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## NEUTRALITY, ACCOMMODATION, OR COMPROMISE: COMPARING THE EFFECTIVENESS OF THREE APPROACHES TOWARDS PROTECTING RELIGIOUS FREEDOM

Beth Anne Patterson

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**NEUTRALITY, ACCOMMODATION, OR  
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RELIGIOUS FREEDOM**

*By Beth Anne Patterson\**

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## I. INTRODUCTION

On January 6, 2021, home-grown religious extremists temporarily occupied the United States Capitol building during a violent insurrection.<sup>1</sup> Spurred on by then-President Donald Trump, religious nationalist leaders declared that violence was necessary to save a “Christian America.”<sup>2</sup> Evangelical leaders pleaded for demonstrations of partisan loyalty from their followers to save “the soul of our nation” from “wicked” opponents.<sup>3</sup> These events represent a troubling trend where, thanks to an existential fear that religious practices are in imminent danger of being “cancelled,” political power must be courted by religious groups at all costs.<sup>4</sup>

Concerns that state religious liberty protections lack effectiveness are not isolated to the United States.<sup>5</sup> Hundreds of religiously-motivated hate crimes target minority groups in Canada

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<sup>1</sup> Emma Green, *A Christian Insurrection*, THE ATLANTIC (Jan. 8, 2021), <https://www.theatlantic.com/politics/archive/2021/01/evangelicals-catholics-jericho-march-capitol/617591/>; Tom Gjelten, *Some Christians Feel It's a God-Given Mission to Fight on Trump's Behalf*, NPR NEWS (Jan 18, 2021) <https://www.npr.org/2021/01/18/957982008/some-christians-feel-its-a-god-given-mission-to-fight-on-trumps-behalf>.

<sup>2</sup> Gjelten, *supra* note 1; Tish Harrison Warren, *We Worship with the Magi, Not MAGA*, CHRISTIANITY TODAY (Jan. 7, 2021), [https://www.christianitytoday.com/ct/2021/january-web-only/trump-capitol-mob-election-politics-magi-not-maga.html?utm\\_source=facebook&utm\\_medium=post&utm\\_campaign=article&fbclid=IwAR3q5OeIT6-f8X6aXZ\\_MG1GXthunu1SoNoleZtlv9zA2LrLar5g7cYCfz8g](https://www.christianitytoday.com/ct/2021/january-web-only/trump-capitol-mob-election-politics-magi-not-maga.html?utm_source=facebook&utm_medium=post&utm_campaign=article&fbclid=IwAR3q5OeIT6-f8X6aXZ_MG1GXthunu1SoNoleZtlv9zA2LrLar5g7cYCfz8g).

<sup>3</sup> Penny Starr, *Franklin Graham: Christians Need to Save “Soul of Our Nation” By Voting for Republicans in Georgia*, BREITBART NEWS (Dec. 28, 2020), <https://www.breitbart.com/2020-election/2020/12/28/franklin-graham-christians-need-to-save-soul-of-our-nation-by-voting-for-republicans-in-georgia/>.

<sup>4</sup> Zack Stanton, *It's Time to Talk About Violent Christian Extremism*, POLITICO (Feb. 4, 2021, 6:21 PM), <https://www.politico.com/news/magazine/2021/02/04/qanon-christian-extremism-nationalism-violence-466034>.

<sup>5</sup> Kent Ingle, *Christian Persecution Not Just Happening Overseas – Many in the US Targeted for Their Faith, Too*, FOX NEWS (Feb. 27, 2019), <https://www.foxnews.com/opinion/christian-persecution-not-just-happening-overseas-many-in-us-targeted-for-their-faith-too>.

each year.<sup>6</sup> In Malaysia, fundamentalist groups actively lobby for an Islamic state and some regions criminalize conversion from Sunni Islam.<sup>7</sup> While these states unify on the importance of protecting religious freedom, they divide on which methods effectively protect both religious majority and minority groups.<sup>8</sup> Despite constitutionally enshrined freedom of religious expression or choice, pervasive inequality still impacts religious groups. As the United States becomes increasingly multicultural, the need for government protections accessible to all religious groups—not merely politically active religious groups—becomes more apparent.<sup>9</sup>

These concerns resonate deeply for many due to the paradigmatic nexus between religious beliefs and cultural identities.<sup>10</sup> As the United States witnessed in recent years, the axiomatic statement “America is a Christian nation” is rife with ethnic and social inference.<sup>11</sup> Indeed, Canada and Malaysia have joined the United States

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<sup>6</sup> *Police-Reported Hate Crime, by Type of Motivation, Canada*, STATISTICS CANADA, <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510006601> (last visited Oct. 2, 2021).

<sup>7</sup> Ewelina U. Ochab, *Religious Freedom in Malaysia Under Microscope*, FORBES (Apr. 1, 2019, 3:12 AM), <https://www.forbes.com/sites/ewelinaochab/2019/04/01/religious-freedom-in-malaysia-under-microscope/#6f88d6e9d30e>.

<sup>8</sup> See *Compare Nations: U.S., Can., & Malay.*, ASS’N RELIGION DATA ARCHIVES, <https://www.thearda.com/internationaldata/compare1.asp?c=234&c=41&c=139&c> (last visited Oct. 2, 2021).

<sup>9</sup> Daniel Cox and Robert P. Jones, Ph.D., *America’s Changing Religious Identity*, PUB. RELIGION RES. INST. (Sept. 6, 2017), <https://www.ppri.org/research/american-religious-landscape-christian-religiously-unaffiliated/> (“The American religious landscape has undergone dramatic changes in the last decade and is more diverse today than at any time since modern sociological measurements began.”).

<sup>10</sup> Karima Bennouna, *Preliminary Observations by the United Nations Special Rapporteur in the Field of Cultural Rights Karima Bennouna at the End of Her Visit to Malaysia*, U.N. HUM. RTS. OFF. HIGH COMM’R (September 21, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22121&LangID=E>.

<sup>11</sup> Jason Wilson, *We’re at the End of White Christian America. What Will That Mean?*, THE GUARDIAN (Sept. 20, 2017, 6:00 AM), <https://www.theguardian.com/us-news/2017/sep/20/end-of-white-christian-america>.

in grappling with a growing majoritarian religious nationalist movement permeated with “racial meaning.”<sup>12</sup>

Freedom of religious expression is one of the foundational human rights essential to protecting diversity and facilitating multiculturalism.<sup>13</sup> Multiculturalism, or the protection of all people and groups regardless of access to power, is the *raison d’être* for the universal value of human rights operating as a precondition for humanity.<sup>14</sup> The Universal Declaration of Human Rights (UDHR) has set the international standard for preserving multiculturalism by unequivocally stating that “[a]ll human beings are born free and equal in dignity and rights.”<sup>15</sup> This document defines the protection of all human freedoms and rights around a concept of innate human dignity.<sup>16</sup> All expressions of identity, including religion, are presumptively valued as stemming from that dignity shared by all, regardless of citizenship.<sup>17</sup>

This comment will take a comparative approach to the United States’, Canada’s, and Malaysia’s respective approaches toward protecting religious freedom. All three nations share similar histories

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<sup>12</sup> Caroline Mala Corbin, *The Supreme Court’s Facilitation of White Christian Nationalism*, 71 ALA. L. REV. 833, 843-44 (2020) (“[T]he Christian nationalist goal of ‘protecting’ or ‘restoring’ America’s ‘Christian heritage’ is laced with an implicit desire to maintain white supremacy and white racial purity.”) (some internal quotations omitted); Catherine Solyom, *Hate Crimes Continue in Montreal, but Wheels of Justice are Advancing*, MONTREAL GAZETTE (July 15, 2020), <https://montrealgazette.com/news/local-news/hate-crimes-continue-in-montreal-but-wheels-of-justice-are-advancing?r;Ochab, supra note 7>.

<sup>13</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. XVIII (Dec. 10, 1948); Constitution of the United Nations Educ., Scientific, & Cultural Org. preamble, Nov. 16, 1945, 52 U.N.T.S. 4 (“the wide diffusion of culture, and the education of humanity for justice and liberty and peace are *indispensable to the dignity of man* and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern”) (emphasis added).

<sup>14</sup> *Universality, Cultural Diversity & Cultural Rights*, U.N. HUM. RTS. OFF. HIGH COMMISSIONER (Oct. 24, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/UniversalityReport.aspx>; see also Jennifer L. Eagan, *Multiculturalism*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/multiculturalism> (last visited Oct. 2, 2021).

<sup>15</sup> G.A. Res. 217 (III) A, *supra* note 13, art. I.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

of British colonization, mass economic immigration, and extensive ethnic and religious diversity.<sup>18</sup> More importantly, each nation chose to constitutionally protect a personal right to religious freedom and actively participates in international efforts to further universally enjoyed religious freedoms.<sup>19</sup> In practice, the United States has used a theory of “neutrality” to equally apply laws to all religious groups; Canada has taken an approach of “reasonable accommodation” to evaluate a religious practitioner’s needs within a secular state on a case-by-case basis; and Malaysia followed its constitutional legacy of “compromise” in equally representing all of its constituent religious groups.<sup>20</sup> Each approach, while spawned from meticulous research and utopian intent, presents unique flaws. More troublingly, each country increasingly grapples with majoritarian fundamentalist nationalist political movements.<sup>21</sup>

Part II explores the essential historical context and elements of each nation’s approach to preserving religious freedom. The United States, with its avowed commitment to free expression and religious liberty, exemplifies the importance of elevating religious freedom to achieve unity in multiculturalism. At the same time, the United States’ overly neutral approach tacitly enables minority groups to experience increasing levels of exclusion. Canada, by prioritizing reciprocal autonomy between religious participants and a secular state, demonstrates a relatively successful method of balancing conflicting expressions of religion in a multicultural society.<sup>22</sup> Concurrently, an explosion of anti-minority popular messaging has led to a “crisis of perception,” hindering national peace and unity.<sup>23</sup> Malaysia has elevated its historic religious and cultural diversity by realistically acknowledging its need for social compromise.<sup>24</sup> This realistic

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<sup>18</sup> *See infra* Part II.

<sup>19</sup> *Id.*

<sup>20</sup> *See infra* Part II, Sections A-C.

<sup>21</sup> *See infra* Part II, Sections A-C.

<sup>22</sup> *See infra* Part II, Section B.

<sup>23</sup> *Id.*

<sup>24</sup> *See infra* Part II, Section C.

acknowledgement has unfortunately facilitated increasing political power for majoritarian fundamentalism.<sup>25</sup>

Part III uses objective third-party metrics to evaluate the respective degree of effectiveness of each nation's protections for both majority and minority religious group members. The Association of Religion Data Archives (ARDA) aggregated the Pew Research Center's "Global Restrictions on Religion" Data and set four generally applicable standards.<sup>26</sup> These standards permit a fair and balanced evaluation of each state's approach towards protecting their citizens' religious freedom.<sup>27</sup> Following that evaluation, each state's approach will be cross-referenced with current scholarship on the most viable approach towards elevating individual religious freedom and equality in modern society.

Part IV concludes by synthesizing the successes and failures of the respective approaches toward protecting religious freedom. Each state has contributed to a greater academic understanding of the kaleidoscope of diversity represented by multiple faith traditions coexisting in different states and cultures. By incorporating cutting-edge research with the nuanced efforts of the United States, Canada, and Malaysia to realize "unity in diversity," the next generation of religious protections will be more effective, equitably distributed, and more universally accessible to different groups, regardless of minority or majority status.

## II. BACKGROUND

The Universal Declaration of Human Rights (UDHR) set the benchmark for protecting religious freedom as a fundamental human right for all people.<sup>28</sup> As the plenary voice of the human rights paradigm, many scholars consider it to have taken on customary

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<sup>25</sup> *Id.*

<sup>26</sup> *Compare Nations: U.S., Can., & Malay.*, ASS'N RELIGION DATA ARCHIVES, *supra* note 8.

<sup>27</sup> *Id.*

<sup>28</sup> G.A. Res. 217 (III) A, *supra* note 13.

international legal force.<sup>29</sup> Canada and the United States signed the UDHR at its initial adoption.<sup>30</sup> After establishing itself as an independent state, Malaysia also affirmed its commitment to upholding the principles of the UDHR.<sup>31</sup> This standard has been supported by the International Court of Justice (ICJ), the primary judicial organ of the United Nations and principle voice in resolving questions of international law.<sup>32</sup> The ICJ stated unequivocally that the internationally declared “freedom of religion or belief” is guaranteed by international human rights law.<sup>33</sup> Internationally protected religious freedom encompasses a broad range of rights including the freedom to follow one’s choice of religion or belief and the freedom to manifest that belief through religious practices collectively and in public, as well as individually and in private.<sup>34</sup> Each of these nations has taken steps towards realizing such utopian ideals, albeit applied in an imperfect manner.

Despite cultural differences, the United States, Canada, and Malaysia bear remarkable historical, governmental, and cultural similarities.<sup>35</sup> Most importantly, all three countries have chosen to protect the individual right to religious freedom in their respective constitutions. Between the impact of large-scale immigration and colonization, these three nations share remarkable ethnic, cultural, and religious diversity. They also share a history of British colonization, culturally and politically dominant religious majority groups, and a myriad of subtler similarities and dissimilarities.

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<sup>29</sup> PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS, 143-44, 152 (2013).

<sup>30</sup> G.A. Res. 217 (III) A, *supra* note 13, at art. I.

<sup>31</sup> *See* Federal Constitution, art. 5-13 (Malay.).

<sup>32</sup> *The Court*, INT’L CT. JUST., <https://www.icj-cij.org/en/court> (last visited Oct. 2, 2021).

<sup>33</sup> INT’L COURT OF JUSTICE, CHALLENGES TO FREEDOM OF RELIGION OR BELIEF IN MALAYSIA, 3 (Mar. 2019) <https://www.icj.org/wp-content/uploads/2019/03/Malaysia-Freedom-of-religion-brief-Advocacy-Analysis-brief-2019-ENG.pdf>.

<sup>34</sup> *Id.*

<sup>35</sup> *See infra* Part II, Sections A-C.



Traditionally, international academic discourse utilized a Western “hegemonic” voice.<sup>36</sup> Further, the traditional approach toward multiculturalism pits multicultural religious groups against each other in competing roles, resulting in an implicit hierarchy of values.<sup>37</sup> In contrast, comparing the United States, Canada, and Malaysia, will provide a sample of countries with a shared history and constitutional influence but with a more diverse cultural and religious representation. Following the anti-imperial intent of the UDHR,<sup>38</sup> this approach will enable this comment to objectively explore the effectiveness of the three nations’ religious freedom protections.<sup>39</sup>

#### A. United States: Neutrality

The United States maintains a diverse population of over three hundred and thirty million people.<sup>40</sup> By landmass and population, the United States is one of the largest countries in world.<sup>41</sup> Currently, over seventy percent of the United States population professes some form of Christianity, with the dominant groups identifying as evangelical Protestant, Catholic, and mainline Protestant.<sup>42</sup> The next largest demographic is religiously “unaffiliated” comprising of atheists, agnostics, and those professing “nothing in particular.”<sup>43</sup> Judaism follows, and those identifying as Muslim, Buddhist, or Hindu represent

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<sup>36</sup> Christian Tomuschat, *The (Hegemonic) Role of the English Language*, 86 NORDIC J. INT’L. 196, 197 (2017) (identifying the English language’s “dominant position” in the United Nations and international affairs).

<sup>37</sup> Corbin, *supra* note 12, at 842.

<sup>38</sup> Mary Ann Glendon, A WORLD MADE NEW, 221 (2001) *reprinted in* Philip Alston and Ryan Goodman, INTERNATIONAL HUMAN RIGHTS, 146-48 (2013).

<sup>39</sup> Francesco Palermo, *Legal Solutions to Complex Societies: The Law of Diversity*, HUM. RIGHTS & DIVERSITY, NEW CHALLENGES FOR PLURAL SOCIETIES 62, 64 (Eduardo J. Ruiz Vieitez & Robert Dunbar eds., 2007) (Spain).

<sup>40</sup> *United States, U.S. & WORLD POPULATION CLOCK*, <https://www.census.gov/popclock/> (last visited Oct. 2, 2021).

<sup>41</sup> *Largest Countries in the World by Area*, WORLDOMETER, <https://www.worldometers.info/geography/largest-countries-in-the-world/> (last visited Oct. 2, 2021) (over 3.5 million square miles as of 2010).

<sup>42</sup> *Religious Landscape Study*, PEW RES. CTR., <https://www.pewforum.org/religious-landscape-study/> (last visited Oct. 2, 2021).

<sup>43</sup> *Id.*

the smallest groups comprising just under one percent of the population respectively.<sup>44</sup>

Pre-colonial North American indigenous religious practices had “broad but striking resemblances” to contemporaneous European practices, like religious rituals worshipping a creator deity and spending their lifetime preparing for a superior afterlife.<sup>45</sup> Many Native religions perceived the physical and spiritual worlds as a “unified realm,” linking all life together.<sup>46</sup> Following British colonization, Protestant immigrants followed a doctrine called “manifest destiny,” mandating the spread of Protestant Christianity throughout the Americas.<sup>47</sup> Manifest destiny encouraged white settlers to expel indigenous groups from their land—often violently—and resulted in an overwhelming national majority group that identified with various sects of Christianity.<sup>48</sup>

After colonization, the leaders of the newly formed United States wrote and ratified the U.S. Constitution.<sup>49</sup> The First Amendment to the Constitution protects every person’s individual right to be free of laws “respecting an establishment of religion,” and “prohibiting the free exercise thereof.”<sup>50</sup> These two clauses, known colloquially as the “Establishment Clause” and the “Free Exercise Clause” elevate a national standard of religious neutrality, often referred to as the

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<sup>44</sup> *Id.*

<sup>45</sup> Christine Leigh Heyrman, “Native American Religion in Early America.” *Divining America, Religion in American History*, TEACHERSERVE® NAT’L HUMAN. CTR., <http://nationalhumanitiescenter.org/tserve/eighteen/ekeyinfo/natrel.htm> (last visited Oct. 2, 2021).

<sup>46</sup> *Id.*

<sup>47</sup> Wilson, *supra* note 11.

<sup>48</sup> *Id.* (describing the early United States as a “white Protestant nation that often made life uncomfortable for other groups”).

<sup>49</sup> Richard R. Beeman, *The Constitutional Convention of 1787: A Revolution in Government*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/white-papers/the-constitutional-convention-of-1787-a-revolution-in-government> (last visited Oct. 2, 2021).

<sup>50</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

“separation of church and state.”<sup>51</sup> Thomas Jefferson, like many of the founding framers of the U.S. Constitution, drew on the recent corruption of state-established religion in seeking to achieve “separation between Church & State.”<sup>52</sup>

While freedom of religion is one of the fundamental liberties protected in the United States, judicial decisions in recent years have “triggered bipartisan, ecumenical condemnation” about perceived unfairness.<sup>53</sup> The Supreme Court has long mandated the rejection of partisan and personal favoritism to maintain the rule of law.<sup>54</sup> Despite this mandate, Supreme Court decisions in recent years have left commentators arguing that Christianity is the Supreme Court’s preferred religion.<sup>55</sup> For example, the Court in *Dunn v. Ray*, by a slim majority, refused to stay an execution despite the prison’s refusal to honor the prisoner’s request to have an imam in attendance for his final moments.<sup>56</sup> The dissent found fault with the prison’s disparate treatment of death row inmates belonging to differing faith traditions. Citing *Larson v. Valente*, Justice Kagan criticized the majority for violating the Establishment Clause by “officially” preferring one religious tradition over another.<sup>57</sup>

At times, the Supreme Court has shown great deference to a variety of religious practices. For example, in *Church of Lukumi Babalu*

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<sup>51</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 529 (1925) (“The American people as a whole have unalterably determined that there shall be an absolute and unequivocal separation of church and state, and that the public schools shall be maintained and conducted free from influences in favor of any religious organization, sect, creed or belief.”).

<sup>52</sup> *Jefferson’s Letter to the Danbury Baptists (1802)*, LIBR. CONG., <https://www.loc.gov/loc/lcib/9806/danpre.html> (last visited Nov. 6, 2021).

<sup>53</sup> Frederick Mark Gedicks, *Dunn v. Ray: We Should Have Seen This Coming*, AM. CONST. SOC’Y (Feb. 15, 2019), <https://www.acslaw.org/expertforum/dunn-v-ray-we-should-have-seen-this-coming/>.

<sup>54</sup> Bernard Hibbits, *Rehnquist Defends Judicial Independence in Year-End Report*, JURIST (Jan. 1, 2005, 1:44 PM) <https://www.jurist.org/news/2005/01/rehnquist-defends-judicial/>.

<sup>55</sup> *Dunn v. Ray*, 139 S. Ct. 661, 661 (2019) (5-4) (granting the State’s application to vacate the stay entered by the Eleventh Circuit); Gedicks, *supra* note 53.

<sup>56</sup> 139 S. Ct. at 661.

<sup>57</sup> *Id.* at 661-62 (quoting *Larson v. Valente*, 456 U. S. 228, 244 (1982)).

*Aye v. City of Hialeah*, a plurality of the Court held that local ordinances proscribing ritual sacrifice of animals by members of the Santeria faith were unconstitutional.<sup>58</sup> Because the ordinances improperly targeted members of the Santeria faith through prohibiting Santeria ritual slaughter while explicitly exempting Kosher slaughter, the ordinances showed favoritism to one religious group while discriminating against another, running afoul of the First Amendment's Free Exercise Clause.<sup>59</sup> By pursuing "the city's governmental interests only against conduct motivated by religious belief," the city unfairly imposed prohibitions against Santeria worshippers that it was not willing to impose upon other religious groups.<sup>60</sup>

In a more controversial application in *Masterpiece Cakeshop*, the Supreme Court found that a state civil rights commission violated the First Amendment rights of a bakery owner who denied service to a same-sex couple for a wedding cake.<sup>61</sup> The Court postulated that the state antidiscrimination statute as written could be found to violate the rights to freedom of expression of a business owner who refused service to the couple because of his "sincere religious beliefs and convictions."<sup>62</sup> While the Court's ruling avoided a definitive statement of the constitutionality of the state statute by limiting its rationale to the "*reasoning* of the state agencies,"<sup>63</sup> the majority's perspective demonstrates bias in favor of the bakery owner.<sup>64</sup> In his concurrence, Justice Gorsuch even stated that the commission unconstitutionally condemned a personally held religious belief, despite the fact that same-sex marriage is similarly constitutionally protected.<sup>65</sup> Critics responded with accusations that the Supreme Court gave extraordinary

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<sup>58</sup> *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993).

<sup>59</sup> *Id.* at 536, 542-45.

<sup>60</sup> *Id.* at 545.

<sup>61</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1724 (2018).

<sup>62</sup> *Id.* at 1723-24.

<sup>63</sup> *Id.* at 173-34 (Kagan, J., concurring) (emphasis in original).

<sup>64</sup> *Id.* at 1744-49 (Ginsburg, J., dissenting) (acknowledging and supporting the Court's language ostensibly supporting neutral civil rights statutes while strongly disagreeing with the majority's holding that there was a "free-exercise violation" in the facts of this case).

<sup>65</sup> *Id.* at 1737 (Gorsuch, J., concurring).

deference towards Christian beliefs, while denying similar deference to minority religious beliefs.<sup>66</sup>

A 2020 study of American public school email correspondence found that principals systemically favored parents from Christian backgrounds while discriminating against or completely ignoring Muslim and atheist parents.<sup>67</sup> The *Kern-Holbein Study* found that public academic systems believed to enable equitable treatment of all families fell far short of their goals.<sup>68</sup> Calling for innovative procedures to ensure families experience equal treatment, the study revealed that public school principals—instead of acting as mediators in a diverse cultural and religious climate—perpetuated discrimination against Muslim and atheist parents.<sup>69</sup>

Despite those assertions of pro-Christian bias, conservative advocates fear that national anti-Christian sentiment is becoming increasingly common.<sup>70</sup> A press release by the American Center for Law and Justice asserted that “[f]aith is part of our American heritage, and Christmas is the day that Christians celebrate the birth of our Savior. Attacks on traditional Christmas displays such as nativity scenes are nothing less than attacks on our religious liberty as Americans.”<sup>71</sup> Fox News has reported regular occurrences of collegiate social groups and organizations demonstrating anti-Christian bias in

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<sup>66</sup> Asma T. Uddin, *Does the Supreme Court Have a Religious Double Standard? Factors to Consider.*, RELIGIOUS FREEDOM CTR. (Apr. 15, 2019), <https://www.religiousfreedomcenter.org/does-the-supreme-court-have-a-religious-double-standard-factors-to-consider/>.

<sup>67</sup> Holger L. Kern & John B. Holbein et al., *Do Street-Level Bureaucrats Discriminate Based on Religion? A Large-Scale Correspondence Experiment Among American Public School Principals*, 2020 PUB. ADMIN. REV., 1.

<sup>68</sup> *Id.* at 11.

<sup>69</sup> *Id.*

<sup>70</sup> Ingle, *supra* note 5.

<sup>71</sup> Edward White, *Christianity Under Attack Again this Christmas as Satanists Erect Forbidden Fruit & Serpent Displays on Capital Grounds & Atheists Force Local Officials to Remove Nativity Displays*, AM. CTR. L. & JUST. (Dec. 13, 2018, 6:15 PM), <https://aclj.org/religious-liberty/christianity-under-attack-again-this-christmas>.

ridiculing outspokenly Christian students, condemning such ridicule as “hateful, bigoted, and privileged.”<sup>72</sup>

## B. Canada: Accommodation of Belief & Practice

Canada is a massive nation with a population of over thirty-seven million inhabitants.<sup>73</sup> Possessing slightly more territory than the United States, Canada has one of the lowest population densities in the world.<sup>74</sup> As of 2011, the great majority of Canadians identified as Christian, comprised mainly of Catholics and Protestants.<sup>75</sup> The next largest percentage of the population claim no religious affiliation, and people identifying as Muslim, Hindu, Sikh, Buddhist, and Jewish, comprise the predominant minority religious groups.<sup>76</sup> While Canada has no established religion,<sup>77</sup> some scholars consider a combination of Anglicanism, Catholicism, and Protestantism to be *de facto* national religions, with loose but still existent ties to the Canadian government.<sup>78</sup>

Canada’s pre-colonial religious practices, like the pre-colonial United States’ indigenous groups, were quite similar to Europe’s religious practices.<sup>79</sup> Religious gatherings, worshipping a creator, and contemplation of the afterlife were common elements in many indigenous religious traditions.<sup>80</sup> Unlike pre-colonial United States’ indigenous groups, Canadian indigenous populations were

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<sup>72</sup> Ingle, *supra* note 5.

<sup>73</sup> Canada, U.S. & WORLD POPULATION CLOCK, *supra* at note 40.

<sup>74</sup> H. Plecher, *Population Density in Canada 2018*, STATISTA (Nov. 17, 2020), <https://www.statista.com/statistics/271206/population-density-in-canada/> (“The country has one of the lowest population densities in the world, as the total population is very small in relation to the dimensions of the land.”).

<sup>75</sup> *Canada National Profile*, ASS’N RELIGION DATA ARCHIVES, [https://www.thearda.com/internationalData/Countries/Country\\_41\\_1.asp](https://www.thearda.com/internationalData/Countries/Country_41_1.asp) (last visited Feb. 12, 2021).

<sup>76</sup> *Id.*

<sup>77</sup> *A Brief History*, THE ANGLICAN CHURCH CAN., <https://www.anglican.ca/about/history/> (“Today the Anglican Church of Canada is an independent, self-governing church.”) (last visited Oct. 2, 2021).

<sup>78</sup> *Canada National Profile*, ASS’N RELIGION DATA ARCHIVES, *supra* note 75.

<sup>79</sup> Heyrman, *supra* note 45.

<sup>80</sup> *Id.*

proselytized<sup>81</sup> by the French-speaking Jesuit Christians.<sup>82</sup> The Jesuit missionaries, unlike their English-speaking Puritan neighbors to the south, permitted indigenous people to embrace a “limber paganism,” blending parts of both faith traditions.<sup>83</sup> This early unity through compromise enabled the French-Indigenous alliance to prevent British dominance during the Seven Years War.<sup>84</sup>

Today, Canada is governed by a federal parliamentary democracy under a constitutional monarchy.<sup>85</sup> Canada’s Charter of Rights and Freedoms, comparable to the United States’ Bill of Rights, protects “freedom of conscience and religion” as a fundamental freedom for everyone.<sup>86</sup> The Charter was established in 1982, following Queen Elizabeth II signing the Canada Act.<sup>87</sup> By signing this Act, the Queen gave Canada autonomy to change its constitution and “enshrine” the Charter of Rights and Freedoms in its constitution.<sup>88</sup> Section 2(a) of the Charter “ensures that every individual must be free to hold and to manifest without state interference those beliefs and opinions dictated by one’s conscience.”<sup>89</sup> The Canadian Supreme

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<sup>81</sup> “Proselytize” means the recruitment of followers to a particular religious tradition. *Proselytize*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/proselytize> (last visited Oct. 2, 2021).

<sup>82</sup> Heyrman, *supra* note 45.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Canada National Profile*, ASS’N RELIGION DATA ARCHIVES, *supra* note 75.

<sup>86</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 2(a) (U.K.).

<sup>87</sup> *Learn About the Charter*, CAN. DEP’T JUST., <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/learn-append.html> (last visited Oct. 2, 2021).

<sup>88</sup> Stephen Azzi & Andrew McIntosh, *Constitution Act, 1982*, THE CANADIAN ENCYCLOPEDIA (last updated Apr. 24, 2020), <https://www.thecanadianencyclopedia.ca/en/article/constitution-act-1982#:~:text=The%20Constitution%20Act%2C%201982%20is,highest%20law%20of%20the%20land.>

<sup>89</sup> *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, para. 72 (Can.).

Court has instructed courts to assume “the sincerity of the beliefs and opinions,” of individuals and refrain from questioning their validity.<sup>90</sup>

Canadian courts have held that freedom of religion is characterized by the “absence of coercion or constraint.”<sup>91</sup> Within the general rule of resolving ambiguity in favor of individual rights, Canadian courts have used a balancing test to determine if someone’s religious freedoms have been infringed.<sup>92</sup> Courts, beginning with that broad assumption, compare the asserted religious liberty interest against a state or private practice as “competing rights.”<sup>93</sup> The threshold judicial determination uses a traditional trial credibility test to see if the applicant sincerely believes the asserted belief.<sup>94</sup> Notably, this test does not require any sort of codified “precept” or collective following by an established religious group.<sup>95</sup> While this approach has been criticized for potentially increasing the number of total and potentially fraudulent cases filed, no correlating increase in cases has been observed in the years following the adoption of this approach.<sup>96</sup> Additionally, because the court circumvents taking on the role of a “religious tribunal,” courts have found greater leeway to recognize individual expressions of belief.<sup>97</sup>

The Consultation Commission on Accommodation Practices Related to Cultural Differences (Bouchard-Taylor Report) led by Gérard Bouchard & Charles Taylor, resulted from a full year of aggregating research and reporting on the state of Québec’s approach

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<sup>90</sup> *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, para. 71 (Can.).

<sup>91</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 336 (Can.).

<sup>92</sup> *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, para. 73, 75 (Can.).

<sup>93</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 1 (U.K.) (“The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”).

<sup>94</sup> GÉRARD BOUCHARD & CHARLES TAYLOR, *BUILDING THE FUTURE: A TIME FOR RECONCILIATION*, 56-57 (2008).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*



to religious freedom.<sup>98</sup> This report analyzed the Canadian Charter and the national statutory foundation of the “reasonable accommodation,” the effectiveness of that standard, and the source of public perception – positive and negative – regarding that standard as well.<sup>99</sup>

Reasonable accommodation is an approach “intended to counteract certain forms of discrimination that the courts have traditionally qualified as indirect,” or, “without directly or explicitly excluding a person or a group of people, nonetheless bring about discrimination in the wake of a prejudicial effect because of the rigid application of a norm.”<sup>100</sup> This method of counteracting discrimination focuses on situations where individuals can request a specific exception to the governing rule.<sup>101</sup> By “relaxing” or “adjusting” rules in this fashion, Quebec courts have followed the Canadian Charter’s professed goals of equality without abrogating a regulation or statute.<sup>102</sup>

For example, the Canadian Supreme Court has, on several occasions, delicately balanced the religious practices of an insular group known as the Hutterites within the existing secular system.<sup>103</sup> In *Hofer I*, the Court demonstrated a nuanced understanding of the needs of a Hutterite colony by engaging in a lengthy and deferential scrutiny of the colony’s internal governance when the it was granted broad permission to self-regulate the members’ communal property within the civil framework of procedural due process.<sup>104</sup> *Hofer II* then placed broad limits on the manner in which the colony could deprive former

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<sup>98</sup> *Id.* at 6.

<sup>99</sup> *Id.* at 7-8.

<sup>100</sup> *Id.* at 23.

<sup>101</sup> *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, para. 17, 26, 96, 143 (Can.).

<sup>102</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 2(a) (U.K.); BOUCHARD & TAYLOR, *supra* note 94, at 23.

<sup>103</sup> Gabriel Rauterberg, *The Treatment of Isolationist Minorities*, 22 YALE J. L. & HUMAN. 105, 115-17 (2010).

<sup>104</sup> *Hofer et al. v. Hofer et al.*, [1970] S.C.R. 958, 964 (Can.); Rauterberg, *supra* note 103 at 116-17.

members of property upon expulsion from the group.<sup>105</sup> *Multani v. Commission* is another example of how flexible and deferential this standard can be towards religious minorities.<sup>106</sup> In *Multani*, the Court permitted a male Sikh student to wear a ceremonial dagger to school despite the school's policy of banning knives on their property.<sup>107</sup> The decision rested on the sincerity of the practitioner's beliefs established by a fact-based credibility test, avoiding any judicial censure on the perceived validity of the instant belief.<sup>108</sup>

Some Canadian Christians have objected to perceived anti-religious and anti-Christian bias, decrying current trends of secularism as "intolerant."<sup>109</sup> However, data has shown that Muslims, especially Muslims of ethnically Arab descent, are the group most negatively affected by discrimination.<sup>110</sup> Scholars have referred to this disparity as a "crisis of perception" leading to growing conservative resistance towards minority harmonization and integration efforts.<sup>111</sup>

### C. Malaysia: Compromise Between Diverse Religious Groups

Since its inception, Malaysia has celebrated its ethnic, cultural, and religious diversity.<sup>112</sup> Comprised of thirteen states spread across the Malay Peninsula and the island of Borneo, it is considered one of

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<sup>105</sup> *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, 170 (Can.) (requiring "notice, opportunity to make representations, and an unbiased tribunal"); Rauterberg, *supra* note 103 at 116-17.

<sup>106</sup> *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, para. 2 (Can.).

<sup>107</sup> *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, para. 54, 71 (Can.).

<sup>108</sup> *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, para. 35, 38 (Can.).

<sup>109</sup> Gary Lane, *Anti-Christian Agenda: Canada Cuts Off Christian College & Bible Camp, but Boosts Muslims*, C.B.N. NEWS (Jun. 18, 2018), <https://www1.cbn.com/cbnnews/world/2018/june/anti-christian-agenda-canada-cuts-off-christian-college-and-bible-camp-but-boosts-muslims>; Aly Laube, Associate Editor, *Canada Doesn't Have an Anti-Christian Bias*, THE RUNNER (Jun. 29, 2017), <https://runnermag.ca/2017/06/canada-doesnt-have-an-anti-christian-bias/>.

<sup>110</sup> BOUCHARD & TAYLOR, *supra* note 94, at 83.

<sup>111</sup> *Id.* at 13.

<sup>112</sup> CHALLENGES TO FREEDOM OF RELIGION OR BELIEF IN MALAYSIA, *supra* note 33, at 5.

the world's few "megadiverse" countries.<sup>113</sup> As of 2010, significantly more than half of the Malaysian population identified as Muslim.<sup>114</sup> The next largest demographic identifies as Buddhist.<sup>115</sup> Lesser represented religious groups encompass Christian, Hindu, and traditional Chinese religions, and the smallest group is not affiliated with any religious identity.<sup>116</sup>

Pre-colonial Malaysia, as records dating back to the fourteenth century show, had a long-standing Islamic tradition rooted in medieval Persian expressions of the faith.<sup>117</sup> *Rajas* (later known as Sultans), who represented the cultural, religious, and legal center of Malayan life, played a central role in the Malay collective identity.<sup>118</sup> The *Rajas* took their roles as spiritual leaders seriously and frequently invited foreign religious leaders to visit and educate local citizens on the teachings of Islam, Buddhism, and Christianity throughout this period.<sup>119</sup> Following colonization by the Portuguese in the sixteenth century, and later the Dutch in the seventeenth century, British colonizers dominated Malaysia from the late eighteenth century until 1957.<sup>120</sup> Mass immigration by Chinese, Indian, and Arab miners and other workers concurrent with colonization helped establish the multicultural dynamic that is reflected in modern Malaysian culture.<sup>121</sup>

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<sup>113</sup> *Malaysia National Profile*, ASS'N RELIGION DATA ARCHIVES, [https://www.thearda.com/internationalData/Countries/Country\\_139\\_1.asp](https://www.thearda.com/internationalData/Countries/Country_139_1.asp) (last visited Oct. 2, 2021); *Malaysia*, CONVENTION ON BIOLOGICAL DIVERSITY, <https://www.cbd.int/countries/profile/?country=my#:~:text=Biodiversity%20Facts&text=Malaysia%20is%20one%20of%20the,vertebrate%20classes%20and%20vascular%20plants> (last visited Oct. 2, 2021).

<sup>114</sup> *Malaysia National Profile*, ASS'N OF RELIGION DATA ARCHIVES, *supra* note 113.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> A.C. Milner, *Islam & Malay Kingship*, 1 J. ROYAL ASIATIC SOC. OF GR. BRIT. & IR. 46, 51 (Cambridge. U. Press 1981).

<sup>118</sup> *Id.* at 49-50, 53.

<sup>119</sup> *Id.* at 54.

<sup>120</sup> *Malaysia National Profile*, ASS'N OF RELIGION DATA ARCHIVES, *supra* note 113.

<sup>121</sup> *Timeline: Malaysia's History*, AL JAZEERA (May 1, 2013), <https://www.aljazeera.com/news/2013/5/1/timeline-malaysias-history>.

Established as an independent nation in 1957, modern Malaysia is a federal parliamentary constitutional monarchy.<sup>122</sup> The elected monarch, a mostly ceremonial position, is chosen every five years from one of the hereditary Sultans of the Malaysian states.<sup>123</sup> Advisory documents preceding the Malaysian constitution reflected the “conflicting interests inherent in Malaya’s plural society” and focused heavily on issues of ethnic tension.<sup>124</sup> Malaysia’s founders sought to find a compromise in the Constitution between differing—and often competing—religious, ethnic, and cultural groups.<sup>125</sup>

The Malaysian Federal Constitution “offers broad protections for freedom of religion or belief, but also makes the link between religion and ethnicity explicit in law.”<sup>126</sup> Article 3 of the Constitution declares Islam to be the official religion of the state while permitting all other religions to be practiced in peace and without interference.<sup>127</sup> In Article 11, every person’s right to practice, profess, and propagate their religion is protected.<sup>128</sup> Following the constitutional basis in compromise, Article 11 also permits the states of Kuala Lumpur, Labuan, and Putrajaya to “control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.”<sup>129</sup> The rationale for this constitutional tension between established religion and religious freedom was justified as a symbolic effort with important psychological effect on Muslim-identifying Malays.<sup>130</sup> The goal was to “not affect the position of the [Muslim]

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<sup>122</sup> *Malaysia National Profile*, ASS’N OF RELIGION DATA ARCHIVES, *supra* note 113.

<sup>123</sup> *Malaysia National Profile*, ASS’N OF RELIGION DATA ARCHIVES, *supra* note 113.

<sup>124</sup> Tommy Thomas, Advocate & Solicitor, *Is Malaysia an Islamic State?*, 4 M.L.J.A. 15 (2006).

<sup>125</sup> *Id.*

<sup>126</sup> CHALLENGES TO FREEDOM OF RELIGION OR BELIEF IN MALAYSIA, *supra* note 33, at 5.

<sup>127</sup> Federal Constitution, art. 3(1) (Malay.).

<sup>128</sup> Federal Constitution, art. 11(1) (Malay.).

<sup>129</sup> Federal Constitution, art. 11(4) (Malay.).

<sup>130</sup> Thomas, *supra* note 124.

Rulers as head of religion in their respective States” while still assuring the “practice and propagation of other religions in the Federation.”<sup>131</sup>

Malaysia’s approach towards religious freedom has been criticized in a contradictory fashion, both for showing favoritism towards Malaysian Muslims as well as failing to properly acknowledge Islam as the state religion.<sup>132</sup> Human rights advocates have chastised Malaysia for preferential treatment of Muslims that discriminates against religious minorities.<sup>133</sup> Conversely, legal scholars accuse Malaysian officials of merely paying superficial obsequence to Islam, falling short of the Islamic State anticipated by some constituents.<sup>134</sup>

The ICJ has identified that jurisdictional disputes between the dual secular and religious judicial systems have a “particularly detrimental impact on already at-risk populations” due to a lack of legal and jurisprudential clarity on the issue.<sup>135</sup> Malaysia has two court systems.<sup>136</sup> The civil, or secular, court system applies state and federal laws.<sup>137</sup> The Syariah, or Sharia courts, apply Islamic laws to Malaysian Muslims.<sup>138</sup> Unfortunately, a lack of clearly defined and distinct jurisdiction within the dual court system has led to ineffective civil remedies and general confusion for citizens.<sup>139</sup> According to the ICJ, “Syariah courts . . . have become a main arena of contestation.”<sup>140</sup> Jurisdictional confusion, inhered in the tension between recognizing the state religion of Islam and preserving freedom of religious self-

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<sup>131</sup> *Id.*

<sup>132</sup> Compare *id.*, with *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & ORS* [2005] 6 MLJ 193.

<sup>133</sup> *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & ORS* [2005] 6 MLJ 193.

<sup>134</sup> Thomas, *supra* note 124.

<sup>135</sup> CHALLENGES TO FREEDOM OF RELIGION OR BELIEF IN MALAYSIA, *supra* note 33, at 3.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 11.

<sup>140</sup> *Id.* at 3.

determination, continues in the clash between minority group interests and interests to elevate “Islamic governance.”<sup>141</sup>

For example, the highly publicized and controversial *Lina Joy* case showcased the tension between the civil and Syariah courts, as well as tension between religious majority and minority groups.<sup>142</sup> Lina Joy was born into the Muslim faith, and her name originally was Azlina bte Jailani.<sup>143</sup> Upon conversion to Christianity, she applied to the National Registration Department (NRD) to change her legal name and her stated religion on her National Registration Identity Card (NRIC).<sup>144</sup> The civil court dismissed her claim for lacking a certification from the Syariah court because “renunciation of Islam was a matter of Islamic law on which the NRD was not an authority.”<sup>145</sup> The dissent found that a certification from the Syariah court was unnecessary because it was not prescribed by regulations and an irrelevant requirement by the NRD.<sup>146</sup> Muslim youth celebrated the ruling while minority-affiliated politicians chastised it as a substantial blow against the “civil liberties and the constitutional rights of Malaysians.”<sup>147</sup>

Some political leaders believe that the stated national commitment to “moderate and progressive Islam” contradicts Malaysia’s religious heritage.<sup>148</sup> Some Sunni Muslim leaders have

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<sup>141</sup> Syed Jaymal Zahiid, *PAS’ Hadi Claims Minorities Racing to Vote for Chance at Political Power, While Malays Weakened by ‘Colonialist Demons’*, MALAY MAIL (Jan. 26, 2021, 5:34 PM), <https://www.malaymail.com/news/malaysia/2021/01/26/pas-hadi-claims-minorities-racing-to-vote-for-chance-at-political-power-whi/1944201>.

<sup>142</sup> Jalil Hamid, Syed Azman, *Malaysia’s Lina Joy Loses Islam Conversion Case*, REUTERS WORLD NEWS (May 29, 2007, 11:57 PM), <https://www.reuters.com/article/us-malaysia-religion-ruling/malysias-lina-joy-loses-islam-conversion-case-idUSSP20856820070530>.

<sup>143</sup> *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & ORS* [2005] 6 MLJ 193.

<sup>144</sup> *Id.*

<sup>145</sup> *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & ORS* [2005] 6 MLJ 193 (Abdul Aziz Mohamad, J.C.A. & Arifin Zakaria, J.C.A., concurring).

<sup>146</sup> *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & ORS* [2005] 6 MLJ 193 (Gopal Sri Ram JCA, dissenting).

<sup>147</sup> Hamid, *supra* note 142.

<sup>148</sup> Thomas, *supra* note 124 (like PAS, which is a political party whose stated goal is to protect the “Islamic cause”); Tashny Sukumaran, *Where Does Malaysia Stand on Gay Rights?*, S. CHINA MORNING POST (Mar. 11, 2019, 8:30 PM)

complained about experiencing attacks from “extremist” LGBTQIA+ and progressive Muslim groups.<sup>149</sup> However, the United Nations Special Rapporteur has expressed deep reservations about the misuse of the concept of extremism to undermine upholding international human rights standards and undercutting the fight against “actual extremism.”<sup>150</sup>

### III. ANALYSIS

#### A. Evaluating the Three National Approaches to Protecting Religious Freedom

The Pew Research Center, as of 2016, has released six annual reports measuring governmental and societal groups’ effect on religious practices.<sup>151</sup> Using consistent, quantifiable, and objective metrics, the “Global Restrictions on Religion” reports (Pew Reports) examine almost two hundred states and self-governing territories, ultimately assessing more than 99% of the world’s population.<sup>152</sup> These reports are indexed by both government restrictions and social hostilities.<sup>153</sup> Ranked on scales of zero to ten (lower indicating less regulation), these reports summarily examined each nation’s “State Regulation of Majority or All Religions” (Religious Regulation), “State Discrimination of Minority Religions” (State Discrimination), “State Funding of Religion” (Establishment), and “Societal Discrimination of Minority Religions,” (Social Discrimination).<sup>154</sup> The studies use

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<https://www.scmp.com/week-asia/politics/article/2189571/where-does-malaysia-stand-gay-rights-despite-promises-mahathir>.

<sup>149</sup> Bennoune, *supra* note 10.

<sup>150</sup> *Id.*

<sup>151</sup> *Codebook for Pew Research Center’s Global Restrictions on Religion Data*, ASS’N RELIGION DATA ARCHIVES, 2, <https://www.thearda.com/archive/files/codebooks/origCB/Global%20Restrictions%20on%20Religion.pdf> (last visited Oct. 2, 2021).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Compare Nations: U.S., Can., & Malay.*, ASS’N RELIGION DATA ARCHIVES, *supra* note 8.

double-blind coding as well as inter-rater reliability assessments to follow best practices standards of accuracy and objectivity.<sup>155</sup>

The Association of Religion Data Archives (ARDA) aggregated the Pew Reports' data points to objectively and accurately measure each of the three nations' religious freedom.<sup>156</sup> This data aggregation will be used below to comparatively present each state's efforts, broken down by category. These categories are not weighted against each other and none are conclusory.

### 1. Religious Regulation

“Religious regulation” is a broadly encompassing term but, for this comment, refers to the amount of regulation imposed by the state on both majority and minority religious practices.<sup>157</sup> The United States regulated religion the least, and Canada's religious regulation falls into the median between the United States and Malaysia.<sup>158</sup> Malaysia, the only country out of the three with a national religion preserved in its constitution, unsurprisingly imposes the most religious regulation on its population.<sup>159</sup> While ostensibly positive, an absence of religious regulation can lead to majoritarian religious groups dominating the process of establishing cultural norms.<sup>160</sup> Many people are concerned with over-regulation as detrimental to individual or collective self-expression.<sup>161</sup> However, while low levels of religious regulation seems positive, in practice, an absence of regulation allows majoritarian religious groups to exploit lacunae in the governance structure for preferential treatment.<sup>162</sup>

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<sup>155</sup> *Codebook*, ASS'N RELIGION DATA ARCHIVES, *supra* note 151, at 2.

<sup>156</sup> *Compare Nations: U.S., Can., & Malay.*, ASS'N RELIGION DATA ARCHIVES, *supra* note 8.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Compare Nations: U.S., Can., & Malay.*, ASS'N RELIGION DATA ARCHIVES, *supra* note 8.

<sup>160</sup> Corbin, *supra* note 12, at 850.

<sup>161</sup> BOUCHARD & TAYLOR, *supra* note 94, at 32.

<sup>162</sup> Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: An Equality Amendment*, 129 YALE L. J. F. 343, 360-61 (Dec. 26, 2019).



On the lightest end of religious regulation is the United States' approach of "state neutrality" towards its citizens' ethical values.<sup>163</sup> This approach holds that "the moral rightness or wrongness of some behavior is not a valid reason for state action."<sup>164</sup> A positive application of this approach protected the religious practitioners in *Lukumi Babalu Aye* from discrimination against participating in rituals involving animal sacrifice.<sup>165</sup> A less positive application of this approach permitted the business owner of *Masterpiece Cakeshop* to exercise personally held discriminatory religious beliefs in violation of state law against a couple celebrating their same-sex marriage.<sup>166</sup> In both applications, the approaches were deferential to the religious practice proffered, but each religious practice's role created opposite lasting effects in their respective communities. *Lukumi Babalu Aye* protected a minority religion from intentional state efforts to suppress the "central element" of its religious practice.<sup>167</sup> In contrast, *Masterpiece Cakeshop* has normalized sex-based discrimination by allowing business owners to antagonize vulnerable minority groups while hiding behind claims of religious freedom.<sup>168</sup>

Canada has chosen a more nuanced approach to religious regulation by enforcing regulations that are still broadly deferential to religious practices. In *Hofer I* and *Hofer II*, the Canadian Supreme Court permitted the Hutterite colony to self-govern, even to the level of deprivation of personal property, but not without limitations.<sup>169</sup> The colony was required to follow minimal procedural requirements aligning with the court's concept of due process to avoid state

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<sup>163</sup> Rauterberg, *supra* note 103, at 108.

<sup>164</sup> *Id.* at 109.

<sup>165</sup> *Church of Lukumi*, 508 U.S. at 547 (1993).

<sup>166</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1750 (2018) (Ginsburg, J., dissenting).

<sup>167</sup> *Church of Lukumi*, 508 U.S. at 534.

<sup>168</sup> Jeff Taylor, *N. Carolina Wedding Venue Denies Lesbian Couple, Citing "Christian Values"*, NBC NEWS (Dec. 22, 2020, 3:54 PM), <https://www.nbcnews.com/feature/nbc-out/n-carolina-wedding-venue-denies-lesbian-couple-citing-christian-values-n1252109>.

<sup>169</sup> *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, para. 80 (Can.); *Hofer v. Interlake Colony of Hutterian Brethren*, [1970] S.C.R. 958, para. 41 (Can.).

involvement in its affairs.<sup>170</sup> The Canadian approach of avoiding coercive influence on religious practices has resulted in relatively fair application.<sup>171</sup> Despite recent issues with anti-Semitic incidents, Canada has maintained comparatively low levels of religious regulation by prioritizing “reciprocal autonomy” between religious bodies and governmental oversight.<sup>172</sup>

Malaysia has taken an unclear approach towards religious regulation by setting up concurrent civil and *Syariah* court systems but not defining each system’s jurisdiction and limitations. As seen in the case of *Lina Joy*, this jurisdictional confusion exacts a heavy toll from religious minority group members.<sup>173</sup> Additionally, because Sunni Islam is the nationally recognized religion, practitioners of other branches of Islam have been arrested for inciting “religious disharmony.”<sup>174</sup> While admittedly realistic in acknowledging the existing religious motivations in political and judicial roles, Malaysia has neglected to provide necessary clarity for the court systems and has imposed an overly restrictive regulation scheme that has the effect of targeting minority religious groups.<sup>175</sup>

Just as the United States’ approach of neutrality is vulnerable to abuse, the Malaysian approach of active regulation presents similarly troubling concerns. Absolute “liberal tolerance” like the United States’ aspirations of neutrality can create an environment for groups, free from any regulation, to interact negatively with other groups by barring state actors from organizing cooperative self-determination efforts.<sup>176</sup> Non-political groups can create an “alternative moral environment” by pressuring group members to “filter” or “censor” differing

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<sup>170</sup> *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 at para. 80 (Can.); *Hofer v. Interlake Colony of Hutterian Brethren*, [1970] S.C.R. 958, para. 41 (Can.).

<sup>171</sup> BOUCHARD & TAYLOR, *supra* note 94, at 32.

<sup>172</sup> *Id.* at 92.

<sup>173</sup> U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., International Religious Freedom Report, Custom Report Excerpts: Can., Malay., <https://www.state.gov/report/custom/d1bbc6375e/> (last visited Oct. 2, 2021).

<sup>174</sup> *Id.*

<sup>175</sup> Bennoune, *supra* note 10.

<sup>176</sup> Rauterberg, *supra* note 103, at 110-11.

perspectives.<sup>177</sup> At one end of the spectrum, as the United States' and Canada's increasingly prominent Christian nationalist movements demonstrate, this defensiveness within a group's structure can negatively affect other religious groups.<sup>178</sup> Relatedly, the United States and Canada have also witnessed majority religious groups finding pretextual legal refuge in actions targeting minority religious groups.<sup>179</sup> At the opposite end of the spectrum, Malaysia has invited international condemnation for limiting religious expression through religiously motivated art censorship, gender-specific performance restrictions, and, in some states, penalizing religious conversions from the state religion.<sup>180</sup> Canada's rhetoric of "compromise, negotiation, and balance" in determining appropriate forms of religious regulation could better respond to the nuanced nature of the subject.<sup>181</sup>

## 2. State Discrimination

"State discrimination" refers to the extent of discrimination instigated by the state on a minority religious group or individual.<sup>182</sup> Canada experiences the least amount of state discrimination, with the only "perfect score" out of the countries assessed here.<sup>183</sup> The United States follows with a minimal amount of state discrimination toward minority religions, and Malaysia reckons with the greatest instances of state discrimination out of the three countries.<sup>184</sup> State discrimination in any form is detrimental to religious freedom, and can deeply impact the extent a minority religious group member can participate in their state's culture.<sup>185</sup>

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<sup>177</sup> *Id.* at 111-12.

<sup>178</sup> Taylor, *supra* note 168.

<sup>179</sup> Corbin, *supra* note 12, at 857-58 (condemning United States courts' preferential treatment allowing Christians to deprive "marginalized citizens of their civil rights").

<sup>180</sup> Bennoune, *supra* note 10.

<sup>181</sup> BOUCHARD & TAYLOR, *supra* note 94, at 9.

<sup>182</sup> *Compare Nations: U.S., Can., & Malay.*, ASS'N RELIGION DATA ARCHIVES, *supra* note 8.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Corbin, *supra* note 12, at 842.

Canada's "perfect score" shows that Canada's laws and procedures, when clashing with religious practices, affect both religious minority and majority groups relatively equally.<sup>186</sup> The religious accommodation analyses undertaken by Canadian courts have acknowledged the interrelated nature of religious freedom and diversity by accommodating religious practices unless they impose an "undue hardship" on institutional costs or other people's rights.<sup>187</sup> Canadian courts have developed an intricate balancing test between state interests and individually applied exceptions based on a minority religious practitioner's expressed needs.<sup>188</sup> By focusing on the sincerity of an asserted belief, instead of the prevalence or homogeneity of such a belief, Canadian courts imperfectly attempt to protect all religious practices regardless of their respective popularity.<sup>189</sup>

The United States, despite its rhetoric of valuing religious free expression, has allowed elected officials to openly favor Christianity at the expense of minority religious groups.<sup>190</sup> As seen most starkly by the participation of elected officials<sup>191</sup> in Christian nationalist events,<sup>192</sup>

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<sup>186</sup> BOUCHARD & TAYLOR, *supra* note 94, at 26 ("the current situation is under control").

<sup>187</sup> *Id.* at 52.

<sup>188</sup> *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, para. 17, 26, 96, 143 (Can.).

<sup>189</sup> BOUCHARD & TAYLOR, *supra* note 94, at 56.

<sup>190</sup> Corbin, *supra* note 12, at 836.

<sup>191</sup> Amanda Chase, State Senator for Virginia, as well as Derrick Evans, State Representative for West Virginia, and other elected officials were present during the pro-Trump events in Washington D.C. on January 6, 2021. Brian Reese, *Amanda Chase, GOP Candidate for Va. Governor, Has Facebook Account Suspended After Posting Conspiracy Theories*, WAVY 10 NEWS (Jan. 8, 2021, 9:57 AM), <https://www.wavy.com/news/breaking-news/amanda-chase-gop-candidate-for-va-governor-has-facebook-account-suspended-after-posting-conspiracy-theories>; Minyvonne Burke & Pete Williams, *West Virginia lawmaker charged after recording himself storming Capitol*, NBC NEWS (updated Jan. 8, 2021, 2:44 PM), <https://www.nbcnews.com/news/us-news/west-virginia-lawmaker-records-himself-storming-capitol-thousands-call-his-n1253362>.

<sup>192</sup> Tom Gjelten, *Faith Leaders Nearly Unanimous in Condemning Assault On Capitol*, NPR NEWS (Jan. 7, 2021, 6:39 PM) <https://www.npr.org/2021/01/07/954581163/faith-leaders-nearly-unanimous-in-condemning-assault-on-capitol> (quoting Robert P. Jones, CEO of the Public Religion Research Institute, referring to the event as an "unholy amalgamation of white supremacy and Christianity").

religiously motivated conduct by lawmakers can exclude minority religious groups while fostering majoritarian intolerance.<sup>193</sup> Elected officials who practice Christianity have gone so far as to unconstitutionally demand that lawmakers practicing minority faiths be forced to take their oaths on the Bible before assuming an elected role.<sup>194</sup> In a less extreme, but more common example, Justice Alito's comments during oral argument for *Fulton v. City of Philadelphia* demonstrated clear religious bias in deciding the constitutionality of local anti-discrimination legislative efforts.<sup>195</sup> Even in public schools, where principals are obligated to remain religiously neutral, personal religious bias has regularly been manifested as widespread "distrust" toward minority group members.<sup>196</sup> In these ways, state discrimination becomes increasingly pervasive through individual and cultural bias when the national discourse focuses on absolute neutrality.<sup>197</sup>

Malaysia's comparatively high level of state discrimination is the natural conclusion of its longstanding approach of compromise towards competing religious values. Some state governments have prohibited proselytizing to Muslims while permitting Muslims to proselytize to those of different religious traditions.<sup>198</sup> Further, minority groups have complained of difficulty when registering as religious organizations, and some laws have enumerated differing standards for Muslim and non-Muslim applicability.<sup>199</sup>

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<sup>193</sup> Corbin, *supra* note 12, at 863.

<sup>194</sup> Danielle Zoellner, *Marjorie Taylor Greene Tried to Force Ilhan Omar & Rashida Tlaib to Take Up Their Oaths on a Bible*, INDEP. EN ESPANOL (Jan. 28, 2021, 4:28 P.M.), [https://www.independentespanol.com/politica/ee-uu/marjorie-taylor-greene-omar-tlaib-biblia-b1794147.html?utm\\_source=redirect](https://www.independentespanol.com/politica/ee-uu/marjorie-taylor-greene-omar-tlaib-biblia-b1794147.html?utm_source=redirect).

<sup>195</sup> Amy Howe, *Argument Analysis: Justices Sympathetic to Faith-Based Foster-Care Agency in Anti-Discrimination Dispute*, SCOTUS BLOG (Nov. 4, 2020, 8:26 PM), <https://www.scotusblog.com/2020/11/argument-analysis-justices-sympathetic-to-faith-based-foster-care-agency-in-anti-discrimination-dispute> (saying, "if we are honest about what's really going on here," the case is not about ensuring equal opportunity for adoption, but about a city that "can't stand the message that Catholic Social Services and the archdiocese are sending by continuing to adhere to the old-fashioned view about marriage.").

<sup>196</sup> Kern et al., *supra* note 67, at 248.

<sup>197</sup> BOUCHARD & TAYLOR, *supra* note 94, at 44.

<sup>198</sup> U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *supra* note 173.

<sup>199</sup> *Id.*

Canada's high-effort approach towards identifying and resolving specific instances of religious discrimination is reflected in its relative success in applying restrictive policies equally regardless of the individual religious belief.<sup>200</sup> In contrast, by treating all religious groups equally without considering their respective influence on state and governmental affairs, the United States has furthered already existing religious discrimination.<sup>201</sup> As defensive majoritarian religious groups become more prominent, their ability to negatively impact minority religious groups increases. However, as Malaysian practices demonstrate, merely acknowledging existing inequality is insufficient to create an equitable system of government.<sup>202</sup> Once a religious majority has dictated the standards of governance, minority religious groups are consequently barred from representation and self-determination.<sup>203</sup>

### 3. Establishment

"Establishment" refers to the existence or extent of state-derived funding of all religious practices.<sup>204</sup> Canada had the least amount of establishment, moving away from any appearance of a national religion in favor of a strictly secular state.<sup>205</sup> The United States had a greater amount of establishment and Malaysia, by choosing to balance freedom of religious expression with an established national religion in an "Islamic secular" state,<sup>206</sup> reported the most pervasive levels of establishment.<sup>207</sup> While not necessarily indicative of failure to

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<sup>200</sup> BOUCHARD & TAYLOR, *supra* note 94, at 56-57.

<sup>201</sup> Corbin, *supra* note 12, at 863.

<sup>202</sup> Bennoune, *supra* note 10.

<sup>203</sup> Corbin, *supra* note 12, at 842 ("In short, Christian nationalism necessarily implies a hierarchy based upon religion, with Christian insiders who truly belong and non-Christian outsiders who do not.").

<sup>204</sup> *Compare Nations: U.S., Can., & Malay.*, ASS'N RELIGION DATA ARCHIVES, *supra* note 8.

<sup>205</sup> *Id.*

<sup>206</sup> Thomas, *supra* note 124 (describing the Malaysian national government as an "Islamic secular Malay federal monarchy").

<sup>207</sup> *Compare Nations: U.S., Can., & Malay.*, ASS'N RELIGION DATA ARCHIVES, *supra* note 8.

protect religious minorities, an established religion can easily “create[] classes of citizens based on their religious affiliation.”<sup>208</sup>

Canada, despite its colonial history with an established Church of England and later with the Anglican Church of Canada, invested extensive effort into creating a secular state.<sup>209</sup> Religious groups may opt to register with the Canada Revenue Agency to receive a tax-exempt status, as long as the group is nonpolitical and consents to periodic audits.<sup>210</sup> In lieu of removing Christian symbols on government buildings that many consider culturally significant,<sup>211</sup> Canada has opted to support holidays and individual “harmonization measures” for minority religious needs.<sup>212</sup> This approach has prioritized some degree of “reciprocal autonomy” between religious institutions and a neutral secular state.<sup>213</sup>

The United States, despite rhetoric disavowing establishment, has enabled a *de facto* established religion through long-standing preferential treatment towards Christianity.<sup>214</sup> Preferential treatment by the state has, instead of furthering tolerance, encouraged a perspective conflating practicing Christianity with United States citizenship.<sup>215</sup> As *Dunn v. Ray* demonstrated, the Supreme Court majority had no issue ensuring a Christian minister would be available to give a convict last rites, while failing to provide minority religious group members the same deference.<sup>216</sup> Additionally, the United States, like Canada, has

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<sup>208</sup> James Madison, *Memorial and Remonstrance against Religious Assessments*, [ca. 20 June] 1785, FOUNDERS ONLINE, NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Madison/01-08-02-0163> (Condemning religious establishment as degrading “from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree.”) (last visited Oct. 2, 2021).

<sup>209</sup> BOUCHARD & TAYLOR, *supra* note 94, at 55-56.

<sup>210</sup> U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *supra* note 173.

<sup>211</sup> BOUCHARD & TAYLOR, *supra* note 94, at 24.

<sup>212</sup> *Id.* at 24.

<sup>213</sup> *Id.* at 92.

<sup>214</sup> Corbin, *supra* note 12, at 859.

<sup>215</sup> *Id.* at 863 (“government endorsements of religion in general may not lead to general religious tolerance, but may be exclusionary for specific religious and nonreligious minorities.”) (internal citations omitted).

<sup>216</sup> *Dunn v. Ray*, 139 S. Ct. 661, 662 (2019).

prevalent symbols of Christianity in state buildings that judges have permitted to remain as reminders of the United States' religious heritage.<sup>217</sup> However, symbols of other religions represented in those communities have not been similarly created, let alone preserved as cultural monuments.<sup>218</sup>

Malaysia, in contrast, has embraced the inherent tension in both acknowledging the importance of religious freedom while elevating Islam as the national religion.<sup>219</sup> By creating dual civil and religious court systems, Malaysia sought to compromise the priorities expressed by disparate population groups.<sup>220</sup> Even if this approach was intended to merely acknowledge the beliefs held by the majority of Malaysians, religious fundamentalists took advantage of it by seizing elected offices through discriminatory campaigns and excluding vulnerable minority religious groups.<sup>221</sup> State actors have found themselves in the tenuous position of vociferously condemning ideological terrorism while acquiescing to its critical underlying worldviews.<sup>222</sup> This position has proven "conducive" to radical fundamentalist sects.<sup>223</sup> One of the Malay states is now referred to as "the Islamic State of Kelantan," where the Islamic fundamentalist controlling party has imposed restrictions on historically significant artistic and cultural practices in the name of religion.<sup>224</sup>

Establishment can be the overt support of a favored religious group by the state, but it can also reflect a dominant religious group's disproportionate influence on state affairs.<sup>225</sup> Malaysia and the United States are grappling with similar fundamentalist nationalist movements equating an ethno-religious identity with a national identity.<sup>226</sup>

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<sup>217</sup> Corbin, *supra* note 12, at 861-62.

<sup>218</sup> *Id.*

<sup>219</sup> Thomas, *supra* note 124.

<sup>220</sup> *See supra* Part II, Section C.

<sup>221</sup> Thomas, *supra* note 124 (Reflecting on the announcement by the Former Prime Minister Datuk Seri Dr Mahathir Mohamed in 2001 declaring that the "UMNO [political party] wishes to state loudly that Malaysia is an Islamic country.").

<sup>222</sup> Bennoune, *supra* note 10.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Corbin, *supra* note 12, at 836.

<sup>226</sup> Bennoune, *supra* note 10.



Currently, Malaysian leaders support policies that focus on moderate and progressive forms of Islam so as not to alienate those following other religions.<sup>227</sup> However, without concurrent equitable measures for the minority groups, individuals like Lina Joy will continue to experience systemic discrimination.<sup>228</sup> Canada's efforts to balance limited funding for public religiously affiliated institutions with accommodation of minority religious needs provides an example of a secular state without an intrusive level of establishment.<sup>229</sup>

#### 4. Social Discrimination

“Social discrimination” refers to the pervasiveness and severity of societal discrimination towards minority religious groups.<sup>230</sup> Despite its poor scores in other categories, Malaysian minority groups suffer from markedly less social discrimination than similarly situated groups in the United States and Canada.<sup>231</sup> Canada follows with substantially more social discrimination targeting minority groups, and the United States trails behind with its worst score yet and more prevalent societal discrimination than either Canada or Malaysia.<sup>232</sup>

Celebrating and protecting all forms of diversity has been a defining characteristic of Malaysian culture since pre-colonial periods.<sup>233</sup> The Muslim Sultans sought out and encouraged religious and philosophical traditions to practice freely in the pre-colonial Malay

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<sup>227</sup> *Remarks by President Trump & PM Najib Before Bilateral Meeting*, ASTRO AWANI (Sept. 13, 2017, 3:55 MYT), <https://www.astroawani.com/berita-dunia/remarks-president-trump-and-pm-najib-bilateral-meeting-155113> (“The more [we] align with progressive and moderate regimes, the better it would be in terms of winning the hearts and minds of the Muslim world.”).

<sup>228</sup> Bennoune, *supra* note 10.

<sup>229</sup> BOUCHARD & TAYLOR, *supra* note 94, at 22, 42.

<sup>230</sup> *Compare Nations: U.S, Can., & Malay.*, ASS’N RELIGION DATA ARCHIVES, *supra* note 8.

<sup>231</sup> *Compare Nations: U.S, Can., & Malay.*, ASS’N RELIGION DATA ARCHIVES, *supra* note 8.

<sup>232</sup> *Id.*

<sup>233</sup> Bennoune, *supra* note 10 (“In Malaysia’s experience ensuring a multi-racial, multi-religious and multi-ethnic population have freedoms to practice their cultures, traditions and religious belief has been essential and integral to our nation building and progress.”).

states.<sup>234</sup> That religious curiosity is reflected in modern life.<sup>235</sup> While Malaysia is currently struggling with politically powerful Islamic fundamentalist groups, the nation has made remarkable progress towards realizing the human rights goals laid out in the UDHR.<sup>236</sup>

Canada, with an unexpectedly high rate of social discrimination, faces a “crisis of perception.”<sup>237</sup> Recent spikes of violence targeting minority religious and immigrant groups have been legitimized by conservative voices decrying “unreasonable accommodations” threatening traditional Canadian cultural values.<sup>238</sup> The *Bouchard-Taylor Report* identified that biased media representation favoring the dominant group plays a role in disrupting legislative and judicial efforts to preserve freedom of religion and belief.<sup>239</sup> Additionally, recent court decisions like *Multani* have protected religious minority groups, drawing ire from nationalist and traditionalist Christian voices.<sup>240</sup> However, Canada’s high rates of social discrimination are not entirely reacting against efforts to equitably protect religious freedom. Canada’s longstanding majoritarian favoritism tradition lingers on.<sup>241</sup>

The United States, despite its noble constitutional efforts to avoid social discrimination, inflicts the most social discrimination on its minority religious groups.<sup>242</sup> As the *Kern-Holbein Study* found, implicit bias favoring the majority religious group presents a pervasive

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<sup>234</sup> Milner, *supra* note 117, at 49-50, 53-54.

<sup>235</sup> Bennoune, *supra* note 10.

<sup>236</sup> *Id.*

<sup>237</sup> BOUCHARD & TAYLOR, *supra* note 94, at 16, 72.

<sup>238</sup> Andy Riga, *Religion in Quebec: the Tumultuous Years*, MONTREAL GAZETTE (May 17, 2019), <https://montrealgazette.com/news/local-news/quebec-and-religion-part-2>.

<sup>239</sup> BOUCHARD & TAYLOR, *supra* note 94, at 20.

<sup>240</sup> *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, para. (Can.).

<sup>241</sup> BOUCHARD & TAYLOR, *supra* note 94, at 68, 72.

<sup>242</sup> *Compare Nations: U.S., Can., & Malay*, ASS’N RELIGION DATA ARCHIVES, *supra* note 8.

and enduring problem.<sup>243</sup> Private individuals, acting out of their beliefs that another religious tradition is illegitimate, use governmental anti-discrimination channels to harm minority group members.<sup>244</sup> By treating all asserted religious practices as equally worthy of state deference regardless of the asserter's political influence, the United States not only fails to protect vulnerable group members, but enables bad actors to manipulate First Amendment protections to the disadvantage of others.<sup>245</sup>

As social discrimination escalates globally, the need for systemic reform is now prescient.<sup>246</sup> Canada's paradigmatic shift from traditional equality based on ideals of uniform treatment, towards a complicated accounting of both individual and collective asserted needs, is an acknowledgment that traditional frameworks for resolving social religious discrimination are inadequate to handle the "muddled" interrelated elements within religious traditions and practices.<sup>247</sup> Malaysia's vociferous celebration of its multi-faceted diversity, while exposing systemic vulnerabilities to manipulation by fundamentalist nationalists, has enabled policy-makers to incorporate differing needs into more equitable systemic goals.<sup>248</sup>

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<sup>243</sup> Kern et al., *supra* note 67, at 245 ("Discrimination against citizens with nonmainstream beliefs about religion seems to be widespread in the American public school system.").

<sup>244</sup> Corbin, *supra* note 12, at 861 ("If Christianity were not the most significant feature of government-sponsored Christian practices and monuments, they probably would not provoke so much emotion in the people defending them.").

<sup>245</sup> Like the Asatru Folk Assembly in Minnesota where a white supremacist group was permitted to turn a former church into its meeting place due to the municipal leadership's reticence to take on an expensive religious discrimination lawsuit. Kim Bellware, *Facing a First Amendment Fight, a Small Minnesota Town Allows a White Supremacist Church*, WASHINGTON POST (Dec. 14, 2020, 6:00 AM), <https://www.washingtonpost.com/religion/2020/12/14/murdock-white-church/>.

<sup>246</sup> Isaac Conrad Herrera Sommers, *Suffering for Her Faith: The Importance of an Intersectional Perspective on Gendered Religious Persecution in International Law*, 61 HARV. INT'L L. J. 511, 525 (2020) (citing The Pew Research Center's data indicating that social discrimination against religion is at a "ten-year high").

<sup>247</sup> Faisal Bhabha, *Between Exclusion and Assimilation: Experimentalizing Multiculturalism*, 54 MCGILL L. J. 45, 48-49 (2009).

<sup>248</sup> Imran Ariff, *Dealing with the "Curse" of Race and Religion in Politics*, FREE MALAYSIA TODAY (Jan. 24, 2021, 10:06 AM),

## B. The Case for Equity

Human dignity must be the foundation for understanding and protecting religious freedom. As seen in all three countries analyzed here, religious groups invariably contain values clashing with other groups.<sup>249</sup> Allowing one voice to dictate state strategies towards enabling equality has allowed the historic marginalization of all but the majority religious groups to continue unchecked.<sup>250</sup> Instead, begin with human dignity—the closest to a “universal good” that we can currently achieve.<sup>251</sup> Beginning with human dignity as the expression of intrinsic human worth justifies the protection of all rights, including the right to religious freedom.<sup>252</sup> Further, by focusing on human dignity instead of the traditional religious justifications for universal individual rights, the quest for equitable religious freedom can avoid the definitional “disarray” plaguing modern discourse.<sup>253</sup> Decision-makers can use the concept of human dignity to both diagnose systemic failures of inclusion and to reorientate religious freedom protections around concepts of equity and fairness.<sup>254</sup>

This focus on human dignity as the foundation of human rights allows a state to use principles of equity to eradicate discrimination.<sup>255</sup> “Little by little, the law has come to recognize that the rule of equality sometimes demands differential treatment.”<sup>256</sup> Laws that treat all parties with absolute equality are inadequate to rectify entrenched disparate treatment.<sup>257</sup> The late Justice Frankfurter has reiterated the need for an equitable approach by stating, “[i]t was a wise man who

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<https://www.freemalaysiatoday.com/category/nation/2021/01/24/dealing-with-the-curse-of-race-and-religion-in-politics>.

<sup>249</sup> David J. Mattson & Susan G. Clark, *Human Dignity in Concept and Practice*, 44 POLICY SCI. 303, 306 (2011).

<sup>250</sup> Eduardo J. Ruiz Vieytez, *Diversity, Immigration & Minorities Within a Human Rights Framework*, in HUM. RIGHTS & DIVERSITY, NEW CHALLENGES FOR PLURAL SOCIETIES 19, 19 (Eduardo J. Ruiz Vieytez & Robert Dunbar eds., 2007) (Spain).

<sup>251</sup> Mattson & Clark, *supra* note 249, at 304-05.

<sup>252</sup> *Id.* at 305.

<sup>253</sup> Mattson & Clark, *supra* note 249, at 305-07.

<sup>254</sup> *Id.* at 306.

<sup>255</sup> BOUCHARD & TAYLOR, *supra* note 94, at 11.

<sup>256</sup> *Id.* at 22.

<sup>257</sup> Sommers, *supra* note 246, at 516.

said that there is no greater inequality than the equal treatment of unequals.”<sup>258</sup> Similarly, Canadian scholars declare that “the right to equality and freedom of religion do[es] not necessarily have as a corollary uniformity or homogeneity.”<sup>259</sup> Malaysian cultural mores of “unity in diversity” elevate equitable approaches to religious freedom over formalistic and rigidly applied laws.<sup>260</sup> Using a core concept of human dignity will equip our systemic human rights protections to move from a traditionally rigid conception into a more flexible approach capable of accommodating the needs of diverse individual and group needs.<sup>261</sup>

A foundation of human dignity is essential not only for the realization of religious freedom ideals, but also to enable unity through diversity within increasingly multicultural states.<sup>262</sup> Traditional approaches for preserving individual rights focused on perceived conflict between differing religious groups.<sup>263</sup> Compounded with broadly applied policies of neutrality, traditional approaches effectively exclude religious minority groups from equal social standing<sup>264</sup> while limiting the religious majority groups’ autonomous expression.<sup>265</sup> An unmediated democratic process facilitates the sorts of defensive majoritarian practices that have caused so much inequality in the United States, Canada, and Malaysia.<sup>266</sup> As states move towards

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<sup>258</sup> *Dennis v. United States*, 339 U.S. 162, 184 (1950) (Frankfurter, J., dissenting) (quoting Thomas Jefferson while disagreeing with the 5-4 ruling a member of the Communist Party could be tried by a jury of federal employees without fear of jurist bias).

<sup>259</sup> BOUCHARD & TAYLOR, *supra* note 94, at 24.

<sup>260</sup> Bennoune, *supra* note 10.

<sup>261</sup> BOUCHARD & TAYLOR, *supra* note 94, at 25.

<sup>262</sup> Corbin, *supra* note 12, at 843 (“The use of religion as a prime mover in the creation of racial divisions is a critical, but frequently overlooked, tradition in American history.”) (citation omitted).

<sup>263</sup> Javier de Lucas Martín, *Managing Multicultural Society Democratically: Identities, Rights, Citizenship*, HUM. RIGHTS & DIVERSITY, NEW CHALLENGES FOR PLURAL SOCIETIES 51, 54 (Eduardo J. Ruiz Vieyetz & Robert Dunbar eds., 2007) (Spain).

<sup>264</sup> BOUCHARD & TAYLOR, *supra* note 94, at 126-28.

<sup>265</sup> Madison, *supra* note 208.

<sup>266</sup> Martín, *supra* note 263.

undoing historically unequal treatment, majoritarian groups are left with less—but a more fair—allocation of social power.<sup>267</sup>

Defensive majoritarian practices, often exhibited as religious nationalism, merely present arcane societal concerns in a novel format.<sup>268</sup> For instance, media condemnation of the Canadian “reasonable accommodation” test applied to protect minority religious practices is a defensive reaction to the Court moving away from implicit favoritism towards equitable state practices.<sup>269</sup> Similarly, defensive messaging in the United States paints Christianity and Protestantism, specifically, as the “embattled defender of ‘true’ American values” threatened by increasing religious and cultural diversity.<sup>270</sup> The Malaysian fundamentalist movement, conflating an ethnic and cultural Malay identity with Wahhabist (Puritan)<sup>271</sup> Muslim culture, claims that movements toward religious diversity are detrimental to the Malaysian national identity.<sup>272</sup> Instead of allowing old insecurities from historic abuses of power to poison modern approaches toward religious freedom, politically dominant religious groups can take lessons from the past and vigorously advocate for minority inclusion.<sup>273</sup>

### C. Moving Forward

Before any specific methods for protecting religious freedom can be critiqued and improved, the general approach must become more realistic about existing inequality.<sup>274</sup> “Equality cannot be evaluated from the perspective of a majority.”<sup>275</sup> Until a state’s

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<sup>267</sup> *Id.* at 54-55.

<sup>268</sup> Bhabha, *supra* note 247, at 45, 48; Martín, *supra* note 263, at 57-58.

<sup>269</sup> BOUCHARD & TAYLOR, *supra* note 94, at 72.

<sup>270</sup> Kern et al., *supra* note 67, at 248 (internal citations omitted).

<sup>271</sup> “Wahhabism” is a form of Islam following a strictly literal interpretation of the Koran, believing that anyone who does not interpret the Koran literally is not Muslim. *Analysis: Wahhabism*, P.B.S. FRONTLINE TEACHER CT., <https://www.pbs.org/wgbh/pages/frontline/shows/saudi/analyses/wahhabism.html> (last visited Oct. 2, 2021).

<sup>272</sup> Bennoune, *supra* note 10.

<sup>273</sup> BOUCHARD & TAYLOR, *supra* note 94, at 85-86.

<sup>274</sup> Kern et al., *supra* note 67, at 254.

<sup>275</sup> Palermo, *supra* note 39, at 77.

approach acknowledges religious favoritism already systemically present, neutral approaches will continue to leave the root of the problem untouched.<sup>276</sup> Traditional frameworks equate religious diversity with an encroaching threat to an otherwise homogenous state identity.<sup>277</sup> Alternatively, by acknowledging the diverse religious traditions already present, decision-makers can avoid an obsolete “neutral” approach that indirectly imparts state validation on majoritarian religious practices.<sup>278</sup> As Malaysia has experienced through conscious effort, celebrating religious diversity strengthens a unifying national identity and can enable social advancement.<sup>279</sup> Human rights protections are chronically inadequate in systems where inequality remains an unacknowledged foundational flaw.<sup>280</sup> Malaysia’s realistic perspective has allowed criticism of procedural flaws to motivate responsive improvement.<sup>281</sup>

Moving away from an anachronistically rigid definitional approach to an acknowledgment of the intersecting nature of human rights requires a shift in terminology.<sup>282</sup> Critically important terms like “freedom,” “human dignity,” “equality,” and “democracy” lack universally acknowledged definitions.<sup>283</sup> As the United States has seen, semantic battles over charged terms can decide the outcome of cases governing freedom of religion.<sup>284</sup> Traditional definitions easily become a “catalogue of the *true identities* with a right to presence in our society” and effectively exclude groups that the majority perceives as illegitimate.<sup>285</sup> Despite an uncomfortable history of majoritarian voices overriding minority group needs, the United States continues to cling

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<sup>276</sup> Martín, *supra* note 263, at 56-57.

<sup>277</sup> *Id.*

<sup>278</sup> Corbin, *supra* note 12, at 839.

<sup>279</sup> Bennoune, *supra* note 10.

<sup>280</sup> MacKinnon & Crenshaw, *supra* note 162, at 344-46.

<sup>281</sup> Bennoune, *supra* note 10.

<sup>282</sup> Sommers, *supra* note 246, at 523.

<sup>283</sup> Palermo, *supra* note 39, at 76.

<sup>284</sup> *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2610 (2020) (Kavanaugh, J., dissenting) (“the parties to religion cases and the judges deciding those cases often do not share a common vocabulary”).

<sup>285</sup> Martín, *supra* note 263, at 57.57

to *e pluribus unum* as an aspirational identity.<sup>286</sup> “[D]iversity is the rule” governing the human experience, and every individual moves between majority or minority group membership, depending on the context.<sup>287</sup> If equality efforts shift to focus on procedural remedies instead of unnecessarily rigid definitional barriers, the conversation can shift from competing values to a “plurality” of legitimate procedural measures.<sup>288</sup> Flexible terminology enables decision-makers to adopt adequate responsive measures that accommodate the shifting vocabulary surrounding resolving discrimination problems.<sup>289</sup>

Re-balancing existing systems through corrections aiming to eradicate structural minority positions would enable an approach rooted in complex multiculturalism, instead of one derived only from the religious majority’s worldview.<sup>290</sup> Building on Canada’s efforts, regulatory approaches towards religious inclusivity can encourage a “cooperative attitude” at all levels of civic engagement by shifting the terminology used to interpret constitutional values.<sup>291</sup> Symbolic reformation measures have not corrected lasting inequality because they have taken too broad an approach to remedy an nearly incomprehensibly nuanced issue.<sup>292</sup> Complex multiculturalism becomes attainable when states use a combination of political and procedural mechanisms to address inequality present in societies already defined by diversity instead of allowing a narrative of competing values to disproportionately affect minority groups.<sup>293</sup> This sort of compromise based on a respect for democracy while still guaranteeing “respect for dissent” preserves the democratic ideal of

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<sup>286</sup> Arthur Schlesinger Jr., *Multiculturalism and the Bill of Rights*, 46 ME. L. REV. 191, 196 (1994).

<sup>287</sup> Kathleen Neal Cleaver, *Racism, Civil Rights, & Feminism* (1997), in CRITICAL RACE FEMINISM: A READER, SECOND EDITION, 48, 53 (Adrien Katherine Wing ed., 2003) (using racism as an example of how rigid social constructs can “subsume” the diverse and interdependent nature of the collective human experience); Palermo, *supra* note 39, at 67.

<sup>288</sup> Palermo, *supra* note 39, at 73.

<sup>289</sup> Schlesinger Jr., *supra* note 286, at 204.

<sup>290</sup> Palermo, *supra* note 39, at 77.

<sup>291</sup> *Id.* at 79.

<sup>292</sup> MacKinnon & Crenshaw, *supra* note 162, at 350-54.

<sup>293</sup> Sommers, *supra* note 246, at 519-20.



peaceful coexistence for diverse identities within a multicultural state.<sup>294</sup>

#### IV. CONCLUSION

The United States, Canada, and Malaysia all share the foundational goal of promoting religious freedom. The difficulty lies in finding the appropriate combination of policies that will safeguard religious freedom not just for the majority group, but every religious group regardless of minority status. Traditional and formalistic approaches to religious equality have addressed the needs of majority religious groups, but have left minority groups at a distinct disadvantage.

The United States, Canada, and Malaysia have all affirmatively shouldered the burden to protect multicultural religious freedom. Each nation, through its innovative efforts, has experienced a unique mixture of success and failure from those attempts. The United States' rhetorical approach of total equality and neutrality disadvantaged already vulnerable minority groups against well-positioned and sometimes hostile majority groups. Canadian deferential regulation addressed the structural concerns of minorities while permitting a culture of discrimination to flourish amid its perception crisis. Malaysia's jurisdictional confusion enabled fundamentalist groups to manipulate government systems to the detriment of minority religious and ethnic groups. These flawed approaches may inspire disappointment but serve as an essential threshold effort towards a greater realization of unity through religious diversity.

Multicultural conceptions of religious freedom grounded in human dignity holistically reckon with issues relevant to both individual and collective needs. Building on the global efforts already undertaken in concert with cutting-edge research will enable principles of equity to positively impact a wider body of religious beliefs, groups, and practices. Instead of passively permitting defensive nationalist groups from subverting notions of equality, a paradigm rooted in human dignity and equity will allow different religious groups to find a

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<sup>294</sup> Martín, *supra* note 263, at 57-58.

new unity in diversity. The United States' flexible definitions and use of "soft law" concepts complement Malaysia's realistic appreciation of its innate diversity. Coupled with Canada's high-effort tactics to harmonize diverse needs, the next generation of religious freedom protections can enable a greater number of minority religious groups to realize social inclusion and acceptance.