

GOVERNMENT EMPLOYEE RELIGION

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ABSTRACT

Picture a county clerk who refuses to issue a marriage license to an LGBT couple or a city bus driver who insists on wearing a hijab. The clerk is fired for failing to fulfill job responsibilities and the bus driver for violating official dress codes. Both claim that their termination violates the First Amendment speech and religion clauses.

There is a well-developed First Amendment government employee speech jurisprudence. Less developed is the doctrine and literature for First Amendment government employee religion. The existing Free Exercise Clause jurisprudence usually does not specifically account for the government employee context. This Article attempts to fill that gap by developing a government employee religion doctrine based on the existing government employee speech doctrine.

Part I summarizes government employee speech doctrine. Part II imagines a parallel government employee religion doctrine and applies it to the opening hypotheticals. It concludes that government employees who are religiously opposed to an aspect of their job would lose their religion claims for multiple reasons. In contrast, employees who wish to wear religious garb have much stronger claims. Part III addresses two concerns with my proposed government employee religion doctrine. One criticism is that government employee speech doctrine is too flawed to serve as a model. Another is that speech and religion are too dissimilar to base one on the other.

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INTRODUCTION.....	1195
I. GOVERNMENT EMPLOYEE SPEECH DOCTRINE	1197
A. Speech Pursuant to Official Duties Threshold.....	1198
B. Matter of Public Concern Threshold.....	1200
C. Undue Disruption.....	1201
II. GOVERNMENT EMPLOYEE RELIGION DOCTRINE	1203
A. The Government Employee Religion Doctrine.....	1204
1. Speech Pursuant to Official Duties Threshold.....	1205
a. If Pursuant to Official Duties, then State Action Not Protected by First Amendment.....	1205
b. If Pursuant to Official Duties, then State Action Triggering Establishment Clause and Equal Protection Clause	1207
i) Establishment Clause	1207
ii) Equal Protection Clause	1210
2. Matter of Public Concern Threshold.....	1215
3. Undue Disruption.....	1222
B. Doctrinal Hesitations.....	1230
1. Free Exercise After <i>Smith</i>	1231
2. Religious Liberty in the Age of RFRA.....	1237
a. The Rise of RFRA.....	1237
b. RFRA and Free Exercise.....	1239
c. Informing RFRA Analysis	1240
III. CRITICISM	1241
A. The Garcetti Critique.....	1242
1. Criticism.....	1242
2. Response	1244
B. The Speech and Religion Are Too Different Critique	1245
1. Criticism.....	1245
2. Response	1245
a. Government Interests	1246
b. First Amendment Interests.....	1248
i) Apply the Same Test	1249
ii) Alter the Test by Dropping the Public Concern Requirement	1251
CONCLUSION.....	1256

INTRODUCTION

Imagine a county clerk who refuses to issue a marriage license to an LGBT couple or a police officer who refuses to arrest disruptive protesters. Or picture a city bus driver who insists on wearing a yarmulke or a hijab. The former are fired for failing to fulfill job responsibilities, and the latter for violating official dress codes. All claim that their termination violates the First Amendment speech and religion clauses.

These examples are not entirely hypothetical.¹ Most famously, Kim Davis, a county clerk in Kentucky, stopped issuing marriage licenses because signing licenses for same-sex couples would compromise her Christian beliefs.² At one point Davis was jailed for defying a court order that she perform the duties of her office.³ The Governor of Kentucky came to her rescue with an executive order changing the forms, which are now issued without an authorizing signature from the county clerk.⁴ This case may be a

1. There are generally three types of government employee religion claims. One, the government employee refuses to perform part of their official duties because it clashes with their religious faith. *See, e.g.*, *Endres v. Ind. State Police*, 349 F.3d 922, 924 (7th Cir. 2003) (Baptist state police officer religiously opposed to gambling who refused assignment as Gaming Commission Agent); *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 222 (3d Cir. 2000) (Pentecostal nurse in labor and delivery room who refused to assist with emergency surgeries she considered abortion); *Ryan v. U.S. Dep't of Justice*, 950 F.2d 458, 459 (7th Cir. 1991) (Roman Catholic FBI agent who refused on religious grounds to investigate vandalism by pacifist groups at military recruiting stations); *Haring v. Blumenthal*, 471 F. Supp. 1172, 1174–75 (D.D.C. 1979) (IRS agent who refused on religious grounds to process tax exempt status for organizations that promote abortion and LGBT rights); cases cited *infra* note 47. Two, the government employee feels religiously compelled to wear something—a beard, a headcovering, a cross—that is barred by uniform or dress rules. *See* cases cited *infra* note 48. Three, the government employee needs time off for religious observance, such as a Sabbath day. *See, e.g.*, *Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1152 (10th Cir. 2000) (U.S. Post Office mail carrier sought Sabbath day off); *Opuku-Boateng v. California*, 95 F.3d 1461, 1464 (9th Cir. 1996) (California Plant Inspector sought Sabbath off).

2. Although Kim Davis inspired this Article, it is not ultimately about Kim Davis herself. Kim Davis was an elected official, and I am focusing on government employees who are not directly chosen by the electorate. Erik Ortiz, Gabe Gutierrez & Daniella Silva, *Kim Davis, Kentucky Clerk, Held in Contempt and Ordered to Jail*, NBCNEWS.COM (Sept. 3, 2015, 5:43 PM), <https://www.nbcnews.com/news/us-news/kentucky-clerk-kim-davis-held-contempt-court-n421126>.

3. *Id.*

4. Sandhya Somashekhar, *Kentucky Governor Alters Marriage Licenses to Accommodate Opponents of Same-Sex Marriage*, WASH. POST (Dec. 22, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/12/22/kentucky-governor-alters-marriage-licenses-to-accommodate-opponents-of-same-sex-marriage/?utm_term=.58652835ce13 (“The order removes a requirement that county clerks’ names appear on marriage licenses issued by their offices.”). Because there was uncertainty over whether the Governor has the legal authority to make this change, the Kentucky legislature passed

harbinger of more to come, as government employees feel empowered to insist on living their lives and doing their jobs in complete conformity with their religious beliefs.

There is a well-developed First Amendment government employee *speech* doctrine, and literature for that matter. Less developed is First Amendment government employee *religion* jurisprudence. Existing Free Exercise Clause jurisprudence usually does not specifically account for the government employee context. This Article attempts to fill that gap by imagining what government employee religion doctrine informed by government employee speech doctrine would look like. It focuses particularly on the religious refusal cases, where a public employee's faith prevents them from executing a job responsibility,⁵ but it also considers other kinds of clashes between religious public employees and government requirements.

Despite widespread scholarly disapproval of the existing government employee speech doctrine,⁶ the Article takes it as a given for two reasons. First, as discussed in Part III, the main criticism does not apply in the religion context. Second, this Article's goal is not to reconceive government employee speech doctrine, but to construct a government employee religion doctrine based on current law, with conclusions that can be immediately adopted. And while the Article focuses on constitutional religious liberty claims, it also provides guidance to statutory religious liberty ones, such as those brought under a state Religious Freedom Restoration Act.⁷

Part I summarizes government employee speech doctrine, which consists of a three-step inquiry. In the first step, government employee speech that is made pursuant to official duties is screened out; it is considered government speech and not covered by the Free Speech Clause. The second step asks whether the speech is on a matter of public concern. If not, it too is

a bill codifying it. Dani Kass, *Kentucky Governor Signs Bill Nixing Clerk Names on Marriage License*, LAW360.COM (Apr. 4, 2016), <https://www.law360.com/articles/784403/ky-gov-signs-bill-nixing-clerk-names-on-marriage-licenses>.

5. Although "employee" is singular and "their" is plural, I adopt it as a gender-neutral substitute for "his or her." See, e.g., Jeff Guo, *Sorry, Grammar Nerds. The Singular 'They' Has Been Declared Word of the Year*, WASH. POST (Jan. 8, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/01/08/donald-trump-may-win-this-years-word-of-the-year/> (reporting the widespread acceptance of the singular "they").

6. See discussion *infra* Part III.A.1 (detailing scholarly complaints about government employee speech doctrine, especially after *Garcetti v. Ceballos*, 547 U.S. 410 (2006)).

7. Laws such as Mississippi's H.B. 1523 "Protecting Freedom of Conscience from Government Discrimination Act," MISS. CODE ANN. § 11-62-1 (2017), which explicitly grant public employees the right to "seek recusal from authorizing or licensing lawful marriages based upon or in a manner consistent with a sincerely held religious belief," *id.* § 11-62-5(8)(a), are beyond the scope of this Article, which addresses claims of government employees whose beliefs have not been accommodated.

unprotected. If the government employee's speech passes those two threshold inquiries, then the value of the speech is balanced against the government's interest in a well-functioning workplace.

Part II imagines what a parallel government employee religion doctrine would look like and applies it to the opening hypotheticals. It concludes that government employees who are religiously opposed to an aspect of their job would lose their religion claims for multiple reasons. In contrast, employees who wish to wear religious garb have much stronger claims. Part II also explains why formulating a constitutional doctrine for public employee religious liberty claims is important even in an age of the Religious Freedom Restoration Act (RFRA): Free Exercise Clause claims will continue despite the growing use of RFRA (or its state counterparts), and in any event the concerns that shape the constitutional claims should inform the statutory ones.

Part III addresses two criticisms of my proposed approach to government employee religion. One is that it is a mistake to rely on the highly flawed government employee speech doctrine. Much scholarly critique has been levied against this doctrine. In particular, by failing to protect employees who report wrongdoing in the course of their job, the pursuant to official duties test discourages whistleblowing and consequently undermines the public's ability to hold the government accountable for its misconduct. Although a valid concern, it does not arise with government employees practicing their religion.

Another argument against basing public employee religion claims on public employee speech claims is that religion and speech are too dissimilar. Protecting speech both furthers the individual autonomy of the speaker as well as ensures a free flow of information to the public. Individual religious practice, however, lacks speech's dual character and promotes only individual autonomy. This difference explains why the whistleblower critique does not reach government employee religion. Might it also be why government employee speech is an inappropriate model? Part III considers this argument, along with a second, albeit less common, criticism of government employee speech doctrine: its failure to adequately incorporate the individual autonomy justification for speech, and now, perhaps, for religion.

I. GOVERNMENT EMPLOYEE SPEECH DOCTRINE

At one time, the Free Speech Clause did not extend to government employees. Justice Homes famously summarized this approach as: “[A policeman] may have a constitutional right to talk politics, but he has no

constitutional right to be a policeman.”⁸ While the Holmes approach no longer prevails,⁹ government employees are not protected from their government-employer to the same extent they are protected from their government-sovereign. In other words, the government may discipline its employees for their speech in a way it cannot punish regular citizens. That does not mean that the government has *carte blanche*: Terminating an employee for their speech might still violate the Free Speech Clause.¹⁰

More specifically, government employee speech claims are currently subject to a three-step test. At each step, certain speech claims are winnowed out. First, no claim lies for speech made pursuant to the government employee’s official duties. Second, government employee speech about purely personal matters as opposed to matters of public concern is not protected by the Free Speech Clause. Third, even if the government employee’s speech was not made as part of their job and concerned a public matter, it is still ultimately unprotected if it unduly disrupts the workplace. Each of these steps is explained in more detail below.

A. *Speech Pursuant to Official Duties Threshold*

Government employee speech that is made fulfilling one’s job responsibilities is not protected by the Free Speech Clause. This limit was announced in 2006 by *Garcetti v. Ceballos*.¹¹ Richard Ceballos was a deputy district attorney for the Los Angeles County District Attorney’s Office¹² and his official duties included advising his superiors on upcoming cases.¹³ In one disposition memorandum, Ceballos criticized an affidavit used to procure a search warrant and recommended dismissal of the case.¹⁴ His supervisors disagreed, and following a heated discussion, Ceballos suffered various adverse employment consequences.¹⁵ The Supreme Court dismissed his subsequent free speech claim, writing, “We hold that when public employees

8. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

9. *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 227 (2003) (“Our precedents firmly reject[] Justice Holmes’ famous dictum . . .”).

10. *See supra* note 5 (discussing singular use of “they” and “them”).

11. *Garcetti*, 547 U.S. at 425.

12. *Id.* at 413.

13. *See id.* at 421.

14. For example, Ceballos questioned “the affidavit’s statement that tire tracks led from a stripped-down truck to the premises covered by the warrant. His doubts arose from his conclusion that the roadway’s composition in some places made it difficult or impossible to leave visible tire tracks.” *Id.* at 414.

15. *Id.* at 415–16.

make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”¹⁶

The decision suggests, although it does not explicitly state, that public employee speech pursuant to official duties is government speech.¹⁷ For example, the Court justifies its holding as “simply reflect[ing] the exercise of employer control over what the employer itself has commissioned or created.”¹⁸ Indeed, Justice Souter complains in dissent that “[t]he majority accepts the fallacy . . . that any statement made within the scope of public employment is (or should be treated as) the government’s own speech.”¹⁹

Thus, the Supreme Court imports the dichotomy between private speech and government speech into the government employee context.²⁰ The Court assumes that Ceballos could either be acting as a private citizen or acting as the government, but not both.²¹ If public employees like Ceballos are speaking outside their job responsibilities, then that speech is private speech that may be covered. If, however, the public employees are speaking pursuant

16. *Id.* at 421.

17. Pauline T. Kim, *Market Norms and Constitutional Values in the Government Workplace*, 94 N.C. L. REV. 601, 636 (2016) (“No Supreme Court case has ever directly applied the government speech doctrine to deny a public employee’s First Amendment claim, although the majority opinion in *Garcetti* appears to have been influenced by it.” (footnote omitted)); Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 12 (2009) (noting that the *Garcetti* majority “created a bright-line rule that treats public employees’ speech delivered pursuant to their official duties as the government’s own speech—that is, speech that the government has bought with a salary and thus may control free from First Amendment scrutiny”); Kermit Roosevelt III, *Not As Bad As You Think: Why Garcetti v. Ceballos Makes Sense*, 14 U. PA. J. CONST. L. 631, 635 (2012) (“The Court did not give an elaborate explanation for why speech produced pursuant to official duties should be unprotected. It gestured in two directions. First, it suggested that speech produced pursuant to official duties was in some sense government speech.”).

18. *Garcetti*, 547 U.S. at 422. Moreover, the supporting quotation directly references government speech: “[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.” *Id.* (alteration in original) (citation omitted).

19. *Id.* at 436 (Souter, J., dissenting).

20. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009) (“The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2254 (2015) (Alito, J., dissenting) (“Under our First Amendment cases, the distinction between government speech and private speech is critical.”); Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 607 (2008) (“We generally characterize speech as either private or governmental, and this dichotomy is embedded in First Amendment jurisprudence.”).

21. For a critique of this dichotomy, see generally Corbin, *supra* note 20.

to their official work duties, then that speech is government speech.²² Government speech, of course, does not trigger the Free Speech Clause.²³ Rather, free speech is meant to protect private individuals from the government.

In sum, the first threshold inquiry is whether the public employee is speaking pursuant to their official duties. If so, then that speech is essentially the government's, and as government speech the Free Speech Clause does not reach it.

B. *Matter of Public Concern Threshold*

Although public employee speech pursuant to official duties is automatically *unprotected*, public employee speech outside official duties is not automatically *protected*. Instead, it must satisfy the second threshold and amount to “speech on a matter of public interest.” “[A] public employee’s speech is entitled to [First Amendment protection] only when the employee speaks ‘as a citizen upon matters of public concern’ rather than ‘as an employee upon matters only of personal interest.’”²⁴

What counts as speech on a matter of public concern is not well-defined.²⁵ In its most recent government employee speech case, the Supreme Court held that “[s]peech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.”²⁶ The local school board’s allocation of funds is a matter of public interest,²⁷ as is the

22. *Garcetti*, 547 U.S. at 422 (“When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee.”).

23. *Walker*, 135 S. Ct. at 2245–46 (“[G]overnment statements . . . do not normally trigger the First Amendment rules designed to protect the marketplace of ideas.”); see also *Pleasant Grove City*, 555 U.S. at 469 (“[G]overnment speech is not restricted by the Free Speech Clause.”).

24. *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004) (per curiam) (citations omitted).

25. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (acknowledging that “the boundaries of the public concern test are not well defined”).

26. *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014) (quotations omitted).

27. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968) (“[T]he question [of] whether a school system requires additional funds is a matter of legitimate public concern . . .”).

issue of whether a government employer pressured his staff to participate in a political campaign.²⁸ Snarky criticism of a sitting President also qualifies.²⁹

On the other hand, as the Supreme Court made clear in *Connick v. Myers*, personal grievances concerning the workplace are not matters of public interest, even if that workplace is a government office. In *Connick*, Assistant District Attorney Sheila Myers, who strongly opposed her proposed transfer,³⁰ prepared a questionnaire for her coworkers.³¹ The Court held that the questions regarding the office transfer policy, office morale, and the need for a grievance committee were not matters of public concern but “mere extensions of Myers’s dispute over her transfer to another section,”³² and “an attempt to turn [her] displeasure [with her transfer] into a cause célèbre.”³³ Consequently, those questions did not trigger free speech protection.³⁴

In sum, the second threshold question is whether the government employee’s speech was on a matter of public interest. If not, then it does not merit Free Speech Clause protection.

C. Undue Disruption

If the government employee’s speech survives the two threshold inquiries, then its free speech value will be weighed against its disruptiveness to the government workplace. The more valuable the speech, the more workplace upheaval it may create before losing protection.³⁵ Still, there is a limit, and even speech on important public affairs will not be protected if it causes too much disruption. “The *Pickering* balance requires full consideration of the

28. *Connick v. Myers*, 461 U.S. 138, 149 (1983) (“[W]e believe it apparent that the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community . . .”).

29. After hearing of an assassination attempt on President Reagan, a young clerk working in a police station remarked, “If they go for him again, I hope they get him.” *Rankin v. McPherson*, 483 U.S. 378, 380 (1987). The Supreme Court held that the comment was speech on a matter of public concern. *Id.* at 386–87.

30. *Connick*, 461 U.S. at 140.

31. *Id.* at 141.

32. *Id.* at 148.

33. *Id.*

34. *Id.* at 146 (“[I]f Myers’ questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge.”).

35. *Connick*, 461 U.S. at 164 n.4 (“The degree to which speech is of interest to the public may be relevant in determining whether a public employer may constitutionally be required to tolerate some degree of disruption resulting from its utterance.”); *see also* *Lane v. Franks*, 134 S. Ct. 2369, 2381 (2014) (“[A] stronger showing . . . may be necessary if the employee’s speech more substantially involve[s] matters of public concern.”).

government's interest in the effective and efficient fulfillment of its responsibilities to the public."³⁶

The disruption may take different forms. The government employee's speech may interfere with a supervisor's ability to supervise or may destroy necessary working relationships.³⁷ The challenged speech may make it impossible for the government employee to continue performing their job.³⁸ Or, the government employee's speech may bring serious disrepute to the government department, as when a police officer sold videos of himself masturbating in police uniform.³⁹

This balancing of free speech and government employer interests, known as *Pickering* balancing, first took place in *Pickering v. Board of Education*.⁴⁰ Marvin L. Pickering, a school teacher, wrote a letter to the local newspaper blasting the school board's handling of school funds.⁴¹ After the school board fired Pickering, he brought—and won—a free speech claim.⁴² According to the Supreme Court, Pickering's views on how the school spent public dollars was a topic of public concern,⁴³ and one for which "free and open debate is vital."⁴⁴ Moreover, his letter to the editor did not disrupt his school in any significant way.⁴⁵ Accordingly, the balance favored free speech protection.

Under current doctrine, then, in order for a public employee's speech to be protected by the Free Speech Clause, three things must be true. One, the speech was not made pursuant to the employee's work responsibilities. Two, the speech is on a matter of public concern. Three, the free speech value outweighs any disruption to the smooth functioning of the public employee's workplace.

36. *Id.* at 150; *see infra* note 40 and accompanying text.

37. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) ("We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers . . .").

38. *See, e.g., Pickering v. Bd. of Educ.*, 391 U.S. 563, 572–73 (1968) (finding a public school teacher's speech protected in part because it was "neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally").

39. *See City of San Diego v. Roe*, 543 U.S. 77, 78, 84 (2004) (*per curiam*) ("The speech in question was detrimental to the mission and functions of the employer.").

40. *Pickering*, 391 U.S. at 568.

41. *Id.* at 564.

42. *Id.* at 564–65.

43. *Id.* at 571 ("[T]he question whether a school system requires additional funds is a matter of legitimate public concern . . .").

44. *Id.* at 571–72 ("On such a question free and open debate is vital to informed decision-making by the electorate.").

45. *Id.* at 571–73.

II. GOVERNMENT EMPLOYEE RELIGION DOCTRINE

This Part explores what a government employee religion doctrine modeled on the government employment employee speech doctrine would look like, and applies it to the opening hypotheticals. It focuses on the religious claims brought by government employees who object to some part of their work assignment, specifically a county clerk who does not want to issue marriage certificates to same-sex couples,⁴⁶ as well as a police officer conscientiously opposed to protecting abortion clinics.⁴⁷ It also considers other religious challenges, such as claims by government employees battling dress codes.⁴⁸ In all cases, the employees would argue that they are entitled to a religious exemption under the Free Exercise Clause.

Of course, government employee religion claims do not arise in a vacuum. There is an existing Free Exercise Clause doctrine. Following *Employment Division, Department of Human Resources of Oregon v. Smith*, laws that are neutral and generally applicable do not violate the Free Exercise Clause.⁴⁹ Therefore, government employees have no constitutional religious liberty claim against job requirements that can be considered neutral (do not target religion) and generally applicable (apply across the board).⁵⁰ Government employees challenging laws that are not neutral and generally applicable, such as a ban on religious garb for public school teachers,⁵¹ are entitled to a

46. See, e.g., *Miller v. Davis*, 123 F. Supp. 3d 924, 929 (E.D. Ky. 2015) (county clerk Kim Davis who refused on religious grounds to issue marriage licenses to same-sex couples); *Slater v. Douglas County*, 743 F. Supp. 2d 1188, 1190 (D. Or. 2010) (county clerk religiously opposed to same-sex unions refused to handle domestic partnership registrations).

47. See, e.g., *Rodriguez v. City of Chicago*, 156 F.3d 771, 773–74 (7th Cir. 1998) (Roman Catholic police officer religiously opposed to guarding abortion clinic); *Parrott v. District of Columbia*, Civ. A. No. 91-0049, 1991 WL 126020, at *2 (D.D.C. June 25, 1991) (police officer unwilling for religious reasons to arrest anti-abortion demonstrators).

48. See, e.g., *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (Muslim police officers challenging police department’s no-beard policy); *Lewis v. N.Y.C. Transit Auth.*, 12 F. Supp. 3d 418, 426 (E.D.N.Y. 2014) (Muslim bus driver challenging regulation barring her khimar headcovering); *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536, 541 (W.D. Pa. 2003) (public school teacher challenging law barring her from wearing cross necklace while teaching).

49. *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990).

50. They may, however, have a Title VII employment discrimination claim. See *infra* notes 218–19 and accompanying text. They may also have claims under the federal Religious Freedom Restoration Act (“RFRA”) or a state counterpart. 42 U.S.C. § 2000bb-1 (2012). Although Title VII is outside the scope of this paper, the RFRA claim is addressed in Part II.B.2.

51. See, e.g., *Nichol*, 268 F. Supp. 2d at 541 (challenging “Garb Statute,” a Pennsylvania law prohibiting public school teachers from wearing religious dress or emblems while in teaching in school).

Free Exercise Clause exemption if the law (a) imposes a substantial burden on their religious exercise and (b) fails strict scrutiny.⁵²

However, this existing doctrine does not directly address the fact that the government employees bringing religious liberty claims are not only citizens for whom the government is their sovereign, but also employees for whom the government is their boss. To the extent that lower courts have addressed the government employee aspect of religion claims that survive the *Smith* threshold,⁵³ they have modified the free exercise doctrine in one of two ways. Either they apply intermediate scrutiny rather than strict scrutiny to non-neutral laws that impose a substantial religious burden,⁵⁴ or they adopt the government employee speech doctrine,⁵⁵ as this Part explores doing. The Supreme Court has not yet addressed government employee religion.

A. *The Government Employee Religion Doctrine*

A government employee religion doctrine that parallels the government employee speech doctrine would incorporate its three-step inquiry. This proposed approach does not supplant existing Free Exercise Clause jurisprudence. The initial neutral and generally applicable inquiry remains. However, in determining whether there is a substantial religious burden on an objecting government employee, courts would start by asking whether the religious conduct was pursuant to official duties. If not, then in place of the two questions of strict scrutiny (which assumes a purely private objector),

52. This describes the *Sherbert v. Verner* test, which was the free exercise test before *Smith*. *Sherbert v. Verner*, 374 U.S. 398 (1963). *Smith* added a threshold inquiry about neutrality and general applicability that screened out free exercise claims regardless of the burden on religious exercise in a way reminiscent of *Garcetti*, which added a threshold inquiry about official duties that screened out free speech claims regardless of the value of the speech.

53. If the government employee is challenging a law that is neutral and generally applicable, then, as *Smith* dictates, the Free Exercise Clause claim fails and there is no need to continue.

54. See, e.g., *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 n.7 (3d Cir. 1999) (“While *Smith* and *Lukumi* speak in terms of strict scrutiny when discussing the requirements for making distinctions between religious and secular exemptions, we will assume that an intermediate level of scrutiny applies since this case arose in the public employment context and since the Department’s actions cannot survive even that level of scrutiny.” (citation omitted)).

55. See, e.g., *Brown v. Polk County*, 61 F.3d 650, 658 (8th Cir. 1995) (“Although the free exercise of religion is certainly a fundamental constitutional right, we believe that the Supreme Court might well adopt, for free exercise cases that arise in the context of public employment, an analysis like the one enunciated in *Pickering v. Board of Education*. That case dealt with free speech rather than the free exercise of religion, but because the analogy is such a close one, and because we see no essential relevant differences between those rights, we shall endeavor to apply the principles of *Pickering* to the case at hand.” (citation omitted)).

would be the next two questions of government employee speech (which takes into account that the objector is a public employee).⁵⁶ Thus, for government actions that fail *Smith*'s "neutral and generally applicable" test, the first step is deciding whether the public employee's conduct was pursuant to official duties. The second step is examining whether it was on a matter of public concern. The third step would balance the free exercise value of the religious conduct against the effects it has on the governmental workplace. While the first step reveals that the government's interests extend beyond an efficient workplace, for speech as well as religion, the second uncovers some fissures in the speech/religion analogy.

1. Speech Pursuant to Official Duties Threshold

Since *Garcetti*, the first threshold question in government employee speech doctrine is whether the employee was speaking pursuant to their official duties.⁵⁷ If so, then the speech is deemed the government's, and no free speech protection is available.⁵⁸ The Free Speech Clause, after all, protects private speech, not government speech.

In a parallel government employee religion doctrine, then, the first (post-*Smith*) threshold question would be whether the employee's religious activity was pursuant to their official duties. If so, then the action should be considered the government's own, with no free exercise protection available. Just as the Constitution does not protect government speech, it does not protect government religion.

In fact, if the religious conduct was government religious conduct, then two results follow. First, as explained, it is not protected by the First Amendment, which protects private actors, not state actors. Second, as state action, the conduct might be affirmatively barred by the Constitution. Notably, even if not forbidden by the Constitution, the government religion is still not protected by the Constitution.

a. If Pursuant to Official Duties, then State Action Not Protected by First Amendment

Was the public employees' conduct in the opening hypotheticals pursuant to their official duties? The line between pursuant to and not pursuant to

56. See *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.").

57. *Id.* at 421.

58. *Id.* at 421–22.

official duties is not always clear-cut, and Supreme Court guidance is limited.⁵⁹ In the speech context, the Court has held that the “[t]he proper inquiry is a practical one”⁶⁰ that asks whether the speech “owes its existence to a public employee’s professional responsibilities.”⁶¹ In their analyses, courts have considered a range of factors, such as where the speech occurred and whether the speech was part and parcel of an employee’s work duties.⁶²

Arguably, even if a bus driver wears his yarmulke or her hijab while fulfilling bus-driving duties, wearing a particular religious garb is itself not part of anyone’s job responsibilities; it is incident to the person, not the job. Their religious conduct does not owe its existence to their government position. Consequently, though not indisputably,⁶³ the religious garb claims likely survive this first threshold inquiry.

In contrast, assigned job responsibilities are the quintessential example of activities that are pursuant to official duties. Actually, they aren’t just pursuant to official duties, they are official duties. Thus, when a government employee refuses to perform one of their official duties, whether it be issuing marriage licenses for a county clerk or protecting an abortion clinic for a police officer, they should have no free speech or free exercise claim.⁶⁴ That conduct is government conduct and is not protected by the Constitution. On that basis alone, their claims should fail.

59. *Id.* at 424 (declining “to articulate a comprehensive framework for defining the scope of an employee’s duties”).

60. *Id.*

61. *Id.* at 421.

62. *See, e.g.,* *Decotiis v. Whittemore*, 635 F.3d 22, 32 (1st Cir. 2011) (“Although no one contextual factor is dispositive, we believe several non-exclusive factors, gleaned from the case law, are instructive: whether the employee was commissioned or paid to make the speech in question; the subject matter of the speech; whether the speech was made up the chain of command; whether the employee spoke at her place of employment; whether the speech gave objective observers the impression that the employee represented the employer when she spoke (lending it ‘official significance’); whether the employee’s speech derived from special knowledge obtained during the course of her employment; and whether there is a so-called citizen analogue to the speech.” (quotation and citations omitted)).

63. Again, the line between pursuant to and not pursuant to official duties can be fuzzy, and it is not the purpose of this Article to demarcate that line.

64. One can rephrase *Garcetti’s* “[w]hen he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee” into “[w]hen he went to work and [refused to perform] the tasks he was paid to perform, Ceballos acted as a government employee.” *Garcetti*, 547 U.S. at 422.

b. If Pursuant to Official Duties, then State Action Triggering Establishment Clause and Equal Protection Clause

As it happens, their religious refusal might also violate the Constitution, which places particular limits on government action. As a result, if the challenged conduct is pursuant to work duties, not only does the Constitution not protect the conduct, but it may affirmatively bar it. It is, after all, state action. Indeed, a government official “acting in his official capacity or . . . exercising his responsibilities pursuant to state law”⁶⁵ is the paradigmatic example of a state actor.⁶⁶

i) Establishment Clause

The Establishment Clause, for example, prohibits the government from favoring or endorsing religion via its speech or conduct.⁶⁷ In the speech context, the Supreme Court has repeatedly observed that “there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”⁶⁸ The same holds true for the distinction between government religious conduct (forbidden) and private religious conduct (protected).

Even before *Garcetti*, Establishment Clause concerns featured prominently in lower court decisions rejecting government employee claims.⁶⁹ For example, the Free Exercise Clause claim of a government social worker fired for praying with prison inmates was rejected on Establishment

65. *West v. Atkins*, 487 U.S. 42, 50 (1988) (“[G]enerally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law.”); *see also* MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS & DEFENSES § 5.10, at 5-82 (2017) (“Most decisions tend to treat the color-of-state-law and state action requirements as one and the same.”).

66. *See, e.g., West*, 487 U.S. at 49 (“[S]tate employment is generally sufficient to render the defendant a state actor.” (alteration in original) (citation omitted)); John Dorsett Niles, Lauren E. Tribble & Jennifer N. Wimsatt, *Making Sense of State Action*, 51 SANTA CLARA L. REV. 885, 908 (2011) (“Government actors acting in a public capacity are the prototypical state actors.”).

67. *See Lee v. Weisman*, 505 U.S. 577, 627 (1992) (noting that under the Establishment Clause “the State may not favor or endorse either religion generally over nonreligion or one religion over others”).

68. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (emphasis omitted) (citation omitted).

69. *Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994) (rebuffing public school biology teacher’s claim that forbidding him from discussing his faith with his students at school infringed his freedom of expression).

Clause grounds,⁷⁰ as were the claims of a sign language interpreter and nurse who both integrated religion into their treatment of clients.⁷¹

Recent Supreme Court decisions render the Establishment Clause a shadow of its former separation-of-church-and-state self.⁷² Still, even today, it would violate the Establishment Clause for a county office to announce that it would not grant licenses to same-sex couples on the ground that such unions conflicted with “God’s moral law.”⁷³

However, some have argued that it does not violate the Establishment Clause to excuse a religious county clerk from issuing licenses if another clerk from the office does.⁷⁴ As the Supreme Court has repeatedly observed,

70. According to the district court, “[E]vidence suggests that, although plaintiff did not overtly coerce inmates into accepting religious counseling, he suggested to at least some inmates that treatment by spiritual means was the preferred method of treatment.” *Spratt v. Kent County*, 621 F. Supp. 594, 601 (W.D. Mich. 1985). The court concluded, “The County is not required to let plaintiff speak on religious issues if that speech violates the establishment clause.” *Id.* at 601.

71. *Knight v. Conn. Dep’t of Pub. Health*, 275 F.3d 156, 166 (2d Cir. 2001) (“[B]oth [nurse consultant] Knight and [sign language interpreter] Quental promoted religious messages while working with clients on state business, raising a legitimate Establishment Clause concern. . . . Knight and Quental may not share their religious beliefs with clients while conducting state business.”).

72. For example, the Supreme Court recently upheld a government practice of starting its town meeting with prayers even though almost all the prayers were Christian. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1828 (2014). For criticism of this decision, see generally Alan Brownstein, *Constitutional Myopia: The Supreme Court’s Blindness to Religious Liberty and Religious Equality Values in Town of Greece v. Galloway*, 48 LOY. L.A. L. REV. 371 (2014). The Supreme Court has also held that direct government funding of churches, formerly verboten, did not necessarily violate the Establishment Clause. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2029 (2017).

73. Mike Wynn & Chris Kenning, *Ky. Clerk’s Office Will Issue Marriage Licenses Friday—Without the Clerk*, USA TODAY (Sept. 4, 2015), <http://www.usatoday.com/story/news/politics/2015/09/03/rowan-county-ky-court-clerk-marriage-licenses-gays/71635794/> (quoting Kim Davis on why she refused to issue marriage licenses to same-sex couples). In Kim Davis’s case, the district court found that her refusal to let the county clerk’s office issue any same-sex marriage licenses violated the Establishment Clause as “a policy that promotes her own religious convictions at the expenses of others.” *Miller v. Davis*, 123 F. Supp. 3d 924, 937 (E.D. Ky. 2015).

74. Because the Establishment Clause also bars exemptions that impose significant third-party harms, see, for example, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787–88 (2014) (Kennedy, J., concurring) (“Yet neither may that [religious] exercise unduly restrict other persons, such as employees, in protecting their own interests”), this argument assumes no serious material or dignitary harms to the LGBT couple seeking a license. Kent Greenawalt, *Granting Exemptions from Legal Duties: When Are They Warranted and What Is the Place of Religion?*, 93 U. DET. MERCY L. REV. 89, 113 (2016) (“If [a county clerk] feels she cannot perform such a marriage, and someone else can do so with no inconvenience or embarrassment for the couple, and with little or no inconvenience within the office, why not grant her that privilege either by law or by supervisor discretion?”); Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW.

there is “play in the joints” between the two religion clauses: The government may grant religious accommodations not required by the Free Exercise Clause without violating the Establishment Clause.⁷⁵ In other words, the Constitution allows the state to make it easier for people to live according to their conscience, even to the extent of granting an exemption from legal obligations others must obey. Otherwise, Title VII of the Civil Rights Act and the Religious Freedom Restoration Act, both laws that mandate religious exemptions, would violate the Constitution.⁷⁶ Might not the long history of permissive religious exemptions in this country suggest that accommodating these religious refusals is constitutional?⁷⁷

Yet the Supreme Court decisions announcing “play in the joints” were not addressing government employees. In order for the religious refusal accommodation to comply with the Establishment Clause, the individual government employee must be distinct from the office they fill, so that their conduct is not attributable to the state. In that case, the government allowing employees to practice their religion does not mean the government itself is practicing religion. However, *Garcetti* requires exactly this conflation if the religious conduct is pursuant to official duties. Because the clerk’s performance of her job responsibilities, or her refusal to perform them, is

J.L. & SOC. POL’Y 318, 340 (2010) (“[U]nder the proposed exemption a religious objector may step aside *only if* another willing clerk can perform the service.”).

75. *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (“Our decisions recognize that ‘there is room for play in the joints’ between the Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause.” (citation omitted)); *Locke v. Davey*, 540 U.S. 712, 718 (2004) (“These two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension. Yet we have long said that ‘there is room for play in the joints’ between them.” (citation omitted)).

76. *See, e.g., Cutter*, 544 U.S. at 724–25 (holding that the Religious Land Use and Institutionalized Persons Act of 2000, which allows federal and state prisoners to seek religious accommodations pursuant to the same standard as set forth in RFRA, does not violate the Establishment Clause). Of course, not all exemptions are constitutional. A Connecticut statute which provides Sabbath observers with an absolute and unqualified right not to work on their Sabbath, violated the Establishment Clause in part because it favored Sabbath observances over other religious observances. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710–11 (1985). A similar problem would arise if a state granted exemptions to religious observers opposed to same-sex marriage but not other religious beliefs. *Barber v. Bryant*, 193 F. Supp. 3d 677, 716 (S.D. Miss. 2016) (holding that Mississippi’s H.B. 1523, which requires exemptions for government employees who believe that marriage should be limited to one man and one woman, violated the Establishment Clause by “establish[ing] an official preference for certain religious beliefs over others”).

77. *See, e.g., Wilson, supra* note 74, at 321 (“This Article argues that government employees who have religious objections should be permitted to step aside from facilitating same-sex marriages when it poses no hardship for same-sex couples.”).

pursuant to official duties, the government employee doctrine dictates that the refusal is a government refusal.

Perhaps, though, the failure to execute official duties should not be equated to the execution of official duties. The argument cannot work as a general matter: Government omissions may violate the Establishment Clause as much as commissions if the result favors or endorses one religion over others. Rather, perhaps the conflation of government employee conduct and government conduct disappears when the employee does not act and does not interact with the public. A publicly employed teacher or social worker or nurse is the government when they pray with those in their care: To students or clients or patients who interact with them, they are the face of the government. But might these employees retain some of their status as private actor vs. state actor if another government employee acts in their stead? Perhaps, especially if the county clerk's office continues to grant licenses without the public ever learning about the accommodations for some employees within it.⁷⁸ Or perhaps not. In rejecting the claim that Kim Davis was acting as a private citizen, the district court noted that private citizens lack authority to issue marriage licenses.⁷⁹ In other words, her refusal remains pursuant to official duties because it still ultimately involves a county clerk's action with regard to her official responsibilities.⁸⁰

ii) Equal Protection Clause

Notably, the government's actions are constrained not just by the Establishment Clause, but by the Equal Protection Clause as well. The Equal Protection Clause prohibits the government from discriminating on the basis of race, sex, and after *United States v. Windsor*⁸¹ and *Obergefell v. Hodges*,⁸²

78. Once the public is made aware that a particular person refuses to fulfill their job, it is harder to argue for a disjunction between the private person and their official role. Of course, the employee and the state need not be one and the same in order to implicate the Constitution. It is not just state religious practice that violates the Establishment Clause; state-sponsored private religious practice may also violate it. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) (district's policy of permitting student-led, student-initiated prayer before football games violates Establishment Clause); *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (benediction by private rabbi invited by school to speak at school graduation violated Establishment Clause).

79. *Miller v. Davis*, 123 F. Supp. 3d 924, 942 (E.D. Ky. 2015) (asking whether Kim Davis was acting as a citizen and answering, "[t]he logical answer to this question is no, as the average citizen has no authority to issue marriage licenses").

80. *See Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006). To rephrase *Garcetti*: "When he went to work and [refused to perform] the tasks he was paid to perform, Ceballos acted as a government employee." *Id.*

81. *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013).

82. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

sexual orientation.⁸³ *Windsor* and *Obergefell*, which struck down marriage bans as based on illegitimate animus, never pinpoint what level of equal protection scrutiny applies to laws that disadvantage gays and lesbians.⁸⁴ Most agree, however, that the Supreme Court conducted some kind of heightened review.⁸⁵ Had it been rational, the Court would have accepted rather than rejected the government's proffered justification.⁸⁶ Post-*Windsor* and *Obergefell*, courts tend to apply heightened scrutiny to laws that classify based on sexual orientation.⁸⁷ Consequently, discrimination by the state,

83. In striking down the federal government's refusal to recognize same-sex marriages, the Supreme Court held that "DOMA [the Defense of Marriage Act] seeks to injure the very class New York seeks to protect. By doing so it violates basic . . . equal protection principles applicable to the Federal Government." *Windsor*, 133 S. Ct. at 2693; *see also id.* at 2694 ("DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality . . ."). In holding that state same-sex marriage bans were unconstitutional, the Supreme Court noted, "The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws." *Obergefell*, 135 S. Ct. at 2602; *see also id.* at 2604 ("It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality.").

84. *See, e.g.*, Elizabeth B. Cooper, *The Power of Dignity*, 84 FORDHAM L. REV. 3, 13 (2015) ("Many commentators have criticized the *Obergefell* Court for failing to address directly the claimants' equal protection arguments, with much of this criticism focusing on the Court's sidestepping the question of whether gay men and lesbians should be treated as a protected class."); Nan D. Hunter, *Interpreting Liberty and Equality Through the Lens of Marriage*, 6 CALIF. L. REV. CIR. 107, 113 (2015) (noting that *Obergefell* lacks "any discussion of the tiers of review that have traditionally been necessary to an analysis under the Equal Protection Clause").

85. *See, e.g.*, Autumn L. Bernhardt, *The Profound and Intimate Power of the Obergefell Decision: Equal Dignity as a Suspect Class*, 25 TUL. J.L. & SEXUALITY 1, 11 (2016) ("The *Obergefell* opinion did not use the magic words of 'heightened scrutiny,' but it is clear from the language and disposition of the case that the Supreme Court gave same-sex couples exactly the ruling and the underlying reasoning they asked for in their briefs."); Lauren Sudeall Lucas, *Identity as Proxy*, 115 COLUM. L. REV. 1605, 1613 n.23 (2015) ("[In *Obergefell*,] the Court provided additional protection to sexual-orientation minorities without explicitly applying a higher level of scrutiny."); James M. Oleske, Jr., "State Inaction," *Equal Protection, and Religious Resistance to LGBT Rights*, 87 U. COLO. L. REV. 1, 36–37 (2016) ("Although the Court did not formally declare that sexual-orientation discrimination is subject to heightened scrutiny under the Equal Protection Clause, its findings make that conclusion virtually inescapable under the traditional criteria for such scrutiny."). *But see* Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIR. 126, 131 (2015) ("[W]ithout a declaration that heightened scrutiny should apply to all sexual orientation-based classifications, it seemed possible to confine *Obergefell*'s analysis to marriage and leave other injustices untouched.").

86. Similarly, in *Pavan v. Smith*, 137 S. Ct. 2075, 2078–79 (2017), the Supreme Court rejected rather than accepted Missouri's proffered biology-based reason for excluding same-sex spouses on birth certificates.

87. *See, e.g.*, *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014) (holding that *Windsor* "requires that heightened scrutiny be applied to equal protection claims

whether it be race, sex, or sexual orientation discrimination, raises serious equal protection issues.

As for the pro-life police officer, their refusal does not trigger any heightened scrutiny under equal protection. Despite the fact that only women become pregnant and have abortions, the government's refusal to protect an abortion clinic would not amount to discrimination on the basis of sex for equal protection purposes. According to a much-maligned decision made before there were any women sitting on the Supreme Court, discrimination on the basis of pregnancy is not discrimination on the basis of sex under the Equal Protection Clause.⁸⁸

On the other hand, the government's failure to issue marriage licenses to LGBT couples on an equal basis probably amounts to unconstitutional sexual orientation discrimination. Allowing county clerks to opt out of providing licenses to same-sex couples will create tangible obstacles—such as waiting until a willing clerk comes on duty, or driving to another county's office if there are none—only LGBT couples have to face.⁸⁹ Unanswered legal questions, such as the level of scrutiny applicable to sexual orientation discrimination claims,⁹⁰ in addition to specific factual issues, such as whether

involving sexual orientation"); Campaign for S. Equal. v. Miss. Dep't of Human Servs., 175 F. Supp. 3d 691, 710 (S.D. Miss. 2016) (striking down same-sex adoption ban for violating equal protection after finding that "it seems clear the [*Obergefell*] Court applied something greater than rational-basis review"); Whitewood v. Wolf, 992 F. Supp. 2d 410, 426 (M.D. Pa. 2014) (applying intermediate scrutiny and noting that "[a]lthough *Windsor* did not identify the appropriate level of scrutiny, its discussion is manifestly not representative of deferential review"). Some cases follow in *Obergefell*'s footsteps by applying heightened scrutiny without admitting it. See, e.g., Roe v. Patton, No. 2:15-CV-00253-DB, 2015 WL 4476734, at *3 (D. Utah July 22, 2015) ("Because Defendants were unable to provide a rational basis for treating male spouse of women who give birth through assisted reproduction involving the use of donor sperm differently than identically situated female spouse, the court need not reach the question of which level of scrutiny applies, and the court concludes the statute violates Plaintiffs' rights to Equal Protection."). But see *Ondo v. City of Cleveland*, 795 F.3d 597, 609 (6th Cir. 2015) ("We have always applied rational-basis review to state actions involving sexual orientation. . . . *Obergefell* did not abrogate those prior cases.").

88. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("While it is true that only women can become pregnant[,] it does not follow that every legislative classification concerning pregnancy is a sex-based classification The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.").

89. But see *Slater v. Douglas County*, 743 F. Supp. 2d 1188, 1195 (D. Or. 2010) ("So long as the [same-sex] registration is processed in a timely fashion, the registrants have suffered no injury.").

90. See *supra* notes 83–85 and accompanying text. Because both *Windsor* and *Obergefell* struck down laws as failing even rational basis scrutiny, the level of scrutiny triggered by sexual orientation is not dispositive.

public employees may also refuse to serve other groups,⁹¹ make the outcome uncertain, but this differential treatment may well violate the Equal Protection Clause.⁹² Indeed, the Sixth Circuit ruled against Kim Davis in part because “it cannot be defensibly argued that the holder of the Rowan County Clerk’s office, apart from who personally occupies that office, may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court.”⁹³

In fact, the Equal Protection Clause may be violated even without any material harm. This argument depends on an expressivist view of equal protection, where the harm to equality is caused by the expressive content of the challenged government action.⁹⁴ The focus is on the message conveyed by the state’s conduct rather than its intent or its practical effect.⁹⁵ State conduct—such as providing unequal service to protected class members—violates the Constitution’s guarantee of equality by failing to treat each person with equal dignity.⁹⁶ That is, “the government may not express, in words or deeds, that it values some of us more than others.”⁹⁷ For example, offering civil unions instead of marriages to mixed-race or same-sex couples, even if the unions came with exactly the same tangible benefits, would violate

91. The Equal Protection claim is even stronger if exemptions are granted only for licenses to LGBT couples and not previously divorced or mixed race or mixed faith or other couples that trigger religious objections. See Oleske, *supra* note 85, at 37–38.

92. See *In re Neely*, 390 P.3d 728, 744 (Wyo. 2017) (“If we held that freedom of religious opinion meant no state official in Wyoming had to marry a same-sex couple if it offended his or her religious belief, the right of same-sex couples to marry under the United States Constitution would be obviated.”); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL’Y 274, 294 (2010) (“[U]nder both the equal protection clause of the 14th Amendment, and related equality provisions of state constitutions . . . state officers have duties of equal respect to all persons within the state. It is very difficult to see how one can square such a duty with a right, religion-based or otherwise, to refuse to provide public services to a particular class of individuals.”).

93. *Miller v. Davis*, No. 15-5880, 2015 WL 10692640, at *1 (6th Cir. Aug. 26, 2015); see also Lupu & Tuttle, *supra* note 92, at 294 (“[S]tate officers have duties of equal respect to all persons within the state. It is very difficult to see how one can square such a duty with a right, religion-based or otherwise, to refuse to provide public services to a particular class of individuals.”).

94. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1533–45 (2000); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 2 (2000).

95. Anderson & Pildes, *supra* note 94, at 1533–45.

96. Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347, 380–81 (2012).

97. Hellman, *supra* note 94, at 13.

the Equal Protection Clause because it treats those couples as second-class citizens.⁹⁸

The government arguably conveys this message of second-class citizenship⁹⁹ when it allows public employees to refuse to serve same-sex couples because they condemn the union, even when others step in.¹⁰⁰ When striking down on equal protection grounds a Mississippi law allowing county clerks to recuse themselves so long as the recusal did not cause any delay, a federal district court held that “the recusal provision itself deprives LGBT citizens of governmental protection from separate treatment. . . . Such treatment viscerally confronts same-sex couples with the same message of inferiority and second-class citizenship that was rejected in [*Windsor* and *Obergefell*].”¹⁰¹

Some might respond that the true message is accommodating religious exercise, and therefore the refusals communicate a commitment to religious liberty, not a disregard for LGBT equality.¹⁰² Others might rebut that

98. Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1275 (2011) (“[T]his Article ultimately concludes that laws withholding the term marriage from same-sex couples unconstitutionally convey the message of second-class citizenship . . .”).

99. See Taylor Flynn, *Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace*, 5 NW. J.L. & SOC. POL'Y 236, 241 (2010) (“To be candid, I find myself unnerved by proponents’ failure to recognize the dignitary harm at the heart of public refusals to serve historically marginalized groups.”); Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2586 (2015) (“Even if the government can provide for affected third parties in alternative ways, these alternatives may not shield third parties from dignitary harms.”).

100. This also assumes that the employee’s refusal is not equated to the government’s refusal, which may be a wrong assumption to make. See *supra* notes 74–78 and accompanying text (discussing, in the Establishment Clause context, the possibility that a public employee’s refusal to perform job duties would not be equated to government action).

101. *Barber v. Bryant*, No. 3:16-CV-417-CWR-LRA, 2016 WL 3562647, at *23 (S.D. Miss. June 30, 2016). Both *Windsor* and *Obergefell* seem to endorse an expressivist approach. More than once they emphasize the message that differential treatment conveys: “[I]t tells those couples, and all the world, that their otherwise valid marriages are unworthy . . . [,] a second-tier marriage. The differentiation demeans the couple” *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (“[I]t impose[s] stigma and injury of the kind prohibited by our basic charter.”).

102. See, e.g., Wilson, *supra* note 74, at 322–23 n.16 (“[T]he possibility of dignitary harm will not take policymakers very far because there are two dignitary harms here—the harm to lesbian and gay couples who are turned aside, and the harm to religious believers who are told that their beliefs are not to be tolerated.”). Alternately, if the accommodation is done without public knowledge, then perhaps no message is conveyed at all.

discriminating in the name of religion is still discriminating,¹⁰³ and therefore under an expressivist theory, barred by the Equal Protection Clause.¹⁰⁴

In sum, there is a real constitutional risk in excusing religious government employees from their official duties if that religious exemption results in favoring one religious viewpoint in violation of the Establishment Clause or in unequal treatment of a group covered by the Equal Protection Clause.

* * *

Although there are a range of government employee religion claims, those involving government employees refusing to do their job are easily resolved under a government employee religion doctrine that mirrors the government employee speech doctrine. This conduct, which is not just pursuant to official duties but consists of official duties, is government conduct. As such, the Constitution does not protect the refusal. Quite the opposite: The Constitution may affirmatively bar it. In contrast, requests for dress accommodations, which are probably not pursuant to official duties, would not be screened out and would proceed to the next threshold inquiry.

2. Matter of Public Concern Threshold

Under the government employee speech doctrine, the next threshold inquiry is whether the speech is on a matter of public interest. If not, then the government's interests prevail over the free speech ones without further analysis. Thus, of the three classic justifications for protecting speech, one—promoting self-expression and personal autonomy—seems to hold no sway when it comes to government employees. As it turns out, this devalued free

103. See Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws*, 22 J.L. & POL'Y 705, 724 (2014) (“[W]hile the right to religious freedom is fundamental, religion cannot be used to discriminate, and thus to harm the dignity of people who deserve basic respect and recognition in our society.”); Laura S. Underkuffler, *Odious Discrimination and the Religious Exemption Question*, 32 CARDOZO L. REV. 2069, 2090 (2011) (“Just as a claimed religious belief does not justify murder, theft, or tortious conduct, so it does not justify odious discrimination against individuals because of their identity or other immutable characteristics, when prohibited by law.”).

104. Moreover, just as Herbert Wechsler's claim in *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1, 11–13 (1959), that segregation involved a clash between equal competing rights overlooked that one group was powerful and one subordinated, so too with objecting Christians and the LGBT community. See Flynn, *supra* note 99, at 257–59; see also *id.* at 258 (“Importantly, however, this assumption ignores the subordination inherent in state-sponsored permission to discriminate against an unpopular minority.”).

speech justification is the one that comes closest to the reason we protect free exercise of religion.

The three classic justifications for protecting free speech are: (1) to encourage a diverse marketplace of ideas to aid our search for knowledge; (2) to facilitate democratic self-rule; and (3) to promote autonomy, self-expression, and self-realization.¹⁰⁵ The “public concern” requirement is linked to the first two free speech justifications, especially the second one centered on participatory democracy.

In common with the first two free speech justifications, the “public concern” requirement focuses on the value of speech to audiences. The first justification, encouraging a marketplace of ideas, is all about ensuring a free flow of information to help recipients with the search for knowledge and truth. The second justification, facilitating democratic self-governance, likewise focuses on the need for a free flow of information, this time to ensure that the electorate has all the information necessary to vote wisely.¹⁰⁶ A free flow of information anchors both justifications, and the matter of public concern test basically specifies what kind of information needs to flow freely.

The public concern test seems particularly tailored to the democratic self-rule justification. The *Pickering* Court describes “[t]he public interest in having free and unhindered debate on matters of public importance” as “the core value of the Free Speech Clause of the First Amendment.”¹⁰⁷ In *Connick*, the Supreme Court states, “The First Amendment ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’ ‘[S]peech concerning public affairs is more than self-expression; it is the essence of self-government,’”¹⁰⁸ adding that “[a]ccordingly, the Court has frequently reaffirmed that speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.”¹⁰⁹

105. Distrust of government, while not technically a value or goal, is also a consistent theme running through free speech jurisprudence. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL INQUIRY* 85–86 (1982).

106. In order for our democracy “of the people, by the people, for the people” to work, the people need the ability to make informed political decisions. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE* 26 (1965). Alexander Meiklejohn would actually privilege the right to receive information over the right to speak: “What is essential is not that everyone shall speak, but that everything worth saying shall be said.” ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (2004).

107. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968).

108. *Connick v. Myers*, 461 U.S. 138, 145 (1983) (alteration in original) (citation omitted).

109. *Id.* (citation omitted); *see also id.* (noting that in *Pickering*, the “subject was ‘a matter of legitimate public concern’ upon which ‘free and open debate is vital to informed decision-making by the electorate’” (citation omitted)).

The Supreme Court has stressed that government employee speech warrants protection because government employees often have special insight on political issues¹¹⁰: “[S]peech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment.”¹¹¹ After all, “[g]overnment employees are often in the best position to know what ails the agencies for which they work.”¹¹² In short, in explaining why the Free Speech Clause protects government employee speech—if it’s speech on matters of public concern—the Supreme Court has emphasized its importance to democratic self-governance.

Missing from the Court’s discussions, which focus on providing information useful to public debate, is recognition that free speech furthers the autonomy of the speaker. To make the constitutional cut, public employee speech has to be valuable to its audience. The Court occasionally acknowledges the autonomy justification,¹¹³ but it is not offered as a reason to protect government employee speech and is not incorporated into the government employee speech doctrine.¹¹⁴ On the contrary, the Supreme Court observed in *Garcetti* that “the First Amendment interests at stake extend beyond the individual speaker.”¹¹⁵ This is not to say that government employees derive no autonomy benefit: Protecting their utterances on matters of public concern allows them to express themselves and to contribute to political discourse. It is rather to say that the autonomy considerations do not enter the government employee speech calculus. For example, it is irrelevant whether government employees derive more autonomy-related benefits from speaking on private matters compared to public matters. The value to the speaker’s autonomy is not measured, only the value to the public is.

110. *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014) (“[P]ublic employees ‘are uniquely qualified to comment’ on ‘matters concerning government policies that are of interest to the public at large.’” (citation omitted)).

111. *Id.* at 2379.

112. *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion).

113. *City of San Diego v. Roe*, 543 U.S. 77, 82 (per curiam) (“The interest at stake is as much the public’s interest in receiving informed opinion as it is the employee’s own right to disseminate it.”).

114. Strictly speaking, the *Pickering* balancing test is phrased in terms of the speaker’s free speech interests. *Pickering*, 391 U.S. at 568 (“The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”). The doctrine, however, only protects the free flow of information deemed useful to an audience.

115. *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

The implications of the “public concern” test for government employee religion may be limited. Like one’s viewpoint on politics and politicians,¹¹⁶ one’s viewpoint on religion is arguably always a matter of public concern, and therefore the public concern requirement may not be difficult to meet in a government employee religion claim. More than one court has taken this position. For example, in evaluating a public school teacher’s challenge to a law that barred her religious jewelry, the district court wrote that “[p]laintiff’s symbolic non-verbal speech is an expression of her personal religious convictions and viewpoint, which is a matter of social and community concern entitled to the full protection of the First Amendment.”¹¹⁷

However, this position has not been uniformly adopted. Other courts have found that individual religious belief, especially when it takes the form of a personal grievance regarding assigned duties, is not necessarily a matter of public concern.¹¹⁸ For example, in a case where an assistant district attorney was reluctant to charge protestors with trespassing on a United States Navy base in Puerto Rico, the district court held that there was no expression on a matter of public concern: “In the present case, Plaintiff claims that she told her supervisors that she had a moral conflict with prosecuting Vieques cases. Her expression that her personal beliefs prevent her from working on Vieques cases is not a matter of public concern.”¹¹⁹ Granted her moral beliefs were not expressly religious, but there is no reason to think the analysis would be different if they were.¹²⁰ Religious or not, “[h]er statements or personal

116. In *Rankin v. McPherson*, the Supreme Court interpreted “[i]f they go for him again, I hope they get him” as a criticism of the current President because “[t]he statement was made in the course of a conversation addressing the policies of the President’s administration.” *Rankin v. McPherson*, 483 U.S. 378, 380, 386 (1987).

117. *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536, 559 (W.D. Pa. 2003).

118. See *Daniels v. City of Arlington*, 246 F.3d 500, 504 (5th Cir. 2001) (“Although personal religious conviction—even the honestly held belief that one must announce such conviction to others—obviously is a matter of great concern to many members of the public, in this case it simply is not a matter of ‘public concern’ as that term of art has been used in the constitutional sense.”); see *Draper v. Logan Cty. Pub. Library*, 403 F. Supp. 2d 608, 614 (W.D. Ky. 2005) (“[T]he public concern inquiry is an individualized one, and the mere fact that an employee’s speech involves a topic traditionally considered of public import does not necessarily mean that the speech is on a matter of public concern [I]f the speech concerns a matter of public interest but the expression addresses only the personal effect upon the employee, then as a matter of law the speech is not of public concern.” (citation omitted)).

119. *Mendoza Toro v. Gil*, 110 F. Supp. 2d 28, 35 (D.P.R. 2000).

120. In fact, there might be an Establishment Clause issue if deeply held religious beliefs were accommodated but deeply held secular beliefs were not. See, e.g., *Welsh v. United States*, 398 U.S. 333, 356 (1970) (Harlan, J., concurring) (arguing that it would violate the Establishment Clause to “draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other” when granting conscientious objector to the draft status).

feelings vis-à-vis her work assignment are not an issue of public concern. Rather, they are complaints about her work duties.”¹²¹

A separate question is whether the public concern inquiry as a whole translates from government employee speech to government employee religion. Speech is expressive, and therefore is capable of conveying a message on a matter of public interest. Conduct is not always expressive. Indeed, more than one court has rejected as expressive conduct a refusal to fulfill a job responsibility.¹²² Consequently, it may not make sense to ask whether a particular act enables the free flow of information on a matter of public interest. This criticism seems entirely fair.¹²³ The public employee speech test was, after all, designed to evaluate speech, not conduct. And while some religion claims involve expression, not all do. In fact, the lower court split on matter of public interest in religious conduct cases could be explained as a division between those cases that involve expressive conduct¹²⁴ and those cases that do not.¹²⁵

At the same time, the matter of public concern inquiry may not be completely irrelevant for government employee religion, if only because it highlights what First Amendment commitments are deemed important enough in the government employee context. Or more accurately, the public concern requirement suggests a First Amendment interest that is not sufficiently important—namely the goal of furthering individual autonomy.¹²⁶

Yet promoting autonomy is a major, if not the major, reason for protecting individual religious liberty.¹²⁷ Nadia Sawicki, for example, describes three

121. *Mendoza Toro*, 110 F. Supp. 2d at 35.

122. *Id.* (holding that work responsibilities are not expressive conduct); *Fabrizio v. City of Providence*, 104 A.3d 1289, 1293 (R.I. 2014) (finding that firefighters appearing in LGBT parade as part of work responsibilities and “solely as members of the Providence Fire Department, did not constitute a form of expression on their part”).

123. The criticism would be inapposite only if every religious act amounts to symbolic conduct for free speech purposes. However, such an approach to religious conduct would essentially eliminate the distinction between speech and conduct and lead to free speech protection for every religiously motivated act. *See generally* Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241 (2015).

124. For example, *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536, 552 (W.D. Pa. 2003), involved wearing a cross, which the court found to be expressive conduct.

125. For example, *Mendoza Toro*, 110 F. Supp. 2d at 35, involved refusing to do one’s job, which the court held was not expressive.

126. I use the word autonomy to cover a constellation of overlapping interests, including but not limited to self-realization, self-expression, self-integrity and self-determination.

127. Note that it is individual religious liberty and not institutional religious liberty that is at issue here. The Supreme Court does not always treat them the same. *Compare* *Emp’t Div. v.*

possible justifications for religious exemptions.¹²⁸ One of them is the pragmatic view that “a civil society is unlikely to function effectively if it chooses to punish conscientious objectors.”¹²⁹ While it may be true of civil society, it is not true for civil service.¹³⁰ Another justification is overtly moral/religious, and “considers acts grounded in conscience worthy of respect because such acts are more likely to reflect objective moral truths.”¹³¹ In other words, religious exemptions should be granted because, objectively speaking, they reflect what God or religious morality commands.¹³² This assumes something impossible—that there is an objective religious truth that the government can discern.¹³³ Moreover, such an assumption clashes with the Establishment Clause, which prohibits the government from endorsing one version of religious truth over another.¹³⁴

Smith, 494 U.S. 872, 874 (1990) (religious claim of individual), *with* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 176–77 (2012) (religious claim of church).

128. I do not address a textual argument for religious exemptions because the text is opaque. An originalist argument for religious exemptions is also excluded because not only do I reject originalism as a theory of constitutional interpretation, but also scholars do not agree on what the original view was. *Compare generally* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992), *with* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

129. Nadia N. Sawicki, *The Hollow Promise of Freedom of Conscience*, 33 CARDOZO L. REV. 1389, 1405 (2012); *see also id.* (“[A]lthough granting conscience-based exemptions from legal obligations as a matter of course may wreak havoc on the state’s ability to maintain order, the same can be said of a state that rejects claims of conscience altogether.”); Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 27 (2004) (“Attempted enforcement of laws against religious claimants might not even succeed in controlling external conduct. In fact, it can frequently promote disrespect for law.” (footnote omitted)).

130. On the contrary, granting religious accommodations to public employees might undermine civil service’s ability to function effectively. *See* discussion *supra* Part I.C.

131. Sawicki, *supra* note 129, at 1408.

132. The Supreme Court has written, “The [Free Exercise] Clause was originally understood to preserve a right to engage in activities necessary to fulfill one’s duty to one’s God.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 576 (1993) (Souter, J., concurring) (adding the caveat, “unless those activities threatened the rights of others or the serious needs of the State”). There are two ways to understand the claim that religious liberty is protected so that people can fulfill their spiritual obligations. One is that God’s commandments must be obeyed, which falls into this second category. Another is that people must be allowed to obey what they believe to be God’s commands, which falls into the autonomy category.

133. “For example, one person’s conscience might direct her to disconnect a dying loved one’s ventilator to relieve him from suffering and allow him to die; another person’s conscience might demand that she request aggressive treatment to preserve her loved one’s life at all costs.” Sawicki, *supra* note 129, at 1409. They cannot both reflect a greater moral truth. *Id.* How would the government even decide?

134. *See, e.g.,* Andrew Koppleman, *Secular Purpose*, 88 VA. L. REV. 87, 108 (2002) (“The Establishment Clause forbids the state from declaring religious truth.”).

Consequently, it is Sawicki's third justification that must carry the day, which is that religious exemptions further individual autonomy. "There is intrinsic moral value in autonomy and self-determination, proponents argue, and the best way for the state to promote this value is to accommodate those with sincere conscientious beliefs."¹³⁵ Many scholars agree.¹³⁶ "Certain 'zones of conscience' are entitled to legal protection . . . [to] protect the right of individuals to define and govern their own existence."¹³⁷ In particular, religious conscience is protected in order to safeguard "the right of an individual to make choices about his or her spiritual life."¹³⁸ In short, "the free exercise clause should primarily be understood to be an autonomy right"¹³⁹

However, government employee speech is not protected for the employee's sake, but for the sake of the broader public who benefit from their (often uniquely informed) viewpoint. Even if a government employee's workplace speech greatly advances their personal autonomy, the First Amendment does not reach it unless it is on a matter of public concern. Under a parallel jurisprudence, the same would be true for government employee religion. Religious conduct,¹⁴⁰ no matter how much it furthered the employee's autonomy, would not be protected by the First Amendment unless it was expressive and expressed something on a matter of public interest.

Applying a parallel jurisprudence, the consequences for the opening hypotheticals depend on whether the religious claim involves expression, or

135. Sawicki, *supra* note 129, at 1406; *see also id.* at 1406–07 ("Whether arising from a Kantian view of the unconditional worth of all persons and the resulting respect for their own moral destiny, or from John Stuart Mill's perspective that 'society should permit individuals to develop according to their convictions,' courts and commentators take it as a given that autonomous choice is valuable and should be promoted." (citation omitted)).

136. *See, e.g.*, Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1529 (2012) ("As a number of scholars have argued, an individual's moral integrity offers the most compelling moral basis for respecting her conscience.").

137. Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 15 (2000).

138. Benjamin L. Berger, *Law's Religion: Rendering Culture*, 45 OSGOODE HALL L.J. 277, 309 (2007); *see also* DANIEL A. FARBER, *THE FIRST AMENDMENT* 256 (1st ed. 1998) (noting that "religion is considered a core example of the kind of personal autonomy which the liberal state is pledged to protect").

139. Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 94 (1990); *see also id.* at 95 ("[The free exercise of religion] is part of that basic autonomy of identity and self-creation which we preserve from state manipulation, not because of its utility to social organization, but because of its importance to the human condition.").

140. Religious speech is already subject to the existing free speech doctrine.

at least expressive conduct. If it does, as courts have held with regard to religious garb, then the public concern test applies to religious expression as it applies to nonreligious expression. If it does not, and the refusal to perform job responsibilities falls into this category, then there is no protection. Alternatively, perhaps the public concern test should simply be deemed inapt. At the same time, given the low priority assigned to personal autonomy as a reason to protect government employee speech, perhaps the same should also apply to government employee religion.

3. Undue Disruption

If the public employee speech passes both thresholds (or if one of the thresholds is discarded),¹⁴¹ then the Free Speech Clause protects the speech unless it unduly disrupts the government workplace. The Supreme Court has described this as “balanc[ing] between the interests of the [government employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”¹⁴²

Accommodating a government employee’s religion is not necessarily disruptive. Allowing a county clerk to wear a hijab or allowing a police officer to grow a beard should not upset working relationships, or interfere with their job duties, or bring disrepute onto their department. The effect on the efficient provision of services to the public seems minimal.¹⁴³

141. Part III discusses critiques of the existing doctrine and its applicability to government employee religion in more detail. Even though government employee refusals would probably be unprotected for failing the pursuant to official duties threshold and for failing the “matter of public interest” threshold, I nevertheless subject them to *Pickering* balancing for two reasons: first, to underscore other reasons why refusals ought to be unprotected; second, to demonstrate the outcome to those who would eliminate both thresholds and favor a pure balancing.

142. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

143. And indeed, several courts have essentially so held, albeit in the context of a Title VII suit rather than a free exercise one. *See, e.g.*, *Lewis v. N.Y.C. Transit Auth.*, 12 F. Supp. 3d 418, 445–46 (E.D.N.Y. 2014) (rejecting a Transit Authority’s claim that allowing a headcovering for Muslim bus drivers “undercut[s] the [Transit Authority’s] right as an employer to present its chosen image to the public through a uniformly applied appearance standard” especially since “it permitted other bus drivers to deviate from its headgear policy without compromising its public image” (second alteration in original) (citation omitted)).

More often than not, religious government employees bring Title VII cases. (Actually, Title VII is the exclusive remedy for religious discrimination in federal employment claims. *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 835 (1976)). In Title VII, the question is not whether the accommodation would be unduly disruptive, but whether the accommodation would impose an “undue hardship.” 42 U.S.C. § 2000e(j) (2012) (providing a defense if an “employer demonstrates that he is unable to reasonably accommodate an employee’s or prospective employee’s religious

On the other hand, an employee refusing to do their job seems to be the epitome of workplace disruption. In finding that Pickering's letter to the editor was protected free speech, the Court emphasized that it had not "in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally."¹⁴⁴ In contrast, refusing to do one's job by definition interferes with the "proper performance of daily duties."

Moreover, allowing public employees to opt out of assignments could create a logistical nightmare. As one court put it:

If all officers were permitted . . . to abstain from enforcing laws which they believed were inappropriate, it would be impossible for the [police department] to organize its forces and to guarantee that there would be a sufficient number of officers at any given moment to enforce any given law." In short, the court held, "The dependability of the police force would be destroyed."¹⁴⁵

These sentiments have been echoed by other courts. Judge Easterbrook of the Seventh Circuit observed that many police officers "have religious scruples about particular activities: to give just a few examples, Baptists oppose liquor as well as gambling, Roman Catholics oppose abortion, Jews and Muslims oppose the consumption of pork, and a few faiths . . . include hallucinogenic drugs in their worship and thus oppose legal prohibitions of those drugs."¹⁴⁶ He then concludes, "Juggling assignments to make each compatible with the varying religious beliefs of a heterogeneous police force would be daunting to managers and difficult for other officers who would be called on to fill in for the objectors."¹⁴⁷

This analysis, however, may turn on whether a court considers the disruption caused by one employee or the disruption caused by all employees with religious scruples. The courts discussing the logistical problems above

observance or practice without undue hardship on the conduct of the employer's business"). As interpreted by the Supreme Court, anything other than a minimal disruption amounts to an undue hardship. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) ("To require [defendant] to bear more than a de minimis cost . . . is an undue hardship.").

144. *Pickering*, 391 U.S. at 572–73 (footnote omitted) (citation omitted).

145. *Parrott v. District of Columbia*, Civ. A. No. 91-0049, 1991 WL 126020, at *3 (D.D.C. June 25, 1991).

146. *Endres v. Ind. State Police*, 349 F.3d 922, 925 (7th Cir. 2003).

147. *Id.*; see also Mark Strasser, *On Same-Sex Marriage and Matters of Conscience*, 17 WM. & MARY J. WOMEN & L. 1, 35 (2010) ("Commentators suggest that legislatures should afford an exemption to those who for religious reasons do not wish to serve members of the LGBT community . . . [S]uch an exemption, once offered, might be difficult to cabin both with respect to the kinds of services subject to the exemption and to the groups of 'objectionable' people who need not be served.").

were not picturing a single objector, but every potential objector. Of course, even a single employee refusing to perform their duties can upset the workplace. A high school biology teacher who refuses to teach evolution cannot so easily be replaced for just a week or two.¹⁴⁸ Similarly, a staff nurse in the Labor & Delivery section of a hospital who refuses to help with an emergency abortion, and whose refusal delays life-saving surgery for a half an hour while a replacement is found, clearly causes a serious disruption to the state hospital's ability to deliver health services.¹⁴⁹

However, perhaps some individual refusals may be accommodated without completely disrupting an office. For example, an IRS tax specialist refused to process tax exempt status applications from organizations his religion condemned, such as those that promoted LGBT and abortion rights.¹⁵⁰ The IRS argued that his failure to fulfill his job responsibilities "create[d] problems with the efficient and expeditious operations of the office."¹⁵¹ The IRS also worried about opening the floodgates to similar requests, leading to the mayhem described by other courts.¹⁵² The district court was unpersuaded. First, it held that at most two percent of the tax specialist's workload presented any religious conflict, and that other tax specialists could easily absorb this work.¹⁵³ Second, the floodgates scenario was unlikely,¹⁵⁴ and moreover, the question the court should address was just

148. See *LeVake v. Indep. Sch. Dist. No. 656*, 625 N.W.2d 502, 506 (Minn. Ct. App. 2001) (tenth grade biology teacher who refused to teach evolution for religious reasons was reassigned to teach ninth grade natural science); see also *Palmer v. Bd. of Educ.*, 603 F.2d 1271, 1272 (7th Cir. 1979) (probationary Kindergarten teacher, a Jehovah's Witness, who refused for religious reasons to sing patriotic songs, to participate in the Pledge of Allegiance, and to celebrate certain national holidays, was discharged).

149. See *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 223 (3d Cir. 2000) ("In November 1995, Shelton refused to treat another emergency patient. This patient—who was 'standing in a pool of blood'—was diagnosed with placenta previa. The attending Labor and Delivery section physician determined the situation was life-threatening. . . . Because the procedure would terminate the pregnancy, Shelton refused to assist or participate. Eventually, another nurse took her place. The Hospital claims Shelton's refusal to assist delayed the emergency procedure for thirty minutes.").

150. *Haring v. Blumenthal*, 471 F. Supp. 1172, 1174, 1180 (D.D.C. 1979). This case predated *Smith*.

151. *Id.* at 1180.

152. *Id.* at 1181 ("[O]thers will be encouraged to do likewise, and a point will soon be reached where the agency will be faced with very real and substantial practical problems.").

153. *Id.* at 1180; see also *McGinnis v. U.S. Postal Serv.*, 512 F. Supp. 517, 526 (N.D. Cal. 1980) (holding that the government should have reasonably accommodated window clerk whose religion prevented her from processing draft registrations).

154. *Haring*, 471 F. Supp. at 1182 ("Unlike prohibitions on laboring during certain days of the week, the refusal to make decisions with respect to specific issues does not appear to be a widespread and deeply ingrained religious tenet.").

this accommodation, not potential future accommodations.¹⁵⁵ The district court acknowledged uncertainty in the law regarding this question,¹⁵⁶ but reasoned that if the court had to consider every potential exemption, then all requests would be disruptive: “Were the law otherwise, any accommodation, however slight, would rise to the level of an undue hardship because, if sufficiently magnified through predictions of the future behavior of the employee’s co-workers, even the most minute accommodation could be calculated to reach that level.”¹⁵⁷ On the other hand, to completely disregard possible future requests risks underestimating the disruption that would follow. One resolution might be to consider the likely, as opposed to hypothetical, repercussions, though that standard could be challenging to apply. The Supreme Court has issued no definitive rule on this question, although it has noted that the disruption need not be “manifest” before the employer may take action¹⁵⁸ and that “substantial weight [is given] to government employers’ reasonable predictions of disruption.”¹⁵⁹

155. *Id.* (holding that “‘undue hardship’ must mean *present* undue hardship, as distinguished from anticipated or multiplied hardship”).

156. *Id.* (noting “the absence of authoritative guidance” on this question). Granted, the court was addressing the “undue hardship” test of Title VII, but similar uncertainty plagues “undue disruption” in government employee cases.

157. *Haring*, 471 F. Supp. at 1182.

158. *Connick v. Myers*, 461 U.S. 138, 152 (1983) (“Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.”). The Court has also held that the more valuable the speech, the stronger the showing of disruption: “We caution that a stronger showing may be necessary if the employee’s speech more substantially involved matters of public concern.” *Id.*

159. *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion).

In any event, religious refusals create more than scheduling problems. Such refusals may threaten the authority of a supervisor¹⁶⁰ or endanger close working relationships.¹⁶¹ In fact, the Supreme Court has suggested that the insubordination of refusing to do one's job is sufficient grounds for termination:

Perhaps the simplest example of a statement by a public employee that would not be protected by the First Amendment would be answering "No" to a request that the employee perform a lawful task within the scope of his duties. Although such a refusal is "speech," which implicates First Amendment interests, it is also insubordination, and as such it may serve as the basis for a lawful dismissal.¹⁶²

This statement seems fairly conclusive vis-à-vis government employees who simply refuse to perform a job duty. Then again, because unpopular rather than popular speech will alienate colleagues,¹⁶³ giving too much weight to the disruption of workplace relationships risks "constitutionalizing a heckler's veto."¹⁶⁴

However, there is also the reputation and obligations of the government office. According to the Supreme Court, bringing a government agency into disrepute may be reason enough for the *Pickering* balance to tip in favor of the government. There are many ways to harm the reputation of a government agency. A police officer selling a sex tape of himself in police uniform is one.¹⁶⁵ Racist, sexist, or homophobic remarks by a public employee,

160. See *Connick*, 461 U.S. at 154 (noting that employer need not "tolerate action which he reasonably believed would disrupt the office, *undermine his authority*, and destroy close working relationships" (emphasis added)).

161. Refusals may endanger close working relationships, although co-workers might not mind swapping duties, or even covering a colleague's duties.

162. *Connick*, 461 U.S. at 163 n.3 (Brennan, J., dissenting); see also *Domiano v. Village of River Grove*, 904 F.2d 1142, 1146-47 (7th Cir. 1990) (same); *Berry v. Bailey*, 726 F.2d 670, 675-76 (11th Cir. 1984) (same, adding "[e]ven the dissenters, who would have precluded the questionnaire-distributor from being fired because her speech, in their view, was protected, drew a line beyond which in-office speech would not be protected").

163. See Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1019 (2005) ("Speech that sparks too much opposition will be vulnerable to public employer restriction and retaliation, whereas speech that is sufficiently in line with mainstream beliefs to be unobjectionable will be protected.").

164. See *id.*; see also Kim, *supra* note 17, at 619 ("[B]y suggesting that the maintenance of 'discipline by immediate superiors or harmony among coworkers' is a relevant factor in the balancing analysis, *Pickering* appears to 'constitutionaliz[e] . . . a heckler's veto' in the employment setting." (second alteration in original) (footnote omitted) (citation omitted)).

165. *City of San Diego v. Roe*, 543 U.S. 77, 78, 84 (2004) (per curiam) ("The speech in question was detrimental to the mission and functions of the employer.").

especially a high ranking one or one who has contact with the public, might be another.¹⁶⁶ A teacher who publicly demeans her own students is yet another.¹⁶⁷

Several lower courts have framed the issue as losing the public's trust rather than losing the public's good opinion. The two are intertwined, since the public is less likely to trust an agency it holds in low regard. These cases argue that government entities ranging from the police to public schools cannot properly function without the public trust. For example, if you do not trust the police, you will not assist them with their inquiries or call them if you need help.¹⁶⁸

In particular, these courts emphasize that the public trusts that the government will be neutral in its provision of services. "It would seem unremarkable that public protectors such as police and firefighters must be neutral in providing their services."¹⁶⁹ The same holds true for public health care providers,¹⁷⁰ public school teachers, and public defenders and prosecutors, to name just a few. A refusal to provide services to certain groups—whether it be members of a racial minority or members of a

166. See *Locurto v. Giuliani*, 447 F.3d 159, 163–64 (2d Cir. 2006) (upholding termination of police officers and fire fighters who had put on black face and paraded on a racist float); *Pappas v. Giuliani*, 290 F.3d 143, 146–47 (2d Cir. 2002) (upholding termination of police officer who disseminated racist and anti-Semitic materials); *McMullen v. Carson*, 754 F.2d 936, 936–37, 940 (11th Cir. 1985) (upholding termination of police officer who revealed during TV interview that he recruited for the KKK); *Shirvell v. Dep't of Attorney Gen.*, 866 N.W.2d 478, 484, 506 (Mich. Ct. App. 2015) (upholding termination of assistant district attorney whose harassing blog undermined anti-cyberharassing initiative and created the appearance that the Department could not fairly represent the interests of gays or victims of harassment or stalking).

167. See *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 476–77, 480 (3d Cir. 2015).

168. *Pappas*, 290 F.3d at 146–47 ("If the police department treats a segment of the population of any race, religion, gender, national origin, or sexual preference, etc., with contempt, so that the particular minority comes to regard the police as oppressor rather than protector, respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired. Members of the minority will be less likely to report crimes, to offer testimony as witnesses, and to rely on the police for their protection. When the police make arrests in that community, its members are likely to assume that the arrests are a product of bias, rather than well-founded, protective law enforcement. And the department's ability to recruit and train personnel from that community will be damaged."); see also *McMullen*, 754 F.2d at 939 ("[T]he Government's responsibilities to the public are manifest. The Sheriff's office is charged with securing the safety of persons and property, and enforcing the law. Under our system of Government, that duty can be performed effectively only with the consent of the vast majority of those citizens policed by the Sheriff's office. Efficient law enforcement requires mutual respect, trust, and support.").

Some courts have argued that the same holds true for public education: "The position of public school teacher requires a degree of public trust not found in many other positions of public employment." *Munroe*, 805 F.3d at 475 (citation omitted).

169. *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 228 (3d Cir. 2000).

170. *Id.* ("We would include public health care providers among such public protectors.").

sexuality minority—would bring that expected neutrality into question. Hence Judge Posner’s insistence that a refusal’s harm to the public trust is more serious than its frustration of workplace logistics:

The objection to recusal in all of these cases is not the inconvenience to the police department . . . though that might be considerable in some instances. The objection is to the loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect.¹⁷¹

This concern is not present in every situation where an employee has a religious objection to part of their job responsibilities. For example, a public school cafeteria worker who refuses to touch that day’s pork chops does not raise it. On the other hand, refusing to serve a member of the public, especially because of their race, sex, sexual orientation, or other protected characteristic, undoubtedly compromises the public trust in their government’s neutral provision of services.

The question becomes how disruptive that loss of trust is. It is obviously a problem when the government agency depends on the public’s cooperation, as the police and schools do. Thus, the police officer who refused to protect an abortion clinic should lose on this particular disruption factor. Even if his refusal was not based on a protected characteristic, public confidence, and consequently police efficacy, would be undermined were the police able to pick and choose who they protected. But what if the agency does not depend on the public’s cooperation—is the loss of public trust on its own sufficient reason for the *Pickering* balance to favor the government?¹⁷² In other words, how disruptive is the loss of public trust that follows a county’s clerk’s refusal to issue marriage licenses to same-sex couples?¹⁷³ It seems a stretch to argue

171. *Rodriguez v. City of Chicago*, 156 F.3d 771, 779 (7th Cir. 1998) (Posner, J., concurring). In fact, Judge Posner thought this issue was so important that he would have imposed a *per se* rule against exemptions, at least for those government employees charged with protecting the public: “The importance of public confidence in the neutrality of its protectors is so great that a police department or fire department or equivalent public-safety agency that decides not to allow recusal by its employees should be able to plead ‘undue hardship’ and thus escape any duty of accommodation.” *Id.*

172. This is, of course, assuming the inquiry even gets this far. The government may well have prevailed earlier.

173. Whether the refusal violates the Equal Protection Clause is a separate question, see *supra* notes 81–104 and accompanying text, unless the constitutional implications increase the loss of trust and disruptiveness. See *Locurto v. Giuliani*, 447 F.3d 159, 179 (2d Cir. 2006) (“Where a Government employee’s job quintessentially involves public contact, the Government may take into account the public’s perception of that employee’s expressive acts in determining whether those acts are disruptive to the Government’s operations.”).

that no government office can function effectively if the public loses confidence in it.¹⁷⁴ Of course, given the two threshold requirements, plus the other types of disruption, it is unlikely a court will ever need to answer this particular question.

* * *

All in all, a public employee who wishes to wear particular religious garb might well prevail were government employee religion law modeled on the existing government employee speech law.¹⁷⁵ First, what one wears, whether a cross, a hijab, or a yarmulke, is not pursuant to official duties.¹⁷⁶ Second, because the Supreme Court recognizes that religion is a topic of public concern,¹⁷⁷ to the extent that religious garb expresses a message about one's faith, then it passes the second threshold.¹⁷⁸ The balancing test is the hardest to generalize about, since the inquiry is so fact specific. While it is certainly possible to come up with scenarios where religious garb might interfere with job performance¹⁷⁹ or undermine public trust,¹⁸⁰ I would suspect that more often than not it would not be disruptive.

In contrast, it would seem that a public official who refuses to perform a job duty on religious grounds would lose under any adaption of public employee speech doctrine. First, their refusal would be refusal of official

174. Then again, the media firestorm and PR disaster might be sufficiently severe to disrupt the smooth functioning of an office. However, that justification does raise some "heckler's veto" issues.

175. This conclusion assumes that the government employee is not bringing a Free Exercise Clause challenge to a law that is neutral and generally applicable. *See supra* notes 49–52 and accompanying text.

176. Government sponsored private conduct may also violate the Establishment Clause, so the conclusion that the religious exercise is not pursuant to official duties does not completely eliminate Establishment Clause concerns. *See supra* note 78 and accompanying text.

177. *United States v. Alvarez*, 132 S. Ct. 2537, 2564 (2012) (listing topics of public concern including "philosophy, religion, history, the social sciences, the arts, and other matters of public concern") (Alito, J., dissenting); *see also, e.g., Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 (9th Cir. 2011) ("[S]peech concerning religion is unquestionably of inherent public concern . . .").

178. This is not a guarantee, as courts do not always view dress as expressive. *See Zalewska v. County of Sullivan*, 316 F.3d 314, 320 (2d Cir. 2003) (rejecting bus driver's claim that wearing skirt rather than pants to express her cultural values was expressive conduct).

179. For example, perhaps wearing certain religious items that were easy to grab might pose a security risk for prison guards. *E.g., Finnie v. Lee County*, 907 F. Supp. 2d 750, 781 (N.D. Miss. 2012) (holding that an exemption to a juvenile detention center's "no-skirts" policy for a juvenile detention officer whose religion required long skirts would be an undue hardship).

180. For example, if one belonged to a racist religious group whose emblem was a well-known symbol of racism.

duties, which means they are complaining about government religion, not private religion, and government religion is not protected at all. Indeed, the doctrinal analysis could end there. Moreover, not only is government religion not protected, but it is subject to both Establishment and Equal Protection Clause limits. Even if their refusal were somehow not pursuant to official duties, it would not necessarily be a matter of public concern, though this factor may turn on whether the challenged conduct has an expressive component. Finally, while the *Pickering* balance is highly fact-specific, there is strong reason to conclude that the disruption caused by a government official refusing to do their job, whether due to loss of smooth functioning of the workplace or loss of public trust and confidence, outweighs the uncertain First Amendment value. In short, if we were to apply the government employee speech approach to government employee religion, the constitution would not bar (and might even require) terminating a government employee for a religious refusal.

B. Doctrinal Hesitations

As a practical matter, one might argue that this analysis is beside the point for two reasons.¹⁸¹ First, it is difficult to win a Free Exercise Clause exemption under current doctrine, and government employee religion claims are often dispatched without needing to take the government employee context into account. Second, it is the Religious Freedom Restoration Act (RFRA), or its state counterparts, that drives most religious liberty litigation right now, and the constitutional analysis does not speak to RFRA. These are both relevant concerns, and I will address them in turn.

181. There is a third reason involving Title VII that is beyond the scope of this Article. According to Supreme Court precedent, Title VII is the exclusive remedy for federal employees' workplace religious discrimination claims. *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 835 (1976) (“[Title VII] provides the exclusive judicial remedy for claims of discrimination in federal employment.”). Some courts have even held that Title VII preempts RFRA as well as the Free Exercise Clause. *See, e.g., Harrell v. Donahue*, 638 F.3d 975, 983–84 (8th Cir. 2011) (holding that Title VII preempts RFRA); *Francis v. Mineta*, 505 F.3d 266, 271–72 (3d Cir. 2007). However, Title VII does not preempt religious claims of state (vs. federal) employees and it does not exempt religious claims that fall outside the “religious discrimination” rubric. *See Otto v. Heckler*, 781 F.2d 754 (9th Cir.), *modified*, 802 F.2d 337 (9th Cir. 1986).

1. Free Exercise After *Smith*

*Employment Division, Department of Human Resources of Oregon v. Smith*¹⁸² fundamentally changed Free Exercise Clause doctrine.¹⁸³ Before the Supreme Court's 1990 *Smith* decision, religious objectors were entitled to exemptions from any law that imposed a substantial burden on their free exercise unless that law passed strict scrutiny.¹⁸⁴ After *Smith*, neutral laws of general applicability do not violate the Free Exercise Clause, regardless of the religious burdens they may impose.¹⁸⁵ A law is neutral as long as it does not intentionally single out religion for disfavor,¹⁸⁶ and it is generally applicable if it applies across the board.¹⁸⁷ Although most challenges are to laws that are neutral and generally applicable, not all are. Those are the cases that benefit from the government employee religion analysis.

The free exercise section is often the shortest part of a government employee decision.¹⁸⁸ Because the majority of challenged regulations, including those requiring a government employee to do their job, qualify as neutral and generally applicable, free exercise challenges to them are generally nonstarters. One Seventh Circuit analysis is basically three sentences:

After *Employment Division v. Smith*, any argument that failure to accommodate [Agent] Ryan's religiously motivated [refusal to fulfill his job responsibilities] violates the free exercise clause of the first amendment is untenable. *Smith* holds that rules neutral with respect to religion satisfy that clause. The FBI did not hold Ryan's

182. *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

183. I am speaking only of the official doctrine. Although the test for free exercise violations underwent a major shift, the actual decisions at the Supreme Court did not, as it had rejected most free exercise claims. *See, e.g.,* Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992) (describing the Court's pre-*Smith* free exercise standard of review as "strict in theory, but ever-so-gentle in fact").

184. *See, e.g.,* *Wisconsin v. Yoder*, 406 U.S. 205, 214–15 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). This test is often called the *Sherbert v. Verner* test.

185. *Smith*, 494 U.S. at 879–80. The Supreme Court has noted that "[n]eutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

186. *See, e.g., Lukumi Babalu Aye*, 508 U.S. at 534 (finding ordinances were not neutral because "suppression of the central element of the Santeria worship service was the object of the ordinances").

187. *See, e.g., id.* at 543–45 (finding ordinances were not generally applicable since they were grossly underinclusive).

188. To the extent the courts have engaged in more nuanced analysis, it has usually been under Title VII, which requires employers, including government employers, to reasonably accommodate the religious needs of their employees. *See* 42 U.S.C. §§ 2000e(j), 2000e-2 (2012).

faith against him . . . and treated him no more severely than it would have treated an agent who refused a direct order for secular reasons.¹⁸⁹

Other courts are similarly brief and to the point.¹⁹⁰ However, there are exceptions. For example, a state law that barred public school teachers from wearing religious garb specifically targeted a religious practice, and therefore did not amount to a neutral and generally applicable law.¹⁹¹ In addition, courts have found that laws that provide a secular exemption but not a religious exemption, such as a police department policy allowing beards for medical but not religious reasons, are not “neutral and generally applicable.”¹⁹² Therefore, a more extended free exercise analysis is not unheard of, especially for religious claims other than religious refusals.

Doctrinally, laws that fail to qualify as neutral and generally applicable do not automatically violate the Free Exercise Clause. Rather, they are unconstitutional if they (a) impose a substantial religious burden and (b) cannot pass strict scrutiny.¹⁹³ In other words, the *Sherbert v. Verner* test, the reigning doctrinal test before *Smith*, applies. It is at this point that the government employee context becomes relevant.

To start, when analyzing the first *Sherbert v. Verner* question regarding the burden on religious exercise, the first government employee question—is it pursuant to official duties—is critical. That is, when analyzing whether a law imposes a substantial burden on religious exercise, it should matter whether it is private religious practice or government religious practice. If the practice is pursuant to the government employee’s official duties and therefore best seen as government religion, it is the Establishment Clause

189. See *Ryan v. U.S. Dep’t of Justice*, 950 F.2d 458, 461 (7th Cir. 1991) (citation omitted).

190. See, e.g., *Miller v. Drennon*, No. 91-2166, 1992 WL 137578, at *4 (4th Cir. June 19, 1992) (“In *Smith*, the Supreme Court held that the first amendment is not violated by a neutral, ‘generally applicable and otherwise valid provision’ which does not as its object prohibit the exercise of religion. Because it is clear that the County implemented the policy to reduce costs and more fairly apportion work and not to prohibit the exercise of religion, Miller’s claim that the scheduling policy violated his first amendment rights must fail.” (citation omitted)).

191. *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536, 552 (W.D. Pa. 2003) (holding that the no-religious-garb policy “is not neutral in effect, and does not pretend to be”).

192. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (“[W]e conclude that the Department’s decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*.”).

193. The *Sherbert v. Verner* test is named after the case that first articulated this free exercise doctrine, *Sherbert v. Verner*, 347 U.S. 398 (1963).

(and the Equal Protection Clause) and not the Free Exercise Clause that courts need to worry about.¹⁹⁴

As for the second *Sherbert v. Verner* question, strict scrutiny may be inappropriate when the government acts as employer as well as sovereign. The Supreme Court has been very clear that the government's powers as employer are more extensive than its powers as sovereign.¹⁹⁵ For example, while the government as sovereign has little justification for curtailing citizens' rudeness, as employer it should be able to punish its employees who are rude to the public they are supposed to serve.¹⁹⁶ That is, as an employer, the government ought to have some managerial prerogatives.¹⁹⁷ Private employers, after all, exercise tremendous control over their workplaces.¹⁹⁸ "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."¹⁹⁹ Thus, strict

194. As a matter of doctrine, the first question in *Sherbert v. Verner* is whether a substantial burden has been imposed on the government employee's ability to practice their religion. However, as explained, if the religious act in question is official conduct, then it is government religious conduct and not protected by the Free Exercise Clause. In other words, the pursuant to official duties question still acts as an initial threshold inquiry, it just happens to help answer the first *Sherbert v. Verner* question. Just as it screened out claims in the free speech context, the pursuant to official duties inquiry would screen out claims in the religious liberty context.

195. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) ("[T]he government as employer indeed has far broader powers than does the government as sovereign." (alteration in original) (citation omitted)); *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion) ("[T]he extra power the government has in this area comes from the nature of the government's mission as employer.").

196. See *Locurto v. Giuliani*, 447 F.3d 159, 183 (2d Cir. 2006) ("The First Amendment does not require a Government employer to sit idly by while its employees insult those they are hired to serve and protect.").

197. Elizabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of Garcetti v. Ceballos*, 29 BERKELEY J. EMP. & LAB. L. 175, 213 (2008) ("As Arthur Goldberg once put it, the concept of management rights is simply 'a recognition of the fact that somebody must be the boss. . . . People can't be wandering around at loose ends, each deciding what to do next. Management decides what the employee is to do.'" (alteration in original) (citation omitted)); Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 583 (1998) ("[G]overnment is entitled to insist that its employees not behave in ways that prevent management from running the workplace as it sees fit.").

198. Pauline Kim points out that the analogy between private employee and public employee is far from perfect. Kim, *supra* note 17, at 607 (criticizing the "trend toward referencing private sector norms to interpret public employees' constitutional rights of speech and privacy"). Still, it is hard to avoid the Court's conclusion that a workplace cannot function if every employment dispute becomes a federal case.

199. *Garcetti*, 547 U.S. 410, 418 (2006). Of course, no employer has carte blanche: Title VII bars religious discrimination and requires reasonable religious accommodations, but only if the

scrutiny, a test designed for the government-sovereign, may be too demanding for measures taken in its government-employer incarnation.²⁰⁰

Even as the government-sovereign, the government's interests in regulating its employees differ from its interests in regulating its citizens. That is, vis-à-vis its employees, the government has special needs as sovereign as well as employer. That is because to some extent (or more accurately, to varying extents), the government employee also represents or embodies the government. Their speech and acts may be attributed, and in certain circumstances will be attributed, to the state in a way that citizen speech and acts are not.

This concern is greatest when the employee is acting pursuant to official duties, especially if they engage with the public while discharging these duties.²⁰¹ To the public, a government employee acting in their official capacity is the government, and, as discussed earlier, the employee's actions amount to state action.²⁰² In those instances, when the employee stands in for the government, the government must be mindful of the Establishment and Equal Protection Clauses.

In short, to strictly scrutinize every government employer decision may not adequately incorporate the government's interests. First, the government as employer needs some managerial control. After all, "[w]hen someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her."²⁰³ Second, the government as sovereign must ensure compliance with the Constitution:

accommodation does not amount to an undue hardship. *See* 42 U.S.C. §§ 2000e(j), 2000e-2 (2012).

200. The special circumstances of academic freedom at public universities, which *Garcetti* reserved judgment on, are beyond the scope of this Article. *Garcetti*, 547 U.S. at 425 ("We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.").

201. Notably, when someone sues a government employee in their official capacity, the suit is treated as a claim against the government. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the [government] entity."). Granted this is a different area of law, but it illustrates that the conflation of an employee's official acts and the state is not unique to the government-employee speech context.

202. *See supra* text accompanying notes 65–66 (explaining that generally the actions of public employees discharging their official duties will be treated as the state for state action purposes).

203. *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion).

When a public employee, in their official capacity, says or does things that violates the Constitution, the government must be able to respond.²⁰⁴

Lower courts have not been blind to the unique context of public employee religion. As noted earlier, these courts have opted for one of two possible modifications to the existing free exercise doctrine.²⁰⁵ A few decisions, such as a Third Circuit opinion written by then-Judge Alito, have applied intermediate rather than strict scrutiny after finding that a non-neutral law imposed a substantial religious burden: “While *Smith* and *Lukumi* speak in terms of strict scrutiny . . . we will assume that an intermediate level of scrutiny applies since this case arose in the public employment context and since the Department’s actions cannot survive even that level of scrutiny.”²⁰⁶

Other courts have adopted the government employee speech inquiry, though notably these decisions predate *Garcetti*. Thus, in a free exercise challenge to a library dress code that barred religious jewelry, one district court adopted a “*Pickering*-like standard of review,”²⁰⁷ arguing that the “policy justifications for applying a less stringent standard of review in the governmental employment arena are every bit as compelling in the free exercise context as in the free speech context.”²⁰⁸ The Eighth Circuit, addressing a social worker’s challenge to a rule barring him from proselytizing his clients, expressed a similar sentiment:

Although the free exercise of religion is certainly a fundamental constitutional right, we believe that the Supreme Court might well

204. Whether an employee is acting pursuant to official duties matters for both *Sherbert v. Verner* inquiries. First, if the religious conduct is government conduct, then there is no substantial burden on individual religious liberty. Second, if the religious act is essentially the government’s act, then the government’s compelling interest in complying with the Establishment Clause and Equal Protection Clause comes into play.

205. Occasionally a court will reject strict scrutiny without being absolutely clear which of these two it is adopting. *See, e.g.*, *Finnie v. Lee County*, 907 F. Supp. 2d 750, 767–68 (N.D. Miss. 2012).

206. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 n.7 (3d Cir. 1999) (citation omitted); *see also* *Lewis v. N.Y.C. Transit Auth.*, 12 F. Supp. 3d 418, 454 (E.D.N.Y. 2014) (“[C]ourts outside this jurisdiction have held that an intermediate level of scrutiny applies, instead of the strict scrutiny set forth in *Lukumi Babalu Aye*, when a Free Exercise challenge is directed at a non-neutral rule imposed by the government as an employer, as opposed to a rule applicable to the general public.”); *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536, 550 (W.D. Pa. 2003) (“Public employers enjoy somewhat more leeway, but not *carte blanche*, in regulating the speech and other First Amendment activities of their employees. ‘Heightened’ or ‘intermediate’ level scrutiny generally applies in the public sector . . .”).

207. *Draper v. Logan Cty. Pub. Library*, 403 F. Supp. 2d 608, 622 (W.D. Ky. 2005) (“[T]he Court concludes that the Sixth Circuit would apply a *Pickering*-like standard of review to free exercise challenges to conduct rules of a governmental employer.”).

208. *Id.*

adopt, for free exercise cases that arise in the context of public employment, an analysis like the one enunciated in *Pickering v. Board of Education*. That case dealt with free speech rather than the free exercise of religion, but because the analogy is such a close one, and because we see no essential relevant differences between those rights, we shall endeavor to apply the principles of *Pickering* to the case at hand.²⁰⁹

Under either approach, strict scrutiny is replaced by a test that better addresses the efficiency needs of the government-employer and the constitutional limits on the government-sovereign. Besides aligning more with government employee speech, the government employee religion approach is more rigorous than the intermediate scrutiny approach. If the religious practice is pursuant to official duties, then it is a government religious practice and consequently no private religious practice has been burdened, substantially or otherwise. There is no free exercise claim, and no scrutiny is required. One might come to the same conclusion regardless, but the pursuant to official duties lens makes the conclusion inevitable. In addition, as with government employee speech, the government employee's autonomy interests are not enough to warrant protection. Their challenged conduct must be on a matter of public interest and have that public-regarding benefit. Again, intermediate scrutiny does not preclude this, but the matter of public interest test requires it.²¹⁰

* * *

The argument that a government employee religion doctrine is not really necessary may have some traction with religious refusal cases, since these usually involve neutral laws of general applicability.²¹¹ Still, not all refusals do, and furthermore religion refusals do not describe the universe of government employee religion. A government employer religion doctrine ensures that the government's unique interests vis-à-vis government employees, both as employer and as sovereign, are adequately balanced against First Amendment interests.

209. *Brown v. Polk County*, 61 F.3d 650, 658 (8th Cir. 1995) (citation omitted).

210. Intermediate scrutiny is a form of balancing of interests, and the *Pickering* balancing test is essentially a structured intermediate scrutiny where the interests have been preset.

211. If citizens must comply with a neutral law of general applicability, then surely government employees must.

2. Religious Liberty in the Age of RFRA

A second question is whether a government employee religion doctrine is relevant for Religious Freedom Restoration Act (RFRA) claims.²¹² Because a plaintiff is more likely to succeed under the federal RFRA or a state RFRA than under the Free Exercise Clause, many of the most important recent religious liberty challenges are RFRA rather than Free Exercise cases.²¹³ Nevertheless, the constitutional doctrine is still relevant for statutory RFRA claims for two reasons. The first reason, which may or may not survive the Supreme Court's recent *Hobby Lobby* decision,²¹⁴ is that RFRA was meant to track pre-*Smith* Free Exercise Clause doctrine. Second, even if RFRA represents a break with the Free Exercise Clause, the same concerns that shape the constitutional government employee religion analysis should inform the RFRA analysis.

a. *The Rise of RFRA*

Congress passed RFRA in direct response to *Employment Division, Department of Human Resources of Oregon v. Smith*,²¹⁵ the Supreme Court decision that weakened free exercise protection.²¹⁶ Recall that before *Smith*'s "neutral and generally applicable" rule, religious observers were, at least in theory, constitutionally entitled to exemptions from any law that substantially

212. Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to -4 (2012).

213. See, e.g., *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (RFRA); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (RFRA); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (RFRA); see also *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (RLUIPA); *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (RLUIPA). RLUIPA, which stands for Religious Land Use and Institutionalized Persons Act, mirrors RFRA except that it is only available for the claims listed in its title. 42 U.S.C. §§ 2000cc-1(a) to (b)(2) (2012). There have been a couple of major Free Exercise Clause cases. For example, *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 132 S. Ct. 694 (2012) (affirming existence of ministerial exception and therefore rejecting school teacher's ADA claim), focused on church autonomy rather than individual religious liberty. The ramifications of this term's *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (holding that churches must be allowed to compete on an equal basis for cash grants from the government), are not yet clear.

214. *Hobby Lobby*, 134 S. Ct. at 2785.

215. 494 U.S. 872 (1990); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210–12 (1994) (explaining how RFRA was passed in direct reaction to *Employment Division v. Smith*).

216. *Smith*, 494 U.S. at 884–85 (holding that neutral laws of general applicability, such as the U.S. drug laws that prohibited the sacramental use of peyote, did not have to pass strict scrutiny in order to comply with the Free Exercise Clause); see also H.R. REP. NO. 103-88, at 2 (1993) [hereinafter HOUSE REPORT] ("The *Smith* majority's abandonment of strict scrutiny represented an abrupt, unexpected rejection of longstanding Supreme Court precedent.").

burdened their religious practice unless that law passed strict scrutiny.²¹⁷ RFRA restored as a matter of statutory law the earlier *Sherbert v. Verner* test.²¹⁸ While the federal RFRA applies to federal laws,²¹⁹ many states have their own version of RFRA that applies to state laws.²²⁰

In terms of litigation, a RFRA suit may be a government employee's best bet for securing a religious accommodation in the workplace. Free Exercise Clause accommodations are not available from neutral laws of general applicability.²²¹ Title VII accommodations are not granted if they impose undue hardship on the employer.²²² While Title VII's standard sounds protective, anything other than a minimal disruption amounts to "undue hardship."²²³ In contrast, RFRA mandates accommodations from all laws that impose a substantial religious burden unless the law passes strict scrutiny. Thus, RFRA lawsuits may be the religious claims of the future.²²⁴

217. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963).

218. RFRA, 42 U.S.C. § 2000bb-1(b) (2012) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest.").

219. The Supreme Court has held that while Congress may subject its own federal laws to RFRA's requirements, Congress exceeded its constitutional authority when it attempted to apply them to state laws. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

220. *State Religious Freedom Restoration Acts*, NAT'L CONF. ST. LEGISLATURES (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>. (noting that between 1993 and 2015, "21 states have enacted state RFRAs"). One or two new state laws explicitly give government employees a religious right to refuse to perform their official duties, see *supra* notes 7, 101, but in most states, public employees with religious liberty claims would rely on their state RFRA.

221. They are also not available for federal employees whose claims mirror Title VII religious discrimination claims. See *supra* note 181 (explaining when Title VII preempts Free Exercise Clause claims).

222. Title VII not only prohibits discrimination on the basis of religion, but it also requires that employers grant reasonable accommodations for religious employees unless the accommodation creates "undue hardship." 42 U.S.C. § 2000e(j) (2012) (religious accommodation required unless "employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business").

223. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) ("To require [defendant] to bear more than a de minimis cost . . . is an undue hardship."). Title VII claims must also meet strict statute of limitations. Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 866 (2008) ("At the root of the problem for rights-claiming under Title VII is the statute's unusually short statute of limitations.").

224. Though perhaps not for federal employees if Title VII is held to preempt RFRA as well as the Free Exercise Clause, as a few courts before *Hobby Lobby* have held. See *supra* note 181. However, *Hobby Lobby* could easily be read to suggest RFRA should not be treated in the same way as the Free Exercise Clause. See *infra* notes 229–230 and accompanying text.

b. RFRA and Free Exercise

Because RFRA was meant to track the Free Exercise Clause, the constitutional government employer religion doctrine should influence the statute's application. As the "Restoration" in the name indicates, RFRA was designed to restore the *Sherbert v. Verner* free exercise test for its religious liberty claims. "RFRA's purpose is specific and written into the statute itself. The Act was crafted to 'restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened.'"²²⁵ In addition, RFRA's statement of purpose discusses religious liberty in terms of the Free Exercise Clause, noting that "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution."²²⁶ In fact, the original statute defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution."²²⁷ RFRA's legislative history likewise links the scope of its protection to the protection offered under the Free Exercise Clause.²²⁸ RFRA's close relationship to the Free Exercise Clause is therefore one reason why a constitutional government employee religion doctrine is relevant for RFRA claims.

225. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2791 (2014) (Ginsburg, J., dissenting) (citing RFRA, 42 U.S.C. § 2000bb(b)(1) (2012)); *see also id.* ("The legislative history is correspondingly emphatic on RFRA's aim. *See, e.g.*, S. REP. NO. 103-111, p. 12 (1993) . . . (RFRA's purpose was 'only to overturn the Supreme Court's decision in *Smith*, not to 'unsettle other areas of the law.');

139 Cong. Rec. 26178 (1993) (statement of Sen. Kennedy) (RFRA was 'designed to restore the compelling interest test for deciding free exercise claims.').")

226. RFRA, 42 U.S.C. § 2000bb(a)(1) (2012).

227. Pub. L. No. 103-141 § 5, 107 Stat. 1488, 1489 (1993). Congress later redefined "exercise of religion." RFRA was amended in 2000, so that "exercise of religion" is now defined, by cross reference to the Religious Land Use and Institutionalized Person Act (RLUIPA), as "any exercise of religion, whether or not compelled by, or central, to a system of religious belief." RFRA, 42 U.S.C. § 2000bb-2(4) (2012); RLUIPA, 42 U.S.C. § 2000cc-5(7)(A) (2012). However, the language was changed to make clear that a religious practice need not be mandatory or central to one's faith in order to be protected. *See, e.g.*, *Rasul v. Myers*, 563 F.3d 527, 534 (D.C. Cir. 2009) (Brown, J., concurring) ("This change was meant to 'clarify[] issues that had generated litigation under RFRA' by providing that '[r]eligious exercise need not be compulsory or central to the claimant's religious belief system.'" (alteration in original) (citation omitted)).

228. *See* S. REP. NO. 103-111, at 8 (1993) ("The Committee expects that the courts will look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened . . ."); HOUSE REPORT, *supra* note 216, at 6-7 ("It is the Committee's expectation that the courts will look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened . . .").

Despite this backdrop, the Supreme Court in *Hobby Lobby* suggests that RFRA is more of a break from than restoration of constitutional doctrine.²²⁹ Although the four-Justice *Hobby Lobby* dissent describes this view as “not plausible,”²³⁰ it currently controls.

c. Informing RFRA Analysis

Even if RFRA breaks with its constitutional counterpart, the concerns incorporated into government employee doctrine apply to the RFRA analysis. With regard to RFRA’s first question, whether the challenged law imposes a substantial religious burden on a government employee, it should matter if the religious exercise is pursuant to official duties. If so, if it occurs as part and parcel of the employee’s governmental responsibilities, it is best seen as the government’s religious exercise and there is no substantial religious burden—the government cannot be religiously burdened. On the contrary, if confronted with a social worker who feels religiously compelled to proselytize to their clients, the courts ought to be more focused on limiting religious exercise rather than facilitating it.²³¹

In fact, although the district court did not explicitly rely on the pursuant to official duties test to dismiss claims of substantial religious burden, the fact that Kim Davis complained about official job responsibilities informed its RFRA analysis.²³² Rather than provide marriage licenses to same-sex couples, which contravened her Apostolic Christian faith, Kim Davis stopped issuing them altogether.²³³ In its First Amendment analysis, the court noted that because Davis’s “refusal to issue marriage licenses[] is a product of her official duties, it likely is not entitled to First Amendment protection.”²³⁴ The court’s RFRA analysis echoes these sentiments, rejecting Davis’s RFRA claim on the grounds that “her religious convictions cannot excuse her from

229. *Hobby Lobby*, 134 S. Ct. at 2761–62 (“In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the ‘exercise of religion’ to include ‘any exercise of religion, whether or not compelled by, or central to, a system of religious belief.’ § 2000cc-5(7)(A).”).

230. *Id.* at 2792 (Ginsburg, J., dissenting).

231. Likewise, a court evaluating the burden on an employee who refuses on religious grounds to provide a government service to a protected class might be dealing with government action that violates the Equal Protection Clause. See *supra* notes 81–104 and accompanying text for more discussion.

232. The statutory claim was brought under Kentucky’s version of RFRA. *Miller v. Davis*, 123 F. Supp. 3d 924, 944 (E.D. Ky. 2015) (noting that the Kentucky Religious Freedom Act is “patterned after the federal RFRA”).

233. *Id.* at 929.

234. *Id.* at 942.

performing the duties that she took an oath to perform as Rowan County Clerk.”²³⁵

Moreover, as discussed in Part II.B.1, even though RFRA requires strict scrutiny for laws that do impose a substantial burden, the government’s interests as employer and as sovereign ought to inform that analysis, and perhaps render it somewhat less strict. There is precedent for a more relaxed strict scrutiny in certain circumstances. In *Cutter v. Wilkinson*,²³⁶ the Supreme Court held that in applying the strict scrutiny required by RLUIPA (RFRA’s counterpart for prisoners and other institutionalized people), courts should be deferential to government prison officials.²³⁷ In other words, the strict scrutiny should not be all that strict in that particular context.²³⁸

What about the argument that RFRA was designed to exceed free exercise protections, and therefore the strict scrutiny standard ought to stand regardless of what happens constitutionally? Even if it were true that RFRA was meant to provide more protection than pre-*Smith* free exercise jurisprudence (itself debatable), this assumes that government employees should receive the exact same expanded RFRA protection as citizens. But as described above, the government has particular needs vis-à-vis its employees, both as employer and as sovereign. In sum, comparison with government employee speech should illuminate how RFRA is applied to government employee religion.

III. CRITICISM

I have not yet addressed the elephant in the room, which is that government employee doctrine, especially *Garcetti*’s pursuant to official duties threshold, is widely criticized. The categorical exclusion of any free speech protection for government employees who speak pursuant to their jobs has been the target of numerous scholarly attacks.²³⁹ Nonetheless, *Garcetti*’s

235. *Id.* at 944.

236. *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

237. First, the Court observed that “[w]hile the Act adopts a ‘compelling governmental interest’ standard, ‘[c]ontext matters’ in the application of that standard.” *Id.* at 722–23 (alteration in original) (citation omitted). It then essentially advised courts to apply it “with ‘due deference to the experience and expertise of prison and jail administrators’” *Id.* at 723 (citation omitted).

238. David M. Shapiro, *To Seek a Newer World: Prisoners’ Rights at the Frontier*, 114 MICH. L. REV. FIRST IMPRESSIONS 124, 126 (2016) (noting that, in *Cutter*, “the Court bled [RLUIPA] of much of its force. . . . [and] the Court’s unanimous opinion . . . suggested that strict scrutiny under RLUIPA was not ‘real’ strict scrutiny”).

239. See, e.g., Adam Shinar, *Public Employee Speech and the Privatization of the First Amendment*, 46 CONN. L. REV. 1, 5–6 (2013) (lamenting that *Garcetti* “has brought constitutional

main flaw does not translate to the government employee religion context. Responding to one criticism, though, raises another possible one: If speech and religion are not sufficiently analogous for the *Garcetti* criticism to stick, perhaps they are also not analogous enough for the government employee speech doctrine as a whole to apply to government employee religion claims.

A. *The Garcetti Critique*

1. Criticism

Thus far, the Article has accepted the government employee speech doctrine as a descriptive and as a normative matter. However, much criticism has been levied against the doctrine, especially the Supreme Court's *Garcetti* decision.²⁴⁰ The most common complaint is that labeling all speech made pursuant to official duties as government speech leaves unprotected a great

protection close to its nineteenth-century level" especially given public employee speech's role in "maintain[ing] a system of internal checks on government in addition to the external checks imposed by legislatures, courts, and the public").

240. Roosevelt, *supra* note 17, at 636 ("[A]cademic reaction to *Garcetti* has been largely negative."); see also Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1471 (2007) (criticizing *Garcetti* by asking "[b]ut why are public employees not acting as citizens when they speak out about government misconduct, waste, or dishonesty in the course of doing their jobs?"); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing, and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561, 563 (2008) (describing *Garcetti* as "unsound as a matter of First Amendment policy because it under-protects public employee speech that is vital to self-government"); Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 911 (2010) ("*Garcetti* empowers the government to punish public employees simply for doing their jobs when those workers have been hired to flag hazards and improprieties."); Paul M. Secunda, *Garcetti's Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 117 (2008) (*Garcetti* has "made it nearly impossible for conscientious public servants to speak out in the best interests of the public without jeopardizing their careers."); Caroline A. Flynn, Note, *Policeman, Citizen, or Both? A Civilian Analogue Exception to Garcetti v. Ceballos*, 111 MICH. L. REV. 759, 772 (2013) ("In short, *Garcetti* was wrongly decided. . . . The decision's shortcomings stemmed, in part, from the majority's failure to appreciate how a public employee can occupy more than one role while speaking."); Shubha Harris, Note, *Case Note: Silencing the Noise of Democracy—the Supreme Court Denies First Amendment Protection for Public Employees' Job-Related Statements in Garcetti v. Ceballos*, 33 WM. MITCHELL L. REV. 1143, 1144–45 (2007) ("While in recent years Congress and the American public have been calling for increased protections for employees who speak out about government wrongdoing, the *Garcetti* Court made a marked move in the opposite direction."); Sarah F. Suma, Note, *Uncertainty and Loss in the Free Speech Rights of Public Employees Under Garcetti v. Ceballos*, 83 CHI.-KENT L. REV. 369, 392 (2008) ("[T]he *Garcetti* rule is least likely to afford First Amendment protection where it is arguably most warranted.").

deal of speech on a matter of public concern. “The academic reaction to [*Garcetti*] has been harshly negative; scholars argue that the holding will prevent the public from learning of governmental misconduct that is known only to those working within the bowels of the government itself.”²⁴¹

Government employee speech is valued and protected in large part because public employees are thought to have a particularly well-informed perspective on their government work.²⁴² “[P]ublic employees ‘are uniquely qualified to comment’ on ‘matters concerning government policies that are of interest to the public at large.’”²⁴³

However, this insight seemed to vanish when the *Garcetti* Court held that speech pursuant to official duties was never protected, even if on a matter of public interest. The speech that might be most useful to the public—speech on government activities by those who, because of their job, know these activities inside out—is precisely that speech now deemed beyond the purview of the Free Speech Clause.

Utterly failing to protect speech pursuant to official duties is especially problematic for democratic accountability.²⁴⁴ A foundational justification for protecting speech is to ensure democratic self-governance. Crucial to self-governance is the ability to hold government officials accountable for their actions. Yet this ability is compromised when potential whistleblowers—public employees—are discouraged from reporting government misdeeds.²⁴⁵ As Helen Louise Norton summarized, the *Garcetti* rule “frustrates a meaningful commitment to republican government because it allows government officials to punish, and thus deter, whistleblowing and other on-the-job speech that would otherwise inform voters’ views and facilitate their ability to hold the government politically accountable for its choices.”²⁴⁶

241. Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 36 (2008).

242. *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam) (“Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues.”).

243. *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014) (citation omitted).

244. Kim, *supra* note 17, at 642 (“Because political accountability is the primary means by which the public seeks to ensure that public managers are pursuing public goals, speech by public employees plays a particularly important role in self-governance.”).

245. Mark Strasser, *Whistleblowing, Public Employees, and the First Amendment*, 60 *CLEV. ST. L. REV.* 975, 993 (2013) (Post-*Garcetti*, “[i]ndividuals who have a professional obligation to expose government wrongdoing have great incentive to turn a blind eye to objectionable practices, because the First Amendment will provide them no protection.”).

246. Norton, *supra* note 17, at 4.

Richard Ceballos himself is a cautionary tale. He attempted to report a faulty affidavit to his supervisors in the district attorney's office, and was demoted for his troubles.²⁴⁷ Nor is his case unique.²⁴⁸ "In fact, in the years following *Garcetti*, the lower federal courts denied protection to numerous government employees who objected to their employers' illegal practices, health and safety violations, and financial improprieties."²⁴⁹ In case after case, courts have dismissed the government whistleblower's First Amendment claim because the speech was pursuant to official responsibilities.²⁵⁰

2. Response

A few scholars have argued that the blow to democratic accountability has been overstated. One commentator, for example, argues that *Garcetti*'s impact is limited because "[i]nternal workplace speech . . . does not improve the public's understanding of the functions of government or otherwise enhance the effectiveness of the process of political accountability."²⁵¹

247. *Garcetti v. Ceballos*, 547 U.S. 410, 413–15, 443 n.14 (2006).

248. Norton & Citron, *supra* note 240, at 911 ("[L]ower courts now routinely rely on [*Garcetti*] to dispose of the constitutional claims of government workers fired after making job-required reports of illegal or dangerous conditions despite the great value of such speech to the public.").

249. Kim, *supra* note 17, at 644; *see* Strasser, *supra* note 245, at 993 ("Regrettably, lower courts have learned the lessons of *Garcetti* quite well. Numerous individuals have suffered adverse employment actions when seeking to expose the kinds of practices that whistleblower protections are designed to bring to light."); *see also, e.g.*, *O'Shell v. Cline*, 571 F. App'x 487, 491 (7th Cir. 2014) (holding auditor's speech unprotected because "[a]s an auditor, O'Shell's job was to report observed financial improprieties."); *McGee v. Pub. Water Supply*, 471 F.3d 918, 919 (8th Cir. 2006) (affirming that the District Manager of a county public water supply district, whose position was eliminated after expressing concern that a leaking septic tank still posed a contamination risk, could not bring First Amendment claim because speech was pursuant to official duties).

250. *See Abdur-Rahman v. Walker*, 567 F.3d 1278, 1283 (11th Cir. 2009) ("[T]he reports of the inspectors to their supervisors about sewer overflows they were required to investigate are not protected under the First Amendment."); *Vose v. Kliment*, 506 F.3d 565, 572 (7th Cir. 2007) ("[W]e find that Vose's speech [regarding police misconduct], albeit an honorable attempt to correct alleged wrongdoing, was not protected by the First Amendment."); *Battle v. Bd. of Regents*, 468 F.3d 755, 761 (11th Cir. 2006) ("Plaintiff's speech to FVSU officials about inaccuracies and signs of fraud in student files was made pursuant to her official employment responsibilities.").

251. Rosenthal, *supra* note 241, at 56; *see also id.* at 38 ("The critics' claim that *Garcetti* undervalues the role of whistleblowers in enhancing the quality of public discussion and debate is misconceived because *Garcetti* is not properly understood as a whistleblower case. Ceballos did not take his case against the District Attorney's office to the public . . .").

Moreover, government employees who speak to the press, or otherwise make their concerns known to the public, are still generally protected.²⁵²

This debate, however, is beside the point for religious liberty claims because the accountability concern is absent from the government employee religion context. As discussed in Part II.B., public employees' religion claims often do not involve matters of public concern as opposed to matters of private interest. Furthermore, even if their conduct qualifies as expressing a religious viewpoint—which is a matter of public concern—it does not convey the type of information that helps keep the government accountable to the people it is meant to represent. In short, people's individual practice of religion does not further democratic self-government in the way that speech about the government does. As a consequence, the major criticism levied against the government employee speech doctrine is simply inapplicable to a parallel government employee religion doctrine.

B. The Speech and Religion Are Too Different Critique

1. Criticism

Given this disjunction between speech and religion, perhaps the two rights, the right to free speech and the right to religious liberty, are too disparate to simply adopt the doctrine of one for the other. In other words, perhaps the two are really not analogous, and should not be treated as such. In particular, the critique continues, the Free Exercise Clause protects different interests than the Free Speech Clause. Protecting public employee speech may be about improving public discourse, but protecting public employee religious practice is about respecting individual conscience. While the lack of public-regarding benefit explains why the main *Garcetti* criticism is not an obstacle for government employee religion, it also suggests that the “public concern” requirement, however relevant it may be for speech, is not appropriate for religion, especially since it results in inadequate protection for public employees' religious exercise.

2. Response

Although speech and religion claims by public employees are not identical, they are more than distant cousins. First, the government interests

252. *Id.* at 57 (“For public employees who take their concerns to the public, *Garcetti* should pose no bar to First Amendment protection . . .”).

are essentially the same. Second, the First Amendment interests are mostly the same: Although there are additional reasons to protect speech, the First Amendment protects both speech and religion as a means of furthering individual autonomy. Thus, it is inaccurate to say that speech protection is about public debate and not private conscience. It is both. Notably, only the former is considered weighty enough to protect in the government employee context.

What might be the doctrinal consequences of being mostly but not exactly the same? The second subsection below sketches out the two options. One option is to apply the existing government employee speech doctrine “as is” to government employee religion claims. If only matters of public interest merit First Amendment protection for the one, the same should be true for the other. The alternative option is to eliminate the “public concern” test for religion but not speech.²⁵³ This differentiation between government employee religion and government employee speech might be justified if the autonomy interests of speech and religion differ in strength or kind—which is an open question.

a. Government Interests

Whether in its role as employer supervising a workplace or as sovereign subject to the Establishment and Equal Protection Clauses, the government’s interests in both government employee speech and government employee religion cases are basically the same.

The government-employer’s need to exercise control over the workplace does not change when an employee is asserting a religious as opposed to a speech right.²⁵⁴ A disruptive employee is a disruptive employee, whether the disruption is caused by speech or religion.

Moreover, the democratic dimensions to these disturbances described by the Supreme Court are similar. “[E]fficient administration of legislatively authorized programs reflects the constitutional need effectively to implement the public’s democratically determined will.”²⁵⁵ That is, it is not just any workplace that is being disrupted, but a government workplace in the process

253. A third option would be eliminate the “public concern” test, which fails to recognize employees’ autonomy interests, for both speech and religion, but this Article takes free speech doctrine as a given.

254. See *supra* notes 195–200 and accompanying text (discussing how the government as employer must be able to exercise control over its workplace).

255. *Garcetti v. Ceballos*, 547 U.S. 410, 445 (2006) (Breyer, J., dissenting).

of enacting the electorate's will. This need to ensure that the government agency does its appointed or delegated duties applies in both types of cases.²⁵⁶

Also applicable to both claims is the Supreme Court worry that giving courts the power to review personnel decisions could potentially upset the balance of power among the three branches of government. *Garcetti* justified its rule in part by arguing that a "contrary rule . . . would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business."²⁵⁷ In particular, the Court worried that this continuing oversight could result in judicial overreaching: "To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers."²⁵⁸

Whether these concerns are well-founded is beyond the scope of this Article. Rather, the main point is that to the extent these concerns are present or absent, they are not present or absent to different degrees in public employee speech and public employee religion claims.

Similarly, the government's interests in avoiding potential Establishment Clause or Equal Protection Clause violations exists whether the claim is based on speech or religious conduct. (If anything, the Establishment Clause concerns are stronger with government employee religion. Public employees practicing religion pursuant to their official duties amounts to government religion, or at least government-sponsored religion, and should trigger Establishment Clause scrutiny.²⁵⁹ Whatever its shortcomings in the speech context, the pursuant to official duties test is important in the religion context.)

256. Describing the Court's reasoning, Cynthia Estlund wrote:

In a sense, democracy itself depends on public officials being empowered to direct and evaluate how employees perform their jobs. It is all well and good for voters to elect officials and express policy preferences, but those democratic processes do not amount to much unless those elected and appointed officials can implement those policies.

Estlund, *supra* note 240, at 1472.

257. *Garcetti*, 547 U.S. at 423.

258. *Id.*

259. Whether a government social worker who preaches to their clients is treated as government proselytization or government-endorsed proselytization, it violates the Establishment Clause. *See supra* note 76 (discussing cases where government-sponsored private speech violated the Establishment Clause).

All in all, the government's interests in government employee religion cases mirror its interests in government employee speech cases. Consequently, if the analogy fails, it is not due to dissimilarities in the government's interests.

b. First Amendment Interests

It is the interests on the other side that do not match up. In general, we protect individuals' right to speak for the sake of both the individual speaker and the public. As explained in Part II.A.2, two of the three main free speech justifications—promoting a marketplace of ideas and facilitating democratic self-governance—are audience focused. The justifications for individual religious practice lack an explicitly audience-focused benefit.²⁶⁰ Some might claim that society as a whole profits because increased individual religious practice leads to greater societal morality.²⁶¹ This is, however, a highly contested proposition.²⁶² As evidenced by the religious arguments both for

260. I set aside the benefits of institutional religion, since government employee religion does not implicate it. In any event, most of the public benefits of religious associations are no different than the public benefits of nonreligious ones. For example, both religious and nonreligious voluntary associations “foster diversity and act as critical buffers between the individual and the power of the State.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984).

261. George Washington, for example, wrote, “[R]eason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.” George Washington, Farewell Address (Sept. 19, 1796), in *GEORGE WASHINGTON: A COLLECTION* 512, 521 (W.B. Allen ed., 1988). In fact, empirical evidence for a causal link between religious belief and moral behavior is inconsistent. See Jean Decety et al., *The Negative Association Between Religiousness and Children's Altruism Across the World*, 25 *CURRENT BIOLOGY* 2951, 2951 (2015) (“Across all countries, parents in religious households reported that their children expressed more empathy and sensitivity for justice in everyday life than non-religious parents. However, religiousness was inversely predictive of children's altruism and positively correlated with their punitive tendencies.”); Luke W. Galen, *Does Religious Belief Promote Prosociality? A Critical Examination*, 138 *PSYCHOL. BULL.* 876, 876 (2012) (“This article critiques evidence regarding this ‘religious prosociality’ hypothesis from several areas of the literature.”); Wilhelm Hofmann et al., *Morality in Everyday Life*, 345 *SCIENCE* 1340, 1340 (2014) (“Religious and nonreligious participants did not differ in the likelihood or quality of committed moral and immoral acts.”); Gregory S. Paul, *Cross-National Correlations of Quantifiable Societal Health with Popular Religiosity and Secularism in the Prosperous Democracies*, 7 *J. RELIGION & SOC'Y* 1 (2005) (“Data correlations show that in almost all regards the highly secular democracies consistently enjoy low rates of societal dysfunction, while pro-religious and anti-evolution America performs poorly.”).

262. MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 7 (2005) (“Religious entities have the capacity for great good and great evil”); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 *U. CHI. L. REV.* 1245, 1265 (1994) (“[W]hile religion sponsors the highest forms of community, compassion, love, and sacrifice, one need only look around the

and against racial equality during the civil rights movement,²⁶³ religion can be a force for good²⁶⁴ or ill.²⁶⁵ In fact, because one person's morality can be another person's immorality,²⁶⁶ agreement on what counts as beneficial social outcomes can itself be elusive. In any event, even if individual religious practice netted a social benefit, it is indirect and attenuated, unlike the direct benefit of a free flow of information provided by individual free speech. In the end, then, unlike speech, individual religious exercise is protected primarily for the sake of the religious individual alone.²⁶⁷ Thus, although religion and speech promote individual autonomy, only speech provides immediate public benefits.

i) Apply the Same Test

Two alternative conclusions may be drawn about the applicability of the government employee speech doctrine to government employer religion doctrine given this mismatch. The first is that the claims are still similar enough that the government employee speech doctrine should apply "as is" in the religion context. The bottom line is that although employees do not forfeit all of their First Amendment rights when they enter government

world, or probe our own history, to recognize that it also sponsors discord, hate, intolerance, and violence.").

263. Enola G. Aird, *Toward A Renaissance for the African-American Family: Confronting the Lie of Black Inferiority*, 58 EMORY L.J. 7, 20 (2008) ("Just as law and religion worked hand-in-hand to support the dehumanization and enslavement of African people, they also worked together to promote abolition and build the civil rights movement.").

264. Claire McCusker, *When Church and State Collide: Averting Democratic Disaffection in a Post-Smith World*, 25 YALE L. & POL'Y REV. 391, 396 (2007) ("The role of religion in abolitionism and the passing of the Thirteenth, Fourteenth, and Fifteenth Amendments, the temperance movement and the Eighteenth Amendment, female suffrage and the Nineteenth Amendment, and the civil rights movement and the repeal of Jim Crow laws is well documented by scholars.").

265. William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 669, 671 (2011) ("Even after the Thirteenth Amendment, adopted in 1865, abolished slavery, some religious leaders continued to invoke biblical arguments for slavery . . . [and] [a]ntimiscegenation was justified on religious grounds . . ."); Daniel Gordon, *Gender, Race and Limiting the Constitutional Privilege of Religion as a Haven for Bias: The Bridge Back to the Twentieth Century*, 31 WOMEN'S RTS. L. REP. 369, 377–79 (2010) (describing theological justifications for slavery and segregation).

266. The clash between those whose faith condemns same-sex marriages and those whose faith condemns this view as bigotry is a contemporary example. People's views of abortion are similarly split.

267. As mentioned earlier, the pragmatic argument for allowing religious practice—to promote civil peace—does not apply in the civil service context. *See supra* text accompanying notes 129–130.

service, at work they lose constitutional protection to speak their mind and practice their religion unless it is a matter of public concern. As the Supreme Court has observed, “[W]here matters of purely private significance are at issue, First Amendment protections are often less rigorous.”²⁶⁸ In particular, protection is less rigorous for public employees when the employee’s speech or religion—however much it might further their own autonomy—does not directly benefit the citizenry.²⁶⁹

Since the benefits of individual religious practice usually accrue only to the individual, government employee religion claims may regularly fail under this regime.²⁷⁰ They may fail even when the religious practice (such as avoiding contact with pork) injures neither the workplace nor the public because harmless religious practice that is not expressive—and conduct often is not—will not satisfy the public concern test. Thus, wholesale adoption of the government speech doctrine, where employees’ speech and religion rights are not protected by the First Amendment if they do not involve a matter of public concern, may underprotect government employee religion.

Perhaps this worry is overstated. Many religious practices actually are expressive either because they involve speech or because they involve conduct with an expressive dimension. For example, courts have held that wearing religious garb amounts to expressive conduct.²⁷¹ Moreover, public employees would not be left without religious protection: Like private employees, Title VII covers them. If their religious practice does not create an undue hardship, then they are legally entitled to a Title VII accommodation. Finally, one might respond, public employees are not worse off than private employees,²⁷² and the fact of the matter is that what you can

268. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (“We have long recognized that not all speech is of equal First Amendment importance. It is speech on ‘matters of public concern’ that is ‘at the heart of the First Amendment’s protection.’” (footnote omitted) (citation omitted)).

269. *Snyder*, 562 U.S. at 452 (“[R]estricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: ‘[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas’” (second alteration in original) (citation omitted)).

270. The odds improve if the claim also involves speech, *i.e.*, religious speech or religious conduct that is expressive. In that case, the religious practice/expression is more likely to meet the “matter of public concern” threshold.

271. *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536, 559 (W.D. Pa. 2003).

272. Roosevelt, *supra* note 17, at 637 (“If we compare public employees to private employees, rather than to private citizens, the public employees actually look better off in terms of protection for speech.” (emphasis added)); *see also* Patrick M. Garry, *The Constitutional Relevance of the Employer-Sovereign Relationship: Examining the Due Process Rights of Government Employees in Light of the Public Employee Speech Doctrine*, 81 ST. JOHN’S L. REV.

do at work is not the same as what you can do outside work.²⁷³ “Yes, speech is a nice means of self-actualization But private sector employees get along well enough without [constitutional speech protection], and it seems a little bit strange that speech protection should be, in effect, a perk of government employment.”²⁷⁴ Consequently, “[f]rom the speaker-centered perspective, the rationale for prohibiting employment decisions based on speech is not at all clear.”²⁷⁵ Similar reasoning applies to extra religion protection.²⁷⁶

Still, not all religious practices are expressive (or express something on a matter of public concern) and some fairly harmless ones might not qualify for Title VII accommodation if they create more than de minimis costs. Thus, the possibility remains that the public concern test forces some to choose between their faith and public employment, and hardworking, devout people could find themselves precluded from government positions.

ii) Alter the Test by Dropping the Public Concern Requirement

The alternative would be to drop the public concern requirement for First Amendment religion claims.²⁷⁷ The requirement does not, as suggested

797, 816 (2007) (“Public employees should not gain additional rights that private employees do not have.”).

273. This is obviously a simplification, as certain off-duty speech might be subject to the government employee speech doctrine if it risks disrupting the workplace. *See, e.g.*, *City of San Diego v. Roe*, 543 U.S. 77, 81 (2004) (per curiam) (upholding termination of police officer who wore police uniform in off-duty sex tape for sale). However, it is beyond the scope of this Article to draw the line between “at work” and “outside of work.” *See generally* Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 BYU L. REV. 2117.

274. Roosevelt, *supra* note 17, at 642; *see also id.* at 649 (“[I]f the only interest at stake is that of the individual employee—if we adopt a speaker-centered view of the First Amendment—the case for any First Amendment rights against the employer strikes me as weak.”).

275. *Id.*

276. I say “extra” because Title VII, which covers private and government employees, provides a measure of protection for religious exercise.

277. Rejecting the government employee speech doctrine as a model for government employee religion is another possibility. Yet a complete abandonment of the government employee speech doctrine goes too far, even if the interests underlying speech and religion do not exactly align. Public employees who practice religion pursuant to their official duties amounts to government religion, or at least government-sponsored religion, and should trigger Establishment Clause scrutiny. Whether a government social worker who preaches to their clients is treated as government proselytization or government-endorsed proselytization, it violates the Establishment Clause. *See supra* note 78 and accompanying text (discussing cases where government-sponsored private speech violated the Establishment Clause). Whatever its shortcomings in the speech context, the pursuant to official duties question is important in the religion context. As for the *Pickering* balancing inquiry, the government’s interests in regulating speech and religion are more or less the same. (The one difference is that Establishment concerns would be more prominent

earlier, readily translate from speech to religion.²⁷⁸ Speech is expressive, and therefore capable of conveying a message about a matter of public interest. Conduct is not necessarily expressive, and consequently it is odd to require that a particular act enable the free flow of information on a matter of public interest. Eliminating this threshold means that so long as the religious exercise is not pursuant to official duties, all religion claims would be subject to the *Pickering* balancing. The result would be a workable government employee religion test that to some extent mirrors the one for speech.

It is not a perfect solution. The problem is not an impending deluge of claims. Eliminating the public concern requirement for religion claims does not invite a floodgates problem (as eliminating it for speech claims might)²⁷⁹ since adverse employment actions are much more likely to feature speech compared to religion.

However, the public concern inquiry signaled that promoting personal autonomy was not of First Amendment interest in the government employee context. Eliminating it for government employee religion but not government employee speech raises the question of why autonomy is constitutionally protected for one but not the other.²⁸⁰ After all, just as the public concern requirement potentially denies constitutional protection for harmless, nondisruptive religious practices, so too it denies protection for harmless, nondisruptive speech.²⁸¹ (Indeed a separate complaint made about the government employee speech doctrine, though not one often made, is that the

for religion claims.) And since the balancing is so fact-specific to begin with, slight differences in the equation ought not defeat the act of balancing itself. Thus, the first and third steps of government employee speech make sense for government employee religion.

278. See *supra* notes 122–125 and accompanying text.

279. Estlund, *supra* note 240, at 1476 (“The fear of opening the floodgates of litigation is based on the potential number of lawsuits as well as the burden of each one. . . . The number of potential disputes over speech alone is mind boggling.”).

280. Toni M. Massaro, *Nuts and Seeds: Mitigating Third-Party Harms of Religious Exemptions, Post-Hobby Lobby*, 92 DENV. U. L. REV. 325, 350–51 (2015) (“Government respect for religious freedom is a legitimate, even compelling, reason for granting an exemption to religious speakers in some cases; but this should not teeter into a form of religious exceptionalism that undermines the neutrality demands central to freedom of speech. A Jehovah’s Witness has an equal, *not superior*, right to excusal from a mandatory flag salute, even if she explains that the requirement burdens both her religious freedom and speech autonomy, and nothing in constitutional law supports a claim that the former is a categorically heavier imposition on individual liberty than is the latter.” (footnote omitted)).

281. Cynthia K.Y. Lee, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 CALIF. L. REV. 1109, 1121 (1988) (“This [matter of public concern] threshold, however, may be overbroad and thus fail to protect constitutionally speech that does not affect the government’s ability to exercise its managerial function.”).

public concern requirement ignores the personal autonomy justification for free speech.²⁸²)

Some might respond that individual²⁸³ religious practice promotes something in addition to autonomy that speech does not.²⁸⁴ But if this claim depends on a view of religious truth, such as God's will, then it is unpersuasive to anyone who does not share that subjective view.²⁸⁵ Others might respond that the autonomy interests in religion are different in strength or kind than they are for speech.²⁸⁶ Perhaps. The argument that the stakes are

282. Pengtian Ma, *Public Employee Speech and Public Concern: A Critique of the U.S. Supreme Court's Threshold Approach to Public Employee Speech Cases*, 30 J. MARSHALL L. REV. 121, 127 (1996) ("The right to free speech includes 'the need of many men to express their opinions on matters vital to them if life is to be worth living' and comports 'with the premise of individual dignity and choice.' Conversely, the application of a 'public concern' threshold to preclude First Amendment protection, rather than safeguard free speech in the context of public employment, goes against the Supreme Court's own precedents and ignores an essential aspect of the First Amendment." (footnote omitted)); see Risa L. Lieberwitz, *Freedom of Speech in Public Sector Employment: The Deconstitutionalization of the Public Sector Workplace*, 19 U.C. DAVIS L. REV. 597, 650 (1986) ("The holding of *Connick* would have been different under a self-development theory.").

Another alternative—dropping the public concern requirement for both religion and speech—might not be desirable or feasible. Most free speech scholars are far more keen to eliminate the pursuant to official duties threshold than the matter of public concern one. It is certainly not sought by those who believe that facilitating political deliberation rather than promoting individual autonomy is the main goal of the Free Speech Clause. Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 253 n.15, 254 (2005) (listing Alexander Meiklejohn, Owen Fiss, and Cass Sunstein as proponents of public rights theory, where "the central purpose of the Free Speech Clause is to ensure that members of the political community receive the information they need to make informed decisions about matters of public policy"). Others may agree that autonomy justification is an important component of free speech, yet question whether government employees should enjoy more constitutional protection than private employees—save when they are providing the public with valuable insight on government operations. As a practical matter, eliminating the public concern requirement invites a floodgate problem. See *supra* note 279 and accompanying text. In any event, the focus on this Article is not reworking the government employee speech doctrine, but developing a government employee religion doctrine.

283. Again, the question is about individual religious practice as opposed to institutional religious practice. The question is whether individual religious practice promotes something, other than individual autonomy, that individual speech does not.

284. Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1365 (2012) ("The explicitly religious premise of this argument is that God, or some transcendent authority, has imposed duties on mankind and that fulfillment of those duties takes priority over complying with positive law.").

285. See *supra* notes 131–134 and accompanying text.

286. See Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 184 (2002) ("As an abstract proposition, it is a mistake to characterize religion as speech because doing so undermines our commitment to

graver since religious observers act out of a sense of obligation²⁸⁷ fails to consider that people also speak out of a sense of obligation.²⁸⁸ Similarly, the argument that the autonomy interest in religion differs because religion is a component of identity in a way speech is not does not describe all religions or all speech.²⁸⁹ Both arguments touch on the perennial question of whether religion is special.²⁹⁰ I do not intend to settle the question here, either in its religion as a whole permutation or in its individual religious practice permutation, but note that the answer will influence which version of government employee religion doctrine seems preferable.

However, any different treatment of speech and religion raises a potential free speech problem. A cornerstone of free speech jurisprudence is that the government may not favor some viewpoints over others.²⁹¹ In fact, the Supreme Court has repeatedly found that the government violates the Free Speech Clause when it treats religious viewpoints differently. For example, once a school board granted social and civic groups after-hour access to its school buildings, the Court ruled that the Free Speech Clause demanded that

the idea that there is something unique and distinctive about religion in life and in constitutional law.”).

287. Schwartzman, *supra* note 284, at 1366 (explaining but not endorsing the argument that “religious people experience psychological harms that differ in kind from those without a sense of obligation to a transcendent power”).

288. William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 587 (1983) (“The critical element in preventing psychic harm is assessing the strength of the conscientiously held belief. Although traditional religious beliefs may be motivated by a strong conscience, the same may be said of most moral beliefs.”); see Shiffrin, *supra* note 129, at 26 (“To force someone to do what he is obliged not to do is especially cruel, regardless of the consequences he fears.”). Moreover, not every religious observer acts pursuant to a mandate. Perhaps the assumption is that the religious observer is almost always acting out of obligation in a way a secular speaker almost never is.

289. For example, motherhood or fatherhood may be a crucial element of identity, as much if not more than religion, so that speech about parenting can also be described as speech about a central component of identity. Then again, perhaps the assumption is that religious practice is always, or almost always, related to identity in a way that speech rarely is.

290. Compare Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 574 (“Because religion is a distinctive human good, accommodation of religion as such is not unfair.”), and Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 (2000), with Eisgruber & Sager, *supra* note 262, at 1315, and Schwartzman, *supra* note 284, at 1355 (“Many of the most widely held normative justifications for favoring (or disfavoring) religion are prone to predictable forms of internal incoherence.”).

291. So strong is this prohibition that it applies even to speech normally considered outside the First Amendment’s protection. In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Supreme Court held that the ban against viewpoint discrimination applies to “fighting words,” a category of speech that can be outlawed altogether. *Id.* at 386.

it grant religious groups equal access.²⁹² Similarly, if a state university funds student activities, then under the Free Speech Clause it must fund the student religious paper on an equal basis.²⁹³ To do otherwise would discriminate against religious viewpoints. Yet subjecting religious claims to a less demanding test seems to favor the religious viewpoint, thereby breaking the free speech commandment against viewpoint favoritism.²⁹⁴

Viewpoint discrimination, a cardinal sin in free speech, might be averted if the religious expression claims are separated out from the religious conduct claims.²⁹⁵ Religion claims that implicate the Free Speech Clause because they have an expressive component would be subject to the same requirements as any other free speech claim.²⁹⁶ Religion claims without a speech component would not have to pass the public concern threshold. Nevertheless, treating religion claims with a speech component differently than religion claims without one²⁹⁷ leads to the unusual situation of less constitutional protection for religious speech than religious conduct (whereas usually it is the opposite).²⁹⁸ Also, it does not fully respond to the criticism that religious autonomy seems favored over speech autonomy. Of course, the alternative, keeping the public concern test for all government employee claims, remains.

292. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102 (2001) (holding that school violated free speech rights of Christian Good News Club when it failed to provide the Club the same after-hours access as other clubs); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) (“[I]t discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.”).

293. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (“We conclude, nonetheless, that here, as in *Lamb's Chapel*, viewpoint discrimination is the proper way to interpret the University's objections to *Wide Awake* [the evangelical student newspaper.]”); see also *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (In refusing to recognize religious student group, “UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion.”).

294. Massaro, *supra* note 280, at 350 (“In the freedom of speech context, religious speakers receive no more or less protection than other actors who speak from other perspectives.”).

295. Because conduct with no expressive component does not implicate the Free Speech Clause, it does not raise viewpoint discrimination problems.

296. Moreover, since religious viewpoints are generally held to be on a matter of public concern, they would probably survive that threshold inquiry.

297. To allow the plaintiff with a religious speech claim to bring a speech claim and a religion claim would essentially reinstate the favored status of religious viewpoints, since only religious speech claims (in the guise of a religion claim) would be exempt from the public concern threshold.

298. Conduct without any expressive component is not subject to any free speech heightened scrutiny, whereas expressive conduct and pure speech are subject to heightened scrutiny. The idea is that conduct is more likely to cause harm than speech, and therefore less justification is needed to regulate it.

* * *

Government employee religion and speech need not be exactly the same in order to apply parallel doctrine. Nevertheless, they have a great deal in common. The government interests are identical. Moreover, the employee's autonomy-based interests overlap if not completely, then to a great degree. In any event, the goal of this Article is not to argue that the public employee speech doctrine be adopted "as is." The goal is, rather, to argue that government employee speech doctrine should serve as a model and to explore what a government employee religion doctrine might look like. The exact test one prefers would depend on, among other things, one's view of the distinctiveness of religion.

CONCLUSION

The speech and religion claims of government employees are very similar. Consequently, it makes sense to base government employee religion doctrine on government employee speech doctrine.²⁹⁹ Moreover, the fact that the accountability problem—the main shortcoming of the government employee speech doctrine—does not arise in the government employee religion context reinforces the argument that the existing doctrine is appropriate for government employee religion.

Unless the government speech model is rejected completely, government employees who refuse to perform their assigned tasks will not have a religion claim. Since their act (or refusal to act) is pursuant to official duties, it is attributable to the state and therefore not protected by the Constitution.³⁰⁰ In contrast, a claim involving a government employee's desire to wear religious garb, which is not part of their official duties, would have a much better chance of succeeding. If expressive, it would express a religious viewpoint, which the Supreme Court has held to be a matter of public concern. Moreover, in most situations, what a person wears does not disrupt the workplace, though it is impossible to generalize about the outcome of the fact-intensive *Pickering* balance. Finally, although the doctrine itself is a constitutional doctrine, the concerns it reflects should inform a statutory RFRA claim.

299. In fact, the pursuant to official duties query highlights that a government employee's acts and speech are not purely private and may actually be attributable to state, thereby triggering the Establishment and Equal Protection Clauses.

300. The one possible exception is a religious refusal that is accommodated behind the scenes without the public knowledge. *See supra* notes 74–78 and accompanying text.