The traditional narrative of religious freedom from colonial British North America to the modern-day United States involves Protestant pilgrims fleeing persecution and creating an unprecedented haven of religious tolerance in the New World.[1] Scholars of African American religion Sabrina Dent and Corey D. B. Walker have characterized this religious freedom narrative as "one of ascension," due to its exceptional "development that has consistently expanded across the centuries."[2] This development includes the constitutional space provided for religion in the First Amendment as well as the flourishing of new sects during the First and Second Great Awakenings.

Nonetheless, as other scholars have pointed out,[3] the assumed linear rise of religious liberty in the United States produces a compelling but noncomprehensive account of the U.S. experience with freedom of religion. Two problems arise from this narrative. The first is a problem of sample and the second is an issue of scope. While the story of early colonial settlers who championed religious tolerance is certainly a piece of U.S. religious freedom history, their striving for religious freedom too often obscures the religious rights of historically underrepresented U.S. populations such as African American slaves, Native Americans, and immigrants. Because these groups were so often deprived of rights beyond religious freedom, it can be easy to consider their religious freedom experience as outliers to the heart of religious

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[1] *See, e.g.*, JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 20–23 (4th ed. 2016).

[2] SABRINA E. DENT & COREY D. B. WALKER, eds., *Disrupting the Narrative: African Americans and Religious Freedom*, *in* AFRICAN AMERICANS AND RELIGIOUS FREEDOM: NEW PERSPECTIVES FOR CONGREGATIONS AND COMMUNITIES (2021) 5.

[3] *See, e.g.*, TISA WENGER, WE HAVE A RELIGION: THE 1920S PUEBLO INDIAN DANCE CONTROVERSY AND AMERICAN RELIGIOUS FREEDOM (2009) (explaining the ways that religious freedom for Native Americans has struggled due to practicing their beliefs in a way that fell outside recognized forms of religious worship); STEVEN WALDMAN, SACRED LIBERTY: AMERICA'S LONG, BLOODY, AND ONGOING STRUGGLE (2019) (drawing attention to many of the marginalized religious groups throughout U.S. history).

freedom in the United States.[4] Yet, these groups must also be included in the sampling of the nation's religious experience to craft a representative narrative. Further, their lived realities of lacking freedom of religion sheds light on patterns when religious freedom has been denied and avoid making similar mistakes in the modern day.

Equally important to sample is the related issue of scope. It is one thing to include oppressed populations in the analysis, but a robust understanding of religious freedom in the United States also requires incorporating the standards of oppressed religious practices into the analysis. In general, the treatment of African Americans and religious freedom has tended toward the crucial role of the Christianity in the black community during times of slavery and freedom.[5] Understandably, this follows a common exercise in the United States to loosely equate religious liberty with "church and state" because the Christian church has been practically synonymous with religion throughout U.S. history.[6] Furthermore, the significance of the black church to developments in U.S. religious freedom is hard to overstate. However, while leaning on the Christian experience of African Americans to inform the religious freedom narrative is useful, the focus can be refined further.[7] Religious freedom for African Americans in the United

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[4] WITTE, JR. & NICHOLS, *supra* note 1, at 61–62 ("No founder thought seriously of having to accommodate the African religion of the slaves or the traditional religion of the Native Americans.").

[5] *See* SABRINA E. DENT & COREY D. B. WALKER, eds., AFRICAN AMERICANS AND RELIGIOUS FREEDOM: NEW PERSPECTIVES FOR CONGREGATIONS AND COMMUNITIES; TISA WENGER, *Defining a People: African Americans and the Racial Limits of Religious Freedom*, *in* RELIGIOUS FREEDOM: THE CONTEST HISTORY OF AN AMERICAN IDEAL (2017); CHARLES WESLEY, *The Negro Has Always Wanted the Four Freedoms*, *in* WHAT THE NEGRO WANTS (Rayford W. Logan, ed., 1944); Kurt Lash, *The Second Adoption of the Free Exercise Clause*, 88 NW. U. L. REV. 1106, 1136 (1994) (explaining how religious freedom of slaves was discussed in terms of the ability to proselyte Christian doctrine to them); Kurt Lash, *The Second Adoption of the Establishment Clause*, 27 ARIZ. ST. L. J. 1085, 1137 n. 234, 1143 n. 254 (1995); Steven G. Calebresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 983–99 (2013); AKHIL REED AMAR, *The Creation and Reconstruction of the First Amendment, in* RELIGIOUS LIBERTY: ESSAYS ON FIRST AMENDMENT LAW, 55, 62 (Daniel N. Robinson & Richard N. Williams, eds., 2016).

[6] For many, this constitutes the "civil religion" of the United States. *See, e.g.*, JON MECHAM, AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION (2007).

[7] Some have also helped to strengthen this line of research through exploring the religious experience of African American Muslims during slavery. *See, e.g*, ALLAN D. AUSTIN, AFRICAN MUSLIMS IN ANTEBELLUM AMERICA: TRANSATLANTIC STORIES AND SPIRITUAL STRUGGLES (1997); SYLVIANE A. DIOUF, SERVANTS OF ALLAH: AFRICAN MUSLIMS ENSLAVED IN THE AMERICAS (2005); MICHAEL A. GOMEZ, BLACK CRESCENT: THE EXPERIENCE AND

States must additionally account for heavy influence from the Indigenous religious practices brought by their African ancestors. An adequate appraisal of U.S. religious freedom cannot stop at merely understanding oppressed groups through the dominant religious paradigm. A meaningful survey of religious freedom will also strive to contemplate underrepresented religious practices from the perspective of those overlooked groups.

In following this pattern, this paper will specifically highlight how the African American slave experience should refine our nation's collective understanding of religious freedom. The first two sections describe religious freedom of slaves through the practice of burial—a prominent spiritual obligation in many African religions that was not initially shared by white settlers. Part I provides the historical context for both African Indigenous and Christian beliefs towards death and how they initially intermingled. Part II then traces burial practice of African American slaves through sources from the late antebellum period.

The religious dimension of burial practices, cemeteries, and death is particularly prominent in spiritual traditions from West Africa, the birthplace for many African American slaves.[8] For this reason, most of the analysis in part I and II will draw upon West African religious tradition. The narrow focus on burial practice is tailored to the aims of this paper as a case study rather than a comprehensive exposition. As opposed to conjure or other African Indigenous practices that could be studied, burial was both public and regulated, making it better sourced and accessible for study.[9] And unlike Islam, which has already received important

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LEGACY OF AFRICAN MUSLIMS IN THE AMERICAS (2005); PRECIOUS RASHEEDA MUHAMMAD, MUSLIMS & THE MAKING OF AMERICA (2013).

[8] MICHAEL A. GOMEZ, EXCHANGING OUR COUNTRY MARKS: TRANSFORMATION OF AFRICAN IDENTITY IN THE COLONIAL AND ANTEBELLUM SOUTH 31–37 (1998).

[9] For others who have written on conjure and other African Indigenous religious practices, see YVONNE P. CHIREAU, BLACK MAGIC: RELIGION AND THE AFRICAN AMERICAN CONJURING TRADITION (2003); LELAND FERGUSON, UNCOMMON GROUND: ARCHAEOLOGY AND EARLY AFRICAN AMERICA, 1650-1800 (1992).

treatment in the literature on African American religion,[10] African Indigenous beliefs of slaves have yet to be included in the study of religious freedom in the United States. The account of Indigenous practices of African American slaves is intended to offer a representative case study and begin more discussion around their religious freedom in the law and life.

Furthermore, because the religious aspects of African American death and burial were distinct from traditional Christian practices until late in the nineteenth century, many slaveowners were unaware of the spiritual dimension to African burials. For this reason, modern observers may assume religious freedom violations could not occur because slaveholders were not targeting the beliefs of enslaved African Americans. But that presumption shows the sample and scope bias baked into the current narrative. Religious freedom is not just violated when groups are targeted for their beliefs. If that were true, the measure for religious freedom violations would be based on the perpetrator's view of the violated beliefs rather than the victim's view (i.e., the issue of sample). And even if the victim's beliefs are recognized as religious, such violations are too easily characterized as "incidental" and therefore justified (i.e., the issue of scope).

This problematic framework of "incidentality" is further explored in modern Free Exercise jurisprudence in part III. Current Supreme Court doctrine sorts all government burdens on the religious exercise into two buckets: targeted burdens and incidental burdens. The bifurcation of Free Exercise claims perpetuates the problems discussed with African American slaves. In short, because incidental government burdens are subject to less judicial scrutiny and fall disproportionately on non-Western religious practices, the Free Exercise framework systemically disadvantages historically oppressed religious minorities. Part IV plays out this

[10] *See supra* note 7.

pattern with four religious groups whose beliefs fall outside the dominant U.S. religious freedom narrative. Part V concludes by highlighting the strong need for proactive protection rather than reactive repair of religious freedom rights and the adjoining responsibility such proactive protection places on all. As a consequence of expanding religious freedom rights through a widened sample and scope, a commensurate expansion of responsibility to understand and respect beliefs different than our own is needed.

I. Background: African Indigenous Burial and British North America (1619-1810)

Understanding the religious practice of African slaves in colonial British North America must begin with the traditions that the slaves carried with them across the Atlantic. Native African religious traditions in general are often resistant to classification. Jacob Olupona, scholar of Indigenous African religion, explains, "African spirituality simply acknowledges that beliefs and practices touch on and inform every facet of human life, and therefore African religion cannot be separated from the mundane."[11] West Africa, a significant exporter of slaves to colonial British North America, shared this heritage of African spirituality and Indigenous religious practices.[12] Because traditional West African beliefs affirmed continued existence of their dead, this fluidity between West African religion and daily life also carried over to the relationship between religion and death. For example, the burial tradition of both the Igbo and Yoruba people of Nigeria was not understood as an ending to life for the deceased, but a reshaping of the relationships that they shared with the community. As explained by one scholar of the Yoruba

[11] Jacob Olupona, *The Spirituality of Africa*, interview by Anthony Chiorazzi, THE HARVARD GAZETTE, Oct. 6, 2015, https://news.harvard.edu/gazette/story/2015/10/the-spirituality-of-africa/.
[12] *See This Far by Faith: Religious Transitions from the Mother Land to the New World*, THE FAITH PROJECT http://www.pbs.org/thisfarbyfaith/journey_1/p_3.html (last visited Sep. 8, 2021).

tradition, the dead are "members of family on earth (though no longer of the same fleshy order) who have crossed the 'border' between this world and the supersensible world."[13]

This belief underlies the second funeral practice that was shared across West African religious traditions. Among the Igbos, a second funeral consisted of making a wickerwork dummy called an "igbudu" which is "constructed of a size corresponding to that of the deceased."[14] Until this counterfeit corpse was laid to rest in the second burial, the spirit of the deceased "is doomed wandering to and fro until the ceremonies are completed whereby it may enter its final resting place and be at peace."[15] Similarly, the Yoruba ritualized death in two phases. "The first phase of the rituals involves the corpse lying in state. The second phase usually begins a few days after the burial. This phase may last from seven to forty days."[16] Once again, it is the second burial that ultimately completes the spirit's transfer to the next life made possible by their community. Admittedly, when death occurred among West African believers, the attainment of salvation and well-being of the deceased critically depended on their surviving community.

The practice of second funerals or burials is also related to another central belief in West African Indigenous religion. After the spirit of the deceased separates from the body, many West African religions believe in two post-mortal periods that spirits may reside. The initial realm spirits enter following death is called Sasa or the state of the living dead. Existing in the Sasa implies continued and active involvement of the departed spirit in the lives of those who remain on Earth. The second burial is one way to ensure that deceased kin in Sasa act favorably towards

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[13] FLORA WILSON BRIDGES, RESURRECTION SONG: AFRICAN-AMERICAN SPIRITUALITY 18 (2001).
[14] GEORGE THOMAS BASDEN, NIGER IGBOS: A DESCRIPTION OF THE PRIMITIVE LIFE, CUSTOMS, ANIMISTIC BELIEFS, ETC., OF THE IGBO PEOPLE OF NIGERIA, BY ONE WHO, FOR THIRTY-FIVES, ENJOYED THEIR CONFIDENCE AND FRIENDSHIP 269 (1966).
[15] *Id*.
[16] BRIDGES, *supra* note 12, at 23.

their surviving community. In reality, many West African burial practices are directly connected with the "sacred duty of the family . . . to keep the living-dead within temporal sight of the Sasa period."[17] This is because when the memory of the deceased begins to fade from the world of the living, the deceased passes from their Sasa period to Zamani. Zamani is considered "the final destiny of the human soul" where the spirit has lost all characteristics of humaneness.[18] In Zamani, the deceased becomes an "'it' and no longer a 'he' or 'she'; it is now one of myriads of spirits who have lost their humaneness."[19] Due to their memories of the living dead, the surviving family and community are consecrated gatekeepers in "the formal conflict between Zamani and Sasa forces" brought about by death.[20]

The hallowed obligation to remember the Deceased in West African Indigenous religion indicates the importance of formal wailing and mourning. Wailings for the dead served the practical purpose of alerting the rest of the community of the death, but they also helped accomplish the religious duty to remember the dead. Each family member had a unique cry for the dead that reflected their relationship to the deceased. For example, the Akan tradition tailored their "[c]ries of *agya ee*, *ɛna ee*, *wɔfa ee*, *nana ee* (O, father, mother, uncle, grandfather, etc., according to the sex and the relationship of the mourners to the death person)."[21] Other tribes also distinguished their cries based on the identity of the deceased or used dirges to lament the dead.[22] The purpose of these and other concerted efforts to make burial a significant event demonstrates how memory of the dead was intimately connected with their state in the next life.

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[17] JOHN S. MBITI, AFRICAN RELIGION & PHILOSOPHY 162 (1969).
[18] *Id*. at 163.
[19] *Id*.
[20] *Id*. at 162.
[21] J. H. NKETIA, FUNERAL DIRGES OF THE AKAN PEOPLE 8 (1969).
[22] MBITI, *supra* note 16, at 152.

White colonists in British North America generally failed to recognize the poignant interrelation between West African Indigenous religion and burial practice. From the beginning, these settlers were prone to subsume the religious burial practice of slaves as simply another facet of West African culture. Their error in this regard is largely due to the contrast between rigidly categorized Christian theology and practice with Indigenous West African religion. Unlike the Yoruba and Igbo, colonial Protestant eschatology signaled the end of obligations to the deceased rather than the beginning. For example, in eighteenth century Virginia, Protestants went to work revising many of the high church burial rituals of Catholics that more accurately reflected their beliefs on the afterlife. This led many to the following result:

> the fate of the dead was said to be sealed at death, and later prayers were not believed to change it. The funeral 'served simply to dispose of the corps.' For this purpose a short, simple burial service would 'do' nicely and the elaborate medieval practices were dropped.[23]

Religious aspects of Protestant funerals ultimately acknowledged that the day of repentance had passed. Compared to the West African tradition, colonial Christian beliefs passively viewed death as creating separation rather than obligation.

Based on their own engagement with death and burial, the Christian white majority easily dismissed slave burial practice as superstition and, therefore, considered it a slave privilege that could be removed. At best, this could mean a slaveholder's ignorance would cause him to leave slaves alone to mourn their dead. At worst, slaveholders restricted slave funerals privately or even publicly. A dramatic example of the worst-case scenario was a 1687 law in Virginia that commanded "all Masters of families haveing any Negro slaves not to permit them to hold or make any Solemnity or Funeralls for any deced Negroes."[24] The stated impetus for enforcing

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[23] MECHAL SOBEL, THE WORLD THEY MADE TOGETHER: BLACK AND WHITE VALUES IN EIGHTEENTH-CENTURY VIRGINIA 16 (1987).

[24] H. R., MCILWAINE, ed., EXECUTIVE JOURNALS, COUNCIL OF THE COLONY OF VIRGINIA, I, 86–87 (1925).

such a measure was a recently uncovered rebellion plotted during a slave funeral. The Virginia colonial government feared that:

> permitting them [slaves] to meete in great NumbImakeing and holding Funeralls for Dead Negroes gives them the Opportunityes under pretention of such public meetings to Consult and advise for the Carrying on of their Evill & wicked purposes & Contrivances.[25]

The perception of West African burial rituals housing "Evill & wicked purposes" to plot against their masters allowed slaveholders to easily use any rebellion plots as justification for categorically banning slave funerals.[26] While it remains unclear how consistently the law was enforced, it is noteworthy that the law is not a restriction on slaves to hold funerals but on slaveholders from allowing funerals. This structure supports the colonial government's expressed fears: allowing some slaveholders to grant slaves greater burial autonomy may increase the risk of their neighbor's slaves to coordinate an insurrection.[27]

In contrast to outright bans like the Virginia law, other regulations were comparatively more modest. The increase in slave funerals in South Carolina raised some concerns among slaveholders seeing the large gatherings of African Americans.[28] Their solution was to limit slave burial practices to daylight hours where closer monitoring could occur.[29] Again, while enforcement of such measures is unclear, the effect of the law would likely constrain African burials to an isolated event rather than a religious process. Any slaveholders that did enforce this

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[25] *Id.*

[26] This suspicion of rebellion underlaid other legal impositions such as Virginia's 1680 act on slave insurrection which warned against "the frequent meetings of considerable numbers of Negro slaves under the pretense of feasts and burials." JUNE PURCELL GUILD, BLACK LAWS OF VIRGINIA: A SUMMARY OF LEGISLATIVE ACTS CONCERNING NEGROES FROM THE EARLIEST TIMES TO THE PRESENT 45 (1969).

[27] This is further supported by the existence of pass laws and laws governing the ratio of whites to blacks on a plantation. Each acted as a "form of restraint on an owner's discretion." *See* THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860 338 (1996).

[28] PHILIP D. MORGAN, SLAVE COUNTERPOINT: BLACK CULTURE IN THE EIGHTEENTH-CENTURY CHESAPEAKE & LOWCOUNTRY 640–41 (1998).

[29] *Id.*

provision were likely either ignorant to Indigenous religious practices or considered the law to be a minimal burden on those practices.

Due to the paucity of both laws on slave burial and personal accounts of slaves during this period, legal conclusions from the colonial era are somewhat limited. The more important takeaway is the tension that existed between the lack of religious influence in Christian burial and the prevalence of religious piety in slave burials. Among colonial white Anglicans, they felt "sorrow was to be shunned and feelings were to be contained."[30] Following from their "little overt concern for the afterlife," slaveowners were unlikely to grant an accommodation to perform essential Indigenous death rituals such as second burial or construct an igbudu.[31] In fact, the few examples of slave burial accommodation in the historical record during this time came almost exclusively within the scope of colonial Anglo-American understandings of death. Several accounts show slaveholders allowing African American preachers to offer a sermon; other slaveholders would occasionally pay for a coffin for the deceased slave.[32] In reality, providing such accommodations probably meant more to the colonial settlers granting them than to the Indigenous African recipients.[33] Perhaps unsurprisingly, very little changed for slave burial worship as white Christian slaveowners adopted their own religious connotations of death in the nineteenth century.

II. Case Study: African Indigenous Burials and Religious Freedom (1810-1865)

In the nineteenth century, as slaves became less African and more American, the connection between their heritage and burial practice became less transparent. In part, this is symptomatic of

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[30] SOBEL, *supra* note 22, at 221.
[31] *Id.*
[32] MORGAN, *supra* note 26, at 641.
[33] *Cf.* LELAND FERGUSON, UNCOMMON GROUND: ARCHAEOLOGY AND EARLY AFRICAN AMERICA, 1650-1800 117–18 (1992) (explaining the different value systems between Africans and colonists where Africans "generally place[d] little, or even no value on the fine houses and superb furniture of their masters.").

two major moments that changed white Christian views of death in the nineteenth century. The first was the Second Great Awakening. Beginning just prior to 1800 and continuing many decades into the nineteenth century, this movement's renewed focus on religion's role in life extended to death as well. This is particularly true of the Second Great Awakening's fascination with salvation that encouraged thinking beyond the grave. The other major shift in the U.S. view of death came from the haunting realities of the Civil War. The direct exposure to the war's high death toll drove many to ask deeper theological questions. On a more practical level, the process of burial was necessarily reconceptualized due to many former battlegrounds becoming mass graveyards. These, in turn, changed the religious freedom landscape for slaves as they slowly emerged from bondage.

A significant product from the convergence of these two national moments was the idea of *ars moriendi* or dying a "good death." Writing about changing U.S. paradigm of death in the nineteenth century, Drew Faust describes the centrality of this fifteenth century Christian practice before and after the Civil War. She explains how the *ars moriendi* "provided rules of conduct for the moribund and their attendants."[34] These rules included how to resist worldly temptations and pattern your death after the sacrifice given by Christ.[35] While its origins were inherently religious, Faust also points out that "[b]y the 1860s, many elements of the Good Death had been to a considerable degree separated from their explicitly theological roots," and had instead become "a part of respectable middle-class behavior and expectation in the North and South."[36]

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[34] DREW GILPIN FAUST, THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR 6 (2009).
[35] *Id*.
[36] *Id*. at 7.

The revival of the good death brought renewed focus to preparation for death, but the resulting adjustments and practices remained focused on the world of the living. During this time, religion helped "to narrow the distance between this world and the next," but for Christians in the United States, it typically stopped short of piercing the divide.[37] By contrast, generations of slaves retained the same religious fervor in burial as their ancestors who viewed death as a beginning to religious ritual. While many aspects of their native culture were removed from African Americans, threads of traditional West African death burial practices and their theological implications were still distinguishable within the cultural norms of the nineteenth century United States. Furthermore, these beliefs continued to be set outside the familiar sampling of protected religious exercise in the U.S. or were incidentally subverted based on prevailing majority views of death.

In studying first-hand accounts of former slaves reflecting on their experiences in bondage, death and burial consistently emerges as a prominent theme. Although African Americans were increasingly uniting themselves with Christian churches, there are important Indigenous religious customs shrouded within the more common religious rituals of the day. For example, the practice of second burial appears to have been carried on by some slaves even while living in a Christianized world. Paul Smith, formerly a slave in Georgia, described how "De whit folkses had all deir funeral sermons preached at the time of buryin'," but slaves instead "had de funeral sermon preached in church, maybe six months atter de buryin'."[38] Previously enslaved in Kentucky, Mary Wright explained how "on de Fourth Sunday in August ebery year all de colored folks would take a basket dinner ter de church en each family dat had buried a

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[37] James Moorehead, *'As Though Nothing At All Had Happened': Death and Afterlife in Protestant Thought, 1840-1925*, 67 SOUNDINGS: AN INTERDISC. J. 658-659 (1984).
[38] GEORGE P. RAWICK, ed., THE AMERICAN SLAVE: A COMPOSITE AUTOBIOGRAPHY, VOLUME 13: GEORGIA NARRATIVE PART 3 330 (1972).

nigger would pay de proacher ter preach the sermon foh dat darkie dat died."[39] These accounts display traces of the West African second burial practice and continued concern for the dead adapted to the Christian society that slaves inhabited.

There are also more subtle references made to the prolonged burial practices of slaves that slaveholders typically failed to make accommodations for. Surveying the transcribed interviews of former slaves from the 1930s Federal Writers' Project, a recurring statement regarding funerals and burial was dissatisfaction with their abrupt pace. While most slaves do not explicitly describe the second funeral or other traditional burial practices, the prevailing theme is one of longing to have more time and attention to properly mourn and ritualize the dead. Alice Sewell, a former slave in early 1800s Alabama, explained "When we [slaves] die, dey bury us next day and you is just like any of the other cattle dying on de place. Dat's all 'tis to it and all 'tis of you. You is just dead, dat's all."[40] In Georgia, an ex-slave named Frances Willingham related, "Us didn't know nothin' 'bout no fun'rals. When one of de slaves died, dey was put in unpainted, home-made coffins and tuk to de graveyard whar de grave had done been dug. Dey put 'em in dar and kivvered 'em up and dat was all dey done 'bout it."[41] In each case, these accounts indicate a gap between what they deemed appropriate time to mourn the dead and the lack of consideration from slaveowners. While most slaveholders may have understood the need to grieve another's passing, they were unfamiliar with the religious significance slaves had attached to their mourning.

In addition to their comments on the speed of burial, slaves were also disenchanted with the low priority their white slaveholders placed on burials vis-à-vis economic efficiency. There

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[39] GEORGE P. RAWICK, ed., THE AMERICAN SLAVE, VOLUME 16: KANSAS NARRATIVE PART 1 65 (1972).
[40] NORMAN R. YETMAN, LIFE UNDER THE "PECULIAR INSTITUTION": SELECTIONS FROM THE SLAVE NARRATIVE COLLECTION [LIBRARY OF CONGRESS] 262 (1970).
[41] GEORGE P. RAWICK, ed., THE AMERICAN SLAVE, VOLUME 13: GEORGIA NARRATIVE PART 4 157 (1972).

were two dominant methods that slaveholders used to handle slave burial. Each case involved a cost-benefit tradeoff for the slaveholder. The first approach was to only allow funerals at nighttime so that the labor of slaves would not be interrupted. While this practice saved on labor costs, it also presented a risk. As in earlier times, white slaveholders were ever suspicious of slaves using funerals as a pretense for organizing rebellion or escape plots. Slave funerals that took place after working hours were much more difficult to monitor and regulate. These concerns provided incentives for slaveholders to allow slave funerals to be held during the day. When this approach was followed, slaveowners looked for ways to expedite the burial process. One particularly impatient slaveholder in Louisiana even prematurely halted slaves from digging a hole for a slave grave and proceeded to jump on the corpse until it awkwardly fit the compact burial pit.[42]

When slaveholder's had economic efficiency first in mind, the quality of slave burials suffered. A former slave in Texas, James Green explained how his master took care of all the burying of slaves to keep everyone working: "He'd say: 'De rest of you niggers get out on de field and go to work.' It didn't make no difference if it was a mother or what dat died. De chillen had to go out and work and not even see where the hole was dug."[43] Rachel Adams, a former slave in Georgia, shared similar sentiments when considering burial practices initiated by the slaveholder. She explained,

I didn't know nothin' 'bout what funeral was dem days. If a nigger died di mornin', de sho' didn't weste no time a-puttin' him right on down in de ground dat same day. Dem coffins never had not shape to 'em; dey was jus' square-shaped pine boxes. Now warn't dat terrible?[44]

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[42] GEORGE P. RAWICK, ed., THE AMERICAN SLAVE, VOLUME 7: OKLAHOMA NARRATIVE 153 (1972).
[43] GEORGE P. RAWICK, ed., THE AMERICAN SLAVE, VOLUME 5: TEXAS NARRATIVE PART 4, SUPPLEMENT SERIES 2 1579-80 (1972).
[44] GEORGE P. RAWICK, ed., THE AMERICAN SLAVE, VOLUME 12: GEORGIA NARRATIVE PART 1 5 (1972).

The practice of using home-made coffins, like the one described above, did little to ameliorate the slaves' dissatisfaction with the white methods of burial. While slaveholders probably considered it a kind gesture, slaves retroactively only comment on these coffins in passing. When coffins are mentioned, it is in an unimpressed tone exemplified by Frances Willingham, the former slave in Georgia: "When one of de slaves died, dey was put in unpainted home-made coffins and tuk to de graveyard whar de grave had done been dug. Dey put 'em in dar and kivvered 'em up and dat was all dey done 'bout it."[45] Slaveholders were often unaware what meaningful accommodations for a slave burial would actually entail.

Although economics usually prohibited time off for any slave activity or event, some slaveholders did make exceptions for funerals. When these occurred, they were almost always under the direction and discretion of the slaveholder and, by extension, his religious beliefs. Henry Cheatem, a man formerly enslaved in Clay County, Mississippi, explained, "Dey would bury de slaves as dey done de white folks," which typically involved a brief Christian service at the grave side.[46] While many slaves did embrace Christianity during their time in bondage, they still describe Christian burial in terms that indicate real religious significance was missing. Elige Davison, formerly enslaved in antebellum Virginia, expressed the following about white burial practice for slaves: "Massa, he builded wodden box and put the nigger in and carry him to the hole in the ground. Us march round the grave three times and that all."[47] Similarly, Willis Winn, a former slave in Louisiana, remembered "every nigger on the place had to go to the grave and walk round and drop in some dirt on him [the deceased]."[48] From these descriptions, white burial practices such as rituals from the Book of Common Prayer (e.g. the famous "ashes to ashes, dust

[45] RAWICK, ed., *supra* note 34, at 157.
[46] YETMAN, *supra* note 33, at 56 (1970).
[47] *Id*. at 92.
[48] *Id*. at 332.

to dust" ritual) and circumambulation seemed to have been puzzling to slaves and often lacked meaning for them. Although the time off was welcomed, it implicitly ensured that slaveholders would dictate the burial procedures to be followed.

In light of the limitations that oft accompanied slave burials allowed during the daytime, the opportunity to hold a nighttime funeral was commonly preferred among slaves. Funerals and burials at night allowed slaves greater autonomy in choosing how they would take place and usually allowed them to observe their own burial rituals with the rest of the slave community. Among these rituals, slaves commonly referenced the formal mourning and wailing mentioned earlier in West African Indigenous religions. In Alabama, one slave named Kitty was known for her commitment to "shouting and a-mourning all night" when a fellow slave had passed to the other side.[49] Chris Franklin, a former slave in Louisiana, related the following description of nighttime funerals among slaves: "Dey sing an' pray all night long. Dey all very 'ligions (religious) in dere profession. De white folks 'lowed 'em to carry on. Dey never come out an' say dey didn't want all dat fuss. An' dat go on all night long. It hardly ever cease."[50] These and other accounts confirm that the practicality of night time funerals for slaveowners incidentally opened ways for slaves to worship and remember their dead. Unfortunately, where laws did not already prohibit nighttime meetings,[51] accommodations were granted only at the will of slaveholders.

Beyond the opportunity cost of funerals, slaveholders were also concerned about the financial cost of burying slaves. The ultimate impact of the material expenses for funerals on the

[49] GEORGE P. RAWICK, ed., THE AMERICAN SLAVE, VOLUME 1: ALABAMA NARRATIVE, SUPPLEMENT SERIES 1 244 (1972).
[50] GEORGE P. RAWICK, ed., THE AMERICAN SLAVE, VOLUME 4: TEXAS NARRATIVE, SUPPLEMENT SERIES 2 1410 (1972).
[51] *See infra* notes 77–79.

religious freedom slaves is unclear. Judicial cases from the early to mid-nineteenth century reveal that slaveowners frequently sued for funeral expenses when one of their slaves was killed or misused by another slaveholder. A case of this sort arose in 1836 Louisiana when a terminally sick slave was transferred from one owner to another. When the purchasing slaveholder, Saul, discovered the illness that took his slave's life was present prior to the exchange, he sued Magee, the former master, for $100 in funeral charges.[52] In *Saul v. Magee*, the Louisiana court awarded only seventeen dollars to Saul for burial expenses. Another case from South Carolina in 1840 awarded the plaintiff sixteen dollars for the cost of "the physian's bill and the funeral expenses [of a slave]."[53] In reality, these damage awards most likely financed funerals in ways that slaveholders knew best and did little to strengthen the religious freedom contentions of slaves.

A final area of interaction between slave burial practice and white slaveholders was the location of graves. Whereas in colonial times, the historical records lacks evidence of slave burial accommodation, nineteenth century evidence presents comparatively more examples to draw from. In both interviews of former slaves and court cases, the antebellum period saw a rise in recognized slave graveyards on southern plantations. At this point, interment was still a relatively private affair, and any sense of a cemetery was typically confined to specific areas of a slaveholder's property rather than public land. One former Georgia slave named Cordelia Thomas explained, "Evvy plantation had its own graveyard wid a fence around it, and dere was a place in it for de slaves nih whar deir white folks was buried."[54] Others made frequent reference to "de Negro buryin' ground, not far f'um whar our white folkses wuz buried."[55] Usually, these

[52] HELEN TUNCLIFF CATTERALL, ed., JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO, VOL. III 511 (1968).
[53] HELEN TUNCLIFF CATTERALL, ed., JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO, VOL. II, 378 (Seibles v. Blackwell) (1968).
[54] RAWICK, ed., *supra* note 34, at 20.
[55] GEORGE P. RAWICK, ed., THE AMERICAN SLAVE, VOLUME 13: GEORGIA NARRATIVE, PART 3 159 (1972).

plantation slave burial grounds were segregated although there were some areas that did include racially mixed plots. Two independent accounts from Texas of former slaves of the same age described mixed graves on one plantation and segregated plots on another.[56] Whether plots remained close together or separate says more about the preferences of the slaveholder than anything else.

In reality, the location of the graves was far less important to slaves than knowing and remembering where those graves could be found. Many slaves retroactively lamented how too many of their family or friends were buried anonymously. Dora Franks, a former slave in Mississippi, recalled, "[a]ll the cullud folks was buried on what dey called Platnum Hill. Dey didn't have no markers nor nothin' at de graves. Dey was just sunk in places. My brother Frank showed me once where my mammy was buried."[57] Given the religious significance of remembering the deceased in West African religious tradition, the ability to locate a family member's grave was deeply important to slaves. A former slave in Louisiana articulated this sentiment in her interview: "W'en ol' marster die he give de culled graveyard on he place to de chu'ch so dat us buryin' place allus be 'membered. He was sho' a good ol' man."[58] Similar to their desires for proper burial rites, slaves placed considerable value on burial grounds that would allow surviving family to carry on their responsibility of remembering the dead.

In the final analysis, the antebellum time frame provides a perceptive and candid look at religious freedom of African American slaves. Due to growing religious diversity and devotion from the second great awakening through the Civil War, this era creates an experimental environment for comparing the religious freedom of free whites and African American slaves.

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[56] GEORGE P. RAWICK, ed., THE AMERICAN SLAVE, VOLUME 6: TEXAS NARRATIVE, PART 5, SUPPLEMENT SERIES 2, 1950–51 1970 (1972).
[57] YETMAN, *supra* note 33, 127–128.
[58] RAWICK, ed., *supra* note 48, at 2040.

This study provides at least two prevailing insights. First, white slaveholders generally did not intentionally protect or attack the religious freedom of slaves because they did not acknowledge the religion of slaves. Instances where slaveholders supported the sacred in slave burial, such as nighttime funerals, work exemptions, and designated graveyards, were usually either concomitant with the slaveholder's other interests or exceptions to common practice.

An initial objection to this conclusion is that the connection between slave burial and religion is instead an expression of culture rather than religion. While there is no precise line between culture and religion, one way to distinguish the two is that religion implicates spiritual obligations whereas culture supports traditions.[59] We might expect that religion blends to culture as rituals continue to occur but our divorced from the original spiritual obligations that gave rise to such rituals. It follows that slave burial, conjure, or other Indigenous practices would more likely fall into a cultural category as African families and communities were separated in the New World. Yet even after the abolition of the slave trade in 1808,[60] African Americans were still forcibly sold across the Atlantic[61] with their religious traditions still presumably close in hand. Furthermore, we should not disqualify African Indigenous burial from religious categorization simply because worshippers failed to use the religious vocabulary familiar to Anglo-American settlers.

Another response to the claim that African American slaves lacked religious freedom in burials is that they were deprived of religious freedom generally. In other words, the outcome of

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[59] *Cf.* Richard Bonney, Reflections on the Differences Between Religion and Culture, 6 Clinical Cornerstone 25, 26 (explaining how culture is easier to see in localized contexts whereas religion tends to transcend geographic boundaries).

[60] The international slave trade was formally abolished by Congress in 1808 in accordance with Article I, Section 9 of the Constitution, illegal trading continued to exist in the decades leading up to the Civil War.

[61] *See* W.E.B. DU BOIS, THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA: 1638-1870 109–12 (1904) (noting how the abolition of the slave trade in the U.S. became "nearly a dead letter" in the decades that followed).

the above analysis is somewhat obvious—no one would expect evidence that slaves enjoyed meaningful religious freedom for their Indigenous beliefs. While it is true the African American religious freedom experience is limited across all belief systems, there is a noticeable difference between accommodation of Christian and Indigenous beliefs. Consequently, the way they accommodated slave religious beliefs focused exclusively on practices that were already familiar to these slaveholders.

The value slaveholders placed on allowing their slaves religious freedom is evidenced by the risks slaveholders undertook to accommodate Christian[62] worship.[63] For example, in mid-nineteenth century South Carolina, Judge John Belton O'Neall urged the state assembly to repeal laws prohibiting slaves from meeting to worship after nine o'clock at night.[64] This South Carolina law was passed in 1803 on the coattails of Gabriel's Rebellion "to prohibit the type of unsupervised, or minimally supervised, religious service that could serve as a pretense for meetings to plan a slave insurrection."[65] Yet courts interpreted the law narrowly[66] until it was deemed a "dead letter[]" in by future South Carolina Supreme Court Justice John Belton O'Neall

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[62] Based on the Christian underpinnings of the common law, it is safe to understand such a right not as a religious liberty, but a Christian right to worship, particularly when the Free Exercise Clause did not do much work until the mid-twentieth century. *See* Jayson L. Spiegel, *Christianity as Part of the Common Law*, 14 N.C. CENT. L. REV. 494, 495 (1984).

[63] *See, e.g.*, The federal and state constitutions, colonial charters, and other organic laws of the state, territories, and colonies now or hertofore forming the United States of America, vol. 5 2785 (Francis Newton Thorpe ed., 1906) https://babel.hathitrust.org/cgi/pt?id=uc2.ark:/13960/t2988ck8z&view=1up&seq=259&skin=2021 ("Since charity obliges us to wish well to the souls of all men, and religion ought to alter nothing in any man's civil estate or right, it shall be lawful for slaves, as well as others, to enter themselves, and be of what church or profession any of them shall think best, and, therefore, be as fully members as any freeman.") (quoting the 1669 North Carolina constitution); *cf.* JAMES L. UNDERWOOD, THE CONSTITUTION OF SOUTH CAROLINA, VOL. 3: CHURCH AND STATE, MORALITY AND EXPRESSION 201–02 (1992) (explaining how the original Carolina constitution's religious liberty for slaves reflects an English common law right to be free to worship).

[64] NEGRO LAW OF SOUTH CAROLINA (John Belton O'Neall ed., 1848), *reprinted in* STATUTES ON SLAVERY: THE PAMPHLET LITERATURE 24 (Paul Finkelman ed., 2007).

[65] Nicholas May, *Holy Rebellion: Religious Assembly Laws in Antebellum South Carolina and Virginia*, 49 THE AM. J. OF LEGAL HIST. 237, 246 (2007).

[66] *Id.*; *see also* JAMES L. UNDERWOOD, THE CONSTITUTION OF SOUTH CAROLINA, VOL. 3: CHURCH AND STATE, MORALITY AND EXPRESSION 202 (1992).

in the mid-nineteenth century.[67] In part, this was because O'Neall recognized such laws "operate as a reproach on us in the mouths of our enemies, in that we do not afford our slaves that free worship of God."[68] But O'Neall also saw how such religious worship was God's "demand[] for all his people," including African American slaves.[69] O'Neall's statement is striking because it suggests an uneasy tension facing slaveholders who sought to uphold religious freedom while preserving the institution of slavery. Many laws on the books in the South prohibited slaves from "reading the Bible, becoming ministers, preaching, and leaving their plantations on 'Sundays, fast days, and holy days.'"[70]

Understandably, these laws reflected slaveholder anxieties about insurrection from witnessing Nat Turner, Denmark Vesey, and Gabriel's Rebellion each unfold from religious meetings. Yet, even as these laws severely limited or regulated freedom of worship for slaves, they also ebbed and flowed with concerns of insurrection. The First Methodist African Church in Charleston allowed majority African American congregations to meet until the Denmark Vesey conspiracy in 1822.[71] Similarly, the Virginia General Assembly responded to Gabriel's Rebellion with their own law restricting nighttime meetings of slaves.[72] The following year, however, the law was relaxed to allow whites to take slaves with them to public worship.[73] Even after Nat Turner's rebellion—an overtly religious slave insurrection—"some masters allowed their slaves to attend mixed-race meetings as temporal distance from Turner's rebellion grew."[74] In both law

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[67] NEGRO LAW OF SOUTH CAROLINA, *supra* note 58, at 24.
[68] *Id.*
[69] *Id.*
[70] Steven G. Calebresi & Abe Salander, *Religion and the Equal Protection Clause*, 65 Fla. L. Rev. 909, 958 (2013) (quoting Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 Cornell L. Rev. 1049, 1051 (1996)).
[71] May, *supra* note 65, at 250.
[72] WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO: 1550-1812 404 (2013).
[73] *Id.*; *see also* May, *supra* note 65, at 247–48.
[74] May, *supra* note 65, at 252.

and practice and even under the most alarming reports of insurrection, slaveholders made room for religious accommodation of slaves to access Christian worship.[75] Compared to countless other freedoms slaves were denied such as citizenship or property, slaveholders incurred greater risks to provide slaves opportunities to worship according to their (slaveholders') beliefs. Their choice to do so is indicative in some sense of white Southerners feelings towards religious freedom rights. While their religious freedom largely relied on privileges as opposed to rights, opportunities to worship as understood by white slaveholders were one of a scarce number of legal accommodations made to African American slaves.

By contrast, no laws accommodating Indigenous beliefs on burials were formally granted; such accommodations were only made available in the law according to the perspective of the majority faith. In antebellum Virginia following Nat Turner's rebellion, nighttime religious services were still allowed, but only when conducted by a white minister.[76] In the same period, Mississippi likewise restricted religious worship of slaves at night except when "conducted by a regularly ordained or licensed white minister" and relating to "some church or regular religious society."[77] There remains uncertainty about the enforcement of these laws just as in earlier time periods; however, the growth of slave patrols to preempt insurrection during this time makes enforcement more likely.[78] As was the case with other laws on slavery, they provided restraints on slaveholder discretion and made personal privileging of Indigenous burial practices all the more improbable.

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[75] The use of South Carolina and Virginia law to illustrate this point is intentional. The three large slave rebellions mentioned—Denmark Vesey, Nat Turner, and Gabriel's Rebellion—all occurred in either South Carolina or Virginia. Accordingly, we would expect these states to impose the most stringent laws restricting slave religious freedom.

[76] ACTS PASSED AT THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA 20-21 (1832).

[77] MORRIS, *supra* note 28, at 346–47 (1996) (citing REVISED CODE OF THE STATUTES AND LAWS OF MISSISSIPPI, 1857 at 247).

[78] *See* Sally E. Hadden, Slave Patrols: Law and Violence in Virginia and the Carolinas 108–09 (2003).

Importantly, this leads to a second insight; namely, religious freedom is fragile when it is based on privileges rather than rights. Even though the Second Great Awakening inspired greater white Christian interest towards death and the afterlife, this changed very little in practice for the way slave worship through burial was accommodated. Granting privilege rather than rights to slaves allowed white settlers to remain in their own definitions of religion and religious freedom. To guarantee robust religious liberty to slaves in practice, slaveholders had to adopt a slave's paradigm of religious freedom. In other words, religious freedom without the beliefs and practices of different faiths to enrich its meaning is hollow. Indeed, oppressed groups like the African American slaves need not even be persecuted or reviled to have their religious freedom removed in such circumstances. Simply failing to understand and accommodate their beliefs ultimately had the same effect. For this reason, the following section traces the idea of overlooking burdens on religious exercise as "incidental," and how that rationale has found its way into the justifications for the current constitutional paradigm of Free Exercise.

III. Modern Implications: Incidental Burdens in Free Exercise Doctrine

Having traced the development of one particular area of religious freedom for African Americans, their sobering experiences distill a common challenge to robust religious freedom. When non-Western religious practice or belief enters a legal system founded on the default view of Western religion, restricting the foreign religious practice or belief is more easily justified and facilitated. Currently, the best example is the Supreme Court's doctrinal framework for Free Exercise. Between two cases decided in 1990 and 1993 respectively, the Supreme Court shifted from a single standard for Free Exercise cases to a bifurcated analysis. Prior to deciding *Employment Division v. Smith* in 1990,[79] the Court's Free Exercise cases principally focused on a

[79] 494 U.S. 872 (1990).

means/ends rationality. First, a "compelling state interest" is required to justify "any incidental burden on the free exercise of [individual's] religion."[80] Even if the state demonstrates an interest of the "highest order," it must also choose the "least restrictive means" for achieving its interest.[81]

Over the years, however, the Court began to shift its focus from the weighing the strength of government justifications—something a federal court is well-positioned to do—to evaluating the size of religious burdens—something a federal court is much less qualified for.[82] For example, in 1986, the Court denied an accommodation to Native American parents who objected on religious grounds to the use of their child's social security number in a federal food stamp program.[83] Yet the majority opinion's path to that conclusion is puzzling. Writing for the Court, Chief Justice Burger reasoned that because the Social Security requirement is neutral and generally applicable rather than an "instance[] of religious persecution and intolerance," there was no legally cognizable burden on free exercise.[84] He then concluded "government regulation that indirectly and incidentally calls for a choice between securing governmental benefits and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons."[85] Almost as an afterthought, the Chief Justice subsequently

[80] Sherbert v. Verner, 374 U.S. 398, 403 (1963) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).
[81] Thomas v. Rev. Bd., Ind. Emp. Section Div., 450 U.S. 707, 718 (1981) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).
[82] *But see* Frederick Mark Gedicks, "*Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 Geo. Wash. L. Rev. 94 (2017) (arguing that secular law analogies can (and should) approximate burdens on free exercise); Christopher C. Lund, *Rethinking the "Religious-Question" Doctrine*, 41 Pepperdine L. Rev. 1013 (2014) (suggesting that court decisions to avoid weighing religious burdens is selectively undertaken to promote their desired religious liberty outcomes).
[83] Bowen v. Roy, 476 U.S. 693 (1986).
[84] *Id.* at 702–04.
[85] *Id.* at 706.

noted the government interest in fraud prevention through Social Security serves to "buttress" their conclusion of no Free Exercise violation.[86]

While the section of the Court's opinion in *Roy* evaluating religious burdens over government justifications garnered only three votes, its dangerous reasoning persisted. Just two years later, the Court decided *Lyng v. Northwest Indian Cemetery Protective Association*.[87] In that case, the Court extended its reasoning in *Roy* to allow logging and roadbuilding projects to damage sacred lands vital to the Indigenous beliefs of the Yurok, Karok, and Talowa.[88] Echoing *Roy*, five Justices reasoned the Free Exercise Clause does not entail "that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions."[89] The Court further reassured itself by noting "the crucial word of the constitutional text is 'prohibit,'" to suggest the Constitution can only stop government action that meets some threshold of violating free exercise.[90]

Roy and *Lyng* ushered in the formal change in Free Exercise doctrine when the Court decided *Employment Division v. Smith* in 1990.[91] A third case dealing with Native American beliefs, *Smith* upheld the denial of unemployment benefits to two Native employees after they were fired for using peyote in a religious ceremony. The Court formally set aside evaluating government justifications against a means/ends proportionality test when the burden on free exercise is "merely the incidental effect of a generally applicable" and neutral law.[92] Rounding

[86] *Id.* at 707.
[87] 485 U.S. 439 (1988).
[88] *Id.* at 441–42.
[89] *Id.* at 450.
[90] *Id.* at 451.
[91] 494 U.S. 872 (1990).
[92] *Id.* at 878; *see also id.* at 892 (O'Connor, J., concurring).

out the framework fashioned in *Smith*, the Court held in 1993 that state action "targeting religious beliefs" places the burden back on the government to evidence a narrowly tailored compelling state interest.[93] As such, government burdens on religious exercise face two standards—a deferential standard for incidental burdens and a heightened standard for targeted coercion.

To the detriment of believers like Indigenous African Americans, constitutional free exercise cases[94] since 1993 have essentially followed this bifurcated approach between *Smith*'s incidental framework and *Lukumi*'s targeting framework.[95] As the African American slave experience with Indigenous beliefs demonstrates, legal accommodations for marginalized belief systems often fail to mobilize legislative support; consequently, believers are left relying on those in power to extend them a religious privilege. Under the Court's Free Exercise framework, this result is exacerbated. Not only will government actors more frequently fail to accommodate religious beliefs, but they have a disincentive to do so. As a unanimous Court recently affirmed in *Fulton*, making any type of accommodation through "individualized exemptions" requires the state to justify its burden on religion through a narrowly tailored compelling state interest.[96] Thus, deciding to accommodate one religion simply opens the government up to more liability from others.

Perhaps more troubling than legislative incentives of this framework are the judicial outcomes. The same sample and scope of religious freedom that prevented accommodation of

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[93] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).
[94] To be sure, the statutory additions of the Religious Freedom Restoration Action (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA) pull much of the weight of protecting religious freedom in the U.S. today. *But see* City of Flores v. Boerne, 521 U.S. 507 (1997) (declaring RFRA unconstitutional as applied to the states).
[95] *See, e.g.*, Fulton v. City of Philadelphia, 593 U.S. ___ (2021) (slip op., at 5) (citing *Lukumi* to explain *Smith* is inapplicable where laws fail to show neutrality towards religion).
[96] *Id.* (slip op., at 5–6) (quoting Smith, 494 U.S. at 884).

African American Indigenous beliefs operates systemically in the judiciary. The Court's framework determines that state action does not amount to a legally cognizable burden under the Free Exercise Clause until government directly coerces believers to act contrary to (or fail to act in accordance with) their beliefs.[97] As other scholars have noted, the idea of coercion as the sole indicator of legally cognizable religious freedom violations is fallacious.[98]

Notably, however, the concept of coercion only tells half the story. Judicial reliance on coercion as a religious freedom standard is especially harmful because it is conceptually trapped in a Westernized default view of religion. Many religious beliefs outside of the Anglo-American tradition are similarly situated to the Indigenous beliefs of African American slaves; in these traditions, religion cannot be compartmentalized from other aspects of life. Whereas Muslims, Jews, and Christians attend mosque, synagogue, or church at regular appointed times, Buddhist, Daoist, and many Indigenous religious traditions are much less modular in their worship. Social scientific study of religion has recently highlighted this reality.[99] Seeking to debias its empirical methods away from the "default view of religion, which focuses on organizations, leaders, and beliefs," scholars are striving to understand how the discipline would be different if Confucian, Navajo, or other non-Western religious paradigm were used.[100] Similarly, U.S. religious freedom law remains stuck in its own default view of Western religion and thus religious freedom.

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[97] *See* 485 U.S. at 450; 476 U.S. at 706.
[98] Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1320–26 (2021) (arguing that coercion as formulated in *Lyng* and other federal court decisions begins with an asymmetric baseline of "omnipresent government interference" for Native Americans rather than voluntary choice).
[99] *See, e.g.*, RELIGIOSITY IN EAST AND WEST: CONCEPTUAL AND METHODOLOGICAL CHALLENGES FROM GLOBAL AND LOCAL PERSPECTIVES (Sarah Demmrich & Ulrich Riegel eds., 2020).
[100] James V. Spickard, *Thinking Beyond the West: Seeing Religions with Unaccustomed Eyes*, *in* RELIGIOSITY IN EAST AND WEST: CONCEPTUAL AND METHODOLOGICAL CHALLENGES FROM GLOBAL AND LOCAL PERSPECTIVES 4–5 (Sarah Demmrich & Ulrich Riegel eds., 2020); *see also* JAMES V. SPICKARD, ALTERNATIVE SOCIOLOGIES OF RELIGION: THROUGH NON-WESTERN EYES (2017).

From the founding to now, the U.S. concept of church-state relations in law presupposes religion as practiced by the former group of faiths (Muslims, Jews, Christians) and not the latter.[101] Consequently, law enters U.S. society with expectations about where religion is (e.g., regular meetings in a building) and where it is not (e.g., wailing with family at a gravesite), and such expectations inform the contours of religious freedom.[102] As a result, government coercion of religious belief is asymmetrically weighted towards the prevailing sample and scope of U.S. religious freedom—one that embraces a Westernized view of religion and what government action is found offensive.[103]

Consider the example of *Roy* already mentioned. The majority's conception of the case was as follows: because the government started social security without religion in mind, it should not be responsible to justify any resulting burdens on free exercise or provide an accommodation.[104] Yet to the Native Americans, their beliefs predated social security; indeed, government disregard for Indigenous beliefs gave rise to coercion when the food stamp program was first created. From the day the program began, these Native Americans were forced into a choice between obtaining food stamps or violating their religious beliefs. Even though, as the majority emphasizes, the Native American plaintiffs were strictly seeking a benefit from

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[101] JOHN WITTE, JR. AND JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 61–62 (4th ed., 2016) ("No founder thought seriously of having to accommodate the African religion of slaves or the traditional religions of Native Americans."). *But see infra* notes 113, 114 and accompanying text (arguing that philosophical rationale for religious freedom at the time of the founding leaves room to expand beyond the Western paradigm of religious freedom); *see also* 15 ANNALS OF CONG. 837 (1819) (addressing an argument made that the Treaty of Fort Jackson "violated the religion of the Indians by demanding their prophets").

[102] *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1133–36 (1990) (arguing how laws affecting religious freedom may reflect the majority faith's religious paradigm).

[103] Importantly, this leads to the recommendation from Barclay and Steele that a baseline of voluntary choice is needed to overcome the systemic bias of using a government coercion standard paired with a baseline of "passive government interference." *See* Barclay & Steele, *supra* note 104, at 1333–43.

[104] 476 U.S. at 703.

government,[105] subsequent Supreme Court decisions have clarified that the Free Exercise Clause "protects religious observers against unequal treatment" such as accessing an otherwise generally available government benefit.[106] The same type of result is what we would expect for any believer whose faith falls outside the sample and scope of U.S. religious freedom. As a result, the Court's Free Exercise distinction between incidental and targeted burdens on religion systemically disadvantages the groups in most need of its protection.

Perhaps the most troubling implication of this framework is how it becomes self-reinforcing—its own systemic oversights fossilize the sample and scope of religious freedom protections. When lawmakers and judges avoid making accommodations for religious freedom, the believer is left to bear the burden. Some may argue that this is precisely what the Free Exercise Clause stood for at the time of the founding and therefore it is the correct action for courts to take today. Yet, there is evidence that the same motivations that animated the founders desire to protect religious freedom logically flow to African American Indigenous religious practices and others.

As explained by James Madison in his *Memorial and Remonstrance Against Religious Assessments*, "It is the duty of every man to render to the Creator such homage and such only as he believes acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[107] Similar language is likewise found in the 1776 Virginia Bill of Rights.[108] Further, Zephaniah Swift, writing in the first legal treatise published in

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[105] *Id.* ("[I]t is appellees who seek benefits from the Government and who assert that, because of certain religious beliefs, they should be excused from compliance with a condition that is binding on all other persons who seek the same benefits from the Government.").
[106] Espinoza v. Montana Dep't of Revenue, 591 U.S. ___ (2020) (slip op., at 8).
[107] *Memorial and Remonstrance Against Religious Assessments, [CA. 20 June] 1785*, FOUNDERS ONLINE https://founders.archives.gov/documents/Madison/01-08-02-0163#JSMN-01-08-02-0163-fn-0002-ptr (last visited Jul. 9, 2022).
[108] *The Constitution of Virginia*, NAT'L HUMANITIES INST. Sec. 16 http://www.nhinet.org/ccs/docs/va-1776.htm (last visited Jul. 9, 2022).

the U.S., explained "where the people in general acknowledge the truth of a particular religion, and the duty of public worship, the legislature may step in to their aid, and enact laws that are necessary to enable them to support public worship in a manner agreeable to their consciences."[109] Even within a primarily Christian paradigm, Swift recognized "a fair construction of this law will give to every person that religious liberty, which leaves no ground for complaint or dissatisfaction."[110] In sum, pre-political obligations from religion gave purchasing power to claims of natural and inalienable rights.[111] As a result, believers could request accommodation in state obligations that conflicted with duties to God.

The idea that religious freedom was about keeping government out of believers fulfilling their obligations to something more than the state extends to African American slave Indigenous beliefs. As already noted in part I, African Indigenous burial was based on the idea of pre-political obligations and duties to one's ancestors. Even without formal religious recognition at its time, those beliefs follow the same logic of religious freedom protection several founders seemed to contemplate. Likewise, religious freedom at the founding was not exclusively preoccupied with coercive acts such as persecution, but also government attempting to place duties to state over obligations to God.[112]

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[109] ZEPHANIAH SWIFT, A SYSTEM OF LAWS OF THE STATE OF CONNECTICUT, IN SIX BOOKS, VOLUME I 146 (1795).
[110] *Id.* Showing he was thinking about more than just Christian faiths, Swift applies these concepts to the worship of a "Jew, Mehometan, or a Brahmin" as well. *Id.*
[111] *See* M. DE VATTEL, THE LAW OF NATIONS: OR, PRINCIPLES OF THE LAW OF NATURE; APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 115 (1796) ("The obligation of sincerely endeavoring to know God . . . being imposed on many by his very nature, it is impossible for him by his engagement with society, to discharge his duty, or deprive himself of the liberty necessary to fulfil it. It must be concluded that liberty of conscience is a natural and inviolable right.").
[112] Because many religious traditions such as Buddhism, Daoism, and Indigenous beliefs do not always recognize a singular, supreme Creator, I take God here to incorporate the highest duties one owes to someone or something as a matter of conscience (such as the duty of African American Indigenous believers to their ancestors). Further, Court precedent likewise recognizes that monotheism is by no means the only protected category of religious beliefs. *See* Torcaso v. Watkins, 367 U.S. 488 (1961).

Outside of historical justifications, modern commentators have related how incidental burdens on religious freedom are problematic. To begin, adopting an incidental burden framework makes a distinction that ultimately awards some plaintiffs "the barest level of minimal scrutiny that the Equal Protection Clause already provides" and others heightened scrutiny.[113] However, the way in which the court decides which burdens are incidental comes from the legislature. These legislative decisions are, in turn, informed by expectations from the U.S. religious freedom narrative about where religion need be accommodated in law. Thus, in one sense, while the Supreme Court does not explicitly follow a definition of religion, it does make decisions about what constitutes a religious burden which are intrinsically based upon the underlying religious practice.[114] Similarly, scholars have highlighted the need to both recognize incidental burdens as constitutionally protected[115] and harmonize those protections across constitutional rights.[116]

Undoubtedly, the religious freedom challenges of African American slaves and those of modern-day believers differ in many ways. Much of the infringement on African American beliefs came through private rather than state action. Furthermore, the Free Exercise Clause would not be applied to the states until after the Civil War and the Fourteenth Amendment. Nevertheless, the relevant parallel between their time and ours are the theoretical justifications underlying the illusory distinction between incidental burdens and targeted attacks on religious freedom. To some observers, only the latter should be legally redressable, leaving the religious freedom of marginalized groups to rely on privilege rather than right. To the individual bearing

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[113] *Roy*, 476 U.S. at 727 (O'Connor, J., concurring).
[114] *Cf.* Samuel J.Levine, *The Supreme Court's Hands-Off Approach to Religious Questions in the Era of COVID-19 and Beyond*, 24 U. Pa. J. of Const. L. 276 (2022) (highlighting the ways in which the hands-off approach to religious questions in the Supreme Court is increasingly "vibrant and vulnerable").
[115] *See, e.g.*, Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996).
[116] *See, e.g.*, Charles F. Capps, *Incidental Burdens on First Amendment Freedoms*, 96 NOTRE DAME L. REV. REFLECTION 136 (2021).

the burden, however, both incidental and targeted burdens violate religious freedom all the same.[117]

IV. Modern Implications: Incidental Burdens in Free Exercise Case Law

The holding of *Smith* justifies incidental violations of religious freedom when oppressed religious practices are overlooked in lawmaking so long as the laws are both "neutral" and "generally applicable."[118] This final section highlights modern examples demonstrating how *Smith* offers limited help to religious groups experiencing disproportionate amounts of incidental government burdens on free exercise. These modern examples draw upon the experience of Native Americans, Santería, Buddhists, and Hmongs in the United States. Each case represents a group with religious practices principally based on beliefs like the Indigenous beliefs of African American slaves where religion is less compartmentalized from aspects of daily life. Consequently, their beliefs also fall outside the sample and scope of the U.S. religious freedom narrative and lack basic legal protections.

The foremost example of overlooking these incidental burdens on religious freedom is the experience of Native Americans since creation of the First Amendment. Like Indigenous religious traditions of burial brought by Africans centuries ago, the Native American religious traditions have struggled to find purchase among the majority of U.S. populace. To those versed in the rites and practices of the Judeo-Christian heritage that undergirds U.S. civil religion, Native American religion can seem fluid and difficult to classify. Native American religion and culture may appear indistinguishable at times. This can lead some outside the belief system to question the sincerity or depth of these religious practices, allowing them to be written off as

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[117] *Cf. Lyng*, 485 U.S. at 450 ("Without ability to make such comparisons, we cannot say that one form of incidental interference with an individual's spiritual activities should be subject to a different constitutional analysis than another.").

[118] Employment Div. v. Smith, 494 U.S. 872, 880–81 (1990).

cultural or even cultish actions that fail to fall within the generally accepted definition of religion. Even at best, when these Native American beliefs are nominally categorized as religion, U.S. law still seems to justify placing these beliefs into a second-class religious freedom status.

A recent case demonstrates this tendency to downgrade Native American religious freedom. Among the most important aspects of Native American worship is the importance of place. Sacred land for Native Americans, like burial for Africans, can form a basis for making connections to their Creator and to each other. Oak Flat in Tonto National Forest, Arizona maintains this sacred status for Apaches living in the area. However, federal government approval has awarded the land to mining companies hoping to profit from the natural resources Oak Flat has to offer. In federal district court, the Apache failed to persuade Judge Steven Logan that Oak Flat merited protection under the U.S. Constitution.[119] Represented by a public interest religious liberty firm, the Apache people continued the legal fight for their land in the Ninth Circuit Court of Appeals.[120]

The Ninth Circuit's decision upheld the government intrusion on the sacred lands.[121] Echoing Supreme Court presuppositions about incidental burdens, the Ninth Circuit reasoned that this government action could not constitute a "substantial burden" on free exercise.[122] Instead, they explained, "[t]he Land Exchange just incidentally keeps everybody—Apache Stronghold's members included—from using Oak Flat: No conditioning of benefit; no coercion."[123] The Ninth Circuit's opinion highlights the damaging connection between finding

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[119] Ryan Knappenberger, *Federal judge rejects Apache Stronghold request to block Oak Flat mine*, CRONKITE NEWS, Feb. 12, 2021 https://cronkitenews.azpbs.org/2021/02/12/federal-judge-rejects-apache-stronghold-request-to-block-oak-flat-mine/.
[120] *See Apache Stronghold v. United States*, BECKET FUND FOR RELIGIOUS LIBERTY https://www.becketlaw.org/case/apache-stronghold-v-united-states/ (last visited Sep. 8, 2021).
[121] Apache Stronghold v. United States, -- F.4th -- 2022 WL2284927 (9th Cir.)
[122] *Id.* at 18.
[123] *Id.*

no coercion and declaring burdens on free exercise as merely incidental.[124] As their opinion makes clear, the government action would still stand "even if the Land Exchange makes worship on Oak Flat 'impossible,'" because only government coercion can amount to a "substantial burden" on religion.[125] The Ninth Circuit further draws an analogy to the special visa program created for ministers of religion, suggesting that denying a visa would not be a violation of religious freedom because believers are not threatened "with a negative outcome."[126]

Besides the previously mentioned problems that come with the nature of coercion,[127] this reasoning errs in several ways. First, the analogy to the visa program does not parallel the situation in Oak Flat—while the visa program was created by government decree, Oak Flat was not. This leads to a second and even more troubling consequence for Indigenous beliefs generally. Because some U.S. laws create new overlapping spaces for government and religion, they produce burdens on religious exercise that otherwise wouldn't exist (such as visas for religious personnel, tax exemptions, and religious tests for government office). But when the form of religious exercise pre-dates government action (such as worshipping on sacred lands, conducting rituals at death, repatriating ceremonial objects, or preserving traditional knowledge), government cannot claim a higher obligation from the individual than their conscience without strong justification. Many, if not most, aspects of Indigenous beliefs flow easily into daily life and commonly fall outside Western conceptions of religion. As a result, government will

[124] *But see id.* at 27 (Berzon, J., dissenting) (doubting that *Smith* should change the way courts define burdens on religious exercise).
[125] *Id*. at 26.
[126] *Id.*
[127] *See* Barclay & Steele, *supra* note 104 (noting how coercion of Native American religious practice pre-dates present-day government action and existed from the very beginning of government relations with Indigenous peoples in the U.S.).

consistently evade the need to justify its actions for "incidental" violations of Native American religious freedom.[128]

Like the Apache, Santería is another religious group that has faced the challenges from their beliefs and practices falling outside the mainstream U.S. religious freedom paradigm. Santería is a syncretistic religion composed of elements from West African Indigenous religion and Caribbean Catholicism. Dating back to late nineteenth century, part of their religious practice includes ritual sacrifices where animals are offered to retain personal communion with a transcendent creator, Olodumare, through Orisha— "the source of consciousness that makes us what we are."[129] It is this crucial relationship between believers and deity that is preserved through ritual sacrifice, known as *ebo*, in Santería religious tradition.[130]

Although not particularly large or well-known, Santería received attention after 1990 when the U.S. Supreme Court decided *Church of Lukumi Babalu Aye v. City of Hialeah*.[131] The city of Hialeah, located in the southern part of Florida, passed a city ordinance that prohibited animal slaughter for religious reasons or otherwise. However, while religion was not considered a legitimate reason to do so, exemptions to the animal slaughter ordinance were provided for other state-licensed purposes.[132] The Supreme Court concluded that granting exemptions to these state actors amounted to unconstitutionally targeting the Santería community and their religious

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[128] *See, e.g.,* Thorpe v. Borough of Thorpe, 770 F.3d 255, 265–66 (3d Cir. 2014) (characterizing Native American repatriation and religiously motivated reburial as an "absurd result" because tribes could "dig up a body with court approval and move it somewhere else for any reason they desire"). The Ninth Circuit's opinion asserts, "[w]ho are we to say whether government action has an 'objective' impact on religious observance or merely 'diminishes [a believer's] subjective spiritual fulfillment.'" *Supra* note 121, at 46. Yet, the Ninth Circuits decision not to decide the centrality of the Apache's land use to their religious exercise places indigenous beliefs into a disadvantaged default of assuming no substantial burden exists. *Id.* at 46. By contrast, the Ninth Circuit's decision to not rule on the centrality of faith for other religious groups maintains a default position of assuming a substantial burden exists. *See, e.g.,* Jones v. Slade, 23 F.4th 1124, 1145 (9th Cir., 2022) (finding a substantial burden on religious exercise was present after an inmate was denied religious texts during Ramadan).

[129] JOSEPH M. MURPHY, SANTERÍA: AN AFRICAN RELIGION IN AMERICA 132 (1988).

[130] *Id*. at 15.

[131] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[132] *Id*. at 528.

beliefs that relied on these ritual sacrifices. The precedent set forth in *Lukumi* later became foundational to the development of religious freedom law for many other religious groups seeking vindication for their rights. This included both minority and majority faiths.[133]

Nevertheless, even with *Lukumi*'s clear protection of Santería's sacrificial practices, practitioners of the faith continue to face burdens under the law. Over a decade after the Supreme Court's decision in *Lukumi* (which had been cited or referenced approvingly at least seven times at that point),[134] city officials in Euless, Texas came to the home of Jose Merced informing him that practicing his religion violated a city ordinance. Eventually, Merced's case was decided by a unanimous Fifth Circuit upholding his right to practice animal sacrifice and initiate priests in the faith in accordance with his religious beliefs.[135] During arguments, the city officials forwarded the view that "a burden [on religion] is not substantial if it is incidental by way of general application."[136] The Fifth Circuit ultimately rejected this view based on the broad language of the Texas Religious Freedom Restoration Act (TRFRA).[137] But even without TRFRA, there should be nothing about making a law generally applicable that lessens a burden on religious exercise. Whether laws target like *Lukumi* or create unintended burdens like *Merced* should not matter to the way we evaluate the religious freedom interests because both cases produce the same burden on the believer.

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[133] *Comp.* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 564 U.S. 418 (2006) (citing Lukumi to demonstrate that granting exemptions to some groups but not others like O Centro Espirita Benficiente Uniao do Vegetal amount to targeting in violation of RFRA), *with* Roman Catholic Diocese v. Brooklyn, 592 U.S. ___ (2021) (explaining that Catholic houses of worship cannot be treated worse than places with comparable activities during times of pandemic closure and mitigation).

[134] *See* Turner Broad., Inc. v. Fed. Comm. Comm'n, 512 U.S. 622 (1994); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994); Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997); Mitchell v. Helms, 530 U.S. 793 (2000); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844 (2005); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

[135] Merced v. Kasson, 577 F.3d 578 (5th Cir. 2009).

[136] *Id*. at 591.

[137] *Id.*

Examples from other faith groups further illuminate this point. Zoning decisions concerning Buddhist houses of worship represents instance where incidental religious freedom burdens play a disproportionate role. After finding the traffic flow and other property specifications of a Buddhist temple to meet town code, the Supreme Court of Connecticut dismissed the Cambodian Buddhist Society's appeal to build based largely on information about a different Buddhist temple in Massachusetts.[138] In part, the Massachusetts town decision drew inferences about the noise level and traffic congestion based on the number of participants in Buddhist festivals.[139] While Cambodian Buddhist festivals like the New Year's festival can raise volume and visitors at temples, these events are similar to what many Americans do to celebrate the New Year.[140] Further, the vast majority of festivals performed involve chanting, prayers, and rituals that do not reach outside the walls of the temple.[141] In justifying its conclusion, the Connecticut Supreme Court explained the town's rejection of the Buddhist temple was "motivated not by religious bigotry but by neutral considerations."[142] Once again, religious interests were more easily set aside when a government body could show it was acting in a neutral or generally applicable manner towards practices it found largely unfamiliar.[143]

A final case from the Hmong community punctuates the harmful justification of incidental harms based on the neutrality and general applicability of laws. Part of Hmong

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[138] Cambodian Buddhist Soc. of CT., Inc. v. Planning and Zoning Comm'n of Town of Newton, 285 Conn. 381, 439–440 (2008).
[139] *Id.* at 440.
[140] CAROL A. MORTLAND, CAMBODIAN BUDDHISM IN THE UNITED STATES 34–35 (2017).
[141] For example, the "holiest day of their religious calendar" celebrates the birth, death, and enlightenment of the Buddha through "walking in a procession around the temple" followed with "prayers, recitations on Buddha's life, and a meal." *Id* at 35–36.
[142] *Id*. at 421.
[143] A similar case was raised years earlier in the town of Bedford, New York where the zoning board was similarly concerned about traffic flow and noise. Nevertheless, that case was decided in favor of the Buddhist community. Pine Hill Zendo, Inc. v. Town of Bedford, N.Y. Zoning Bd. of Appeals, No. 17833-01 (N.Y. Sup. Ct. 2002) (reaching settlement that allowed for religious land use).

religious beliefs includes the sacred nature of the body which prohibits removing organs or performing autopsies after death.[144] Neng Yang, the son of Hmong immigrants from Laos, tragically died in Rhode Island days after suffering a seizure. Because the specific nature of his death was unclear, the medical examiner's office for Rhode Island was called upon to perform an autopsy according to state law. The autopsy was then performed without notifying the parents and in direct violation of their religious beliefs. The district court ultimately concluded even though the state law "did profoundly impair the Yang's religious freedom," the fact that it was both "facially neutral" and "generally applicable" prevented the law's harm to religious freedom from rising "to a constitutional level."[145]As in the cases already mentioned, this interpretation places less weight on religious interests under the Constitution when the laws that burden free exercise are neutral and generally applicable.

In explaining through these contemporary examples, it is not novel to introduce criticism of the Supreme Court's neutral and generally applicable test under *Smith*. While many scholars have presented the legal reasons this case is so problematic,[146] this paper attempts to present a close, but distinguishable issue. *Smith* is troubling because of the ways it constitutionalizes the narrative of U.S. religious freedom this article endeavors to reappraise. While the *Smith* standard

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[144] *See* Lor Maichou, Phia Xiong, Linda Park, Rebecca J. Schwei, and Elizabeth A. Jacobs, *Western or Traditional Healers? Understanding Decision Making in the Hmong Population*, 39 W. J. of Nursing Rsch. 400, 402–03 ("Hmong people who still practice traditional religion fear autopsies because they believe that the disfigurement of the body may prevent the reincarnation of the soul."); *see also Hmong Refugees and the US Health System*, CULTURAL SURVIVAL Q. MAG. (Mar. 1988) https://www.culturalsurvival.org/publications/cultural-survival-quarterly/hmong-refugees-and-us-health-system.

[145] Yang v. Sturner, 728 F. Supp. 845, 853-57 (D.R.I.), *withdrawn*, 750 F. Supp. 558 (D.R.I. 1990). *See also* Douglas Laycock, *New Directions in Religious Liberty: The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221, 226 (1993).

[146] *See, e.g.*, Laycock, *supra* note 77; Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. I, I; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990); *see also* Fulton v. City of Philadelphia, 593 U.S. ___ (2021) (Gorsuch, J., concurring) ("*Smith* has been criticized since the day it was decided.").

will continue to adjust in one form or another for adjudicating cases, the justification has persisted since the early years of the U.S. religious freedom narrative.

While other examples could be cited, Native American, Santería, Buddhist, and Hmong religious practices represent contemporary challenges that come from a biased sample or scope of religious freedom. Like African American slave burial, these religious traditions diverge from the Western conceptions informing U.S. civil religion tradition. Accordingly, this may leave many unsettled about how compelling religious freedom claims should be for these groups.[147] As a result, robust religious freedom requires additional effort to create an understanding of these beliefs and practices that values the perspective of believers vis-à-vis their own faith. This involves moving from chanting a monotonic narrative of religious freedom in the U.S. to a harmony of voices that add both depth as well as dissonance to the story.

V. Conclusion

This paper has endeavored to make several claims about religious freedom. First, at a moment of racial reckoning in our nation's history, the article aims to also spell out a religious freedom reckoning. The early African American experience demonstrates a need for expanded sample and scope of a working definition of religious exercise to achieve robust religious freedom. As we add more chapters to our nation's religious freedom narrative, the experience of oppressed groups suggests that incidental burdens from neutral and generally applicable laws are particularly problematic for minority faiths.

The cited case studies, both past and present, underscore an opportunity for reshaping the religious freedom narrative from one about rights—a primarily Western concept—to a

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[147] Indeed, Florida residents are still expressing concern about Santería rituals. *See* Amy Bennett Williams, *Understanding Santería and Afro-Cuban spiritual traditions*, HERALD TRIBUNE, Jan. 31, 2020 https://www.heraldtribune.com/zz/news/20200131/florida-news-understanding-santeriacutea-and-afro-cuban-spiritual-traditions.

synergizing story of interconnected rights and responsibilities—a relatively non-Western conceptualization. The rights centered path of addressing this issue would require restructuring or rewriting Free Exercise jurisprudence to tighten scrutiny on incidental government burdens on religious freedom. As explained in part III and shown in part IV, the distinction between targeted and incidental burdens on religious freedom disproportionately leaves marginalized faith groups without legal recourse. Conversely, efforts to remove this distinction would expand religious freedom consistent with the logic at the founding. Furthermore, returning to a focus on government justifications rather than burdens on religion will better harmonize the Free Exercise Clause with other First Amendment doctrine. Courts continue to express their unwillingness to engage in evaluating the sincerity of religious beliefs yet perpetuate the distinction between incidental and substantial religious burdens.[148] Focusing first on government justifications may help them avoid this problem entirely while directing them to an analysis better suited to their skill set.[149]

Notably, changes in constitutional law can also be supplemented by legislative action. This approach may be focused on rights or responsibilities. For example, laws such as RFRA and RLUIPA show how legislatures can fill gaps in constitutional law through protecting rights. However, legislative efforts to work carefully crafted religious accommodations into their own lawmaking may produce similar results. With more work on the front end to understand and tailor accommodations, the potential of litigation on the back end is reduced. More importantly, as laws come to adopt a new paradigm of where religion exists in society and how to

[148] *Supra* note 121, at 46.
[149] *Supra* note 82. *See also* Note, *Constitutional Constraint in Free Exercise Analogies*, 134 HARV. L. REV. 1782, 1802 (2021) (arguing for a shift in Free Exercise Clause inquiry from secular/religious comparisons to scrutiny of government justifications for infringing on religious exercise).

accommodate it, the sample and scope of religious freedom will invite more faiths into the public square.

Nevertheless, even if we identified the perfect formula for Free Exercise jurisprudence, there will always be ways this falls short without a commitment to responsibilities as well as rights. It will be the norms and culture surrounding religious freedom that determine what conflicts come before the courts. This leads to the second, less Westernized path which emphasizes responsibility of legislatures and other rights holders to understand and elevate unfamiliar or overlooked religious beliefs. Responsibility for bringing incidental burdens to the surface ultimately rests on actors beyond the burdened community. Perhaps one of the most telling failures of this is the subtitle of Albert Raboteau's pathbreaking work on slave religion: the "invisible institution."[150]

Overcoming this "default view" of religious freedom will require proactive protection rather than reactive repair of religious freedom rights—something mainstream U.S. religious communities are well equipped to do. Following Christian Smith's observations, religious groups would bring 1) transcendent motivation to recognize and help the "other" 2) organizational resources beyond the capacity of marginalized groups 3) shared religious identity to connect with non-Western faiths 4) social and geographic positioning in the U.S., 5) privileged legitimacy in the U.S. political framework, and 6) institutional self-interest including mutual resistance to state encroachment on freedom of religion.[151] On a macro level, religion has already played a critical role in social movements such as abolitionism, civil rights, Polish anti-communist workers

[150] ALBERT J. RABOTEAU, SLAVE RELIGION: THE INVISIBLE INSTITUTION IN THE ANTEBELLUM SOUTH (1978).
[151] Christian Smith, *Introduction: Correcting a Curious Neglect, or Bringing Religion Back In*, *in* DISRUPTIVE RELIGION: THE FORCE OF FAITH IN SOCIAL-MOVEMENT ACTIVISM 9–22 (1996); *see also* Elizabeth Clark, *The Impact of Religion and Religious Organizations*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4119695 (last accessed Jul. 14, 2022).

movements, and nonviolent protests against colonialism, religious discrimination, and war.[152] Ultimately, communities of believers and non-believers will need to invite one another into their own religious freedom paradigm and push back against "religious freedom talk" that has "privileged and prioritized" dominant faith groups in the U.S.[153]

Far from removing the idea of civil religion in the U.S., these steps will enhance and grow the U.S. civil religious tradition in way that sustains a founding principle in an everchanging nation. Like African American slaves, modern day oppression of religious groups demonstrates that robust religious freedom is not only about championing the rights of an oppressed group but seeing the benefits and responsibilities that flow from a nation committed to religious freedom for all. The U.S. religious freedom narrative is largely a story of prosperity and persecution. It is filled with experiments—successful and failed—of religious freedom rights defended and abused. But amongst this rich narrative's hills and valleys sits an overlooked terrain—the experiences of religious groups we have yet to recognize as such. Adding their stories might change the way some understand previous chapters in the narrative, but it will also improve the chapters we have yet to write.

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[152] *See* Clark, *supra* note 159, at 15; Meghan Campbell, *Religious Nonviolence: An Analysis of Mahatma Gandhi, Martin Luther King, Jr., and Thich Nhat Hahn*, 11 THE HILLTOP REV. 43 (2019).

[153] Tisa Wenger, *The Black Church and Religious Freedom, in* AFRICAN AMERICANS AND RELIGIOUS FREEDOM: NEW PERSPECTIVES FOR CONGREGATIONS AND COMMUNITIES 39 (Sabrina E. Dent & Corey D.B. Walker eds., 2021).