

## RELIGIOUS LIBERTY INTEREST CONVERGENCE

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### ABSTRACT

*Americans are deeply polarized on a plethora of issues. One of the most prominent areas of polarization is religious liberty, which in recent years has increasingly pitted conservative, white Christians against a range of marginalized minorities, particularly Muslims. The divide threatens Muslims' rights and the vitality of religious liberty more broadly. This Article assesses the extent to which self-interest—especially the self-interest of the conservative Justices of the Supreme Court—can help depolarize religious liberty.*

*Professor Derrick Bell's theory of "interest convergence" helps connect different self-interests that, in turn, enable issue-specific coalitions strong enough to effect serious cultural and legal change. Bell used interest convergence theory to analyze judicial decision-making during the civil rights movement. Other scholars have built upon Bell's original thesis about Black people's rights by extending interest convergence to other racial minorities. This Article is the first to consider the implications of interest convergence not just for religious minorities but specifically the status of religious minorities in today's politicized religious liberty landscape. In so doing, it aims to formulate a theory of "religious liberty interest convergence."*

*Specifically, this Article applies Bell's framework to two recent Supreme Court cases. It uses interest convergence theory to explain the rulings against Muslim claimants in *Trump v. Hawaii* (2018) and for Muslim claimants in *Tanzin v. Tanvir* (2020).*

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*The Article concludes by assessing the relevance of religious liberty interest convergence to political coalition-building. In both the judicial and coalition-building contexts, relying on self-interest helps create openings where openings may not otherwise be possible.*

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## INTRODUCTION

America is becoming increasingly polarized between conflicting cultural and political perspectives. Americans' partisan affiliations are morphing into broad identities that even include factors like what they eat and drive, where they live and shop, and their race or sexual orientation. Unfortunately, this grouping has also affected religious communities and religious liberty, so that white, conservative Christians (and their religious claims) are associated with the Republican Party, and the claims of religious minorities (particularly Muslims) are associated with the Democratic Party. This Article aims to identify potential convergence points for religious liberty lawyers seeking to build bipartisan and cross-ideological support for religious freedom, with specific attention to the Muslim-Christian divide.

Professor Derrick Bell's theory of "interest convergence" helps connect different self-interests that, in turn, enable issue-specific coalitions strong enough to effect serious cultural and legal change. Bell used interest convergence theory to analyze judicial decision-making during the civil rights movement. Other scholars have built upon Bell's original thesis about Black people's rights by extending interest convergence to other racial minorities. This Article is the first to consider the implications of interest convergence not just for *religious* minorities but specifically the status of religious minorities in today's politicized religious liberty landscape. In so doing, it aims to formulate a theory of "religious liberty interest convergence."

Specifically, this Article applies Bell's framework to two recent Supreme Court cases. The Article uses interest convergence theory to explain why the conservative Christian Justices<sup>1</sup> of the U.S. Supreme Court ruled against Muslim claimants in *Trump v. Hawaii*<sup>2</sup> but for Muslim claimants in *Tanzin v. Tanvir*.<sup>3</sup> Both cases positioned Muslims as national security threats and appealed to the conservative Justices' predilection for deference to the executive

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1. Parts IV.A and B explore evidence that the conservative Justices of the Court reflect the interests of conservative Christians broadly.

2. 138 S. Ct. 2392 (2018).

3. 141 S. Ct. 486 (2020).

branch—but they led to two very different results. In *Hawaii*, the conservative Justices upheld the Trump administration’s executive order blocking citizens from six majority-Muslim countries from entering the United States (dubbed by many as the “Muslim ban”).<sup>4</sup> The Court held that in matters of immigration and national security, it must defer almost completely to the executive branch.<sup>5</sup> In contrast, in *Tanvir*, the conservative Justices joined with their liberal colleagues in holding for three Muslim men seeking money damages against FBI agents who pressured the men to spy on their Muslim communities.<sup>6</sup> This result ensued even though a key part of the government’s argument was that provision of money damages would compromise national security.<sup>7</sup>

This Article proceeds in five Parts. Parts I and II provide the requisite background and analytical framework. Part I lays out the various facets of religious liberty polarization in the United States, including key drivers of these divides. Part II breaks down the primary battlefronts in the religious liberty culture war. Generally, the war pits conservative, white Christians against a range of marginalized minorities. The political and legal discourse, however, is preoccupied with the more specific conflicts between Christians and sexual minorities (addressed in Section A), and Christians and Muslims (addressed in Section B). The conflict with sexual minorities is defined here as being centered on cases that involve Christians’ objections to contraception, abortion, and same-sex marriage. The conflict with Muslims stems from conservative Christian Justices’ perceived favoritism for Christian claimants over Muslim ones.

Part III outlines Bell’s interest convergence theory and how other scholars have used it to both explain rights-protective decisions at the Supreme Court (addressed in Section A), and develop strategies for political coalition-building (addressed in Section B). This Part also describes Bell’s thinking about the limits of interest convergence in effectuating lasting change.

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4. 138 S. Ct. at 2423.

5. *See id.* at 2421-22.

6. 141 S. Ct. at 488-89.

7. Transcript of Oral Argument at 28, *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020) (No. 19-71).

Part IV presents the central proposition of the Article. It offers possible strategies for diffusing tension by applying Bell's interest convergence theory to religious liberty. This Part uses the theory to explain the contrasting results in *Hawaii* and *Tanvir*. It assesses both cases against the backdrop of the current politicized religious liberty landscape and the conservative Justices' apparent alignment with the conservative faction of that culture war. Based on this assessment, Part IV offers several areas of interest convergence between the conservative Justices and the Muslim men in *Tanvir* and then argues that many of those same interests were not at stake in *Hawaii*. It also uses those convergence points to chart a path forward for Muslim-Christian coalition-building on religious liberty. Finally, this Part considers the unique features of the religious liberty tradition that contribute to the viability of religious liberty interest convergence vis-à-vis Bell's pessimism about the long-term success of racial interest convergence.

Part V concludes with an assessment of the project's limitations. It gives special attention to the strong ideological divergences between conservative Christians and Muslims in America.

## I. POLARIZATION OF RELIGIOUS LIBERTY IN THE UNITED STATES: KEY DRIVERS

There are two key drivers of today's religious liberty polarization, particularly the polarization between Muslims and conservative Christians. The first involves significant demographic changes that have resulted in what one prominent pollster calls the "[e]nd of [w]hite Christian America."<sup>8</sup> The second is the country's growing tribalization on not just policy positions but also a wide range of other preferences.

### A. *End of White Christian America*

Many white, conservative Christians (Protestants in particular)<sup>9</sup> believe that the country is not just leaving them behind but also

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8. ROBERT P. JONES, THE END OF WHITE CHRISTIAN AMERICA 50-51 (2016).

9. *Id.* at 40, 49-51.

repudiating many of their core beliefs. Three shifts are contributing to this sense of anxiety.

First, for the first time in U.S. history, white racial dominance in terms of numerical representation is on the decline.<sup>10</sup> In 1965, white Americans constituted 84 percent of the U.S. population.<sup>11</sup> Now, they are projected to be a minority by 2055 according to Pew,<sup>12</sup> or by 2044 according to the U.S. Census Bureau.<sup>13</sup> Second, also for the first time in U.S. history, white Protestant Christians are currently a minority in America.<sup>14</sup> A 2017 Public Religion Research Institute (PRRI) study found that white Protestant Christians constitute only 43 percent of the U.S. population.<sup>15</sup> In 1996, white Christians still made up two-thirds of the population.<sup>16</sup> Among white Protestants, white Evangelicals have also seen a precipitous drop in their number. In the 1990s, white Evangelicals constituted 27 percent of the U.S. population; today the number is somewhere between 17 and 13 percent.<sup>17</sup>

Third, the demise of white Protestant America has brought with it an end to Protestant dominance over American culture and institutions. Not only is Christianity declining, but so is religion overall.<sup>18</sup> More and more Americans are religiously unaffiliated (the so-called “nones”).<sup>19</sup> In 2019, the percentage of nones became

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10. PEW RSCH. CTR., MODERN IMMIGRATION WAVE BRINGS 59 MILLION TO U.S., DRIVING POPULATION GROWTH AND CHANGE THROUGH 2065: VIEWS OF IMMIGRATION’S IMPACT ON U.S. SOCIETY MIXED 23-27 (2015).

11. *Id.* at 27.

12. *Id.* at 29.

13. U.S. CENSUS BUREAU, *Projecting Majority-Minority* (2014), [https://www.census.gov/content/dam/Census/newsroom/releases/2015/cb15-tps16\\_graphic.pdf](https://www.census.gov/content/dam/Census/newsroom/releases/2015/cb15-tps16_graphic.pdf) [<https://perma.cc/F6LR-RL7X>].

14. Jason Wilson, *We’re at the End of White Christian America. What Will That Mean?*, THE GUARDIAN (Sept. 20, 2017, 6:00 AM), <https://www.theguardian.com/us-news/2017/sep/20/end-of-white-christian-america> [<https://perma.cc/4WQB-TBMV>].

15. *Id.*

16. *Id.*

17. Harriet Sherwood, *“Toxic Christianity”: The Evangelicals Creating Champions for Trump*, THE GUARDIAN (Oct. 21, 2018, 1:00 AM), <https://www.theguardian.com/us-news/2018/oct/21/evangelical-christians-trump-liberty-university-jerry-falwell> [<https://perma.cc/M6SM-RJ3V>].

18. Samuel Smith, *Religious “Nones” Now as Big as Evangelicals in the U.S.*, *New Data Shows*, CHRISTIAN POST (Mar. 20, 2019), <https://www.christianpost.com/news/religious-nones-now-as-big-as-evangelicals-in-the-us-new-data-shows.html> [<https://perma.cc/NUX2-5SHE>].

19. *Id.*



roughly the same as the percentage of Evangelicals or Catholics.<sup>20</sup> By 2016, the nones already constituted the nation's largest "religious" voting bloc.<sup>21</sup> The massive shift signals growing discontent with organized religion generally. Altogether, this has precipitated an identity crisis that has generated tremendous anger, insecurity, and anxiety.

### *B. Tribalization of American Politics and Muslim-Christian Relations*

America is deeply polarized between competing cultural and political viewpoints, and the divide is only getting worse. As political scientist Lilliana Mason explains in *Uncivil Agreement: How Politics Became Our Identity*, Americans' political affiliations are morphing into "mega-identit[ies]."<sup>22</sup> A single vote now indicates more than a person's partisan preference; it also indicates his or her religion, race, gender, and a host of preferences such as their favorite grocery store.<sup>23</sup> Partisanship is no longer a single social identity but rather a "mega-identity, with all the psychological and behavioral magnifications that implies."<sup>24</sup> Given these dynamics, if one were to tell someone over the phone that they were a Republican, the listener could reasonably assume that the speaker was not Black, non-religious, Jewish, or LGBTQ.<sup>25</sup>

The phenomenon can be seen in terms of the difference between sorting and polarizing. The first is issue-based polarization—Americans cluster together based on their policy opinions.<sup>26</sup> The second is identity-based polarization—Americans cluster together

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20. *Id.*

21. Christopher Ingraham, *The Non-Religious Are Now the Country's Largest Religious Voting Bloc*, WASH. POST (July 14, 2016, 1:15PM), <https://www.washingtonpost.com/news/wonk/wp/2016/07/14/the-non-religious-are-now-the-countrys-largest-religious-voting-bloc/> [<https://perma.cc/3LBZ-TQYP>].

22. LILLIANA MASON, *UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY* 14 (2018).

23. *Id.*

24. *Id.*

25. Peter Bacon Jr., *Democrats Are Wrong About Republicans. Republicans Are Wrong About Democrats.*, FIVETHIRTYEIGHT (June 26, 2018, 9:00 AM), <https://fivethirtyeight.com/features/democrats-are-wrong-about-republicans-republicans-are-wrong-about-democrats/> [<https://perma.cc/33HW-SXKW>].

26. EZRA KLEIN, *WHY WE'RE POLARIZED* 32-33 (2020).

based on political identities.<sup>27</sup> Americans' political identities are polarizing their other identities, and issue conflicts are merely one of many expressions of that hostility.<sup>28</sup>

In this ever-widening circle—what one journalist and political commentator calls the “politicization of everything”—almost nothing is apolitical anymore.<sup>29</sup> Consider a 2004 ad by the Club for Growth, a conservative group that advocates for lower taxes and deregulation, against then-presidential candidate Howard Dean.<sup>30</sup> The ad features someone asking an older white couple what they think of Dean's plan, and the man responds: “I think Howard Dean should take his tax-hiking, government-expanding, latte-drinking, sushi-eating, Volvo-driving, *New York Times*-reading—.”<sup>31</sup> His wife cuts in: “Body-piercing, Hollywood-loving, left-wing freak show back to Vermont, where it belongs.”<sup>32</sup> Each of these traits reinforces a particular mega-identity, and when one is activated, they are all activated.

In an America where everything is political and where everything fits into one or the other mega-identity, religion is no different. Non-Christian religious minorities and Muslims, specifically, are facets of the liberal mega-identity. Interfaith civic leader Eboo Patel begins to get at this in *Out of Many Faiths: Religious Diversity and the American Promise*, where he notes that Muslims are given platforms by outlets like the *New York Times*, NPR, CNN, and the *New Yorker*—outlets that are associated with a multicultural, progressive America and less so with a white, conservative America.<sup>33</sup> If Trump's America castigates Muslims, Barack Obama's America celebrates them.<sup>34</sup> In a sense, then, Muslims have “become a totem in the current chapter of the American culture wars,” and Americans' embrace or rejection of Muslims signals a tribal belonging to

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27. *Id.*

28. *Id.*

29. Kevin Baker, *The Politicization of Everything*, POLITICO MAG. (Jan. 31, 2017), <https://www.politico.com/magazine/story/2017/01/the-politicization-of-everything-214714/> [<https://perma.cc/8YRS-H387>].

30. KLEIN, *supra* note 26, at 69.

31. *Id.*

32. *Id.*

33. EBOO PATEL, *OUT OF MANY FAITHS: RELIGIOUS DIVERSITY AND THE AMERICAN PROMISE* 85-86 (2018).

34. *Id.* at 86.

one or the other type of America.<sup>35</sup> In other words, Muslims are traits of the liberal mega-identity, and opposition to Muslims is a trait of the conservative mega-identity. This leads Conservatives to oppose Muslims as part of their opposition to liberals.

There is, of course, more to the anti-Muslim opposition than Muslims' presumed association with liberals. Part V looks at empirical findings that Muslims are perceived not just as outsiders but also as fundamental threats to American identity.<sup>36</sup> Americans also favor protecting religious liberty for Christians over other faith groups, ranking Muslims as the least deserving of this right.<sup>37</sup>

At the core, though, is the mapping of the religious divide onto the political divide. For example, it is mostly Republicans who believe that Christians face more discrimination than Muslims, while most Democrats believe that Muslims face more discrimination.<sup>38</sup>

The tribalization of American politics and Muslim-Christian relations, and the demographic trends described above, together form the backdrop of today's battle over religious freedom. As Part II explains, in this battle, conservative, white Christians are pitted against marginalized minorities. That dynamic is also crucial to the possibilities—and limits—of religious liberty interest convergence, which this Article explores in Parts IV and V.

## II. POLARIZATION OF RELIGIOUS LIBERTY IN THE UNITED STATES: CHRISTIAN CONSERVATIVES VERSUS MARGINALIZED MINORITIES

In *Sherbert v. Verner*, the U.S. Supreme Court held that when a government measure places a “substantial infringement” on a religious practice, the government has to offer a compelling interest justifying the burden, and it must prove that its measure is the

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35. *Id.* at 85-86.

36. PEW RSCH. CTR., U.S. MUSLIMS AND ISLAM GENERAL PUBLIC VIEWS CONCERNED ABOUT THEIR PLACE IN SOCIETY, BUT CONTINUE TO BELIEVE IN THE AMERICAN DREAM 122-30 (2015).

37. See Rachel Zoll, *AP-NORC Poll: Christian-Muslim Split on Religious Freedom*, ASSOCIATED PRESS (Dec. 30, 2015), <https://apnews.com/de486b3d64154d0baae9f04fba0a4094/> [<https://perma.cc/TK6V-XGW4>].

38. See Neha Sahgal & Besheer Mohamed, *In the U.S. and Western Europe, People Say They Accept Muslims, but Opinions Are Divided on Islam*, PEW RSCH. CTR. (Oct. 8, 2019), <https://www.pewresearch.org/fact-tank/2019/10/08/in-the-u-s-and-western-europe-people-say-they-accept-muslims-but-opinions-are-divided-on-islam/> [<https://perma.cc/FYS2-RV4N>].

least restrictive means of serving the government's interest<sup>39</sup>—a standard known as “strict scrutiny.”<sup>40</sup> In 1990, the Court watered down that legal standard for Free Exercise Clause violations in *Employment Division v. Smith*,<sup>41</sup> provoking an outcry from religious and public policy groups across the spectrum.<sup>42</sup> These groups worked together to pass the Religious Freedom Restoration Act (RFRA), which reinstated the strict scrutiny standard in 1993.<sup>43</sup>

Today, the RFRA no longer enjoys the strong bipartisan support it once did. Martin R. Castro, Chairman of the United States Commission on Civil Rights, captured the shifting sentiment in the Commission's 2016 *Peaceful Coexistence* report: “The phrases ‘religious liberty’ and ‘religious freedom’ will ... remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance.”<sup>44</sup>

As has now become common even in mainstream legal and political discourse, Castro argued that conservatives (often meant to refer to white, Christian conservatives in particular) are using religious liberty to “give one religion dominion over other religions, or a veto power over the civil rights and civil liberties of others.”<sup>45</sup> In other words, the rights secured by conservative, white Christians in some of today's most prominent religious liberty cases directly contravene the rights of marginalized minorities, including sexual minorities, such as women and LGBTQ persons, and religious minorities, particularly Muslims.

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39. 374 U.S. 398, 407 (1963).

40. See, e.g., *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 146 (1987) (Powell, J., concurring) (referring to the analysis applied in *Sherbert v. Verner* as “strict scrutiny”).

41. See 494 U.S. 872, 881-82 (1990) (holding that the Free Exercise Clause is generally no bar to neutral, generally applicable laws).

42. Ross Douthat, *When Politics Isn't About Principle*, N.Y. TIMES (Sept. 14, 2021), <https://www.nytimes.com/2021/09/14/opinion/vaccine-politics.html> [<https://perma.cc/HEM7-F7ZP>].

43. See generally Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb-2000bb-4 (2012)).

44. U.S. COMM'N ON C.R., PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 29 (2016).

45. See *id.*

### A. *Conservative Christians and Sexual Minorities*

In recent years, perhaps no case has contributed more to the politicization of religious liberty than the U.S. Supreme Court's 2014 decision in *Burwell v. Hobby Lobby*.<sup>46</sup> The owners of Hobby Lobby craft stores, the Green family, objected to paying for two drugs and two devices required under the Affordable Care Act (ACA).<sup>47</sup> In their view, providing these drugs and devices would have violated their religious beliefs about abortion.<sup>48</sup> The Court, in a 5-4 decision split along ideological lines, held in favor of Hobby Lobby.<sup>49</sup> It held that because the government had found a way to get these drugs to the employees of religious nonprofits that had similar concerns, the government could provide that accommodation here, too.<sup>50</sup>

The case was, in many ways, a straightforward application of the law (in this case the Federal RFRA), which some prominent commentators acknowledged.<sup>51</sup> Much of the public discourse, however, painted the ruling as intrinsically political.<sup>52</sup>

This cultural divide was further exacerbated a year after *Hobby Lobby*, when the Court established a constitutional right to same-sex marriage in *Obergefell v. Hodges*.<sup>53</sup> Christian conservatives who think of marriage as a religious relationship refuse to facilitate

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46. See 573 U.S. 682 (2014).

47. *Id.* at 702-03.

48. *Id.*

49. *Id.* at 687, 692.

50. *Id.* at 692.

51. See Emma Green, *The Supreme Court Isn't Waging a War on Women in Hobby Lobby*, ATLANTIC (June 30, 2014), <https://www.theatlantic.com/national/archive/2014/06/hobby-lobby-isnt-waging-a-war-on-women/373717/> [<https://perma.cc/E8D5-XPVS>].

52. See Karen Finney, *Hobby Lobby Opens a New Front in the "War on Women,"* MSNBC (July 13, 2014, 9:11 AM), <https://www.msnbc.com/msnbc/hobby-lobby-opens-new-front-the-war-women-msna366701> [<https://perma.cc/SK85-GQZR>]; Sandra Fluke, *Sandra Fluke: The Hobby Lobby Case Is an Attack on Women*, WASH. POST (June 30, 2014, 3:20 PM), <https://www.washingtonpost.com/posteverything/wp/2014/06/30/sandra-fluke-the-hobby-lobby-case-is-an-attack-on-women/> [<https://perma.cc/US44-KF5K>]; Peter Rosenstein, *Hobby Lobby and the War on Women*, WASH. BLADE (July 3, 2014), <https://www.washingtonblade.com/2014/07/03/opinion-hobby-lobby-and-the-war-on-women/> [<https://perma.cc/DST6-Y2GA>]; Press Release, Court Sides with Hobby Lobby, Joins War on Women, NAT'L ORG. FOR WOMEN (June 30, 2014) (on file with author), <https://now.org/media-center/press-release/court-sides-with-hobby-lobby-joins-war-on-women/> [<https://perma.cc/5SSN-A6L7>].

53. 135 S. Ct. 2584, 2604-05 (2015).

same-sex weddings because doing so would violate their religious beliefs.<sup>54</sup> In the post-*Obergefell* landscape, the 2018 Supreme Court case *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* became the most prominent of such challenges.<sup>55</sup> That case involved a Christian baker who refused on religious grounds to bake a wedding cake for a gay couple.<sup>56</sup>

This strand of cases and the *Hobby Lobby*-type challenges have splintered the once-bipartisan coalition in favor of the RFRA.<sup>57</sup> Some of the same advocates who supported the RFRA in 1993 are now part of a coalition that is trying to enact the Do No Harm Act.<sup>58</sup> The purpose of the Act is to prevent the use of religious freedom to “discriminate” against vulnerable populations.<sup>59</sup>

Most House Democrats today support the Do No Harm Act,<sup>60</sup> and *all* of them support another statute, the Equality Act, which would eliminate RFRA claims in many civil rights cases.<sup>61</sup> This rejection of conservative religious claims as invalid is central to many conservatives’ fear that religious liberty is under threat.<sup>62</sup> Part IV argues that this perception of threat creates an opportunity for religious liberty interest convergence with marginalized religious groups like Muslims.

### *B. Conservative Christians and American Muslims*

Concurrent to the politicization of religious liberty with respect to sexual minorities, the disparate treatment of religious minorities has also come into sharper focus. The treatment of Muslims in

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54. Douglas Laycock, *Religious Liberty and the Culture Wars*, U. ILL. L. REV. 839, 849 (2014).

55. See 138 S. Ct. 1719 (2018).

56. *Id.* at 1723.

57. Douthat, *supra* note 42.

58. See *Do No Harm Act*, HUM. RTS. CAMPAIGN (Oct. 8, 2021), <https://www.hrc.org/resources/do-no-harm-act> [<https://perma.cc/5E86-S9X5>].

59. *Id.*

60. See generally *Do No Harm: Examining the Misapplication of the “Religious Freedom Restoration Act”*: Hearing Before the H. Comm. on Educ. & Lab., 116th Cong. (2019).

61. Danielle Kurtzleben, *House Passes the Equality Act: Here’s What It Would Do*, NAT’L PUB. RADIO (Feb. 25, 2021, 4:39 PM), <https://www.npr.org/2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do> [<https://perma.cc/LS5K-7D5T>].

62. See *infra* Part IV.

particular is the subject of much recent discussion.<sup>63</sup> This discussion was prompted in significant part by the marked difference in how the Court treated antireligious animus in *Masterpiece* versus *Trump v. Hawaii*.<sup>64</sup>

In *Masterpiece*, the Court held in favor of the Christian baker, basing its decision on the fact that several Colorado civil rights commissioners had treated the baker's religion with hostility.<sup>65</sup> Three weeks later, however, the Court in a 5-4 decision (split along ideological lines) upheld the Trump administration's Executive Order No. 13769.<sup>66</sup> The order, or "Muslim ban," blocked citizens from six majority-Muslim countries from entering the United States.<sup>67</sup> In *Hawaii*, the Court declined to consider the extensive evidence of President Trump's anti-Muslim animus.<sup>68</sup> It chose instead to defer to the executive branch because the issue implicated matters of national security.<sup>69</sup>

In this context, executive deference required overlooking anti-Muslim animus.<sup>70</sup> For example, Trump had at one point declared, "Islam hates us"<sup>71</sup> and elaborated during an official presidential debate that, "I mean a lot of them. I mean a lot of them."<sup>72</sup> His policy proposals included "a total and complete shutdown of Muslims entering the United States," warrantless surveillance of American Muslims, closing American mosques, and creating a registry of all Muslims in the United States.<sup>73</sup> Immediately after he was elected, Trump put his words into action.<sup>74</sup> In preparing for the travel ban,

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63. See, e.g., *supra* Part I.B.

64. Compare *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1723 (2018), with *Trump v. Hawaii*, 138 S. Ct. 2392, 2415-23 (2018).

65. 138 S. Ct. at 1729.

66. *Hawaii*, 138 S. Ct. at 2402-03, 2423.

67. *Id.* at 2403, 2417.

68. *Id.* at 2421.

69. *Id.*

70. See *id.* at 2435-36 (Sotomayor, J., dissenting).

71. *Id.* at 2436.

72. *Donald Trump Says Stands by his "Islam Hates Us" Remark*, ECON. TIMES (Mar. 11, 2016, 1:40 PM), <https://economictimes.indiatimes.com/news/international/world-news/donald-trump-says-stands-by-his-islam-hates-us-remark/articleshow/51356884.cms> [<https://perma.cc/PE5L-G8GG>].

73. *Hawaii*, 138 S. Ct. at 2435-36 (Sotomayor, J., dissenting).

74. See Rebecca Savransky, *Giuliani: Trump Asked Me How to Do a Muslim Ban "Legally"*, THE HILL (Jan. 29, 2017, 8:48 AM), <https://thehill.com/homenews/administration/316726-giuliani-trump-asked-me-how-to-do-a-muslim-ban-legally> [<https://perma.cc/8NC3-MD6S>].

he summoned his advisor, Rudolph Giuliani, to “[p]ut a commission together” to “show me the right way to do it legally.”<sup>75</sup>

However, the *Hawaii* Court found that these statements fell outside the purview of the judicial branch.<sup>76</sup> Led by Chief Justice Roberts, the conservative majority (at the time, five Justices) stated that regardless of the President’s intent, the executive order would survive because it was “expressly premised on legitimate [national security] purposes.”<sup>77</sup> The Court could not “substitute [its] own assessment for the Executive’s predictive judgments on such matters, all of which ‘are delicate, complex, and involve large elements of prophecy.’”<sup>78</sup>

Justice Sotomayor, in her passionate dissent, called out the majority’s decision to “ignor[e] the facts, misconstru[e] our legal precedent, and turn[] a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens.”<sup>79</sup> Sotomayor reflected the concerns of many Americans, who saw the travel ban decision as a clear indication of disfavored treatment for Muslim minorities, in stark contrast to the treatment of Christians.

Shortly after the *Hawaii* decision, in February 2019, Alabama executed Dominique Ray, a Muslim death row inmate, without accommodating his request to have an imam in the room with him.<sup>80</sup> The clergy allowed in the execution chamber were limited to the ones on staff, but the prison employed only Christian clergy.<sup>81</sup> Ray challenged the prison’s denial on religious liberty grounds and asked that his execution be stayed while the matter was pending.<sup>82</sup> When the matter reached the Supreme Court, the conservative Justices permitted the State to proceed with the execution without the imam.<sup>83</sup> The decision shocked many Americans, leaving them

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75. *Id.*

76. *See* 138 S. Ct. at 2417, 2420.

77. *Id.* at 2421.

78. *Id.* (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)).

79. *Id.* at 2433 (Sotomayor, J., dissenting).

80. *See* *Dunn v. Ray*, 139 S. Ct. 661, 661 (2019).

81. *Ray v. Comm’r*, 915 F.3d 689, 697 (11th Cir. 2019).

82. *Id.* at 692.

83. *Dunn*, 139 S. Ct. at 661.



wondering, in the words of the *New York Times* Editorial Board, “Is Religious Freedom for Christians Only?”<sup>84</sup>

The public narrative of conservative Justices favoring Christian claimants over Muslim ones has firmly taken root. *Hawaii* triggered that piece of today’s polarized religious liberty conversation. The ruling is also key in understanding the relevance of interest convergence in effectuating rights-protective rulings for Muslim minorities. This Article offers that analysis in Part IV. But first, the next two Sections explore common ways Muslims’ religious freedom is subordinated to other concerns of particular interest to conservative jurists. Part II.B.3. extends that analysis to the political sphere.

### *1. Deference to Executive Authority*

The Court’s 5-4 split in *Hawaii* is another example of conservative, or Republican-appointed, judges’ deference to the executive branch on matters of national security. Professor Cass Sunstein, in his 2008 piece *Judging National Security Post-9/11: An Empirical Investigation*, surveyed relevant court of appeal cases between September 11, 2001, and September 2008 to determine the rate of court invalidation of executive action.<sup>85</sup> He also checked for ideological differences in the judges’ voting patterns.<sup>86</sup> On the latter, Sunstein found a significant difference in the voting patterns of Republican-appointed versus Democrat-appointed judges.<sup>87</sup> The former invalidated national security measures in favor of individual rights only 12 percent of the time.<sup>88</sup> In contrast, the Democratic invalidation rate was almost double that, at 23 percent.<sup>89</sup> The invalidation rate also remained stable across cases in the seven-year period, instead of spiking, in the immediate post-September 11 context, when judges might have felt the threat of terrorism more

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84. Editorial Board, *Is Religious Freedom for Christians Only?*, N.Y. TIMES (Feb. 9, 2019), <https://www.nytimes.com/2019/02/09/opinion/supreme-court-alabama-execution.html> [https://perma.cc/AGM4-V8SG].

85. See Cass R. Sunstein, *Judging National Security Post-9/11: An Empirical Investigation*, 2008 SUP. CT. REV. 269, 270-71.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

acutely.<sup>90</sup> Sunstein compared cases in the three-year period immediately post-September 11 with cases from 2006-2008 and found no discernible difference in judges' voting patterns.<sup>91</sup>

In an earlier piece, Sunstein considered what he called "National Security Fundamentalism"—that is, the federal courts' position in the face of national security threats that the "president must be permitted to do what needs to be done to protect the country."<sup>92</sup> Writing in 2005, just four years after September 11, Sunstein said the U.S. Supreme Court was repudiating National Security Fundamentalism in its decisions.<sup>93</sup> However, the approach did make a "conspicuous appearance" in a dissenting opinion by Justice Thomas.<sup>94</sup> In *Hamdi v. Rumsfeld*, while the Court recognized the power of the government to detain enemy combatants, a plurality of the Justices held that when those detainees are U.S. citizens, they have rights to due process.<sup>95</sup> The Court reversed the lower court's dismissal of a habeas corpus petition brought on behalf of Yaser Hamdi, a U.S. citizen who was being detained indefinitely as an illegal enemy combatant.<sup>96</sup>

In his dissent, Justice Thomas repeatedly emphasized the executive branch's power to make determinations pertinent to national security.<sup>97</sup>

I do not think that the Federal Government's war powers can be balanced away by this Court.... "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." The national security, after all, is the primary responsibility and purpose of the Federal Government.... [B]ecause the Founders understood that they could not foresee the myriad potential threats to national security that might later arise, they chose to create a Federal Government

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90. *See id.*

91. *Id.*

92. Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693, 693 (2005).

93. *Id.* at 694-95.

94. *Id.* at 695.

95. 542 U.S. 507, 509 (2004).

96. *Id.*

97. *Id.* at 579-99 (Thomas, J., dissenting).

that necessarily possesses sufficient power to handle any threat to the security of the Nation.<sup>98</sup>

Justice Thomas went on to quote the Federalist Papers, stating that the government’s power to protect the country “ought to exist without limitation.... The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.”<sup>99</sup>

Justice Thomas’s position was that, because the executive branch of the federal government has a strong interest in protecting national security, it can use that interest to limit individual liberty.<sup>100</sup> And the courts should not second-guess the executive because judges lack “expertise and capacity,”<sup>101</sup> and their interference “destroys the purpose of vesting primary responsibility in a unitary Executive.”<sup>102</sup>

This position, Sunstein says, is National Security Fundamentalism.<sup>103</sup> It cedes vast power to the executive branch with little to no consideration of a particular case’s facts and context.<sup>104</sup> That it was Justice Thomas who embraced this position is relevant to the discussion below on religious liberty interest convergence, as it was Justice Thomas who wrote the opinion in the case under consideration in this Article, *Tanzin v. Tanvir*.<sup>105</sup>

Beyond the specific scenario of national security, conservative Justices also defer to law enforcement. In 1971, the Supreme Court in *Bivens v. Six Unknown Named Agents* permitted federal lawsuits against law enforcement officers who violate the Constitution.<sup>106</sup> In the years since, however, conservative judges and commentators

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98. *Id.* at 579-80 (citations omitted) (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)).

99. *Id.* at 580 (quoting FEDERALIST NO. 23, at 147 (Alexander Hamilton) (J. Cooke ed., 1961)).

100. *See id.* at 580-82.

101. *Id.* at 579.

102. Sunstein, *supra* note 92, at 695.

103. *Id.*

104. *See id.*

105. *See* 141 S. Ct. 486, 489 (2020).

106. Stephen I. Vladeck, *The Disingenuous Demise and Death of Bivens*, 2019-2020 CATO SUP. CT. REV. 263, 263.

have insisted that *Bivens* was wrongly decided.<sup>107</sup> The conservative narrative is that *Bivens* was judicial arrogation of legislative power—and that *Bivens*'s recognition of implied causes of action is outdated.<sup>108</sup> Justice Kennedy in the 2017 case *Ziglar v. Abbasi*, where the Court refused to extend *Bivens*, described it as a relic of an “ancien regime.”<sup>109</sup>

Conservatives also worry what *Bivens* means for law enforcement's ability to carry out their duties. A recent case, *Hernandez v. Mesa*, reflects that concern.<sup>110</sup> *Hernandez* involved a fifteen-year-old Mexican boy who was playing at the U.S.-Mexico border when he was shot by a Border Patrol Agent.<sup>111</sup> The Fifth Circuit's opinion in the case notes that if law enforcement officers fear lawsuits for possible constitutional violations, they may “hesitate in making split-second decisions.”<sup>112</sup> In the *Hernandez* context, the court said that threat of litigation “could undermine the Border Patrol's ability to perform duties essential to national security.”<sup>113</sup> Yet, as described below, the Trump administration made the same arguments in *Tanvir*—but lost handily.

## 2. Muslims as National Security Threats

As noted by Justice Sotomayor's dissent in *Hawaii*, the travel ban positioned Muslims as security threats.<sup>114</sup> Data shows that more than any other religious group, Muslims are viewed as security threats and that stereotype affects judicial decision-making in religious liberty litigation.<sup>115</sup>

Researchers Gregory C. Sisk, Michael Heise, and Andrew P. Morriss conducted an empirical study of religious freedom cases in

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107. *Id.*

108. *Id.* at 264.

109. 137 S. Ct. 1843, 1855 (2017).

110. See 885 F.3d 811 (5th Cir. 2018), *aff'd*, 140 S. Ct. 735 (2020).

111. *Id.* at 814.

112. *Id.* at 819.

113. *Id.*

114. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2440 (2018) (Sotomayor, J., dissenting).

115. See Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 235 n.17, 259, 282 (2012).

federal district courts and federal appellate courts.<sup>116</sup> They looked at claims under the Free Exercise Clause of the First Amendment, the Free Speech Clause (for restrictions on religious speech), federal statutes that specifically protect religious actions and speech, and laws that protect against religious discrimination by the government, including government employers (they did not look at Title VII cases of religious discrimination in private employment).<sup>117</sup> Examining cases between 1986 and 1995, their study found that religion exerted the most prominent and consistent influence on a judge's decision-making, whether it was the judge's religion, the claimant's religion, or the religious demographics of the judge's community.<sup>118</sup> A judge's religious background determined how he or she would rule.<sup>119</sup> As for the claimant's religion, the researchers found evidence that Muslims, "apparently alone among the non-Christian religious faiths," may face "greater resistance" to their claims for religious accommodations.<sup>120</sup>

This initial evidence inspired Sisk and Heise to take a closer look at just how disadvantaged Muslims are in court. Their second study ("Sisk Study II") looked at religious liberty cases (Muslim and otherwise) decided between 1996 and 2005 and found that Muslim claimants faced a marked disadvantage.<sup>121</sup> Compared to non-Muslims, Muslims are nearly half as likely to win their religious liberty case in federal court.<sup>122</sup> The number shrinks further when it is a Muslim prisoner bringing the case, with Muslim prisoners succeeding only a third as often as non-Muslim prisoners.<sup>123</sup> This percentage is significant because prisoner cases comprise three-fourths of all Muslim religious liberty claims.<sup>124</sup> The only other group with significant losses consisted of Black separatist sects.<sup>125</sup>

In trying to explain the reason for these skewed outcomes, Sisk and Heise considered and dismissed several theories, settling on

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116. *Id.* at 235.

117. *Id.* at 237-38.

118. *See id.* at 238.

119. *See id.* at 238-43.

120. *See id.* at 249.

121. *Id.* at 248-54.

122. *Id.* at 249.

123. *Id.* at 276-77.

124. *See id.* at 260.

125. *Id.*

their final explanation: Muslims are “at a pronounced disadvantage ... *because they are Muslims.*”<sup>126</sup> The cases *Sisk* and *Heise* examined involve a religious believer challenging some decision by the government—a decision that a public officer defends as necessary to American law and order.<sup>127</sup> These types of cases trigger base stereotypes among judges about Muslims or Islam as security threats.<sup>128</sup>

Although *Sisk* and *Heise* did not break down the court decisions based on whether the judges were Democrat- or Republican-appointed, one can surmise based on Sunstein’s assessments as well as the conservative posture on law enforcement and national security that conservative judges are more likely to rule against Muslim claimants. One can also deduce this from the social and political environment of conservatives broadly or certain judges, specifically. For example, Justice Thomas’s wife, Virginia “Ginni” Thomas, is an outspoken conservative whose activism has raised judicial issues in the past.<sup>129</sup> With respect to Muslims, she has invited hard-Right-anti-Muslim conspiracists to a meeting she convened at the Trump White House,<sup>130</sup> and she organized in support of the travel ban.<sup>131</sup>

### 3. *Beyond the Courts: Religious Liberty Dissonance in Politics*

The general posture in the political space can best be described as religious liberty dissonance. Many of the most vocal defenders of Christians’ religious liberty explicitly advocate against Muslims’ religious liberty. During the 2016 presidential election, where presidential candidate Ted Cruz called the election the “religious liberty election,” he stated that religious liberty issues were front

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126. *Id.* at 262.

127. *See id.* at 236-37.

128. *Id.*

129. Jackie Calmes, *Activism of Thomas’s Wife Could Raise Judicial Issues*, N.Y. TIMES (Oct. 8, 2010), <https://www.nytimes.com/2010/10/09/us/politics/09thomas.html> [<https://perma.cc/9QGP-PTST>].

130. Maggie Haberman & Annie Karni, *Trump Meets with Hard-Right Group Led by Ginni Thomas*, N.Y. TIMES (Jan. 26, 2019), <https://www.nytimes.com/2019/01/26/us/politics/trump-ginni-thomas-meeting.html> [<https://perma.cc/WJ33-4AZV>].

131. Betsy Swan, *Leaked Emails Show Justice Clarence Thomas’s Wife Pushing Travel Ban*, DAILY BEAST (Apr. 11, 2017, 4:06 PM), <https://www.thedailybeast.com/leaked-emails-show-justice-clarence-thomass-wife-pushing-travel-ban> [<https://perma.cc/4QB3-4JEL>].

and center in determining who the next President would be.<sup>132</sup> Then-candidate Trump also promised on the campaign trail that the first priority of his administration would be to “preserve and protect our religious liberty.”<sup>133</sup> Yet, even as Cruz and Trump were rallying for religious freedom, they were proposing staunchly anti-Muslim measures.<sup>134</sup> Trump promised to establish a database to track Muslims and suggested shutting down mosques, and Cruz advocated for surveilling “Muslim neighborhoods.”<sup>135</sup>

On the local level, John Andrews, founder of the Western Conservative Summit and a former Colorado Senate president, proclaimed on the Summit stage, “The simplistic approach of simply granting unconditional ‘freedom of religion’ to a religion that doesn’t believe in freedom—and never doubt me, Islam does not—that approach is civilizational suicide, friends.”<sup>136</sup> Similarly, in a January 2018 press release, state senator of South Dakota, Neal Tapio, a Republican running for a spot in the U.S. House of Representatives, questioned whether the First Amendment applies to Muslims: “Does our Constitution offer protections and rights to a person who believes in the full implementation of Islamic Law, as practiced by 14 Islamic countries and up to 350 [million] self-described Muslims, who believe in the deadly political ideology that believes you should be killed for leaving Islam?”<sup>137</sup> In 2011, Jody Hice, the U.S. representative from Georgia’s Tenth District, argued: “Most people

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132. Anugrah Kumar, *Ted Cruz: 2016 Is Going to Be a “Religious Liberty Election,”* CHRISTIAN POST (Dec. 6, 2015), <https://www.christianpost.com/news/ted-cruz-2016-presidential-election-religious-liberty.html> [<https://perma.cc/G8L7-V784>].

133. Charles C. Haynes, *Trump and the Future of the First Amendment*, FREEDOM F. INST. (Mar. 3, 2016), <https://www.freedomforuminstitute.org/2016/03/03/trump-and-the-future-of-the-first-amendment/> [<https://perma.cc/4NE5-A76C>].

134. See Katie Zezima & Adam Goldman, *Ted Cruz Calls for Law Enforcement to “Patrol and Secure” Muslim Neighborhoods*, WASH. POST (Mar. 22, 2016, 7:47 PM), <https://www.washingtonpost.com/news/post-politics/wp/2016/03/22/ted-cruz-calls-for-law-enforcement-to-patrol-and-secure-muslim-neighborhoods/> [<https://perma.cc/5LD6-L4SK>].

135. *Id.*

136. Justin Wingerter, Nic Garcia & Anna Staver, *Cory Gardner, the Women’s Vote and Religion: Western Conservative Summit Takeaways*, DENVER POST (July 14, 2019, 9:20 AM), <https://www.denverpost.com/2019/07/14/western-conservative-summit-trump-gardner/> [<https://perma.cc/35AU-X9W7>].

137. Seth Tupper, *Tapio Questions Religious Freedom for Muslims*, RAPID CITY J. (Aug. 12, 2019) (alteration in original), [https://rapidcityjournal.com/news/local/tapio-questions-religious-freedom-for-muslims/article\\_a4e4532f-1b69-5b4d-9400-a70fb5028caa.html](https://rapidcityjournal.com/news/local/tapio-questions-religious-freedom-for-muslims/article_a4e4532f-1b69-5b4d-9400-a70fb5028caa.html) [<https://perma.cc/4RFN-HV7C>].

think Islam is a religion, it's not. It's a totalitarian way of life with a religious component" further arguing that Islam would not qualify for First Amendment protection because it is a "geo-political system."<sup>138</sup>

The hypocrisy—or dissonance—also shows up in what prominent voices choose *not* to say. When Republican presidential candidates during the 2016 campaign repeatedly challenged Muslims' religious rights, conservative religious liberty groups stayed silent.<sup>139</sup> The Supreme Court's contrasting results in *Masterpiece* versus *Hawaii* were also met with silence.<sup>140</sup> Many of the same conservative religious groups that celebrated Phillips's win in *Masterpiece* failed to decry the travel ban decision or say anything at all about the president's anti-Muslim animus.<sup>141</sup>

In the forthcoming Sections, this Article maps out a path forward for the depolarization of religious liberty. Part III explores Derrick Bell's interest convergence theory, which he used to analyze judicial and political decision-making during the African American civil rights movements. Section A of Part III also describes how other scholars have used this theory to explain other rights-protective decisions by the U.S. Supreme Court. Section B strategizes political coalition-building between marginalized minorities and the powerful majority. Part IV applies interest convergence to the religious liberty context, with a focus on the Christian-Muslim divide, and uses the theory to explain the disparate results in *Hawaii* versus *Tanvir*.

Importantly, the efficacy of interest convergence theory lies in the fact that it does not require, in this context, for the powerful

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138. Jane Timm, *GOP Candidate Jody Hice in 2011: "Most People Think Islam Is a Religion, It's Not,"* MSNBC (June 24, 2014, 8:21 AM), <https://www.msnbc.com/msnbc/gop-jody-hice-islam-doesnt-deserve-first-amendment-protections-msna355796> [<https://perma.cc/7K7D-GAPV>].

139. Michelle Boorstein, *When Muslims Are the Target, Prominent Religious Freedom Advocates Largely Go Quiet*, WASH. POST (Dec. 30, 2015, 1:45 PM), <https://www.washingtonpost.com/news/acts-of-faith/wp/2015/12/10/when-muslims-are-the-target-prominent-religious-free-dom-advocates-largely-go-quiet/> [<https://perma.cc/SH27-JJ7E>].

140. Michelle Boorstein, *Why Many Religious Liberty Groups Are Silent About the Supreme Court's Decision on Trump's Travel Ban*, WASH. POST (June 27, 2018, 10:58 AM), <https://www.washingtonpost.com/news/acts-of-faith/wp/2018/06/26/why-many-religious-liberty-groups-are-silent-on-the-supreme-courts-decision-to-uphold-trumps-travel-ban/> [<https://perma.cc/N98F-5AP2>].

141. *Id.*



majority to support Muslims' religious freedom in a substantive manner. Instead, the majority is primarily motivated by its own self-interest—even as it continues to hold dissonant beliefs.

### III. INTEREST CONVERGENCE THEORY

The development of civil rights for African Americans has not been straightforward. As scholar Richard Delgado explains it, progress has taken a “zigzag path, with periods of advancement followed by ones of retrenchment.”<sup>142</sup> Black people made great strides during the Reconstruction, only to later face violence, terror, and Jim Crow laws.<sup>143</sup> *Plessy v. Ferguson* in 1896 consigned Black people to inferior schools and public facilities in service of “separate but equal.”<sup>144</sup> But the Black community again made major progress in the Civil Rights Era of the 1950s and 1960s, during which the U.S. Supreme Court in *Brown v. Board of Education* (1954) struck down state-mandated racial segregation in public schools.<sup>145</sup>

Several theories have emerged about this “zigzag” path of progress, and they can roughly be grouped into two schools of thought: Idealist and Materialist.<sup>146</sup> The Idealists believe that Black people “are racialized by a system of thoughts, words, messages, stories, and scripts” that plant in many Americans’ minds deep-seated images of inferiority.<sup>147</sup> Humans can overcome this racialization through education, storytelling, and consciously rooting out their own unconscious biases.<sup>148</sup> If we can change the way we think and talk about race, the Idealists say, we can straighten the zigzag of racial progress and consistently build toward progress.<sup>149</sup>

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142. Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 369 (2002) (reviewing MARY L. DUZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000)).

143. *Id.*

144. *Id.*

145. *Id.* at 369-70.

146. *Id.* at 369-71.

147. *Id.* at 370.

148. *Id.*

149. *Id.*

The Materialists agree in part.<sup>150</sup> Race and racism are ideas at least partly under our control, they acknowledge.<sup>151</sup> However, what really drives change are material factors, such as “competition for jobs, social and pecuniary advantage” and a convergence between the interests of minorities and the interests of the powerful elite.<sup>152</sup>

A major figure in the Materialist school of thought is the late Harvard law professor Derrick Bell.<sup>153</sup> He first coined the term “interest convergence” in a 1980 *Harvard Law Review* piece.<sup>154</sup> Writing twenty-six years after *Brown v. Board of Education*, Bell said the Court’s decision—although it seemed like a breakthrough at the time—had yielded little in the way of social reform.<sup>155</sup> “Demographic patterns, white flight, and the inability of the courts” to implement *Brown* in a way that yielded real change had made *Brown* mostly irrelevant.<sup>156</sup>

Bell then turned to an essay written by Herbert Wechsler, where Wechsler criticized the Court for deciding *Brown* without a neutral and principled basis.<sup>157</sup> Bell responded by noting that the decision was, in fact, based on the neutral principle of racial equality.<sup>158</sup> But Bell also noted that in 1954, racial equality was not valued by many Americans as a desirable goal, so there must have been some other motivation at play.<sup>159</sup>

Bell’s theory was that the Court’s decision to end racial segregation in public schools was due to a convergence between the interests of Black people and the interests of whites.<sup>160</sup> “[W]hites in policymaking positions” saw in *Brown* a chance to make “economic and political advances at home and abroad.”<sup>161</sup>

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150. *See id.* at 371.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518 (1980).

156. *Id.*

157. *Id.* at 519.

158. *Id.* at 522.

159. *Id.* at 525.

160. *See id.* at 526.

161. *Id.* at 524.

Bell posited three ways the *Brown* ruling served the interests of whites apart from a moral effort to redress Black suffering. First, the desegregation of public schools helped increase American credibility in its “struggle with Communist countries to win the hearts and minds of emerging third world peoples”—that is, people who would be marginalized and oppressed if they lived in the United States.<sup>162</sup> *Brown* encouraged countries to resist Communism and favor Western democracy by holding up America as a model of equality.<sup>163</sup>

Second, *Brown* helped persuade Black Americans, many of whom served during World War II, that they were a welcome part of the United States.<sup>164</sup> To contain a possible civil war when these soldiers returned home from war only to face continued discrimination, *Brown* would signal to them America’s commitment to equality.<sup>165</sup>

Third, Bell said that some whites realized that the South could transition from a rural, plantation society to an industrialized one only when it stopped struggling over state-mandated racial segregation.<sup>166</sup>

Importantly, although some scholars rejected Bell’s theory as unfairly pessimistic, twenty years after Bell posited his theory, legal historian Mary Dudziak unearthed significant evidence that, in fact, *Brown* signaled a shift in the balance of interests, with elites finding “powerful reason” to help African Americans.<sup>167</sup> In a 1994 *Stanford Law Review* article and in her 2000 book, *Cold War Civil Rights: Race and the Image of American Democracy*, Dudziak cites hundreds of documents and international press releases that all point to America’s need to do something “large-scale, public and spectacular” to bolster its international brand.<sup>168</sup>

For example, the Acting Secretary of State Dean Acheson sent a memorandum to the chairman of the Fair Employment Practices Commission acknowledging that discriminatory conditions in America pose “a formidable obstacle to the development of mutual

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162. *Id.* at 524.

163. *Id.*

164. *Id.* at 524-25.

165. *Id.*

166. *Id.* at 525.

167. Delgado, *supra* note 142, at 372.

168. *Id.* at 373.

understanding and trust” abroad.<sup>169</sup> Secretary of State Dean Rusk noted in a memo that America’s clashes with “minority groups have been fully treated in the press of other countries.”<sup>170</sup> Similarly, the U.S. ambassador to India, Chester Bowles, noted in a 1952 speech that the “colored peoples of Asia and Africa, who total two-thirds of the world’s population” do not think of America without also thinking of the “limitations under which our 13 million Negroes are living.”<sup>171</sup>

Dudziak’s investigation demonstrated that the *Brown* decision had less to do with the Court’s recognition of the innate humanity, worth, and rights of marginalized communities than the realization among Supreme Court Justices, State Department officials, and other powerful whites that America would “gain an edge in the Cold War” if it publicly supported Black people.<sup>172</sup> This is the core of interest convergence theory—that civil rights advocacy must account for humans’ material interests and their tribal and primal instincts to protect their own.<sup>173</sup>

That is, groups in power will cede some of that power only when it is in their interest to do so.<sup>174</sup> Although humans many times act altruistically, in the context of politics (especially the hyperpartisan politics of today), altruism is not the primary motivator.<sup>175</sup> This outlook on human nature might seem bleak but it also offers hope: If we can identify the convergence of interests that are important to both majority and minority groups, reform and progress is possible.

Several other scholars have utilized interest convergence theory to explain U.S. Supreme Court cases.<sup>176</sup> Others have used interest convergence as a way of strategizing political coalition-building.<sup>177</sup>

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169. *Id.* at 373-74.

170. *Id.* at 374.

171. *Id.*

172. *Id.* at 372.

173. *Id.* at 371-72.

174. *See id.*

175. *See id.*

176. For a larger discussion, see, for example, Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149 (2011).

177. Professor Cynthia Lee in her piece, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911 (2007), uses the categories “Interest Convergence as Explanation” and “Interest Convergence as Political Strategy.” This Article uses the same categories.

In the Subsections below, I explore each of those utilizations in greater detail. In Part V, this Article applies interest convergence theory to both areas of religious liberty.

### *A. Interest Convergence as Explanation*

#### *1. Hernandez v. Texas*

Professor Richard Delgado has applied interest convergence to the 1954 Supreme Court case, *Hernandez v. Texas*.<sup>178</sup> Mexican American Pete Hernandez was indicted by a grand jury in Jackson County, Texas, for the murder of another Latino.<sup>179</sup> Before Hernandez's trial commenced, his lawyer moved to quash the indictment on the basis that Mexican Americans had been "systematically excluded from service as jury commissioners, grand jurors, and petit jurors"—this, even though the county had a heavy Latino concentration.<sup>180</sup> Hernandez's lawyer argued that this exclusion of Mexican Americans deprived his client of equal protection.<sup>181</sup>

The Texas Court of Criminal Appeals rejected the argument, holding that Mexican Americans were not a separate racial group apart from whites under the Fourteenth Amendment.<sup>182</sup> But the U.S. Supreme Court disagreed, holding that Mexican Americans were an independent racial demographic under the Amendment and that Jackson County's systematic exclusion of Mexican Americans from juries deprived Hernandez of equal protection.<sup>183</sup> The Court noted that Mexicans in southern Texas routinely faced discrimination; whites-only bathrooms were common, and at least one local restaurant had posted a sign barring Mexicans.<sup>184</sup> It also noted that "there being no members of this class among the over six thousand jurors called in the past 25 years ... bespeaks discrimination,

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178. Richard Delgado, *Rodrigo's Roundelay, Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23 (2006).

179. *Hernandez v. Texas*, 347 U.S. 475, 476 (1954).

180. *Id.* at 476-77 (footnote omitted).

181. *Id.* at 477.

182. *Id.*

183. *Id.* at 476-78.

184. *Id.* at 479.

whether or not it was a conscious decision on the part of any individual jury commissioner.”<sup>185</sup>

The Court’s language signaled a major moral breakthrough, a recognition of the mistreatment and deep injustices faced by Mexican Americans. But Delgado has argued that the ruling is less an indication of a moral awakening, and more the result of interest convergence.<sup>186</sup>

Like the majority interests articulated by Bell in his original piece, Delgado says *Hernandez* was at least partly about bolstering America’s reputation during war—this time, the Cold War.<sup>187</sup> The United States was competing with the Soviet Union for the allegiance of the Third World.<sup>188</sup> The world press had publicized American racism, and the Soviet Union had used these reports for its own propaganda.<sup>189</sup> To counter this messaging and broadcast to the world that the United States was serious about minorities’ rights, the Court had to deliver a big win.<sup>190</sup>

Also, similar to Bell’s theories about *Brown*, the Court in *Hernandez* was worried about the civil unrest that would ensue when Latino veterans returned home and faced abject discrimination. Just a few years before *Hernandez*, there had been significant outbreaks of Latino activism in Denver and Los Angeles.<sup>191</sup> In the 1942 “Sleepy Lagoon murder,” a man named José Gallardo Diaz was found dead by a swimming hole called Sleepy Lagoon.<sup>192</sup> A hospital autopsy found that he may have been drunk the night before his death and had a skull fracture, suggesting that perhaps he had fallen or been involved in a car accident.<sup>193</sup> Despite lacking conclusive evidence that Diaz was murdered, the Los Angeles Police Department arrested twenty-two Mexican American youths as suspects and held

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185. *Id.* at 482.

186. Delgado, *supra* note 178, at 63.

187. *Id.* at 48.

188. *Id.* at 31.

189. *Id.* at 40.

190. *Id.* at 40-41.

191. *Id.* at 49.

192. History.com Editors, *Man Murdered Near L.A. Reservoir*, HISTORY.COM (July 30, 2020), <https://www.history.com/this-day-in-history/man-murdered-near-l-a-reservoir> [<https://perma.cc/N89W-35RC>].

193. *People v. Zammora*, 152 P.2d 180, 186 (Cal. Ct. App. 1944).

them in prison without bail on charges of murder.<sup>194</sup> They were later imprisoned, twelve of them on counts of second-degree murder, but in 1944 had their convictions overturned.<sup>195</sup>

Before the convictions were overturned, the Sleepy Lagoon incident instigated the 1943 Zoot Suit Riots.<sup>196</sup> The riots raged for five days and pitted whites in the city against Latino residents;<sup>197</sup> they also led to numerous similar attacks that year in Chicago, San Diego, Detroit, and Philadelphia.<sup>198</sup>

Anti-Latino racism was so deep and pervasive that in the late forties, the Mexican government stepped in to demand fair treatment of Mexican Americans.<sup>199</sup> Even Eleanor Roosevelt took up the case, as did several well-known writers such as John Steinbeck.<sup>200</sup> At the time *Hernandez* was decided, then, the Court understood a loss for Mexican Americans would not only further damage America's international brand but it would also trigger explosive civil unrest at home.

Even more pressing for the Court, Delgado argues, was the concern that racism helped draw Latinos to communism.<sup>201</sup> Latino Americans regularly witnessed mistreatment—whether it was decorated veterans returning from war only to be denied a meal at their local restaurants, or expansive deportation programs that compulsorily repatriated over a million Mexicans and Mexican Americans.<sup>202</sup> The U.S. Communist Party seized on this mounting distaste; activists helped instigate strikes and, in 1939, *The Communist* published a piece called “The Mexican Question.”<sup>203</sup>

The American elite also had serious concerns about communist infiltration from Latin America. Assistant Secretary of State

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194. *Man Murdered Near L.A. Reservoir*, *supra* note 192.

195. *Id.*

196. *Id.*

197. History.com Editors, *Zoot Suit Riots*, HISTORY.COM (Aug. 29, 2022), <https://www.history.com/topics/world-war-ii/zoot-suit-riots> [<https://perma.cc/YC74-YCGE>]. The Zoot Suit Riots were so named because during the riots, the servicemen stripped Latino children and teenagers of their zoot suits. The suits were made from large amounts of fabric and considered unpatriotic during World War II when fabric was being rationed for the war effort.

198. *Id.*

199. Delgado, *supra* note 178, at 49.

200. *Id.* at 43-44.

201. *Id.* at 42-43.

202. *Id.* at 44.

203. *Id.* at 43-44.

Edward Miller in 1950 warned of the dangers of communist political aggression in Latin America.<sup>204</sup> Secretary of State John Foster Dulles in 1953 also counseled vigilance: “[I]f we don’t look out, we will wake up some morning and read in the newspapers that there happened in South America the same kind of thing that happened in China in 1949.”<sup>205</sup>

In 1950, U.S. State Department official Louis Halle published an influential piece in *Foreign Affairs* warning about the instability in the region.<sup>206</sup> The United States also established the School of the Americas to thwart insurrections and teach anticommunist methods to Latin American officers.<sup>207</sup>

Multiple Justices of the Court were aware of this broader context and had expressed their concerns publicly. Justices Hugo Black and William Douglas and Chief Justice Earl Warren all noted that racial discrimination in America hurt the country’s standing abroad, and believed that adhering to the Constitution and the Bill of Rights would help America project itself as a model of justice to other countries.<sup>208</sup> Justice Black commented that the “ugly facts” of racism inflict harm to America’s standing in the world.<sup>209</sup> Justice Douglas had written about his trip to India in 1950 and how the first question he received at a press conference there was about the “lynching of Negroes.”<sup>210</sup> A year later, Justice Douglas published his book, *Strange Lands and Friendly People*, in which he reflected on how America’s color consciousness impacted other countries’ view of the United States.<sup>211</sup>

Justice Douglas was also aware of the communist threat in Latin America.<sup>212</sup> On various trips to Latin America, Justice Douglas noted how the area was “ripe for communism.”<sup>213</sup> He mentioned it in a letter he wrote to a friend when Justice Douglas was sick

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204. *Id.* at 49-50.

205. *Id.* at 50.

206. *Id.* at 50-51.

207. *Id.* at 51.

208. *Id.* at 52-53.

209. *Id.* at 53.

210. *Id.* at 52.

211. *Id.*

212. *Id.*

213. *Id.*



during a trip to Panama;<sup>214</sup> in another letter, he describes how he traveled to Latin America to dissuade university students from joining the Communist Party.<sup>215</sup>

Delgado also notes that Chief Justice Warren, who wrote the *Hernandez* decision, had previously served as the attorney general and then the governor of California—making it highly likely that he was aware of the Zoot Suit Riots and other anti-Latino incidents in his state.<sup>216</sup> Taking this all together, Delgado posits that America’s foreign policy interests converged with the interests of Mexican Americans in *Hernandez* and the interest convergence contributed to the Court’s holding.<sup>217</sup>

## 2. *Plyler v. Doe*

Law professor María Pabón López uses interest convergence to explain the Supreme Court case, *Plyler v. Doe*.<sup>218</sup> In *Plyler*, the Court struck down a Texas statute that withheld funding for the education of undocumented children and authorized school districts to deny enrollment to them.<sup>219</sup> The case was the first in which the Court stated that undocumented people constitute “persons” under the Equal Protection Clause of the Fourteenth Amendment and that in denying them an education, Texas had violated their equal protection rights.<sup>220</sup>

In reaching its conclusion, the Court first determined that the appropriate level of scrutiny was rational basis.<sup>221</sup> Despite this assertion, however, the Court went on to apply a more demanding standard.<sup>222</sup> It quoted *Brown*’s finding that “education is perhaps the most important function of state and local governments.”<sup>223</sup> As such, the state’s denial of education to the undocumented students could

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214. *Id.*

215. *Id.*

216. *Id.* at 53.

217. *See id.* at 54-55.

218. See María Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373, 1337 (2005).

219. *Plyler v. Doe*, 457 U.S. 202, 205, 210 (1982).

220. *See id.* at 210.

221. *See id.* at 216.

222. *Id.* at 223.

223. *Id.* at 222.

not satisfy rational basis review unless it served a “substantial” state goal.<sup>224</sup> The analysis, the Court said, required an assessment of both the costs to the nation and the interests of the innocent children, including the fact that Texas’s denial “imposes a lifetime hardship on a discrete class of children not accountable for their disabling status.”<sup>225</sup> In the Court’s view, Texas lacked the “substantial” goal needed to justify these grave injustices and the statute did not satisfy the demands of equal protection.<sup>226</sup>

On its face, *Plyler* was a resounding victory for undocumented children. The Court’s opinion included powerful language about the importance of education and the need for equal access to prevent the creation of a permanent caste of noncitizens destined to carry life-long burdens.<sup>227</sup> But, López argues, it would be a mistake to take *Plyler* at face value.<sup>228</sup>

In López’s view, *Plyler* was at least partly the result of interest convergence between the undocumented students and the powerful elite, with the latter having a stake in the availability of low-wage workers to do the work no one else wanted to do.<sup>229</sup> López’s evidence includes, for one, that the Immigration Reform and Control Act (IRCA), which made it illegal to hire undocumented workers, had not been passed at the time *Plyler* was decided.<sup>230</sup> Second, higher education remains largely inaccessible to undocumented students, and many are still unable to work legally in the United States.<sup>231</sup> López describes multiple legislative efforts designed to build on *Plyler* and give undocumented students access to higher education, but most of these bills never made it to a vote or were postponed indefinitely.<sup>232</sup> As of her writing, twenty-one states had not even considered the issue at all.<sup>233</sup> Litigation has also proved unsuccessful; all the cases that had been brought (as of López’s

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224. *Id.* at 224.

225. *Id.* at 223.

226. *See id.* at 224.

227. *See id.* at 218-19.

228. López, *supra* note 218, at 1377.

229. *Id.*

230. *Id.* at 1405.

231. *Id.* at 1400.

232. *Id.* at 1400-04.

233. *Id.* at 1402.

writing) to challenge the denial of higher education had resulted in losses.<sup>234</sup>

At the same time, there have been several attempts to overturn *Plyler*, but those have also been unsuccessful.<sup>235</sup> Two federal proposals from 1995 and 1996 would have effectively overruled *Plyler* and permitted states to deny education to undocumented students.<sup>236</sup> At the state level, California's Proposition 187 in 1994 denied free public education to undocumented students but was invalidated in a subsequent case.<sup>237</sup>

Multiple efforts have failed to build on *Plyler*, and still other initiatives have failed to overrule it. Altogether, undocumented students are allowed to stay and receive secondary education, but their prospects beyond that are limited. In this way, instead of being a moral breakthrough, *Plyler* perpetuates the second-class status of the undocumented and ensures "a primary and secondary education for their children, but nothing more."<sup>238</sup> The powerful elite want a low-cost, dispensable labor force, and *Plyler* gave them exactly that.<sup>239</sup>

### 3. *Grutter v. Bollinger*

Another example of interest convergence as explanation comes from Bell himself, who considered *Grutter v. Bollinger* his interest convergence prophecy come true.<sup>240</sup> The crux of this theory is that Black people will not attain benefits until those benefits also serve the interests of whites.<sup>241</sup> He found proof of that in the two affirmative action cases decided on the same day: *Grutter* and, separately, *Gratz v. Bollinger*.<sup>242</sup> In the latter, the Court struck down the University of Michigan's undergraduate admissions program that automatically assigned twenty points (one-fifth of the points needed

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234. *Id.* at 1402-03.

235. *Id.* at 1395.

236. *Id.* at 1395-96.

237. *Id.* at 1396-97.

238. *Id.* at 1398.

239. *Id.* at 1405.

240. Derrick A. Bell, Jr., *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1624 (2003).

241. *See id.*

242. *Id.*

to gain admission) to every applicant who belonged to an under-represented minority.<sup>243</sup>

In contrast, the Court in *Grutter* upheld the same university's law school admissions program that took race into account alongside other diversity factors, instead of applying the "mechanical" method of assigning points.<sup>244</sup> Justice Ginsburg's dissent in *Gratz* noted the importance of race-conscious admissions programs in remediating the effects of a past system of racial caste.<sup>245</sup> Bell argued, however, that this was not enough to move the majority to vote in favor of affirmative action.<sup>246</sup> Something else was needed—something that made clearer the benefit of affirmative action for whites.

The university's lawyers and their civil rights allies knew what that something was in *Grutter*—particularly when it came to Justice O'Connor, who voted against the university in *Gratz* but was the swing vote and author of the opinion in favor of the university in *Grutter*.<sup>247</sup> The lawyers lined up sixty-four amicus briefs representing over 300 organizations including, among others, labor unions, Fortune 500 companies, and almost thirty retired military and civilian defense officials.<sup>248</sup> The central point in these briefs: "that a racially diverse, well-educated work force was essential to the success of their operations."<sup>249</sup> Thus, it was diversity in schools, at work, and in the military that Justice O'Connor found appealing, rather than the need to address past and present racial barriers.<sup>250</sup>

Bell reviewed several cases in which Justice O'Connor decided the validity of a variety of programs that were intended to make space for long-excluded minorities.<sup>251</sup> His conclusion, based on this analysis: Justice O'Connor typically struck them down while expressing concerns about their negative effects on non-minorities.<sup>252</sup> It comes as no surprise then, Bell says, that Justice O'Connor voted in favor of the affirmative action program in *Grutter*, as "[s]he

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243. *Gratz v. Bollinger*, 539 U.S. 244, 274-75 (2003).

244. *Grutter v. Bollinger*, 539 U.S. 306, 337, 342-43 (2003).

245. 539 U.S. at 298-301 (Ginsburg, J., dissenting).

246. Bell, *supra* note 240, at 1624-25.

247. *Id.*

248. *Id.*

249. *Id.* at 1625.

250. *Id.*

251. *See id.* at 1623-26.

252. *Id.* at 1625-26.

evidently viewed it as a benefit and not a burden to nonminorities.”<sup>253</sup>

Citing the amicus briefs filed by the corporate and military entities, O’Connor wrote in her *Grutter* majority opinion that the law school’s admissions program “promotes learning outcomes” and “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”<sup>254</sup> In particular, it “enables [students] to better understand persons of different races’... [C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’”<sup>255</sup> As such, Bell notes, white students benefit, and so do the “corporate and institutional entities with which [Justice O’Connor] identifies.”<sup>256</sup>

Other scholars have debated the convergence theory in the *Grutter* context, with some agreeing with Bell<sup>257</sup> and others disagreeing.<sup>258</sup> But the use of interest convergence in *Grutter* again illustrates how it can be used to explain and complicate the analysis of Supreme Court rulings. As with the other analyses of interest convergence, it is meant to help explain and not minimize the importance of the Court’s ruling.<sup>259</sup> The analyses are not meant to deny that there are whites for whom genuine equality is the primary motivation. It does posit, however, that the number of such individuals is insufficient to bring about true reform. It also suggests that the case at issue—whether it is *Brown*, *Hernandez*, *Plyler*, or *Grutter*—would provide a short-lived or limited victory instead of real, lasting influence.

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253. *Id.* at 1626.

254. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (quoting Brief for American Educational Research Association et al. as Amici Curiae, *id.* (02-241) 3).

255. *Id.* (quoting App. to Pet. for Cert. 244a, 246a, *id.* (02-241)).

256. Bell, *supra* note 240, at 1626.

257. See, e.g., Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J. C.R. & C.L. 51, 60 (2005).

258. See, e.g., Arthur M. Wolfson, Note, *Business Support of Affirmative Action and Discriminatory Hiring Practices: Contradictory or Compatible?*, 27 W. NEW ENG. L. REV. 197, 210-11 (2005).

259. See generally Bell, *supra* note 240.

### *B. Interest Convergence as Political Strategy*

Beyond explaining the majoritarian politics behind rights-protective judicial decisions, interest convergence theory also offers a realist perspective on political coalition-building. For example, in *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, Professor Sheryll Cashin describes how the Industrial Areas Foundation (IAF) teaches its diverse members to identify self-interests and use interest convergence to work effectively toward change.<sup>260</sup> A local IAF affiliate, the Dallas Area Interfaith (DAI)—founded by a group of Black, Latino, and white ministers and local leaders—utilized this approach to mobilize Hispanic voters, which in turned was key to passing a \$1.4 billion school bond initiative.<sup>261</sup>

Another example is the Gamaliel Foundation, which has created metropolitan-wide coalitions of local institutions that mobilize thousands of people around tax base inequity, housing, transportation, and regional policies that drain cities and the working-class suburbs to foster the growth of rich communities.<sup>262</sup> Cashin locates interest convergence in the coalition of working-class suburbs and city dwellers.<sup>263</sup> Although the “inner-ring of older suburbs culturally may identify with the more affluent, job-rich outer-ring suburbs,” they share a fiscal destiny with central cities.<sup>264</sup> Both suffer from the disproportionate investment in outer-ring suburbs.<sup>265</sup>

Writing about federal legislation, Professor Sudha Setty explores bipartisan coalition-building around rights-protective legislation for American Muslims in the post-September 11 era in her piece, *National Security Convergence*.<sup>266</sup> In this context, the political self-interests of liberal and conservative politicians from “safe” political districts diverge markedly.<sup>267</sup> Liberals benefit from opposing

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260. Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253, 281-82 (2005).

261. *Id.* at 284.

262. *Id.* at 286-87.

263. *Id.* at 287.

264. *Id.*

265. *Id.*

266. See Sudha Setty, *National Security Interest Convergence*, 4 HARV. NAT'L SEC. J. 185 (2012).

267. *Id.* at 189-90.

indefinite detention and protecting civil liberties.<sup>268</sup> Conservatives benefit from taking a “hawkish stance” on national security.<sup>269</sup> They must be “aggressive” about detention and interrogation of detainees and “skeptical” about civil rights claims.<sup>270</sup> For a politician to vote for an unpopular rights-protective measure, moral imperatives are not enough; the vote also must be politically beneficial.<sup>271</sup> Only if enough politicians find it politically beneficial to take civil rights claims seriously will Congress pass rights-protective laws.<sup>272</sup>

Applying interest convergence to national security legislation, Setty identifies fiscal responsibility as a shared interest.<sup>273</sup> Curbing government spending is a key piece of conservative political platforms.<sup>274</sup> Cutting back on defense spending and expensive counterterrorism programs that have proven unnecessary helps protect Muslim communities and reduces the U.S. budget deficit—a convergence of liberal and conservative interests.<sup>275</sup>

### *C. The Limitations of Interest Convergence*

This Section discusses three limitations of interest convergence: (1) remedies are short-lived, (2) interest convergence requires concessions, and (3) ideology can outweigh interest.

#### *1. Remedies Are Short Lived*

Bell saw interest convergence as one side to a two-sided coin.<sup>276</sup> On the other side is what Bell called “involuntary racial sacrifice.”<sup>277</sup> Black people won remedies when their interests converged with the interests of whites.<sup>278</sup> But Black people also see their rights

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268. *Id.* at 189.

269. *Id.*

270. *Id.*

271. *Id.* at 190.

272. *Id.*

273. *Id.* at 218.

274. *Id.* at 216.

275. *Id.*

276. DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 69 (2004).

277. *Id.*

278. *Id.*

abrogated if those rights are seen as challenging the racial superiority of whites.<sup>279</sup>

Bell's pessimism proved warranted when it came to the long-term impact of *Brown*. Twelve years after the ruling, as he was working through its "difficult implementation," Bell realized that racial segregation was just a symptom of the much more pervasive and entrenched problem of white superiority.<sup>280</sup> Bell quotes one of the *Brown* lawyers: "Invalidating state-supported segregation, we learned, simply meant it would shift to different but hardly less dominating forms."<sup>281</sup>

## 2. *Interest Convergence Requires Concessions*

Interest convergence necessarily requires working with the powerful—sometimes oppressive—majority. This, in turn, requires some level of sacrifice in the purity of one's activism. Bell, for example, expressed disappointment with the NAACP's willingness to change its litigation practices during the early 1950s, when Joseph McCarthy and his anticommunist witch hunt were at the height of their power.<sup>282</sup> The NAACP chose not to represent Paul Robeson, a popular singer and actor, when the government helped end his career over his outspoken criticism of racial discrimination.<sup>283</sup> The NAACP also did not represent one of its founders, W.E.B. DuBois, when he was indicted under the Foreign Agents Registration Act.<sup>284</sup> In both cases, the NAACP feared representing these men would make it vulnerable to charges of communist sympathizing.<sup>285</sup> Though he acknowledges that the NAACP had valid motivations, Bell found the NAACP's reluctance "excessive."<sup>286</sup>

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279. *Id.*

280. Derrick Bell, *Racial Equality: Progressives' Passion for the Unattainable*, 94 VA. L. REV. 495, 499 (2008) (reviewing RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007)).

281. *Id.*

282. *Id.* at 508-09.

283. *Id.* at 509.

284. *Id.*

285. *See id.*

286. *Id.*



### 3. *Ideology Can Outweigh Interests*

Interest convergence for purposes of coalition-building may prove difficult if there is a significant conflict of ideology between the parties involved. In the race context, ideology often makes it difficult for Black people to form coalitions with minority groups, despite their shared interests. For example, Latinos tend to prefer building coalitions with whites over Black people.<sup>287</sup>

## IV. RELIGIOUS LIBERTY INTEREST CONVERGENCE

This Part charts a path forward for religious liberty in a polarized age. Although numerous scholars have built upon Bell's original thesis about Black people's rights by applying interest convergence to cases involving other racial minorities, only one scholar has applied it to religious minorities,<sup>288</sup> and no one has considered its implications for the status of religious minorities in today's politicized religious liberty landscape. This Part tackles both challenges. In its analysis of religious liberty interest convergence, Muslims are the minoritized group and conservative, white Christians are the powerful majority that will be more inclined to coalition-build with Muslims when it serves its self-interest. Part IV.A will map how the conservative, Christian Justices of the Court reflect the interests of conservative Christians broadly.

Of course, religion and race are deeply interwoven in the public imagination. Whereas Christianity is often imagined as a white, Western, and American religion, Islam is perceived as a non-white, Eastern tradition.<sup>289</sup> One is domestic, one is foreign—one is “us,” and one is “other.”<sup>290</sup> Some scholars have even argued that Islam has become “racialized” in the United States; that is, Muslims are perceived as uniformly non-white (specifically, “brown”) and treated

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287. Cashin, *supra* note 260, at 279.

288. Stephen M. Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 IOWA L. REV. 833, 871 (1996) (applying interest convergence theory to “explain why the separation of church and state often provides only minimal benefits to outgroup religions”).

289. Hadi Khoshnevis, *The Inferior White: Politics and Practices of Racialization of People from the Middle East in the U.S.*, 19 ETHNICITIES 117, 121 (2019).

290. *See id.* at 120.

as a racial rather than religious minority.<sup>291</sup> These considerations will be relevant to the discussion in Part V about the role of ideology convergence vis-à-vis interest convergence.

On the flipside, religious liberty convergence is different in important ways from racial interest convergence. In Bell's analysis of *Brown*, the powerful whites had one set of interests while Black people had a different set of interests.<sup>292</sup> In contrast, the religious liberty tradition has long understood that believers of both majority and minority faiths (or no faith) have the same interest in broad religious freedom protections. Favoring some religions over others only weakens the protections for all; that is, religious freedom for some is religious freedom for none. While the politicized religious liberty context often muddles this basic fact for many Americans, at least one nationally prominent conservative religious liberty law firm has a strong grasp on this principle. Moreover, there is a long history in the religious freedom tradition of protecting both majority and minority groups. Numerous leaders in early America offered spiritual and pragmatic arguments for religious freedom, which in turn undergird constitutional protections for religious freedom.

Part IV.B uses interest convergence theory to explain the contrasting results in *Hawaii* versus *Tanvir*. It assesses both cases against the backdrop of the current politicized religious liberty landscape and the conservative Justices' apparent alignment with the conservative faction of that culture war. Based on this assessment, Part IV.B offers several areas of interest convergence between the conservative Justices and the Muslim men in *Tanvir* and then argues that many of those same interests were not as clearly at stake in *Hawaii*. In *Hawaii*, the conservative Justices were also strongly disincentivized against ruling for the Muslim claimants.

Next, Part IV.C uses the convergence points to devise a political strategy for Muslim-Christian coalition-building on religious liberty. Finally, Part IV.D explores religious liberty interest convergence as constitutional justification.

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291. See, e.g., Nagwa Ibrahim, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E.L. 121, 135 (2008).

292. See Bell, *supra* note 280, at 499.

A. *Conservative Justices and the Interests of White Conservative Christians*

That the conservative, Christian Justices of the Court reflect the interests of conservative Christians broadly is evidenced by (1) the Justices' explicit statements both in Court opinions and in public statements; (2) empirical studies tracking outcomes in religious rights cases; and (3) circumstantial evidence, including (a) the rise of a conservative legal movement designed to replace liberal Justices with conservative ones that share the movement's interests and (b) the active involvement of religious conservatives in the judicial confirmation process.

The first set of proofs—the Justices' explicit statements—are incorporated into the relevant portions of the discussion in Part IV.B. In addition to parsing the Court's opinion in *Tanvir*, Part IV.B details statements by the conservative Justices that indicate their interest in particular religious liberty outcomes. But before delving into that evidence, this Part will explore empirical and circumstantial evidence.

1. *Empirical Evidence*

In a study published in 2022, Professors Lee Epstein and Eric Posner found that the Roberts Court has transformed the constitutional protection for religion.<sup>293</sup> They reviewed every Supreme Court case from the 1953 to the 2020 Term that involved the Free Exercise or Establishment Clauses and resulted in a judicial opinion, excluding cases that were decided without oral argument.<sup>294</sup> In total, they reviewed 95 cases consisting of 841 votes by 32 Justices.<sup>295</sup> Epstein and Posner categorized votes that favored a religious outcome as “pro-religion.”<sup>296</sup> They found that, over the entire studied period, the Court voted pro-religion 59 percent of the time but that number jumped to 83 percent in the Roberts Court.<sup>297</sup> The Solicitor

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293. Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315, 315-16.

294. *Id.* at 323.

295. *Id.*

296. *Id.*

297. *Id.* at 324.

General's participation in religion cases also rose dramatically—from 9 percent during the Warren Court (1953-1969) to 89 percent in the Roberts Court.<sup>298</sup>

The researchers then redefined pro-religion to mean pro-mainstream Christians, noting that the presence of mainstream Christian plaintiffs in religious rights cases before the Supreme Court is a relatively recent phenomenon.<sup>299</sup> In the Warren Court, no religious plaintiff belonged to a mainstream Christian religion.<sup>300</sup> After 1969, this begins to change as the Court moved right, so that during the Roberts Court, “nine mainstream Christian plaintiffs win seven of their cases.”<sup>301</sup> Epstein and Posner labeled these pro-religion rulings “pro-mainstream Christian,” and found that—much like the win rate for pro-religion rulings—the win rate rose gradually from 44 percent to 57 percent, and then jumped to 80 percent in the Roberts Court.<sup>302</sup> Another way to look at the patterns across pro-religion and pro-mainstream Christian rulings: before the Roberts Court, pro-religion rulings were mostly for religious minorities, and the Roberts Court extended those same protections to religious majorities.<sup>303</sup>

Epstein and Posner go on to argue that the transformation of religious outcomes can be attributed to the ideologies of the Justices.<sup>304</sup> They break down pro-religion votes of all Justices from 1953 onward and find that the top five pro-religion Justices sit on the Roberts Court.<sup>305</sup> All five are Republican appointees, ideologically conservative, and religiously devout.<sup>306</sup> Epstein and Posner also note that the Roberts Court is not just the most pro-religion—it is also the most polarized, with two of the least pro-religion Justices (Sotomayor and Ginsburg) sitting (or having sat) on the Roberts Court.<sup>307</sup>

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298. *Id.*

299. *Id.* at 325-26.

300. *Id.*

301. *Id.* at 326.

302. *Id.*

303. *Id.*

304. *Id.* at 326-27.

305. *Id.*

306. *Id.*

307. *Id.* at 327.

There is a caveat to these numbers: the case volume is low (Justice Kavanaugh heard only six of the cases whereas Justice Thomas heard thirty-six cases).<sup>308</sup> Because Epstein and Posner considered only cases that were argued, they omit two cases where Chief Justice Roberts joined the liberal Justices in ruling against religious challenges to COVID-19 orders.<sup>309</sup> Still, it remains indisputable that partisan polarization on religion is growing.

Epstein and Posner explain their findings this way: “The conservative bloc on the Supreme Court sees the promotion of religious rights as a legitimate way to push back on the socially liberal rulings of the court.”<sup>310</sup> For more than fifty years, Conservatives complained about Supreme Court rulings that have, on the one hand, established protections for contraception, abortion, and the rights of sexual minorities, and on the other, provided relatively weak constitutional protections for religious actors, particularly conservative Christians, who lost disputes related to holiday displays on government property or prayer in public schools.<sup>311</sup> To push back against both trends, the conservative Justices have strengthened religious rights for conservative Christians.<sup>312</sup> “This jurisprudential move mirrors a broader trend in the country,” Epstein and Posner explain.<sup>313</sup> In other words, the conservative, Christian Justices reflect the interests of conservative Christians in the United States today.

Other researchers studying judicial decision-making and religious rights cases have found similar trends. The COVID-19 cases provide the most recent set of proofs. Faced with a series of cases where religious organizations challenged the impact of pandemic lockdown orders on houses of worship, judges in lower courts voted in politically predictable ways.<sup>314</sup> Zalman Rothschild in *Free Exercise*

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308. Lee Epstein & Eric Posner, *How the Religious Right Has Transformed the Supreme Court*, N.Y. TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/09/22/opinion/supreme-court-religion.html> [<https://perma.cc/Z424-J4P7>]. The final, published version of the study added two cases heard by Justice Kavanaugh and three additional cases heard by Justice Thomas. Epstein & Posner, *supra* note 293, at 328.

309. Epstein & Posner, *supra* note 308.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

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

*Partisanship* found that 82 percent of Trump-appointed judges ruled for the religious organizations while 100 percent of Democrat-appointed judges ruled for the government (non-Trump-appointed Republican judges split).<sup>315</sup>

In another study, researchers found that Democrat- and Republican-appointed judges in lower federal courts vote in ideologically predictable ways in Establishment Clause cases.<sup>316</sup> In this context, ruling against an Establishment Clause challenge is the “pro-religion” position, and upholding the challenge is the “anti-religion” one. The study found that Democrat-appointed judges took the anti-religion position 57.3 percent of the time, and that number fell to 25.4 percent with Republican-appointed judges.<sup>317</sup>

## 2. *Circumstantial Evidence*

Former Supreme Court Justice Antonin Scalia’s death in the months before former President Trump’s 2016 election made the appointment of a conservative Justice front and center for a lot of would-be Trump voters.<sup>318</sup> And as Trump went on during his term to appoint hundreds of lower federal court judges and three Supreme Court Justices,<sup>319</sup> numerous researchers and journalists probed the influence of conservative groups on Trump’s selection process.<sup>320</sup>

The latter inquiry focused on the rise of the Federalist Society, which experts describe as having a “monopoly” on the Supreme

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315. *See id.* at 1068.

316. Gregory C. Sisk & Michael Heise, *Ideology “All the Way Down”? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1201 (2012).

317. *Id.* at 1204-05.

318. David Frum, *The Supreme Court Isn’t a Sufficient Reason to Vote for Trump*, ATLANTIC (Aug. 4, 2016), <https://www.theatlantic.com/politics/archive/2016/08/scotus-not-a-good-reason-to-vote-trump/494630/> [<https://perma.cc/5S24-6AM4>].

319. John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/> [<https://perma.cc/627X-57SX>].

320. NOAH FELDMAN, TAKEOVER: HOW A CONSERVATIVE STUDENT CLUB CAPTURED THE SUPREME COURT (2021); *The Money Behind Conservative Legal Movement*, N.Y. TIMES (Mar. 19, 2017), <https://www.nytimes.com/interactive/2017/03/19/us/politics/document-Conservative-Donors-DocCloud.html> [<https://perma.cc/NAM3-E288>].

Court appointment process<sup>321</sup>—so much so that the current conservative Justices of the Court are considered “Federalist Society judges.”<sup>322</sup> The Society identifies qualified candidates who could be trusted to remain reliably conservative, including on matters pertaining to religious rights.<sup>323</sup> An investigation into the Society’s creation and impact is beyond the scope of this Article, but its central role in Trump’s many judicial picks establishes a connection between conservative Justices and a conservative legal movement whose interests the Justices are expected to uphold.<sup>324</sup>

The Court’s June 2022 decision in *Dobbs v. Jackson Women’s Health Organization* provides a particularly pointed example of this expectation.<sup>325</sup> In *Dobbs*, the Court overruled *Roe v. Wade*,<sup>326</sup> a 1973 decision establishing a constitutional right to abortion.<sup>327</sup> As numerous news outlets reported, the conservative legal movement had for fifty years worked toward that precise goal by, among other things, helping place Justices on the Court that would serve that purpose.<sup>328</sup>

Similarly, conservative Justices are most certainly aware of religious Conservatives’ active role in the confirmation process. For example, in the wake of Justice Ginsburg’s death in 2020, numerous

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321. Dylan Matthews & Byrd Pinkerton, *The Incredible Influence of the Federalist Society, Explained*, VOX (June 3, 2019, 9:00 AM), <https://www.vox.com/future-perfect/2019/6/3/18632438/federalist-society-leonard-leo-brett-kavanaugh> [<https://perma.cc/29MM-RXAY>].

322. Caroline Fredrickson & Eric J. Segall, Opinion, *Trump Judges or Federalist Society Judges? Try Both*, N.Y. TIMES (May 20, 2020), <https://www.nytimes.com/2020/05/20/opinion/trump-judges-federalist-society.html> [<https://perma.cc/6QSC-TV7F>].

323. *See id.*

324. Another conservative organization, the Judicial Crisis Network, has also been identified as a central player in the selection and vetting of judges at both the federal and state levels. Elizabeth Williamson, *With Barrett Nomination, a D.C. Conservative Power Couple Nears Its Dream*, N.Y. TIMES (Oct. 15, 2020), <https://www.nytimes.com/2020/10/15/us/politics/severinos-amy-coney-barrett.html> [<https://perma.cc/7CKQ-KK6W>].

325. *See* 142 S. Ct. 2228 (2022).

326. *Id.* at 2284-85.

327. 410 U.S. 113, 164 (1973).

328. All Things Considered, *How Conservatives Worked for Decades to Fill Courts with Anti-Abortion Rights Judges*, NPR (June 26, 2022, 5:02 PM), <https://www.npr.org/2022/06/26/1107713225/how-conservatives-worked-for-decades-to-fill-courts-with-anti-abortion-rights-ju> [<https://perma.cc/JRY4-W6H5>]; Edwin Meese III, Opinion, *Did the Conservative Legal Movement Succeed? That All Depends on Whether the Supreme Court Overrules Roe v. Wade*, WASH. POST (Nov. 29, 2021, 9:48 AM), <https://www.washingtonpost.com/opinions/2021/11/29/did-conservative-legal-movement-succeed-that-all-depends-whether-supreme-court-overrules-roe-v-wade/> [<https://perma.cc/9P2E-UG7N>].

conservative Christian groups mobilized to pressure Senate Republicans to speedily confirm Trump's nominee.<sup>329</sup> As one *New York Times* piece explains, Justice Ginsburg's death gave these religious conservatives a chance to fulfill "their long-denied goal of shifting the Supreme Court decisively to the right."<sup>330</sup> The Christian groups seized the opportunity and worked to secure the appointment with the expectation that a conservative Justice would reflect—and protect—their interests.<sup>331</sup>

*B. Religious Liberty Interest Convergence as an Explanation:  
Tanzin v. Tanvir Versus Trump v. Hawaii*

On December 10, 2020, the U.S. Supreme Court in *Tanzin v. Tanvir* ruled unanimously in favor of three Muslim men who alleged they were placed on the no-fly list by Federal Bureau of Investigation (FBI) agents in retaliation for their refusal to spy on their religious community.<sup>332</sup> The Muslim men had argued under the Religious Freedom Restoration Act (RFRA) that the FBI forced them to choose between their religious beliefs and being subjected to the punishment of placement on the no-fly list.<sup>333</sup>

The no-fly list is developed and maintained by the federal Terrorist Screening Center (TSC) and administered by the FBI.<sup>334</sup> The TSC maintains a database with information about individuals who are known to have or are reasonably suspected of committing terrorist activity.<sup>335</sup> The TSC places the names of such individuals on the no-fly list and shares it with the Transportation Security Administration (TSA) and airline representatives, in addition to state and federal law enforcement agencies.<sup>336</sup>

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329. Jeremy W. Peters, "This Is Why We Wanted This Guy": Conservatives Push Trump to Fill Court Seat Quickly, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/2020/09/19/us/politics/trump-supreme-court.html> [https://perma.cc/5LER-CL85].

330. *Id.*

331. *See id.*

332. *See* 141 S. Ct. 486, 489 (2020).

333. *See id.*

334. TERRORIST SCREENING CTR., FBI 1-2, <https://archives.fbi.gov/archives/about-us/ten-years-after-the-fbi-since-9-11/just-the-facts-1/terrorist-screening-center-1> [https://perma.cc/S9QX-PMSP].

335. *Id.*

336. *Id.*



The plaintiffs in *Tanvir* alleged that federal law enforcement and intelligence agencies can also “nominate” individuals for the no-fly list if they have “reasonable suspicion[s]” that the individual is a “known or suspected terrorist” and poses a terrorist threat on an aircraft.<sup>337</sup> People on the no-fly list are banned from plane trips that start or end in the United States or involve flying over the United States.<sup>338</sup>

The *Tanvir* plaintiffs also alleged that the federal agents named in the lawsuit took advantage of the opaque standards for placing someone on the no-fly list to attempt to coerce plaintiffs into becoming informants within their religious communities and places of worship.<sup>339</sup> When plaintiffs refused, the FBI agents placed them on the no-fly list.<sup>340</sup>

### 1. *Tanvir’s Story*

The saga began when FBI Special Agent FNU Tanzin and another agent approached the lead plaintiff in the case, Muhammad Tanvir, in February 2007 to question him about an acquaintance who entered the country illegally.<sup>341</sup> The agents questioned Tanvir for thirty minutes and then, two days later, Tanzin called Tanvir again to ask if Tanvir had any information to share with him.<sup>342</sup>

In July 2008, when Tanvir returned home from a trip to Pakistan to visit family, he was detained at the John F. Kennedy International Airport (JFK) by federal agents for five hours.<sup>343</sup> They confiscated Tanvir’s passport and told him he could retrieve it six months later, in January 2009.<sup>344</sup> Tanzin and another agent later visited Tanvir at his workplace and asked him to come into the FBI’s Manhattan office, where the FBI agents went on to question Tanvir for an hour.<sup>345</sup> They asked him whether he was aware of

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337. *Tanvir v. Tanzin*, 894 F.3d 449, 454 (2d Cir. 2018), *aff’d*, 141 S. Ct. 486 (2020).

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.* at 455.

344. *Id.*

345. *Id.*

Taliban training camps near Tanvir's home in Pakistan and whether he himself had received Taliban training.<sup>346</sup> Tanvir told them he was unaware of the camps and had never been trained by the Taliban.<sup>347</sup>

After the questioning, the agents asked Tanvir if he could work as an informant for the FBI in Pakistan or Afghanistan.<sup>348</sup> Tanvir alleged that the agents offered him multiple incentives, but Tanvir declined.<sup>349</sup> The agents then persisted and even threatened to withhold Tanvir's passport and deport him if he did not cooperate.<sup>350</sup> The next day, Tanzin and the other FBI agent contacted Tanvir and again threatened him with deportation for failure to cooperate as an informant, to which Tanvir again declined.<sup>351</sup>

In January 2009, Tanvir received his passport from Department of Homeland Security (DHS) officers at JFK Airport.<sup>352</sup> The next day, Tanzin called Tanvir and told him his passport had been released only because Tanvir was "cooperative" with the FBI.<sup>353</sup> The FBI pressure continued the next few weeks, including calls and visits at Tanvir's workplace.<sup>354</sup> Later, the agents asked Tanvir to submit to a polygraph test and when he declined, threatened to arrest him.<sup>355</sup>

In January 2010, Tanvir took a job as a long-haul trucker.<sup>356</sup> He often had to fly home after he completed his deliveries.<sup>357</sup> In October 2010, as he tried boarding a flight in Atlanta, he was turned away and instead taken by two FBI agents to a bus station, where he had to take a twenty-four-hour bus ride home.<sup>358</sup> Two days later, another agent, Sanya Garcia, contacted him and told him she would help remove his name from the no-fly list if he met with her for

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346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

questioning.<sup>359</sup> Tanvir declined, saying he had already answered the FBI's questions.<sup>360</sup>

Because he believed he was unable to fly, Tanvir quit his job; however, the difficulties continued.<sup>361</sup> On multiple occasions, he bought plane tickets to visit his ailing mother in Pakistan, but in each case, he was not permitted to fly.<sup>362</sup> Throughout this period, he was informed repeatedly by FBI agents that they could help him get off the no-fly list if he agreed to serve as an FBI informant.<sup>363</sup> The two other men in the case alleged they were placed under similar pressure.<sup>364</sup>

After the plaintiffs sued the agents in 2013, and just four days before oral arguments on the government's motion to dismiss, the government took the plaintiffs off the no-fly list.<sup>365</sup> It claimed that the plaintiffs' experience was due to "misidentification against a government record" or "random selection" and that the government would update its record.<sup>366</sup> There was no guarantee the government would not put them back on the list, and there was also no compensation for the hardship and financial loss the men suffered because of their placement on the list.<sup>367</sup> Their placement had resulted in unused airline tickets and lost income when they were unable to take advantage of job opportunities.<sup>368</sup> Injunctive relief was inadequate to compensate the men for their injuries, which raised the question of whether the plaintiffs could sue the FBI agents for money damages under the RFRA.<sup>369</sup>

A federal district court dismissed the men's claims for financial relief, holding that the RFRA did not allow claimants to sue federal officials in their personal capacity for money damages.<sup>370</sup> The

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359. *Id.* at 456.

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.* at 454, 456-57.

364. *Tanvir v. Lynch*, 128 F. Supp. 3d 756, 764 (S.D.N.Y. 2015), *rev'd in part sub nom. Tanvir v. Tanzin*, 889 F. 3d 72 (2d Cir. 2018), *aff'd*, 141 S. Ct. 486 (2020).

365. *Tanzin*, 894 F.3d at 456.

366. *Id.*

367. *See id.*

368. *See id.*

369. *See id.* at 457.

370. *Id.*

Second Circuit Court of Appeals reversed that ruling, and the federal government sought review at the Supreme Court.<sup>371</sup>

## 2. *The Legal Arguments*

Two of the main arguments in *Tanvir* had to do with the implications of money damages for national security and the nature of the RFRA.

### a. *Implications for National Security*

A key part of the government's argument was that provision of money damages would compromise national security.<sup>372</sup> The government appealed to themes likely to resonate with the conservative Justices. It called attention to the "Court's hesitation in recognizing new *Bivens* causes of action" and argued that providing money damages under a statute like the RFRA, which is designed to create exemptions from generally applicable laws, would dissuade law enforcement officials from performing their duties robustly.<sup>373</sup> Officials would have to decide on the spot whether to create an exemption from the rule he or she was supposed to be enforcing.<sup>374</sup> If money damages were available, the official would likely decide against enforcement.<sup>375</sup>

This, the government argued, is particularly dangerous when it comes to federal agents protecting national security, as in *Tanvir*: "Personal damage actions are especially concerning in the national security context, where ... the President and the Executive have special responsibilities under ... Article II and have sensitivities within those by lists."<sup>376</sup> The language was fine tuned to appeal to Justice Thomas' National Security Fundamentalism (recall that in *Hamdi*, Justice Thomas argued that "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security

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371. *Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020).

372. Transcript of Oral Argument, *supra* note 7, at 28.

373. *Id.* at 14-15.

374. *Id.* at 13-15.

375. *See id.*

376. *Id.* at 28.

of the Nation. The national security, after all, is the primary responsibility and purpose of the Federal Government.”).<sup>377</sup>

In contrast, Tanvir acknowledged that the government’s qualified immunity defense gave it wide protection, but he also made clear that the RFRA’s encroachment on the Executive’s national security responsibilities is potentially broad.<sup>378</sup> During oral arguments, Justice Thomas asked whether the RFRA has a mens rea requirement, that is, whether the RFRA requires that the federal official intend to burden the claimant’s free exercise rights.<sup>379</sup> Tanvir responded that the RFRA does not have a mens rea requirement and only requires that the burden be “substantial,” not intentional.<sup>380</sup>

*b. The Nature of RFRA*

There was considerable discussion during oral argument about what precisely the RFRA accomplished in the aftermath of the Court’s 1990 *Smith* decision.<sup>381</sup> The government argued that the RFRA merely restored the pre-*Smith* standard and is therefore limited to equitable relief because the RFRA did not significantly depart from the established remedial scheme at the time *Smith* was decided.<sup>382</sup> On the other hand, Tanvir argued that the RFRA was intended to do much more than merely restore the pre-*Smith* standard.<sup>383</sup>

During the arguments, Justice Breyer described the RFRA as an effort to put into statutory form a constitutional interpretation that *Smith* rejected.<sup>384</sup> He called the RFRA a constitutional statute, or a way of implementing what Congress thinks is the correct interpretation of the First Amendment; given the remedial scheme in place at the time, this did not include personal action.<sup>385</sup>

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377. *Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting) (citation omitted) (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)).

378. See Transcript of Oral Argument, *supra* note 7, at 31.

379. *Id.* at 35-36.

380. *Id.* at 36.

381. See *id.* at 38-39.

382. See *id.* at 19-20.

383. *Id.* at 39.

384. *Id.* at 38.

385. *Id.*

In response, Tanvir invoked *Hobby Lobby*.<sup>386</sup> The Court knows how to tether statutes to specific jurisprudence, Tanvir noted, but in *Hobby Lobby*, the Court did not do that.<sup>387</sup> To the contrary, the Court explicitly noted that the RFRA marks “a complete separation from First Amendment case law.”<sup>388</sup> In fact, in *Bostock v. Clayton County*, the Court described the RFRA as a “super-statute.”<sup>389</sup> Tanvir used this phrasing to address Justice Sotomayor’s question during oral arguments about whether the statute needs some sort of explicit text permitting monetary damages.<sup>390</sup> In response, Tanvir used the Court’s own words to describe the RFRA as not just any other statute but a “super-statute.”<sup>391</sup>

As a super-statute, Tanvir argued, the RFRA expanded protections for religious exercise in part by providing relief appropriate to the injury.<sup>392</sup> When injunctive relief was insufficient, money damages would be the only appropriate relief.<sup>393</sup> In *Tanvir*, the government placed petitioners on the no-fly list and then removed them immediately prior to oral arguments on petitioner’s motion to dismiss in order to moot the case.<sup>394</sup> As one conservative religious liberty law firm argued in its amicus brief, this also leaves the government free to continue its gamesmanship, adding then removing individuals from the no-fly list with impunity.<sup>395</sup> Money damages would help prevent the gamesmanship.<sup>396</sup>

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386. *Id.* at 38-39.

387. *Id.*

388. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014).

389. 140 S. Ct. 1731, 1754 (2020); Transcript of Oral Argument, *supra* note 7, at 43.

390. Transcript of Oral Argument, *supra* note 7, at 42-43.

391. *Id.* at 43.

392. *Id.* at 44.

393. *Id.* at 43-44.

394. Brief of Respondents at 9, *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020) (No. 19-71) (“On June 8, 2015, four days before oral argument on the government’s motions to dismiss in the district court and less than a week after Respondents pursued the modified TRIP procedure, DHS informed Respondents that the government ‘knows of no reason why they would be unable to fly.’”).

395. Brief for The Becket Fund for Religious Liberty as Amicus Curiae in Support of Respondents at 17-18, *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020) (No. 19-71).

396. *Id.* at 2-3.

*c. The Court's Ruling*

On December 10, 2020, the Court ruled unanimously that the three Muslim men could sue the FBI agents for money damages.<sup>397</sup> In a brief opinion by Justice Thomas, the Court said the RFRA's text giving claimants the right to "obtain appropriate relief against a government" meant that claimants can sue government officials in their personal capacities.<sup>398</sup> Moreover, "appropriate relief" included money damages, which Justice Thomas said "have long been awarded as appropriate relief" and, in cases like *Tanvir's*, are the only adequate remedy.<sup>399</sup> Justice Thomas noted, "it would be odd to construe RFRA in a manner that prevents courts from awarding such relief."<sup>400</sup>

At least with respect to the remedies portion of the RFRA, the Court did not adopt Justice Alito's stance in *Hobby Lobby* that the "RFRA did more than merely restore the balancing test used in the *Sherbert* line of [Free Exercise] cases; it provided even broader protection for religious liberty than was available under those decisions."<sup>401</sup> Justice Thomas in *Tanvir* instead wrote that the "RFRA sought to counter the effect of that holding and restore the pre-*Smith* 'compelling interest test.'"<sup>402</sup> In other words, the RFRA did not go beyond the pre-*Smith* regime but instead restored that regime.<sup>403</sup>

In further assessing what Congress intended the RFRA to do, the Court looked at the "legal 'backdrop'" against which the statute was enacted, which included "one of the most well-known civil rights statutes: 42 U.S.C. § 1983."<sup>404</sup> As the Court noted, "[t]hat statute applies to 'person[s] ... under color of any statute,'" and the Court has long interpreted it as permitting individual capacity suits.<sup>405</sup>

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397. See *Tanvir*, 141 S. Ct. at 493. The decision was 8-0. Justice Barrett took no part in the consideration or decision of the case, as it was argued before she was confirmed to fill the vacancy left open by the death of Justice Ruth Bader Ginsburg. See *id.*

398. *Id.* at 490, 492.

399. *Id.* at 491.

400. *Id.* at 492.

401. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695 n.3 (2014).

402. *Tanvir*, 141 S. Ct. at 489.

403. See *id.* at 492.

404. *Id.* at 490.

405. *Id.*

Notably, the Court found that religious freedom belongs in the “very same field of civil rights law” as other claims under Section 1983.<sup>406</sup> “Because RFRA uses the same terminology as § 1983 in the very same field of civil rights law,” the Court said, “it is reasonable to believe that the terminology bears a consistent meaning.”<sup>407</sup>

Also notable is Justice Thomas’s rejection of the government’s argument that permitting government officials to be liable for monetary damages “could raise separation-of-powers concerns.”<sup>408</sup> Instead, Justice Thomas said that “this exact remedy has coexisted with our constitutional system since the dawn of the Republic.”<sup>409</sup> While there may be reasons to prevent liability for government officials, those are policy considerations for Congress, not the Court.<sup>410</sup> Justice Thomas appears to have departed from his posture of National Security Fundamentalism, that is, that the executive branch’s interest in protecting national security permits it to limit individual liberty and that judicial interference would destroy the purpose of vesting national security responsibilities in the Executive.<sup>411</sup>

What might account for the change of heart? This Article argues that religious liberty interest convergence helps explain the results in *Tanvir*.

### 3. *Conservative Christians’ Interests at Stake in Tanvir*

The Court’s decision in *Tanvir* was necessary to correct a grave injustice. But the case—and Justice Thomas’s abdication, it appears, of National Security Fundamentalism—cannot be fully understood without consideration of the broader context of the religious liberty culture wars.<sup>412</sup> That context reveals what was at stake for conservative Christians—including, for example, the group

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406. *Id.*

407. *Id.* at 490-91 (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 323 (2012)).

408. *Id.* at 493.

409. *Id.*

410. *See id.*

411. *See* Sunstein, *supra* note 92, at 695.

412. *See* Brief of Religious Organizations, Public Speakers and Scholars as Amici Curiae in Support of Respondents at 6, *Tanvir*, 141 S. Ct. (No. 19-71).



of inveterate and well-known conservative individuals and organizations that filed an amicus brief in support of the Muslim men in *Tanvir*.<sup>413</sup> Represented by the conservative religious liberty law firm, First Liberty Institute, the following entities signed on to the brief: the Billy Graham Evangelistic Association, a group founded by Graham to evangelize in America and abroad; Samaritan's Purse, an evangelical organization that offers relief aid worldwide; the Chuck Colson Center for Christian Worldview, which seeks to create a movement that "defend[s] the Christian worldview," and the Center's president, John Stonestreet; two professors who teach at evangelical schools; and Eric Metaxas, a major conservative public figure and devoted supporter of former President Trump.<sup>414</sup> Metaxas is also avowedly anti-Islam; his position is perhaps best captured in an interview with the Christian website, *The Stream*:

Without getting into the details, Islam has historically tended to work against the kind of freedom we have in the United States. Indeed, it tends toward theocracy, toward merging "church and state"—or "mosque and state"—into something that coerces faith and thus blurs the line between the laws of the state and the laws of God. There's no room for "religious liberty" in a world where the state has taken over religion, or where religion has taken over the state. That's the genius of the Founders in keeping the state out of the faith of its citizens. Islam also typically teaches that one can convert to Islam but never away from Islam, so one is not at all free. Freedom of conscience is defenestrated, along with anyone thought to be gay. *So, alas, Islam is generally incompatible with American liberty.*<sup>415</sup>

Metaxas so believes in Islam's incompatibility with American liberty that he tweeted that last line to promote the interview.<sup>416</sup> Metaxas also wrote the foreword to *The Hidden Enemy: Aggressive Secularism, Radical Islam, and the Fight for Our Future*, a book—published

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413. *See id.* at 1-4.

414. *Id.*

415. John Zmirak, *Author Eric Metaxas Asks if American Democracy Will Survive*, STREAM (June 17, 2016) (emphasis added), <https://stream.org/author-eric-metaxas-asks-american-democracy-will-survive/> [<https://perma.cc/B4AM-SJQ9>].

416. Eric Metaxas (@ericmetaxas), TWITTER (June 18, 2016, 8:30 AM), <https://twitter.com/ericmetaxas/status/744145146317516800?lang=en> [<https://perma.cc/A72P-TNCF>].

by a conservative Christian publisher—that sets out to “show[] how we can ... beat back the threat of radical Islam.”<sup>417</sup>

And yet, Metaxas signed onto a brief in support of Muslim men who were being recruited to serve federal national security imperatives.<sup>418</sup> Why? This Section explores the interests Metaxas and his fellow Christian conservatives had in *Tanvir*. In parsing the interests at stake, this Article is the first to apply interest convergence theory to the national religious liberty debate and religious freedom jurisprudence.

*a. Disincentivize Government Limits on Christian Religious Claims Related to Changing Sexual Norms*

As discussed above, conservative Christians in recent years have brought religious liberty claims to defend their ability to live according to their traditional beliefs about sexuality in a fast-changing culture.<sup>419</sup> Those claims include multiple by Christian wedding vendors like Jack Phillips in *Masterpiece* who decline to serve gay couples.<sup>420</sup> Although *Tanvir*'s holding that religious claimants can sue government officials in their personal capacity applies only to federal officials being sued under the Federal RFRA, its reasoning can be extended to laws that make state officials liable for religious liberty violations.<sup>421</sup> That means government officials enforcing state antidiscrimination laws against conservative Christians who object to same-sex marriage (for example, the state civil rights commissioners in *Masterpiece*) may become more hesitant to do so because they might be held personally liable.<sup>422</sup>

Also relevant in this context is Justice Thomas's language in *Tanvir* that religious freedom belongs in the “very same field of civil

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417. *The Hidden Enemy: Aggressive Secularism, Radical Islam, and the Fight for Our Future*, AMAZON, <https://www.amazon.com/Hidden-Enemy-%20Aggressive-Secularism-Radical-ebook/dp/B073RSBCZH> [<https://perma.cc/Y5VD-C3MJ>].

418. See Brief for Religious Organizations, Public Speakers and Scholars as Amici Curiae Supporting Respondents, *supra* note 412, at 3.

419. See *supra* Part II.A.

420. See *supra* notes 57-58 and accompanying text.

421. Ian Millhiser, *A Heartbreaking Supreme Court Case Could Be a Huge Win for the Christian Right*, VOX (Nov. 26, 2019, 8:30 AM), <https://www.vox.com/policy-and-politics/2019/11/26/20982273/supreme-court-religion-tanvir-tanzin-rfra> [<https://perma.cc/9QC4-K49N>].

422. See *id.*

rights law” as other claims under Section 1983.<sup>423</sup> The current political debate around religious freedom often highlights apparent conflicts between religious freedom and the rights of others.<sup>424</sup> Specifically, it juxtaposes religious freedom against the right to nondiscrimination, particularly in the case of sexual minorities.<sup>425</sup> For example, the Do No Harm Act addresses this precise tension.<sup>426</sup> The Court’s opinion situating the RFRA and religious freedom in the broader context of civil rights can be interpreted as a counter to such claims; it emphasizes that religious freedom is an important civil right as opposed to a threat to civil rights.

*b. Bolster the Legal and Cultural Status of Religious Liberty*

Relatedly, but more broadly, permitting money damages under the RFRA bolsters the legal and cultural status of religious liberty. Many conservatives believe that religious liberty in America is under threat.<sup>427</sup> In 2012 and 2014, the PRRI measured the percentage of Americans who think religious liberty is under threat.<sup>428</sup> When asked, “In America today, do you believe that the right of religious liberty is being threatened, or not?” 54 percent said yes in May 2014.<sup>429</sup> That number was 39 percent in March 2012 and 50 percent in November 2012.<sup>430</sup> The percentage of Americans who completely agreed that “[t]he right of religious liberty is being threatened in America today” increased from 18 percent in June 2012 to 28 percent in July 2014.<sup>431</sup> An August 2020 survey by the University of Chicago Divinity School and AP-NORC found that across America’s largest religious denominations, Evangelical

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423. 141 S. Ct. 486, 490-91 (2020).

424. *See supra* notes 45-47 and accompanying text.

425. *See supra* Part II.A.

426. *See supra* notes 60-63 and accompanying text.

427. *See* Daniel Cox & Robert P. Jones, *Majority of Americans Do Not Believe Religious Liberty is Under Attack*, PUB. RELIGION RSCH. INST. (Mar. 15, 2012), <https://www.prrri.org/research/march-%20rns-2012-research/> [https://perma.cc/AR3M-BYPG].

428. *See id.*; Press Release, Majority of Americans Still Support Contraception Coverage Mandate, PUB. RELIGION RSCH. INST. (June 2, 2014), <https://www.prrri.org/press-release/news-release-contraception/> [https://perma.cc/M6JZ-VUMW].

429. Kirby Goidel, Brian Smentkowski & Craig Freeman, *Perceptions of Threat to Religious Liberty*, 49 PS: POL. SCI. & POL. 426, 427 (2016).

430. *Id.*

431. *Id.*

Protestants were “especially likely to perceive risks to their freedom to worship.”<sup>432</sup> Headlines by conservative groups capture the prevailing sentiment: the Evangelical Biola University, the *Christian Post*, the U.S. Conference of Catholic Bishops, and the conservative Heritage Foundation, among others, have put out pieces on “current” or “continuing” threats to religious liberty.<sup>433</sup>

The Trump administration seized on these perceptions of threat. Then-candidate Trump throughout his campaign promised that the “first priority of my administration will be to preserve and protect our religious liberty.”<sup>434</sup> After his election (made possible in large part by the 81 percent of white Evangelicals who voted for him), Trump kept his promise by instituting the expansive religious liberty protections his conservative Christian supporters wanted.<sup>435</sup>

In May 2017, President Trump issued an executive order directing the Department of Health and Human Services (HHS) and other federal agencies to exempt religious organizations from the contraceptive mandate.<sup>436</sup> In November 2018, the government issued a new rule formally exempting all religious objectors from the Affordable Care Act’s contraceptive mandate and leaving in place the accommodation that delivered the drugs to employees without

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432. Elana Schor & Hannah Fingerhut, *Religious Freedom in America: Popular and Polarizing*, ASSOCIATED PRESS (Aug. 5, 2020), <https://www.apnews.com/article/donald-trump-religion-u-s-news-virus-outbreak-reinventing-faith-535624d93b8ce3d271019200e362b0cf> [<https://perma.cc/E98A-5NXU>].

433. Michael Koby, *The Biggest Threat to Religious Liberty*, BIOLA MAG. (Aug. 31, 2006), <https://www.biola.edu/blogs/biola-magazine/2006/the-biggest-threat-to-religious-liberty> [<https://perma.cc/S2WQ-CDZJ>]; USCCB, CURRENT THREATS TO RELIGIOUS FREEDOM 1, 1 (2018), <https://www.usccb.org/issues-and-action/religious-liberty/upload/Current-threats-to-religious-liberty.pdf> [<https://perma.cc/XT3H-MBLX>]; Michael Gryboski, *What Are the Biggest Threats to Religious Liberty in the US?*, CHRISTIAN POST (Oct. 21, 2019), <https://www.christianpost.com/books/what-are-the-biggest-threats-to-religious-liberty-in-the-us.html> [<https://perma.cc/ZM7Q-J5PC>]; Ryan T. Anderson, *The Continuing Threat to Religious Liberty*, HERITAGE FOUND. (Aug. 4, 2017), <https://www.heritage.org/religious-liberty/commentary/the-continuing-threat-religious-liberty> [<https://perma.cc/5GG7-8HGY>].

434. Maureen Groppe, *First Year of Trump-Pence Brings Bountiful Blessings, Religious Conservatives Say*, USA TODAY (Jan. 19, 2018, 10:33 AM), <https://www.usatoday.com/story/news/politics/2018/01/19/first-year-trump-pence-brings-bountiful-blessings-religious-conservatives-say/1044308001/> [<https://perma.cc/Y484-3UB5>].

435. *Id.*

436. See Robert Pear, *White House Acts to Roll Back Birth-Control Mandate for Religious Employers*, N.Y. TIMES (May 29, 2017), <https://www.nytimes.com/2017/05/29/us/politics/birth-control-trump-obamacare-religion.html> [<https://perma.cc/JHT8-ZFPN>].

involving the religious employer.<sup>437</sup> Under the Trump administration, HHS opened a new Conscience and Religious Freedom Division, the Department of Justice (DOJ) instituted the Religious Liberty Task Force, and the State Department held several global conferences on combatting international religious freedom violations.<sup>438</sup>

During the COVID-19 shutdown, as some conservatives felt embattled by state and local orders to close churches, church closures became the new flash point in the religious liberty culture wars.<sup>439</sup> At the time the coronavirus outbreak affected the United States, tribalization and political divides were so entrenched that the virus was almost immediately politicized.<sup>440</sup> And the lockdown measures, once they affected churches, also became politicized under the religious liberty aegis.<sup>441</sup>

President Trump stepped in, threatening to overrule states that refused to open houses of worship.<sup>442</sup> The DOJ entered the fray, filing numerous statements of interest on behalf of churches suing state and local authorities.<sup>443</sup> U.S. Attorney General William Barr

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437. 26 C.F.R. §§ 54.9185-2713 to -2713T (2022); 29 C.F.R. § 2590.715-2713A (2022); 45 C.F.R. §§ 147.131-147.133 (2022).

438. Meridith McGraw, *Trump Administration Announces New “Conscience and Religious Freedom” Division at HHS*, ABC NEWS (Jan. 18, 2018, 11:19 AM), <https://abcnews.go.com/Politics/trump-administration-announce-conscience-religious-freedom-division-hhs/story?id=52434480> [<https://perma.cc/TX43-MTY8>]; Sarah Hallam, *Sessions Announces New “Religious Liberty Task Force,”* CNN (July 31, 2018, 2:46 AM), <https://www.cnn.com/2018/07/30/politics/jeff-sessions-religious-liberty-task-force/index.html> [<https://perma.cc/5YU9-57CN>]; *Ministerial to Advance Religious Freedom*, U.S. DEP’T STATE, <https://2017-2021.state.gov/ministerial-to-advance-religious-freedom/index.html> [<https://perma.cc/JR7R-LXYE>].

439. Jeremy W. Peters, *Trump’s Approval Slips Where He Can’t Afford to Lose It: Among Evangelicals*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/04/us/politics/trump-polls-christians-evangelicals.html> [<https://perma.cc/9APT-8URK>].

440. See Arielle Mitropoulos, *For Red and Blue America, a Glaring Divide in COVID-19 Death Rates Persists 2 Years Later*, ABC NEWS (Mar. 28, 2022, 6:32 AM), <https://abcnews.go.com/Health/red-blue-america-glaring-divide-covid-19-death/story?id=83649085> [<https://perma.cc/9AW8-3MHU>].

441. See Colleen Long, Michael Balsamo & Emily Wagster Pettus, *Justice Department Takes Church’s Side in 1st Amendment Suit*, ASSOCIATED PRESS (Apr. 14, 2020, 8:07 PM), <https://abcnews.go.com/Politics/wireStory/justice-department-takes-churchs-side-1st-amendment-suit-70149557> [<https://perma.cc/E4E7-RN4E>].

442. Kevin Breuninger & Noah Higgins-Dunn, *Trump Slams Governors, Demands They Open Houses of Worship “Right Now,”* CNBC (May 22, 2020, 4:19 PM), <https://www.cnbc.com/2020/05/22/trump-slams-governors-demands-they-open-houses-of-worship-right-now.html> [<https://perma.cc/6KU6-KN3E>].

443. See Melissa Quinn, *Justice Department Sides with Virginia Church in Dispute over*

put out a strong statement in defense of religion, noting that “in recent years, an expanding government has made the Free Exercise Clause more important than ever.”<sup>444</sup> When the Centers for Disease Control and Prevention (CDC) issued its first guidelines on reopening, Roger Severino, the head of HHS’s Division of Conscience and Religious Freedom, lamented that the CDC treated churches as especially “dangerous or worthy of scrutiny than comparable secular behavior.”<sup>445</sup> The guidelines were too prescriptive, he said, and that violated religious rights: “Governments have a duty to instruct the public on how to stay safe during this crisis and can absolutely do so without dictating to people how they should worship God.”<sup>446</sup>

The idea throughout the Trump term and still today is that religious liberty is under threat. The conservative Justices agree with that sentiment. (In this regard, it is important to note that the conservative, Catholic Justices are seen as allies to Evangelicals, often reflecting the same concerns.)<sup>447</sup> Justices Thomas and Alito issued a statement in October 2020 that *Obergefell* was wrongly decided and needs to be reconsidered because of its “ruinous consequences for religious liberty.”<sup>448</sup> They lamented that the decision “enables courts and governments to brand religious adherents who believe that marriage is between one man and one

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*State’s Lockdown Orders*, CBS NEWS (May 4, 2020, 2:42 PM), <https://www.cbsnews.com/news/virginia-lockdown-church-coronavirus-justice-department/> [https://perma.cc/SA6F-H2V6].

444. *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 907 (W.D. Ky. 2020).

445. Abby Goodnough & Maggie Haberman, *White House Rejects C.D.C.’s Coronavirus Reopening Plan*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/05/07/us/politics/trump-cdc.html> [https://perma.cc/Z2JS-J5KE]; All Things Considered, *Roger Severino Discusses the HHS Division of Conscience and Religious Freedom*, NPR (Jan. 18, 2018, 4:16 PM), <https://www.npr.org/2018/01/18/578956922/rep-vicky-hartzler-on-why-she-supports-the-hhs-division-of-conscience-and-religi> [https://perma.cc/NL4T-AMS8].

446. See Goodnough & Haberman, *supra* note 445.

447. Ronald Brownstein, *How Conservative Catholics Became Supreme on GOP’s Court*, CNN (Sept. 27, 2020, 4:39 PM), <https://www.cnn.com/2020/09/27/politics/conservative-catholics-gop-supreme-court/index.html> [https://perma.cc/F2QS-E9PV] (“You have a situation where the evangelicals have been outsourcing their judicial appointments to conservative Catholics’... The ideological convergence is that conservative Catholics, including those in the legal field, have displayed as much commitment to conservative social causes, particularly banning abortion, as evangelical Christians.”).

448. *Davis v. Ermold*, 141 S. Ct. 3, 3, 4 (2020) (Thomas, J., dissenting from denial of certiorari) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2639 (2015) (Thomas, J., dissenting)).

woman as bigots, making their religious liberty concerns that much easier to dismiss.”<sup>449</sup>

Conservative Justices of the Court also weighed in on threats to religion when COVID-19 regulations closed houses of worship. On November 25, 2020, the Court ruled in favor of the Roman Catholic Diocese of Brooklyn and the Orthodox Jewish group Agudath Israel in their case against New York Governor Andrew Cuomo’s limitations on houses of worship.<sup>450</sup> Justice Gorsuch, in his concurring opinion, wrote passionately about the value judgments he felt state officials were making about religion:

The only explanation for treating religious places differently seems to be a judgment that what happens there just isn’t as “essential” as what happens in secular spaces.... Nor is the problem an isolated one. In recent months, certain other Governors have issued similar edicts. At the flick of a pen, they have asserted the right to privilege restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples.<sup>451</sup>

Meanwhile, Justice Alito had, just a week before the case reached the Court, expressed a similarly impassioned position, noting at a legal conference that the pandemic had ushered in “previously unimaginable restrictions on individual liberty.”<sup>452</sup> In a July 2022

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449. *See id.* at 4.

450. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65-66 (2020).

451. *Id.* at 69 (Gorsuch, J., concurring).

452. *See* Associated Press, *Justice Alito Calls Covid Restrictions “Previously Unimaginable,” Cites Danger to Religious Freedom*, NBC NEWS (Nov. 13, 2020, 6:58 AM), <https://www.nbcnews.com/politics/supremecourt/justice-alito-calls-covid-restrictions-previouslyunimaginable-cites-danger-religious-n1247657> [<https://perma.cc/5CM4-46Y7>]. However, the concern about individual liberty seemed relevant to religious liberty only; law professor Steve Vladeck noted in an interview with *Slate* that the Court seems less concerned about Covid restrictions as they affect prisoners:

Look, for example, at how aggressive the Supreme Court has been in pushing back against state COVID restrictions insofar as they affect religious practice, and how deferential they’ve been with regard to COVID restrictions as they affect prisoners. It creates the perception that the court is playing favorites with litigants and claims.

Mark Joseph Stern, *The Supreme Court Broke Its Own Rules to Radically Redefine Religious Liberty*, SLATE (Apr. 12, 2021, 2:51 PM), <https://slate.com/news-and-politics/2021/04/supreme-court-religious-liberty-covid-california.html> [<https://perma.cc/GH5V-DXTP>].

keynote address in Rome that was widely covered by American media, Justice Alito again warned that “[r]eligious liberty is under attack” and might not endure.<sup>453</sup>

*c. Ameliorate Political Tribalism Broadly and  
Around Religious Rights Specifically*

Bell posited that another reason for the *Brown* decision was that elite decisionmakers were concerned about civil disruption when thousands of Black servicemen and women returned from fighting for American democracy.<sup>454</sup> The decisionmakers realized that these men and women were unlikely to accept the old regime of servility to whites.<sup>455</sup> To quell possible domestic unrest, *Brown* signaled that the U.S. government cared about the needs and interests of Black people.<sup>456</sup>

Today, the potential for tremendous social unrest also looms large, largely due to the country’s worsening polarization.<sup>457</sup> Numerous scholars and experts have warned about the potential for these divisions to lead to violent unrest (indeed, a few such events have already occurred) and even secession.<sup>458</sup>

Divisions over religious liberty are a particularly prominent facet of this polarization.<sup>459</sup> The Justices of the Supreme Court— particularly the conservative Justices—are aware of the fight and have tried to mediate through their opinions. When it comes to LGBTQ

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453. Ariane de Vogue, *Samuel Alito Mocks Foreign Critics of Repealing Roe v. Wade in Rome Speech on Religious Liberty*, CNN (July 29, 2022, 9:42 AM), <https://www.cnn.com/2022/07/28/politics/samuel-alito-religious-liberty-notre-dame-rome/index.html> [<https://perma.cc/78AH-PDBW>]; Kelsey Dallas, *How the Green Bay Packers Helped Justice Samuel Alito Explain Religious Liberty Law*, DESERET NEWS (Aug. 1, 2022, 11:00 PM), <https://www.deseret.com/fair/2022/8/1/23286702/samuel-alito-speech-on-abortion-religious-freedom-sports-fandom-to-explain-religious-liberty-law> [<https://perma.cc/B2AU-N97M>].

454. Delgado, *supra* note 178, at 42.

455. *Id.*

456. *Id.*

457. DAVID FRENCH, *DIVIDED WE FALL: AMERICA’S SECESSION THREAT AND HOW TO RESTORE OUR NATION* 1-2 (2020).

458. *Id.*; Brian Michael Jenkins, *Opinion, Politicians Face Violence and Threats from Voters—and Each Other. Are We Nearing a Civil War?*, NBC NEWS: THINK: OPINIONS, ANALYSIS, ESSAYS (Nov. 14, 2021, 5:35 AM), <https://www.nbcnews.com/think/opinion/politicians-face-violence-threats-voters-each-other-are-we-nearing-ncna1283824> [<https://perma.cc/P6PA-T4P2>].

459. *See* FRENCH, *supra* note 457, at 1-2.



rights, Justice Kennedy in *Masterpiece* emphasized that “gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth” but also said about the Christian baker that “the customers’ rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.”<sup>460</sup> No doubt understanding the broader cultural framework, Justice Kennedy spoke about both parties’ concerns from a place of empathy rather than labeling one party bigoted.<sup>461</sup>

Similarly, in *Bostock v. Clayton County*, Justice Gorsuch paved the way for broad Title VII employment protections for LGBTQ individuals, but made a point to note that “[w]e are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society.”<sup>462</sup> He also reiterated the RFRA’s status as a “super statute,” explaining that it likely “might supersede Title VII’s commands in appropriate cases.”<sup>463</sup>

And again in *Fulton v. City of Philadelphia*, which involved a Catholic foster agency’s refusal to certify same-sex couples as foster care parents, Chief Justice Roberts shepherded a unanimous opinion in favor of the Catholic entity.<sup>464</sup> While the religious claimants in that case had asked the Court to overturn the *Smith* precedent, the majority declined to do so in favor of a narrower ruling.<sup>465</sup> As law professor Hugh Hewitt noted in the *Washington Post*, Roberts probably wanted to overturn *Smith*, “but he knows the value of 9 to 0 in terms of guiding officials of the country to a common consensus about tolerance of religious diversity.”<sup>466</sup>

*Tanvir* is the Court’s foray into another facet of the cultural battle, this one between conservative Christians and Muslims.

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460. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1727-28 (2018).

461. *See id.*

462. 140 S. Ct. 1731, 1754 (2020).

463. *Id.*

464. 141 S. Ct. 1868, 1873-74, 1882 (2021).

465. *Id.* at 1876-77, 1882.

466. Hugh Hewitt, Opinion, *Chief Justice Roberts Opts for Restraint, the Center and a Cease-Fire*, WASH. POST (June 18, 2021, 8:11 PM), <https://www.washingtonpost.com/opinions/2021/06/18/chief-justice-roberts-opts-restraint-center-cease-fire/> [https://perma.cc/QK97-TNHZ].

Finding for the Muslim men despite the purported national security interests at stake not only bolstered legal protection for Christian religious claims but also softened the public image that the conservative Justices—and conservatives generally—protect religious liberty selectively and favor Christian claims over Muslim ones.

*d. Promote an American Brand Instructive to Other Countries*

Bell theorized that the Court's decision in *Brown* helped position America as a post-World War II moral authority.<sup>467</sup> Similarly, the Court's interest in international image management may be at play in its *Tanvir* decision. After the September 11 attacks, the United States has contributed significant capital to improving its image with Muslim communities abroad.<sup>468</sup> The programming has often been part of the government's Countering Violent Extremism (CVE) initiatives, which in turn are premised on the idea that American security depends on winning the "battle of ideas."<sup>469</sup> As the first-ever U.S. Special Representative to Muslim Communities, Farah Pandith has explained, her job meeting with Muslim communities in Europe and the Middle East was "an essential element of CVE strategy"; it was a way of winning support for the United States and promoting its human rights values.<sup>470</sup> In a similar vein, in 2006, then U.S. Undersecretary of State for Public Diplomacy and Public Affairs Karen Hughes created a Civic Outreach program that sent Muslim citizen ambassadors abroad to speak to Muslim communities about their (positive) experiences in America.<sup>471</sup>

In recent years, particularly in light of the Trump administration singling out Muslims for special disfavor, that image has become

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467. Bell, Jr., *supra* note 155, at 524-25.

468. Farah Pandith *Speaks About Countering Violent Extremism in the Wake of Trump Administration Travel Ban*, BELFER CTR. FOR SCI. & INT'L AFFS. (Feb. 14, 2017), <https://www.belfercenter.org/publication/farah-pandith-speaks-about-countering-violent-extremism-wake-trump-administration> [<https://perma.cc/4YQB-2DWH>].

469. *Id.*

470. *Id.*

471. Heather Maher, *Islam: Muslim-Americans to Improve U.S. Image Abroad*, RADIO FREE EUR./RADIO LIBERTY (June 16, 2006, 4:02 PM), <https://www.rferl.org/a/1069230.html> [<https://perma.cc/YU46-J484>].

complicated.<sup>472</sup> The Trump travel ban continues to have concrete impact on the relationship between Muslims abroad and their friends and relatives in the United States.<sup>473</sup> Further, the politicized religious liberty battle between conservative Christian and Muslim interests has also added to the negative image.<sup>474</sup> *Tanvir* helps resolve some of that tension.<sup>475</sup>

Conservative Christians also often lament about the persecuted status of Christian minorities in some Muslim-majority states.<sup>476</sup> Protecting Muslims' religious liberty in America helps promote religious liberty values in the Muslim-majority states Christians are concerned about.

*e. Protect Religious Liberty in Times of Emergency*

In *Tanvir*, FBI agents asked the three Muslim men to serve as undercover spies in their Muslim communities.<sup>477</sup> It was not the first time Muslims had been asked to spy or been subject to surveillance. In 2002, the New York Police Department (NYPD), with help from the Central Intelligence Agency (CIA), began a decade-long program of covert surveillance that monitored a wide range of Muslims without any probable cause or reasonable suspicion of illegal activity.<sup>478</sup> Undercover officers visited local businesses, schools, mosques, and nightclubs and engaged casually with the business owners to get a sense of their religious and political views and report them back to the NYPD.<sup>479</sup> Using a secret unit called the

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472. See Isa Gutierrez, "Psychological Trauma and Stress": The Lasting Impact of the "Muslim Ban," NBC NEWS (Jan. 20, 2021, 8:56 AM), <https://www.nbcnews.com/news/asian-america/psychological-trauma-stress-lasting-impact-muslim-ban-n1254789> [<https://perma.cc/3GC8-A7PR>].

473. See *id.*

474. See *supra* notes 427-29 and accompanying text.

475. See *supra* Part IV.B.3.a.

476. CT Editors, *CT's 25 Most-Read Stories on the Persecuted Church*, CHRISTIANITY TODAY (Jan. 4, 2018, 9:00 AM), <https://www.christianitytoday.com/news/2018/january/cts-25-most-read-stories-on-persecuted-church.html> [<https://perma.cc/NEP6-XKAQ>].

477. *Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020).

478. Matt Apuzzo & Adam Goldman, *After Spying on Muslims, New York Police Agree to Greater Oversight*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/nyregion/nypd-spying-muslims-surveillance-lawsuit.html> [<https://perma.cc/M2UV-3KXA>].

479. *Id.*; Matt Apuzzo, Adam Goldman, Eileen Sullivan and Chris Hawley of the Associated Press, THE PULITZER PRIZES (2012), <https://www.pulitzer.org/winners/matt-apuzzo-adam->

Demographic Unit, the NYPD mounted surveillance cameras on light poles aimed at mosques, which police officers controlled remotely from their computers in order to collect the congregants' license plate numbers and generate footage of everyone entering and leaving the mosque.<sup>480</sup> Over the course of the program, the NYPD surveilled "at least 20 mosques, 14 restaurants, 11 retail stores, two grade schools and two Muslim student organizations."<sup>481</sup> And, in the end, the broad surveillance failed to yield even a single lead.<sup>482</sup>

In recent years, many conservative Christians have become attuned to the experience of broad curtailment of religious liberty in times of emergency.<sup>483</sup> The conservative Justices recognized it explicitly in the Court's November 2020 decision in *Roman Catholic Diocese*, where it noted that "even in a pandemic, the Constitution cannot be put away and forgotten."<sup>484</sup> Justice Gorsuch, in his concurrence, emphasized the message: "Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical."<sup>485</sup>

The Court in *Roman Catholic Diocese* also acknowledged the unique impact on religious minorities in times of exigency. In its opinion, which addressed an application by the Orthodox Jewish organization Agudath Israel, the Court noted there was evidence that the COVID-19 regulations as applied to the Jewish group were rooted in anti-religious animus.<sup>486</sup> The dissent in the lower court had written: "The day before issuing the order, the Governor said that if the 'ultra-Orthodox [Jewish] community' would not agree to enforce the rules, 'then we'll close the institutions down.'"<sup>487</sup> The

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goldman-eileen-sullivan-and-chris-hawley [https://perma.cc/RZL8-K4CW].

480. Apuzzo & Goldman, *supra* note 478; First Amended Complaint ¶¶ 45-46, Hassan v. City of New York, No. 12-3401, 2014 WL 654604 (D.N.J. Oct. 3, 2012).

481. Colin Moynihan, *Last Suit Accusing N.Y.P.D. of Spying on Muslims is Settled*, N.Y. TIMES (Apr. 5, 2018), <https://www.nytimes.com/2018/04/05/nyregion/last-suit-accusing-nypd-of-spying-on-muslims-is-settled.html> [https://perma.cc/KQ57-4ZUN].

482. First Amended Complaint, *supra* note 480, ¶ 2.

483. *See, e.g.*, Long et al., *supra* note 441.

484. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020).

485. *Id.* at 70 (Gorsuch, J., concurring).

486. *Id.* at 66 (majority opinion).

487. *Agudath Israel of Am. v. Cuomo*, 980 F.3d 222, 229 (2d Cir. 2020) (Park, Cir. J., dissenting) (per curiam) (alteration in original) (quoting *Video, Audio, Photos & Rush Transcript*:

Governor also admitted on national television that his policies “target ... a couple of unique clusters, frankly, which are more religious organizations, and that’s what we’re targeting.”<sup>488</sup> And he described the policy as a “fear[-]driven response” to his constituents “anxiety.”<sup>489</sup>

An amicus brief in *Roman Catholic Diocese* detailed these incidents and also extended its analysis of the scapegoating to the way other minorities have been treated by the government in times of emergency.<sup>490</sup> In particular, it discussed the post-September 11 scapegoating of the local Muslim community: “For a decade after the attacks, Muslim religious and community organizations were singled out and subjected to mass surveillance initiatives by a secret unit of the New York Police Department known as the ‘Demographic Unit.’”<sup>491</sup>

Given the pandemic context in which the *Tanvir* decision was issued, the conservative Justices were attuned to the need for religious liberty protections in times that otherwise require great deference to the government.<sup>492</sup> Professor Cass Sunstein has gone so far as calling *Roman Catholic Diocese* “anti-Korematsu”<sup>493</sup> (referring to *Korematsu v. United States*, where the Court upheld President Franklin D. Roosevelt’s executive order authorizing the internment of Japanese Americans in the aftermath of Imperial Japan’s attack on Pearl Harbor<sup>494</sup>). *Roman Catholic Diocese* is anti-Korematsu because, despite the “serious health effects of the pandemic” and the need to defer to the “complex choices by elected officials,” the

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*Governor Cuomo Updates New Yorkers on State’s Progress During COVID-19 Pandemic*, OFF. OF THE GOVERNOR (Oct. 5, 2020), <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-updates-new-yorkers-states-progress-during-1> [<https://perma.cc/V3CM-MFYK>].

488. *Governor Cuomo Is a Guest on CNN Newsroom with Poppy Harlow and Jim Sciutto*, OFF. OF THE GOVERNOR (Oct. 9, 2020), <https://www.governor.ny.gov/news/audio-rush-transcript-governor-cuomo-guest-cnn-newsroom-poppy-harlow-and-jim-sciutto> [<https://perma.cc/5QV9-9KZP>].

489. See Brief for Muslim Public Affairs Council et al. as Amici Curiae Supporting Applicants at 3, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (No. 20-A90).

490. *Id.* at 3-11.

491. *Id.* at 7-8.

492. See *supra* Part IV.B.2.c.

493. Cass R. Sunstein, *Our Anti-Korematsu*, 2021 AM. J.L. & EQUAL. 221.

494. *Korematsu v. United States*, 323 U.S. 214 (1944), *overruled by Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

opinion demonstrates strong “judicial solicitude for constitutional rights” and a “judicial willingness to protect against discrimination, even under emergency circumstances in which life is on the line.”<sup>495</sup>

Sunstein recognized that the conservative Justices took this major step because religion was involved:

[I]mportantly, the case involved the Free Exercise Clause, not discrimination in general. Those with realist inclinations might emphasize that within the current Supreme Court, some of the Justices are greatly concerned about discrimination against religious believers and religious institutions in particular and are interested in moving constitutional law in directions that are highly protective of their concerns. Indeed, realists might note that an important division on the Court can be found precisely there.

More crudely, the Justices who are conventionally described as “conservative” tend to side with religious organizations and to seek doctrinal changes in directions that would please them, whereas the Justices conventionally described as “liberal” are less likely to side with those organizations and are less likely to seek such changes.<sup>496</sup>

And it was not just any religion that the conservatives were worried about. Both the politicized religious liberty context and the impact of COVID-19 restrictions on houses of worship created a context in which the conservative Justices were alert to the needs of conservative Christians in times of emergency.<sup>497</sup> The pandemic made the plight of Muslims more relatable to conservatives generally and the conservative Justices in particular.

Sudha Setty notes in *National Security Interest Convergence* that the powerful majority is more likely to accede to unjust national security measures if those measures do not limit the majority’s rights and privileges.<sup>498</sup> On the flip side, when those same

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495. Sunstein, *supra* note 493, at 222.

496. *Id.* at 236.

497. See Robert Dunn, Opinion, *Op-Ed: Supreme Court Decision on At-Home Worship Wisely Supported Religious Liberty*, L.A. TIMES (Apr. 13, 2021), <https://www.latimes.com/opinion/story/2021-04-13/supreme-court-california-worship-covid-bible-study> [<https://perma.cc/E9EM-9HJY>].

498. Setty, *supra* note 266, at 223.

government measures begin to affect majority groups, “opposition tends to grow dramatically.”<sup>499</sup> *Tanvir* offers an example of this interest convergence in the area of religious liberty.

*f. Contrasting Results in Trump v. Hawaii*

While the government’s duty to protect national security was at the center of the Trump administration’s argument in both *Tanvir* and *Hawaii*, the conservative Justices—usually prone to deference to the executive—chose to defer in *Hawaii*, but not in *Tanvir*.<sup>500</sup> This Article argues that this divergence can at least partly be attributed to strong disincentives and weak incentives vis-à-vis the politicized religious liberty landscape.

*i. Strong Disincentives*

Among the multiple and complex reasons the conservative Justices upheld the travel ban in *Hawaii* are two strong disincentives: (1) conservatives’ ideological alignment with Trump, and (2) advancing legal arguments that could limit conservative Christians’ religious claims.

*Ideological alignment with Trump.* Commenting on why the *Hawaii* decision failed to elicit disapproval from conservative religious liberty advocates,<sup>501</sup> one *Washington Post* writer noted: “To take a stand against the ‘Muslim ban’ is also a stand against Trump, who remains popular among conservatives and white evangelicals, and for the rights of foreign Muslims, who are often vilified by conservative Christian activists.”<sup>502</sup> The travel ban was

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499. *Id.* at 224.

500. *See supra* notes 2-3 and accompanying text.

501. *See supra* note 83 and accompanying text.

502. Tobin Grant & Sarah Pulliam Bailey, *Why Some Religious-Freedom Groups Won’t Take a Stand on the Travel Ban*, WASH. POST (Apr. 25, 2018, 11:59 AM), <https://www.washingtonpost.com/news/acts-of-faith/wp/2018/04/25/why-some-religious-freedom-groups-wont-take-a-stand-on-the-travel-ban/> [<https://perma.cc/CM4C-2UN6>].

one of the central promises of Trump's 2016 campaign.<sup>503</sup> His name was in the case title. To oppose the travel ban was to oppose Trump.

Conservatives could not afford to oppose Trump so defiantly. After all, this was the same Trump who became the premier defender of Christians' rights.<sup>504</sup> Even the first iteration of the travel ban reflected that Christian favoritism by prioritizing refugee claims from religious minorities in mostly Muslim-majority states.<sup>505</sup>

Not only were Trump's core constituents not opposed to the ban, their support for it grew over time. When the Public Religion Research Institute (PRRI) surveyed Americans' approval of Executive Order No. 13,769, the third and final iteration of the travel ban, it found that the numbers of white Evangelicals supporting the ban had increased from when then-candidate Trump first announced the ban on the campaign trail.<sup>506</sup> 55 percent supported it during the election, and 61 percent supported it when it was implemented.<sup>507</sup>

In contrast, *Tanvir* did not require an ideological dealignment with Trump. Even though the Trump administration was arguing against provision of money damages, Trump himself was invisible in the case. He did not make any public statements regarding the matter, his name was not in the title, and the case matter did not directly connect with his campaign or policy agenda.

*Legal arguments limited the scope of religious protections for conservative Christian claims.* Legal commentator Jeffrey Toobin noted in the *New Yorker* that, in recent years, the conservative Justices are essentially "reading the establishment clause out of the Constitution, and turning almost every issue into a free-exercise case."<sup>508</sup> (Recall that empirical findings have found exactly this

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503. See Jenna Johnson, *Donald Trump is Expanding His Muslim Ban, Not Rolling it Back*, WASH. POST (July 24, 2016, 10:55 AM), <https://www.washingtonpost.com/news/post-politics/wp/2016/07/24/donald-trump-is-expanding-his-muslim-ban-not-rolling-it-back/> [<https://perma.cc/9BPE-Z2WC>].

504. See *supra* notes 441-52 and accompanying text.

505. See Exec. Order No. 13,379 Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8,977 (Feb. 1, 2017).

506. Daniel Cox & Robert P. Jones, *47% of the Country Say Trump Has Violated the Constitution, but Few Support Impeachment*, PUB. RELIGION RSCH. INST. (Feb. 24, 2017), <https://www.prri.org/research/poll-trump-impeachment-constitution-partisanship-muslim-ban/> [<https://perma.cc/G4EQ-M7PU>].

507. *Id.*

508. Jeffrey Toobin, *The Supreme Court Is Quietly Changing the Status of Religion in American Life*, NEW YORKER (Mar. 6, 2019), <https://www.newyorker.com/news/daily-comment/>



trend among lower federal court judges.<sup>509</sup>) According to Toobin, conservative lawyers are arguing, and the Court is accepting, a vast interpretation of the Free Exercise Clause.<sup>510</sup> Under this interpretation, the Free Exercise Clause requires that religious believers be exempt from obligations binding on all citizens (such as Phillips in *Masterpiece* being exempt from the Colorado nondiscrimination law).<sup>511</sup> In other words, the conservative majority wants an expansive religious liberty jurisprudence, so that it can accommodate a wide range of religious exercise, including conservative interests in the culture wars.

In a politicized religious liberty context, if conservative Justices are looking to expand the interpretation of the Free Exercise Clause, liberals—including liberal lawyers—are seeking to restrict it. This might be one reason why, in *Hawaii*, attorney Neal Katyal challenged the travel ban without invoking the Free Exercise Clause.<sup>512</sup> One conservative lawyer called attention to this in *The Hill*, where he noted that left-leaning lawyers “know strong free exercise protections will protect traditional Christian beliefs.... So they put all their eggs in an Establishment Clause basket—hoping that by winning under the Establishment Clause, they can prevent blatant discrimination against religious minorities without also protecting traditional Christian beliefs.”<sup>513</sup> Some liberal lawyers have admitted to such a strategy. For example, with respect to the Religious Freedom Restoration Act (which provides strong free exercise protection),<sup>514</sup> one liberal lawyer explained that “bolstering [RFRA] runs the risk of emboldening the conservatives who use it to restrict LGBT rights.”<sup>515</sup>

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the-supreme-court-is-quietly-changing-the-status-of-religion-in-american-life [https://perma.cc/42RW-DQ7B].

509. See *supra* note 326 and accompanying text.

510. Toobin, *supra* note 508.

511. See *id.*

512. See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

513. Luke Goodrich, Opinion, *No Anti-Muslim Bias at Supreme Court: Constitution, Argued Properly, Protects All Religions*, THE HILL (Apr. 5, 2019, 2:30 PM), <https://thehill.com/opinion/judiciary/437575-no-anti-muslim-bias-at-supreme-court-constitution-argued-properly-protects> [https://perma.cc/59UD-6QLC].

514. See *supra* note 45 and accompanying text.

515. Stephanie Russell-Kraft, *Activists Are Invoking Religious Freedom to Save Migrants' Lives*, NATION (Apr. 15, 2019), <https://www.thenation.com/article/archive/no-more-deaths-migrant-catholic-border/> [https://perma.cc/GY3X-ZKL4].

With the Religion Clauses caught in this ideological tug-of-war, Katyal's decision to use the Establishment Clause and avoid the Free Exercise Clause likely created strong disincentives for the conservative Justices to rule in favor of the Muslim claimants.

*ii. Weak Socio-Political Incentives*

In addition to strong disincentives for ruling against the travel ban, any socio-political incentives that could have moved the conservative Justices were relatively weak. The political tribalism the Justices appear interested in countering had not yet taken firm hold. Also, the COVID-19 context had not yet presented the urgency around religious freedom protections that came to animate the conservative Justices.

*Less entrenched political tribalism.* Although the conservative Justices no doubt understood that a ruling in favor of the travel ban would enflame passions among those who opposed Trump, the public narrative of conservative Justices favoring Christian claimants over Muslim ones had not yet taken hold. *Hawaii* was the first major trigger of this narrative, particularly in its contrast with the *Masterpiece* holding just three weeks prior.<sup>516</sup> The February 2019 case involving the Muslim death row inmate further exacerbated perceptions of unfair treatment,<sup>517</sup> creating an increasingly rancorous dynamic for the Justices to address when *Tanvir* was decided almost two years later.

*Pre-COVID-19 context.* *Hawaii* preceded the COVID-19 pandemic by several years. Without the pandemic, there was no real-world context in which Christians' religious liberty interests in America were threatened by a state of emergency. To use Sunstein's phrase, the COVID context was necessary for a conservative "anti-*Korematsu*" and without that context, the incentives to avoid deferring to the government were weak at best.<sup>518</sup>

The foregoing differences between *Hawaii* and *Tanvir* help explain the disparate results. They also shed light on the limitations of religious liberty interest convergence, covered in Part V.

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516. See *Masterpiece Cakeshop, Ltd. v. Colo. C. R. Comm'n*, 138 S. Ct. 1719, 1732 (2018).

517. See *supra* note 84 and accompanying text.

518. See sources cited *supra* note 493 and accompanying text.

*C. Religious Liberty Interest Convergence as Political Strategy*

Interest convergence theory has not just been used to explain rights-protective cases; it has also been used to formulate strategies for political coalition-building. However, when a religious minority is so politically powerless that its interests can be ignored without political repercussions for the majority, the majority is unlikely to protect it.<sup>519</sup> As such, the minority should wield some level of power in order for the majority to enter into coalitions with it. Viable coalition-building also requires that both parties recognize the interests they have at stake and believe that there is a benefit to allying with the other.<sup>520</sup>

While there are ideological hurdles to overcome,<sup>521</sup> Christian-Muslim coalition-building around religious liberty satisfies these preconditions. First, although Muslims constituted only 1 percent of the U.S. population in 2015,<sup>522</sup> their political cache is significant—demonstrated in part by how the Christian-Muslim divide has become a fixture of the national culture war and the defense of Muslims' rights has become a core issue for the political Right.

Second, conservative Christians and Muslims, for their own reasons, have vested interests in the broad interpretation of religious liberty protections. *Tanvir* highlights multiple Christian interests at stake in the protection of Muslims' rights.<sup>523</sup> And Muslims have incentive to work with Christians on legal matters pertaining to religious rights, if for no other reason than to better appeal to conservative judges, including the 6-3 conservative majority on the Court.

Third, while not all Christians and Muslims in America understand the potential for mutual benefit, many do. The Muslim think tank Institute for Social Policy and Understanding has found that 49 percent of the America's Muslims support coalition-building with

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519. Setty, *supra* note 266, at 193.

520. Cashin, *supra* note 260, at 270.

521. See discussion *infra* Part V.

522. Besheer Mohamed, *A New Estimate of the U.S. Muslim Population*, PEW RSCH. CTR. (Jan. 6, 2016), <https://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population/> [<https://perma.cc/7PFH-287Z>].

523. See discussion *supra* Part IV.C.3.

political conservatives on religious liberty issues.<sup>524</sup> There is no similar polling among conservative white Christians, but at least one nationally prominent conservative religious liberty advocacy group (with significant influence in conservative Christian circles) encourages “religious liberty for all” and the bridging of the Christian-Muslim religious liberty divide.<sup>525</sup> Part IV.D. looks briefly at the roots of such advocacy in the religious freedom tradition.

In addition, America’s continued racial and religious demographic shifts and cultural changes—that is, the shift away from white Christian America—suggests that the conservative Christian interests outlined in this Article will remain salient and thus continue to create openings for religious liberty interest convergence with Muslims.<sup>526</sup> In particular, white Protestants, as new demographic minorities in the United States, more obviously share interests with other non-Christian minorities. Law professor Thomas Berg appealed to that shared plight in his *Christianity Today* piece, *4 Ways Muslims’ Religious Freedom Fight Now Sounds Familiar to Evangelicals*.<sup>527</sup> He argued the pragmatic benefit of the Golden Rule:

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524. Dalia Mogahed & Erum Ikramullah, *American Muslim Poll 2020: Amid Pandemic and Protest*, INST. FOR POL’Y & UNDERSTANDING (Oct. 1, 2020), <https://www.ispu.org/american-muslim-poll-2020-amid-pandemic-and-protest/> [<https://perma.cc/W3QL-PZKK>].

525. BECKET, <https://www.becketlaw.org> [<https://perma.cc/2T44-JVDF>]. Becket Law represented Christian claimants in the majority of religious liberty cases in 2019-2020. Steven K. Green, *How the Supreme Court Found its Faith and Put “Religious Liberty” on a Winning Streak*, THE CONVERSATION (Apr. 13, 2021, 8:30 AM), <https://theconversation.com/how-the-supreme-court-found-its-faith-and-put-religious-liberty-on-a-winning-streak-158509> [<https://perma.cc/4NDG-GAAN>] (“Catholic Social Services and its counsel, Becket Fund for Religious Liberty, believe that they have the wind at their back.... they could be right.”). For examples of Becket’s support of Muslims’ rights, see *Holt v. Hobbs*, <https://www.becketlaw.org/case/holt/> [<https://perma.cc/UZ57-E8UT>]; Montse Alvarado, Opinion, *A Hijab on the House Floor: A Beautiful American Sight*, DAILY NEWS (Jan. 15, 2019, 6:30 PM), <https://www.nydailynews.com/opinion/ny-oped-a-hijab-on-the-house-floor-a-beautiful-american-sight-20190115-story.html> [<https://perma.cc/4LM2-Y6F6>].

526. Scholars have acknowledged the impact of racial demographic changes on the viability of wins secured through interest convergence and noted that “Bell makes no attempt to account for how or whether America’s growing racial complexity might alter the phenomenon of racial fortuity he laments.” Cashin, *supra* note 260, at 272-73.

527. Thomas C. Berg, *4 Ways Muslims’ Religious Freedom Fight Now Sounds Familiar to Evangelicals*, CHRISTIANITY TODAY (Sept. 9, 2019), <https://www.christianitytoday.com/ct/2019/september-web-only/muslims-religious-freedom-evangelicals-legal-fight.html> [<https://perma.cc/LR6A-V8DZ>].

“American evangelicals aren’t persecuted like Christians abroad, but they do face increasing religious-freedom challenges.”<sup>528</sup>

Importantly, there are society-wide benefits to such Muslim-Christian coalition-building, as it has the potential to not only shore up religious protections but also serve as a bulwark against political polarization more broadly. Political scientists have prescribed cross-cutting coalitions, or unsorting, as a remedy for political polarization.<sup>529</sup> Unsorting is about complicating how individuals group themselves and others into opposing camps. It creates a “partisan dealignment” and reveals “cross-cutting cleavages.”<sup>530</sup> Religious liberty interest convergence across the Muslim-Christian divide is a form of unsorting.

#### *D. Religious Liberty Interest Convergence as Constitutional Justification*

The influential conservative religious liberty advocacy groups that encourage “religious liberty for all” often explain that if Americans cede to government the power to selectively protect religions that it likes (or views as politically expedient) and not protect the ones it does not like, the government can use those limits against any religion at any point.<sup>531</sup> The idea is that believers of both majority and minority faiths have the *same* interest in broad religious freedom protections. That this argument is oft-repeated in conservative circles distinguishes religious liberty interest convergence from racial interest convergence, which turns on elite whites and marginalized racial minorities typically having *different* interests.<sup>532</sup>

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528. *Id.*

529. See MASON, *supra* note 22, at 17-18.

530. *Id.* at 139.

531. See, e.g., Michael Gryboski, *Russell Moore Takes on Critics at SBC for Supporting Religious Freedom for Muslims to Build Mosques*, CHRISTIAN POST (June 16, 2016), <https://www.christianpost.com/news/erlcs-russell-moore-takes-heat-sbc-supporting-religious-freedom-muslims-build-mosque.html> [<https://perma.cc/FXX4-W7ZZ>] (“Brothers and sisters, when you have a government that says ‘we can decide whether or not a house of worship can be constructed based upon the theological beliefs of that house of worship,’ then there are going to be Southern Baptist churches in San Francisco and New York and throughout this country who are not going to be able to build.”).

532. See *supra* notes 161-71 and accompanying text.

The shared interest in robust religious protections in fact undergirds the constitutional protection of religious freedom. Political scientist Mark David Hall explains that in the Founding Era, what drove support for religious freedom was, first, that it allowed for religion to flourish, and second, that when religion flourished, it benefited society in myriad ways.<sup>533</sup> On the spiritual front, a variety of Protestant denominations—for example, Quakers like William Penn, Baptists like the minister Isaac Backus, and the Presbyterians of Hanover County, Virginia—argued that to be a true Christian, one had to come to the faith free from government coercion.<sup>534</sup>

As for the practical reasons for religious liberty, a central benefit was that it offered a pragmatic tool to deal with religious diversity. Since its inception, America was home to diverse religious groups.<sup>535</sup> Hall writes, “[f]rom an early date, even in Congregational New England and the Anglican South, there were dissenters, and the middle colonies were always a muddle.”<sup>536</sup> A 1771 woodcut of New York City features houses of worship “belonging to Presbyterians, Anglicans, Dutch Calvinists, Moravians, Jews, Quakers, Anabaptists, Catholics, Methodists, and others.... This diversity forced civic authorities to negotiate laws and policies encouraging different groups to get along.”<sup>537</sup> Religious liberty was one of those policies.<sup>538</sup>

Of course, despite the recognition that religious liberty for all is a good idea, the history of religious freedom in America is checkered. In the past, members of various Protestant denominations, African American and Native American religions, Catholics, and Latter-day Saints were persecuted,<sup>539</sup> and today, prominent conservatives actively push for limits on Muslims’ rights.<sup>540</sup> But the

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533. Mark David Hall, *America’s Founders, Religious Liberty, and the Common Good*, 15 U. ST. THOMAS L.J. 642, 642 (2019).

534. *Id.* at 651-53.

535. *Id.* at 650-51.

536. MARK DAVID HALL, DID AMERICA HAVE A CHRISTIAN FOUNDING? 124 (2019).

537. *Id.* at 124-25.

538. *Id.* at 125.

539. See Kenneth C. Davis, *America’s True History of Religious Tolerance*, SMITHSONIAN MAG. (Oct. 2010), <https://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/> [<https://perma.cc/NA62-Y7B9>].

540. See, e.g., Sarah Pulliam Bailey, *Donald Trump Says He Would Consider Closing Down Some Mosques in the U.S.*, WASH. POST (Oct. 21, 2015, 4:29 PM), <https://www.washingtonpost.com>.

minority rights element of the tradition suggests that the religious liberty interest convergence project is more likely to succeed than the short-lived victories of racial interest convergence. Materialist considerations as posited by interest convergence theory can help bring to the fore the latent, protective aspect of the religious freedom tradition. Part V considers additional reasons religious liberty interest convergence might fare better than its racial counterpart.

## V. THE LIMITATIONS OF RELIGIOUS LIBERTY INTEREST CONVERGENCE

Part III.C listed three limitations of interest convergence: (1) remedies are short lived, (2) interest convergence requires concessions, and (3) ideology can outweigh interest. This Part addresses each as it applies to religious liberty interest convergence.

### *A. Remedies Are Short Lived*

Interest convergence theory is, at its core, pessimistic about human nature and, as such, doubtful about long-term change. In Bell's view, because parties are acting merely based on self-interest, any short-term win will backslide when the majority's interest is no longer at play.<sup>541</sup>

A related concern is the majority's instrumentalization or tokenization of minorities to serve its interests. As noted earlier, the Muslim win in *Tanvir* might help deter government officials from enforcing nondiscrimination laws against Christians who do not want to serve same-sex couples.<sup>542</sup> To the extent one or more of the conservative Justices was motivated to rule for the Muslim claimants for this reason, the claimants were mere instruments. Similarly, in the political context, ameliorating culture war rhetoric around religious liberty by ruling for Muslims may ultimately be

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com/news/acts-of-faith/wp/2015/10/21/donald-trump-says-he-would-consider-closing-down-some-mosques-in-the-u-s/ [https://perma.cc/XAH7-JSQC].

541. See Bell, *supra* note 155, at 526-28.

542. See *supra* Part IV.B.3.a.

about making Christians' religious liberty claims more politically palatable.

When self-interest is the primary motivator for the majority in its rights-protective decisions, these obstacles are inevitable. However, there is reason to believe that religious liberty interest convergence (along with its benefits for minorities) has long-term viability at least with respect to claims that the Christian majority sees itself reflected in. As demonstrated in this Article, religious liberty today is seen as a way of protecting white Christian America from the impact of seismic demographic and cultural changes.<sup>543</sup> America is fast browning<sup>544</sup> and experiencing tremendous religious diversification<sup>545</sup>—trends that, if they continue, will create the conditions for interest convergence and an openness to coalition-build with religious minorities.

### *B. Interest Convergence Requires Concessions*

There are not many Muslim advocacy organizations in the United States, but the few that exist and have a national platform have generally taken public positions against conservative Christian religious claims. These positions are based on Muslims' interest convergence with other marginalized minorities. For example, the Muslim advocacy group, Muslim Advocates, filed an amicus brief at the Supreme Court against Jack Phillips in *Masterpiece*; the brief argued that if discrimination were permitted against gay individuals, religious minorities like Muslims would also face discrimination.<sup>546</sup> Although religious liberty interest convergence does not require Muslim advocacy groups to cease partnerships with LGBTQ and other minority groups, it does require some level of concession on religious liberty matters. Muslim groups would have to acquiesce to conservative religious claims when those claims would facilitate a jurisprudence that is broadly protective of religious liberty and could serve Muslims' interests. *Tanvir's* appeal to *Hobby Lobby* is

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543. See discussion *supra* Part I.A.

544. See *supra* notes 10-13 and accompanying text.

545. ROBERT P. JONES & DANIEL COX, AMERICA'S CHANGING RELIGIOUS IDENTITY 7 (2017).

546. Brief for 15 Faith and Civil Rights Organizations as Amici Curiae in Support of Respondents at 3, 8, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111).



one example of that.<sup>547</sup>

### C. *Ideology Can Outweigh Interests*

Ideological divergence—particularly in the context of politicized religious liberty and deepening polarization—is the biggest obstacle to Christian-Muslim religious liberty interest convergence.

A core issue is strong anti-Muslim attitudes among conservatives. In 2009, political scientists Kerem Ozan Kalkan, Geoffrey Layman, and Eric Uslaner noted that although “[p]rejudice toward most minority groups has declined in recent decades ... Muslims are an exception: they are viewed much less favorably than most other religious and racial minorities.”<sup>548</sup> The researchers also noted that religious and racial outsiders are eventually accepted by the in-group, but cultural outsiders—people who exhibit behaviors different from the mainstream or who are thought to hold different values—have a harder time being accepted.<sup>549</sup>

Kalkan, Layman, and Uslaner hypothesized and proved that a big reason Muslims are not accepted is because they belong to both of these “bands of others.”<sup>550</sup> Muslims may be considered both racial and religious outsiders and “behavioral” outsiders.<sup>551</sup> About the latter, the researchers wrote that even though Muslims are “generally ... well integrated into American society,” they are also “disproportionately foreign born ... and their religious practices and teachings are clearly ‘strange’ from the standpoint of the Judeo-Christian tradition.”<sup>552</sup>

Other studies suggest that “strange” means more than just “different.” For many Americans—and conservatives in particular—Muslims are simultaneously “*non-American* (outsiders), *anti-American* (enemies), and *un-American* (others).”<sup>553</sup> A 2016 Pew

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547. See *supra* notes 397-406 and accompanying text.

548. Kerem Ozan Kalkan, Geoffrey C. Layman & Eric M. Uslaner, “*Bands of Others?*” *Attitudes Toward Muslims in Contemporary American Society*, 71 J. POL. 847, 847 (2009).

549. *Id.* at 849.

550. *Id.* at 848.

551. *Id.* at 849.

552. *Id.* In identifying these factors of “otherness,” the study found that the 9/11 attacks and fears about terrorism do not explain anti-Muslim attitudes in America. *Id.* at 855-56.

553. Ruth Braunstein, *Muslims as Outsiders, Enemies, and Others: The 2016 Presidential Election and the Politics of Religious Exclusion*, AM. J. CULTURAL SOCIO. 355, 356 (2017).

Research Center survey found that almost half of all U.S. adults believed that some American Muslims are anti-American.<sup>554</sup> An August 2017 poll by the Annenberg Public Policy Center of the University of Pennsylvania found that almost one in four Americans did not know that under the U.S. Constitution, American Muslims have the same rights as other American citizens.<sup>555</sup> A 2017 Pew poll found that half of U.S. adults believe that Islam does not have a place in “mainstream American society,” and almost half (44 percent) thought that there is a “natural conflict between Islam and democracy.”<sup>556</sup> A 2015 poll by the Associated Press-NORC Center for Public Affairs Research found that Americans favored protecting religious liberty for Christians over other faith groups, ranking Muslims as the least deserving of this right.<sup>557</sup> Eighty-two percent voiced support for protecting religious liberty for Christians, while only 61 percent said the same for Muslims.<sup>558</sup> Of these divisions, Pew researchers wrote that “attitudes toward Muslims are tied to politics, even after taking education, age and other demographic factors into account,” and found that Democrats are more accepting of Muslims than are Republicans.<sup>559</sup>

Contributing to these perceptions of Muslims as religious outsiders is what scholars have termed the “racialization” of Muslims. There is a particular idea of what a Muslim looks like (generally, brown-skinned), which makes Muslimness an immutable characteristic—more like race than a religion.<sup>560</sup> And when the government, the media, and private citizens conflate Islam and terrorism and view all Muslims as actual or potential terrorists, terrorism (or a proclivity to violence) also becomes an immutable aspect of Muslimness.<sup>561</sup> As one writer notes, Muslims and Muslim-looking

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554. Katayoun Kishi, *Anti-Muslim Assaults Reach 9/11-Era Levels, FBI Data Show*, PEW RSCH. CTR. (Nov. 21, 2016), <https://www.pewresearch.org/fact-tank/2016/11/21/anti-muslim-assaults-reach-911-era-levels-fbi-data-show/> [<https://perma.cc/KR8K-39GP>].

555. *Americans Are Poorly Informed About Basic Constitutional Provisions*, ANNENBERG PUB. POLY CTR. (Sept. 12, 2017), <https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions/> [<https://perma.cc/R72R-PUBB>].

556. PEW RSCH. CTR., *supra* note 36.

557. Zoll, *supra* note 37.

558. *Id.*

559. Sahgal & Mohamed, *supra* note 38.

560. *See* Ibrahim, *supra* note 291, at 123, 144.

561. *Id.* at 136-37, 142.

people are “projected as the fictionalized ‘terrorist enemy’.... whose violence, danger and disloyalty is innate such that it transcends citizenship ... [t]hey are neither citizen nor alien, but rather belong to this inherently evil world called ‘Islam.’”<sup>562</sup>

Stereotypes about Muslims as non-American, anti-American, and un-American have been an obstacle for Christian groups in the past when it comes to supporting Muslims’ religious freedom. Notably absent from the amicus briefs filed in *Tanvir* was the Ethics and Religious Liberty Commission (ERLC) of the Southern Baptist Convention (SBC). In 2016, the ERLC received strong pushback from SBC members when it filed a brief in support of the Islamic Society of Basking Ridge, New Jersey.<sup>563</sup> The Islamic Society was fighting to build a new mosque, despite many years of resistance from local residents, and when the ERLC got involved on behalf of the mosque,<sup>564</sup> SBC members called for ERLC’s then-President Russell Moore to be fired.<sup>565</sup> As one member explained, “I move that all Southern Baptist officials or officers who support the rights of Muslims to build Islamic mosques in the United States be immediately removed from their position within the Southern Baptist Convention.”<sup>566</sup>

Moore’s predecessor, Richard Land, also faced fiery protest in 2010 when the ERLC joined a multi-faith coalition to protect Muslims’ right to build houses of worship; Land was forced to withdraw mere months after ERLC joined the coalition.<sup>567</sup> In his words, “While many Southern Baptists share my deep commitment to religious freedom and the right of Muslims to have places of worship, they also feel that a Southern Baptist denominational leader filing suit to allow individual mosques to be built is ‘a bridge too far.’”<sup>568</sup>

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562. *Id.* at 142.

563. Gryboski, *supra* note 531.

564. Bob Allen, *Mosque Backed by Baptists Wins in Lawsuit Settlement*, BAPTIST NEWS GLOB. (May 31, 2017), <https://baptistnews.com/article/mosque-backed-baptists-wins-lawsuit-settlement/#.YPn8wS2cbUY> [<https://perma.cc/5HBQ-ENLA>].

565. Gryboski, *supra* note 531.

566. *Id.*

567. Tobin Grant, *Richard Land Leaves Interfaith Coalition on Mosques*, CHRISTIANITY TODAY (Jan. 25, 2011, 10:18 AM), <https://www.christianitytoday.com/news/2011/January/richard-land-leaves-interfaith-coalition-on-mosques.html> [<https://perma.cc/F2AV-YKJK>].

568. *Id.*

Clearly, there is a deep distrust, even hatred, toward Muslims among many conservative Christians, and many stubbornly resist Muslims' rights. Making the situation even worse is conservatives' tendency to conflate Muslims with the political left.<sup>569</sup> This same dynamic comes into play when political figures like former-President Trump position themselves against Muslims and allegiance to Trump becomes conflated with opposition to Muslims.<sup>570</sup> In a polarized context, such divisions can be intractable.

### CONCLUSION

In many ways, religious liberty has fallen victim to the broader phenomenon of extreme political tribalism taking hold in America today. White, conservative Christians and religious minorities, especially Muslims, often find themselves pitted against each other in the legal and political arenas—in sharp contrast to the bipartisan coalition that passed the RFRA as recently as 1993.<sup>571</sup>

Charting a path forward requires a realist take on human nature. Interest convergence theory is that realist strategy; it is a recognition that, although altruism is possible, for society-wide change, something more is needed.<sup>572</sup> Bell's materialist school of thought posits that humans with power will cede some of that power only if there is something in it for them.<sup>573</sup>

Although this may be a pessimistic take on human nature, interest convergence theory also offers hopeful possibilities—possibilities of unlikely partners working together. Importantly, religious liberty interest convergence does not require the involved parties to agree on the substance of each other's claims for them to work together to achieve robust legal protections. Social scientists refer to this as “tolerance,” that is, the process by which individuals put up with others' beliefs and practices not because they agree with them, but because they seek a higher goal—in this case, religious liberty.<sup>574</sup> This type of tolerance is the reason at least one nationally

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569. See discussion *supra* Part I.B.

570. See discussion *supra* Part IV.B.3.f.i.(a).

571. See Douthat, *supra* note 42.

572. See *supra* notes 167-71 and accompanying text.

573. See *id.*

574. See Maykel Verkuyten, Kumar Yogeeswaran & Levi Adelman, *Toleration and*

influential conservative religious liberty advocacy group encourages consistency across Christian and minority religious claims.<sup>575</sup> At the core of its advocacy is the idea that each side can endure the other side's practices and beliefs, even as they continue to vehemently disapprove of them.<sup>576</sup>

In a context when religious polarization is deepening and solutions are hard to imagine, religious liberty interest convergence might offer a rare, viable solution.

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*Prejudice-Reduction: Two Ways of Improving Intergroup Relations*, 50 EUR. J. SOC. PSYCH. 239, 240 (2020).

575. See Adèle Keim, *Hobby Lobby (In)Sanity and the Right to Be Wrong*, BECKET (July 17, 2014), <https://www.becketlaw.org/media/hobby-lobby-insanity-right-wrong/> [<https://perma.cc/53FX-WBU4>].

576. See *id.*