Ecoworship and Federal Environmental Law

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As the growing land stewardship movement has joined with rising evangelical environmentalism, religious worship has intersected with ecological protection to spark the rise of a new variety of ecoworship. Given the U.S. Supreme Court's recent willingness to expand constitutional protections for religious exercise and trim bulwarks against Establishment Clause challenges, religious claimants now have bolstered powers to assert exemptions from governmental mandates based on their free exercise of faith. The growing role of faith-based environmentalism and institutional religions in private environmental protection will likely lead to similar claims for religious exemptions for pro-environmental activism based on faith. Most legal scholarship so far has squarely focused on the general foundational question of how federal and state constitutional laws apply to protect religiously motivated actions both within and outside environmental law.

This Article takes a different tack. Federal environmental law is overwhelmingly statutory, and state environmental laws rely on a similar base. It is time to re-read these statutes through the newly expanded constitutional lens. This path yields two notable results. First, the increased accommodation for Free Exercise claims and revamped

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Establishment Clause parameters will inevitably shape the way that courts will interpret environmental statutes that impinge on religious activities. This interpretive tendency has a deep historical provenance in federal and state courts, although it is difficult to extract from the outsized historical shadow of Holy Trinity Church v. United States. *Second, an altered interpretation of federal statutory terms through the new religious exercise lens could grant special status to proactive environmental initiatives impelled by religious beliefs, as essentially protected environmental worship. This reinterpreted statutory language could expand standing for certain claimants raising federal statutory claims, force the federal government to reassess the way it selects clean-up remedies or environmental permit limits in certain contexts, redefine the scope of environmental justice policies, and alter the degree of regulatory limitations on environmentally protective uses of land by religious actors.*

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I. INTRODUCTION

Imagine the future New Ecology Church. Members of this new religious movement would take seriously their divine commandment to protect the Earth as an expression of respect for God's handiwork and as the embodiment of prayerful worship. Church members, as a result, could tithe directly for the purchase of undeveloped land to permanently set aside as nature sanctuaries for worship and meditation. They would actively seek out environmental harm and damage, and then invest themselves directly in salving the Earth's wounds. This work might take the form of private cleanups of contaminated land, creation of environmental care centers, private collection of wastes and toxic garbage for proper disposal, and other proactive environmental practices. But, at heart, these New Ecology Church members would not take these steps to be good environmentalists—they would worship in a fundamentally environmental way at the temple of nature and protect their open-air church.

Inevitably, such a new Church's zeal for the environment would conflict with secular demands and desires to economically develop fallow land. If the faithful respond that their evangelical environmentalism deserves special legal status under U.S. environmental laws, how should the courts respond?

This example, while fictional, is not fanciful. Environmental activism often springs from deeply held religious beliefs.[1] As federal and state courts navigate the burgeoning law on constitutional and statutory accommodations of religious beliefs and exercise in the workplace, schools, and health care, environmental law has begun to face similar demands. In prayers and pleadings, litigants now point to their sincere religious beliefs—and their freedom to express them—as a basis to oppose or promote environmental actions. High-profile

1. *See, e.g.*, JUSTIN FARRELL, THE BATTLE FOR YELLOWSTONE: MORALITY AND THE SACRED ROOTS OF ENVIRONMENTAL CONFLICT 2–8 (2015) (conflicts over use of Yellowstone region reflect deep moral, cultural, and spiritual beliefs that often lie hidden behind technical, economic and scientific framings of legal and policy challenges). For example, the Evangelical Environmental Network is a multidenominational group that describes itself as "a ministry that educates, inspires, and mobilizes Christians in their efforts to care for God's creation, to be faithful stewards of God's provision, to get involved in regions of the United States and the World impacted by pollution, and to advocate for actions and policies that honor God and protect the environment." *Mission & History*, EVANGELICAL ENVIRONMENTAL NETWORK, https://creationcare.org/who-we-are/ [https://perma.cc/YS6G-B22F] (last visited Feb. 19, 2023). Its religious philosophy has led the Network to appear in judicial proceedings and undertake grass roots activism to promote environmental protection. *Id.* *See also infra* note 180.

environmental disputes in the United States consequently have taken an increasingly theological hue.

The long-running Dakota Access Pipeline litigation, for example, featured a last-ditch effort by the Cheyenne River Sioux Tribe to enjoin the pipeline's completion by claiming the pipeline, once operating under Lake Oahe, would harm the tribes' spiritual practices and beliefs.[2] While the district court ultimately rejected the tribes' request for an injunction,[3] similar claims have surfaced in other environmental lawsuits alleging that the government's actions or tacit approval of private action unreasonably burdened religious expression or freedom of religious belief. In another action, the Adorers of the Blood of Christ (a Roman Catholic order of nuns) alleged that the Federal Energy Regulatory Commission's approval of the Atlantic Sunrise Pipeline's placement on their land would force the order to violate its religious convictions to preserve the Earth and dedicate its own property to environmental healing.[4] While the Third Circuit ultimately rejected their claims on procedural grounds,[5] the decision left open the possibility of future claims raised in a timely manner. The Ninth Circuit recently faced a similar dispute over objections raised by several Native American tribes that a proposed federal highway expansion would curtail their worship on affected lands, but the court did not squarely resolve the question.[6]

The call for environmental stewardship cuts across multiple faiths. Hinduism has seen the emergence of calls for a faith-based approach

2. Andrew A. Westney, *Feds, Dakota Access Fight Religious Opposition to Pipeline,* ENV'T L. 360 (Feb. 22, 2017), https://www.law360.com/articles/894547/feds-dakota-access-fight-religious-opposition-to-pipeline [https://perma.cc/K22R-KHYM]; E. Gilmer, *Pipeline Foes Pivot to Religious Freedom,* E&E NEWS, GREENWIRE (Feb. 9, 2017), www.eenews.net/greenwire/stories/1060049828. Notably, religious leaders have taken highly visible roles in other environmental actions without explicitly raising religious legal claims. *See, e.g.*, State v. Spokane Cnty. Dist. Ct., 198 Wash. 2d 1, 2 (2021) (upholding Reverend George Taylor's ability to raise climate necessity defense against criminal charges for trespass on rail tracks used to convey fossil fuels).

3. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77 (D.D.C. 2017).

4. Complaint at 2, Adorers of the Blood of Christ v. Fed. Energy Regul. Comm'n, No. 5:17-cv-03163-JLS (E.D. Pa. July 14, 2017).

5. Adorers of the Blood of Christ v. Fed. Energy Regul, Comm'n, 897 F.3d 187 (3d Cir. 2018); *see* discussion *infra* Part III(C).

6. Slockish v. U.S. Dep't of Transp., 2021 WL 5507413 (Nov. 24, 2021) (deemed moot after dismissal of Oregon Department of Transportation on Eleventh Amendment grounds and lack of federal agency authority under easement). The district court in Slockish v. U.S. Fed. Highway Admin., No. 3:08-CV-01169-YY, 2021 WL 683485 (D. Or. Feb. 21, 2021) had adopted the magistrate judge's report rejecting the tribe's Religious Freedom Restoration Act (RFRA) and constitutional claims. Slockish v. U.S. Fed. Highway Admin., No. 3:08-CV-01169-YY, 2020 WL 8617636 (D. Or. Apr. 1, 2020).

to climate change that differs from the perspective of Abrahamic faiths.[7] Islamic environmentalism also has a deep and rich history that has spurred ecological activism and political activity to protect the environment and respond to risks posed by climate change.[8] Each religious tradition emphasizes a similar core concept: they identify communion with nature as central to their relationship with a higher deity, and they stress the need to protect the environment as a religious duty.[9]

These lawsuits reflect the tangled—and frequently adversarial—historical relationship shared by church, nature and environmental law.[10] Some of the largest faiths and religious institutions have expanded and deepened their commitments to environmental protection and their stewardship of God's handiwork in the natural world. With Pope Francis' bold *Encyclical on Climate Change and Inequality* at the vanguard,[11] a growing number of other churches, religious leaders, and adherents have publicly committed to serve as stewards of nature, responsibly oppose actions that damage the environment, and seek sustainable lifestyles that preserve natural

7. The Convocation of Hindu Spiritual Leaders adopted an inaugural Hindu Declaration on Climate Change at the Parliament of the World Religions in 2009. The Declaration explicitly emphasizes that Hindus have an inherent duty to protect the environment. *Hindu Declaration on Climate Change*, THE OXFORD CENTRE FOR HINDU STUDIES, http://www.hinduclimatedeclaration2015.org/english [https://perma.cc/4RNM-MH5P] (last visited Feb. 13, 2023); Priscilla Tay, *Can Religion Teach Us to Protect Our Environment? Analyzing the Case of Hinduism,* ETHICS & INTERNATIONAL AFFAIRS (Apr. 23, 2019), https://www.ethicsandinternationalaffairs.org/2019/can-religion-teach-us-to-protect-our-environment-analyzing-the-case-of-hinduism/ [https://perma.cc/79KN-4P76]; Murali Balaji, *Hindu climate activists take lead on combating climate change,* YALENEWS (Feb. 15, 2019), https://news.yale.edu/2019/02/15/hindu-climate-activists-take-lead-combating-climate-change [https://perma.cc/7EBV-UVRA].

8. Jens Koehrsen, *Muslims and Climate Change: How Islam, Muslim Organizations, and Religious Leaders Influence Climate Change Perceptions and Mitigation Activities,* 12 WIRE CLIMATE CHANGE (May 2021); Anna M. Gade, MUSLIM ENVIRONMENTALISMS: RELIGIOUS AND SOCIAL FOUNDATIONS chap. 4 ("Roots and Branches of Islamic Environmental Law") (2019); ROSEMARY HANCOCK, ISLAMIC ENVIRONMENTALISM: ACTIVISM IN THE UNITED STATES AND GREAT BRITAIN, 3–6 (2017); Soumaya Pernilla Ouis, *Islamic Ecotheology Based on the Qur'an*, 37 ISLAMIC STUD. 151, 151-152 (1998).

9. KAREN ARMSTRONG, SACRED NATURE: RESTORING OUR ANCIENT BOND WITH THE NATURAL WORLD 29–53, 136–143 (2022) (describing similar emphasis on ecological values by Confucianism, Daoism, Kabbalistic Judaism, Islam, and Hinduism).

10. Gregory E. Hitzhusen & Mary Evelyn Tucker, *The Potential of Religion for Earth Stewardship,* 11 FRONTIERS ECOLOGY ENV'T 368 (2013); RODERICK FRAZIER NASH, THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS 87–120 (1989) (describing the "Greening of Religion" in the United States and England).

11. POPE FRANCIS, ENCYCLICAL ON CLIMATE CHANGE & INEQUALITY—ON CARE FOR OUR COMMON HOME (2015).

resources for future generations.[12] Given the vast property holdings by large religious organizations,[13] the business and financial operations of megachurches,[14] and the large number of faithful adherents whose behavior can have an outsized collective impact,[15] this growing movement toward religious environmentalism has huge potential to accomplish important environmental goals. It also poses a growing challenge to infrastructure construction or other public land uses that might have environmental impacts.

12. *See, e.g.*, Albert C. Lin, *Pope Francis' Encyclical on the Environment as Private Environmental Governance*, 9 GEO. WASH. J. ENERGY & ENV'T L. 33, 38–44 (2018); ROGER GOTTLIEB, A GREENER FAITH, RELIGIOUS ENVIRONMENTALISM AND OUR PLANET'S FUTURE 9 (2006); *Solar Congregations and Resources,* CALIFORNIA INTERFAITH POWER & LIGHT (Mar. 2016), https://interfaithpowerandlight.org/congregational-solar/ [https://perma.cc/HD9G-ZJ6E]. S*ee also* James Osborne, *Evangelicals See the Light on Climate Change,* HOUSTON CHRON. (Oct. 1, 2019), https://www.houstonchronicle.com/business/energy/article/Evangelicals-see-the-light-on-climate-change-14481442.php [https://perma.cc/SU4H-XMTD]; Benjamin Hulac, *1,000 sermons: Clergy invokes kids' case from the pulpit,* E&E NEWS CLIMATEWIRE (Oct. 19, 2018), www.eenews.net/climatewire/stories/1060103729. Some churches may also seek environmental action because climate change directly threatens their locations of worship and operations. Daniel Cusick, *Holy water: Hundreds of U.S. Churches Face Climate Risk,* CLIMATEWIRE (July 28, 2020), www.eenews.net/climatewire/stories/1063641465.

13. For example, the Catholic Church owns approximately 177 million acres of land, and is the largest non-governmental landowner in the world. *Church Properties Represent Substantial Assets*, FITZGERALD INSTITUTE FOR REAL ESTATE, UNIVERSITY OF NOTRE DAME, https://realestate.nd.edu/research/church-properties/ [https://perma.cc/H29H-BGVS] (last visited June 29, 2021). The Church of Latter Day Saints owns over one million acres of property in the continental United States. *See The Mormon Global Business* Empire, BLOOMBERG, https://www.bloomberg.com/news/photo-essays/2012-07-12/the-mormon-global-business-empire?leadSource=uverify%20wall#xj4y7vzkg [https://perma.cc/FQ4K-WW9M] (last visited June 29, 2021). The Church of Latter Day Saints is one of the largest private land holders in Florida. Terrence McCoy, *The Mormon Church Will Soon Own More Land Than Anyone in Florida,* MIAMI NEW TIMES (Nov. 8, 2013), https://www.miaminewtimes.com/news/the-mormon-church-will-soon-own-more-private-land-than-anyone-in-florida-6519089 [https://perma.cc/EB7R-E5M2] (overall landownership by Mormon Church in Florida is nearly 670,000 acres).

14. Megachurches do not have a formal definition, but one recent report describes them as Protestant churches with regular attendances (pre-pandemic) of 2,000 or more adults and children. There are roughly 1,750 megachurches in the United States. The average U.S. megachurch budget is $5.3 million (median), and an average of 96% of a megachurch's total budget comes from participant contributions. Excluding capital campaigns, only a small fraction of megachurch revenues come from rental income or business services provided directly by the church (as opposed to non-religious separately incorporated business ventures owned or controlled by the church). WARREN BIRD & SCOTT THUMMA, HARTFORD INST. FOR RELIGION RSCH., MEGACHURCH 2020: THE CHANGING REALITY IN AMERICA'S LARGEST CHURCHES 20 (2020).

15. In 2012, church membership in the United States totaled 145,691,446 people. That number reflected a gradual decline in overall church membership in the United States over the past forty years. CLARE J. CHAPMAN, YEARBOOK OF AMERICAN & CANADIAN CHURCHES 2012 (Eileen W. Lindner ed., 2012); *Fast Facts About American Religion*, HARTFORD INST. FOR RELIGION RSCH., http://hirr.hartsem.edu/research/fastfacts/fast_facts.html [https://perma.cc/8LVK-ESF5] (last visited June 29, 2021).

Ecological worship, in this context, means the exercise of religious faith through actions intended to protect the environment for theological reasons. It differs from numerous other terms that blend ecumenical motives with environmental protection,[16] including, in particular, worship of the environment itself as a religious entity or deity. It also distinguishes religiously motivated environmental protection from actions by religious entities undertaken for economic or policy benefits. Its essence is that proactive steps to protect the environment, or forestall ecological harm, are a form of worship and free exercise of religious beliefs.

Under U.S. law, these types of religious environmental initiatives must proceed within a collection of environmental statutes that are essentially agnostic to individual vulnerabilities or preferences. In essential ways, these laws do not facially account for or consider aspects of personal identity such as religious and spiritual beliefs or practices. U.S. environmental laws and regulations generally seek to extend equal protections to everyone within their compass, and governmental agencies usually will not explicitly adjust their implementation of environmental obligations in light of the identity, beliefs, or interests of the person protected or affected by them. This deeply egalitarian perspective assumes, essentially by policy fiat, that environmental risks and concerns affect human health and environmental interests in largely the same way with little material individual variation. As a result, federal and state courts have rarely found that certain groups or individuals should receive special environmental protections or heightened safeguards under federal and state statutes or regulations designed to protect the general public.[17]

Environmental law's agnosticism towards individual identity faces an emerging challenge. Federal and state statutes have expanded the scope of protection accorded to expressions of religious belief and religiously-motivated actions, and courts have begun to extend those

16. Similar concepts include ecotheology, ecospiritualism, and liturgical environmentalism. These other terms tend to focus on the relationships between human worshippers within a church as they act collectively to protect the environment.

17. Some uniquely affected groups sought greater environmental protections under other environmental statutes, such as the Americans with Disabilities Act, because they claimed heightened sensitivity to toxins and environmental impairments. These cases generally proved unsuccessful. *See* discussion *infra* note 49. While complaints of environmental injustice raised under constitutional or statutory grounds have historically failed to produce meaningful relief, the Biden Administration's renewed commitment to environmental justice as a legal framework for action may lead to greater recognition of individual vulnerabilities in future environmental permitting and regulations.

protections to individual conduct that might otherwise fall under general prohibitions that do not explicitly target religious actions.[18] This heightened accommodation for religious exercise through Free Exercise exemptions and Establishment Clause claims has led the current U.S. Supreme Court to strike down applications of state and federal anti-discrimination laws and regulations that impermissibly burden religious actions.[19] This debate has flared anew with federal constitutional challenges to governmental actions that burden religious expression,[20] but additional powerful judicial rulings have focused on federal and state statutes that require judicial strict scrutiny of state actions that substantially burden sincere religious activities.[21]

A rich scholarly debate has focused on whether religiously motivated actions might receive heightened protection under federal and state constitutions and religious liberty. This Article focuses on a different aspect: how the Court's expanded Free Exercise jurisprudence will reframe our interpretation and application of statutory laws and, in particular, federal environmental legislation. While this constitutional predicate sets important foundations for protections accorded environmental worship, the statutory terms will likely serve as the first, and predominant, line of analysis for most legal challenges.[22] In particular, if the Court follows through on its recent signals to overturn long-standing precedents such as *Employment Division v. Smith*,[23] religious institutions and faithful individuals may find it easier to successfully contend that federal environmental statutes should be reinterpreted to assure that their application meets linguistic and substantive canons read through this new perspective.

18. *See* discussion *infra* Part II(A).

19. *See* discussion *infra* Part II(A)(1).

20. *See* discussion *infra* Part II(A)(2).

21. *See* discussion *infra* Part II(A).

22. This analysis will not include the outstanding prior scholarship that focuses on this issue from the opposite perspective: the risk that RFRA, RLUIPA and Free Exercise exemptions might undermine environmental protection programs under other federal and state laws. Zachary Bray, *RLUIPA and the Limits of Religious Institutionalism,* 2016 UTAH L. REV. 41 (2016); Kellen Zale, *God's Green Earth? The Environmental Impacts of Religious Land Use,* 64 ME. L. REV. 207 (2011). *But see* discussion *infra* Part IV (managing risks from accommodating religious environmentalism claims).

23. In *Fulton,* Justices Alito and Gorsuch provided concurring opinions that voiced great frustration that the majority had failed to squarely revisit *Smith* and argued vigorously that the Court should overrule the decision. *See* discussion of *Fulton infra* note 81.

This exploration will follow three stages. First, it examines how the Court's expanded Free Exercise jurisprudence might apply to religiously motivated environmental actions, including additional statutory protections provided by the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[24] Second, it weighs whether the new Free Exercise framing will affect statutory interpretation doctrines that apply to religiously motivated environmental acts. In particular, it traces the impact of *Holy Trinity Church*[25] and its progeny on the interpretation of federal statutes that affect religiously motivated actions and its impact on statutory stare decisis doctrines. And third, this analysis reviews key federal environmental statutes to see how their terms might need an updated interpretation. For example, federal environmental statutory terms may need to account for religious values in determining standing, scope of environmental impact statements, selection of remedies for environmental remediations and application of state clean-up standards, and expanded conceptions of environmental justice.

This conclusion, however, needs careful cabining. An overzealous reading of federal statutory terms to shield religiously motivated environmental actions creates a risk of proliferating claims for exemptions from standards and regulations that otherwise protect public peace and safety. This risk can be constrained, however, by precedents that focus on religious exemptions that pose special public hazards or dangers.[26]

II. WHERE ENVIRONMENTAL STATUTES AND RELIGIOUS FREEDOM

24. While Native American tribes have played a central role in religious challenges to environmental mandates, other complex fields of law govern those legal actions. For example, tribal claims may include treaty obligations, tribal law, and other federal laws explicitly dedicated to protecting tribal cultural resources and possessions. *See generally* AM. L. INST., RESTATEMENT OF THE LAW OF AMERICAN INDIANS (2023). As a result, this Article will not focus on claims rooted uniquely in tribal laws or special legal status.

25. Rector of Holy Trinity Church v. United States, 143 U.S. 457 (1892).

26. *See* discussion *infra* Part IV.

PROTECTION LAW OVERLAP

To determine how religious freedom protection doctrine and environmental protection laws overlap, the first step is to assess the zones of interests and values protected by each set of laws. While both facially seem to target wholly separate spheres of activity, they nonetheless coincide in certain core sets of actions where environmental initiatives spring from religious motivations, and where religiously motivated conduct might command the pursuit of environmental goals.

A. Identity Agnosticism in Environmental Protection Law

Federal and state environmental quality protection statutes largely work within two frameworks: health protection and technology-forcing. The health protection model focuses on personal health and safety. These laws generally seek to protect the public from injury caused by the emission of pollutants in harmful quantities from another person or institution. Under this model, federal and state environmental statutes focus on injuries that a person may inflict on other individuals or on interests held in common by the public.[27] To achieve this end, environmental statutes seek to either (i) determine a level of pollutants (even if zero) that a facility can emit into the environment without creating an unacceptable risk of human injury or property damage to the public at large or to protected ecological resources, or (ii) imposing responsibility and liability on the person who emits the pollutants into the environment for the costs of abatement, cleanup, or personal damages.

This mechanism, for example, roughly explains how emission standards are set under the federal Clean Air Act (CAA) for National Ambient Air Quality Standards (NAAQS) and permit limits under non-attainment New Source Review (NSR) and Prevention of Significant Deterioration (PSD) permits,[28] major source emissions under the New

27. This orientation reflects some of the deep historical roots that modern U.S. environmental law shares with tort law, including the special role played by enforcement of public nuisance actions by the sovereign. While typical nuisance actions focused on the individual harm suffered by individual plaintiffs, the duty of care owed to those plaintiffs depended on the actions of a hypothetical reasonable individual rather than the unique preferences or vulnerabilities of the injured party. More tellingly, public nuisance actions could only vindicate injuries to rights held in common by the public, and individuals typically cannot bring public nuisance actions unless they suffer special injuries. Denise Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule,* 28 ECOLOGY L.Q. 755 (2001).

28. 42 U.S.C. §§ 7470–7513.

Source Performance Standards under both the federal Clean Air Act and the Clean Water Act (CWA),[29] and hazardous characteristics of solid wastes under the Resource Conservation Recovery Act (RCRA) as well as land disposal treatment standards for discarded hazardous wastes under RCRA.[30] The hallmark for many of the protective standards set by these programs—for example, preventing more than one excess cancer death per one million people[31]—reflects a broadly generic view of the individual variability of public sensitivity, perceptions, and preferences.

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or "Superfund"), for example, relies on this identity-neutral approach at multiple levels. This keystone environmental statute empowers the federal government to undertake clean-ups of facilities highly contaminated by hazardous substances and pollutants.[32] To do so, CERCLA casts a broad net of liability over potentially responsible parties who either owned or operated the site, transported hazardous substances to the facility, or arranged for the substances' treatment or disposal.[33] Notably, the statute defines "hazardous substances" through a broad amalgam of dangerous materials regulated under other federal environmental statutes.[34] None of these programs focus on specific vulnerabilities or sensitivities of individuals or discrete subgroups.[35] In addition, CERCLA relies on statutory criteria to select permanent remedial actions that do not include any express mention of individual

29. *Id.* at § 7611 (federal Clean Air Act NSPS program); 33 U.S.C. § 1316 (federal Clean Water Act national standards of performance).

30. 42 U.S.C. §§ 6921, 6924(d)–(h).

31. *Lead Indus. Ass'n v. EPA,* 647 F.2d 1130 (D.C. Cir. 1980) (allowing use of precautionary risk-based standards under the Toxic Substances Control Act for limiting dangers of lead exposure).

32. 42 U.S.C. §§ 9601, 9607.

33. *Id*. at § 9606(a)(1)–(4).

34. *Id* at § 9601(14) (definition of "hazardous substance" incorporates by reference a variety of other dangerous materials, including "hazardous waste" under RCRA, "hazardous air pollutant" under the federal Clean Air Act, "priority pollutant" under the federal Clean Water Act, and others).

35. In addition to incorporating listings from other statutes, CERCLA also allows EPA to directly add chemicals or pollutants that other statutes have not addressed to the list of designated hazardous substances (and, where appropriate, to adjust their reportable quantities for releases). 42 U.S.C. § 9602(a). The statute only requires that EPA find that the hazardous substance (in its associated quantity) "when released into the environment may present substantial danger to the public health or welfare or the environment". *Id.* While EPA has created a lengthy list of chemicals identified under other statutes as "hazardous substances," it has never independently added a chemical to the list under this CERCLA authority. 40 C.F.R. § 302.4.

variation or personal sensitivities of exposed populations.[36] While the selection of a final remedy must incorporate any applicable or relevant and appropriate state standards, EPA guidance does not require accounting for state standards that do not directly relate to environmental health and safety. As a result, state laws that expressly mandate consideration of historical, cultural, or religious values may be considered in the federal remedy selection, but the CERCLA program would not mandate their inclusion.[37]

The second technology-forcing framework focuses on the capacity of technology to reduce emissions as much as possible without relying solely on a health-based assessment of a 'safe' exposure level. Under this approach, the agency will select a technology based on the availability of the control measure in the industrial sector where it would be used, the effectiveness of the technology in controlling the emissions, and—usually—the costs of installing the controls. This approach, for example, underlies the selection of maximum available control technologies (MACT) for hazardous air pollutants under Title III of the CAA[38], mobile source emission standards under Title II of the CAA,[39] or the specification of particular containment and control measures for the storage of hazardous wastes in tanks, containers, and other waste management units under RCRA.[40] These technology-forcing approaches rely on a presumption that the selection of the most stringent appropriate technique will yield an emission level that is sufficiently protective of public health and the environment.

Notably, these regulatory approaches do not generally focus on the particular interests or vulnerabilities of the persons exposed to the pollutants. If individuals living near a particular source are especially vulnerable or have unique economic or cultural interests that the pollutants would threaten, they do not have any enhanced regulatory basis for claiming that the emission standards should change to reflect their specific circumstances.[41] Even when environmental programs

36. 42 U.S.C. § 9614.

37. EPA, CERCLA COMPLIANCE WITH OTHER LAWS MANUALS: PART I, EPA 540/G-89/006, OSWER 9234.1-01 (1988); EPA, CERCLA COMPLIANCE WITH OTHER LAWS MANUALS: PART II, EPA 540/G-89/009, OSWER 9234.1-01 (1988).

38. 42 U.S.C. § 7412. Note, however, the federal Clean Air Act provides a backstop with the residual risk review process to assure that MACT standards adequately protect public health. Michigan v. EPA, 576 U.S. 743 (2015) (obligating inclusion of cost assessment in selecting residual risk regulatory standard for certain power generators that use fossil fuels).

39. 42 U.S.C. §§ 7521–7590.

40. *Id.* at §§ 6924–6925.

41. Of course, these individuals might have a greater ability to assert standing in litigation to challenge the emission standard. They arguably could also assert enhanced damages for

require site-specific modeling to determine emission levels for particular air, water, or waste permits, the modeling typically does not account for the individual vulnerabilities or preferences of the persons directly affected by the actual release.[42]

For example, when the U.S. Environmental Protection Agency (EPA) or a delegated state undertakes modeling to determine whether a facility should receive a PSD permit, federal regulations require that the facility model its emissions to determine their potential degradation of air quality in the surrounding area and assess whether the facility is not using more than its PSD increment.[43] This modeling exercise may focus on the geographic location of particular individuals to identify the closest exposure point, but the modeling does not take into account any more specific individual identifying factor beyond location.[44]

Similarly, individual preferences and beliefs do not factor into site-specific calculations to determine mixing zones for discharges of pollutants under National Pollutant Discharge Elimination System (NPDES) permits,[45] migration of subsurface pollutants for site-specific hazardous waste delistings,[46] or selection of remediation

regulatory violations or tortious conduct that infringed on their special interests. GENERAL ACCOUNTING OFFICE, ENVIRONMENTAL HEALTH: EPA EFFORTS TO ADDRESS CHILDREN'S HEALTH ISSUES NEED GREATER FOCUS, DIRECTION, AND TOP-LEVEL COMMITMENT 1–4 (2008) (reviewing EPA obligation to protect sensitive populations, such as children, when setting air quality standards and other environmental benchmarks).

42. Other federal agencies participate in the development of environmental regulations, and they may bring a perspective on individual variabilities that differs from EPA's indivistic agnosticism. The Office of Information and Regulatory Affairs (OIRA), for example, oversees the assessment of major federal rules under Executive Order 12,866 to determine whether their benefits exceed their costs. As part of calculating the benefits, OIRA has explored using a statistical valuation of expected life (VSEL) that varies according to individual circumstances such as age. OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR A-94 (2022). While OIRA's assessment might modify the projected costs or benefits of a regulation based on the specific groups affected by the rule, it does not expand or constrict the underlying degree of protection offered by the primary environmental statute or regulation itself.

43. 40 C.F.R. §§ 51.166, 52.21; Revisions to the Guideline on Air Quality Models, 82 Fed. Reg. 5,182 (Jan. 17, 2017) (to be codified at 40 C.F.R. pt. 51).

44. Revisions to the Guideline on Air Quality Models, 82 Fed. Reg. 5,182.

45. A permitting authority may specify a limited area or volume of water where initial dilution of a discharge takes place in a way that might cause exceedances of certain numeric water quality criteria. 40 C.F.R. §§ 131.13, 122.44(d)(1)(ii); EPA, NPDES PERMIT WRITERS' MANUAL 5.1 (2010); EPA OFFICE OF WATER, EPA 505-290-001, TECHNICAL SUPPORT DOCUMENT FOR WATER QUALITY-BASED TOXICS CONTROL, ch. 2 (1991).

46. EPA, EPA 530-R-93-007, PETITIONS TO DELIST HAZARDOUS WASTES: A GUIDANCE MANUAL SECOND EDITION 9-1–9-6 (1993).

levels for site-specific risk-based corrective actions under RCRA[47] or identification of remedial design/ remedial actions for cleanups under CERCLA.[48] Essentially, each of these programs assumes that the exposed individual in their risk-based modeling and calculations is a person of average health or reasonable condition.[49]

This fundamental framing in environmental law assures that federal statutes seek to provide a general level of protection to the population at large based on either widely shared characteristics or universally applicable technology standards, rather than varying protection based on identity or individual beliefs or circumstances. As a result, federal environmental programs have a void where other federal programs addressing health, employment, immigration, or criminal prosecutions have adopted initiatives dedicated to assessing and protecting individual religious concerns. For example, the U.S. Department of Health and Human Services administers federal statutes and programs that include express opt-outs based on individual religious beliefs or objections, and it has an office dedicated solely to managing these claims.[50] The U.S. Department of Justice has a unit dedicated to litigating against religious hate crimes or impingements on religious activities rooted in land use.[51] By contrast, EPA and other federal environmental programs lack any institutional platform to address religious objections or concerns outside of broader environmental goals.

B. Challenges to Environmental Law's Agnosticism Towards Individuals

So why has U.S. environmental law, and particularly its interpreters like EPA, avoided institutional commitments to address concerns raised by religious communities and faith traditions when other federal agencies have set up offices and programs to explicitly tackle

47. *See, e.g.,* EPA, EPA910/R-98-001, INTERIM FINAL GUIDANCE: DEVELOPING RISK-BASED CLEANUP LEVELS AT RESOURCE CONVERSATION AND RECOVERY ACT SITES IN REGION 10, 1-1–1-9 (1998).

48. *See* EPA, REGIONAL SCREENING LEVELS (RSLS), https://www.epa.gov/risk/regional-screening-levels-rsls [https://perma.cc/N699-AAVF] (last visited Apr. 2, 2023) (discussing general EPA approaches to setting risk-based cleanup levels at CERCLA sites).

49. Notably, attempts to use the Americans with Disabilities Act to force EPA to target health-based exposure standards towards especially vulnerable populations, such as asthma sufferers or immunocompromised patients, have generally not succeeded. Robert J. Kinney, *Americans with Disabilities Act Challenges to Environmental Regulatory* Programs, 49 VA. LAW. 18, 18–22 (2001).

50. *See* discussion *infra* note 79.

51. *See* discussion *infra* note 78.

those issues? In part, federal environmental statutes include exceptions that temper their broader commitment to agnosticism to individuals.

First, while environmental quality statutes such as the CAA, CWA, and RCRA do not vary the degree of environmental protection they provide based on the identity of a specific affected population, other federal environmental programs require a detailed and individual assessment of particularly affected parties as part of the permit review process. For example, regulations governing the preparation of environmental impact statements under the National Environmental Policy Act (NEPA) require an accounting of the particular impacts that a major federal action might have on the environmental, economic, and cultural interests of nearby persons or communities.[52] The review process under Section 106 of the National Historic Preservation Act imposes a similar assessment process on federal actions that may affect culturally or historically significant facilities and areas.[53] These impact assessment obligations require the federal government to take steps to identify potential individual impacts to local groups or areas, but they do not set out a substantive standard to dictate whether a federal action should proceed.[54]

A more important exception to the general principle that environmental laws do not tailor their degree of protection based on the identity of the affected parties is, of course, environmental justice.[55] Although federal environmental statutes do not provide express protection of environmental justice interests, Executive Order 12898 has required federal agencies for nearly 30 years to identify and address any disproportionately high and adverse human health or environmental effects on "minority populations and low-

52. 40 C.F.R. § 1508.8 (2022).

53. Notably, the new Restatement of American Indian Law does not address the potential constitutional and statutory issues raised by religious practices of indigenous peoples that might conflict with federal or state environmental requirements. The Restatement only notes that treaty guarantees for certain practices rooted in religious beliefs (such as peyote use or taking a bald eagle) will yield if Congress subsequently passes a statute that conflicts with the earlier treaty. AM. L. INST., RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 5(c) cmt. e (2023).

54. Opponents could use EIS and other assessment information to argue that the government's failure to account for individual vulnerabilities, sensitivities, or unique values would render the action arbitrary, capricious or otherwise not in accordance with law under section 706 of the Administrative Procedure Act. CONG. RSCH. SERV., NATIONAL ENVIRONMENTAL POLICY ACT: JUDICIAL REVIEW & REMEDIES 1–2 (2021).

55. *See* MICHAEL B. GERRARD & SHEILA R. FOSTER, THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISK (2008) (conducting a broad and rigorous survey of historical development of U.S. domestic environmental justice law and legal theories).

income populations."[56] While the executive order does not create any enforceable legal rights or remedies, federal agencies have prepared environmental justice action plans and undertaken significant agency actions to identify, reduce, and address environmental justice concerns,[57] including specifying how environmental justice issues should affect the issuance of environmental permits and influence the selection of targets of enforcement.[58] Environmental justice has also affected the selection of environmental criminal enforcement and sentencing.[59]

The Biden Administration has made environmental justice one of the cornerstones of its environmental and energy policies. President Biden's Executive Order on Tackling the Climate Crisis at Home and Abroad, which he signed on his first day of office, required all federal agencies to

> make achieving environmental justice part of their mission by developing programs, policies, and activities to address the disproportionately high and adverse human, health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts.[60]

The executive order directs multiple agencies to prepare plans, coordinate environmental justice data and mapping tools, and prepare suggested action plans to address environmental justice impacts. In particular, it directs EPA to "strengthen enforcement of environmental violations with disproportionate impact on under-

56. Exec. Order No. 12898—Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

57. EPA, FEDERAL EJ STRATEGIES, *Federal Agency EJ Strategies & Annual Implementation Progress Reports*, U.S. EPA, https://www.epa.gov/environmentaljustice/federal-ej-strategies [https://perma.cc/NW3J-AAF4] (last visited July 20, 2021) (compilation of environmental justice action plans and annual progress reports for all executive federal agencies).

58. Memorandum from Lawrence Starfield, Acting Assistant Administrator for Office of Enforcement and Compliance Assurance (OECA), to Office of Enforcement and Compliance Assurance of the EPA re: *Strengthening Enforcement in Communities with Environmental Justice Concerns* (Apr. 30, 2021).

59. *Id. See also* Memorandum from Lawrence Starfield, Acting Assistant Administrator for OECA, Office of Enforcement and Compliance Assurance of the EPA re: *Strengthening Environmental Justice Through Criminal Enforcement* (June 21, 2021); Joshua Ozymy & Melissa Jarrell, *Of Sex Crimes and Fencelines: How Recognition of Environmental Justice Communities as Crime Victims Under State and Federal Law Can Help Secure Environmental Justice*, 38 PACE ENV'T L. REV. 109, 123–132 (Dec. 2020); Tracy Hester, *Environmental Justice in Criminal Sentencing,* 4 A.B.A. ENV'T CRIMES & ENV'T NEWSL. 2 (Jan. 2003).

60. THE WHITE HOUSE BRIEFING ROOM, EXECUTIVE ORDER ON TACKLING THE CLIMATE CRISIS AT HOME AND ABROAD, Exec. Order No. 14008, 86 Fed. Reg. 7,619, § 219 (Jan. 27, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/ [https://perma.cc/57PA-4GCK].

served communities through the Office of Enforcement and Compliance Assurance" and requires the Department of Justice to coordinate with EPA to "develop a comprehensive environmental justice enforcement strategy, which will seek to provide timely remedies for systemic environmental violations and contaminations, and injury to natural resources."[61] The Biden Administration has expanded on this initial direction through several subsequent orders and guidances that expand the role of environmental justice in federal environmental regulatory decisions and enforcement priorities.[62]

Notably, none of these new executive orders and guidances expressly includes religious minorities or affected communities as protected environmental justice groups. EPA's Office of Environmental Justice (OEJ), as well as the U.S. Department of Justice, have pursued religious concerns and values as part of its environmental justice policies and programs, but only when the religious concerns play an important role in the identification of groups protected for other reasons.[63] For example, EPA's OEJ has worked extensively with Native American tribes to help address their environmental justice concerns, including the impact of federal actions on environmental resources and natural objects that tribes hold as sacred places. These religious motivations play out, however, within the larger legal identification of tribal sovereign interests as a "minority population" or "low-income population."[64] To date, no federal agency has expressly couched its environmental justice policy

61. *Id.* at § 222(b)(i); (c)(ii).

62. *See, e.g.,* Memorandum re *Strengthening Enforcement in Communities with Environmental Justice Concerns*, *supra* note 58, at 1–3; Memorandum re *Strengthening Environmental Justice Through Criminal Enforcement*, *supra* note 59, at 1–2; *EPA Administrator Announces Agency Actions to Advance Environmental Justice*, EPA (Apr. 7, 2021), https://www.epa.gov/newsreleases/epa-administrator-announces-agency-actions-advance-environmental-justice [https://perma.cc/KQU7-XL7L].

63. *See, e.g.,* Letter from Thomas Perez, Assistant Attorney General, C. R. Div. of the U.S. Dep't of Just., to the Hon. Russlynn Ali, Assistant Secretary for C. R., Office for C. R. of the U.S. Dep't of Educ., re *Title VI and Coverage of Religiously Identifiable Groups* 1 (Sept. 8, 2010) ("Although Title VI does not prohibit discrimination on the basis of religion, discrimination against Jews, Muslims, Sikhs, and members of other religious groups violates Title VI when that discrimination is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than its members' religious practice.").

64. EPA, EPA POLICY ON ENVIRONMENTAL JUSTICE FOR WORKING WITH FEDERALLY RECOGNIZED TRIBES AND INDIGENOUS PEOPLES (July 24, 2014). *See also* EPA, ENVIRONMENTAL JUSTICE FOR TRIBES AND INDIGENOUS PEOPLES, https://www.epa.gov/environmentaljustice/environmental-justice-tribes-and-indigenous-peoples [https://perma.cc/H8GW-MPH2] (last visited July 20, 2021) (comprehensive summary of federal agency activities to implement environmental justice on people of tribes and indigenous peoples).

or action plan to protect solely religious values or sensitivities affected by environmental practices.

C. Protection of Individual Religious Beliefs and Expression

While environmental laws do not focus on the specific values or vulnerabilities of individuals that they protect, federal and state religious freedom statutes squarely address exactly those features. The development of religious freedom acts illuminates their focus on the individual and institutional religious interests of their protected classes. Prior to 1990, the U.S. Supreme Court had interpreted the federal Free Exercise Clause to require strict scrutiny of any governmental actions or regulations that substantially burdened religious activities without a compelling state interest.[65] After its decision in *Employment Division v. Smith* in 1990, however, the Court exempted neutral laws and regulations with general applicability from strict scrutiny even if they substantially burdened religious activity (for example, laws banning the use of psychotropic drugs could reasonably bar the use of peyote during religious ceremonies).[66] While subsequent decisions such as *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[67] confirmed that the federal courts would continue to strictly scrutinize legislative actions that effectively targeted religious expression, the *Smith* ruling created a groundswell of concern that federal and state regulators would have substantially expanded authority to control or criminalize expressions of religious belief or religiously motivated conduct.

In response, in 1993, Congress promulgated the Religious Freedom Restoration Act (RFRA) expressly to overturn *Smith.*[68] RFRA restored the prior *Sherbert* test by requiring that governmental actions which substantially burdened religious activities have a compelling governmental interest, and that they choose the least restrictive alternative to accomplish their purpose.[69] While the Supreme Court subsequently ruled that RFRA could not constitutionally constrain

65. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997); Sherbert v. Verner, 374 U.S. 398 (1963).

66. A neutral law of general applicability must still undergo strict scrutiny if it substantially burdens more than one constitutional right at the same time. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990). *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (addressing right to free exercise of religion and right to choose how to raise your own children); Merced v. Kasson, 577 F.3d 578, 587 n.12 (5th Cir. 2009).

67. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

68. 42 U.S.C. §§ 2000bb-2000bb(4).

69. *Id.* at § 2000bb-1.

actions by state lawmakers,[70] the law remains as a statutory constraint on actions by the federal government that burden religious expression.

The Court's hobbling of RFRA claims against state governmental actions led to two additional statutory responses. First, Congress passed another religious freedom restoration law to impose more narrowly tailored restrictions on state actions. In the Religious Land Use and Institutionalized Persons Act (RLUIPA), Congress directed states not to substantially burden religious free exercise by imposing restrictions on either local land use or religious practices by incarcerated individuals unless those strictures promoted compelling governmental interests in the least restrictive manner possible.[71] Notably, RLUIPA amended RFRA by replacing its definition of "exercise of religion" to remove any reference to the First Amendment, and it substituted an extraordinarily broad definition that included "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[72] RLUIPA has led to a burgeoning industry of litigation over local attempts to impose restrictive zoning or land use limits on churches that wish to expand their facilities in residential neighborhoods or other conflicting uses.[73] In particular, the courts have interpreted RLUIPA to apply to a broad set of land uses that fall within the term "religious exercise" (including, for example, constructing basketball courts or food courts in large church complexes) and have found substantial burdens on that religious conduct when local governments ban or restrictively zone land uses in a way that prevents churches or religious groups from undertaking those actions.

In addition to RLUIPA on the federal level, state governments took their own separate actions to impose state-level versions of RFRA that apply to their state and local governments' actions. While these state religious freedom statutes use varying specific language, they tend to hew closely to the original RFRA test that requires both a compelling government interest as well as use of the least restrictive alternative to accomplish that interest. These state laws usually define "free exercise of religion" broadly and flexibly, and they do not require a

70. Specifically, the Court held that Congress exceeded its enforcement powers under Section 5 of the Fourteenth Amendment when it attempted under RFRA to restrict governmental actions by states. *City of Boerne, supra* note 65, at 532.

71. 42 U.S.C. §§ 2000cc–2000cc(5).

72. *Id.* at § 2000cc-5(7)(A).

73. *See generally* DANIEL P. DALTON, LITIGATING RELIGIOUS LAND USE CASES 16–71 (2d ed. 2016).

close inquiry into the sincerity of the motivations behind religious beliefs or conduct.[74]

As opposed to environmental regulations, religious freedom statutes focus specifically and explicitly on the unique religious beliefs and practices of the persons affected by government action. Identity matters intensely under RFRA, RLUIPA and state religious freedom statutes.[75] As a result, actions that an environmental statute would view as protective and necessary under health-based or technology-based standards may arguably require exceptions or modifications under religious freedom laws if they substantially burden the religious expression of particular individuals or groups without selecting the least restrictive alternative possible.

The U.S. Supreme Court has given RFRA a broad interpretation and extended its protections to both individuals and closely held corporations. The Court has further emphasized that the statute shields employers from liability if they declined, for reasons of religious conviction, to provide certain health benefits mandated by federal law.[76] While doing so, the Court broadly interpreted the First Amendment's protections of religious expression in parallel with the statutory text. In *Hosanna-Tabor,* for example, the Court extended the First Amendment's protections to religious organizations that explicitly discriminated against particular applicants because certain strongly held religious beliefs and customs provided a valid criterion for identifying candidates for that job.[77]

As litigation over RFRA and RLUIPA claims (as well as their state law analogs) continued to percolate in the courts, the executive branch and regulatory agencies took action as well. The Trump Administration took energetic action to foster religious free exercise claims through a series of presidential executive orders, federal agency executive orders and memoranda, and—in the health and labor fields—regulatory actions to expressly shield certain religious objections from otherwise broadly applicable prohibitions on certain discriminatory or public health risks. The U.S. Department of Justice

74. Merced v. Kasson, 577 F.3d 578 (5th Cir. 2009) (Texas Religious Freedom Restoration Act).

75. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (when examining whether federal government had compelling interest for its action, RFRA requires court to examine the specific individual beliefs and burdens on the actual parties before it rather than a generalized weighing of harm to a large or hypothetical population.).

76. *Id.* at 730–31.

77. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171 (2012). *See also* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

created a new office for religious liberty within its Civil Rights Division, and the Department of Health and Human Services finalized regulations that explicitly allowed health care providers to decline certain health care requests based on their religious beliefs.[78] Attorney General Jeff Sessions memorialized these priorities and institutions in a U.S. Department of Justice memorandum in 2017, which remains in effect.[79]

Notably, the Biden Administration has not taken steps to reverse key executive orders that generally protect religious liberty claims (although it has signaled its desire to re-examine regulations that allow the refusal of health care services based on religious conscience assertions). As discussed above, the Biden Administration has taken much more aggressive executive action to address environmental justice and climate action through executive orders. None of these orders, notably, mention religious exercise concerns or conscience exemptions.

The most notable recent resurgence of religious liberty litigation, however, has returned to its constitutional roots. The COVID-19 pandemic set the stage for stark challenges between the U.S. Supreme Court's long-standing deference to the state's power to take emergency action during epidemics and its growing willingness to re-examine religious liberty objections to burdens created by broad-reaching facially neutral statutes. This tension led the Court to issue important, high-profile decisions via its 'shadow docket' by reviewing requests for emergency stays of state orders to halt public meetings and congregations—including religious services. After a handful of initial decisions that deferred to the state's long-standing historical power to curtail individual liberties during a public health emergency, the Court finally stepped over the threshold and enjoined state prohibitions of large religious congregations in 2020.[80] The decisions largely relied on the Court's growing willingness to compare restrictions on religious actions with similar commercial activities. If the state burdened the religious exercise in ways that exceeded its

78. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CONSCIENCE AND RELIGIOUS NON-DISCRIMINATION, https://www.hhs.gov/conscience/conscience-protections/index.html [https://perma.cc/UX3M-ESA7].

79. U.S. DEP'T OF JUST., MEMORANDUM FROM THE ATTORNEY GENERAL TO ALL EXECUTIVE DEPARTMENTS AND AGENCIES, FEDERAL LAW PROTECTIONS FOR RELIGIOUS LIBERTIES (Oct. 6, 2017). *See also* U.S. DEP'T OF JUST. MANUAL, RESPECT FOR RELIGIOUS LIBERTY, § 1-15.100 -300 (2023).

80. Tandon v. Newsom, 141 S. Ct. 294 (2021) (per curiam); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 1613 (2020) (mem.); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S.Ct. 63 (2020) (per curiam).

burdens on the comparable secular activity, the Court deemed the state's public health bans as impermissibly broad and struck them down under the strict scrutiny test. This 'most favored nation' framing of Free Exercise claims has grown in strength and volume in other religious liberty litigation as well.

The latest guidance from the Court has shed some light, but the murk persists. In *Fulton v. City of Philadelphia Social Services,* Chief Justice Roberts cobbled together a majority opinion that deftly avoided the question on which the Court had actually granted certiorari: did the City of Philadelphia's insistence that religiously-sponsored adoption services handle cases with same-sex parents (or unmarried parents) impermissibly infringe on religious liberties under the Free Exercise Clause? More simply, this question would require the Court to rule squarely on whether *Smith*'s long-standing rule—that laws and regulations could incidentally burden the exercise of religion if they were both neutral and generally applicable—should be overruled.

Chief Justice Robert's majority opinion side-stepped the issue by declaring that the City's anti-discrimination rules were not "generally applicable" because the City could issue case-by-case exemptions from their requirements.[81] The Court also strained to interpret the City's contract with the adoption providers to find that its language contained similar discretionary exclusions and did not "apply to the general public" because it only addressed the small universe of adoption service providers.[82] As a result, the Court applied strict scrutiny to overturn the City of Philadelphia's attempt to apply its non-discrimination policies to the adoption agencies, but only on narrow grounds.

The narrow opinion, however, did little to hide the broader and deeper currents of the Court's broader conservative majority. Justice Barrett (joined by Justice Kavanaugh) concurred by noting that *Smith* should be overturned,[83] and Justice Alito provided a detailed roadmap for future assaults on *Smith* in his 73-page concurrence (joined by Justices Thomas and Gorsuch).[84] The growing chorus of objections to *Smith,* and the signals given by the increasingly restive conservative bench, augur a likely rejection of the rule in the near future. While the Court has not signaled what rule might replace it, the congressional

81. *Fulton v. City of Philadelphia,* 141 S.Ct. 1868, 1877-78 (2021).
82. *Id.* at 1882.
83. *Id.* at 1882–83.
84. *Id*. at 1883–926.

endorsement of the pre-existing *Yoder v. Sherbert* rule via RFRA and RLUIPA as well as Justice Alito's detailed recitation of potential alternative formulations along similar lines, strongly hints that the Court will allow broader faith-based exclusions from neutral and generally-applicable statutes which burden expressions of religious faith in ways that fail strict scrutiny review.

This broader acceptance of free exercise exemption claims, however, may face a final hurdle. Justice Alito's lengthy concurrence relied on a historical reading of the Free Exercise clause's language to identify constraints on the degree of exemptions allowed for religious exercises at the time of the Constitution's drafting.[85] According to Justice Alito, most state constitutions and religious liberty statutes allowed exceptions except in instances where they posed a "threat to public health and safety."[86] While he did not elaborate on how the concept would apply in modern settings, this safety valve against religious exceptions from neutral and generally applicable statutes which posed threats to public health and safety could play an important role in certain fields such as public health, workplace safety, and environmental protection.

To simplify the results of this complex interplay of constitutional precedents, statutory glosses, and state law counterpoints, federal law currently offers three primary routes to religious exemptions from broader regulatory mandates. First, if a law or regulation constitutes a facially neutral and generally applicable mandate, it will pass constitutional muster even if it imposes an incidental burden on religious exercises or beliefs. Laws that fail to meet the thresholds of generality and neutrality, however, must survive strict scrutiny judicial review. Beyond this constitutional floor, additional statutory protections provided by RFRA and RLUIPA will require judicial scrutiny of generally applicable and facially neutral laws that fall under those statutes' ambit. And last, even if a governmental action survives federal constitutional and statutory scrutiny under these tests, actions subject to state law may face similar strict judicial review under complementary state religious freedom statutes that parallel RFRA or RLUIPA at the local level.

III. REINTERPRETING FEDERAL ENVIRONMENTAL STATUTES THROUGH A

85. *Id.* at 1901–07.
86. *Id.* at 1911.

FREE EXERCISE LENS

If courts start to interpret federal environmental statutes to treat persons or activities differently based on enhanced constitutional protections for religious action, key areas in environmental law could see substantial changes. Affected areas will include federal constitutional standing analysis; prudential standing under environmental statutes; a greater sensitivity to the religious impacts of federal and state agency actions under environmental justice policies; greater protection of religiously-motivated environmental land uses, such as conservation easements or land trusts, that conflict with local zoning or land use ordinances or potential condemnation attempts; and similar questions under state religious freedom laws. More concretely, a heightened level of protection for institutional religious actions could influence the selection of remedies at CERCLA sites or the identification of ESA mitigation options in biological opinions. It could also spur greater attention to religious and cultural issues in federal and state environmental impact statements.

A. Settling the Constitutional Baseline: Mandated Exceptions to Environmental Requirements That Infringe on Religious Free Exercise

The tension between the secular framework of federal statutes and religiously motivated environmental protection surfaced early in modern environmental law.[87] After the celebrated *Tennessee Valley Authority v. Hill* decision—the famous snail darter ruling—a separate group of Native American plaintiffs made a last-gasp motion for an injunction to halt the closing of the dam's gates after Congress specifically authorized the dam's completion in a midnight rider in an appropriations bill. Their complaint alleged, for the first time in the long-running litigation, that the flooding of the upstream lands would submerge numerous sites held sacred by the Cherokee Nation and critical to their religious worship. The district court, relying on prevailing precedent of the time, ruled that the dam's completion would constitute a religiously neutral action and not transgress constitutional limits under either the Establishment Clause or the Free Exercise Clause.[88] Subsequent federal decisions largely upheld the constitutionality of governmental actions that set out neutral

87. Sequoyah v. Tenn. Valley Auth., 480 F. Supp. 608 (E.D. Tenn. 1979).
88. *Id.*

environmental obligations on the population at large despite their incidental imposition of burdens on religious exercises or activities.[89]

The evolving federal caselaw on Free Exercise exemptions to governmental obligations, and the potential hemming or revocation of *Employment Division v. Smith*, portends a potential change in this litigative landscape. Early signals from other cases highlight possible areas where federal courts may construe the Free Exercise clause to require exemptions from environmental legal mandates: the imposition of obligations to take affirmative actions that violate the religious beliefs of a particular individual or sect ("right to refuse cases"), and the invocation of religious motivations to seek heightened constitutional protections for affirmative actions that a person or sect feels compelled to follow because of their beliefs ("right to act cases"). Under this framework,[90] the nature of the environmental action at issue will trigger differing levels of judicial review and likely favor individual claims for exemptions based on the right to refuse governmental compulsions to act in violation of religious beliefs.

89. *See* Snoqualmie Indian Tribe v. Fed Energy Regul. Comm'n, 545 F.3d 1207, 1214 (9th Cir. 2008) (objecting to relicensing of hydroelectric facility located near a waterfall considered sacred by tribe); Dedman v. Bd. of Land & Nat. Res., 740 P.2d 28 (Haw. 1987), *cert. denied*, 485 U.S. 1020 (1988) (rejecting claims that geothermal development would desecrate sacred site and interfere with religious exercise). *See also* S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior, 588 F.3d 718 (9th Cir. 2009) (upholding rejection of request for injunction under RFRA of mining project permit approval by the Bureau of Land Management). Other tribes have raised RFRA claims in their complaints, but the ultimate judicial opinion rested on other grounds and never reached the Free Exercise claims. *See, e.g.*, Crow Indian Tribe v. United States, 343 F. Supp. 3d 999, 1003 n.1 (D. Mont. 2018), *aff'd in part and remanded on other grounds,* 965 F.3d 662 (9th Cir. 2019) (Tribe relied on religious free exercise claims and RFRA to object to proposed delisting of grizzly bears in the Greater Yellowstone ecosystem from the threatened species list).

Tribal members also opposed to the Cape Wind project in Nantucket Sound because it would interfere with their view of the rising sun and desecrate ancestral burial grounds. The Department of Interior approved the project despite these objections. Patricia Salkin, *Facility Siting and Permitting,* L. CLEAN ENERGY ch. 5, 100–01 (Michael Gerrard ed. 2011); *Salazar Announces Approval of Cape Wind Energy Project Construction and Operations Plan*, U.S. DEP'T OF INTERIOR (Apr. 19, 2011) https://www.doi.gov/news/pressreleases/Salazar-Announces-Approval-of-Cape-Wind-Energy-Project-Construction-and-Operations-Plan [https://perma.cc/4YYP-XQ38].

90. Angela Carmella, *Progressive Religion and Free Exercise Exemptions,* 68 KANSAS L. REV. 535 (2020) (laying out this analytical framework). While Prof. Carmella discusses affirmative environmental actions that draw on religious motivations (such as the installation of solar panels on church facilities), her analysis includes a much broader swatch of religiously-motivated progressive actions in the labor, discrimination, health care, immigration, and human rights fields. *See also* Angela Carmella, *RLUIPA: Linking Religion, Land Use, Ownership and the Common Good,* 2 ALB. GOV'T L. REV. 485 (2009).

1. Right to Refuse

The clearest test for religious exemptions from environmental regulatory obligations or liabilities will likely arise in cases where those laws would force a person to take actions that violate their religious beliefs or identity. For example, if an environmental regulatory program would require a church to dispose of solid wastes or sewage in a way that would violate religious dictates or beliefs, that church could readily identify the imposition and burden by pointing to the clear regulatory command and the discrete compelled act. In this circumstance, the government would then bear the burden of showing that the application of the challenged law *to that person* would satisfy the compelling interest test. In addition, the federal courts in such cases have not closely scrutinized whether the underlying religious belief was sincere, the religious values at stake were compulsory or voluntary, or the penalty for refusal involved loss of benefits or governmental approvals rather than criminal punishment or fines. As a result, litigants seeking exemptions from governmental obligations that require them to take actions that violate their faiths face a less demanding judicial review and lesser burdens of proof than litigants asserting a right to take positive actions based on religious beliefs.

From this perspective, the *Fulton v. City of Philadelphia* decision has important implications for environmental actions. First, the more lenient *Smith* test may not apply because virtually every federal environmental regulatory statute provides a mechanism for case-by-case exemptions—either through site-specific waivers of environmental standards, exemptions for particular industries or locations, or after-the-fact permitting that effectively forgives prior failures to meet environmental standards.[91] This broad and dense network of environmental exemptions would arguably prevent those laws from having an effect "generally applicab[le] to the public" under the *Smith* test. Second, litigants may challenge the neutrality of those laws if they do not assure terms equally favorable to the environmental requirements imposed on other commercial or private ventures—which means that general permits or other favorable permitting schemes in certain industries or contexts may

91. *See, e.g.,* 40 C.F.R. § 260.22 (delisting hazardous waste through petition process); 40 C.F.R. §§ 125.30–.32, 403.13 (fundamentally different factor variances under the federal Clean Water Act); 42 U.S.C. § 7410(f)–(g) (procedures for temporary emergency suspensions of Clean Air Act permit requirements); 33 C.F.R. § 326.3(c)(1)(iii)–(iv) (issuance of after-the-fact permits by U.S. Army Corps of Engineers for dredging or filling of jurisdictional wetlands).

automatically extend to religious ventures as part of a religious exemption. Third, *Fulton's* substantial burden test will look at the marginal utility of applying those environmental standards to the particular religious claimants at issue. This close scrutiny would prevent the government from simply appealing to the need for uniformity in the application and enforcement of environmental standards generally.[92]

Admittedly, circumstances where a governmental environmental mandate would require an individual to take actions that directly violate their religious beliefs appear, at most, rare. The bulk of religious objector claims in environmental contexts so far have centered on issues involving either religious ceremonies or practices that use animals (or animal parts) otherwise shielded by endangered species law or other protection statutes, or opposition to governmental permits or land use decisions that damage sacred sites or limit religious expression.[93] But as the right to constrain governmental mandates that compel persons to violate their religious beliefs grows in future caselaw or statutes, the expansion of those claims to burdensome or expensive environmental mandates will likely grow in the future as well.

2. Right to Act

The right to take affirmative action needed to satisfy a religious obligation, by contrast, will likely face greater obstacles in court. While a claimant alleging a right to refuse can point to a specific governmental dictate and a particular religious command, a litigant asserting a specific religious obligation to undertake affirmative environmental action would face much more daunting judicial review and burdens of proof.

For example, imagine a church whose members conclude that they have an affirmative obligation to take steps to fight climate change and protect wilderness ecosystems. They then choose to pursue this religious obligation by purchasing a large tract of land and dedicating

92. For example, the canonical *EEOC v. Smith* decision involved two Oregon drug counselors whose unemployment claims were denied after they were fired for ingesting peyote during a religious ceremony. *Smith*, *supra* note 66, at 874–75.

93. *See, e.g.*, Jessica L. Fjerstad, *The First Amendment and Eagle Feathers: An Analysis of RFRA, BGEPA, and the Regulation of Indian Religious Practices*, 55 S.D. L. REV. 528 (2010); Scott Idleman, *Religious Freedom Restoration Act: Pushing the Limits of Legislative Power,* 73 TEX. L. REV. 247, 256 (1994); Matt Pawa, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment,* 141 U. PENN. L. REV. 1029, 1099 (1993).

it to carbon-neutral worship through ecological protection. If a governmental agency[94] later chooses to zone that land for industrial development, or attempts to condemn it for other commercial uses, the church could then reasonably object that the government's action impermissibly burdened their freedom to exercise their religious beliefs via affirmative acts (here, the purchase and maintenance of the ecological sanctuary).

These religious objectors would encounter several additional hurdles not faced by their brethren asserting the right to refuse. The most significant barrier lies in the obligation to prove that the government's action imposed a "substantial burden" on the religious actors (as required by *Smith* as a predicate for judicial review). Pointing to this requirement, the government would likely first contend that the church had alternatives that would equally allow it to express their religious faith. For example, the church could purchase lands in other locations, or pursue ecological stewardship without requiring exclusive use of the land. The availability of these alternatives has proved a fatal flaw to other claimants asserting free exercise protections for their affirmative actions in analogous contexts. For example, the Ninth Circuit rejected the claims of Navajo tribal members who claimed that the use of recycled water to manufacture snow at a ski resort in Snowbowl, Arizona impermissibly burdened their religious exercise by desecrating a sacred site needed for their faith.[95] The court held that the tribal members, who understandably objected to the use of recycled sewage at their sacred site, did not face a "substantial burden" on their free exercise of religion because they could still exercise their religious beliefs at other locations or in other ways.[96]

The existence of a tolerable alternative has typically proven fatal for constitutional free exercise claims rooted in a duty to act (although the appellate courts currently have muddled and conflicting standards to determine what impositions constitute a "substantial burden").[97] If a church or its members can choose among numerous

94. In another variation on this thought experiment, a private party could seek to develop the land for commercial purposes by exercising eminent domain powers delegated to them by the state.

95. Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1043 (9th Cir. 2007), *reh'g en banc,* 535 F.3d 1058, 1066 (9th Cir. 2008).

96. *Id.* at 1069–70.

97. Bret Matera, *Divining a Definition: "Substantial Burden" in the Penal Context Under a Post-Holt RLUIPA,* 119 COLUM. L. REV. 2239, 2240–41, 2255–2260 (2019) (due to lack of statutory

alternatives to pursue general environmental goals as part of their religious faith, the government's burden on one particular option does not necessarily impose a substantial burden on the church's religious exercise. Last, the availability of alternative options for a church or its members to express their faith will often lead a court to conclude that there is no coercion by the government; the individual objectors can simply elect to adopt alternative ways to express their faith.[98]

In *Lyng v. Northwest Indian Cemetery Protection Association,* for example, the U.S. Supreme Court rejected claims by Native American tribes that a governmental road and timber foresting on sacred land would impair their religious exercises.[99] The Court reasoned that the Free Exercise clause only prohibited *coercive* governmental acts that impaired religious actions.[100] While the proposed foresting activities admittedly could have had "devastating effects on traditional Indian religious practices," the Court held that the government's action did not coerce or penalize any particular individuals or faiths.[101] As a result, while the government needed to provide access to sacred lands needed for religious ceremonies by the tribes, it had no duty to ensure the quality of that religious experience.[102]

The continuing viability of *Lyng* under the new post-*Fulton* era and the passage of RFRA and RLUIPA will face a sharp test in two religious land use cases reviewed by the Ninth Circuit. In *Slockish v. Federal Highway Administration,*[103] Native American elders and environmental groups challenged the expansion of highways and roads located near Mount Hood, Oregon. The expansion allegedly lacked proper environmental review under the National Environmental Policy Act, violated the Native American Graves Protection Act, and—most notably for religious environmental claimants—violated the tribe's free exercise of religion by damaging

definition of "substantial burden" in statute, ". . .contrasting methods of statutory interpretation have resulted in a circuit split over the definition of the term.").

98. This analysis focuses on the potential Free Exercise challenges to religiously-motivated environmental action. If a governmental mandate has such a broad scope that it effectively coerces conformity with mainstream religious beliefs, it may face similar challenges under the Establishment Clause. Mark Storslee, *Religious Accommodation and Third-Party Harm*, 86 U. CHI. L. REV. 871, 930–43 (2019).

99. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1987).

100. *Id.* at 449–53.

101. *Id.* at 452–53.

102. *Id.*

103. Slockish v. Fed. Highway Admin., Magistrate's Op., No. 3:08-cv-01169-YY, 2020 WL 8617636, slip op. at 33–34 (D. Ore. 2020), *adopted in part and rejected in part*, 2021 WL 683485, slip op. (D. Ore. 2021); *dismissed as moot,* 2021 WL 5507413 (Nov. 24, 2021).

sacred sites and restricting access to a stone altar discovered during road construction. The magistrate judge denied the tribes' Free Exercise Clause claim by concluding the government's action did not "substantially burden" the tribe's religious activities because it did not force them to "act contrary to their religious beliefs under the threat of sanctions or that a governmental benefit is being conditioned upon conduct that would violate their religious beliefs."[104]

The Ninth Circuit received numerous filings and appellate briefs in *Slockish* that squarely raised the issue of whether the Free Exercise Clause and RFRA require a claimant to prove that the government's action "substantially burdened" their free exercise if other alternative forms of religious expression remained available to them.[105] These arguments, in essence, asked the Ninth Circuit to rule on whether *Lyng* remains relevant for Free Exercise claims that involve religiously-motived affirmative actions by claimants. After the Ninth Circuit dismissed the tribal elders' RFRA and Free Exercise Clause claims as moot,[106] the parties elevated the dispute to the Supreme Court.[107] The Court is awaiting a response from the U.S. Solicitor General before it decides whether to grant petitions to review the Ninth Circuit's opinion.[108]

The second decision to test the environmental boundaries of RFRA and RLUIPA is *Apache Stronghold v. United States.*[109] In this dispute, Congress authorized the swap of land held by Resolution Copper and

104. *Slockish, Magistrate's Op.*, *supra* note 102, at 34.

105. *See, e.g.*, Brief for the Jewish Coalition for Religious Liberty, the Sikh Coalition, the Anglican Church in North America Jurisdiction of the Armed Forces and Chaplaincy, and Protect the 1st as *Amici Curiae* Supporting Respondents, Slockish v. Fed. Highway Admin., No. 21-3522 (9th Cir. filed May 10, 2021); Brief for Religious Liberty Law Scholars as *Amici Curiae* Supporting Plaintiffs-Appellants, Slockish v. Fed. Highway Admin., No. 21-3522 (9th Cir. filed May 10, 2021).

106. *Slockish v. U.S. Dep't of Transp.*, 2021 WL 5507413, *supra* note 102 (deemed moot after dismissal of Oregon Department of Transportation on Eleventh Amendment grounds and lack of federal agency authority under easement).

107. Petition for writ of certiorari, *Slockish v. U.S. Dep't of Transp.,* 2021 WL 5507413 (No. 22-35220).

108. Solicitor General Elizabeth Prelogar submitted an unopposed request on April 26, 2023, for an extension of her deadline to respond to the tribal elders' certiorari petition. If granted, the United States will have until June 2, 2023, to reply. This request is the seventh extension sought by the United States. Letter from Solic. Gen. Elizabeth Prelogar to the Hon. Scot Harris, Clerk of U.S. (Apr. 24, 2023) https://www.supremecourt.gov/DocketPDF/22/22-321/255587/20230224165515973_Extension%20letter%2022-321%205th.pdf [https://perma.cc/GNN7-HGKM]. The Court granted the extension request on April 27, 2023. *Docket for 22-321*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/docket/docketfiles/html/public/22-321.html [https://perma.cc/D2ZU-HP8B](last visited May 10, 2023).

109. Apache Stronghold v. United States, 38 F.4th 742 (9th Cir. 2022).

other parties in exchange for Oak Flat, a federal plot of land in Arizona, that overlaid one of the world's largest undeveloped copper deposits. The Oak Flat parcel, however, is sacred ground to the Apache American Indians, and Apache Stronghold[110] sued to halt the exchange.[111] The plaintiffs claimed that the exchange violated RFRA and the Free Exercise Clause of the First Amendment,[112] but a panel of the Ninth Circuit disagreed and dismissed the case.

The panel focused on prior precedent that construed RFRA as Congress' statutory reinstatement of pre-*Smith* Free Exercise caselaw (in particular, the long-standing *Sherbert* and *Yoder* tests). Under these prior decisions, a claimant could only seek relief upon a showing that the federal government's actions would either deprive them of a governmental benefit if they continued with their religious practice, or expose them to a penalty or other form of punishment. Simple inconvenience—even to the point of making the religious practice impossible—was not enough. As a result, the panel concluded that the Apache Nation's loss of access to the Oak Flat sacred lands did not constitute a "substantial burden" under RFRA that would trigger strict scrutiny under the statute.[113]

Like *Slockish,* the Ninth Circuit's holding in *Apache Nation* remains actively contested. The court has granted *en banc* review of the panel decision,[114] and is scheduled to hear oral argument during the week of March 20, 2023.[115] The Ninth Circuit's grant of *en banc* review has, of course, automatically vacated the prior panel decision, and the importance and notoriety of the issue has provoked a flurry of amici briefs and commentary.[116]

As a final note, all of this ferment centers solely on the federal courts' willingness to find broader religious exercise exemptions from federal mandates. Even if the Supreme Court ultimately balks at affirmatively overruling *Smith* and fails to expansively interpret RFRA and RLUIPA for religious environmental claims, the parallel but

110. Apache Stronghold is a non-profit entity created to preserve and protect American Indian sacred sites. *Id.* at 748.

111. *Id*.

112. Apache Stronghold also alleged violations of the 1852 Treat of Santa Fe between the Apache and the United States. Those claims are not relevant to this article's analysis. *Id.*

113. *Id.* at 756–68.

114. Apache Stronghold v. United States, 56 F.4th 636 (9th Cir. 2022).

115. J.K.J. v. City of San Diego, No. 20-55622, 2023 WL 2062786 (9th Cir. Feb. 17, 2023).

116. As of February 26, 2023, the Ninth Circuit's *en banc* review has spurred the filing of seven *amici* briefs from various religious organizations, churches, and business organizations. The original complaint and panel consideration also led to the filing of eleven *amici* briefs. Docket for Apache Stronghold v. United States, Westlaw, verified on Feb. 26, 2023.

potentially broader language of state-level constitutional and statutory protections for religious actions may offer a more robust basis for protecting ecoworship.

B. Principles for Interpreting Environmental Statutory Terms Regarding Religiously Motivated Actions

The fast-evolving constitutional backdrop for religious free exercise protections sets the foundation for future development, but the development of fundamental constitutional precedents and modifications of long-standing religious free exercise principles make it a slow-moving engine for change. The most likely arena for action lies elsewhere: the vast body of federal and state environmental statutory and regulatory standards that drive most environmental obligations in the modern administrative state. If the U.S. Supreme Court alters the ground rules for constitutional obligations towards free exercise of religious beliefs, how will those changes translate into a revamped understanding of the statutes that carry out Congressional priorities and goals?

1. The Stickiness of Statutory Precedent and *Stare Decisis*

One readily apparent barricade could immediately hamper revamped interpretations of federal environmental statutes to accommodate expanded free exercise religious claims. For decades, the U.S. Supreme Court has repeatedly held that precedents involving interpretations of statutory language deserve especially strong protection under *stare decisis.*[117] Under this approach, the federal courts should not disturb prior statutory interpretations because—unlike constitutional precedents—Congress can readily overrule judicial constructions of legislative provisions. If Congress chooses not to correct the judiciary's construction of its language, that choice presumably reflects the outcome of a democratic process that the courts should not quickly disturb.[118]

This interpretive inertia for statutes nonetheless leaves some room for change. Other statutory interpretive doctrines allow the federal courts to find new statutory meaning when underlying constitutional precepts change or other substantive canons of interpretation urge a modified view of statutory language. These interpretive tools include the expanded role of the constitutional avoidance principle when statutes impinge on religious liberties, the federalism clear statement principle's insistence on unambiguous Congressional direction when federal statutes intrude on core state sovereign interests (which can include state religious accommodation statutes), the persistent vitality of continuity canons for interpreting federal statutory language against changing societal mores, and the Court's prior construction of statutes in light of religious context in decisions

117. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008) ("[S]tare decisis in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what we have done.'") (citations omitted); United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 483 (2012); Halliburton CO. v. Erica P. John Fund, Inc., 573 U.S. 258, 274 (2014). *See also* William Eskridge Jr., *Overruling Statutory Precedents,* 76 GEO. L.J. 1361 (1988).

118. Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals,* 73 GEO. WASH. L. REV. 317, 319–27 (2005); Randy Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis,* 97 TEX. L. REV. 1125 (2019); BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 334–35 (2016). Notably, the U.S. Supreme Court has agreed to review the Third Circuit's opinion in *Groff v. DeJoy*, which dealt with the scope of Title VII of the Civil Rights Act protection for employees' demands for religious accommodation. While the questions on which the Court granted certiorari do not explicitly raise challenges to the strength of statutory stare decisis, the petitions squarely ask the Court to reverse its prior interpretation of Title VII, and amici briefs have already expressly invoked the issue. *See, e.g.,* Brief of the American Center for Law and Justice at 8-11, *Groff v. DeJoy,* No. 22-174 (Sept. 26, 2022); Brief for the General Conference of Seventh-Day Adventists and the Union of Orthodox Jewish Congregations of America as Amici Curiae in Support of Petition at 9-12, *Groff v. DeJoy,* No. 22-174 (Sept. 26, 2022).

reaching back to its seminal decision in *Holy Trinity Church v. United States*.

The most likely basis for statutory reinterpretations to harmonize federal environmental statutes with the rise of ecoworship will be the constitutional avoidance principle. This canon of statutory construction directs a court facing ambiguous statutory text to choose the interpretation that avoids a potential constitutional difficulty for the statute. The court should adopt this protective interpretation even if that reading is not the most obvious or plain reading of the text because Congress presumably would not pass legislation that it knew to be unconstitutional. While the federal courts have vacillated on whether a court must affirmatively find that one interpretation actually poses a constitutional risk,[119] the doctrine enjoys strong acceptance as a general principle of statutory construction.

The constitutional avoidance principle has an obvious role in interpreting the scope of federal environmental statutory language that might impinge on an expanded right to religious free exercises. If an environmental statute contains ambiguous text that, under one interpretation, would limit the ability to worship, the avoidance canon would require the court to choose a narrower construction (even if that safer interpretation is less plausible).[120] If those environmental statutes offer possible exemptions to other entities or groups through a delisting or variance process, the constitutional avoidance principle will strongly direct a federal court to interpret those statutes to require a similar variance or exemption process for religiously motivated activities that pose equivalent environmental impacts.[121]

A second, and similarly powerful, statutory construction doctrine focuses on construing federal statutes to be consistent with other important societal values and political priorities—even values that have evolved since Congress promulgated the original statute.[122] This approach allows the Court to flexibly extend existing statutory language to unanticipated new societal practices and norms, yet it

119. John Copeland Nagle, Delaware & Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495 (1997).

120. United States v. Davis, 139 S. Ct. 2319 (2019); Bond v. United States, 134 S. Ct. 2077 (2014); Zadvydas v. Davis, 533 U.S. 678, 696–99 (2001). The constitutional avoidance doctrine has a long provenance in federal environmental decisions as well. *See, e.g.*, Rapanos v. United States, 547 U.S. 715 (2006) (plurality opinion); Solid Waste Auth. of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).

121. *See* discussion *infra* Part III(D).

122. Bob Jones U. v. United States, 461 U.S. 574 (1983) (construing tax exemption provisions of Internal Revenue Code of 1954 to prohibit tax exempt status to private education institutions that used racially discriminatory admissions standards).

preserves Congress' ability to modify the statute and explicitly express its contrary views.[123] To the extent that federal environmental statutes use broad terms that incorporate norms and standards which can evolve or change over time, the courts can interpret those terms accordingly—including terms that could regulate religious activities that involve environmental protection.[124]

Last, the federal courts might turn to substantive interpretive canons that explicitly address religious activities. Caselaw is sparse on substantive canons of construction for statutes that directly affect religious institutions and activities (outside of references to the constitutional avoidance canon, which does not directly address the religious content of the activities at all). One foundational decision, however, explicitly addresses the construction of federal statutes that affect religious institutions: *Holy Trinity Church v. United States.* While *Holy Trinity* remains good law (albeit controversial) for the proposition that federal courts can sometimes disregard statutory text whose plain meaning conflicts with the larger purposes of the statute (i.e., its "spirit"), the second half of the decision explicitly relies on the religious nature of a regulated activity as a valid basis for imposing a narrowing construction on the statute.[125]

This aspect of the decision, with its enthusiastic proclamation that the United States is "a Christian nation," jars with modern sensibilities of U.S. culture and history. Its discussion of Christianity has understandably gotten scant attention and little reliance in subsequent decisions.[126] But this portion of the decision has never

123. William Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1021, 1022 n. 49 (1989).

124. While less likely, a federal court might also seek to apply the federalism clear statement principle to narrowly construe environmental statutes that affect core state interests in accommodating religious activities protected under that state's constitution or statutes. Gregory v. Ashcroft, 501 U.S. 452, 461–64 (1992); Rapanos v. United States, *supra* note 119.

[119] To date, no federal court has concluded that a state's legal accommodation of religious activities constitutes a core sovereign function that qualifies for protection under the federalism clear statement principle.

125. Holy Trinity Church, *supra* note 25, 143 U.S. at 465–72. Given the Court's first half of the opinion which finds that the spirit of the statute required a narrowing construction, the second half of the opinion may arguably constitute dicta. The Court, however, did not couch it as an alternative rationale, but instead gave each argument equal weight in reaching its decision.

126. Anita Krishnakumar, *The Hidden Legacy of Holy Trinity Church: The Unique National Institution Canon*, 51 WILLIAM & MARY L. REV. 1053, 1058–59 (2009) ("[t]o the extent that it has been discussed at all, the Christian-nation portion of the *Holy Trinity* opinion generally has been dismissed as a nineteenth-century embarrassment beyond which we as a nation have grown, or as a declaration by one religious justice that has had little impact on the subsequent development of American law.") (citations omitted). Professor Krishnakumar argues that *Holy Trinity's* second half should be reconceptualized as a "national institution" principle of

been challenged or overruled, and thus has played an important role in subsequent judicial decisions on the scope of allowed conscientious objection to conscription, the display of religious commandments in public schools, and federal labor regulation of employee relations within religious institutions.[127] The Roberts Court's increased attention to originalist interpretations of the Free Exercise and Establishment clauses may bring *Holy Trinity's* forgotten half back to light.[128]

For now, that debate remains unnecessary. To the extent that *Holy Trinity* utilized broadly held notions in the United States about the value of religious activities and institutions as a backdrop to interpret statutory terms that affect them, it offers a relatively agnostic way to account for societal mores about religion when wrestling with ambiguous statutory text. As constitutional norms continue to evolve on the proper degree of deference that the Court should provide to religion when construing text, *Holy Trinity's* statutory approach may resurface in a new context—especially when assessing how federal environmental statutes might apply to ecoworship.[129] Notably, the *Fulton* decision and others have already wrestled with narrowing interpretations of state statutes that arguably burdened religious exercise.[130]

2. Statutory Mandates for Interpretation of Religious and Envi-

interpretation that allows reference to uniquely American institutions (such as baseball, tobacco, and railway developments) as important context when interpreting statutes.

127. *See, e.g.*, United States v. Macintosh, 238 U.S. 605 (1931) (favorably citing *Holy Trinity's* discussion of U.S. historical tradition of Christianity, but rejecting argument that federal naturalization requirements could not bar applicants who object on religious grounds to taking up arms in civil defense). *See also* United States v. Johnson, 25 F.3d 1335 (6th Cir. 1994); Dayton Christian Schs., Inc. v. Ohio C. R. Comm'n, 766 F.2d 932 (6th Cir. 1985); United States v. Girouard, 149 F.2d 760 (1st Cir. 1945); In re Warkentin, 93 F.2d 42 (7th Cir. 1937); Fraina v. United States, 55 F. 28 (2d Cir. 1918); Am. C. L. Union of Ky. v. McCreary Cnty., 96 F. Supp. 2d 679 (E.D. Ky. 2000).

128. The courts may not explicitly announce the implementation of a new substantive canon for statutes that affect religious activities or institutions. To the extent such a principle begins to guide the federal judiciary's considerations and holdings, however, it might constitute a statutory construction canon even if it isn't labeled outright. Evan Zoldan, *Canon Spotting,* 59 HOUS. L. REV. 621, 657 n.213 (2022) ("The exclusion on putative canons that have been introduced only by scholars does not exclude canons simply because they have not yet been named by a court. Indeed, courts often rely on interpretive principles without specifically naming them.").

129. *See, e.g.*, Mast v. Fillmore Cnty., Minn., 141 S. Ct. 2430 (2021) (per curiam) (reversal of lower court decision that imposed sanitary sewer obligations on an Amish family farm, with Justice Gorsuch's concurrence relying on a narrowing review of state statutory requirements).

130. *Fulton, supra* note 80, at 1881.

ronmental Statutes

Looking beyond doctrines of statutory construction, Congress has enacted statutory directives on how to interpret statutes that affect either religious activities or environmental protection. While both of these legislative directives remain largely untapped as matters of affirmative law, they nonetheless express important guideposts for the construction of federal environmental statutes that potentially affect religious activities such as ecoworship.

Section 2000cc-3(g) of RLUIPA provides clear direction from Congress on how federal courts should interpret its terms. Under this provision, courts must construe the statute "in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[131] RFRA contains similarly sweeping directions to the courts that its construction should apply to all future federal statutory laws and that nothing in RFRA "shall be construed to authorize any government to burden any religious belief."[132] While a handful of federal courts have cited these provisions as background to their statutory analyses,[133] these legislative directives on how to interpret RFRA and RLUIPA have not conflicted with interpretations reached by the courts under traditional tools of statutory construction.

A similar statutory provision offers Congressional guidance on interpretation of federal environmental statutes. Under NEPA, Congress has explicitly instructed the federal courts that "[t]he Congress authorizes and directs that, to the fullest extent possible[,] the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies [set forth in NEPA]."[134] NEPA's policies, as spelled out in the statute, explicitly encourage a broad federal role to preserve the environment for succeeding generations, preserve important historic, cultural and natural aspects of national heritage, and balance resource use to permit high living standards.[135] While the federal courts have not yet relied on this statutory directive to broadly interpret the environmental terms of federal legislation, NEPA section 102(l) offers

131. 42 U.S.C. § 2000cc-3(g).

132. *Id.* at § 2000bb-3(b).

133. *See, e.g.,* Opulent Life Church v. City of Holly Springs, Miss., 697 F.3d 279, 295 (5th Cir. 2012); Greene v. Solano County Jail, 513 F.2d 982, 986 (9th Cir. 2008); Gonzales v. Collier, 610 F. Supp. 3d 963, 982 (S.D. Tex. 2022).

134. 42 U.S.C. § 4332(1).

135. *Id.* at § 4331(b).

a strong signal of Congress' intent on how courts should apply those rules of construction.[136]

To date, no federal court has attempted to apply both of these sets of Congressional direction on statutory construction. To the extent that these two statutory instructions conflict, the court will need to assess which—if any—should have priority. But the interpretive instructions in RLUIPA, RFRA, and NEPA should provide a powerful impetus to federal courts to construe federal statutes broadly when faced with claims where the three statutes would favor the same values and statutory interpretation. For example, if a claimant alleged that their particular form of ecoworship qualified for a broad interpretation under RLUIPA and RFRA as well as an environmentally protective gloss under NEPA, a federal court would presumably at least take note of these Congressional preferences and afford them an according degree of weight.

IV. New Federal Environmental Statutory Interpretations From an Expanded Free Exercise Baseline

A. Religious Interests, Environmental Standing, and Statutory Zones of Interest

One of the bedrock constraints on judicial review of federal environmental government actions is the doctrine of standing (both constitutional and prudential). Federal Article III courts and most state courts will not hear a complaint unless the claimant can show a concrete and particularized injury to his or her interests protected by the statute which can be both fairly traced back to conduct by the defendant, and which can be redressed by a decision of the court. Certain aspects of environmental claims can raise exotic additional dimensions of standing such as procedural and informational injuries, and the special status of parties such as sovereign states can affect their standing to raise specific environmental claims.[137] Absent these circumstances, the barriers of standing have significantly deterred

136. Joel Mintz, *Can You Reach New "Greens" If You Swing Old "Clubs"? Underutilized Principles of Statutory Interpretation and Their Potential Applicability to Environmental Cases,* 7 ENV'T LAW. 295, 315–16 (2001).

137. Massachusetts v. EPA, 549 U.S. 497 (2007) (special solicitude for state governments raising claims that federal government had failed to adequately respond to petition for rulemaking to identify carbon dioxide as a pollutant requiring regulation under Title II of the federal Clean Air Act).

citizen suits and direct actions that federal environmental statutes might otherwise facially allow.

RFRA, RLUIPA, and state religious freedom statutes provide a basis for plaintiffs to argue that their religious exercise of environmentally protective beliefs requires that the federal courts give a deferential weighing to their injury-in-fact for standing purposes. While simple aesthetic injury or unhappiness might otherwise fail to support a citizen suit under the CWA or CAA, the presence of a genuine religious belief that drives the expression of environmentally protective actions might mandate a federal court to grant standing to a citizen suit by a religiously driven claimant for an injury that, when considered outside a religious context, might otherwise fail to satisfy the court's Article III analysis.[138]

Beyond the constitutional strictures of Article III standing and the limited power of Congress to expand the judiciary's ability to admit claims by parties without minimal standing requirements,[139] prudential standing doctrines offer an additional basis for a court to consider unique religious expression elements of a claim. While frustration of religiously expressed environmental action could provide an injury-in-fact for Article III purposes, the rationale for a similar approach with prudential standing, however, has a more complicated justification. Prudential doctrines typically center on aspects and needs of the courts themselves, and as a result a court that invokes the political question doctrine or *Pullman* deference[140] is not focusing on the burden of the original governmental action. The court is instead weighing how hearing the claim would affect the court's ability to administer justice or adequately adjudicate the claim.[141]

138. For example, many citizen suits under the federal Clean Water Act founder on standing grounds because the citizens cannot demonstrate that a facility's violation of its wastewater discharge permit damaged them in a concrete and particularized way (especially if they lived or used the water significantly downstream from the discharge point). A claim to injury based on religious objections would not need to provide scientifically complex expert testimony to show a physical effect; the permit violation's harm would affect the objector's religious exercise. This expansion of standing analysis, however, may still face additional challenges based on some appellate courts' willingness to use a "zone of interests" protected by a statute to identify relevant harms for a standing analysis. Under this approach, a court may insist that only injuries arising from environmental impacts would be salient for standing assessments.

139. Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016).

140. Pullman abstention requires federal courts to withhold adjudication of the constitutionality of a state's law until that state's courts has an opportunity to rule on them. Railroad Commission v. Pullman Co., 312 U.S. 496 (1941).

141. A court's refusal to waive prudential standing requirements, oddly enough, would arguably not constitute a governmental action under RFRA or RLUIPA because those statutes do not apply to actions by the courts.

In the handful of decisions where the federal courts have already wrestled with challenges to standing for environmental claims under the Free Exercise Clause or RFRA, they have generally found concrete injuries-in-fact that the court could effectively remedy. For example, the D.C. federal district court readily determined that the Native American tribal members who alleged RFRA violations arising from construction of the Dakota Access Pipeline had standing to seek recovery for injuries to their interests in free religious exercises (even though the court ultimately rejected the underlying substantive claims).[142] Similarly, the *Slockish* district court rejected challenges to the tribal members' standing to allege that the proposed highway construction violated their rights under the Free Exercise Clause and RFRA.[143]

In total, the federal courts have shown a growing willingness to read standing requirements flexibly when faced with demands for religious exemptions from statutory dictates.[144] Given the U.S. Supreme Court's recent willingness to expand standing thresholds when claimants seek predominantly nominal damages,[145] the scope of standing available to claimants pursuing religiously-motivated environmental actions should grow accordingly.

B. Religious Free Exercise and Expanded Environmental Justice Policy

As noted earlier, current federal environmental justice policy generally does not extend its protections to religious groups who suffer disproportionate environmental impacts from federal agency actions.[146] As a result, environmental justice reviews of the burdens

142. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4, 26–27 (D.D.C. 2016).

143. The Ninth Circuit, of course, may revisit this jurisdictional decision *sua sponte* in the current appeal. Other courts have also shown a willingness to dismiss claims for mootness if the governmental action at issue had already completed.

144. This expansiveness is not surprising given the logical overlap of the concept of concrete injuries-in-fact required for federal standing and substantial burdens under the Free Exercise clause, RFRA, and RLUIPA.

145. Uzuegbunam v. Preczewski, 141 S. Ct. 792 (Mar. 8, 2021) (request for nominal damages alone sufficient to support standing and overcome mootness challenge). *But see* California v. Texas, 141 S. Ct. 2104 (June 17, 2021) (denying standing because states could not show past or future injury fairly traceable to enforcement of the specific statutory provision at issue); Transunion LLC v. Ramirez, 141 S. Ct. 2190, 2209–10 (June 25, 2021) (no standing for portion of class plaintiffs who had not suffered concrete individualized harm from erroneous credit history reports).

146. *See* discussion *supra* Part I(A).

created by environmental permitting or enforcement decisions and policies do not include a weighing of disproportionate burdens on religious minorities or practices, except in relatively rare cases where a racial or low-income group's identity is tightly linked to its religious beliefs (e.g., for practices by certain Native American faiths).[147] As a result, federal environmental justice policies can consider disproportionate burdens suffered by racial groups and low-income groups that happen to practice a faith peculiarly affected by the environmental effects of government action. Those same policies would not apply to the same governmental action and environmental effects suffered by other groups.

An expanded scope of protection for religiously motivated environmentalism might alter the intersection of environmental justice and religious liberty claims. For example, assume that a federal agency subjects a permitting decision to a more searching review because the permit would affect an environmental justice community. This approach, as noted earlier, would squarely accord with the Biden Administration's new executive orders to prioritize environmental restorative justice in all federal executive actions. If an objector to that same permit on religious grounds, however, fell outside the federal government's conception of environmental justice, that objector might claim that the federal government had failed to extend a similar deference for comparable activities in the public sphere. Under the Supreme Court's recent acceptance of a most-favored nation framework to assess Free Exercise Clause objections to pandemic-related restrictions on religious worship,[148] a federal court might find that the religious objectors merited a similar level of administrative deference.

Religiously motivated objectors to environmental obligations might point to other aspects of the Court's recent Free Exercise and RFRA decisions that could bolster religious environmental justice claims. The Court's emphasis on individualized exclusions from regulatory obligations as an escape hatch from *Smith's* lenient scrutiny standard, for example, opens the opportunity for similar comparisons to federal and state environmental laws that authorize broad networks of individualized exclusions, de-listings, and site-specific exemptions to modulate the impact of environmental standards. If an environmental law included similar discretionary exclusions and delisting mechanisms, a federal court might forego the relative flexibility of

147. *See* discussion *supra* Part III(B).
148. *See* discussion *supra* Part I(B).

Smith's standard and instead subject that environmental standard to a harsh strict scrutiny review.

C. Protection of Religiously Motivated Environmental Land Uses

One area where religiously motivated environmentalism seems most likely to occur is in land use. This is especially relevant because religious entities already hold large amounts of land in the United States for a wide array of purposes, including for use as sites for churches and institutions of worship, to provide services for congregational members, and to serve as economic investments which support other church operations.[149]

Little of this land, however, lies within conservation easements, land trusts, or other environmental use restrictions. In addition to the difficulties of identifying which parcels of land are owned by religious entities, the fragmentation of property records complicates the task of identifying conservation easements, environmental servitudes, or lands held in trust for preservation purposes. Informal inquiries with several conservancy groups indicate that none of them were aware of conservation easements or land-use restrictions based primarily or solely as an expression of religious worship or expression. A review of the land holding records maintained by the Texas Land Trust, for example, does not identify any easements, restrictive covenants or trusts created or held solely by religious entities for those purposes.[150]

The creation of a conservation easement or land trust by a religious group or individual as a means of religious expression or worship would pose the sharpest test of the degree of protection that federal law provides to religiously motivated environmental action. In addition to the federal constitutional constraints described earlier, state actions that burden religious land uses also must satisfy the federal statutory limits imposed by RLUIPA.[151] This statute bars any state or local government from imposing a land use regulation that imposes a "substantial burden" on the "religious exercise" of a person

149. *See supra* note 13.

150. *E.g.,* Texas Land Trust records show that not a single significant land trust or conservation easement in Texas is overtly or explicitly held by a religious group or church. This outcome is not surprising because religious organizations already enjoy tax exempt status under federal and state law, so they would not enjoy a financial benefit from placing their real estate holdings in a tax-sheltered conservation easement or land trust.

151. Actions by the federal government which burden religious land uses must also satisfy the statutory requirements of RFRA, as described earlier. *See* discussion *supra* Part I(C).

(including a religious assembly or institution). If it does, the local or state government must prove that the burden was imposed in furtherance of "a compelling government interest" and was the "least restrictive means" to further that interest.[152] The statute then defines "religious exercise" as "any exercise of religion," including the use of real property if the property is "use[d] or intend[ed] to [b]e use[d]" for religious exercise by its owner.[153] Congress expressly noted that it wished for the courts to construe the statute "in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[154] A more sweeping textual endorsement of broad protection for religiously-motivated action is hard to imagine.[155]

While the courts have largely rejected claims of religious exemption from environmental regulatory requirements, plaintiffs have quickly realized the value of RFRA and RLUIPA claims as challenges to federal actions. However, the prominent early attempts to use religious expression and beliefs under RFRA and the Free Exercise Clause failed to halt proposed federal governmental actions on public lands not owned by the plaintiffs. For example, when the Navajo Nation objected to plans to use recycled sewage as fodder for artificial snow-making on the Snowbowl Ski Resort, the Ninth Circuit rejected the claim. After *en banc* reconsideration, the court ultimately concluded that RFRA's requirement that the government cannot "substantially burden" religious expression should be interpreted narrowly in accord with earlier First Amendment caselaw.[156] As a result, the Ninth Circuit required the tribe to show that the federal government's plan would force them to either forego governmental benefits or face governmental sanctions if they exercised their religious beliefs. As the mountain remained accessible and sacred, the federal government

152. 42 U.S.C. § 2000cc(a)(1).

153. *Id.* at § 2000cc-5(7).

154. *Id.* at § 2000cc-3(g).

155. James Key, *This Land is My Land: The Tension Between Federal Use of Public Lands and the Religious Freedom Restoration Act,* 65 AIR FORCE L. REV. 51, 54 (2010) (noting the breadth of RFRA's language, and suggesting textual revisions because "Congress never intended for RFRA to control government land use decisions with respect to public lands."). In other contexts, the U.S. Supreme Court has recently noted the tension between condemnation of public lands and the need to balance competing public uses. PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244 (June 29, 2021) (the federal Natural Gas Act authorizes a private party to exercise eminent domain power along a federally approved pipeline route to sue a state government to condemn state land).

156. *Navajo Nation, supra* note 94, at 1043.

did not have an obligation to find an alternative less restrictive action because there was no "substantial burden" in the first place.[157]

By contrast, the Third Circuit sidestepped the opportunity to clarify the scope of potential accommodation exceptions for religious environmentalism in the *Adorers* dispute.[158] As noted earlier, the Adorers contended that FERC's decision to approve the placement of the Atlantic Sunrise Pipeline on the convent's property impermissibly burdened their religious expression. The nuns explicitly pointed to their religiously-motivated environmental beliefs as the basis for alleging that the pipeline's approval constituted a substantial burden on their ability to worship God. After the district court rejected the Adorers' claim because the pipeline did not substantially burden them because they could worship in other locations and in other ways, the Third Circuit disposed of the appeal on unrelated jurisdictional grounds. Effectively, the court ruled that the sisters had waived their Free Exercise objections because they failed to raise them before the agency during the permitting process.[159] This outcome, beyond dodging the core issue, also shifts many of these disputes into the more technocratic confines of administrative agencies whose managers may have little experience with these types of religious constitutional and statutory claims.

The Adorers also raised a parallel religious environmental claim in different garb: a takings claim for damages caused by substantial burdens to their exercise of religion inflicted by the condemnation action.[160] The Adorers argued that RFRA entitled them to recover monetary damages as part of their just compensation under the Natural Gas Act condemnation action for the natural gas pipeline. The district court rejected the claim by noting that Pennsylvania's eminent domain code (which the Natural Gas Act relied upon for eminent domain takings purposes) looked to the diminution of fair market value for the property.[161] The "religious liberties of a landowner clearly do not affect the fair market value of a property," according to the court.[162] The Pennsylvania Eminent Domain Code's authorization

157. *Id.*

158. *Adorers, supra* note 5, at 193.

159. *Id.* at 193–98. *See also* Diana Stanley, *Prayers and Pipelines: RFRA's Possible Role in Environmental Litigation,* 30 BOS. U. PUB. INT. L. J. 89 (2021) (reviewing case's procedural history and appellate ruling).

160. Transcon. Gas Pipe Line Co. v. Permanent Easement for 1.02 Acres, Civ. No. 17-1725, 2020 WL 3469040 (E.D. Pa. 2020).

161. *Id.* at 2.

162. *Id.*

of certain narrow categories of consequential damages also did not include damage to religious liberties.[163] As a concluding note, however, the opinion explicitly did not foreclose the Adorers' right to seek damages under RFRA outside of the condemnation action.[164]

The continuing validity of *Navajo Nation* is in doubt after RFRA and the U.S. Supreme Court's recent decisions,[165] although the Ninth Circuit declined the opportunity to revisit the case in *Slockish.* These cases nonetheless highlight the potential use of RFRA and RLUIPA in environmental contexts. Rather than challenging governmental environmental statutes that authorize permits which burden religious expressions, the new cases reverse the polarity of the claim: the church or religious individual wishes to take steps to protect the environment as a way to express sincere religious beliefs, and a governmental agency has invoked other land-use statutes, zoning authority, condemnation power, or other legal authorization to bar the religiously motivated environmental action. For example, if a church, religious organization, or wealthy individual chose to create a nature reserve or land conservation trust for religious expression or worship activities, that protected area might enjoy enhanced legal defenses against governmental attempts to condemn it for other public purposes, zoning changes to limit the ability to impair land for commercial use, or permission to adjoining property uses that would damage the protected religious conservation easement or protected area.

As noted earlier, this new variety of religious environmentalism has already begun to percolate in the lower courts.[166] The added dimensions of federally protected property rights (when the claimant owns the property at issue), the sharpened stakes when a government seeks to limit an adherent's use of their own property for religious purposes, and the broad Congressional sanction of statutory remedies under RLUIPA offer a strong setting for potential cases to test the limits of protections for religious environmental claims. For example, in *United Universalists v. Town of Bedford's Historic District*

163. 26 PA. CONS. STAT. §§ 701-706.

164. *Id.*

165. Congress included express provisions in RFRA and RLUIPA that effectively required broad construction and prospective applications of their statutory terms. Religious Freedom Restoration Act of 1993, § 6(b), 42 U.S.C. § 2000bb ("Rule of Construction"); 42 U.S.C. § 2000cc-3(g) ("Broad Construction"). No federal or state cases discuss how these legislation directives on interpretation would apply to the construction of RFRA, RLUIPA, or federal environmental statutes impinging on religious expression or land uses.

166. *See* discussion *supra* Part II(A)(2).

Commission,[167] the church wished to install solar panels on the roof of its sanctuary. Seeking to implement the Seventh Principle of the Unitarian Universalist faith to show "respect for the interdependent web of all existence of which we are a part," the church had already revamped its building to reduce natural gas consumption by 75%.[168] When the church sought to add solar panels to further reduce its carbon footprint, the Historic District Commission denied the church's application as inappropriate for the district historic character. The church then sued to overturn the Commission's rejection of the certificate for construction.[169] Its complaint included an allegation that the Commission had "violate[d] First Parish's right to free exercise of religion, as guaranteed by the First Amendment to the Constitution of the United States and Article II of the Massachusetts Declaration of Rights."[170]

A Massachusetts Superior Court struck down the Commission's decision as arbitrary and outside its authority. Notably, however, the court also dismissed the claims that denial of the certificate violated the church's freedom of religious expression. Before the Massachusetts Court of Appeals could hear the case, the parties settled their dispute in an agreement that allowed the church to install the solar panels.[171]

The *First Parish* decision highlights several bellwethers that will affect future litigation over religiously motivated land uses that promote environmental values. First, the Historic District Commission never contested the sincerity of the church's religious beliefs or its choice to express those beliefs through environmentally

167. First Par. in Bedford v. Historic Dist. Comm'n of the Town of Bedford, 2018 Mass. Super. LEXIS 2087 (Mass. Super. Ct. Aug. 16, 2018).

168. *Superior Court Rules in Favor of First Parish in Bedford's Solar Panel Project,* THE BEDFORD CITIZEN (Aug. 13, 2018), https://www.thebedfordcitizen.org/2018/08/superior-court-rules-in-favor-of-first-parish-in-bedfords-solar-panel-project/ [https://perma.cc/F3AP-2NPS].

169. Complaint, First Par. in Bedford v. Historic Dist. Comm'n of the Town of Bedford, 2018 Mass. Super. LEXIS 2087 (Mass. Super. Ct. June 27, 2016).

170. *Id.* at ¶ 92. Notably, the complaint did not include any alleged violations of RLUIPA. This choice of claims is probably not rooted in a preference to remain in Massachusetts state courts because RLUIPA gives concurrent jurisdiction for claimants to litigate in federal or state court. Religious Land Use and Institutionalize Persons Act, 42 U.S.C. § 2000cc-2; Gill v. State, 831 N.Y.S.2d 347 (2006). The Massachusetts Superior Court noted in passing that the Historic District Commission had failed to address potential RLUIPA concerns, but the court found no need to resolve the issue. Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment at 3 n.4, First Par. in Bedford v. Historic Dist. Comm'n of the Town of Bedford, 2017 WL 11261395 (Mass. Super. July 31, 2017)(No. 16-1844).

171. *First Parish Solar Panel Litigation Settled,* THE BEDFORD CITIZEN (Dec. 12, 2018), https://www.thebedfordcitizen.org/2018/12/first-parish-solar-panel-litigation-settled/ [https://perma.cc/NYM5-R9ZK].

protective action.[172] The parties clashed on whether the certificate denial substantially burdened the church's religious exercise, and each conceded that the Historic District Commission bore the burden of proving that the burden served overriding governmental interests and was narrowly crafted to minimize that burden.

This framework may create a significant opening for religiously motivated actors to acquire or manage currently owned property for environmentally protective uses. For example, a congregation arguably could acquire a large parcel of real property for the purpose of worshipping through contact and contemplation in the natural world. As part of that expression, the congregation could place the entire parcel under a restrictive covenant or conservation easement that forbade future commercial development of the property as long as the congregation used it for religious services. In this circumstance, the congregation's property use—even as it also promoted environmentally protective uses—would enjoy the enhanced protections of the federal Constitution and RLUIPA against conflicting state zoning decisions, permitting requirements, or condemnation actions.[173]

D. Religious Exercise, Least Restrictive Alternatives, and Identification of Environmental Impacts and Remedial Action Selections

When the federal government cleans up a contaminated site or weighs the environmental consequences of a proposed major action, by necessity it needs to choose the final option from various alternatives. In setting the criteria to make that choice or weigh those consequences, EPA has typically given religious concerns comparatively minor weight. Usually it subsumes religious values within a broader category of "cultural concerns" or "community reaction," but these sociological framings do not give religious objections any qualitative difference from other objections or social factors.

For example, when EPA selects a final permanent remedial action for a Superfund site, CERCLA requires the agency to select that cleanup according to a list of statutory criteria.[174] Those criteria prefer remedial actions that "permanently and significantly reduce[]

172. Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment, *supra* note 169, at. 4–5.

173. State law religious freedom statutes and state constitutional provisions often parallel RFRA in many respects, but they can include broader bases for claims and relief. DALTON, *supra* note 73, at 200–10.

174. 42 U.S.C. § 9621.

the volume, toxicity, or mobility of the hazardous substances, pollutants and contaminants. . ."[175] The statute adds that the selection and action, at a minimum, should take into account the long-term uncertainties associated with land disposal, the goals of the federal hazardous waste act, the persistence, toxicity, mobility, and propensity to bioaccumulate of the hazardous substances at issue, the short- and long-term potential for adverse health effects from human exposure, long-term maintenance costs, and the potential threat to human health and the environment from excavating, transporting, and redisposing the contaminants.[176] Notably, none of these criteria include any overt basis to incorporate religious motivations or values in selecting a remedial action or other response action at a CERCLA site. While EPA must also account for applicable or relevant and appropriate standards imposed by other programs or state environmental laws, it has typically viewed standards that do not directly address public health requirements or pollutant discharge standards as factors "to be considered" even if they do not directly apply. This discretionary review rarely, if ever, incorporates requests for religious accommodation or exemptions under other federal or state laws.[177]

Despite this general tendency, the federal government does account for religious concerns and values in certain discrete environmental contexts. When a federal agency conducts a full environmental impact statement under NEPA, for example, its general regulations explicitly note that the acting agency must account for cultural impacts arising from the proposed action.[178] The term "cultural impacts" is generally broad enough to include religious objections and concerns embedded within cultural practices and values. In addition, federal agencies conducting natural resource damage assessments after oil spills or

175. *Id.* at § 9621(a)(1).

176. *Id.* at § 9621(a)(1)(A)–(G).

177. EPA can consider religious values and sacred status of land as part of its discretionary selection of remedial actions at CERCLA sites, particularly for sites located on or near tribal lands. Memorandum from Elliott P. Laws, Assistant Adm'r, EPA Office of Solid Waste and Emergency Response, to Dir., Waste Mgmt. Div. Region I, IV, V, VII 5 (May 25, 1995) (selected remedy can anticipate future land use that includes cultural factors such as Native American religious sites). Notably, a search of the online database of Records of Decision for CERCLA remedy selections maintained by LEXIS/NEXIS did not contain any RODs that specify RFRA, RLUIPA, or other free exercise legal protections as either applicable or appropriate and relevant requirements at a CERCLA site (search updated July 16, 2021).

178. The central regulations implementing the NEPA environmental impact assessment process already require consideration of relevant cultural impacts (which would include religious free exercise concerns) affected by federal governmental actions. 40 C.F.R. § 1502.16(a)(8).

major releases of hazardous substances have expressly included damages to cultural and religious resources as part of their claims for compensation or restitution.[179] And the U.S. Fish and Wildlife Service, when it issues biological opinions that include mitigation requirements to protect threatened or endangered species, can establish differing alternative steps that will mandate restrictions on habitat or actions that affect species might conflict with religiously motivated land use or free exercise activities, and would require selection of mitigation measures that also would satisfy a least restrictive alternative test.[180]

Beyond selections of final actions for remediation, natural resources restoration, and protection of species, advocates have urged the courts to include religious values and concerns as an element in their interpretation of statutory terms. For example, in *Weyerhaeuser Corp. v. U.S. Forest and Wildlife Service,* a coalition of evangelical organizations urged the U.S. Supreme Court to account for the religious obligation of stewardship incumbent on all persons of faith when it reviewed the government's interpretation of the term "critical habitat" in the Endangered Species Protection Act.[181] The groups' amicus brief noted that the United States' narrow reading of the term focused heavily on economic considerations and ignored the important religious and non-economic values that Congress meant to protect when it originally passed the statute.[182] As a result, the groups argued that the Fifth Circuit had correctly decided that the Endangered Species Act's language should be read broadly to reflect these non-monetary values by deferring to the federal government's decision to include forested areas as critical habitat for the dusky gopher frog even if that land required alteration to make it usable for

179. Amanda Halter and Ashleigh, Myers, *Counterculture: The Uncertain Legal Bases for Stand-Alone Tribal/Cultural Damages Recoveries for Natural Resource Injuries Under CERCLA*, 36 NAT. RESOURCES & ENV'T 8, 8 (2022); Natural Resource Damage Assessments, 59 Fed. Reg. 14,262-01(Mar. 25, 1994).

180. For example, the federal government has had to craft biological opinions under the Endangered Species Act's consultation requirements that authorize the incidental takings of protected whales for cultural and religious ceremonies by Inuit tribal communities and the subsistence harvesting of salmon under treaty rights. Tina Boradiansky, *Conflicting Values: The Religious Killing of Federally Protected Wildlife,* 30 NAT. RES. L.J. 709 (1990).

181. Brief of Evangelical Environmental Network as Amici Curiae at 5–8, Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv. (July 3, 2018) (No. 17-71).

182. As noted earlier, state religious free exercise laws—both constitutional and statutory—can also trigger requirements for consideration and, if appropriate, incorporation into federal selections of remedial actions under CERCLA as ARARs and for inclusion in environmental impact statements under NEPA. *See* discussion *infra* Part I(A).

the frog.[183] The Fifth Circuit and the Supreme Court, however, ultimately decided the case on other grounds.[184]

V. Risks of Reinterpreting Federal Statutes to Accommodate Environmental Worship

The accommodation of religious values in environmental protection, of course, can cut in both directions. As highlighted by the distinction between the right to act and the right to refuse, an invigorated right to claim exemptions from environmental regulatory dictates could raise the risk for weakened environmental protections, regulatory inconsistency and gaps, and delays over needed environmental actions while parties assert their religious objections in protracted litigation. These risks could arise in several distinct forms.

The most obvious risk is that a religious adherent may claim that a facially neutral and generally applicable federal environmental requirement unnecessarily and substantially burdens their rights to free religious exercise. The blade cuts both ways: a religious institution may seek exemptions of an entire host of environmental and safety requirements as an impermissible burden and thereby endanger the public. For example, a church may wish to expand its worship facilities, but the state government may seek to halt its efforts because the church has not provided adequate wastewater treatment services for the expanded facility. While the church would likely fail in its efforts to exempt itself from water quality protection obligations in these circumstances, it could substantially delay enforcement of those obligations by requiring the government to prove that its refusal was narrowly tailored and no other alternatives could serve the same goals. If the government has also granted exemptions to non-religious facilities in the same area, the church might also contend that its actions fail the most-favored nations approach laid out in *Fulton v. City of Philadelphia.* The delay, uncertainty, and potential inconsistency raise grave concerns even if the process ultimately yields an environmentally protective result for this specific church facility.

Beyond requests for exemptions, an expanded accommodation of religious interests in environmental law could perversely generate

183. *See* Brief of Evangelical Environmental Network as Amici Curiae, *supra* note 180, at 19–27.

184. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 586 U.S. ___, 139 S.Ct.361 (2018).

Establishment Clause challenges. To the extent that a government exempts religious facilities from expensive environmental standards or compliance obligations—especially in arenas where churches provide services that compete with commercial or secular alternatives—disfavored parties may argue that the government has effectively subsidized and favored the exempted facilities.[185] While this tension has haunted the border between Free Exercise claims and Establishment Clause objections for decades, the substantial expenses and potential criminal penalties associated with environmental compliance programs could magnify these concerns.[186]

The accommodation of religious concerns in environmental law may also force states into an awkward posture of choosing between competing religious claims over natural resources or regulatory obligations. For example, if multiple religious faiths sought to use a particular parcel of land in a way that conflicted with federal environmental requirements to protect endangered species on that property, the government could find itself caught between warring religious (and secular) camps. By choosing to exempt or protect one religious use, it could effectively frustrate or substantially burden another.

Last, and most likely, the enhanced availability of religious environmental exemptions raises the risk of manipulation or rent-seeking by marginal or bad-faith claimants. The federal courts have generally not sought to measure the sincerity or legitimacy of religious beliefs, and that deference has lately increasingly extended to accepting the adherent's choices on how to express those beliefs. As a result, the courts have increasingly focused on whether the governmental action substantially burdens the religious beliefs, which the courts often accept at face value. If bad-faith actors can avoid extremely expensive environmental obligations or avoid criminal prosecution for destruction of public resources or protected wildlife, the government might find itself needing to more aggressively assess claims of religious exercise and the need for particular avenues to express them.

185. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); Locke v. Davey, 540 U.S. 712 (2004).

186. Notably, some commentators have argued that an originalist interpretation of the Establishment Clause should acknowledge the historical relevance of governmental support for churches during colonial times, Michael McConnell, *Disestablishment at the Founding Part I: Establishment of Religion,* 44 WM. & MARY L. REV. 2105 (2003), with the implication that the First Amendment might mandate some forms of religious preferentialism.

VI. Conclusion

These deep statutory waters and societal currents lead to a surprisingly straightforward, and practical, set of principles to guide further governance of the future growth and diversity of ecoworship. These principles center on revamping how federal environmental statutes account for religious values during environmental remediation and ecosystem protection, preparing for the expansion of action and authorizations by religious actors to exercise their beliefs through environmental protection, and crafting limits on statutory interpretations and substantive doctrines to cabin impermissible societal harm and legal confusion.

First, the federal and state governments will need to include a greater sensitivity to religious concerns when they take environmental actions that affect free exercise of beliefs through ecoworship. The decisions that will invoke these concerns will likely appear first in environmental impact considerations, selection of remedial actions where religious protection statutes might constitute relevant and appropriate authorities, and expanded statutory and Article III standing for claimants who assert injuries rooted, in whole or in part, in religious ecological values. These broader bases for governmental action will likely encompass aspects of environmental justice that currently do not explicitly account for free exercise ecoworship outside of cultural and socioeconomic contexts covered by existing definitions of environmental justice and equity.

Second, religious actors will likely see an expanding ability to express their faiths through ecoworship that federal and state governments must allow or accommodate. For example, churches could shield lands from development as a necessary basis for their worship or rituals, congregants could bar or boycott environmentally destructive products or materials as part of their faith, and the faithful could act collectively to combat environmental dangers and risks through direct action via private cleanups or species stewardship.

Finally, this path to ecoworship conjures the companion risk that claims of environmental free exercise could undermine or frustrate regulatory requirements and health standards needed to protect the public. To cabin this risk, the courts can act. The U.S. Supreme Court has already signaled possible options to enhance religious environmentalism without risking dangerous environmental opt-outs. One pathway appears in *Fulton v. City of Philadelphia* in Justice Alito's concurrence. As noted earlier, the concurrence (which four justices partially accepted) focuses on an originalist interpretation of the Free

Exercise Clause by reviewing the historical roots of its language. Justice Alito describes, at great length, how the state legislatures and courts originally viewed the scope of free exercise protections under their constitutions or common law. Most of those historical predecessors included an important qualification: the exemption sought could not shield activities that posed a "threat to public peace and safety." While this option could put the courts in the uncomfortable position of measuring whether claimed religious exemptions would threaten public health and safety (a task that the courts have typically happily ceded to expert administrative agencies), it could also allow the courts to support environmental actions and exemptions without needlessly undermining generally applicable and neutral environmental standards that protect the public at large.[187]

Beyond reviving the public peace and safety limits on religious exemptions based on historical understandings of the original intent of the Constitution's drafters, the Court could also turn to broader textualist approaches that take advantage of the extraordinarily sweeping statutory text of RFRA and RLUIPA to emphasize Congressional intent as embodied in the statute itself. This expanded view of legislative purpose could include reasonable limits on the degree of protection offered by the statutes if they threaten public health or the environment. This interpretive approach, championed by Justices Gorsuch and Barrett, could also draw support from the moderate wing of the current Supreme Court bench.[188]

As a final step, Congress and state legislatures could clarify the scope of protection accorded to claims of religiously motivated environmental actions. Some of these changes could focus on definitional and jurisdictional elements of both RLUIPA and RFRA. More generally, a model statute could provide guidance to state legislatures on appropriate balances between protections of religious conscience, protection of the environment, and the need for stability

187. James Oleske, *Free Exercise (Dis)honesty,* 2019 WISC. L. REV. 689 (2019) (in larger context of free exercise challenges generally, suggesting the courts should reject return to *Sherbert* test and instead adopt an intermediate heightened scrutiny test that would require the state to prove that it has an actual and substantial interest in denying an exemption to the claimant).

188. The use of broad textualist approaches to implement statutory language that reflects Congressional desires for flexible and adaptive judicial interpretation has also surfaced in non-environmental contexts. *See, e.g.*, Brnovich v. Democratic National Committee, 141 S. Ct. 2321, 2350–51, 2372–73 (2021) (Kagan, J., dissenting) (broad textualist interpretation needed to implement facial obligations of Section 2 of the Voting Rights Act).

and predictability in public and commercial activities. These statutory changes could explicitly and carefully craft the degree of protection for environmental affirmative actions by clearly establishing how the courts could weigh their religious motivation and character, as well as determine the elements of substantial burden and coercion if those claims are denied.