytimes.com/2019/03/01/us/politics/michael-cohen-trump-reelection.html ("Ralph Reed, a longtime evangelical leader, said Mr. Trump's record of delivering on conservative priorities had effectively cemented his own party in place, fostering particular loyalty among Christian conservatives with two Supreme Court appointments and efforts to restrict abortion rights. 'He made a set of promises and he not only kept them — he is in many cases exceeding them,' Mr. Reed said.").

[112] 468 U.S. 737, 755–56 (1984).

[113] *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

A. The Nature of Evangelism and the Non-Believer as Accessorial

But alas, there are reasons why religious conservatives see secular neutrality and their own loss of control as more serious injuries than even the stigmatic harm attendant to racial discrimination. First, it is in the nature of evangelism to pit the believer as the central figure in a biblically sanctioned design, and to cast non-believers as instrumentalities necessary to the evangelical project to proselytize and convert.[114] In this sense, non-believers are accessorial in nature. This paradigm engenders the perception of loss of centrality as an acute injury.[115] Second, there is the harm inhering in the loss of power when a group that once enjoyed dominant cultural influence is met, rather than with obedience, instead with cruel indifference.[116] Finally, it is in the nature of fundamentalist Christians to see their own persecution as a necessary component of the life of a believer, and Christian conservatives are therefore predisposed to see resistance or rejection of their dogmas as persecution—as a concrete and palpable injury.[117] These factors combine to incite claims of injury that are forlorn and even overwrought.

1. Evangelism Requires the Participation of Non-Adherents

The notion of secular neutrality—what might be defined as the non-participation of non-adherents in the religious projects of Christian conservatives—as a free exercise injury likely has to do with the nature of evangelism and the missionary calling of many Christians.

> From the birth of the religion, Christians have been spreading their faith. . . . The "Great Commission" of Jesus lays the groundwork for Christian missions: "Go therefore and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit and teaching them to obey everything that I have commanded you."[118]

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[114] *See infra* Section III.A.1 and accompanying notes.

[115] *See infra* Section III.A.2 and accompanying notes.

[116] *See infra* Section III.B and accompanying notes.

[117] *See infra* Section III.C and accompanying notes.

[118] Joel A. Nichols, *Mission, Evangelism, and Proselytism in Christianity: Mainline Conceptions as Reflected in Church Documents*, 12 EMORY INT'L L. REV. 563, 563 (1998) (quoting *Matthew* 28:19–20 (NRSV)).

The religious impulse to abide by this command has had some unfortunate historical outcomes, as the conversion of unbelievers has not always been achieved through peaceable persuasion.[119] In modern American culture, evangelical outreach rarely approximates the violent misadventures of much of Christian lore, but there remains an element of aggression.[120] "Since Christianity is, by its nature, a missionary faith, Christians claim the right to attempt to persuade others of the truth of their faith. Of course, the right to attempt to convince people to change their religious beliefs stands in tension with the other party's right to privacy."[121]

John Fea, a historian at Messiah College,[122] described modern evangelism this way: "Evangelicals are primarily concerned with preaching the gospel, with evangelism, with social justice ministries . . . . So . . . they're out trying to win people to Christ."[123] In this sense, modern conservative American Christianity differs from some other sects and religious movements throughout history. Jewish people, for example, have generally "had no wish to convert the Gentiles; they were content with the feeling . . . they derived from being the Chosen People."[124] As another example, "Shinto, which teaches that Japan was created earlier than the rest of the world, is not intended or likely to appeal to those who are not Japanese."[125]

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[119] *See id.* at 565 (citations omitted) ("Unhappily, theological justification has been offered for the use of force since the time of St. Augustine. Using Jesus' parable of a great feast, Augustine interpreted the words *"compelle intrare"* (compel them to come in) as applicable to those who believed something other than orthodox doctrine: the heretics. Augustine's interpretation gave theological justification to all manner of pressure and persecution of the heterodox over the centuries.").

[120] *See* Isabelle R. Gunning, *Lawyers of All Faiths: Constructing Professional Identity and Finding Common Ground*, 39 J. LEGAL PROF. 231, 271 (2015) ("[L]awyers who identified with proselytizing forms of Christianity stated that [in their professional lives] they practiced 'lifestyle evangelism' rather than an 'aggressive evangelism' that could conflict with client autonomy."); Susan J. Stabile, *What is Religious "Persecution" in a Pluralist Society?*, 59 VILL. L. REV. 753, 762 (2014) ("Different Christian traditions have different ideas about what evangelization means. And some Christians are fairly aggressive in their efforts to try to bring other people to the Christian faith.").

[121] Nichols, *supra* note 118, at 565 (citation omitted).

[122] MESSIAH COLLEGE, https://www.messiah.edu/a/academics/facultydir/faculty_profile.php?directoryID=9&entryID=453 (last visited Oct. 11, 2019).

[123] Sarah McCammon & Domenico Montanaro, *Religion, the Supreme Court and Why It Matters*, NPR (July 7, 2018), https://www.npr.org/2018/07/07/626711777/religion-the-supreme-court-and-why-it-matters (quoting John Fea).

[124] BERTRAND RUSSELL, POWER: A NEW SOCIAL ANALYSIS 141 (2004).

[125] *Id.* at 141–42.

On the other hand, in the evangelical view, although it is advisable for an adherent to engage in humanitarian outreach and also to live life in a way that exemplifies biblical moral teachings, it is even more important that the adherents evangelize by proclaiming their beliefs.[126]

This summary elucidates a remarkable view of rights as they relate to evangelical Christian free exercise. Since the very nature of evangelical Christianity is that exercising one's religion involves the participation of non-believers as would-be proselytes, a non-believer may obstruct an evangelical Christian individual's religious calling simply by refusing to participate or at least to be available. In a paradigm where the believer cannot be the principal without accessories, accessories must exist and accede; failure to provide accessorial participation in believers' project to proselytize and convert is, in a sense, a denial of free exercise.

Evangelical Protestants[127] are not alone in this way of thinking; Catholicism involves similar values:

> The foundation for modern Roman Catholic missiology was laid by the Second Vatican Council [which reaffirmed] . . . that "the Church on earth is by its very nature missionary." . . .

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[126] Joel A. Nichols, *Evangelicals and Human Rights: The Continuing Ambivalence of Evangelical Christians' Support for Human Rights*, 24 J. L. & RELIGION 629, 635–36 (2008–2009) (citation omitted) ("[S]ocial action (through assisting those in need) and "'witness'" (living a godly life or by practicing the Eucharist regularly) are not evangelism. These latter actions are desirable, but rank lower in priority for evangelicals.").

[127] David M. Smolin, *Religion, Education, and the Theoretically Liberal State: Contrasting Evangelical and Secularist Perspectives*, 44 J. CATH. LEGAL STUD. 99, 99–100 (2005). Professor Smolin states:

> For purposes of this essay, I would define evangelical Protestantism as involving the following:
> (1) Adherence to classic Christian orthodoxy, and hence to monotheistic Trinitarian theology, as reflected in ancient creedal statements such as the Apostle's and Nicene Creed.
> (2) Acceptance of the Protestant Old Testament and New Testament canon as inspired scripture and the preeminent source of religious authority, with such scripture regarded as reliable and true (i.e. infallible/inerrant).
> (3) An emphasis on a personal relationship between each individual believer and God, expressed as a relationship of trust and faith in Christ, which involves the individual turning away from sin and toward God (personal repentance).
> (4) An emphasis on "evangelism," based on a Biblical mandate to spread the Christian faith to persons of every national, ethnic, and cultural group. Thus, evangelicals believe that the Christian faith represents universal truth and the way of salvation applicable in every culture.

Id.

> Christ proclaimed his own mission by claiming, "The Spirit of the Lord is upon me, because he anointed me; to bring good news to the poor he sent me, to heal the broken-hearted, to proclaim to the captive release, and sight to the blind." On another occasion Christ claimed, "The Son of man has come to seek and to save what was lost." The Church, as the Body of Christ, has assumed Christ's missionizing nature and task. . . . [M]ost importantly, the missionary nature of the Church stems from the activity of the Holy Spirit. The Holy Spirit is the true agent of mission, and that agent is active in and through the Church. Claiming the Holy Spirit allows the Church to designate its activities as God-ordained.
>
> The Church is obligated to "proclaim the faith and salvation which comes from Christ" because Christ commanded his apostles (and thus the Church) to go into all nations and make disciples. The Church carries out its mission to all the nations as it obediently "makes itself fully present to all men and peoples in order to lead them to the faith, freedom and peace of Christ by the example of its life and teaching, by the sacraments and other means of grace." The purpose of missionary activity is to "make Christ present" to those people being evangelized, so that they may know the mystery and love of Christ.[128]

"[G]o into all nations and make disciples."[129] Again, the very nature of one's religion may be that it requires others as accessorial participants in the project. If a believer comes to me and wishes to heal me, to proclaim to me his beliefs, and to make of me a proselyte, and if I do not allow him at least to try, then in a very real sense, I am denying him the ability—the "right"—to practice and perform his religious mission: to exercise his religion.

The centrality principle manifested in this arrangement—the believer as central and all others as accessorial—is a common theme among organized religions on a more macro scale, as well. Geocentrism, until Copernicus came along, reflected humans' collective narcissism in the assumption that all the universe must revolve around us:

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[128] Nichols, *supra* note 118, at 570–71 (first quoting *Luke* 4:8; then quoting *Luke* 9:10; and then quoting Decree of the Church's Missionary Activity *reprinted in* MISSIONS AND RELIGIONS 82–120 ¶¶ 5, 9, 20 (Austin Flannery, OP, ed., Redmond Fitzmaurice, OP, trans., 1968)).

[129] *Id.* at 571 (quoting Decree of the Church's Missionary Activity *reprinted in* MISSIONS AND RELIGIONS 82–120 ¶ 5 (Austin Flannery, OP, ed., Redmond Fitzmaurice, OP, trans., 1968)).

> The first [developmental] revolution [preceding the information age] is the assertion of heliocentrism by Nikolas Copernicus (1473–1543), which decentered human self-understanding being the apex at the center of God's creation by arguing that the sun, rather than the earth, was at the center of the universe. [The] second and third revolutions occurred in the late nineteenth century[. T]he second was Charles Darwin's *Origins of Species*, and the third was . . . the development of Sigmund Freud's psychoanalysis. Darwin decentered human beings from the apex position among animals by showing that animals, including humans, evolve through historical processes and have common origins. He showed that human uniqueness does not lay in the creative source of the species since all species evolve through a common set of physical processes and the species were less differentiated in earlier generations. Human beings can no longer claim to possess a metaphysical essence superior to other creatures. While traits, like being rational, might still distinguish humans from non-humans, rationality itself is not part of the metaphysical substance of the person as viewed in pre-modern thought. Freud discovered the unconscious mind and its influence on reason. This discovery altered philosophical anthropology again, this time decentering human beings from the privileged position of being the only self-aware beings. After the discovery of the unconscious mind, it was no longer possible to maintain the belief that human beings know themselves and consciously control their own actions.[130]

The Church's view of geocentrism was sufficiently dogmatic and foundational that it called one of history's most esteemed thinkers, Galileo, before the Inquisition, requiring him to renounce his own claims of heliocentrism and spend the rest of his days under house arrest.[131] The rebellion of dogmatists—mostly religious—to the ideas of evolution and the "decentering" of humankind from the core of all existence is well documented:[132]

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[130] Kevin P. Lee, *A Preface to the Philosophy of Legal Information*, 20 SMU SCI. & TECH. L. REV. 277, 282–83 (2017) (citing LUCIANO FLORIDI, INFORMATION: A VERY SHORT INTRODUCTION ix, 8–9; Boethius, *A Treatise Against Eutyches and* Nestorias, *in* THE THEOLOGICAL TRACTATES 73–127 (E. Capps et al eds., 2005); DANIEL DENNETT, DARWIN'S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF LIFE (1995)).

[131] *See* Nathaniel T. Noda, *Perpetuating Cultures: What Fan-Based Activities Can Teach Us About Intangible Cultural Property*, 44 CREIGHTON L. REV. 429, 450 (2011).

[132] *See* Susan Haack, *Cracks in the Wall, a Bulge Under the Carpet: The Singular Story of Religion, Evolution, and the U.S. Constitution*, 57 WAYNE L. REV. 1303, 1312 (2011) (citations omitted) ("When the *Origin* was published, there was a storm of religious protest: the Bishop of Oxford, 'Soapy Sam' Wilberforce, accused Darwin of 'a tendency to limit the glory of God in creation,' declaring that his theory 'contradict[ed]

"[Religion] assures [people] that god cares for them individually, and it claims that the cosmos was created with them specifically in mind."[133]

A claim of entitlement to centrality in our society and culture is a claim of privilege, not merely a claim to the right to exist peacefully and be let alone.[134] So in the conservative Christian worldview, the mere governmental tolerance of religion will not do; author and journalist Katherine Stewart recently argued that

> [i]f the Senate confirms Brett Kavanaugh, it will be declaring that the United States is a nation in which one brand of religion enjoys a place of privilege; [and] that we are a nation of laws—except [when] the law offends those who subscribe to our preferred religion . . . .[135]

2. Principal and Accessory

In an article published in 2002, Professor Richard Hiers, in comments seemingly critical of individualism, wrote:

> [Professor] Susan Wolfson's comments on the problematics of rights theory based on individualism could be applied to all jurisprudential systems founded on individual self-interest:
>
> > "[B]y having the exclusive focus of the model on the individual and his autonomous initiative in exercising his rights, a blindly inaccurate and immoral egocentricity of the individual is actually a central component of the model itself . . . . Each individual's autonomy becomes a virtual law unto itself unaccountable to anyone else, except in so far as [. . .] in or out of court with the other individual's conduct."

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the revealed relations of creation to its Creator'; philosopher of science William Whewell refused to allow the book in the library at Trinity College, Cambridge. When *The Descent of Man* was published, Pope Pius IX denounced it as 'a system . . . repugnant at once to history, to the tradition of all peoples, to exact science, to observed facts, and even to Reason itself.' " (first quoting 1 ANDREW DICKSON WHITE, A HISTORY OF THE WARFARE OF SCIENCE WITH THEOLOGY IN CHRISTENDOM 70 (Dover ed., 1960) (1896); then quoting DOUGLAS J. FUTUYMA, SCIENCE ON TRIAL: THE CASE FOR EVOLUTION 24 (Pantheon Books, 1st ed. 1983))).

[133] CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING 74 (2007).

[134] *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights, and the right most valued by civilized men.").

[135] Stewart, *supra* note 74.

> The self may, of course, be regarded as the center of value, and a person may be committed to the advancement of his or her own interests. In that case, however, one is concerned for others only incidentally or instrumentally, to the extent that what is good for the other is also good for oneself.[136]

In this passage, Professor Hiers seems to suggest that individual autonomy is unsatisfactory in its unconcern for the wellbeing of others. But this arguably misconceives the idea of individual autonomy. An autonomous individual is not necessarily unconcerned with the wellbeing of others; he is simply unwilling to play an accessorial role in somebody else's story. Autonomy may be responsive to the claim of others of entitlement to centrality; it is not necessarily a manifestation of narcissistic or hedonistic impulses in and of itself. Is it a free spirit on the periphery of society who is most likely to see others as instrumentalities or props? Or is it, rather, the person or group that claims centrality and insists that all others remain in orbit around the dogmas and missions of the self or the ingroup?

To some, freedom and liberty mean freedom to proselytize and participate in others' behavior; autonomy and choice are regarded as contrary to notions of justice. For example, Michael Gerson, an evangelical Christian and one-time adviser in the George W. Bush administration, had this to say about the Democratic Party and its liberal preferences:

> I would love to see the Democratic Party return to a tradition of social justice that was found in people like William Jennings Bryan. During that period, many if not most politically engaged evangelicals were in the Democratic Party, because it was a party oriented toward justice. I don't see much of that now in the Democratic Party. Instead of an emphasis on the weak and suffering, there's so much emphasis on autonomy and choice.[137]

Here, Gershen advances the proposition not just that a preference for autonomy and choice is a bad thing, but also that autonomy and choice run counter to social justice and the interests of the

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[136] Richard H. Hiers, *Biblical Social Welfare Legislation: Protected Classes and Provisions for Persons in Need*, 17 J. L. & RELIGION 49, 93 (2002) (quoting Susan A. Wolfson, *Modern Liberal Rights Theory and Jewish Law*, 9 J. L. & RELIG. 399, 410–11 (1992)).

[137] Robert J. Delahunty, *Changing Hearts, Changing Minds: A New Evangelical Politics?*, 47 J. CATH. LEGAL STUD. 271, 273–74 (2008) (citing Collin Hansen, *How Then Shall We Politick? Michael Gerson, Recently Resigned Bush Speechwriter and Adviser, on How Evangleicals Should Comport Themselves in the Public* Square, CHRISTIANITY TODAY, Aug. 2006, at 40 (interviewing Michael Gerson)).

weak and suffering. At the very least, the suggestion is that autonomy and choice rank lower than social justice, and that they cannot, therefore, be components of social justice.

From an evangelical standpoint, this makes sense: If the central mission of one's life—one's calling—is to corral, channel, and correct human behavior, then liberty is not found in one's autonomy to make one's own choices, but rather in freedom to proselytize—and to prevent the sinking of fellow travelers into the currents of hedonism—or at least to try. The non-adherent's role is to acquiesce to evangelism. And if the believer's most sacrosanct calling is in proclamation and intercession—be it passive or aggressive—then surely the government's obstruction of that calling is a burden on free exercise, and a concrete and palpable injury. Put simply, proclamation requires a receptive audience—receptive at least to hearing, if not to accepting. If my central religious mission is to proclaim my beliefs *to others*, then others must make themselves available, and their failure to make themselves available, or the government's getting between me and them, leaves me whistling into the wind, unable to perform my religion and undertake my most essential religious practices.

B. Loss of Power and Control

An obviously related problem for a person or group that has suffered extra-centric injury is the loss of power and control. To understand how the loss of power by a religious group or person can be a concrete and palpable injury, one must rid oneself of the popular conception of piety as subservience rather than dominance. As Bertrand Russell opined:

> The power impulse has two forms: explicit, in leaders; and implicit, in their followers. When men willingly follow a leader, they do so with a view to the acquisition of power by the group which he commands, and they feel that his triumphs are theirs. Most men do not feel in themselves the competence required for leading their group to victory, and therefore seek out a captain who appears to possess the courage and sagacity necessary for the achievement of supremacy. Even in religion this impulse appears. Nietzsche accused Christianity of inculcating a slave-morality, but ultimate triumph was always the goal. 'Blessed are the meek, *for they shall inherit the earth*.' Or as a well-known hymn more explicitly states it:
>
> The Son of God goes forth to war,
> A kingly crown to gain.
> His blood-red banner streams afar.

Who follows in His train?
Who best can drink his cup of woe,
Triumphant over pain,
Who patient bears his cross below,
He follows in His train.[138]

If the impulse to acquire power is so innate to the human endeavor, then losing power after it has been acquired must seem an acute injury. Indeed, in The Federalist No. 71, Alexander Hamilton wrote:

> It is a general principle of human nature that a man will be interested in whatever he possesses, in proportion to the firmness or precariousness of the tenure by which he holds it; will be less attached to what he holds by a momentary or uncertain title, than to what he enjoys by a durable or certain title; and, of course, will be willing to risk more for the sake of the one than for the sake of the other.[139]

About this observation, Professor John Wood explains:

> This "general principle" combines an understanding of the endowment effect, loss aversion, and prospect theory, respectively. People value what they already possess more than what they do not (endowment effect). People prefer avoiding loss to acquiring gains (loss aversion). People evaluate outcomes based on the change that outcome represents from an initial reference point rather than based on the nature of the outcome itself (prospect theory). So much was said [by Hamilton] without reference to a single replicable, empirical study.[140]

"The endowment effect is the phenomenon whereby people value something more when they own it than when they do not own it."[141] The effect increases with time.[142] It cannot be gainsaid that conservative Christians, throughout American history, have "owned" a position of dominance in politics and culture.[143] Interestingly, "the endowment effect will increase with the evolutionary salience of the item in question. . . . '[E]volutionary

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[138] RUSSELL, supra note 124, at 7–8.

[139] THE FEDERALIST NO. 71 (Alexander Hamilton).

[140] John Wood, *The "Constitution of Man": Reflections on Human Nature from* The Federalist Papers *to Behavioral Law and Economics*, 7 N.Y.U. J. L. & LIBERTY 184, 207 (2013).

[141] Justin L. Bernstein, *Controlling Medicare with Lessons from Endowment Effect Experiments*, 49 CAL. W. L. REV. 169, 170 (2013).

[142] *Id.* at 177.

[143] *See* JONES, *supra* note 1, at 38–39.

salience' . . . is the connection an organism perceives between its survival and [an] item. Thus, food has more evolutionary salience than toys."[144]

"Aversion to losses is one of the most robust phenomena in the pantheon of decision theory . . . . It even has a neurological basis."[145]

> Loss aversion . . . , as psychologists dubbed this phenomenon, . . . [posits] that preferences . . . depend upon the position people currently occupy (reference-dependent choice). It also leads to a preference for the status quo . . . . Loss aversion induces people to value commodities more once they own them . . . , [and] when [facing] . . . losses, an aversion to sure losses leads to risk-seeking conduct; people choose options that hold out hope of losing as little as possible, even when those options are economically less attractive than [other] options . . . .[146]

If the psychological tendency to hold on to what one has is powerful enough to warrant risk-seeking behaviors as an alternative, then it would seem that the prospect of losing the status quo, particularly for individuals or groups possessed of long-term power and dominance, might induce anxieties that seem, psychologically, palpable and intense.[147]

The dominance of Judeo-Christian norms prevailed for so much of the nation's modern history that it has become a reference point against which to judge historical and cultural developments.[148] What might seem to a secularist or a merely

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[144] Bernstein, *supra* note 141, at 176.

[145] Jeffrey J. Rachlinski & Andrew J. Wistrich, *Gains, Losses, and Judges: Framing and the Judiciary*, 94 NOTRE DAME L. REV. 521, 523 (2018).

[146] *Id.* at 524–25.

[147] For a good discussion of how these principles and "prospect theory" apply to economic decision-making, see Aurora Harley, *Prospect Theory and Loss Aversion: How Users Make Decisions*, NIELSEN NORMAN GROUP (June 19, 2016), https://www.nngroup.com/articles/prospect-theory/ (last visited Oct. 11, 2019).

[148] *See* Frederick Mark Gedicks & Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. VA. L. REV. 275, 281–82 (2007) ("Waves of European immigrants in the nineteenth and early twentieth centuries exposed 'nonsectarian' Christianity as essentially Protestant. This period is accordingly marked by periodic Catholic and Jewish resistance to assimilation by 'nonsectarian' Christian culture, especially in the public schools. By the 1950s, however, these conflicts had largely abated. Succeeding generations of Catholic and Jewish immigrants had absorbed some of the Protestant individualism implicit in 'nonsectarianism,' while nonsectarianism itself loosened its ties to Protestant beliefs and observances. This permitted a reformulation of the American civil religion from 'nonsectarian' Christianity to a more plausible transdenominational 'Judeo-Christianity.' Thus did Justice Douglas declare in the early 1950s that

indifferent citizen to be nothing more than benign historical evolution as the United States moves away from conservative Christian moorings must seem to some conservative Christians an acute trigger of loss aversion with respect to the societal and cultural largesse with which they have for so long been endowed.

C. Persecution

The upshot of all this is a claim of persecution, and persecution is something that a conservative Christian believer should welcome even while decrying its injustice. It seems fair to say that if conservative Christians do not feel persecuted, then they must not be doing religion the right way—because the Bible teaches that believers, if they are doing it right, can expect to be persecuted.[149] Among the Bible verses discussing the inevitability of persecution to Christians who do Christ's will are the following:

- "Indeed, all who desire to live a godly life in Christ Jesus will be persecuted . . . ."[150]
- "Beloved, do not be surprised at the fiery trial when it comes upon you to test you, as though something strange were happening to you. But rejoice insofar as you share Christ's sufferings, that you may also rejoice and be glad when his glory is revealed. If you are insulted for the name of Christ, you are blessed, because the Spirit of glory and of God rests upon you."[151]
- "Blessed are those who are persecuted for righteousness' sake, for theirs is the kingdom of heaven."[152]
- "Blessed are you when others revile you and persecute you and utter all kinds of evil against you falsely on my account."[153]
- "If the world hates you, know that it has hated me before it hated you. If you were of the world, the world would love you as its own; but because you are not of the world, but I chose you out of the world, therefore the world hates you.

Americans are a 'religious' rather than a 'Christian' people, and that American institutions presuppose belief in a 'Supreme Being,' which presumably signified the Jewish as well as the Christian God." (citations omitted)).

[149] *See generally* Stephen Smith (ed.), *100 Bible Verses about Persecution,* OPENBIBLE.INFO, https://www.openbible.info/topics/persecution (last visited Oct. 12, 2019).

[150] *Id.* (quoting 2 *Timothy* 3:12 (English Standard Version)).

[151] *Id.* (quoting 1 *Peter* 4:12–14).

[152] *Id.* (quoting *Matthew* 5:10).

[153] *Id.* (quoting *Matthew* 5:11).

> Remember the word that I said to you: 'A servant is not greater than his master.' If they persecuted me, they will also persecute you. If they kept my word, they will also keep yours."[154]

The natural tendency, then, would be to see persecution, which in a sense is a welcome marker of piety and faith, as present wherever it is even arguably in play:

> Any number of issues have given rise to the use by various persons of the label "persecution" to describe the treatment of Catholic or other Christians in this country:
>
> - The Health and Human Services mandate that employers (including Catholic universities and hospitals) provide contraceptive coverage for their employees, which the outgoing president of the Ethics and Religious Liberty Commission characterized as "by definition, a form of religious persecution."
> - The lack of satisfactory religious exemptions in state statutes governing same-sex marriage as well as lawsuits against companies who refuse to provide services to gay couples.
> - Laws that seek to force Catholic adoption and foster care agencies to allow gays to adopt children (or punish those who do not).
> - Restrictions on evangelization in the military. . . .
> - Not being able to put Christian symbols on public buildings, such as the Ten Commandments on school buildings.[155]

And as Professor Susan J. Stabile also notes:

> Once people see themselves as "persecuted," their instinctive reaction is to fight and resist. And the fight becomes fierce because a kind of circle the wagon mentality arises and anyone outside that circle is the enemy. And when we are talking in religious terms, the enemy is evil. If I believe I am persecuted, I must fight to defend myself. It is not just that someone disagrees with me[;] I am being attacked.[156]

In a similar vein, "Where a spirit of ferocious dogmatism prevails, any opinion with which men disagree is liable to provoke a breach of the peace. Schoolboys are apt to ill-treat a boy whose opinions are in any way odd, and many grown men have not got

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[154] *Id.* (quoting *John* 15:18–20).
[155] Stabile, *supra* note 120, at 754–55 (citation omitted).
[156] *Id.* at 765.

beyond the mental age of schoolboys."[157] This is especially so with regard to "beliefs . . . instilled into the minds of the young . . . . The beliefs are instilled, not by giving any reason for supposing them true, but by . . . repetition . . . and mass suggestion."[158] Once dogmatic beliefs are instilled, and when it turns out that competing creeds have been instilled in different populations, these creeds "produce two armies which clash, not two parties that can discuss. Each . . . feels that everything most sacred is bound up with the victory of his side, [and that] everything most horrible is exemplified by the other side."[159] So there is no soft landing for the losing side in a battle between creeds, particularly where one or both is grounded in the repetition of rote dogmas; there is, rather, total loss—a psychic injury as grave as it is invisible and ethereal.

Once again, we see indicia of acute injury—attack—even in the insult of mere neutrality or in the refusal to allow conservative Christians to intervene in the lives of others. And as mentioned earlier, claims of persecution and injury can seem forlorn and overwrought. One scholar has likened the rhetoric of religious conservatives in the "Culture Wars" to conservative rhetoric on the "War on Terror."[160] As she explains, "[t]he commonalities between emergency rhetoric in the War on Terror and in the Culture Wars are indisputable. In both cases, conservatives have framed historical events (small or large) in terms of *injury*, enmity, crisis, and emergency."[161] As Professor Stabile notes, these despairing claims of persecution and injury emerge even when religious conservatives are merely restrained from interceding in the lives and belief systems of others, as when they are asked to refrain from evangelizing in the military, or to abide by anti-discrimination laws that protect LGBT Americans, or to provide insurance coverage to employees that makes it employees' choice rather than employers' choice whether to access and use contraceptives for sexual or health purposes.[162]

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[157] RUSSELL, *supra* note 124, at 241–42.

[158] *Id.* at 245.

[159] *Id.*

[160] *See* Noa Ben-Asher, *Faith-Based Emergency Powers*, 41 HARV. J.L. & GENDER 269, 270 (2018).

[161] *Id.* at 281 (emphasis added).

[162] Stabile, *supra* note 120, at 754–55.

To the last example, if I am a believer whose dogmas were once central and whose deeply held beliefs require my intercession in the lives of others, then I need not be compelled to directly *provide* contraceptives to others to suffer a free exercise injury; it is, rather, an affront to my religious freedom even that I must *allow* the use of contraceptives by those in my employ.[163] My freedom to do what? To not allow it—not among my employees and not in my sphere of conscious awareness. And if the government permits me to opt out of the program only by filing a form, the government has coerced me into actively releasing others from obedience to my will.[164] By opting out of participating in their sin, I am forced to abide it—when my belief system requires me not just to exist in peace as to my own life, but also to stop the sins of others, or at least to try. This is the nature of evangelism and proselytizing: I cannot achieve my own salvation without the involvement of others, and to be free to practice my religion, I must therefore be free to involve myself in the lives of others, or at least not to participate in their emancipation from the strictures of my beliefs.[165] In this view of things, the government's refusal to allow me to manage the contraceptive choices of my employees will have caused me great anxiety and angst—indeed to fear for the fate of my soul in its eternal fate. And surely, that is the greatest injury imaginable.

So under the conservative religious worldview, generally applicable and neutral laws, when they require adherents to traditional religious beliefs to accede to secular policy outcomes that offend sectarian sensibilities, are, in a sense, discriminatory. A natural corollary to this view is the notion that the government's active promotion of religion merely constitutes *non*-discrimination or *anti*-discrimination:

> [F]aith-based programs formally adopt the language of anti-discrimination. The concept begins with the premise that religious groups historically have been excluded from government benefits, which amounts to anti-religious discrimination. To avoid or eliminate this discrimination, there

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[163] *See generally*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[164] *See generally* Priests for Life v. U.S. Dep't of Health and Human Servs., 772 F.3d 229, (D.C. Cir. 2014), *vacated*, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (per curiam)).

[165] This may explain why "[w]hile most white mainline Protestants supported the court ruling [regarding the right of same-sex couples to marry], as did majorities of Catholics and Jews, white evangelical Protestants remain strongly opposed." JONES, *supra* note 1, at 43.

> must be a government initiative to ensure that religious groups are restored to a position of equality with their non-religious peers. This is essentially a variation on the rhetoric of affirmative action, applied to secure religious benefits from government spending programs. While this reasoning might have merit in circumstances where past discrimination unrelated to legitimate principles separating church and state can be demonstrated, it is complicated both by the commands of the Establishment Cause [sic] and by the inherent potential for claims of anti-discrimination to cloak motives of religious preference.[166]

So it is not just that the government must allow evangelicals to proselytize or to involve themselves in the contraceptive choices of the employees in their charge. The government must also give money for tire tar to churches, because any effort to disentangle the government from religion—in other words, governmental neutrality as to religion—is, in this view, in fact discriminatory.

Put simply, conservative Christians consider themselves entitled to the centrality of their purposes and missions in American life, and they see their emerging extra-centrality as an acute injury that, even if merely psychic in nature, is also concrete and palpable.

IV. PROPHYLACTIC FREE EXERCISE REQUIRES INSULT AS INJURY

Some lower courts have applied a standing test in free exercise cases that reflects the dynamic—rather than the prophylactic view of the Free Exercise Clause—that fails to account for the forces that undergird the conservative Christian conception of injury. Consider a recent case from the Sixth Circuit Court of Appeals, *Nikolao v. Lyon*.[167] Under Michigan law, children must be vaccinated before entering public school.[168] In *Nikolao*, the plaintiff, a mother, objected on religious grounds to having her children vaccinated.[169] Michigan allowed the plaintiff to get a waiver, but she first had to meet with a local health official and explain the reason for her objection.[170] Two health department nurses failed to convince the mother to have her children vaccinated.[171] After getting the waiver, she sued, claiming that the

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[166] Rahdert, *supra* note 54, at 1012–13 (footnotes omitted) (citations omitted).
[167] 875 F.3d 310 (6th Cir. 2017).
[168] *Id.* at 314.
[169] *Id.*
[170] *Id.*
[171] *Id.*

exemption process—called the Certification Rule[172]—ran afoul of the Free Exercise Clause and the Establishment Clause.[173] Before turning to the merits of the parent's constitutional claims, the court addressed whether she had standing to sue.

As discussed briefly above, to have Article III standing to sue, a plaintiff must show that: (1) she has suffered an injury-in-fact, (2) the injury was caused by the defendant, and (3) the injury is redressable by a court.[174] Under Sixth Circuit precedent, standing to assert a free exercise claim is grounded in coercion.[175] This approach is consistent with the idea of dynamic free exercise—the idea that the exercise of religion involves the performance or practice of religious rites or rituals or the overt expression of religious belief. Thus, "a litigant suffers an injury to her free exercise rights when the state compels her 'to do or refrain from doing an act forbidden or required by [her] religion, or to affirm or disavow a belief forbidden or required by [her] religion.' "[176]

As part of the exemption process, the plaintiff in *Nikolao* was exposed to information she disagreed with in the form of a Religious Waiver Note.[177] The Religious Waiver Note was a list of responses to common religion-based objections to vaccines.[178] But according to the court, the plaintiff gave "no indication that the information *coerced* her into doing or not doing anything."[179] None of the information the government gave the plaintiff forced her to change her religious beliefs.[180] And she had "not presented any facts to suggest that the state ha[d] coerced her in her religious practices. As such, she ha[d] not suffered an injury-in-fact under the Free Exercise Clause and [did] not have standing to pursue that claim."[181] The court went so far as to say that:

> Having to take time off from work to travel to and from the local health office is not a sufficient injury for standing purposes either. This requirement does [not] burden her practice of

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[172] *Id.* at 314–15. The "Certification Rule" is an administrative rule created by the Michigan Department of Health and Human Services that spells out the exemption process. *See id.* at 314.

[173] *Id.* at 315.

[174] *Id.* at 315–16.

[175] *Id.* at 316.

[176] *Id.* (quoting Mozert v. Hawkins Cty. Bd. of Educ., 827 F.2d 1058, 1066 (6th Cir. 1987)).

[177] *Id.* at 314.

[178] *Id.*

[179] *Id.* at 316.

[180] *Id.*

[181] *Id.*

> religion [or] discriminate against religion in any way, as all parents seeking nonmedical exemptions must go through the same process.[182]

In stating that the Sixth Circuit requires coercion for free exercise standing, the court cited *Mozert v. Hawkins County Board of Education*, in which the Sixth Circuit held that a student's parents had failed to present a cognizable free exercise violation because there was no evidence that the defendant school district "required [the student] to profess or deny a religious belief."[183]

In some senses, the court's reliance on the coercion test in a religion-in-public-school case to assess standing in a free exercise case seems misplaced. First, the coercion test is normally applied in Establishment Clause cases to determine whether the government has impermissibly promoted religion, not in Free Exercise Clause cases to determine whether the government has interfered with someone's religious practices.[184] Second, whereas standing is a justiciability issue that normally precedes any discussion of the merits of a case, the coercion test is normally considered when a court is addressing the merits of a First Amendment religion claim.[185]

But this is not to say that the *Nikolao* court's reference to coercion does not make sense. In fact, it makes eminent sense. For one thing, the distinction between addressing a party's standing and addressing the merits of a case is largely an illusory distinction; it is a distinction without a difference.[186] Since an analysis of a plaintiff's standing requires a court to consider not

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[182] *Id.*

[183] 827 F.2d 1058, 1065–66 (6th Cir. 1987).

[184] *See* Lee v. Weisman, 505 U.S. 577, 604 (1992) (finding that a violation of the Establishment Clause is not predicated on the coercion test).

[185] *See id.* at 591–92.

[186] *See* Howard M. Wasserman, *Fletcherian Standing, Merits, and* Spokeo, Inc. v. Robins, 68 VAND. L. REV. EN BANC 257, 264 (2015). Professor Wasserman states:

> If more legal issues are treated as merits rather than the Article III subject-matter jurisdiction threshold, it makes sense to do the same with the merits as compared with the Article III standing threshold. Like statutory facts such as whether the defendant qualifies as an employer or whether the plaintiff is a person protected by the statute, the elements of standing—injury in fact, causation, and redressability—go to who can sue whom for what conduct and what remedy. If that question goes to the underlying merits in the context of subject-matter jurisdiction, it also should go to the merits in the context of standing.
>
> Unfortunately, the Court has been less ready to acknowledge standing as erroneously constitutionalized merits to the same extent it has with adjudicative jurisdiction.

Id. (footnote omitted) (citation omitted).

only whether the plaintiff was injured, but also whether the injury was caused by the defendant, a court must sometimes delve into the merits of a claim—particularly where causation is an element of the claim—to rule on the threshold matter of standing.[187]

Second, and more importantly, although the coercion issue typically comes up in establishment cases, it might fit better in free exercise cases—and some establishment cases might better be framed as free exercise cases. For example, when a public school forces a student—a non-adherent to majoritarian religious beliefs—to participate in a pre-class prayer, one issue is obviously whether the school has thereby established religion.[188] In that context, the Supreme Court has applied the coercion test to determine whether a student has been made to feel like an outsider.[189] But the better question might be whether, by compelling this kind of participation, the school has violated the free exercise rights of the student. The issue of whether the student has been made to violate his or her own beliefs in an active and kinetic way seems more on point than the question of whether the school was promoting religion in a way that constituted establishment—although again, that question is clearly relevant.

And what better way exists to decide whether a person's free exercise rights have been violated than to ask whether the person has been forced—coerced—to participate in or practice an overtly religious undertaking or to abstain from an overtly religious undertaking?[190] It would be hard to imagine a more common-sense approach to the issue of free exercise and to the question whether a plaintiff has suffered a free exercise injury.

Nonetheless, the coercion standard as a component of standing doctrine in free exercise cases is unlikely to survive the new Supreme Court majority for long. If a plaintiff may allege a free exercise injury merely by dint of her having to provide health insurance coverage to an employee,[191] having to sign and submit a

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[187] *See* Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (But Unrecognized) Separation of Powers Problem*, 162 U. PA. L. REV. 1373, 1407 (2014) (recognizing the argument that "causation, one of standing's three prongs, is often a key merits issue").

[188] *See* Wallace v. Jaffree, 472 U.S. 38, 41–42 (1985).

[189] *See id.* at 42 (noting the allegation that "children were exposed to ostracism from their peer group class members if they did not participate" in the prayer).

[190] *Accord* Nikolao v. Lyon, 875 F.3d 310, 316 (6th Cir. 2017).

[191] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 719 (2014).

form to opt out of providing such coverage,[192] or having to exist without state assistance in repaving a playground,[193] then surely a plaintiff who has had to submit herself to state counseling as to religious matters, with all the time and angst involved in that process,[194] has suffered an injury as well. In fact, it would be a free exercise injury to be required under the law to have a child vaccinated at all, never mind having also to explain oneself to the state and be lectured by medical professionals.[195]

The argument that the plaintiff in *Nikolao* was not required to do anything religious would seem to be unavailing in light of the prophylactic approach to free exercise now prevailing among conservative federal judges. Providing health insurance is not religious, and neither is complying with bureaucratic form-filling requirements. Nor, of course, is paving a playground. In *Nikolao*, since state health officials counseled the plaintiff about religious beliefs as to vaccinations, there actually was a religious component to the activity the plaintiff was forced to undertake. More to the point, though, it would not have mattered were the entire undertaking devoid of any religious references. The state's failure to abide and accommodate the plaintiff's religious beliefs, no matter how nonreligious the context, was a concrete and palpable injury if federal courts are to abide the approach reflected in *Burwell*, *Masterpiece Cake Shop*, *Trinity Lutheran Church*, and *Priests for Life*. As journalist Katherine Stewart noted:

> In his dissenting opinion in Priests for Life v. Health and Human Services, Judge Kavanaugh argued that requiring an organization to fill out a one-page form that would have exempted it from providing contraception coverage imposed a "*substantial burden*" on its free exercise of religion. He appears to feel keenly the anguish of priests and nuns living in a nation where women have a range of lawfully and medically supported health care options.[196]

We end where we began: anguish and angst, in the coming age of prophylactic free exercise, will be regarded as concrete and palpable injuries.

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[192] *See* Priests for Life v. U.S. Dep't of Health & Hum. Servs., 808 F.3d. 1,17 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[193] *See* Trinity Lutheran Church v. Comer, 137 S. Ct. 2012, 2017, 2022 (2017).

[194] *See Nikolao*, 875 F.3d at 314, 316.

[195] *See id.* at 314.

[196] Stewart, *supra* note 74.

CONCLUSION

In the future, should the Court adopt the dynamic view of free exercise, the coercion standard endorsed in *Nikolao* would be appropriate. As it stands today, however, the dynamic view of free exercise seems to command only a minority on the Court.

According to Justice Kavanaugh's dissent in the denial of rehearing the case *Priests for Life* en banc, the problem under the ACA was that plaintiffs, by filling out and filing a form, were required to participate in their employees' choices to access contraceptive care. Under this logic, when I must release others from the strictures of my own beliefs, I am no longer free—free to involve myself in the behavior of others and conform them to my own preferences, or at least to try; free to exist without the awareness that I am not in control; and free to participate in a society where my own God, through me and my fealty to His will, is sovereign. If I am a believer and you are not, then you are not free from my involvement in your life; to abide my own right to free exercise, you must participate in my project and my mission.