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## FREEDOM OF RELIGION AND LIVING TOGETHER

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## ABSTRACT

Despite the international recognition of religious freedom as a fundamental human right, recent developments in the United States and Europe reveal that the Islamic faith has been singled out *qua* Islam for special prohibitions. The question is whether this sectarian approach is compatible with the normative liberal approach to religious freedom that emphasizes egalitarianism and neutrality. The answer to this question is, no. Although religion within the paradigm of liberal political philosophy does not warrant special legal protection *qua* religion, this article contends that it is equally troublesome to single out religion *qua* religion for special disfavored treatment, even if the justification is facially neutral. This article uses facially neutral examples, such as: the French burqa-ban case, the Travel Ban project of President Trump, and the anti-Sharia debacle in the state of Oklahoma. This article draws on the dichotomous approach of liberal political philosophy to religion and develops a non-sectarian framework of arguments to defend religious liberty.

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## INTRODUCTION

In June 2018, the Austrian government decided in an unprecedented step to close seven mosques and expel dozens of imams.<sup>1</sup> The closure was based on the 2015 “Islam-bill” that singles out Islamic organizations for a special ban: the prohibition on receiving foreign funding.<sup>2</sup> The government reasoned the closure would protect

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1. Tom Barnes, *Austria to close seven mosques and deport imams in crackdown on ‘political Islam’*, INDEPENDENT (June 8, 2018), <https://abcnews.go.com/International/wireStory/austria-close-mosques-expel-imams-crackdown-55742091>.

2. Section 6. (2) of the Austrian Islam Bill prohibits Islamic Organizations from accepting foreign funding: “The procurement of funds for the usual activity to satisfy religious needs of [the] members [of the Islamic Religious Society] has to be

diversity by standing against the spread of political Islam and thus prevent radicalization and the creation of parallel societies in Austria.<sup>3</sup> At the same time, regarding the same issue, and by reference to the same concerns, an overwhelming majority of the Dutch *Tweede Kamer* (House of Representatives) has urged the government to intensely monitor the sources of funding for Dutch mosques.<sup>4</sup> The majoritarian concern is that foreign money has been used as a tool to create support for a message opposing the dominant standards of the Dutch society. Under the guise of combatting the “undesirable influence” from “unfree states,” the *Tweede Kamer* adopted eight resolutions.<sup>5</sup> These resolutions varied from the call for a new study about the financial sources of Dutch mosques to the ban on government subsidies for Islamic organizations that disturb the integration process of immigrants.<sup>6</sup> The European concern about the unwanted influences from the “unfree states,” referring to states in the Gulf region, has also manifested itself in another way. In the aftermath of the *theoterrorist* attacks, meaning terrorism justified on religious grounds,<sup>7</sup> and in

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undertaken inland by the Religious Society, the local communities respectively their members.” *Islamgesetz 2015*, StF: BGBl. I Nr. 39/2015 (Austria), translated in: *Federal Law on the External Legal Relationships of Islamic Societies – Islam Law 2015* [https://www.bmeia.gv.at/fileadmin/user\\_upload/Zentrale/Integration/Islamgesetz/Islam\\_Law.pdf](https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Integration/Islamgesetz/Islam_Law.pdf) (last visited Feb. 27, 2019).

3. Nadine Schmidt & Judith Vonberg, *Austria to close seven mosques, expel imams*, CNN (June 8, 2018), <https://edition.cnn.com/2018/06/08/europe/austria-mosques-imams-intl/index.html>.

4. See *Agenda Tweede Kamer der Staten Generaal*, vergaderjaar 2017–2018, ag-tk-2018-06-01, nr. 11, at 3 (Neth.) (discussing the amount of resolutions submitted during the parliamentary debate about the funding of mosques in the Netherlands).

5. *Kamerstukken II 2017/18*, 29 614, nr. 82 (resolution Sjoerdsma/Segers); *Kamerstukken II 2017/18*, 29 614, nr. 82 (resolution Becker/Segers) (Neth.) (on file with author); see generally Tamar de Waal, “Make Sure You Belong!” *A Critical Assessment of Integration Requirements for Residential and Citizenship Rights in Europe*, 25 BUFF. HUM. RTS. L. REV. (forthcoming 2019) (on file with author) (discussing the “integration debate” in Europe).

6. *Id*

7. See Paul B. Cliteur, *Tolerantie en Theoterrorisme [Tolerance and Theoterrorism]*, in FRANS KRAP & WILLEM SINNINGHE DAMSTE (EDS.), *OVER TOLERANTIE GESPROKEN [SPEAKING OF TOLERANCE]* 167-69 (2016); see also Paul Cliteur, BARDOT, FALLACI, HOUELLEBECQ EN WILDERS [BARDOT, FALLACI, HOUELLEBECQ EN WILDERS] 2016 (on file with author); Donna E. Arzi, *The Role of*

reaction to the political developments in the Middle-East,<sup>8</sup> some European authorities decided to critically scrutinize the work of Islamic preachers.<sup>9</sup> A minimally noticed and criticized instrument that is widely used in this context concerns the policy of targeting a particular category of Islamic preachers for special restrictions.<sup>10</sup> This category of religious leaders is usually accused of spreading messages of hatred and violence.<sup>11</sup> This approach of targeting Islamic extremism manifests itself in multiple ways and on different levels. As such, on the level of public and political debate, the language used to address Muslim radicalization is quite aggressive in tone.<sup>12</sup> The concepts of “hate

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*Compulsion in Islamic Conversion: Jihad, Dhimma and Ridda*, 8 BUFF. HUM. RTS. L. REV. 15 (2002) (exploring the content of Islamic dogmas, such as Jihad and apostasy).

8. See KARIN VEEGENS, *A DISRUPTED BALANCE?* (2011) (discussing the criminal law developments in reaction to terrorist attacks under the flag of religion); see also Mark D. Kielsgard, *A Human Rights Approach to Counter-Terrorism*, 36 CAL. W. INT'L L.J. 249 (2006).

9. Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651 (2017) (discussing the debate in the U.S.); Michiel Bot, *The Right to Offend: Contested Speech Acts and Critical Democratic Practice*, 24 LAW & LITERATURE 232, 238 (2012) (paying attention to the Dutch debate on reducing the influence of radical Imams).

10. See generally Khaled A. Beydoun, *Muslim Bans and the (Re)Making of Political Islamophobia*, 2017 U. ILL. L. REV. 1733 (2017) (providing some insights in the background of targeting Muslims in the U.S.); Jeroen Temperman, *Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech*, 2011 BYUL. REV. 729 (2011) (discussing the challenges of religious sensitivity to free speech and how this right to free expression has been affected by those sensitivities); see also Robin Edger, *Are Hate Speech Provisions Anti-Democratic: An International Perspective*, 26 AM. U. INT'L L. REV. 119 (2010) (assessing the Canadian attempts to deal with “hate speeches” from an international law perspective); Helen Ginger Berrigan, *“Speaking Out” about Hate Speech*, 48 LOY. L. REV. 1 (2002) (defining hate speech).

11. This article does not aim to challenge the positive obligation states have under international law to protect minorities from hate speech. However, it aims to create awareness about framing the followers of one particular religious faith as potential terrorists and thus singling out that religion for special bans. See Nazila Ghanea, *Minorities and Hatred: Protections and Implications*, 17 INT'L J. ON MINORITY & GROUP RTS. 423, 425 (2010); Robert A. Kahn, *Flemming Rose, the Danish Cartoon Controversy, and the New European Freedom of Speech*, 40 CAL. W. INT'L L.J. 253 (2010) (discussing the clash between free speech and religious freedom).

12. The anti-radicalization policies developed in this regard fit the propagated idea of tolerating only those versions of the Islam that fit European values. See

Imams” and “hate preachers” seem to be completely integrated in this debate.<sup>13</sup> On the level of anti-radicalization policies, the instruments addressing Muslim-extremism appear to be as severe as the tone of the anti-radicalization debate. These policies include the following: (1) indefinitely and “without delay” shutting down mosques and Islamic institutes;<sup>14</sup> (2) frustrating the broadcast of TV channels;<sup>15</sup> (3) explicit refusal of permissions to build mosques;<sup>16</sup> (4) withdrawal of residence permits;<sup>17</sup> (5) imposition of area bans;<sup>18</sup> (6) invalidating issued travel

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EUROPEAN PARLIAMENT, DRAFT REPORT ON FINDINGS AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON TERRORISM recommendation 15 (2018).

13. See Beydoun, *supra* note 10 (critiquing this development in the U.S. context).

14. Cf. EUROPEAN PARLIAMENT, *supra* note 12 (explicitly calling upon its member-states to close “without delay” mosques and other Islamic institutes that violate EU values); Susanne Schröter, *Debating Salafism, Traditionalism and Liberalism: Muslims and the State in Germany*, in MOHA ENNAJI (ED.) NEW HORIZONS OF MUSLIM DIASPORA IN EUROPE AND NORTH AMERICA 215 (2016) (on file with author); see also Harriet Agerholm, *Muslims stage mass prayer in protest over closure of mosques in Italy*, INDEPENDENT (Oct. 23, 2016), <https://www.independent.co.uk/news/world/europe/muslims-stage-mass-prayer-protest-over-closure-mosques-italy-rome-demonstration-islamophobia-a7376286.html> (reporting that Italian authorities have closed mosques on remarkable “administrative grounds” and highlighting that politicians have expressed their concerns about the existence of unofficial “garage mosques”).

15. EUROPEAN PARLIAMENT, *supra* note 12 (without providing a clear definition of “hate preacher,” the European Parliament urges the committee in its draft report to take legislative steps meant to measure the effectiveness of knocking down foreign TV channels spreading messages contrary to EU values).

16. Cf. Giorgio Ghiglione in Sesto San Giovanni, *The fall of ‘Italy’s Stalingrad’: symbol of left wages war on migrants and poor*, GUARDIAN (May 22, 2018), <https://www.theguardian.com/cities/2018/may/22/fall-italy-stalingrad-sesto-san-giovanni-milan-symbol-of-the-left-wages-war-on-migrants-and-the-poor> (reporting on how the presence of a terrorist in a small Italian town unfairly played a role in not granting construction permission for the building of a mosque).

17. Cf. Human Rights Without Frontiers, *Belgian court decision blocking deportation of Brussels grand mosque imam appealed to the council of state*, (Nov. 30, 2017), <http://hrwf.eu/belgian-court-decision-blocking-deportation-of-brussels-grand-mosque-imam-appealed-to-the-council-of-state/> (paying attention to the highly controversial deportation case of the Egyptian imam Abdelhadi Sewif who lived for 13 years in Belgium and was accused of spreading radicalism. Eventually, a Belgium court stopped the deportation process).

18. The Dutch *Raad van State*, Council of State May 30, 2018, no. 201709324/1/A3, ECLI:NL:RVS:2018:1763 (Neth.) (ruling that the imposed area ban

visas to attend conferences and symposia;<sup>19</sup> and (7) proposals aimed at amending criminal law enforcing the law against the “hate Imams” and *takfiri* Islamists,<sup>20</sup> who label other Muslims as apostates.<sup>21</sup>

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on a Muslim preacher was justified in light of the risk of radicalizing believers in those particular neighborhoods of The Hague, leaving aside the argument of the preacher that he is manifesting his religion).

19. See Teis Jensen, *Denmark bans six ‘hate preachers’ from entering the country*, REUTERS (May 2, 2017), <https://ca.reuters.com/article/topNews/idCAKBN17Y1MV-OCATP> (last visited Feb. 27, 2019); see also <https://www.rtlnieuws.nl/nieuws/binnenland/stichting-verbijsterd-over-intrekking-visa-imams> (in 2015 the Dutch Minister of Foreign Affairs invalidated the issued travel visas of three controversial Islamic preachers that aimed to attend a money raising “gala” in the Dutch city of Rijswijk); cf. Regional Court of Oost-Brabant December 23, 2015, no. SHE 15/6861, ECLI:NL:RBOBR:2015:7607 (Neth.) (the mayor of Eindhoven banned the organizers of an Islamic conference); see also Regional Court of Oost-Brabant January 30, 2017, no. SHE 16/2650, ECLI:NL:RBOBR:2017:415 (Neth.) (the court overturned the 2015 interim judgment and ruled that the ban was an inadmissible violation of the right to religious freedom and the freedom of association).

20. See *Tweede Kamer der Staten-Generaal [The House of Representatives], Aanhangsel Handelingen II [Parliamentary Proceedings II] 2017/2018*, at 68-35-12 (Neth.) (showcasing a recent debate in the Netherlands). Amending criminal law for this purpose is highly controversial. The liberal criticism is of Ayaan Hirsi Ali, a former member of the Dutch House of Representatives, saying that according to our modern standards, the Islamic Prophet is a warlord. If he is allowed to say this then why should a local conservative imam not be left room for saying that the mayor of Rotterdam is an apostate, however shocking and objectionable the content of both statements may be. Cf. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1292 (1994) (arguing that it would be “unacceptable” from a normative point of view to give a different treatment to very similar cases).

21. Eli Alshech, *The Doctrinal Crisis within the Salafi-Jihado Ranks and the Emergence of Neo-Takfirism*, 21 ISLAMIC L. & SOC’Y 419, 437 (2014) (explaining what the *takfiri* ideology entails and providing an overview of the recent developments regarding the thinking of this sect).

These recent developments have two key commonalities. First, a latent presence of Islamophobia,<sup>22</sup> a kind of Islam and Muslim fear.<sup>23</sup> As highlighted by Justice Sotomayor in her dissenting opinion in *Trump v. Hawaii*,<sup>24</sup> this fear is gradually growing and institutionalizing. Second, the deep commitment to undo beliefs, expressions, and manifestations that deviate from the required and dominant standards to save mainstream culture fuels the façade of the anti-terrorism and anti-radicalization agenda. One example of attempting to preserve mainstream culture is highlighted in the case of *Awad v. Ziriax*, which was brought before the Court in the aftermath of the so-called “Save Our State” Amendment.<sup>25</sup>

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22. Sohail Wahedi, *EU wil islam anders behandelen [EU wants to treat Islam differently]*, ND (July 31, 2018), <https://www.nd.nl/nieuws/opinie/eu-wil-islam-anders-behandelen.3082450.lynkx> (last visited Feb. 27, 2019) (defining Islamophobia as fear for the Islam and Muslims and warning for the institutionalization of Islamophobia); see also ENES BAYRAKLI & FARID HAFEZ, EUROPEAN ISLAMOPHOBIA REPORT 2017 (2018); cf. Yaseen Eldik & Monica C. Bell, *The Establishment Clause and Public Education in an Islamophobic Era*, 8 STAN. J. C.R. & C.L. 245 (2012).

23. Christian Joppke, *Pluralism vs. Pluralism: Islam and Christianity in the European Court of Human Rights*, in RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY 88 (Jean Louise Cohen & Cécile Laborde eds., 2016) (analyzing the case law of the European Court of Human Rights (ECtHR) in religious freedom cases and claiming that the Court interprets pluralism as a value that is threatened by the Islamic faith and needs therefore be protected).

24. Cf. *Trump v. Hawaii* 138 S. Ct. 2392, 2433 (2018) (Sotomayor, S., dissenting) (Justice Sotomayor criticizes the contentious “Travel Ban” that was designed and enforced just shortly after President Donald J. Trump came to power. She notes the Supreme Court’s majority fails to see that the travel ban is a violation of religious neutrality and a clear sign of Muslim fear. Sotomayor says that “repackaging” the ban as a security need, knowing that its background is laid down in the electoral promise of shutting down the U.S. borders for Muslims, “does little to cleanse [the Travel Ban] of the appearance of discrimination that the President’s words have created. Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus . . . The majority holds otherwise by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the [Travel Ban] inflicts upon countless families and individuals, many of whom are United States citizens.”).

25. See Brenna Bhandar, *The Ties that Bind Multiculturalism and Secularism Reconsidered*, 36 J.L. & SOC’Y 301, 304, 326 (2009) (discussing multiculturalism and secularism as established dominant political doctrines dealing with diversity. Bhandar claims that these political theories “reproduce and hold in place a unitary, sovereign political subjectivity. Despite their ostensible differences as political ideologies, both multiculturalism and secularism are deployed as techniques to govern



This strategy of reconciliation<sup>26</sup> touches on diversity and issues related to diversity, from a biased and dominant majoritarian perspective.<sup>27</sup> The main aim of this reconciliation strategy is to make diversity as a concept, “majoritarian-proof.”<sup>28</sup> That is to say, what is considered to fit the diversity concept passes through the majoritarian

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difference.” She concludes by saying that both political theories have in common the objective “to govern and manage difference that is perceived to violate dominant norms and values, defined in reference to the Christian cultural heritage of the nation state.”); *see also* Steven M. Rosato, *Saving Oklahoma’s Save Our State Amendment: Sharia Law in the West and Suggestions to Protect Similar State Legislation from Constitutional Attack*, 44 SETON HALL L. REV. 659 (2014); Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231 (2011).

26. *S.A.S. v. France*, App. No. 43835/11, Eur. Ct. H. R. ¶ 126 (2014) (Fr.) (the Court rules that for “democratic societies, in which several religions coexist within one and the same population, it may be necessary to place limitations on freedom to manifest one’s religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.”); *see also Kokkinakis v. Greece*, App. No. 14307/88, Eur. Ct. H. R. ¶ 33 (1993) (Greece) (the ECtHR formulated in this first religious freedom judgment the “reconciliation formula,” using the same language as in *S.A.S. v. France*); *see also* Mark Hill, *Tensions and Synergies in Religious Liberty: An Evaluation of the Interrelation of Freedom of Belief with Other Human Rights; Parallel Equality and Anti-discrimination Provisions; Enforcement in Competing European Courts; and Mediated Dispute Resolution*, 2014 BYU L. REV. 547 (2014) (providing some insights and background in the case law of the ECtHR on religious freedom).

27. Eoin Daly, *Fraternalism as a Limitation on Religious Freedom: The Case of S.A.S. v. France*, 11 RELIGION & HUM. RTS. 140, 165 (2016) (criticizing the way contentious practices of religious minorities have often been approached from an ethnocentric perspective that has been grounded on majoritarian cultural norms that provide little room for the habits of cultural and religious minorities); *see also* Anna Triandafyllidou, Tariq Modood & Ricard Zapata-Barrero, *European challenges to multicultural citizenship. Muslims, secularism and beyond*, in ANNA TRIANDAFYLLIDOU, TARIQ MODOOD & RICARD ZAPATA-BARRERO (EDS.), MULTICULTURALISM, MUSLIMS AND CITIZENSHIP. A EUROPEAN APPROACH 1, 3 (2006) (saying that “there is a widespread perception that Muslims are making politically exceptional, culturally unreasonable or theologically alien demands upon European states.”).

28. *Cf.* Irene Zubaida Khan, *The Rule of Law and the Politics of Fear: Human Rights in the Twenty-First Century*, 14 BUFF. HUM. RTS. L. REV. 1, 2 (2008) (outlining her “Afghanistan experience” and claiming: “What I saw in Kabul in 2003 is a microcosm of what I see is happening across our world today; a world where the interests of the powerful and the privileged prevail over those of the poor and the marginalised, and security trumps human rights.”).

lens of skepticism and beats the criticism of favoritisms toward religious believers or immigrants. Thus, what diversity should entail is made dependent upon the desires and wishes of a dominant majority.<sup>29</sup> This idea of making diversity majoritarian-proof has serious consequences for the true free exercise of fundamental rights (i.e., freedom of religion, freedom of expression, and freedom of association). The non-sectarian and thus the egalitarian approach to fundamental rights is threatened.<sup>30</sup> In addition, the reconciliation strategy involves another highly unpleasant risk.

Specifically, the reconciliation strategy concerns the emergence of a “Christocracy” and the shifting away from the religion-neutral liberal democracy.<sup>31</sup> Here, Christocracy does not refer to a theocracy that is governed by Jesus’ words or following God’s divine revelations in the Holy Bible.<sup>32</sup> The type of Christocracy emerging here takes the form

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29. Cf. Bhandar, *supra* note 25, at 315 (discussing the British dilemma of how to deal with religious manifestations of Muslims in the aftermath of the terrorism and the rise of radicalism and extremism).

30. The egalitarian interpretation of religion and religious freedom is not affected by the specific beliefs that form the basis of certain claims for exceptions. See RONALD DWORKIN, *RELIGION WITHOUT GOD*, 146 (2013). Another appropriate example in this context is the local French ban on wearing the so-called *Burkini* that covers the whole body except the face, arguing that this piece of clothing is not “respectful of good morals and of secularism,” completely ignoring similar clothing worn by non-Muslim women. See Alissa J. Rubin, *French ‘Burkini’ Bans Provoke Backlash as Armed Police Confront Beachgoers*, N.Y. TIMES (Aug. 24, 2016), <https://www.nytimes.com/2016/08/25/world/europe/france-burkini.html>; see also Mohamed Abdelaal, *Extreme Secularism vs. Religious Radicalism: The Case of the French Burkini*, 23 ILSA J. INT’L & COMP. L. 443, 454 (2017) (discussing the way French courts have dealt with the legality of the ban on wearing *burkini*). One of the *sectarian* arguments that is used to justify a non-egalitarian application of religious freedom is laid down in the idea that Christianity stands for peace while Islam is inherently violent: STAATKUNDIG GEREFORMEERDE PARTIJ (“SGP”) [THE DUTCH REFORMED POLITICAL PARTY], *ISLAM IN NEDERLAND [ISLAM IN THE NETHERLANDS]* 3, 4 (2017), <https://www.sgp.nl/actueel/manifest—islam-in-nederland/6125> (last visited Feb. 27, 2019).

31. Wahedi, *supra* note 22 (raising up the question as to whether liberal democracies are moving toward a regime that is democratic for the “native” majority and “reactionary” in its approach toward the minorities’ claims for exemptions from general laws).

32. Cf. Erik J. Krueger, *God versus Government: Understanding State Authority in the Context of the Same-Sex Marriage Movement*, 7 LIBERTY U. L. REV.

of a democracy for the “natives,” which consists of a Christian majority who have full access to the basic liberties.<sup>33</sup> However, this privilege is not reserved for religious minorities.<sup>34</sup> The concept of Christocracy is quite ethnocentric in its response to the claims, manifestations, and beliefs of other religious minorities.<sup>35</sup> This response is meant to promote the Christian, and as claimed by some, the Judeo-Christian heritage of Western societies. The proponents of this line consider this historic heritage the cradle of European civilization that has brought liberties and prosperity to Western nations.<sup>36</sup>

The emergence of the reconciliation strategy, and the rise of ethnocentrism across Western democracies such as the United States and Europe, might affect the propagated egalitarian understanding of religious freedom and the idea of “living together in diversity.”<sup>37</sup> Thus,

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235, 237 (2013) (Krueger describes Christocracy as “a community of Christians governed by Christ through the Church according to the immutable divine law.”).

33. See SGP, *supra* note 30, at 3-4.

34. See generally Najmeh Mahmoudjafari, *Religion and Family Law: The Possibility of Pluralistic Cooperation*, 82 UMKC L. REV. 1077, 1085 (2014) (on file with author) (wondering whether the Muslim community could benefit from the same privileges of religious arbitration, as this option is for example available for the Jewish community).

35. Joppke, *supra* note 23, at 96 (in the religious freedom case law of the ECtHR, Joppke has discovered “a laxness for Christianity and an unforgiving stance toward Islam,” which he qualifies as “a double standard at work”); see also Sohail Wahedi & Renée Kool, *De Strafrechtelijke aanpak van meisjesbesnijdenis in een rechtsvergelijkende context [The criminal law approach toward female circumcision: a comparative law perspective]*, 7 TIJDSCHRIFT VOOR RELIGIE, RECHT EN BELEID [J. FOR RELIGION, L. AND POL’Y], 51 (2016) (on file with author) (highlighting the emergence of ethnocentrism in the enforcement of laws against the practice of female genital mutilation).

36. Yasser Louati, *Islamophobia in France. National Report 2017*, in ENES BAYRAKLI & FARID HAFEZ (EDS.), EUROPEAN ISLAMOPHOBIA REPORT 2017 225 (2018) (commenting on how French politicians have referred to the Judeo-Christian background of France to promote their political opinions. Louati says, “[w]hile [some French politicians] constantly pose as staunch advocates of a repressive *laïcité* when speaking of the religious rights of Muslims, they nevertheless invoke religious freedoms or the “Judeo-Christian roots” of France to justify special arrangements for their political base.”); see also Leyla Yildirim, *Islamophobia in Netherlands. National Report 2017*, in ENES BAYRAKLI & FARID HAFEZ (EDS.), EUROPEAN ISLAMOPHOBIA REPORT 2017 431 (2018) (for similar rhetoric used in the Netherlands).

37. Ilias Trispiotis, *Two Interpretations of Living Together in European Human Rights Law*, 75 CAMBRIDGE L.J. 580, 582 (2016) (arguing that “the historical

where does our analysis bring us in terms of the widely advocated egalitarian understanding of religious freedom in liberal political philosophy and the idea of “living together in diversity”? To develop a robust theoretical framework that helps us reflect on this question, we should deal with two intertwined matters. On the one hand, we have to deal with the question of religious freedom and its propagated non-sectarian and egalitarian understanding. On the other, we need to properly address the rise of ethnocentrism across Western democracies and the related concerns about the reconciliation strategy.<sup>38</sup>

Our analysis begins with the question of whether the move toward ethnocentrism and the use of a reconciliation strategy reflect the propagated non-sectarian role religion should play for the purposes of religious accommodation and decisions taken in liberal democracies.<sup>39</sup> To explore more on this matter, we need to take two steps. First, we need to conceptualize the reconciliation strategy. Second, we need to provide a clear theoretical framework that helps us find out what role religion plays, for legal and political purposes, within the paradigm of liberal political philosophy. A recent draft report of the special European Parliamentary committee on anti-terrorism provides a helping hand regarding this first step; the report urges member states to combat Islamic manifestations that violate European values.<sup>40</sup> The same is true for the case law of the European Court of Human Rights (“ECtHR”). The ECtHR has used the concept of “living together,” as used in *S.A.S. v. France* (*S.A.S.*), ruling that norms prohibiting or restricting “contentious religious manifestations” do not violate religious freedom. The Court held that such prohibitions are meant to protect the rights and freedoms of others through ruling out religious practices that challenge the core values of a democratic society.<sup>41</sup>

Part I of this article draws on relevant case law and the recommendations of the special committee to theorize the

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emphasis on peaceful coexistence” reveals much of the way European authorities deal with religion).

38. Cf. Micah Schwartzman, *Religion, Equality and Anarchy*, in RELIGION IN LIBERAL POLITICAL PHILOSOPHY 15 (Cécile Laborde & Aurélie Bardon eds., 2017) (explaining the relevant methodology).

39. Cf. CÉCILE LABORDE, LIBERALISM’S RELIGION (2017); CÉCILE LABORDE & AURÉLIE BARDON, RELIGION IN LIBERAL POLITICAL PHILOSOPHY (2017).

40. EUROPEAN PARLIAMENT, *supra* note 12.

41. *S.A.S. v. France*, ¶ 126 (2014).

reconciliation strategy. Although this theorization rests heavily on European experiences, a similar development of reinforcing majoritarianism is happening in the United States. The most recent case in the United States that illustrates reinforcing majoritarianism is *Trump v. Hawaii*. However, the “Travel Ban” preceding this Supreme Court ruling is not unique in its effect of singling out one faith for a special ban. The “Save Our State” Amendment in Oklahoma, resulting in *Awad v. Ziriax*,<sup>42</sup> and the upcoming *United States v. Nagarwala*,<sup>43</sup> contain elements of what this article theorizes as the reinforcement of majoritarianism that causes feelings of anxiety toward the “stranger.”<sup>44</sup>

Part II of this article focuses on whether the reconciliation strategy could be considered a paradigmatic expression of the most recent theoretical developments regarding the place of religion within liberal political philosophy.<sup>45</sup> These developments involve a growing support

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42. This case concerned the lawfulness of State Question 755 that aimed to ban the use of Sharia Law in the courts of the state of Oklahoma. Its author, Rex Duncan, presented his initiative as a necessary mean in the battle against an evil culture. Both the District Court as well as the Court of Appeals decided that the ban—which was approved by more than 70% of the Oklahomans participating in the ballot—was clearly aimed at singling out the Islamic law for a disfavored treatment and for these reasons both legal instances held that challenger would likely be able to challenge this ban because it was unconditional and violated the Establishment Clause. *Awad v. Ziriax*, 754 F. Supp. 2d 1298 (W.D. Okla. 2010); *Awad v. Ziriax* 670 F.3d 1111 (10th Cir. 2012); see Amara S. Chaudhry-Kravitz, *The New Facially Neutral Anti-Shariah Bills: A Constitutional Analysis*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 25, 31 (2013); Lee Tankle, *The Only Thing We Have to Fear Is Fear Itself: Islamophobia and the Recently Proposed Unconstitutional and Unnecessary Anti-Religion Laws*, 21 WM. & MARY BILL RTS. J. 273 (2012); Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMEND. L. REV. 363 (2012).

43. *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018) (the legality of female circumcision, which involves separating the mucous membrane from the genitalia, however the District Court held that the Federal law banning this practice is unconstitutional because “Congress had no authority to pass this statute under either the Necessary and Proper Clause or the Commerce Clause.” The District Court referred in this respect to *United States v. Lopez*, 514 U.S. at 566, 115 S. Ct. 1624 and *Bond v. United States*, 572 U.S. at 858, 134 S. Ct. 2077. This case is pending appeal).

44. Trispiotis, *supra* note 37. Here, “stranger,” means those who do not belong to an established majority, either because they adhere to another religion or because they have an immigrant background.

45. Part II includes and revises the analysis on the role of religion in liberal political philosophy that has been published previously. See Sohail Wahedi,

for a “religion-empty” and a “God-empty” understanding of religion and religious freedom.<sup>46</sup> Such understanding draws on non-sectarianism, anti-favoritisms, and thus, an egalitarian approach to the beliefs, views, expressions, and manifestations of citizens.<sup>47</sup> Part II helps us understand why religion *qua* religion does not require special protection. Thus, each liberal protection provided for the exercise of religion takes place through finding suitable substitutes for the category of religion. This means religion is only special because of abstraction. Allegedly, it is not possible to provide a liberal protection regime for religion *qua* religion.<sup>48</sup> This theoretical framework helps us to answer the question of why majoritarian sensitivities seem to prevail in important free exercise cases.

As we will see, in *S.A.S. v. France*, the ban on religious face-covering veils has been justified as a matter of “living together.”<sup>49</sup> The “Travel Ban” in *Trump v. Hawaii* was justified as a matter of security.<sup>50</sup> The “Save Our State” Amendment was a serious attempt to keep the “stranger”<sup>51</sup> outside the territories of the state—a policy of fear that

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*Abstraction from the Religious Dimension*, 24 BUFF. HUM. RTS. L. REV. 1 (2017-2018).

46. See generally Wahedi, *supra* note 22.

47. *Id.*

48. STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* 83 (2014).

49. The French ban on face-covering veils did not violate the right to Religious Freedom, as France had “a broad margin of appreciation” to make a choice regarding the lawfulness of face-covering veils.

50. For example, the first version of the travel ban, Executive Order 13769, *Protecting the Nation from Foreign Terrorist Entry into the United States*, explicitly said that

Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.

Exec. Order No. 13,769, 82 FR 8977 (Jan. 27, 2017).

51. Sahar F. Aziz, *A Muslim Registry: The Precursor to Internment*, 2017 BYU L. REV. 779, 825 (2017); Eunice Lee, *Non-Discrimination in Refugee and Asylum Law (Against Travel Ban 1.0 and 2.0)*, 31 GEO. IMMIGR. L.J. 459, 464 (2017) (both saying that the aim—as explicitly mentioned in the first version of the travel ban, Executive Order 13,769—to keep honor killers outside the United States is an obvious reference to Muslims).

advanced the political agenda of spreading anxiety toward the “stranger.” Another example is *United States v. Nagarwala*, where the interventions were based on protecting girls, leaving zero room for analogies.<sup>52</sup> Moreover, why do authorities allow religious male circumcision *qua* religious,<sup>53</sup> while religious and ritual female circumcision has been outlawed in all its variants? Part II also suggests that we can understand this way of “re-packaging” religious cases as “abstraction from the religious dimension,” which does not justify singling out one faith for special bans in liberal democracies.

Part III draws on the liberal critique of singling out religion *qua* religion for special protection in law and the emergence of the reconciliation strategy. Part III also addresses the shift toward ethnocentrism to provide a more “close-to-reality” conception of religious freedom that is “diversity-friendly,” “sectarian-proof,” and compatible with the egalitarian view of this right that rejects religious toleration *qua* religious.<sup>54</sup>

This article concludes that although the presence of the reconciliation strategy and the shift toward ethnocentrism can be

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52. Cf. *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018) (outlawing the Federal law on banning female circumcision and saying with reference to *United States v. Morrison*, 529 U.S. 598, 607 (2000) that “as the Supreme Court found in *Morrison*, rape and other forms of sexual assault against women are not economic or commercial activity, and therefore not part of an interstate market, no different conclusion can be reached concerning FGM, which is another form of gender-related violence.”).

53. Cf. *Cent. Rabbinical Cong. of U.S. & Canada v. New York City Dep’t of Health & Mental Hygiene*, 763 F.3d 183 (2d Cir. 2014) (on file with author) (holding that a local regulation banning the practice of immediate oral suction of the circumcision wound—also known as *metzitzah b’peh* and practiced by some Orthodox Jews—preventing the spread of (Herpes Simplex Virus) is not neutral nor generally applicable. “The Regulation is not neutral because it purposefully and exclusively targets a religious practice for special burdens. And . . . the Regulation is not generally applicable either, because it is underinclusive in relation to its asserted secular goals: the Regulation pertains to religious conduct associated with a small percentage of HSV infection cases among infants, while leaving secular conduct associated with a larger percentage of such infection unaddressed.” In fact, the Court accepts at this point that ritual male circumcision is a *permissible* religious practice as it points out that the Regulation mainly “targets a religious practice for special burdens.”).

54. Part III includes and revises the analysis on the pragmatic defense of religious freedom that has been published previously. See Sohail Wahedi, *The Health Law Implications of Ritual Circumcisions*, 22 QUINNIPIAC HEALTH L. J 209 (2019).

theorized in light of the abstraction theory, as developed and defended in this article, we need to be very cautious about this justification. After all, non-sectarianism and egalitarianism are two sides of the same coin. This means authorities need to be very careful about disfavoring harmless, though very different lifestyles that deviate from the desired standards. This religion-empty understanding of religious freedom supports the proposition that people should be free to organize and live their lives as they choose.<sup>55</sup> However, the reconciliation strategy and the emergence of strong ethnocentrism give cause to rethink religious freedom in a way that endorses diversity for pragmatic reasons, intending to avoid a Hobbesian “war of all against all.”<sup>56</sup> Hence, this defense of religious freedom is rooted in grounds that are non-sectarian, non-majoritarian, and non-violent toward the advocated egalitarian conception of religious freedom.<sup>57</sup>

### I. THE RECONCILIATION STRATEGY

Hidden behind the façade of “unity in diversity” that aims to combat “radical Islam” and support the moderate Muslim, a special anti-terrorism committee of the European Parliament has proposed in its recent report to only tolerate variants of Islam that are “in full accordance with EU values.”<sup>58</sup> These values include respect for human rights, fundamental freedoms, human dignity, equality, and solidarity.<sup>59</sup> Mosques and other Islamic institutes that violate these values should be closed immediately.<sup>60</sup> This radical proposal is the first serious and most comprehensive legislative attempt to create a legal basis for state interventions against norm deviant beliefs, expressions, and

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55. *See generally* DWORKIN, *supra* note 30 (this idea is grounded in the neutrality principle of liberal philosophy. The State should act in a religion-blind way. This position considers religion a non-sectarian concept that could help people to organize their lives independently, and thus without State interference, except for cases of harm or damages).

56. *Cf.* BRIAN LEITER, *WHY TOLERATE RELIGION?* 9 (2014).

57. *Cf.* Sohail Wahedi, *Female circumcision as an African problem: double standards or harsh reality?*, in CHRISTIAN GREEN, JEREMY GUNN & MARK HILL (EDS.), *RELIGION, LAW AND SECURITY IN AFRICA* 400 (2018).

58. EUROPEAN PARLIAMENT, *supra* note 12, 17.

59. *Id.* at 14.

60. *Id.* at 17.



manifestations of a “contentious minority” in Europe. However, it is not something completely unique. On a different level and in a case by case assessment, judges across liberal democracies have ruled in a large number of cases on the legality of religious manifestations that are considered contrary to legal and social norms of society.<sup>61</sup>

The legal outcomes of some of these cases are as controversial as the proposed plans of the special committee. The controversy lies in two specific grounds that shape the contours of the reconciliation strategy. First, some court judgments and the special committee report seek to adjust beliefs, expressions, and manifestations that violate general expectations about how one should live a life conforming to the dominant standards of the society. Second, the court judgments and the recommendations of the European Parliament seem to single out one “contentious” minority for special bans and restrictions. At this point, the majoritarian attitude is that some beliefs, expressions, and manifestations of this minority are unwelcome, anomalous, or simply problematic,<sup>62</sup> as they do not show enough respect for the societal achievements of Western societies, such as the equality between men and women.<sup>63</sup>

Taking both developments together unveils that very little of the propagated egalitarian and non-sectarian conception of religious

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61. Shelby L. Wade, *Living Together or Living Apart from Religious Freedoms: The European Court of Human Right’s Concept of Living Together and Its Impact on Religious Freedom*, 50 CASE W. RES. J. INT’L L. 411 (2018); Sarah Trotter, *Living Together, Learning Together, and Swimming Together: Osmanoglu and Kocabas v Switzerland (2017) and the Construction of Collective Life*, 18 HUM. RTS. L. REV. 157, 169 (2018) (discussing the emergence of the “living together” doctrine in the case law of the ECtHR and how this shift move toward constructing a “common identity” has affected free exercise of religious freedom); Cf. Stephanie A. Ferraiolo, *Justice for Injured Children: A Look into Possible Criminal Liability of Parents Whose Unvaccinated Children Infect Others*, 19 QUINNIPIAC HEALTH L. J. 29 (2016); Geurt Henk Spruyt, *Politicians and Epidemics in the Bible Belt*, 12 UTRECHT L. REV. 114, 124 (2016) (refraining from child vaccination on religious grounds provides another appropriate example of a contentious religious manifestation). Cf. John Alan Cohan, *Honor Killings and the Cultural Defense*, 40 CAL. W. INT’L L.J. 177 (2010).

62. Triandafyllidou, Modood & Zapata-Barrero, *supra* note 27, at 3.

63. Cf. *Staatkundig Gereformeerde Partij v. the Netherlands (SGP)*, App. No. 58369/10, Eur. Ct. H. R. (2012) (critically scrutinizing the practice of a “native” religious minority).

freedom has been adopted by decision makers in law and politics across liberal democracies.<sup>64</sup>

Instead, the protection of the rights and freedoms of others has been prioritized to cut off non-mainstream ways of life.<sup>65</sup> This approach is clearly present in the ECtHR's case law concerning the legality of Islamic dress codes,<sup>66</sup> such as headscarves and face-covering veils.<sup>67</sup> The European Parliament's recent draft report highly relies on the same ECtHR formula. The rule of thumb is that protecting the rights and freedoms of "others" justifies state practices that violate a minority's rights.<sup>68</sup> Hence, the special committee's recommendations might sound radical or even contradictory to the concept of "living together" in peace and diversity, but it attempts to codify the line that was developed by the ECtHR. In other words, the recommendations of the special committee and the ECtHR's case law share exactly the same narrative

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64. *Cf. Id.* The SGP case is controversial for several reasons. Mainly, the idea that the State should not interfere in the way people want to give content to their lives, simply because the authorities do not appreciate that way of life, not because that way of life is causing harm or puts the safety of others under serious health risks. *See generally* DWORKIN, *supra* note 30, and Michael J. Perry, *From Religious Freedom to Moral Freedom*, 47 SAN DIEGO L. REV. 993 (2010) (arguing that the state should not prescribe how people should live their lives).

65. *Cf.* interview with the former acting mayor of Amsterdam Jozias van Aartsen: Niels Klaassen, 'VVD moet moslims juist beschermen' ['VVD must protect Muslims'], AD (July 20, 2018) (on file with author) (Van Aartsen claims that much of the current policy is based on gut feelings and suspicion toward Muslims, while religious freedom is meant to stop the government from prescribing how one should exercise his religion).

66. The ECtHR judgment in the SGP case forms an exception to this view. Another exception to this rule is the court judgment in *Refah Partisi and Others v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98 and 41344/98, Eur. Ct. H. R. (2003) (in both judgments the major concern was the rights and freedoms of others).

67. *Dahlab v. Switzerland*, App. No. 42393/98, Eur. Ct. H. R. (2001) [hereinafter, *Dahlab v. Switzerland*]; *Leyla Şahin v. Turkey*, App. No. 44774/98, Eur. Ct. H. R. (2005) [hereinafter *Leyla Şahin v. Turkey*]. *See also* Timothy J. Murphy, *Comparative Secularism: Leaving Room for the Holy Spirit and Headscarves in Turkish and American Public Schools*, 45 CAL. W. INT'L L.J. 297 (2015) (providing a comparative critical analysis of the protection regime for religion in the United States and Turkey).

68. EUROPEAN PARLIAMENT, *supra* note 12; *see also* Trotter *supra* note 61, at 163 (analyzes and discusses the way the ECtHR has embraced through case law the doctrine of "living together" as part of the limitation ground "protecting the rights and freedoms of others" to justify restrictions upon religious freedom).

that, in turn, reconciles diversity with majoritarian sensitivities about the way people should live their lives. What does this narrative exactly entail and how does it help us to theorize the reconciliation strategy? To answer this question, we can make use of the court's ruling in *S.A.S.* and compare this decision to the special committee's recommendations.

*A. S.A.S. v. France*

In *S.A.S.*, the ECtHR used, for the first time, the predominantly French concept of “living together” to rule on the legality of the French ban on publicly wearing face-covering veils.<sup>69</sup> The background of this judgment lies in the adoption of a highly controversial bill that aimed to ban face-covering dresses and veils, such as the *burqa* and *niqab*.<sup>70</sup> In July 2010, the French *Assemblée Nationale* passed the bill that was meant to prohibit concealing one's face in the public space. An absolute majority of the then present Assembly members voted in favor of this bill. Only one member voted against it while three members abstained.<sup>71</sup> In September 2010, the French *Sénat* adopted by an absolute majority the bill that criminalized wearing face-covering dresses in public (“prohibition law”).<sup>72</sup>

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69. Hakeem Yusuf, *S.A.S. v. France: Supporting Living Together or Forced Assimilation*, 3 INT'L HUM. RTS. L. REV. 277, 281 (2014) (criticizing the embracement of the French “living together” doctrine in *S.A.S.*).

70. *LOI n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public (LOI n° 2010-1192)* [Law no. 2010-1192 of October 11, 2010 prohibiting the concealment of the face in the public space] (Fran.).

71. See generally *Assemblée nationale, Année 2010. – No 72 [2] A.N. (C.R.)*, – 2e *SÉANCE DU 13 JUILLET 2010*, 5550 (Fran.) (on file with author) (335 out of 339 present Assembly members voted in favor of the bill).

72. *Sénat, Année 2010. – No 82 S. (C.R.)*, *SÉANCE DU 14 SEPTEMBRE 2010*, 6763 (Fran.) (246 out of 247 present Senate members voted in favor of the bill. One member voted against).

### 1. *The French Prohibition Law*

The French prohibition law, which has been active since April 2011,<sup>73</sup> prohibits anyone from covering his or her face in public,<sup>74</sup> unless this face concealment is required: (1) to fulfil a legal duty, (2) for a festivity, traditional, or artistic event, or (3) for the exercise of a particular sport.<sup>75</sup> An individual who violates this prohibition is fined or obligated to take a course on citizenship, or a combination of both.<sup>76</sup> The parliamentary proceedings on this bill reveal that the main rationale behind this piece of legislation has been the complete withdrawal of the Islamic face-covering dresses, such as the *burqa* and *niqab* from the public space in France.<sup>77</sup> The main justification for this intervention has been enshrined in the French idea of “living together” that has allegedly been threatened and frustrated by face-covering dresses.<sup>78</sup>

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73. See generally *S.A.S. v. France*, ¶¶ 14; 24-27 (providing a chronological overview of the legislative steps set to criminalize the concealment of the face in public).

74. *LOI n° 2010-1192*, (Article 1: No one may, within the public space, wear clothing that conceals the face.) See also *S.A.S. v. France*, ¶ 28 (provides a translation of the French Law on face-covering veils).

75. *LOI n° 2010-1192*, Article 2, section II.

76. *LOI n° 2010-1192*, Article 3 (the amount of this fine is connected with the infringements of second class).

77. See *Expose des Motifs*, Explanatory Memorandum of *LOI n° 2010-1192*, [https://www.legifrance.gouv.fr/affichLoiPubliee.do?jsessionid=A3D47BAB744505C3074B405E1EA232DA.tplgfr25s\\_3?idDocument=JORFDOLE000022234691&type=expose&typeLoi=&legislature=](https://www.legifrance.gouv.fr/affichLoiPubliee.do?jsessionid=A3D47BAB744505C3074B405E1EA232DA.tplgfr25s_3?idDocument=JORFDOLE000022234691&type=expose&typeLoi=&legislature=) (last visited Feb. 27, 2019) (according to this document that explains the rationale behind the bill, the French values of liberty, equality and fraternity, which “underpin the principle of respect for . . . equality between men and women” are threatened “by the wearing of full veil”). The quotations are based on the translation of the *Expose des Motifs* in *S.A.S. v. France*, ¶ 25. Also, the debates in the French Parliament reveals that the main aim of this prohibition has been the Islamic face-covering veils, like *burqa* and *niqab*. As such, only during the three debate at the *Assemblée nationale*, these contentious pieces of clothes are mentioned 92 times.

78. *Expose des Motifs*, Explanatory Memorandum of *LOI n° 2010-1192*, *supra* note 77 (the main argument behind this bill has always been that face-covering dresses are incompatible with the idea of “living together.” The Memorandum does not explicate what this concept entails. However, it says that the French Republic is based on certain values, such as liberty, equality and fraternity and also some principles, like gender equality, which are threatened by a “sectarian manifestation” that rejects the values of the French Republic. Hence, the Memorandum suggests that “the

The bill's historical background is essential to better understand the rationale behind the bill.<sup>79</sup> The bill's historical background unveils that the concept of "living together" is basically defined by an exclusive French Republican ideal about how citizens should live and behave within the Republic,<sup>80</sup> providing little room for groups or people who reject this view.<sup>81</sup> Furthermore, this domestic background helps us evaluate the implications of adopting the ECtHR's "living together" doctrine and its impact on the free exercise of religion and matters of diversity that are so closely related to this right.<sup>82</sup>

### *2. The French Prohibition Law Before the European Court of Human Rights*

In *S.A.S.*, a French citizen who was born in Pakistan but living in France, challenged the prohibition law.<sup>83</sup> She described herself as a "devout Muslim."<sup>84</sup> In her public and private life, she occasionally

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Republican social covenant" that forms the basis of the French society needs to be protected through outlawing practices that are contrary to this). *See also* *S.A.S. v. France*, ¶¶ 25, 140-41. This call can also be found back in the Parliamentary debate concerning the bill. *Cf.* the position of André Gerin who has defended the prohibition, since "the burqa, is the refusal of the Republic": *Assemblée nationale, Année 2010. – No 70 [1] A.N. (C.R.), – 1re SÉANCE DU 7 JUILLET 2010*, 5394 (Fran.) (on file with author).

79. Daly, *supra* note 27, at 141 (arguing that "living together," which has played such an important role in the justification of the prohibition, is a French concept about the manners of behavior in public life, in other words, it concerns "the duty of fraternity").

80. This line of reasoning is echoed very well by the contribution of Jean-Claude Guibal, who was a member of the *Union pour un mouvement populaire* [*Union for a Popular Movement*] that was led by Nicolas Sarkozy. During his address of the bill at the *Assemblée nationale*, Guibal defended the proposed prohibition and argued that although France is a tolerant society, it does not accept that some groups refuse to live in France as French people. Guibal said that such groups threatened "our" way of "living together" by their provocative behavior.

81. Daly, *supra* note 27, at 146-47 (criticizing the Court judgment in *S.A.S.*). This point of criticism was also mentioned by the applicant who challenged the French prohibition law before the ECtHR. *See S.A.S. v. France* ¶ 77.

82. *See* Trotter, *supra* note 61.

83. *S.A.S. v. France* ¶ 76.

84. *Id.* ¶ 11.

covered her face for religious, cultural, and personal purposes.<sup>85</sup> In doing so, she did not experience any forces or threats from her family or her husband to cover her face.<sup>86</sup> If needed, she refrained from using her face-covering *niqab* or *burqa*.<sup>87</sup> However, she insisted on having the option to cover her face when she was in a particular spiritual mood, such as during the Islamic fasting period.<sup>88</sup>

Although she was not prosecuted for a breach of the new prohibition law nor did she experience any negative consequence immediately after the enactment of the prohibition law,<sup>89</sup> she aimed to challenge the legality of this law for different reasons.<sup>90</sup> However, for the purpose of theorizing the reconciliation strategy, we will only focus on the alleged violation of religious freedom and the way the ECtHR has dealt with this particular concern.<sup>91</sup> The complaint about the violation of religious freedom rested strictly on two arguments.<sup>92</sup> The first argument suggested that although the ban on wearing face-covering dresses was prescribed by law,<sup>93</sup> it generally lacked resemblance to any of the legitimate limitation grounds against the free exercise of religion.<sup>94</sup> Moreover, the criticism put the defense of the French style of “living together” in the public area under critical

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85. *Id.* ¶ 12.

86. *Id.* ¶ 11.

87. *Id.*

88. *Id.* ¶ 12.

89. *Id.* ¶ 57.

90. *Id.* ¶¶ 69-73 (she argued before the Court that the French prohibition law put her at risk of harassment. Furthermore, she claimed that the ban discriminated against her and violated her freedoms of expression, association, and respect for the private life).

91. *See id.* ¶¶ 76-80 (arguing why the ban violated her right to religious freedom and respect for the private life). *See id.* ¶¶ 110-158 (the Court’s assessment of the complaint regarding the alleged violation of religious freedom and the right to respect the private life).

92. Article 9 of the European Convention on Human Rights [hereinafter, ECHR].

93. *S.A.S. v. France* ¶ 76.

94. *Id.* ¶ 77 (the applicant argues why the prohibition law cannot pursue the legitimate limitation ground of “public safety,” since the ban was not designed for security reasons).

scrutiny.<sup>95</sup> The argument was that this French justification for the prohibition law completely neglected the minority's perspective. This particular viewpoint rested on the idea that it is possible for minorities to peacefully live together with the majority, while keeping their own habits and traditions.<sup>96</sup> In other words, living peacefully does not require the minority group to strictly follow the French style of "living together."<sup>97</sup> In the same way, presenting the law as a tool to pursue gender equality was considered a "simplistic" presentation of the reality in which there are groups of women who themselves choose to cover their faces.<sup>98</sup>

The second argument that questioned the legality of the prohibition law challenged the "necessity" of this ban in light of the prohibition law's justification.<sup>99</sup> The criticism, at this point, contended that it is not

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95. See *Assemblée nationale*, *supra* note 71, at 5548 (on file with author). The original text of this address reads as follows:

"[L]e port du voile intégral constitue bien une pratique aux antipodes des valeurs qui fondent et structurent l'idée que tous ici nous nous faisons de la République. C'est un déni de liberté lorsqu'il a lieu sous l'effet de la contrainte, que celle-ci soit patente ou diluée dans un environnement social ; c'est une négation de l'égalité entre citoyens qui dépouille la femme de son identité, quand ce n'est pas de son humanité ; c'est un refus affiché de l'idéal de fraternité, une volonté de se soustraire au vivre ensemble républicain."

96. See *S.A.S. v. France* ¶ 77.

97. *Id.* ¶ 77 in conjunction with ¶ 114.

98. *Id.*

99. *Id.* ¶ 111. The ECtHR follows four specific steps to decide upon an alleged violation of the right to respect: private and family life; the freedom of thought, conscience, and religion; and freedom of expression, assembly, and association. First, it decides upon the presence of an *interference*. Second, it rules on the question as to whether this interference was *prescribed by law*. Third, it answers the question whether this interference was meant to pursue one or more of *legitimate limitation grounds upon fundamental freedoms*. Finally, it considers whether such a legitimate interference is *necessary in a democratic society*. The necessity question is a proportionality test. In fact, it helps judges determine whether a particular limitation upon a fundamental right "is necessary in a democratic society" to meet one or more of the legitimate limitation grounds, such as public safety, health, or morals, and the protection of public order as well as the rights and freedoms of others. Although the Court does not want to frustrate the democratic decisions of national states that in some cases limit the exercise of fundamental freedoms, giving states a certain "margin of appreciation" to take decisions, it aims to consider whether there is a "pressing social need" for a specific limitation. That pressing social need is meant to determine

to the authorities to favor or disfavor a particular lifestyle. Thus, the critique was about state's interferences in how people want to live their individual lives.<sup>100</sup> More generally, the argument suggested that a free society should accommodate a wide range of people, both believers and non-believers.<sup>101</sup> Hence, the authorities should not single out a particular lifestyle for disfavored treatment, even if there might be political support for that purpose. In other words, political support for a limitation does not automatically say that the measure is "necessary in a democratic society."<sup>102</sup> The argument relied on the idea that French authorities have failed to study less restrictive measures that could have reached the same goals as the ones behind the prohibition law.<sup>103</sup>

### *3. The Court's Assessment of the Legality of the French Prohibition Law*

In the Court's assessment of the alleged violation of the right to religious freedom, it first rules that the French prohibition law interferes with the right to free exercise of religion.<sup>104</sup> Subsequently, the Court considers this "continuing interference" as sufficiently prescribed by

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the limitation's necessity. *See generally* Steven Greer, *The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation*, 3 UCL HUM. RTS. REV. 1, 9 (2010); Gerorge Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEGAL STUD. 705, 710-11 (2006) (analyzing how the ECtHR assesses complaints about alleged violation of fundamental rights). *See also* Christopher Belelieu, *The Headscarf as a Symbolic Enemy of the European Court of Human Rights' Democratic Jurisprudence: Viewing Islam through a European Legal Prism in Light of the Sahin Judgment*, 12 COLUM. J. EUR. L. 573, 590 (2006); Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 128 (2005) (providing a historical overview of the way the margin of appreciation doctrine has been developed in the case law of the ECtHR and discussing the way the Court has dealt with the "necessity test").

100. S.A.S. v. France ¶ 78.

101. *Id.*

102. *Id.*; *see also* DWORKIN, *supra* note 30, at 130 (arguing that a liberal state should not favor or disfavor a particular lifestyle because another lifestyle is "intrinsically better." It should be left to citizens to decide which way of life better suits them).

103. S.A.S. v. France ¶ 78.

104. *Id.* ¶¶ 110-112.



law.<sup>105</sup> The Court elaborates quite extensively on the question of whether the French prohibition law pursues a legitimate aim.<sup>106</sup> The same is true for the legal assessment of the necessity test, which asks: is the prohibition law necessary in a democratic society to pursue one or more of the legitimate limitation grounds?<sup>107</sup>

What does the Court say about the legitimacy of the aim behind the prohibition law? The Court starts by noting that the list of grounds on which states could rely on to justify interferences with fundamental rights is “exhaustive” and their definition is “restrictive.”<sup>108</sup> Meaning, the Court refrains from applying an extensive interpretation method to interpret the limitation grounds in light of an alleged violation of fundamental rights.<sup>109</sup>

In order to rule on whether there is a legitimate ground for the prohibition law, the Court draws on the justification provided by the French authorities in favor of the law.<sup>110</sup> The authorities have argued the ban pursues two goals. First, it aims to protect public safety.<sup>111</sup> Second, it aims to enforce respect for the minimum set of values of an open and democratic society.<sup>112</sup> The Court concludes that the latter aim does not “expressly” correspond with any of the legitimate limitations grounds that are mentioned in the Convention.<sup>113</sup> Absent a Convention limitation ground, the Court specifies with reference to the explanation provided by the French authorities that the second aim behind the prohibition law is meant to serve three values.<sup>114</sup> The three values are: (1) pursuing respect for gender equality, (2) pursuing respect for human dignity, and (3) pursuing respect for the minimum requirements of life in society.<sup>115</sup>

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105. *Id.*

106. *Id.* ¶¶ 113-122.

107. *Id.* ¶¶ 123-159.

108. *Id.* ¶ 113.

109. *Id.*

110. *Id.* ¶ 110-11

111. *Id.* ¶ 114-115.

112. *Id.* ¶ 114.

113. *Id.*

114. *Id.* ¶ 116.

115. *Id.*

At first sight, the Court says that pursuing these three values cannot be related to one of the legitimate limitations grounds that are enlisted in the ECHR.<sup>116</sup>

Nevertheless, the Court relies on the French government's argument, which suggests ensuring respect for the minimum set of values of an open and democratic society as part of the legitimate limitation ground of protecting the rights and freedoms of others.<sup>117</sup> In doing so, the Court first examines and rejects the gender-equality argument.

According to the Court, this gender argument is ill-founded to pursue protection of the rights and freedoms of others as ultimate justification for the prohibition law.<sup>118</sup> In this context, the Court refers to women who insist to wear this type of clothing in public for religious purpose and as a matter of personal choice.<sup>119</sup> In other words, the treaty does not allow the limiting of people's basic liberties by an appeal to protecting these people from the free exercise of fundamental rights.<sup>120</sup>

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116. *Id.* ¶ 117.

117. *Id.*; *Id.* ¶¶ 81-82.

118. *Id.* ¶ 119. The court's rejection of the gender argument is a shift away from its own jurisprudence in which the Court repeatedly showed leniency toward the gender argument, allowing far reaching restrictions upon free exercise of religion and targeting particularly women. See Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1094 (2009); Karima Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality under International Law*, 45 COLUM. J. TRANSNAT'L L. 367, 382 (2007); Benjamin Bleiberg, *Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in Leyla Sahin v. Turkey*, 91 CORNELL L. REV. 129 (2005). Interestingly enough, the Government's gender argument in favor of the ban was later debunked by empirical findings. See Eva Brems, *Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings*, 22 J.L. & POL'Y 517, 551 (2014) (purporting that some of women who cover their faces "express assertive emancipated views against traditional role patterns and against unequal gender practices in the Muslim community," concluding that "the face veil is not an indicator of its wearer's approval of male dominance, let alone of its promotion.").

119. *Id.* ¶ 125.

120. *Id.* ¶ 119 (the Court held: "a State Party cannot invoke gender equality in order to ban a practice that is defended by women . . . in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.").

With regard to the argument that the prohibition law aims to pursue respect for human dignity, this noble ground does not justify “a blanket ban” on face-covering dresses in public, despite the fact that this piece of clothing is considered “strange” by many people in the society.<sup>121</sup> The argument is that this “expression of a cultural identity” is crucial for the maintenance of pluralism,<sup>122</sup> which is according to the Court in favor of the whole democracy.<sup>123</sup>

When it comes to the assessment of the third value, respect for the minimum requirements of life in society (that is synonymous to “living together”), the Court very briefly says that pursuing this value might fall under the scope of the legitimate limitation ground of protecting the rights and freedoms of others.<sup>124</sup> In this regard, the Court engages with the French position—that considers an unveiled face in public as an indispensable tool for social interaction.<sup>125</sup> The Court reaches the following conclusion:

It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier. That being said, in view of the flexibility of the notion of “living together” and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned limitation.<sup>126</sup>

After having concluded that the French prohibition law constitutes an interference, which is prescribed by law and also pursues a legitimate aim, the Court starts examining the necessity of the legitimate limitation

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121. *Id.* ¶ 120.

122. *Id.*

123. *Id.*

124. *Id.* ¶ 122.

125. *Id.*

126. *Id.*

in a democratic society.<sup>127</sup> In this regard, the Court first reiterates its standard interpretation of religious freedom, noting that:

[F]reedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.<sup>128</sup>

However, the Court has also ruled that limitations upon free exercise of religious freedom are at some points justified as a tool “to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.”<sup>129</sup> This asks judges to “balance between the fundamental rights of each individual which constitutes the foundation of a ‘democratic society.’”<sup>130</sup> This judicial balance should not frustrate the decision making process that has democratic legitimacy. The Court admits at this point that it has a “subsidiary role” in assessing whether particular restrictions upon fundamental rights in democratic societies are necessary.<sup>131</sup> This is because the Court views the sovereign states are “in principle better placed than an international court to evaluate local needs and conditions.”<sup>132</sup>

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127. *Id.* ¶ 124.

128. *Id.*

129. *Id.* ¶ 126.

130. *Id.* ¶ 128.

131. *Id.* ¶ 129.

132. *Id.*; see Brauch, *supra* note 99 (for more information on “the better placed argument”). See also Patricia Popelier & Catherine van de Heyning, *Subsidiarity Post-Brighton: Procedural Rationality as Answer*, 30 LJIL 5 (2017) (analyzing how the ECtHR has dealt with the principle of subsidiarity, comparing the period before and after the so-called “Brighton” declaration that aimed to reinforce the idea that national States are in a better position to deal with the proper protection of fundamental rights); Alastair Mowbray, *Subsidiarity and the European Convention on Human Rights*, 15 HUM. RTS. L. REV. 313 (2015) (using a quantitative research method to analyze the subsidiarity principle); Matthew Saul, *The European Court of Human Rights’ Margin of Appreciation and the Processes of National Parliaments*,

This is especially the case, the Court found, when it faces questions of law and religion.<sup>133</sup> Hence, the Court ruled that in such cases, “the role of the domestic policy-maker should be given special weight.”<sup>134</sup> In such cases, the Court grants states a wider “margin of appreciation,”<sup>135</sup> in assessing whether the legitimate limitation upon a particular freedom can undergo the necessity test.<sup>136</sup> To examine this properly, the Court must determine whether there is “consensus” amongst the member states of the ECHR concerning the need to impose certain limitations upon the exercise of a freedom.<sup>137</sup> This margin of appreciation does not provide states a *carte blanche*, rather it “goes hand in hand with a European supervision embracing both the law and the decisions applying it. The Court’s task is to determine whether the

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15 HUM. RTS. L. REV. 745, 751 (2015) (providing an explanation for the subsidiarity principle, referring to the democratic legitimacy of nation States, the state of art with regard to a particular limitation amongst the States and the domestic expertise that an international Court generally lacks).

133. S.A.S. v. France ¶ 129.

134. *Id.* ¶ 129. See also Robert F. Cochran, Jr. & Michael A. Helfand, *The Competing Claims of Law and Religion: Who Should Influence Whom?*, 39 PEPP. L. REV. 1051, 1052 (2013) (on the continuous and “endless jousting” between law and religion).

135. In short, this doctrine entails that the Court grants the State certain room to develop its own policies. That room—the margin of appreciation—might be wider (i.e., the Court is less restrictive) in cases concerning subjects that state parties are “better placed” to deal with or issues where state parties respond differently to, the so-called “no-consensus” argument.

136. S.A.S. v. France ¶ 129; see also Aaron R. Petty, *Religion, Conscience, and Belief in the European Court of Human Rights*, 48 GEO. WASH. INT’L L. REV. 807, 824 (2016).

137. *Id.*; see Brauch, *supra* note 99, at 126-27 (identifying two key-factors that help to define the scope of the margin of appreciation: “[first,] a balancing of the importance of the right with the importance of the restriction, [second] the existence of a European consensus on the matter before the Court.”); Peter Cumper & Tom Lewis, *Empathy and Human Rights: The Case of Religious Dress*, 18 HUM. RTS. L. REV. 61, 69 (2018) (arguing that consensus amongst the member States generally leads to a narrower margin of appreciation). Cf. Ryan Thoreson, *The Limits of Moral Limitations: Reconceptualizing Morals in Human Rights Law*, 59 HARV. INT’L L.J. 197, 217 (2018) (giving the example of restrictions and limitations upon adult same-sex activities and illustrating how growing consensus amongst member States led to a narrower margin of appreciation in finding justification for such limitations).

measures taken at national level were justified in principle and proportionate.”<sup>138</sup>

In addition to the analysis above, the Court also examined the necessity of the ban in light of the public safety argument.<sup>139</sup> In a more general note, the Court found that restrictions upon religious freedom for security reasons are, under some circumstances, necessary in a democratic society.<sup>140</sup> However, the Court did not see any reason to consider the prohibition law as a legitimate limitation that aims to deal with an immediate security threat.<sup>141</sup> For instance, the Court considered that the authorities could have chosen a less restrictive measure, such as requiring women to take off their veils at places that are constantly under high pressure of security threats.<sup>142</sup> Hence, the Court ruled that the interference caused by the prohibition law cannot be justified in a democratic society on the ground of pursuing public safety.<sup>143</sup>

The Court then assessed the necessity of the French prohibition law in light of the second justification provided by the authorities: considering the ban as ensuring the “living together” ideal.<sup>144</sup> Against the backdrop of the weight French authorities have given to ensure a particular way of “living together,” the Court was sensitive to the argument that states should be given room “to secure the conditions whereby individuals can live together in their diversity.”<sup>145</sup> Hence, the

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138. S.A.S. v. France ¶ 131. See Letsas, *supra* note 99, at 711 (claiming that the proportionality question “is by far the most important and most demanding criterion for whether the limitation of a right was permissible under the Convention.”). Cf. Rosamund Scott, *Reproductive Health: Morals, Margins and Rights*, 81 MOD. L. REV. 422, 425 (2018) (arguing that the proportionality test “underlies the assessment of necessity and the Convention as a whole,” which in turn requires a proper assessment “between the interests and rights of the individual and those of the community, including the public interest.”).

139. S.A.S. v. France ¶ 137 (rejecting first the claim that the prohibition law was meant “to protect women against a practice which was imposed on them or would be detrimental to them.”).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* ¶ 140 (the value of respect for the minimum requirements of life in society is amongst the three values of the broader goal pursuing respect for the minimum set of values of an open and democratic society).

145. *Id.* ¶ 141.

Court found the interference upon religious freedom “justified in its principle solely” because it aims to shape the contours of “living together” in the French society.<sup>146</sup>

With regard to the democratic necessity of imposing a ban on wearing face-covering veils in public that aims to ensure “living together,” the Court admitted that this ban might “seem excessive,” because it is designed to target a very small group who wants to cover their face in public.<sup>147</sup> Furthermore, the Court emphasized that it is aware of the fact that:

[T]he ban has a significant negative impact on the situation of women who, like the applicant, have chosen to wear the full-face veil for reasons related to their beliefs. As stated previously, they are thus confronted with a complex dilemma, and the ban may have the effect of isolating them and restricting their autonomy, as well as impairing the exercise of their freedom to manifest their beliefs and their right to respect for their private life. It is also understandable that the women concerned may perceive the ban as a threat to their identity.<sup>148</sup>

Although the Court acknowledged that many human rights groups have objected to the French prohibition law as “disproportionate,”<sup>149</sup> and that some voices consider this law “islamophobic,”<sup>150</sup> the Judges ruled they are not in the position to intervene in domestic political debates that result in limitations of fundamental rights.<sup>151</sup> Nevertheless, the Court reiterated that:

[A] State which enters into a [sensitive] legislative process . . . takes the risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the

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146. *Id.* ¶ 142.

147. *Id.*

148. *Id.* ¶ 146.

149. *Id.* ¶ 147.

150. *Id.* ¶ 149.

151. *Id.* (ruling that “[it] is admittedly not for the Court to rule on whether legislation is desirable in such matters.”)

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expression of intolerance, when it has a duty, on the contrary, to promote tolerance.<sup>152</sup>

The Court also noted that the prohibition law was not designed to protest against the “religious connotation” of face-covering veils.<sup>153</sup> Rather, the ban is “solely” meant to combat the concealment of the face.<sup>154</sup> At the same time, the Court admitted that the ban leads to a decrease of pluralism in the French society.<sup>155</sup> By situating itself as such, the Court is not refrained from being genuinely sympathetic about the French struggle in this case, which seeks to protect and ensure:

[A] principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic

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152. *Id.* (the Court also says “that remarks which constitute a general, vehement attack on a religious or ethnic group are incompatible with the values of tolerance, social peace and non-discrimination which underlie the Convention and do not fall within the right to freedom of expression that it protects.”).

153. *Id.* ¶ 151.

154. *Id.* However, neutralizing the ban as merely a legal project that is not singling out religious face-covering dresses in public *qua* religious is a gross denial of the parliamentary history behind this ban. The history attests to the fact the ban was certainly designed to stop Muslim women from wearing face-covering dresses. The arguments used by the French Minister of Justice defending this ban in the *Assemblée nationale*, leave no ambiguity about this. She argues the French style of Islam respects French laws and she refers to the role Imams will play in explaining the prohibition law to their worshippers and community. In addition, the many exceptions the law makes for other groups to cover their faces, either for religious or non-religious purposes, clearly reveals that the prohibition not only aimed to single out the *burqa* and *niqab* for a special ban, but also introduces a French Islam that is compatible with the ideal of “living together.” See *Assemblée nationale, supra* note 78, at 5417; see also Sofie G. Syed, *Liberte, Egalite, Vie Privee: The Implications of France’s Anti-Veil Laws for Privacy and Autonomy*, 40 HARV. WOMEN’S L.J. 301, 306 (2017); W. Cole Jr. Durham & Alexander Dushku, *Traditionalism, Secularism, and the Transformative Dimension of Religious Institutions*, 1993 BYU L. REV. 421, 450 (1993) (discussing how seemingly neutral laws affect religious minorities: “The major problem is that any neutral, generally applicable law, however insignificant and ill-conceived, can trump religious liberty. This places smaller religious groups that lack significant political influence at constant risk of having their religious freedom rights violated by an intolerant or inadvertently insensitive majority.”). Cf. R. J. Delahunty, *Does Animal Welfare Trump Religious Liberty? The Danish Ban on Kosher and Halal Butchering*, 16 SAN DIEGO INT’L L.J. 341 (2015).

155. *S.A.S. v. France* ¶ 149.



society . . . It can thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.<sup>156</sup>

Against this backdrop, the Court refrained from making a value judgment about how the French decided to establish and maintain their society. The criticism entailed that “such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question.”<sup>157</sup> Thus, in cases characterized by a high amount of sensitivity and polarization, the primacy lies with the national legislator. This means France has a broad margin of appreciation to decide upon the admissibility of face-covering dresses in public, in light of the “living together” ideal that it aims to ensure. To justify this wide margin, the Court referred to the lack of consensus amongst its member states with regard to the legality of face-covering veils.<sup>158</sup>

The Court reasoned that given the broad margin of appreciation France has in this case, the interference on religious freedom caused by the prohibition law, pursues a legitimate aim.<sup>159</sup> This legitimate aim ensures “living together” as part of protecting the rights and freedoms of others. This legitimate limitation is, according to the Court, necessary in a democratic society.<sup>160</sup> Therefore, there was no violation of religious freedom or any other right.<sup>161</sup> This way of reasoning revealed that the margin of appreciation doctrine is very sensitive toward reinforcing majoritarianism that effectively advances a particular political agenda.<sup>162</sup>

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156. *Id.* ¶ 154.

157. *Id.*

158. *Id.* ¶ 156.

159. *Id.* ¶ 157.

160. *Id.* ¶ 158.

161. *Id.* ¶¶ 156-159.

162. For example, the Court held that it needs to be restrained in opining about the lawfulness of “matters of general policy, on which opinions within a democratic society may reasonably differ widely.” In such cases, the Court says, “the role of the domestic policy-maker should be given special weight.” *See id.* ¶ 154. This facially neutral consideration is problematic for many reasons. But most importantly, it is problematic because the Court neglects its main task: giving protection to subordinated and marginalized people who seek protection under the law. Drawing on technical reasoning that gives majorities a wide margin of discretion effectively

*B. “Majoritarian-proof” Making of Diversity*

How can we understand the “abrupt” endorsement of “living together” in *S.A.S.*?<sup>163</sup> The adoption of this novel legitimate limitation ground on religious freedom reveals the use of a majoritarian lens and language to eventually decide the admissibility of contentious and norm deviant practices of minorities.<sup>164</sup> This approach immediately implicates that majoritarian ideas about the acceptability of contentious religious manifestations, such as wearing face-covering veils in public, matter very much in the justification of imposed restrictions upon “unwelcome” practices of religious groups. This reinforces and legitimizes the search, construction and maintenance of a collective cultural identity.<sup>165</sup> In other words, pursing and developing a shared narrative about the roots and character of the society, either secular or Judeo-Christian, results in “majoritarianism.”<sup>166</sup> This majoritarian narrative aims to protect the native “national” identity that tells us more about “who we are.” The construction of this “common background”

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advances their political agenda. *See also* *Trump v. Hawaii* 138 S. Ct. 2448 (2018) (Sotomayor, J., dissenting) (rightly pointing out that the judiciary must correct political branches of power when they obviously neglect constitutional rights).

163. *Cf.* Kristin Henrard, *Exploring the Potential (Contribution) of Multi-Disciplinary Legal Research for the Analysis of Minorities’ Rights*, 8 ERASMUS L. REV. 111, 120 (2015) (criticizing the way the Court has assessed the different interests in *S.A.S.*, speaking of a poorly motivated decision).

164. LABORDE, *supra* note 39, at 33 (speaks about the decisiveness of majorities sensitivities for the acceptability of minorities’ practices); Joppke, *supra* note 23, at 95-99 (discussing the preference for the preserve of the majoritarian practices in the case law of the ECtHR); Saba Mahmood, *Religious Reason and Secular Affect: An Incommensurable Divide?*, in TALAL ASAD ET AL. (EDS.), *IS CRITIQUE SECULAR? BLASPHEMY, INJURY, AND FREE SPEECH* 79 (2009) (discussing how “majoritarian cultural sensibilities” challenge the beliefs and practices of Muslim minorities across Europe).

165. Trotter, *supra* note 61, at 169.

166. *Cf.* Ratna Kapur, *The Ayodhya Case: Hindu Majoritarianism and the Right to Religious Liberty*, 29 MD. J. INT’L L. 305, 307 (2014) (discussing how a local Indian court’s judgment has contributed to the establishment of “Hindu Majoritarianism,” affecting the rights of the Muslim minority). *Cf. also* Loren E. Mulraine, *Religious Freedom: The Original Civil Liberty*, 61 HOWARD L.J. 147, 149 (2017) (defending religious liberty and warning against the rise of nationalism that threatens this fundamental liberty). *See also* Bridgette Dunlap, *Protecting the Space to Be Unveiled: Why France’s Full Veil Ban Does Not Violate the European Convention on Human Rights*, 35 FORDHAM INT’L L.J. 968 (2012).

leads to the immediate accusation of “disloyalty” for those who do not share the majoritarian narrative, or who cannot comply with majoritarian expectations about how one should live a life.<sup>167</sup> Hence, reinforcing majoritarianism advances ethnocentrism. This shift reduces the free exercise of fundamental rights for minorities who do not fit the perfect majoritarian picture.<sup>168</sup>

A timely example of the endorsement and reinforcement of majoritarianism is the Court’s ruling in *S.A.S.*, which uniquely justifies its legitimate limitation ground against religious freedom in the pursuit of “living together.”<sup>169</sup> This expansion of the limitation grounds is

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167. Indeed, the dominant idea suggests: who can be against the dominant narrative that tells us more about “who we are”? Cf. Beydoun, *supra* note 10, at 1764 (discussing how some have labeled U.S. Muslims as disloyal in the post-9/11 terrorist attacks era); Sahar F. Aziz, *Coercive Assimilationism: The Perils of Muslim Women’s Identity Performance in the Workplace*, 20 MICH. J. RACE & L. 1, 39 (2014) (elaborating on how Muslim women in the U.S. have been accused of “disloyalty” because of their extant Islamic appearance, such as wearing headscarves); David Smith, *Presumed Suspect: Post-9/11 Intelligence Gathering, Race, and the First Amendment*, 11 UCLA J. ISLAMIC & NEAR E. L. 85, 120 (2012) (describing the logic used by authorities that result in considering Muslims as “disloyal”); Nagwa Ibrahim, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E. L. 121, 142 (2008) (arguing how the “racialization” of Muslims as disloyal citizens have created “a new zone of lawlessness where they are neither citizen nor alien, but rather belong to [the] inherently evil world called “Islam.””). See also Nehal Bhuta, *Two Concepts of Religious Freedom in the European Court of Human Rights*, 113 S. ATLANTIC Q. 9, 25 (2014) (discussing ECtHR case law, framing Islamic headscarves as incompatible with democratic values).

168. See generally Wahedi, *supra* note 45; LABORDE, *supra* note 39; Joppke, *supra* note 23; Kapur, *supra* note 166; Mahmood, *supra* note 164 (sharing the point of view that using majoritarian standards in the legal assessment of minority practices results in an asymmetrical toleration regime: merciful for the majority and stingy in granting exemptions to religious minorities).

169. However, the outcome of the case is *not* surprising nor unique. It was even predictable as it fits a notorious line of jurisprudence that has been set out by the ECtHR, which is not merciful but stingy toward the habits and beliefs of the Muslim minority in Europe. See LABORDE, *supra* note 39, at 33 (“The European Court of Human Rights freedom of religion jurisprudence has notoriously been lenient toward practices of Christian establishment and overtly intolerant toward the presence of Islam in the public sphere.”); see generally Keturah A. Dunner, *Addressing Religious Intolerance in Europe: The Limited Application of Article 9 of the European Convention of Human Rights and Fundamental Freedoms*, 30 CAL. W. INT’L L.J. 117 (1999). In other words, *S.A.S.* fits the overall Islamophobic case law of the ECtHR, which is part of an Islamophobic atmosphere that is currently dominating debates on

thought-provoking and prone to criticism.<sup>170</sup> What does the normative attitude of the Court in *S.A.S.* tell us about the role of religion in liberal political philosophy?<sup>171</sup>

### *1. The Prohibition Law and Majoritarianism*

Does the judgment reflect support for the French struggle of ensuring and reinforcing the minimum requirements of life in society thereby backing “living together” in a French style?<sup>172</sup> In addition, does

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migration and the place of Islam in Western democracies. See Wahedi, *supra* note 22 (describing Islamophobia merely as the fear for the Islam and Muslims and providing some recent examples of this tendency); see generally MARTHA C. NUSSBAUM, *THE NEW RELIGIOUS INTOLERANCE: OVERCOMING THE POLITICS OF FEAR IN AN ANXIOUS AGE* (2012) (discussing the contemporary fear toward religious minorities, particularly the Muslim minority, in the Western world); Martha C. Nussbaum, *In Defense of Universal Values*, 36 *IDAHO L. REV.* 379 (2000).

170. The Court’s expansion of the legitimate limitation grounds is one of the most prominent points of criticisms toward the judgment in *S.A.S.* Cf. Brett G. Scharffs, *Islam and Religious Freedom: The Experience of Religious Majorities and Minorities*, 93 *NOTRE DAME L. REV. ONLINE* 78, 96 (2018) (saying that the justification of the ban on grounds of “living together” has been criticized as expansion of the legitimate limitation grounds).

171. The central question of this liberal paradigm is: what role does religion play for the purposes of religious accommodation and justification of public policies? See Wahedi, *supra* note 45 (claiming that religion is not a unique protection-worthy category *qua* religion within the paradigm of liberal political philosophy); LABORDE, *supra* note 39 (discussing the emphasis on egalitarianism in contemporary liberal theories of religious freedom and calling upon legal philosophers to think about religion as an interpretive concept); LABORDE & BARDON, *supra* note 39, at 1-5 (identifying four types of debates concerning the question of religion in liberal political philosophy. First, the debate concerning the specialness of religion for legal purposes. Second, the religion neutrality debate. Third, the question of religious accommodation. Fourth, the debate on the relationship between religion and comparable, though non-sectarian categories, such as conscience and identity); Carlo Invernizzi Accetti, *Religious Truth and Democratic Freedom*, in *RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY* 293-94 (Jean Louise Cohen & Cécile Laborde eds., 2016) (criticizing and providing an explanation for why within the paradigm of liberal political philosophy religious arguments are systematically labelled as inadmissible or reformulated in neutral terms).

172. Thus, does the *S.A.S.* judgment strengthen “forced assimilation” of French citizens who do not have a “native” French background, through allowing mechanisms that encourage minorities to adopt the majoritarian French lifestyle? See Syed, *supra* note 154, at 303 (qualifying the prohibition law as “assimilationist”); see

this jurisprudential expansion force minorities to follow the majoritarian choice of society,<sup>173</sup> providing little room for the habits, traditions, and ideas that diverge from this majoritarian norm?<sup>174</sup> In sum, how does the Court's judgment in *S.A.S.* fit the tendency of reinforcing majoritarianism and what does this mean for diversity and free exercise of religion?<sup>175</sup> To answer this question, we need to clarify which majoritarian ideas the Court has embraced and reinforced. The search for this answer helps us in two ways. First, it enables us to develop a theoretical framework we can use to embed the Court's approach. Second, it helps us to map the implications of the endorsement of majoritarianism for diversity and the free exercise of religion.<sup>176</sup> To conceptualize the Court's decision in *S.A.S.* we need to focus on the arguments used by the judges to justify the expansion of the limitation grounds with "living together," resulting in the justification of the imposed ban on wearing face-covering dresses in public.

Although, the Court's reasoning is meandering in this respect and often very contradictory, the overall outcome of this case affirms the large body of criticism that accuses the Court of being "overtly intolerant toward the presence of Islam in the public sphere."<sup>177</sup> This

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*also* Yusuf, *supra* note 69, at 284 (claiming that *S.A.S.* reinforces policies that are meant to assimilate minorities).

173. *S.A.S. v. France* ¶¶ 153-154 (the question of having or not a ban on wearing face-covering dresses in public concerns a "choice of society." The Court says in this respect that it "has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question.")

174. See LARBODE, *supra* note 39, at 33; Daly, *supra* note 27, at 165 (criticizing the use of majoritarian standards as yardstick in assessing the admissibility of minority practices).

175. Cf. Trotter, *supra* note 61, at 169 (warning for the shift toward a collective culture that is little merciful toward the religious demands of minorities, analyzing the post-"living together" judgments).

176. See Kapur, *supra* note 166, at 307.

177. LABORDE, *supra* note 39, at 33; Bhuta, *supra* note 167, at 26 (arguing that the ECtHR provides more room for majoritarian practices, while it adopts a militant secularist approach in assessing the legality of minority practices—in particular with regard to headscarves—resulting in the "equation of Islamic religious practices with intolerance, discrimination, and inequality," which obviously do not deserve protection under the Convention). See generally Wahedi, *supra* note 45; Joppke, *supra* note 23.

theoretical critique provides a fruitful insight in the general attitude of the Court toward contentious religious practices of a non-native minority. Therefore, this critique also helps to conceptualize the Court's decision in *S.A.S.*—paving the way toward conceptualizing the Court's approach toward diversity.

This part argues that justifying far-reaching restrictions upon religious freedom with an appeal on “living together” aims to make diversity, as a concept, majoritarian-proof. That is to say: what is considered protection-worthy under “diversity” depends on majoritarian sensitivities, standards, and ideas about how people in a society should behave and live.<sup>178</sup>

Making diversity majoritarian-proof is meant to pass hard cases regarding the legality of contentious practices through the skeptical and critical lens of the majority, which aims to promote its own narrative. This results in an asymmetrical toleration regime: protective toward the rights, habits, and beliefs of the “native” majority, but intolerant, reactionary, and aggressive toward the exemption claims of “non-native” minorities, such as Muslims.<sup>179</sup> What evidence do we have to

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178. See Mahmood, *supra* note 164, at 68.

179. See generally Wahedi, *supra* note 22. See Mahmood, *supra* note 164 at 86 (referring to Peter G. Danchin and discussing the criticism that qualifies the ECtHR attitude as “hypocritical,” allegedly protecting the Christian majority, and being intolerant toward the Muslim minority); Peter G. Danchin, *Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law*, 49 HARV. INT'L L.J. 249, at 275 (2008) (referring to critics of the ECtHR case law and concluding that “there appears to be a bias in the jurisprudence of the Court under article 9 toward protecting traditional and established religions and a corresponding insensitivity toward the rights of minority, nontraditional, or unpopular religious groups.”); see also Samuel Moyn, *Religious Freedom and the Fate of Secularism*, in RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY 27 (Jean Louise Cohen & Cécile Laborde eds., 2016) (asking rhetorically with respect to the systematically different legal treatment of Islamic cases before the ECtHR: “Do the cases . . . reflect a Christian Islamophobia in the principled garb of secularism?”); Bhuta, *supra* note 167, at 26 (criticizing the double standard that is seemingly used by the ECtHR to assess the admissibility of the manifestations of Muslims and Christians. “When it comes to Christian religious values, their potential inconsistency with democracy, equality, and tolerance is never in doubt, revealing sharply the degree to which this line of cases rests not on a thoroughgoing rationalist secularism but on a political theology of Christian democracy in which the identity of democratic values with an imagined Christian civilizational tradition is unquestioned.”). For a similar argument raised in the United States, see Robert L. McFarland, *Are Religious Arbitration Panels Incompatible with Law: Examining Overlapping Jurisdictions in Private Law*, 4

claim that the Court has interpreted the limitation grounds upon religious freedom in a way that makes diversity ultimately “majoritarian proof?”

For the answer to this question we need to briefly recall the objectives of the French prohibition law. This discursive approach helps us see how the Court’s endorsement of “living together” through an extensive interpretation of the legitimate limitation ground that attempts to protect the rights and freedoms of others has actually resulted in the reinforcement of majoritarianism.<sup>180</sup> In other words, attempting to protect the rights and freedoms of others is making diversity majoritarian-proof. The historical background of the prohibition law reveals that the ban has been considered necessary to: protect French secularism, rescue women who are victims of gender-inequality, and reaffirm fraternalism; as the full-face veil constitutes a breach of the French style of “living together” in public.<sup>181</sup> In short, the veil has been considered a sectarian “rejection of the values of the Republic,” which makes social interaction impossible.<sup>182</sup>

The French authorities defended the limitation this law posed upon religious freedom as necessary for national security, and defending the rights and freedoms of others, which should guarantee a minimum amount of respect for the values of an open and democratic society.<sup>183</sup> The majoritarian argument suggests that face-covering veils do not belong to the “real” France, as these pieces of clothing make open communication impossible. The “true” Frenchman respects equality, human dignity, and is willing to interact socially in public.<sup>184</sup> The veil allegedly contradicts this majoritarian tradition.

However, the Court convincingly debunked the national security arguments,<sup>185</sup> and most of the arguments relating to the protection of the rights and freedoms of others, such as the gender-equality

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FAULKNER L. REV. 367, 371 (2013) (criticizing the stinginess of those who defend religious arbitration, but do not want to extend that right to Muslims).

180. For a comparable method applied to reach the same conclusion, compare Kapur, *supra* note 166, at 307.

181. S.A.S. v. France ¶¶ 17; 24-25.

182. *Id.* ¶ 25.

183. *Id.* ¶ 82.

184. *Cf. id.* ¶ 25.

185. *Id.* ¶ 139.

argument<sup>186</sup> and the human dignity argument.<sup>187</sup> Nevertheless, the Court interpreted the protection argument to justify the imposition of far reaching restrictions upon the free exercise of religious freedom with an appeal on ensuring the French style of “living together.”<sup>188</sup> At first sight, this extensive interpretation of the Court is not only very remarkable but also very problematic because it reinforces majoritarianism and establishes ethnocentrism.

The Court’s endorsement of “living together” is *only* remarkable in light of the Court’s arguments discussing the legitimacy of the ban’s aims and its necessity in a democratic society. As such, the Court has countlessly reaffirmed the importance and the value of pluralism and tolerance in democratic societies that are seemingly endangered by the prohibition law.<sup>189</sup> The Court also shared its concerns of animosity toward religious minorities at different points and called upon all parties involved to look for the dialogue instead of clashes and confrontation.<sup>190</sup> Thus, it is hard to believe the same Court has developed an argumentation pattern that contradicts the emphasis on tolerance, pluralism, and diversity. In fact, the Court’s reasoning itself is intolerant and disrespectful toward “the other.”

## *2. The Reconciliation of Diversity with Majoritarian Sensitivities*

The Court’s argument, as a whole, is contradictory. On the one hand, it emphasizes pluralism, broadmindedness, and the ability to develop unique identities. On the other hand, it shows understanding for “an established consensus” about public performance.<sup>191</sup> This contradictory way of reasoning can only be understood against the backdrop of a decisive and proven formula insinuated between the Court’s reasoning in *S.A.S.* The judges reiterate that: “[in] democratic societies, in which several religions coexist within one and the same population, it may be necessary to place limitations on freedom to

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186. *Id.* ¶ 118.

187. *Id.* ¶ 120.

188. *Id.* ¶¶ 142.

189. *Id.* ¶ 128.

190. *Id.* ¶¶ 128; 149; 152.

191. *Id.* ¶ 122.



manifest one's religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."<sup>192</sup>

This reconciliation strategy that aims to protect the rights and freedoms of others, generally the majority, has proven to be a very effective formula in finding justifications for far-reaching restrictions upon free exercise of religion. As such, in *Dahlab v. Switzerland* ("*Dahlab*"), although the Court declared the applicant's complaints about violating her right to manifest her religion inadmissible, it accepted the idea that wearing headscarves is problematic because this practice:

[A]ppears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.<sup>193</sup>

With reference to this *Dahlab* reconciliation formula, the Court in *Leyla Şahin v. Turkey* ("*Şahin*") again draws on prejudiced and hostile arguments to justify the Turkish ban on wearing religious symbols at the university.<sup>194</sup> While this ban was still enforced, the Court argued that in such places:

[W]here the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.<sup>195</sup>

The Court used a very similar argument in its merciless judgments in *Dahlab* and *Şahin* to help reconstruct the Court's logic in *S.A.S.*,

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192. *Id.* ¶ 126.

193. *Dahlab v. Switzerland*, ECtHR at 13 (2001).

194. *Leyla Şahin v. Turkey*, App. No. 44774/98, Eur. Ct. H.R. ¶¶ 116; 111 (2005) (addressing the reconciliation formula of *Dahlab*).

195. *Id.*

resulting in the endorsement of “living together” as a legitimate limitation ground against the free exercise of religion. The Court stated that

[it] can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question.<sup>196</sup>

Reconciling diversity questions—dealing with inclusiveness—with majoritarian sensitivities relating to integration and assimilation of minority groups is not helpful “to hold the coordinate branches to account when they defy our most sacred legal commitments.”<sup>197</sup> Furthermore, as these cases have revealed, reconciling diversity with majoritarian sensitives equates to “blindly accepting the Government’s misguided invitation to sanction [discriminatory policies] motivated by animosity toward a disfavored group, all in the name of a superficial claim of [for example] national security, gender-equality or living together.”<sup>198</sup>

### 3. *The Reinforcement of Majoritarianism*

The Court in *S.A.S. v. France* accepted that wearing full face-covering veils is a breach of the right to live together with others, which “under certain conditions,” can be related to the limitation ground that aims to protect the rights and freedoms of others.<sup>199</sup> Thus, the Court found that in this case the veil is the trouble maker, as it does not fit a protection-worthy “established consensus” about how one should dress in public. The Court reaffirmed the reconciliation formula of *Dahlab* through *Sahin*,<sup>200</sup> and ruled that because the French aim is to ensure “living together” through defending and protecting “a principle of interaction,” it is not for an international Court to give a value judgment

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196. *S.A.S. v. France* ¶ 122.

197. *Trump v. Hawaii*, 138 S. Ct. at 2448 (Sotomayor, J., dissenting).

198. *Id.*

199. *S.A.S. v. France* ¶ 122.

200. *Id.* ¶ 126.

about the “choice of society,” which is the exclusive right of French citizens.<sup>201</sup> The Court uses this reasoning along with the fact that European states are very much divided on the legality of wearing face-covering veils in public to provide France with a wide margin of appreciation.<sup>202</sup> However, relating the French wide margin of appreciation to the legality of face-covering dresses in other European states, does little to hide the reconciliation strategy that is clearly present in this case. The application of this strategy results in a majoritarian-proof version of diversity.<sup>203</sup>

In *S.A.S.*, the majoritarian concern was the incompatibility of the *burqa* and *niqab* in public with the French lifestyle, or the French way of “living together,” which allegedly prescribes an “open visor.”<sup>204</sup> The Court’s decision in *S.A.S.* reaffirms and declares the French “open visor” theory, a majoritarian narrative about “living together,” as a protection worthy category in law. This “living together” narrative could be invoked against the manners of minorities that counter and harm the majoritarian narrative about how people should behave in public.<sup>205</sup>

*S.A.S.* reinforces majoritarianism in a further way. The endorsement of “living together” promotes the majoritarian narrative, which prescribes the conditions under which one can be considered a

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201. *Id.* ¶¶ 153-154.

202. *Id.* ¶ 155.

203. *Id.* ¶ 128. It is very confusing to read what the Court says in *S.A.S.* about majoritarian desires in a democratic society: “democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position.” However, it seems that the Court has operated in another way.

204. The concern regarding “the public manners” is illustrated by the fact that an overwhelming majority of both chambers previously voted in favor of the prohibition law. See *Assemblée nationale*, *supra* note 78; *Sénat*, *supra* note 72; see also Ralf Michaels, *Banning Burqas: The Perspective of Postsecular Comparative Law*, 28 DUKE J. COMP. & INT’L L. 213, 238 (2018) (providing insights into the impossibility to reconcile the desire to wear face-covering veils in public with the French conception of “living together”).

205. Eva Brems, *S.A.S. v. France: A Reality Check*, 25 NOTTINGHAM L.J. 58, 70 (2016) (arguing that the Court’s reasoning in *S.A.S.* “legitimizes a majority banning minority expressions from the entire public sphere on the sole basis of an ideological position that is the expression of the majority’s culture.”). Cf. Daly, *supra* note 27, at 161 (arguing that the “living together” ideology burdens religious and ethnic minorities more than the established majority).

real French citizen. *S.A.S.* clearly shows that one of the crucial elements in this respect is *not only* the ability to socialize in public, but also showing the *willingness* to do that through an “open visor,” leaving little room for those who do not want to socialize publicly.<sup>206</sup>

### C. The “Sacrifice” of a Fundamental Right

*S.A.S.* reinforced majoritarianism through an extensive interpretation of the limitation grounds of religious freedom by prioritizing the “living together” narrative. Subsequently, the Court has moved away from its traditionally used “religious freedom” rationale,<sup>207</sup> by reconciling diversity questions with majoritarian sensitivities about the acceptability of non-majoritarian practices, such as wearing face-covering dresses in public. This approach ultimately favors “the cultural and religious beliefs of the majority population.”<sup>208</sup>

The downside of a majoritarian-proof-made-diversity is that non-native religions are “treated as a second-class religion not entitled to the same sort of consideration as the Christian faith.”<sup>209</sup> Within this framework, the crucifix is allowed for reasons of diversity, as it does not counter majoritarian concerns about tolerance or human dignity. The Islamic *hijab*, however, both headscarves and face-covering dresses, is not considered a primary matter of diversity—but rather a practice that threatens the majoritarian culture about gender equality,

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206. Cf. Jill Marshall, *S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities*, 15 HUM. RTS. L. REV. 377, 385 (2015) (criticizing the Court’s willingness to accept the French perception of “living together” that necessitates a ban on face-covering veils in public, and “effectively bulldozes a right to personal identity unless that identity is acceptable and permissible in the eyes of the majority.”).

207. The religious freedom rationale considers religious freedom a right that promotes pluralism, while enabling human beings to develop unique identities and live in accordance with their own conception of life. See Trispiotis, *supra* note 37, at 581 (referring to critics of *S.A.S.* accusing the Court of having favored majoritarian ideas at the expense of religious freedom).

208. Mahmood, *supra* note 164, at 86. See generally Samuel P. Kovach-Orr, *Banning the Burka: Indicative of a Legitimate Aim or a Thinly-Veiled Attempt to Legislate Religious and Cultural Intolerance*, 18 RUTGERS J. L. & RELIGION 89 (2016).

209. Moyn, *supra* note 179, at 29 (based on an analysis of the ECtHR case law).

human dignity, ethical integrity, and tolerance in general.<sup>210</sup> This reconciliation strategy does not rely “on a thoroughgoing rationalist secularism but on a political theology of Christian democracy, in which the identity of democratic values with an imagined Christian civilizational tradition is unquestioned.”<sup>211</sup> This has far-reaching consequences for religious liberty, however, as free exercise becomes dependent upon the sensitivities of the majority.

Therefore, does the reinforcement of majoritarianism result in the subordination of religious freedom to principles that are designed to promote the majoritarian narrative?<sup>212</sup> It does.<sup>213</sup> The reinforcement of the French style of “living together” grossly limits the way people develop their personal and unique identities. It also limits the opportunity to pursue a life in accordance with their own beliefs on how to present themselves in public.<sup>214</sup> In a sense, the Court’s judgment in *S.A.S.* has not only “sacrificed” the free exercise of a very important liberty,<sup>215</sup> but it has also provided lip service to a majoritarian political

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210. See Syed, *supra* note 154, at 308 (describing the French perception of the Islamic hijab as a symbol of “Muslim oppression from which Muslim women need deliverance at the hands of secular actors”); see also Bhuta, *supra* note 167, at 29 (“One of the fears concerning Dahlab’s headscarf was that it might invite curious questions from pupils leading to a discussion of her religious beliefs and, thereby, a risk of offense or coercion of children and their parents. The crucifix poses no such threat, and the possibility that it could stimulate a dialogue about religious beliefs is welcomed as conducive to tolerance.”)

211. Bhuta, *supra* note 167, at 26. See generally Joseph H. H. Weiler, *Freedom of Religion and Freedom from Religion: The European Model*, 65 ME. L. REV. 759 (2013).

212. Joint partly dissenting opinion of Judges Nussberger and Jäderblom in *S.A.S. v. France* ¶ 2 (arguing that “the opinion of the majority . . . sacrifices concrete individual rights guaranteed by the Convention to abstract principles.”).

213. Syed, *supra* note 154, at 314 (arguing that the French arguments in favor of the prohibition law have supported Islamophobia).

214. Cf. *S.A.S. v. France* ¶ 124 (the “freedom of thought, conscience and religion is . . . in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life . . .”).

215. Joint partly dissenting opinion of Judges Nussberger and Jäderblom in *S.A.S. v. France* ¶ 2.

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agenda.<sup>216</sup> This agenda has set out its minimum expectations of citizenship for its minorities in the receiving society.<sup>217</sup>

Through its interpretation of “living together,” the Court has advanced a political agenda regarding the role and the place of the Islam in liberal democracies.<sup>218</sup> This agenda reaffirms the majoritarian narrative that tells us who we are and what our binding characteristics are, not only historically, but also in terms of building a common future. In other words, this agenda reinforces a national and collective identity agenda.<sup>219</sup> Formulated in this way, the Court’s jurisprudence on the

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216. *Id.*

217. *Cf.* Kapur, *supra* note 166, at 311 (illustrating how the legal discourse in India reinforced a majoritarian political agenda). *See also* Michaels, *supra* note 204, at 238 (arguing that within the French context, the prohibition law should be understood as a matter of “a civil duty . . . . By requiring the Muslim woman to take off her face veil, the state creates a positive duty for her to express her belonging to the state.”); Stephane Mechoulan, *France Bans the Veil: What French Republicanism Has to Say about It*, 35 B.U. INT’L L.J. 223, 273 (2017); Daly, *supra* note 27, at 164 (arguing that the prohibition law can be considered a tool for the purpose of protecting a “republican *habitus*”); Trispiotis, *supra* note 37, at 591 (quoting Stephanie Berry who has argued that the “living together” argument is in favor of a “distinctly assimilationist agenda.”); Susan S. M. Edwards, *No Burqas We’re French: The Wide Margin of Appreciation and the ECtHR Burqa Ruling*, 26 DENNING L.J. 246, 258 (2014) (claiming that S.A.S. reinforces the French assimilation agenda).

218. Trispiotis, *supra* note 37, at 591 (quoting Eva Brems, who has suggested that the argument of “living together” in the context of face covering veils reflects “the fundamental unease of a large majority of people with the idea of an Islamic face veil, and the widespread feeling that this garment is undesirable in ‘our society.’”); Myriam Hunter-Henin, *Why the French Don’t Like the Burqa: Laïcité, National Identity and Religious Freedom*, 61 INT’L & COMP. L.Q. 613, 615 (2012) (arguing that the French ban on both wearing headscarves at school and face-covering veils in public are “legal expression of the French sensitivity to the presence of Islam in the public sphere.”).

219. Michaels, *supra* note 204, at 215; Trotter, *supra* note 61, at 169; Syed, *supra* note 154, at 322. A very recent example of adjusting to the dominant norms is present in *Osmanoğlu & Kocabaş v. Switzerland*. In this case, the ECtHR held that the Swiss authorities’ denial to exempt Muslim girls from taking part in mixed-school swimming does not violate the right to religious freedom. Here, the judges unanimously held that although denial of the exemption request interfered with religious freedom, this interference was justified in light of the promotion of pupils’ integration into Swiss society. *See Osmanoğlu & Kocabaş v. Switzerland*, App. No. 29086/12, Eur. Ct. H.R. (2017). In a similar case, a Muslim pupil had asked the Federal Constitutional Court of Germany, the Bundesverfassungsgericht (BVerfG), to review a decision of the Federal Administrative Court, the

lawfulness of laws that burden Muslim citizens, is difficult to reconcile with the notions of tolerance, equality, and respect.

The same is true for the European Parliament's recent recommendations that singled out Islamic institutions for a disfavored treatment *qua* Islam. With its proposal to shut down mosques that violate the EU's values and its call to develop education programs that can spread a "moderate" version of Islam, the Parliament reinforces majoritarianism and advances political Islamophobia that institutionalizes Islam and Muslim fear.<sup>220</sup> Like the ECtHR, the European Parliament has aimed to reconcile "Islam" with majoritarian sensitivities about terrorism, radicalization, and security matters in general. This resulted in the European Parliament drafting far-reaching proposals that ultimately treat the Islamic faith as a second-class religion—instead of a particular conception of life that helps human beings to flourish.

In sum, *S.A.S.* illustrates how the use of the "living together" argument has resulted in limiting the free exercise of religion *and* the reinforcement of a majoritarian political agenda suggesting how people should act in public. Additionally, EU Parliament's recommendations (relying on reconciliation strategy) will have serious consequences for

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Bundesverwaltungsgericht (BVerwG). The BVerwG had ruled that the school authorities' refusal to exempt applicant from joint swimming lessons did not violate the right to religious freedom. The BVerfG did not accept the complaint for adjudication, as the petitioner failed to explain convincingly why the *burkini* could not qualify as a religious alternative for other swimming clothes. See Bundesverfassungsgericht, BvR 3237/13, ¶ III.3.aa, Nov. 7, 2016 (Germ.); Sohail Wahedi, *BVerfG 3237/13*, 6 OXFORD J. L. & RELIGION 426 (2017) (on file with author). The problem with this way of reasoning is that the judge sits on the clergy. On this specific criticism, see Faizan Mustafa & Jagteshwar Singh Sohi, *Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy*, 2017 BYU L. REV. 915, 953 (2017) (on file with author) (critical of the way the Indian Supreme Court has introduced an "essentiality" test that aims to examine which practices do belong to a faith, "[elevating] the judiciary to the status of clergy.").

220. EUROPEAN PARLIAMENT, *supra* note 12, recommendation 15 ("Urges the Member States to encourage and tolerate only 'practices of Islam' that are in full accordance with EU values."); recommendation 17 ("invites the Commission and the Member States to develop and fund a network of European religious scholars that can spread - and testify to - practices of Islam that are compliant with EU values."); recommendation 20 ("Urges the Member States to close without delay mosques and places of worship and ban associations that do not adhere to EU values and incite to terrorist offences, hatred, discrimination or violence.").

equal treatment of the adherents of different religious groups. Therefore, the reconciliation strategy has given diversity a majoritarian content, fitting the sensitivities of the established majority and leaving little room for unpopular faiths, such as the Islam, and non-majoritarian religious manifestations, such as the full-face veil in public. Thus, such religious manifestations fail to satisfy the protection-worthy version of diversity that encompasses important liberal democratic values, like human dignity and gender equality.<sup>221</sup>

## II. ABSTRACTION FROM THE RELIGIOUS DIMENSION

The question is whether this majoritarian-proof-making approach to “diversity” is compatible with the egalitarian and non-sectarian understanding of religion and religious freedom. To answer this question, this part first outlines the broader context of *S.A.S.* and the EU Parliament’s recommendations, which concerns the question of religion in liberal political philosophy. Second, it develops a theoretical framework for religion and religious freedom within the paradigm of liberal political philosophy. Third, this theoretical framework will be used to reflect on the reconciliation of “diversity” with the dominant view regarding the desirability and legality of “contentious religious manifestations.” The next question asks: is the “reconciliation strategy” a paradigmatic expression of recent developments in legal theory and liberal political philosophy about the role of “religion” for the justification of religious accommodation and public decisions taken in law and politics?

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221. Michaels, *supra* note 204, at 227 (arguing that “regardless of whether the face veil is cultural or political or both, classifying it as nonreligious has an advantage: if the face veil is not religious, then the woman who wears it cannot invoke freedom of religion to do so. If she has been forced to wear it by family members, then the ban provides her with protection. If she has freely chosen to wear it . . . then this choice is inherently suspicious, because it shows that the woman is either against gender equality, or in favor of a politically suspicious movement.”). See also Siobhán O’Grady, *After refusing a handshake, a Muslim couple was denied Swiss citizenship*, WASH. POST (Aug. 18, 2018), [https://www.washingtonpost.com/world/2018/08/18/after-refusing-handshake-muslim-couple-was-denied-swiss-citizenship/?noredirect=on&utm\\_term=.74b13ae51014](https://www.washingtonpost.com/world/2018/08/18/after-refusing-handshake-muslim-couple-was-denied-swiss-citizenship/?noredirect=on&utm_term=.74b13ae51014) (reporting about the Swiss denial to grant a Muslim couple citizenship after they insisted in their rejection to shake hands with the opposite gender).



*A. Religion in the Paradigm of Liberal Political Philosophy*

The recurring conflict in liberal democracies between competing religious demands and established legal norms has resulted in a principled debate in legal theory and liberal political philosophy regarding the role of religion in law and politics.<sup>222</sup> Religious manifestations that compete with legal and majoritarian norms of liberal democracies have accelerated the need for clarification of the question: does religion *qua* religion deserve any special protection?<sup>223</sup> More specifically, should liberal democracies care about religion *qua* religion for the public justification of decisions taken in law and

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222. Cf. debates on the legality of Islamic veils in public, ritual circumcisions of children, ministerial exceptions, mixed school swimming cases and the religious slaughter cases. See Mechoulam, *supra* note 217 (contextualizing the French prohibition law); Trotter, *supra* note 61 (analyzing how the “living together” argument has played a role in a couple of recent judgments); Wahedi, *supra* note 54 (discussing the “double standards” argument in the debate on the legality of ritual circumcisions); Yasmine Ergas, *Regulating Religion Beyond Borders*, in RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY 66 (Jean Louise Cohen & Cécile Laborde eds., 2016) (discussing the legality of female circumcision from a law and religion perspective); see generally Jeremy A. Rovinsky, *The Cutting Edge: The Debate over Regulation of Ritual Slaughter in the Western World*, 45 CAL. W. INT’L L.J. 79 (2014) (discussing the legality of ritual slaughter in Western democracies).

223. See generally Kenneth Einar Himma, *An Unjust Dogma: Why a Special Right to Religion Wrongly Discriminates against Non-Religious Worldviews*, 54 SAN DIEGO L. REV. 217 (2017); Arif A. Jamal, *Considering Freedom of Religion in a Post-Secular Context: Hapless or Hopeful?* 6 OXFORD J. L. & RELIGION 433 (2017); Christopher C. Lund, *Religion is Special Enough*, 103 VA. L. REV. 481 (2017); Brett G. Scharffs, *Why Religious Freedom - Why the Religiously Committed, the Religiously Indifferent, and Those Hostile to Religion Should Care*, 2017 BYU L. REV. 957 (2017); NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE (2017); Tara Smith, *Religious Liberty or Religious License: Legal Schizophrenia and the Case against Exemptions*, 32 J.L. & POL. 43 (2016); LABORDE, *supra* note 39; SMITH, *supra* note 48; LEITER, *supra* note 56; DWORKIN, *supra* note 30; ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2013); MICAH SCHWARTZMAN, *What if Religion is Not Special?*, 79 U. CHI. L. REV. 1351 (2012); MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE (2008); Chad Flanders, *The Possibility of a Secular First Amendment*, 26 QLR 257 (2008); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007); James Nickel, *Who Needs Freedom of Religion?*, 76 U. COLO. L. REV. 941 (2005); WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM (2005). Cf. Steven P. Aggergaard, *The Question Speech on Private Campuses and the Answer Nobody Wants to Hear*, 44 MITCHELL HAMLINE L. REV. 629 (2018).

politics?<sup>224</sup> Hence, what do current debates in legal theory and liberal political philosophy tell us about the way modern liberal democracies interpret, value, protect, and deal with religious freedom? Is the outcome of *S.A.S.* compatible with the existing line of research within the liberal paradigm of law and religious scholarship? To answer all these questions, we need to develop a theoretical framework to help us conceptualize the possible liberal responses to the question whether religion *qua* religion deserves special protection.<sup>225</sup>

### *1. Liberal Theories of Religious Freedom*

The main distinction in law and religious scholarship on the role of religion for granting exemptions and justifying decisions in law lies between *liberal* and *sectarian* theories of religious freedom. As such, sectarian theories justify the special legal solicitude toward religion with an appeal to some values that are considered distinctly religious.<sup>226</sup>

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224. Schwartzman, *supra* note 38, at 15 (arguing the current debate in liberal political philosophy regarding the role of religion in law and politics consists of two more specific debates: (1) the role of religion for the purpose of state actions (public justification debate); and (2) its relevance for granting exemptions (the religious accommodation debate) to certain groups in society).

225. The main research method of this Part is a conceptual meta-analysis of positions defended in the “specialness-debate” of religion, with a particular focus on the liberal theories of religious freedom. To identify the binding characteristic of the normative positions, this article has developed a matrix of positions. This matrix focuses on the arguments developed to deal with the question whether religion *qua* religion needs special legal protection. An advantage of this method is that it helps to see what the advantages and disadvantages of a particular concept are. It is also helpful to see what the alternatives are. *See generally* Schwartzman, *supra* note 38, at 28 (explaining how building up a theory in a systematic way sharpens our mind to see the inconsistencies in the existing body of knowledge); W. COLE DURHAM, JR. & BRETT G. SCHARFFS, *LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES* 45 (2010) (on file with author) (providing a taxonomy of the various definitions of religion, as used in the case law or defended in the law and religion scholarship).

226. *See generally* Lund, *supra* note 223, at 490 (providing an overview of and discussing some of the religious arguments in favor of religious freedom); Cécile Laborde, *Religion in the Law: The Disaggregation Approach*, 34 *LAW & PHIL.* 581, 582 (2015) (explaining the distinction between liberal and sectarian theories of religious freedom and arguing that the transcendental value of religion does not justify religious freedom). For a sectarian justification of religious freedom *qua* religious, compare RAFAEL DOMINGO, *GOD AND THE SECULAR LEGAL SYSTEM* 79, 80-82

The paradigmatic distinction between sectarian and liberal theories of religious freedom is present within the paradigm of religion in liberal political philosophy.<sup>227</sup> There are also hybrid theories of religious freedom, using a mixture of liberal and sectarian arguments to justify religious freedom and the legality of certain religious manifestations.<sup>228</sup> This section focuses on the liberal theories of religious freedom that have put the question of religious accommodation under critical scrutiny, either by challenging or defending the special legal solicitude

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(2016) (considering the “protection of suprarationality” as the “ultimate justification” for protecting religion *qua* religion); Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1183 (2013); DAVID NOVAK, IN DEFENSE OF RELIGIOUS LIBERTY 116, 117 (2009) (using a transcendental argument to justify the special legal protection of religion); JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 57 (1996) (on file with author) (claiming that within the context of U.S. constitutional law, the “split-level character” could only be clarified in light of an exclusive “religious justification” of religious freedom); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 15 (1985) (arguing the liberal state is not able to ultimately exclude the possibility that religious claims might be true, which means that the transcendental authority of such claims has more value than the claims of the state). McConnell continued to defend this line in recent publications. See Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 786-89 (2013).

227. Cf. Paul B. Anderson, *Religious Liberty under Communism*, 6 J. CHURCH & ST. 169 (1964) (showing non-liberal, non-sectarian theories of religious freedom).

228. Cf. Donna E. Arzt, *Religious Freedom in a Religious State: The Case of Israel in Comparative Constitutional Perspective*, 9 WIS. INT’L L.J. 1 (1990) (comparing the Israeli approach to religious freedom). The hybrid approach to the justification of religious freedom should not be confused with quasi-liberal approaches to religious liberty, which favor the majoritarian religion or the religions of “recognized” minorities. Compare with the Constitution of the Islamic Republic of Iran that contains a sectarian explanation of “religious freedom.” Articles 12 and 13 of Iran’s Constitution exhaustively enumerate religions that are allowed to practice their faiths within the legal framework of the Islamic Republic. The “recognized” religions include Zoroastrianism, Judaism and Christianity. The Shia Jafari school of beliefs is the “eternally immutable” state’s religion. See QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] (1980) (Iran), <http://www.divan-edalat.ir/show.php?page=base>, (translation) (last visited Feb. 27, 2019). For a quasi-liberal approach to religious freedom, see the recent proposal of the Dutch SGP. This party has argued that the state should make a distinction between religions that have shaped the Dutch tradition (including Christianity and Judaism but excluding Islam), to protect the Judeo-Christian character of the Dutch culture and society. See SGP, *supra* note 30, at 3-4.

for religion.<sup>229</sup> Essential to the religious accommodation debate is for whom accommodations should be made for and for what kind of reasons?<sup>230</sup> These questions are used by legal theorists and liberal political philosophers to determine the normative tolerance and protection of religious beliefs and practices in liberal democracies.

In order to identify how the liberal paradigm of the law and religious scholarship has evolved, we need to categorize the type of arguments used within this paradigm. Categorizing this paradigm looks beyond the empirical argument that suggests religion *is special* because of religious freedom, accommodation through case law, and people's relationship with religion as a special experience that deserves special protection in law. Rather, this categorization draws on the body of normative arguments that posit how the law in liberal democracies *should* deal with the category of religion.<sup>231</sup> Generally, liberal theories of religious freedom contain "strong rejectionist" and "soft rejectionist" responses to the question of whether religion *should* be treated special in law. The strong rejectionist responses claim that there is nothing special about religion that makes it a protection worthy category in law. Therefore, religion does not deserve any special protection *qua*

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229. See generally LABORDE & BARDON, *supra* note 39.

230. These two questions are helpful to deal in a more systematic way with the controversies that arise out of free exercise. Cf. LEITER, *supra* note 56, at 3 (Brian Leiter compares an orthodox Sikh boy to a non-Sikh boy from a traditional family. Both boys want to wear a dagger—the orthodox Sikh boy for religious purposes (he wants to wear a *kirpan*, a religious object made of metal that resembles a dagger) and the other for reasons of tradition. This case questions what the justification would be to treat the two differently. That is to say, Leiter asks, "[w]hy the state should have to tolerate exemptions from generally applicable laws when they conflict with religious obligations but not with any other equally serious obligations of conscience.").

231. Basically, the conceptual question of these liberal theories of religious freedom is: *should* the law grant religion *qua* religion special protection, or rather, *should* the law treat religion special because of the protection-worthy liberal substitutes of religion. For the development of this particular argument, I have benefited tremendously from the feedback of professor Benjamin Berger on the theory of abstraction during my stay as visiting researcher at Osgoode Hall Law School in Toronto (Apr. 2017). For a similar method that aims to challenge the empirical argument, see generally LEITER, *supra* note 56; DWORKIN, *supra* note 30; Schwartzman, *supra* note 223; Perry, *supra* note 64; Eisgruber & Sager, *supra* note 20 (questioning why the law protects religion specially).

religion.<sup>232</sup> The softer responses cover the body of arguments positing that the category of religion is not special *as such* but the liberal substitutes of religion are special. Therefore, religion is *only* special by virtue of abstraction from the religious dimension.

## 2. *A Taxonomy of the Liberal Theories of Religious Freedom*

This section develops a conceptual framework of normative approaches to religion in law. This framework classifies the liberal positions into five categories. First, principled *rejection* of arguments that justify the special legal protection of religion with an appeal to values that are presented as distinctly religious. Rejectionist arguments reject qualifying specific beliefs or manifestations as religious. Second, *substitution* consists of arguments explaining why religion is a subset of a broader human faculty, namely conscience. Substitution also covers arguments that say religious freedom has no distinct constitutional value, like other liberties, such as the freedom of expression and association. These in combination with the right to non-discrimination, *in practice* could guarantee free exercise of religion. Third, *generalization* opposes a sectarian interpretation of religion and religious freedom, arguing that religion stands for deep ethical commitments of human beings and that religious freedom is the general right that gives human beings access to ethical independence and moral freedom. Fourth, *equation*, which says that equality of treatment should be the norm when authorities are dealing with deep commitments of human beings who ask for exemptions from the application of general laws. Fifth, *representation*, which justifies the special legal protection of religion in light of values that are not necessarily religious in nature. Religion represents in this position certain values that let human beings flourish—this particular argument justifies the special legal protection of religion.<sup>233</sup>

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232. Basically, the position of Brian Leiter and Kenneth Einar Himma. See generally LEITER, *supra* note 56; Himma, *supra* note 223.

233. The focus is on the appropriate interpretation of “the notion of religion in law (regardless of whether the category of freedom of religion is upheld or not).” Laborde, *supra* note 226, at 594.

*a. Rejection*

The rejectionist position discards arguments that justify religious freedom with an appeal to values that are considered distinctly religious. This position consists of two broader categories: *principled* rejection and *non-principled* rejection. Non-principled rejection claims that the concept of religion does not apply to certain beliefs, traditions or manifestations.<sup>234</sup> Yet, non-principled rejection does not exclude the option to use the term “religion” to consider other manifestations as religious for reasons of consensus and tradition. Thus, it promotes the term “religion” for particular religions and excludes other religions as not falling under the specific definition of “religion.” The appropriate example is the rhetorical approach currently present in the political discourse, which views Islam not as a religion but as a totalitarian ideology with a closed internal system of rules that prescribe in detail how one should live his or her life. Against this backdrop, it has been argued practices and beliefs that are based on Islam should not have access to the privileges of religious freedom.<sup>235</sup> Principled rejection draws primarily on the idea that there are no principled reasons to tolerate religion *qua* religion within liberal democracies.<sup>236</sup>

*i. Principled Rejection*

The principled rejectionist rejects tolerating religion *qua* religion for principled reasons (i.e., reasons that find their origins in morality or epistemology). This position starts from the question of what toleration on principled grounds says about the justification of the special legal protection of religion *qua* religion. Thus, it questions whether the concept of toleration provides any room for arguments that justify religious toleration because of any specialness of religion (i.e., distinctly religious values). This sub-position defines pure toleration as

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234. See generally AMOS N. GUIORA, FREEDOM FROM RELIGION 19 (2009).

235. See generally Wahedi, *supra* note 45.

236. LEITER, *supra* note 56, at 7, 55, 67; see also Schwartzman, *supra* note 38, at 22; Cécile Laborde, *Conclusion: Is Religion Special?*, in RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY 423 (Jean Louise Cohen & Cécile Laborde eds., 2016); DWORKIN, *supra* note 30, at 111, 144; NUSSBAUM, *supra* note 223, at 164; Nickel, *supra* note 223, at 943; Eisgruber & Sager, *supra* note 20, at 1248; see generally SULLIVAN, *supra* note 223; Himma, *supra* note 223.

the situation in which the dominant group sees on moral, or epistemic grounds a reason to allow, or tolerate on such principled grounds, another group of citizens to continue with acts or manifestations that are considered objectionable by the dominant group. Principled rejection draws on this particular definition of toleration and concludes that the principle of toleration does not require special legal protection for religion *qua* religion.<sup>237</sup>

The principled rejectionist questions whether one can identify one or more principled reasons that could justify a toleration regime for religion *qua* religion. To answer this question, a distinction is made between two potentially distinctive characteristics of religion: “the categoricity of religious commands” and “insulation [of religious beliefs] from evidence” and reason.<sup>238</sup> This particular feature is closely related to the argument that religious beliefs might be distinctive due to their involvement in a “metaphysics of ultimate reality.”<sup>239</sup> According to this position, the moral reasons for toleration only justify the special legal protection of human conscience. This moral justification of liberty of conscience does not simultaneously single out religion and its categoricity of commands for special legal protection. Thus, no evidence could support the argument that people in the Rawlsian “original position” will opt for religious freedom next to equal liberty of conscience.<sup>240</sup> Hence, the emphasis on the need for liberty of conscience does not make a distinction between the backgrounds of conscientious commands—it does not single out religion for a special favored treatment.<sup>241</sup> Leiter explains this argument as follows:

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237. Toleration is usually justified on different types of moral and epistemic grounds. Brian Leiter concludes there is nothing special, in terms of morality or epistemology, to warrant toleration of religion *qua* religion. LEITER, *supra* note 56, at 7-13; see LORENZO ZUCCA, A SECULAR EUROPE. LAW AND RELIGION IN THE EUROPEAN CONSTITUTIONAL LANDSCAPE 8, n.17 (2012) (providing a broader definition of toleration).

238. LEITER, *supra* note 56, at 33-34.

239. *Id.* at 47. See also NUSSBAUM, *supra* note 223, at 168.

240. Rawlsian morality argues in favor of toleration stating that people in the original position, when they perform behind the “veil of ignorance,” will definitely accept some categorical demands, though these are not of a religious nature per se. In other words, this ground of toleration does not provide a principled argument to tolerate “religion *qua* religion.” See generally LEITER, *supra* note 56, at 55.

241. See Simon Căbulea May, *Exemptions for Conscience*, in RELIGION IN LIBERAL POLITICAL PHILOSOPHY 191 (Cécile Laborde & Aurélie Bardon eds., 2017)

Rawls repeatedly lumps religious and moral categoricity together, so that it is fair to say that the only thing individuals behind the veil of ignorance know is that they will accept some categorical demands, not they will accept distinctively religious ones, that is, ones whose grounding is a matter of faith.<sup>242</sup>

Similarly, the utilitarian moral arguments for toleration (which focus on the maximization of human well-being that, among others, depends on the ability of people to live by their conscience) do not prescribe special protection of religion. Therefore, toleration on moral grounds does not support the arguments that aim to single out religion as a matter of principled toleration.<sup>243</sup>

The other principled ground for toleration found in the epistemic arguments draws on an accepted toleration for knowledge expansion. Interestingly, knowledge expansion conflicts with religion's second potentially distinctive feature: insulation of religious beliefs from evidence and reason.<sup>244</sup> As Leiter argues, it is far from obvious "to think, after all, that tolerating the expression of beliefs that are insulated from evidence and reasons—that is, insulated from epistemically relevant considerations—will promote knowledge of the truth."<sup>245</sup> Although this argument does not address religious manifestations' effect on knowledge expansion, it is conceivable to say that principled rejection equally rejects arguments that aim to justify toleration of religious conduct, solely because of religion. Arguably, there is no reason to deny that both religious practices and beliefs are equally insulated from evidence.

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(arguing that accommodation of sincere conscientious objections to generally applicable laws face the same criticism of unfair treatment as religious accommodation does).

242. LEITER, *supra* note 56, at 55; see Andrew Koppelman, *A Rawlsian Defence of Special Treatment for Religion*, in RELIGION IN LIBERAL POLITICAL PHILOSOPHY 31 (Cécile Laborde & Aurélie Bardon eds., 2017) (presenting some Rawlsian arguments in defense of religious freedom).

243. LEITER, *supra* note 56, at 55, 61.

244. Leiter argues reliance on Mill's perspective on what is "true for the right reasons" will not make a strong case to tolerate religion *qua* religion for epistemic reasons; religious faith excludes the idea that there might be some uncovered truth. *Id.* at 58.

245. *Id.* at 55-56.



*ii. Non-Principled Rejection*

Non-principled rejection rejects the qualification of certain beliefs, speeches, or conducts as religious, and is mainly present in political and legal discourse. As such, one can refer to the political approach of the Dutch right-wing party, *Partij voor de Vrijheid* (the Party for Freedom), toward Islam. This political party has repeatedly argued that Islam is not a religion, but rather a totalitarian ideology that should not enjoy the privileges of religious freedom. Consequently, it has proposed an immigration ban from Islamic countries, legal prohibition of the Koran, and closure of all mosques and Islamic schools in the Netherlands.<sup>246</sup> Non-principled rejection in legal discourse occurs when one asks for permission to perform a practice that is portrayed as religious but apparently prohibited by authorities. In some of the cases dealing with the legal admissibility of norm-deviant practices, the court or other parties involved refuse to admit that the practice at stake has a potentially religious dimension.<sup>247</sup>

Similarly, in the legal debate related to the Travel Ban of President Trump, some scholars have explicitly argued that this ban has nothing to do with religion, purporting that it is related to security concerns.<sup>248</sup> Most notably, one of the legal advisors to President Trump revealed the President-elect asked him about how he could realize his promised

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246. *Tweede Kamer der Staten-Generaal [The House of Representatives], Aanhangsel Handelingen II [Parliamentary Proceedings II]*, 2016/2017, at 2-6-61 and 2-6-62 (Neth.) (on file with author).

247. Compare with tax exemption litigations of the Scientology Church and the Church of Satan case: Hof. Den Haag 21 October 2015, ECLI:NL:GHDHA:2015:2875, ¶ 8.16 (Neth.) (holding that the activities of the Scientology Church—in particular, Auditing and Training—are commercial in nature and not religious, serving primarily private interests. Thus, the Church is ineligible for tax exemptions). The case of Saint-Walburga, which focused on sisters forming the Church of Satan, turned on the question whether a brothel could be considered a religious institution. HR 31 October 1986, ECLI:NL:HR:1986:AC9553 (Neth.); *Cf. Religion Based on Sex Gets a Judicial Review*, N.Y. TIMES, <http://www.nytimes.com/1990/05/02/us/religion-based-on-sex-gets-a-judicial-review.html> (discussing a case in which a couple charged for pimping and prostitution claimed that the activities that took place in the Church were part of their sacred religion).

248. See generally Michael B. Mukasey, *Judicial Independence: The Fortress Threatened from Within*, 47 U. MEM. L. REV. 1223 (2017) (defending the ban as a matter of national security) (on file with author).

Muslim travel ban in a legal way.<sup>249</sup> The advisory team found “danger” was an appropriate substitute for those coming from Muslim majority countries—the category of people, the President promised he would single out for special travel restrictions.<sup>250</sup> The shift from focusing on security matters and rejecting the religious dimension in this context was “perfectly sensible, perfectly legal.”<sup>251</sup>

*b. Substitution*

The substitution position claims both religion and religious freedom have adequate substitutes.<sup>252</sup> Like the rejectionist position, substitution consists of both principled substitution and non-principled substitution.<sup>253</sup> Principled substitution draws on arguments that view religion as a subset of a particular faculty that is worthy of special legal protection. This protection-worthy faculty concerns human conscience.<sup>254</sup> The argument is that free exercise of religion and the admissibility of religious claims for exemptions could be adequately ensured through freedom of conscience.<sup>255</sup> Non-principled substitution

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249. Jim Dwyer, *First Came Giuliani's Input on the Immigration Order. Now There's the Court Test*, N.Y. TIMES (Feb. 9, 2017), <https://www.nytimes.com/2017/02/09/nyregion/rudolph-giuliani-donald-trump-travel-ban.html>.

250. *See id.*

251. *Id.*

252. *See generally* LABORDE, *supra* note 39; Michah Schwartzman, *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085, 1099 (2014) (discussing the “substitution” position).

253. *See generally* NUSSBAUM, *supra* note 223 (providing a deeper philosophical account for the argument that religion has a substitute, like conscience); Nickel, *supra* note 223 (purporting that religious freedom can be replaced by other freedoms).

254. This article will not engage in the discussion about the different conceptions of conscience. Neither will it discuss the argument that there is a difference between human conscience and religious conscience. *See* Lund, *supra* note 223, at 503-04. For the argument that this article aims to develop, it is sufficient to indicate that some liberal theorists of religious freedom argue that religion and religious freedom have certain substitutes.

255. *See* JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* 89 (2011) (arguing that given “the context of contemporary societies marked by moral and religious diversity, it is not religious convictions in themselves that must enjoy a special status but rather, all core beliefs that allow individuals to

views basic liberties as being in practice enough to guarantee the free exercise of religion. Thus, as Nickel has rightly asked: “who needs freedom of religion,” when this right turns out to be superfluous?<sup>256</sup>

*i. Principled Substitution*

Principled substitution says that religion is a subset of a broader protection-worthy category: the conscience.<sup>257</sup> With reference to the work of Roger Williams, Nussbaum argues:

The faculty with which each person searches for the ultimate meaning of life is of intrinsic worth and value, and is worthy of respect whether the person is using it well or badly. The faculty is identified in part by what it does—it reasons, searches, and experiences emotions of longing connected to that search—and in part by its subject matter—it deals with ultimate questions, questions of ultimate meaning. It is the faculty, not its goal, that is the basis of political respect, and thus we can agree to respect the faculty without prejudicing the question whether there is a meaning to be found, or what it might be like. From the respect we have for the person’s conscience, that faculty of inquiring and searching, it follows that we ought to respect the space required by any activity that has the general shape of searching for the ultimate meaning of life, except when that search violates the right of others or comes up against some compelling state interest.<sup>258</sup>

According to Nussbaum, this way of reasoning helps us “make sense of our feeling that there really is something about religion or quasi-religion that calls for special protection and delicacy.”<sup>259</sup>

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structure their moral identity.”). *See also* LABORDE, *supra* note 39, at 66-67 (critical of the position defended by Jocelyn Maclure and Charles Taylor).

256. Nickel, *supra* note 223, at 943.

257. *See also* Koppelman, *supra* note 242, at 38 (rejecting the claim that religion is a subset of human conscience and arguing that the latter is at best a complement, not a substitute, for teleologically loaded terms such as religion).

258. NUSSBAUM, *supra* note 223, at 168-69.

259. *Id.* at 169 (arguing the search for meaningful answers to ultimate questions of life helps us to keep our special solicitude for religion, as a matter of respect for a broader human faculty, separated from “silly” faculties. That is to say, “faculties used by my car lover, who isn’t engaged in a search for meaning, or the person who feels

Specifically, this protection-worthy “something” is the human conscience, which is an inalienable dignity people possess, regardless of educational or socioeconomic background, health, religious belief, and more.<sup>260</sup> Thus, there is no principled reason to single out religion because it is religion. Rather, there is a principled argument to justify the special protection of a broad liberty of conscience that encompasses and protects the religious conscience as a matter of respect for human dignity.<sup>261</sup> Accordingly, religious claims for exemptions are sometimes granted “because they involve matters of conscience, not matters of religion.”<sup>262</sup>

*ii. Non-Principled Substitution*

Non-principled substitution seeks to invalidate the necessity of a separate right to religious freedom.<sup>263</sup> Specifically, existing freedoms of speech and association, and bans on discrimination and violence, render a separate right unnecessary.<sup>264</sup> In other words: freedom of religion has at least some very “adequate substitute[s].”<sup>265</sup> Arguments that support the replacement of religious freedom consider this right “dispensable,”<sup>266</sup> as other basic liberties ensure the free exercise of religion. The argument suggests religious manifestations are related to a broad range of areas, such as business, politics and association. Non-

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called to dress like a chicken when going to work, which is (probably) just too silly to count as a genuine search for meaning.”).

260. *Id.*

261. *Id.* at 164-74; *see also* NUSSBAUM, *supra* note 169, at 61-66; *see generally* LEITER, *supra* note 56 (discussing the line that liberty of conscience is an appropriate substitute for religious freedom). In the theoretical framework that Leiter uses to develop his argument, principled substitution arises out of what the liberal concept of toleration considers protection-worthy for principled reasons: equal liberty of conscience.

262. LEITER, *supra* note 56, at 64.

263. *See generally* Nickel, *supra* note 223.

264. *See generally* Nickel, *supra* note 223, for a further discussion of this position; *see also* Mark Tushnet, *Redundant of Free Exercise Clause?*, 33 LOY. U. CHI. L. J. 71, 73, 94 (2001). *See generally* Scott M. Noveck, *The Promise and Problems of Treating Religious Freedom as Freedom of Association*, 45 GONZ. L. REV. 745 (2009).

265. Tushnet, *supra* note 264, at 94.

266. Nickel, *supra* note 223, at 941.

principled substitution understands religious freedom in light of the argument “that the sorts of activities it involves are covered by the most important general liberties.”<sup>267</sup>

Furthermore, non-principled substitution expects religious freedom shares the same basis as other basic liberties. Thus, there is no reason to think religion is something unique that could justify the special legal solicitude toward religion *qua* religion. The expectation is that understanding the need for the free exercise of religion in light of existing basic liberties may eliminate the idea that religious beliefs are privileged in society. Therefore, the granted exemptions are the outcome of a proper application of basic liberties and not derived from the presumed distinct value of religious beliefs. Lastly, the emphasis on the protection of religious beliefs through the application of basic liberties ensures people have a real choice to engage in or disapprove certain convictions.<sup>268</sup>

### *c. Generalization*

Generalization advocates a broader, ecumenical and non-sectarian definition of religion and religious freedom. Against this normative backdrop, generalization defends the position that religious freedom should not be considered a special right, which protects only a selected group of people—the believers.<sup>269</sup> Rather, religious freedom should be a general right to ethical and moral independence.<sup>270</sup> This position is ecumenical because it looks beyond the sectarian theistic accounts of religion. It is also non-sectarian because it does not bifurcate theistic and non-theistic convictions about the good.<sup>271</sup> Generalization looks beyond the narrow, theistic conception of “religion” and argues that both God-believers and non-believers may be considered “religious,” as both could have the same convictions about fundamental questions.<sup>272</sup> In examining the deep commitment that religious and

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267. *Id.* at 950.

268. *Id.* at 943-50.

269. DWORKIN, *supra* note 30, at 132 (discussing religious freedom as a general right to ethical independence); *see also* Perry, *supra* note 64, at 996 (stating how broadening religious freedom will encompass moral freedom).

270. *Id.*

271. *Id.*

272. DWORKIN, *supra* note 30, at 5.

non-religious people share, the generalist position sees an “intrinsic and inescapable ethical responsibility” to succeed in life.<sup>273</sup> Accordingly, this position says religious freedom should be the general right to ethical independence that opens the doors to moral freedom.<sup>274</sup>

Under the generalist framework, religious freedom is the right that gives humans full access to ethical independence.<sup>275</sup> Thus, the generalist account of religious freedom emphasizes the opportunities for individuals to make independent life decisions based on their deeply held ethical commitments. This approach apparently extends the definition of religion.<sup>276</sup> The main justification for this extension is rooted in the idea that we need a deeper, non-sectarian understanding of religious freedom because the free exercise of religion cannot be protected on sectarian grounds for distinctly religious reasons.<sup>277</sup> The leading normative argument behind generalization’s core tenets—religious beliefs as deep ethical commitments and religious freedom as a general right to moral and ethical independence—is the assumption that public authorities are not apt to judge what should count as moral or religious truth.<sup>278</sup>

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273. *Id.* at 114. See also James McBride, *Paul Tillich and the Supreme Court: Tillich’s Ultimate Concern as a Standard in Judicial Interpretation*, 30 J. CHURCH & ST. 245, 260 (1988) (discussing Paul Tillich’s idea of “ultimate concerns” that scholars have used to interpret religion beyond its theistic definition). Many thanks to Christy Green for the suggestion to have a look at Paul Tillich’s discussion of “ultimate concerns.”

274. DWORKIN, *supra* note 30, at 129-30.

275. *Id.* at 132.

276. See Schwartzman, *supra* note 38, at 22. A serious concern of this “symmetrical theory” of religious freedom—on both sides (public justification and religious accommodation) religion is not something special—is the huge risk of anarchy. See generally DWORKIN, *supra* note 30, at 117; LEITER, *supra* note 56, at 95; NUSSBAUM, *supra* note 223, at 173 (drawing attention to the side-constraints of an all-inclusive term religion).

277. DWORKIN, *supra* note 30, at 17, 129. See generally Matthew Clayton, *Is Ethical Independence Enough?*, in RELIGION IN LIBERAL POLITICAL PHILOSOPHY 132 (Cécile Laborde & Aurélie Bardon Eds.) (2017) (a recent defense of Dworkin’s approach to religious freedom).

278. Perry, *supra* note 64, at 1012. This concerns a Lockean criticism on governmental interference in matters of morality and religion. Locke states that the main purpose of the law “is not to provide for the truth of opinions, but for the safety and security of the commonwealth and of every particular man’s goods and person.” *Id.* at 1003.

Understanding religion in terms of access to ethical independence pursues an ideal of liberal neutrality,<sup>279</sup> toward what Nussbaum has called, the “ultimate questions” of life.<sup>280</sup> The call for liberal neutrality toward deep human commitments is bolstered by the crux of ethical independence, which “requires that government not restrict citizens’ freedom when its justification assumes that one concept of how to live, or what makes a successful life, is superior to others. It is often an interpretive question, and sometimes a difficult one, whether a policy does reflect that assumption.”<sup>281</sup> To clarify why we should endorse liberal neutrality as a matter of principle, the generalist position divides basic liberties into special and general rights. The difference between these two variants is rooted in what the threshold authorities must cross when they aim to restrict a right. Special rights focus on a particular “subject matter” and it is complicated to limit these rights legitimately, except in cases of emergency. General rights, on the other hand, focus on the relation between authorities and people. General rights restrict the scope of arguments authorities can provide to legitimately limit the exercise of a general right.<sup>282</sup>

The specific distinction between general (restrict arguments to limit free exercise) and special (focus is on a protection-worthy subject) rights gives generalists a reason to argue that religious freedom should be a general right, as the category of “religion” remains a complicated subject to interpret. Thus, the definition problem of religion, which the generalists posit is intertwined with freedom of religion, is an important argument to oppose granting religious freedom a special status. That is to say, considering religious freedom a special right. The semantic criticism at this point conveys that a special right would explicitly focus

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279. Cécile Laborde, *Dworkin’s Freedom of Religion Without God*, 94 B.U. L. REV. 125, 125 (2014).

280. NUSSBAUM, *supra* note 223, at 168.

281. DWORKIN, *supra* note 30, at 141-42.

282. DWORKIN, *supra* note 30, at 132-33 (stating that “a special right of religion declares that government must not constrain religious exercise in any way, absent an extraordinary emergency. The general right to ethical independence, on the contrary . . . limits the reasons government may offer for any constraint on a citizen’s freedom at all.”).

on the definition of religion and it would not be able to solve the definition problem of this right.<sup>283</sup>

Furthermore, a special right requires high demands on restrictions that aim to limit the exercise of such a right. Instead, the generalist position argues that approaching religious freedom as a general right to ethical independence will provide protection to the free exercise of religion. The generalist position explains that the right to ethical independence “condemns any explicit discrimination . . . that assumes . . . that one variety of religious faith is superior to others in truth or virtue or that a political majority is entitled to favor one faith over others or that atheism is father to immorality.”<sup>284</sup> Moreover, it “protects religious conviction in a more subtle way as well: by outlawing any constraint neutral on its face but whose design covertly assumes some direct or indirect subordination.”<sup>285</sup> However, understanding religious freedom as a general right to ethical independence might force people to adjust their religious conduct in a way that conforms to laws that are not *per se* catered to them.<sup>286</sup> Therefore, the generalist position argues that authorities should take into account whether restrictions on a particular practice they propose are in fact targeting what one group might consider “a sacred duty.”<sup>287</sup> If so, “then the legislature must consider whether equal concern . . . requires an exemption or other amelioration. If an exception can be managed with no significant damage to the policy in play, then it might be unreasonable not to grant that exception.”<sup>288</sup>

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283. *Id.*; see generally LABORDE, *supra* note 39, at 30-33; SULLIVAN, *supra* note 223, at 1-4 (discussing the problem of defining religion).

284. DWORKIN, *supra* note 30, at 133-34.

285. *Id.* at 134.

286. Ronald Dworkin stated, “[i]f we deny a special right to free exercise of religious practice, and rely only on the general right to ethical independence, then religions may be forced to restrict their practices so as to obey rational, non-discriminatory laws that do not display less than equal concern for them.” *Id.* at 135-36.

287. *Id.* at 136.

288. *Id.*



*d. Equation*

Equation requires equal respect for all deep concerns of people. In effect, religious beliefs and practices of one group of citizens, as they relate to deep human concerns, should not be favored over similar deep concerns of others. Religious freedom should ensure this equal treatment of people.<sup>289</sup> Against this backdrop, equation opposes arguments that justify religious freedom in light of any “distinct value” of religious manifestations. Rather, it argues that believers’ vulnerability to discrimination should be considered the main justification for religious freedom. In addition, equation opposes a “religious” understanding of religious freedom. In this sense, equation is very close to generalization. However, there are two main differences. First, it is not indifference or neutrality as such that requires principled equation.<sup>290</sup> Rather, it is the ideal of equality of treatment of all acts and thoughts that have an intrinsic value.<sup>291</sup> Second, equation does not generalize religious freedom to something like the general right to ethical independence and moral freedom.<sup>292</sup> Instead, equation approaches religious freedom from the principle of equality of treatment, which is considered the main constitutional value of a liberal democracy.<sup>293</sup> Therefore, the equation approach is part of

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289. Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?* 84 NOTRE DAME L. REV. 807, 834-35 (2009) (stating that “the point of the Religion Clauses is not to affirm (or deny) the value of religious practices, any more than the point of the Free Speech Clause is to affirm (or deny) the value of flag burning.”).

290. See Bret Boyce, *Equality and the Free Exercise of Religion*, 57 CLEV. ST. L. REV. 493, 496-97, 520 (2009).

291. See Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 TENN. L. REV. 351, at 352 (2010) (arguing that some liberal theorists of religious freedom have “[attacked] religious exemptions on the general premise that they are fundamentally unfair to nonreligious people.”).

292. See EISGRUBER & SAGER, *supra* note 223, 51-77 (2007); see generally LABORDE, *supra* note 39, at 55-57; Lund, *supra* note 291, at 360 (critical of the theory developed by Eisgruber and Sager). See also Boyce, *supra* note 290, at 496-97 (differentiating between equality in treatment and equality in effect).

293. See LABORDE, *supra* note 39, at 19.

what has been called the egalitarian theories of religious freedom.<sup>294</sup> The question is, however, equation of *what*?<sup>295</sup> At the outset, this position is anti-favoritism,<sup>296</sup> as it advocates equal treatment of all conscientious manifestations and beliefs that contain an intrinsic value.<sup>297</sup>

Equation “requires simply that government treat[s] the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally.”<sup>298</sup> Thus, there are no principled reasons to differentiate between deep human commitments. The norm should be an equal approach to non-religious and religious perspectives on the ultimate questions of life. The equation approach rethinks religious freedom as “the right of the individual . . . to life outside the state—the right to live as a self on which many given, as well as chosen, demands are made. Such a right may not be best realized through laws guaranteeing religious freedom but by laws guaranteeing equality.”<sup>299</sup> Thus, the regime of religious toleration should be understood against the backdrop of human vulnerability to discrimination. Eisgruber and Sager states:

[what] properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination, not their distinct value; and what is called for, in turn, is protection against discrimination, not privilege against legitimate governmental concerns. When we have replaced value with vulnerability, and the paradigm of privilege with that of protection, then it will be possible both to make sense of our constitutional past in this area and to chart an appealing constitutional future.<sup>300</sup>

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294. See Cécile Laborde, *Liberal Neutrality, Religion and the Good?*, in RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY 249 (Jean Louise Cohen & Cécile Laborde Eds., 2016) (discussing egalitarian theories of religious freedom).

295. See LABORDE, *supra* note 39, at 89.

296. SULLIVAN, *supra* note 223, at 149; see also LABORDE, *supra* note 39, at 42.

297. EISGRUBER & SAGER, *supra* note 223, at 51-77; LABORDE, *supra* note 39, at 51.

298. Eisgruber & Sager, *supra* note 20, at 1283.

299. SULLIVAN, *supra* note 223, at 159.

300. Eisgruber & Sager, *supra* note 20, at 1248.

This position allows us to accept two main differences between generalization and equation. In short, generalization focuses on how we should understand religious freedom as a liberty and equation approaches religious freedom from the ideal of equality.

*e. Representation*

Representation's main claim is that a single group should not have exclusive protections that are not afforded to other groups. Hence, it is not a sectarian theory of religious freedom. Representation is rooted, as Laborde says, "in the ecumenical value of ethical integrity, and in the normative justifications for generic liberal rights such as speech and association."<sup>301</sup> Representation views religion as a concept that stands for a set of protection-worthy values that are not necessarily "religious" at the core.<sup>302</sup> These values justify the codification of a special right to religious freedom.<sup>303</sup> As such, religion, like respect, stands for a "hypergood"—a particular category of higher goods.<sup>304</sup> Koppelman argues that:

[religion] . . . has a value that can override many other goods and preferences. But religion is one among many hypergoods. It should not be privileged over the rest of them. This fundamental problem of modernity should not be adjudicated by the state. The problem of determining the appropriate hypergood, if any, and its reconciliation with the broad range of ordinary goods, is a question that occupies the same existential territory as religion. If the state is incompetent

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301. The position this article qualifies as "representation" elaborates on the "proxy" and "disaggregation" approaches. See LABORDE & BARDON, *supra* note 39, at 599-600.

302. See generally Ronan McCrea, *The Consequences of Disaggregation and the Impossibility of a Third Way*, in RELIGION IN LIBERAL POLITICAL PHILOSOPHY 69 (Cécile Laborde & Aurélie Bardon eds., 2017) (criticizing Laborde's disaggregation approach).

303. Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 WM. & MARY BILL RTS. J. 303, 332 (2001).

304. Andrew Koppelman, *Is it Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 594 (2006).

to resolve religious questions, it is likewise incompetent to resolve this one.<sup>305</sup>

To identify the relevant legal values of religion, the representation position reflects on the potential matches between the “different parts of the law” and “different dimensions of religion for the protection of different normative values.”<sup>306</sup> Examples of such matches are: the presentation of religion as a conception of the good life; a conscientious moral obligation; the key feature of identity; mode of human association; a vulnerability class; a totalizing institution; and an inaccessible doctrine.<sup>307</sup> Specifically, matches such as the presentation of religion as a conception of the good life, a matter of conscience, identity and association, are more “relevant to the notion of freedom of religion” than other overlapping areas.<sup>308</sup> Hence, representation could be defined as “religion-blind without being religion-insensitive, because it sees religion, not as a specialised and self-contained area of human belief and activity, but as a richly diverse expression of life itself.”<sup>309</sup>

### *B. Religious Freedom: Abstraction from the Religious Dimension*

Does religion *qua* religion deserve special legal protection? At the outset, there is no right or wrong answer to this question. At most, classifying different positions is instructive for mapping the main arguments to explore alternative methods. Also, classifying normative approaches is helpful when examining the theoretical differences of the

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305. *Id.* In his later publications, Andrew Koppelman has elaborated on considering religion a legal proxy. See, e.g., Andrew Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961, 981 (2010) (stating “it is not possible to offer a unitary account of what religion is good for. Like a knife or a rock, it is something that people find already existing in the world, which they then put to a huge variety of uses. Religion denotes a cluster of goods.”). This position has been defended more recently in KOPPELMAN, *supra* note 223, at 124. See also Koppelman, *supra* note 242, at 36-37 (repeating the view that religion encompasses many goods that people aim to pursue and religious freedom enables them to do that).

306. Laborde, *supra* note 226, at 594.

307. *Id.* at 594-95.

308. *Id.* at 595-97.

309. *Id.* at 600.

liberal theories of religious freedom. Moreover, mapping out differences streamlines the process of finding an element of commonality between the theories. The similarities between the responses reveal two potential categories. First, a “strong rejectionist response.” Second, a “soft rejectionist response.” The strong rejectionist response posits that religion should not be considered a special protection-worthy category in law. This position corresponds with the rejectionist position. The softer response also rejects the position that religion is special *qua* religion in law—entailing that the liberal substitutes of religion make this category possibly protection worthy. Therefore, religion is only special through substitution, generalization, equation, and representation. Does this twofold response about religion’s specialness provide us with a binding commonality between all liberal theories of religious freedom? It does.

The underlying message supporting both categories of responses is that distinctly religious values are not enough to justify the special legal solicitude toward religion. Thus, both responses reject the specialness of the metaphysics of religion for the special legal solitude toward religion. The synthesis of the twofold response is the dismissal of the special legal protection of religion *qua* religion. Moreover, this synthesis renounces arguments that justify religious freedom with an appeal to any distinct value of religion. What clarifies and justifies the special legal attention for religion is a broader and apparently religion-empty (i.e., free from distinctly religious values) framework of faculties, liberties, and vulnerabilities.<sup>310</sup>

The question is, what does this predominantly negative answer to the question of whether religion *qua* religion requires special legal protection suggest about the binding feature of the liberal theories of religious freedom? Can we claim that the twofold response that we have given is an illustration of “decoupling religion from a god?”<sup>311</sup> Alternatively, does the synthesis of our twofold response fit the

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310. LABORDE, *supra* note 39, at 42 (criticizing the “vague” broader framework that is adopted by egalitarian theorists of religious freedom to justify the special legal solicitude toward religion).

311. DWORKIN, *supra* note 30 at 132 (stating that “the problems we encountered in defining freedom of religion flow from trying to retain that right as a special right while also decoupling religion from a god.”).

“tendency, among legal practitioners, to re-describe” religious matters in non-religious terms?<sup>312</sup>

The synthesis of our negative response encompasses both hypothetical questions when it reacts to the justification grounds of the special legal solicitude toward religion. It decouples religion from any God. Essentially, it presents religion as one subcategory in the more general and apparently non-religious categories of human conscience and the conceptions of the good life. It decouples religion from any God in a further sense. The twofold response conceptualizes religion in a God-empty way, free from distinctly religious values. For example, the definition of religion states that it is the combination of categorical demands that are insulated from evidence and reason.<sup>313</sup> Other God-empty conceptions of religion are concerned with the identification of general and apparently non-religious values that are worthy of legal protection. Examples of such intrinsic and valuable aspects of religion include: the values behind human conscience,<sup>314</sup> ethical integrity,<sup>315</sup>

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312. Laborde, *supra* note 226, at 590 (arguing that “there has been a tendency, among legal practitioners, to re-describe [particular religious] practices in the language of conscientious obligation, so as to accommodate them under the label of freedom of religion.”).

313. LEITER, *supra* note 56, at 33-34. Koppelman is critical of Brian Leiter’s conception of religion, referring to it as “a radically impoverished conception.” Koppelman, *supra* note 305, at 962; *see also* McConnell, *supra* note 226, at 784 (suggesting, “it is futile to draw up a list of features descriptive of religion and only of religion. What makes religion distinctive is its unique combination of features, as well as the place it holds in real human lives and human history.”) *See also* François Boucher & Cécile Laborde, *Why Tolerate Conscience?*, 10 CRIM. L. & PHIL. 493, 496 (2016) (stating that “Leiter fails to establish insulation from reasons and evidence as the demarcating feature of religion. This is because he draws on incompatible interpretations of ‘insulation from reasons and evidence’ to reply to different challenges regarding either the under-inclusiveness or the over-inclusiveness of his definition of religion.”).

314. NUSSBAUM, *supra* note 223, at 168-69. *But see* KOPPELMAN, *supra* note 223, at 153 (arguing that “[it] is not clear how Nussbaum can maintain the distinction between her position and a libertarian view in which any regulation of anyone’s conduct is presumptively invalid . . . [As such], [t]he boundaries of protection in Nussbaum are thus uncertain.”). *See also* Laborde, *supra* note 226, at 589 (arguing that the substitution position is not able to provide equal protection to all religious practices that are valuable, though not always on conscientious grounds).

315. Laborde, *supra* note 226, at 589.

deep ethical commitments,<sup>316</sup> hope and vulnerability to injustice.<sup>317</sup> These valuable—though not specifically or distinctly religious— aspects of religion justify the special legal protection of religious beliefs and manifestations.

The synthesis of our twofold response fits the tendency of re-description, which suggests that in analyzing the legal aspects of a religious manifestation case, it is neither necessary nor useful to define or understand that case in distinct religious terms. The tendency of re-description arises from projects that aim to rethink religious freedom in a religion-empty way, protecting both theistic and non-theistic beliefs and manifestations. The normative argument is that both theistic and non-theistic beliefs and manifestations with an intrinsic value, which attaches to valuable aspects of a human life, should be treated with the same amount of respect and concern. As such, religious freedom has been rethought, approached and defended as: the liberty of conscience,<sup>318</sup> the right to moral freedom,<sup>319</sup> the right to ethical independence, and the citizens' equal right to live outside the state.<sup>320</sup>

Thus far, we have argued that the synthesis of our twofold response decouples religion from any God and relies mainly on non-religious language to re-describe religious matters.<sup>321</sup> The question is whether we could provide a more coherent description of our synthesis, encompassing both the decoupling and re-description aspect of the debate in jurisprudence about law and religion. In other words, is it possible to systematically identify and subsequently define the feature that serves as the binding characteristic of the liberal theories of religious freedom? This feature looks beyond the varieties of normative

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316. DWORKIN, *supra* note 30, at 5.

317. KOPPELMAN, *supra* note 223, at 122 (discussing hope); Eisgruber & Sager, *supra* note 20, at 1248 (discussing the vulnerability to injustice).

318. MACLURE & TAYLOR, *supra* note 255, at 89; NUSSBAUM, *supra* note 223, at 169.

319. Perry, *supra* note 64, at 996.

320. DWORKIN, *supra* note 30, at 130 (on the right to ethical independence); SULLIVAN, *supra* note 223, at 159 (on the right to live outside the state).

321. Cf. Peter Jones, *Religious Exemptions and Distributive Justice*, in RELIGION IN LIBERAL POLITICAL PHILOSOPHY 163 (Cécile Laborde & Aurélie Bardon eds., 2017) (explaining that the non-religious description of religious exemptions, such as the use of a cultural frame, fits the egalitarian strategy to defend religious exemptions on non-sectarian grounds).

positions and connects these perspectives through a common focus—the justification grounds for the special legal protection of religion.

With this presumption in mind, the starting point in identifying the potential binding element of the liberal theories of religious freedom is the interpretative concern about the proper legal definition of religion and religious freedom and the definition's fair application in practice. This interpretative concern guides us to define the binding characteristic of the liberal theories of religious freedom. First, we have seen that these theories aim to provide the most appropriate definition of religion in law. Second, they have one important concern: the egalitarian attention to fair treatment of deep human commitments and beliefs.

Hence, the binding characteristic is a normative response to the question: how should liberal democracies understand and accordingly deal with the concept of religion in law? This binding element encompasses the entire body of arguments that paves the way for balancing religion's role in law as it relates to the paradigm of liberal political philosophy. The binding characteristic takes the form of an *interpretative shield*. It is embedded in philosophical arguments that can resist the justification of religious freedom with an appeal to distinctly religious values. In addition, it draws on a non-sectarian language to conceptualize religion and religious manifestations.

What does this *interpretative shield* suggest about the binding feature of the liberal theories of religious freedom? Does it help provide a more coherent definition of our synthesis that covers the decoupling and the re-description aspects of the law and religion debate in jurisprudence? Yes, it does. The negative answer to the question as to whether religion *qua* religion requires special legal protection stands for abstraction from the religious dimension. The abstraction theory entails that religion does not deserve special protection in law *qua* religion. Religion receives *only* a special treatment through abstraction, meaning through the non-sectarian, protection-worthy categories that serve as proper liberal substitutes for the category of religion. This is due to the egalitarian approach of religious freedom's liberal theories



to theistic and non-theistic beliefs and the emphasis of these theories on neutrality toward any particular worldview.<sup>322</sup>

Abstraction manifests itself by refusing to justify religious freedom through appeals to religious values, thus rejecting the toleration of religion *qua* religion. Moreover, it also refuses to justify free exercise by appealing to a more general framework of values that are not theistic *per se*. Even more, abstraction insists that justifications for religious exceptions, like for any other type of legal exception, need to be ecumenical.<sup>323</sup>

As with ritual dietary restrictions, the liberal argument suggests exemptions are granted *not* because of *any* religious narrative, but because of the commitment to respect the human conscience equally.<sup>324</sup> The abstraction theory unveils that within the liberal paradigm of political philosophy, religious freedom is in fact a euphemism for abstraction from the religious dimension. As such, abstraction is not about the empirical argument concerning the specialness of religion. Rather, abstraction covers the complete body of conceptual and normative arguments that either strongly (rejection) or less strongly (substitution, generalization, equation and representation) oppose to the empirical reality in liberal democracies that treats religion as special *qua* religion.

However, the abstraction theory provides two ways to understand the law and religious scholarship within the paradigm of liberal political philosophy. First, the metaphysics of religion are not considered special—this has a legal explanation. The abstraction argument suggests that law always abstracts from a particular perspective toward a more general perspective. Second, religion is not a special protection-worthy category in law *qua* religion. Liberal theories of religious freedom strongly oppose favoritism of religious beliefs and practices, and abstraction is an ideological tool to equalize beliefs and experiences.

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322. Laborde, *supra* note 294, at 249 (for a discussion of the egalitarian theories of religious freedom). There is also a legal explanation for the phenomenon of abstraction, however that is beyond the scope of this article.

323. Ecumenical, here, is not in the religious meaning of the word, but rather in the sense of being widely accessible to a broad public, and not because of the quality of people's beliefs but simply because they are human beings who share certain important features, such as the conscience.

324. Cf. MACLURE & TAYLOR, *supra* note 255, at 77.

*C. Abstraction and “Living Together”*

Abstraction and “Living Together” directs our attention back to *S.A.S.*, the recommendations of the EU Parliament, the “reconciliation strategy” and the reinforcement of majoritarianism. Is the “reconciliation strategy” a paradigmatic expression of recent developments in legal theory and liberal political philosophy about religion’s role in justifying accommodation and decisions in law and politics? In other words, does the abstraction theory help us to reconcile diversity with majoritarian sensitivities under critical scrutiny? It does. The abstraction theory, with its emphasis on the use of religiously neutral or religion-empty language in discussions concerning the lawfulness of contentious religious manifestations helps us discuss the outcome of *S.A.S.* in light of the most recent theoretical developments in the field of liberal political philosophy. On the one hand, presenting an extant religious manifestation (such as face-covering veils) as a matter of gender-equality, human dignity, and “living together” fits the non-sectarian approach of abstraction. Indeed, the abstraction theory does not support any legal discussion of religious practices from a sectarian perspective, meaning an exclusively religious view. In other words, the use of that language fits the tendency of “re-describing” extant religious manifestation in non-religious terms. That is not problematic *per se*. But the Travel Ban case has shown that such a facially neutral language does not help to vanish its history of animus toward Muslims.<sup>325</sup>

Furthermore, reinforcing the argument that particular lifestyles are not welcome might pose a serious danger to the egalitarian defense of religious freedoms. The abstraction theory has unveiled the notion that liberal theories of religious freedom strongly oppose favoring or disfavoring a particular lifestyle because of the specific narratives behind that lifestyle.<sup>326</sup> Nevertheless, the empirical argument suggests something else.

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325. Matthew J. Lindsay, *The Perpetual Invasion: Past as Prologue in Constitutional Immigration Law*, 23 ROGER WILLIAMS U. L. REV. 369, 389 (2018) (on file with author) (rightly pointing out that Trump’s anti-Muslim rhetoric during the Presidential campaign, was more than a slip of the tongue).

326. Cf. DWORKIN, *supra* note 30 at 130; Perry, *supra* note 64 (both arguing that the state should not prescribe how people should live their lives).

Over the past few years, particularly over the last decade and in the aftermath of terrorist attacks that are linked to radicalized Islamic groups, a growing number of liberal democracies have developed monitoring policies that single out Muslims and Muslim organizations for *special* bans.<sup>327</sup> The arguments used to defend these types of prohibitions are similar: defending the neutrality of the state, avoiding radicalization, and combatting life styles that are contrary to Western norms. The latter objective challenges us to think about the compatibility of these *special* bans with the standards of liberal political philosophy that has shaped the contours of modern liberal democracies. Within this liberal paradigm of political thought, the state should refrain from favoring or disfavoring particular lifestyles. As a result, the recent prohibitions targeting Muslims across liberal democracies for their norm deviant behavior violates the favored egalitarian understanding of religious freedom. Hence, the endorsement of living together and the reinforcement of majoritarianism are both paradigmatic expressions of the shifts toward ethnocentrism that is little tolerant of non-mainstream ideas and practices.

### III. THE PRAGMATIC DEFENSE

The reinforcement of majoritarianism results in the creation of the “good religion,” which is adopted by the vast majority. Subsequently, “bad religions” are outlawed by making diversity and religious plurality majoritarian-proof. The outcome is the establishment of a “State’s Religion,” which clearly admires the category of good religions of the dominant majority. These are basically religious practices and beliefs that fit the state’s agenda of how citizens should live their lives. Hence, practices and beliefs that do not fall within the category of good

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327. See generally Khaled A. Beydoun, *9/11 and 11/9: The Law, Lives and Lies That Bind*, 20 CUNY L. REV. 455 (2017) (on the anti-Muslim agenda of President Trump); Mark C. Rahdert, *Exceptionalism Unbound: Appraising American Resistance to Foreign Law*, 65 CATH. U. L. REV. 537, 558 (2016) (critical of singling out Sharia law *qua* Sharia for a special ban); Yaser Ali, *Shariah and Citizenship—How Islamophobia is Creating a Second-Class Citizenry in America*, 100 CALIF. L. REV. 1027 (2012) (on how anti-Muslim initiatives reinforce disparities); Jennifer Heider, *Unveiling the Truth behind the French Burqa Ban: The Unwarranted Restriction of the Right to Freedom of Religion and the European Court of Human Rights*, 22 IND. INT’L & COMP. L. REV. 93 (2012) (on file with author) (on the rise of Islamophobia and how this affects the fundamental rights of Muslims).

religions are banned, restricted, or labeled as “unwelcome.” The question is: are we able to develop argumentation patterns that help us refrain from this dangerous path, while remaining aware of the security threats some beliefs pose to the core ideals of a liberal democracy? Is it possible to rethink religious freedom in a way that is more “diversity-friendly” and compatible with the egalitarian understating of this right that rejects religious toleration *qua* religious? How can we develop argumentation patterns that would fit a broad sense of justice when we talk about religious freedom? Reflecting on the implications potential bans would have on extant religious practices, internally and externally, is a helpful first exercise to develop the sort arguments needed to defend religious freedom beyond the sectarian justification of this right.

#### A. *The Anti-Alienation Argument*

To explain this argument we need to think about a real threat to a particular religious manifestation. The potential ban on ritual infant male circumcision (“MC”) is an appropriate example. Although, this practice has not been outlawed yet, a few “exceptional judgments” mirror the growing public outcry across Western countries to stop MC. These decisions consider the current legal approach to MC as contrary to the child’s best interests. The argument is that given the high health risks of MC, such as the risk of developing sexual and mental health problems, the non-therapeutic ritual circumcision of boys should be postponed until the child is of an age that he can competently consent to the procedure.<sup>328</sup> The most outspoken court ruling embracing this line of reasoning is the 2012 German Cologne *Landgericht* ruling.<sup>329</sup> A similar decision was reached a few years earlier in Finland,<sup>330</sup> and in

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328. Peter W. Adler, *Is Circumcision Legal?*, 16 RICH. J. L. & PUB. INT. 439, 440-41 (2013).

329. The court ruled that parents’ right to religious freedom—in general—does not justify MC, if the intervention is not medically required. The child should have the opportunity to decide himself about the status of his foreskin. *See also* Bijan Fateh-Moghadam, *Criminalizing Male Circumcision*, 13 GERMAN L.J. 1131 (2012).

330. The Tampere District Court held that religious freedom does not justify the violation of bodily integrity. The court referred to the ban on female circumcision and argued that toleration of male circumcision would result in discrimination. *See generally* Heli Askola, *Cut-Off Point? Regulating Male Circumcision in Finland*, 25 INT’L J.L. POL’Y & FAM. 100 (2011).

Iceland a bill to completely ban ritual male circumcision was designed.<sup>331</sup>

Reflecting on the implications of a potential ban on ritual male circumcision would have internally, we can argue that such a total ban would give Jews and Muslims the impression that they do not enjoy equal respect from authorities. This argument finds support in scholarly works that have found how anti-Sharia legal initiatives in the United States, such as the “Save our State” Amendment, have put Muslim communities at risk of isolation and alienation.<sup>332</sup> Therefore, liberal democracies need to encourage mutual understanding between different groups of citizens. This “anti-alienation” argument helps maintain the legal status quo of ritual male circumcision, not because of its sectarian nature, but rather because a total ban on this practice could further alienate marginalized groups that attach great importance to ritual male circumcision.<sup>333</sup>

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331. Harriet Sherwood, *Iceland law to outlaw male circumcision sparks row over religious freedom*, GUARDIAN (Feb. 18, 2018), <https://www.theguardian.com/society/2018/feb/18/iceland-ban-male-circumcision-first-european-country>.

332. Ali, *supra* note 327, at 1031. See also Ross Johnson, *A Monolithic Threat: The anti-Sharia Movement and America’s Counter-Subversive Tradition*, 19 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 183, 218 (2012).

333. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, REPORT OF THE SPECIAL RAPPORTEUR ON FREEDOM OF RELIGION AND BELIEF ON HIS MISSION TO DENMARK (2016). Interestingly enough, the enormous and global sensitivity about a potential ban regarding male circumcision is completely absent in the area of female circumcision. On the contrary, many countries around the globe have decided to eliminate this practice by either using standard laws banning assault and other types of physical harm or developing special bans on female circumcision. See Renée Kool & Sohail Wahedi, *European Models of Citizenship and the Fight against Female Genital Mutilation*, in DEVELOPMENT AND THE POLITICS OF HUMAN RIGHTS 205-221 (Scott Nicholas Romaniuk & Marguerite Marlin Eds., 2015) (on file with author). See also Saul Levmore, *Can Wrinkles be Glamorous?* in SAUL LEVMORE & MARTHA C. NUSSBAUM, AGING THOUGHTFULLY: CONVERSATIONS ABOUT RETIREMENT, ROMANCE, WRINKLES, AND REGRET 104-05 (2017) (saying “the fact that so many thoughtful people find female but not male circumcision abhorrent, suggests that a critical difference is that one is practiced on a group that is, at least to Western eyes, seriously constrained and subjugated by a variety of practices.”); see generally Hope Lewis & Isabelle R. Gunning, *Essay: Cleaning Our Own House: Exotic and Familial Human Rights Violations*, 4 BUFF. HUM. RTS. L. REV. 123 (1998). On the presence of double standards in this context, see Obiajulu Nnamuchi, *Hands off My Pudendum: A Critique of the Human Rights*

*B. The Wrong-Signal Argument*

Next to the anti-alienation argument, we can also reflect on the external effects of a ban on ritual male circumcision. The question is: what implications would a ban on ritual male circumcision have for the foreign policies of liberal democracies? Such policies are, among other matters, concerned with the protection of the rights of non-believers, atheists, proselytes, and critics of religion in countries that lack fundamental rights, such as the freedoms of speech, conscience, and association.<sup>334</sup> Notably, religious freedom is within the human rights discourse understood as the right to believe, to not believe, to change religion, and to be able to criticize religion. Therefore, a complete ban on ritual male circumcision, which has also been practiced in countries that do not have a strong human rights record, would further complicate and narrow our possibilities when asking to direct attention to the rights of vulnerable groups around the globe. In other words, such a policy would send the wrong signal about religion and related freedoms.<sup>335</sup>

This “wrong signal” argument accepts that within liberal democracies, religious freedom has no intrinsic liberal value. It understands this freedom as a religion-empty liberty that provides protection to a wide range of beliefs and practices, without making a distinction between the theistic and non-theistic beliefs people may have. However, in line with the political commitment to draw attention to the human rights situation of vulnerable groups,<sup>336</sup> in countries that lack religious freedom, we would benefit from this freedom to raise awareness about the deplorable human rights situation of vulnerable groups. We need to draw attention to the insecurity threatening these

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*Approach to Female Genital Ritual*, 15 QUINNIPIAC HEALTH L. J. 243, 253 (2011) (pointing out that a traditional practice like female circumcision is generally associated with harm and mutilation, while similar harsh language is absent from the discussion on cosmetic interventions upon female bodies).

334. The European Union has even a Special Envoy, Ján Figel, former Slovak diplomat, who promotes religious freedom as part of the European Union’s foreign policy. See also Ján Figel, *The European Union and Freedom of Religion or Belief: A New Momentum*, 2017 BYU L. REV. 895 (2017). Cf. Jeremy Patrick, *Religion and New Constitutions: Recent Trends of Harmony and Divergence*, 44 MCGEORGE L. REV. 903 (2013).

335. Cf. Yusuf, *supra* note 69, at 293.

336. Vulnerable groups, in this context, include: atheists, adherents of new religions, and critics of religion.

vulnerable groups in countries that do not recognize the right to religious freedom. Therefore, any serious restriction—such as a total ban on important religious practices like ritual male circumcision (relevant for many Muslims and Jews)—creates a complex situation for liberal democracies.<sup>337</sup>

### *C. The Non-Sectarian Liberal Defense of Religious Liberty*

Although the pragmatic arguments help us to oppose a complete ban on MC and a toleration regime for FC, they are not the similar to *principled* arguments that criticize the ban on face-covering dresses and the proposed closure of mosques by the EU Parliament. Opposing restrictions on the latter category of religious manifestations draws on matters related to liberties of conscience, expression, and association. The theory of abstraction from the religious dimension, with its emphasis on the egalitarian and non-sectarian understanding of religious freedom, provides *principled* arguments to oppose measures that unfairly restrict ways of life that are not favored by the majority. Meaning, that the pragmatic defense of religious freedom based on the “anti-alienation” and “wrong signal” arguments is not *principled* in nature. This defense does not convincingly debunk the liberal rejection (the “strong rejectionist response”) and substitution (the “soft rejectionist response”) criticism. However, for the time being, it provides arguments that explain why we should be aware of imposing restrictions upon certain extant religious manifestations. The case of ritual circumcision reveals that any total ban on ritual male circumcision would call for both internal and external resistance. Hence, the pragmatic arguments warn us for the implications of a ban internally and externally. This reflection is a helpful exercise for developing a theory of religious freedom that endorses diversity for pragmatic reasons.

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337. We may also find support for this argument in Justice Kennedy’s concurring opinion in *Trump v. Hawaii* 138 S. Ct. at 2424, “The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government remains *committed* always *to the liberties* the Constitution seeks to preserve and protect, so that *freedom extends outward*, and lasts.” (emphasis added).

However, there is something very crucial about the relationship between abstraction and the non-sectarian liberal defense of religious liberty. What we should clearly dispatch, is the idea that the theory of abstraction—with its talent to undo religious practices from a religious angle, is effectively an open invitation to disregard fundamental rights of people. Denying them the right to manifest or even have their own beliefs, and declaring them and religious accommodation at war.

Liberal political philosophy has a dichotomous relationship with religion. On the one hand it contends that religion *qua* religion should not be singled out for a special, or favored, treatment in law. Hence, no religious freedom simply because religion is special. On the other hand, liberal political philosophy includes many arguments we could rely on to say that religion *qua* religion should not be singled out for a special disfavored treatment in law.<sup>338</sup> This is because of the reasons liberal political philosophy generally gives to object a legal protection regime for religion *qua* religion.

This rejection is laid down in an egalitarian approach to questions of accommodation. However, egalitarianism in this context does not imply that religious people should be deprived from the right to manifest their beliefs. Egalitarianism, in relation to religious accommodation, challenges the legal protection regime, asking if there is anything special about religion that warrants a special and favored treatment of religion *qua* religion. Admittedly, it answers this question negatively. But it provides via abstraction a wide range of grounds and substitutes on which the toleration regime for religious accommodation can continue. It continues, not because it involves religion, but, for example, because of conscience and the high importance it attaches to the protection hereof.<sup>339</sup>

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338. *Cf.* the “inclusive non-accommodation” theory of religious freedom, as discussed by Micah Schwartzman. The *inclusiveness* of this theory is related to the public justification debate (on the “specialness” of religion for the purpose of justifying public decisions), implying that religion is not something special for the justification of legal and political decisions. Thus, no limitation on adding religion to the body of categories that can be used by legal and political authorities to justify their decisions. Similarly, religion is not special for the accommodation question: religions and non-religions should be treated equally by granting exemptions. *See* Schwartzman, *supra* note 38, at 22.

339. Wahedi, *supra* note 54.



This egalitarian challenge to religious accommodation does not only help us critically revisit the protection regime for a wide range of religious practices. It also helps us to dismantle and uncover double standards behind plans that target religion, either in an implicit way or a clear showing of animus toward religion. Hence, the egalitarian perspective—with its focus on the non-sectarian substitutes of religion—helps us to challenge facially neutral grounds that effectively challenge the lawfulness of religious manifestations or target the adherents of a particular religion.<sup>340</sup>

Since singling out religion *qua* religion for special legal protection is problematic, it is equally troublesome to single out religion *qua* religion for special prohibitions. To put it differently, neither sectarian grounds nor grounds evincing animosity toward religion should be considered decisive for granting exemptions or issuing bans. Both are equally objectionable. This point can be illustrated in light of the problematic cases we have discussed in this article and by asking ourselves the following two questions. First, does the action attest to singling out religion *qua* religion for a disfavored treatment? Second, would we have been able to scrutinize this action in absence of religious freedom?

Let's begin with The Austrian "Islam bill." Does the ban for Islamic organizations and houses of worship on receiving foreign founding attest to singling out religion *qua* religion for a disfavored treatment? It does. Other religious groups do not face similar restrictions. Hence, this may point to the presence of double standards in dealing with religious radicalization, the facially neutral ground the restriction rests on. But, would we have been able to scrutinize this action in absence of religious freedom? Yes. The limitations it poses on the freedom of association and the opportunities to have equal access to, for example, crowdfunding actions, would help us argue that the Austrian bill is wrong, apart from the fact that it implies a double standard. Both the *substitution* and the *equation* approach would help us at this point to challenge the legality of the Austrian "Islam bill."

Next, let's review the French ban on face-covering dresses. Does the French Prohibition Law attest to singling out religion *qua* religion for a disfavored treatment? It does. The notorious history of this ban

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340. See generally Sohail Wahedi, *Muslims and the Myths in the Immigration Politics of the United States*, CAL. W. L. REV. (forthcoming).

contains many indications revealing this ban was initiated as a response to Islamic manifestations in public.<sup>341</sup> The exceptions it contains, for example, for those who cover their faces to participate in traditional and artistic events, reinforce the suspicion that the ban effectively singled out an Islamic practice *qua* Islamic. Would we in any way have been able to scrutinize this action in absence of religious freedom? Yes. We would have approached this ban, for example, as contradictory to freedom of conscience, as the women who cover their faces are deprived from the right to live in accordance with their deepest convictions, without posing serious harm to other people or the society as a whole. Hence, the *substitution* approach to religion and the *generalization* approach to religious freedom, rethink this right as the right to ethical independence and helps us to put the ban under critical scrutiny.

Our next illustration is the Travel Ban of President Trump. Does the enactment of travel restrictions for people coming from Muslim majority countries attest to singling out religion *qua* religion for a disfavored treatment? It does. The issuance of the Travel Ban incarnated the promise of Republican Party's Candidate Trump to close all the U.S. borders to Muslims.<sup>342</sup> But, would we have been able to scrutinize this action in absence of religious freedom? Yes. The Travel Ban—lacking a profound justification for the choice of targeted nations—is an obvious example of discrimination based on nationality. Furthermore, the fact that the Ban mainly targets Muslims—or people coming from Muslim majority countries—makes it possible to posit that it is clearly against the freedom of expression, as it hinders people to pursue their path of beliefs. The *equation* and the *substitution* approaches would help us to further challenge the Travel Ban in absence of religious freedom.

We can add the Save our State debacle in the state of Oklahoma, singling out the Sharia law for a special ban to the list of examples discussed. And we can even revisit the legality of ritual male

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341. Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 746 (2006) (saying that the bans in this area were meant to target the Islamic appearance in public *qua* Islamic for a disfavored treatment).

342. Cf. Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475, 1501 (2018) (arguing that the issued travel bans effectively incarnate Donald Trump's promise of issuing a Muslim ban).

circumcision—although this illustration would ask a much deeper discussion. On the one hand, we may rely on the non-sectarian argument that parents should have the autonomy to raise their child in accordance with their convictions. But does this mean that we should similarly create exemptions for those types of female circumcision that are comparable to male circumcision? And does autonomy allow to irreversibly alter the body of your own child, even if there is no medical support for that alteration? That is very questionable—but our brief analysis is large enough to conclude that facially neutral arguments do not cleanse legislative steps from obvious animus towards religion.

Furthermore, our brief analysis has shown us what we could have done in all these cases in absence of religious freedom. In other words, do we lose anything if we would delete religious freedom from the constitution? Apart from the pragmatic arguments we have provided at the beginning of this section, we contend that we do not lose anything. The paradigm of liberal political philosophy contains enough arguments to oppose any mistreatment of religious people *qua* religious. Hence, the abstraction knife cuts on two sides: it is a helpful strategy to repackage and undo religious practices from their religious dimension, but it is never *as such* a justificatory strategy for obvious discrimination, religious intolerance, and spread of hatred toward unpopular religious groups or religions.

#### CONCLUSION

This article has reflected on the reconciliation of diversity with majoritarian sensitivities as present in the Travel Ban of President Trump, the Save our State initiative from Oklahoma, and the religious freedom jurisprudence of the European Court of Human Rights. The European Court of Human Rights has “notoriously been lenient toward practices of Christian establishment and overtly intolerant toward the presence of Islam in the public sphere.”<sup>343</sup> Reconciliation of diversity questions with majoritarian sensitivities effectively reinforces majoritarianism and advances a political agenda that is not tolerant of the practices of religious minorities. This development violates the advocated egalitarian understanding of religious freedom. To face the challenge at this point, this article has developed two novel pragmatic

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343. LABORDE, *supra* note 39, at 33.

arguments in favor of religious freedom. These arguments are not principled in nature. However, for the time being, they provide very strong arguments to reflect critically upon the internal and external implications of a potential ban on extant religious manifestations of religious minorities. This is a temporary defense of religious freedom rooted in grounds that are non-sectarian, non-majoritarian, and non-violent to the advocated egalitarian conception of religious freedom. In addition to the development of this pragmatic framework this article has set out why even in absence of the right to religious freedom, religious people and their practices warrant protection, that is because these cases involve matters of conscience, association, and expression.<sup>344</sup>

The dichotomous relationship of liberal political philosophy with religion does not support a disfavored treatment of either singling people or their religion out for special prohibitions and restrictions. Ultimately, this helps us “hold the coordinate branches to account when they defy our most sacred legal commitments.”<sup>345</sup>

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344. Cf. LEITER, *supra* note 56, at 64.

345. Trump v. Hawaii, 138 S. Ct. at 2448 (Sotomayor, J., dissenting).