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## ARTICLE

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### FRAGILITY, NOT SUPERIORITY? ASSESSING THE FAIRNESS OF SPECIAL RELIGIOUS PROTECTIONS

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SHERIF GIRGIS†

*Is it fair to grant exemptions from neutral laws to protect religion but not other deep commitments and pursuits, like secular conscience or care-giving bonds? The thirty-year scholarly debate on this question now has legal import, as the Supreme Court stands poised to reverse precedent and restore free exercise exemptions from neutral laws. Whether it should, under stare decisis, turns partly on moral considerations like the fairness issue. And the fairness debate is worth revisiting. Almost everyone has assumed that special religious protections are fair only if religion matters more than other interests. Yet protections for religion might be warranted not because religion is more important, but because it is more needful of protection.*

*To see if these special protections are indeed fair and necessary, this Article develops a measure of need, based on how all civil liberties work in our system. Our doctrines on speech, abortion (for decades), gun rights, and travel have imposed heightened scrutiny on laws that deny us one means of exercising a liberty without leaving adequate alternatives—i.e., other ways to realize the interests served by that liberty to the same degree and at no greater cost. Thus, an interest will have greater need for this protection, the more that laws burdening some means to it will leave no adequate alternative means—or the more “fragile” the interest is. And even if an interest is fragile (because burdens on it are often too heavy), it will not need protection if it rarely faces burdens, heavy or not—if it is not “exposed.” These two concepts create a framework for assessing all our liberties and limiting their scope.*

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† Associate Professor of Law, Notre Dame Law School. Ph.D., Princeton, expected 2022; J.D., Yale, 2016; B.Phil., Oxford, 2010; A.B., Princeton 2008. I thank (but exonerate) Netta Barak-Corren, Rishabh Bhandari, Will Baude, Michael Bradley, Alan Brownstein, Jud Campbell, Nathan Chapman, Ben Eidelson, Bill Eskridge, Richard Fallon, Noah Feldman, Rick Garnett, Frederick Gedicks, Gabby Girgis, Jack Goldsmith, Whitney Hermandorfer, Beatrice Hill, Paul Horwitz, Mark Johnston, Andy Koppelman, Christopher Lund, Daniel Markovits, Michael McConnell, John McGinnis, Stefan McDaniel, Sam Moyn, Victor Muniz-Fraticelli, Lee Otis, Laura Portuondo, Gideon Rosen, Zalman Rothschild, Micah Schwartzman, Elizabeth Sepper, Reva Siegel, Nomi Stolzenberg, Mark Storslee, Eugene Volokh, Gideon Yaffe, and workshop audiences at Notre Dame and Harvard Law Schools.

So far, the fairness debate has produced almost no evidence that key secular interests need adequate-alternatives protection—that they’re fragile or exposed. By contrast, the interests served by religion are quite often fragile. Their pursuit must be funneled into the narrow range of behaviors dictated by a believer’s particular creed. And her creed is what it is. She cannot change it just to get around the law. If a law makes it hard for her to live as a Muslim, she cannot make up for that by living as a Mennonite. Religious demands can also be more particular or picky than other life-shaping commitments. Thus religion’s fragility: removing options often leaves no adequate alternatives.

This Article sketches several ways, rooted in different disciplines, to see if the same is true of crucial secular interests—to see if they have as much need for protection, or if religion is more needful and so fair to single out. On this, the Article seeks not to settle the fairness debate but to steer it onto crucial overlooked questions.

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## INTRODUCTION

For thirty years, law-and-religion scholars have debated the fairness of constitutionally protecting religion but not deep secular commitments and pursuits. To be clear, the question is not in the first instance about positive law—about what liberties courts should enforce now, given the law as it now exists. The question is about something else—about whether a positive-law regime that protected religion but not other deep commitments would be fair. Yet today this question of morality and constitutional design has practical implications for law. It speaks to one of the more significant choices in religion law to face the Supreme Court in a generation: whether to reverse *Employment Division v. Smith*, the 1990 case that eliminated free exercise exemptions from laws that are neutral toward religion.<sup>1</sup> Three Justices have voted to reverse *Smith*, and two are openly deliberating about whether to join them.<sup>2</sup> Before reversing, the Court would have to conduct a *stare decisis* analysis, which turns partly on moral and policy considerations.<sup>3</sup> And that

<sup>1</sup> 494 U.S. 872 (1990).

<sup>2</sup> *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring, joined by Kavanaugh, J.) (finding “textual and structural arguments against *Smith* are more compelling”); *id.* at 1883 (Alito, J., concurring, joined by Thomas & Gorsuch, JJ.) (calling for *Smith* to be overruled).

<sup>3</sup> Adherents of a range of theories of interpretation agree that “moral and policy considerations are critical to” the *stare decisis* analysis. *See, e.g.*, Christopher R. Green, *Justice Gorsuch and Moral Reality*, 70 ALA L.R. 635, 664 (2019); BRYAN GARNER, CARLOS BEA, REBECCA WHITE BERCH, NEIL M. GORSUCH, HARRIS L. HARTZ, NATHAN L. HECHT, BRETT M. KAVANAUGH, ALEX KOZINSKI, SANDRA L. LYNCH, WILLIAM H. PRYOR JR., THOMAS M. REAVLEY, JEFFREY S. SUTTON & DIANE P. WOOD, *THE LAW OF JUDICIAL PRECEDENT* 388 (2016) (“[T]he court [thinking of overruling precedent] must first decide whether overruling the precedent would result in more harm than continuing to follow the erroneous decision.”); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2265 (considering under *stare decisis* how “damaging” a precedent was); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring) (under *stare decisis*, courts may

leads to the question driving the fairness debate: is it fair—especially to nonbelievers—to grant exemptions from neutral laws for religion but not for other cherished interests, like secular conscience, care-giving bonds, education, or professional fulfillment? Why protect worship more than yoga or Sikh convictions more than secular-humanist ones, if these interests matter equally to different people? Even if *Smith* survives, this debate is relevant for evaluating (and revising) existing statutes that recreate *Smith*'s exemptions regime in some federal and state contexts.<sup>4</sup> Moreover, this long and deep debate also matters in its own right.

This Article clarifies the fairness debate and reveals a major gap. It offers a more complete and rigorous analytic framework for filling that gap and for addressing related issues about *all* civil liberties—a framework based on the most comprehensive account to date of a key function of our civil liberties. And the Article uses that framework to explore an overlooked possibility: some *limited* religious protection may be justified not because religion is more worthy of protection, but because it's more *needful*. Or, in this Article's terms, religion might be more fragile and exposed.

It has long been a “daunting challenge” to explain “whether and why religion should” receive special protection,<sup>5</sup> and most scholars writing on this issue have argued powerfully that it should not.<sup>6</sup> They consider religious

“scrutinize the precedent’s real-world effects on the citizenry”) (citing *Brown v. Board of Education*, 347 U.S. 483, 494-95 (1954)).

<sup>4</sup> See *infra* note 41 and accompanying text.

<sup>5</sup> Kent Greenawalt, *Fundamental Questions About the Religion Clauses: Reflections on Some Critiques*, 47 SAN DIEGO L. REV. 1131, 1138 (2010).

<sup>6</sup> For an overview of various scholarly arguments, all of which suggest that religion should not receive special protection, see generally CÉCILE LABORDE, *LIBERALISM’S RELIGION* (2017); CHRISTOPHER EISGRUBER & LAWRENCE SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007); BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* (2001); BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013); JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* (2011); RONALD DWORKIN, *RELIGION WITHOUT GOD* (2013); Gemma Cornelissen, *Belief-Based Exemptions: Are Religious Beliefs Special?*, 25 *RATIO JURIS* 85 (2012); Anthony Ellis, *What Is Special About Religion?*, 25 *L. & PHIL.* 219 (2006); Paul Bou-Habib, *A Theory of Religious Accommodation*, *J. APPLIED PHIL.* 109 (2006); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 *U. CHI. L. REV.* 1245 (1994); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 *U. ARK. LITTLE ROCK L.J.* 555 (1998); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 *U. CHI. L. REV.* 308 (1991); William P. Marshall, *What Is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 *IND. L.J.* 193 (2000); Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 *GEO. L.J.* 1691 (1988); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 *CASE W. RES. L. REV.* 357 (1989); Micah Schwartzman, *What If Religion Is Not Special?*, 79 *U. CHI. L. REV.* 1351 (2012); Steven G. Gey, *Why is Religion Special: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 *U. PITT. L. REV.* 75 (1990). For responses generally favorable to special protections for religion, see generally,

exemptions an “undefensible special privilege,”<sup>7</sup> whose injustice only spreads in modernity, as more people forge identities apart from religion. And academic defenders, with only minor variations,<sup>8</sup> have accepted the critics’ premise that for special religious protections to be fair, religion must *matter more* than other commitments.<sup>9</sup> Some defenders of special religious protections thus concede “there is no convincing secular-liberal argument”<sup>10</sup>

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KATHLEEN A. BRADY, *THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW* (2015); ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* (2013); JOHN GARVEY, *WHAT ARE FREEDOMS FOR?* (1996); Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481 (2017); Michael Stokes Paulsen, *God is Great, Garvey is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597 (1997); Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?* 2006 U. ILL. L. REV. 571 (2006); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992); Stephen D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991).

<sup>7</sup> See EISGRUBER & SAGER, *supra* note 6, at 88; cf. John Corvino, *Religious Liberty, Not Religious Privilege*, in JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, *DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION* 103-04 (2017) (“[R]eligious liberty should not morph into religious privilege . . .”).

<sup>8</sup> See *infra* notes 60–62. Some argue not that religion is better in any single respect but only that it tends to correlate more closely with a cluster of benefits. See Koppelman, *supra* note 6, at 593 (“[R]eligion is one of a plurality of goods [and] . . . religion is not reducible to any other good.”). Others argue that the intensity of religious conviction makes religion a cause of strife if not tolerated—an argument that piggybacks on the argument from religion’s special importance to the believer. See Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 317 (1996) (“[B]eliefs about religion are often of extraordinary importance to the individual—important enough to die for, to suffer for, to rebel for, to emigrate for, to fight to control the government for.”). The most common point made about need is that without religious liberty, minorities would suffer the most, as their religious interests would be overlooked. See, e.g., Koppelman, *supra* note 6, at 596 (“[O]ne might also give religion judicial protection because one regards it as handicapped in the lawmaking process, perhaps because minority religions are likely to be the object of prejudice.”); William N. Eskridge, *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law* 106 YALE L.J. 2411, 2414 (1997) (“[A]ntireligious prejudice is systematically similar to anti-gay prejudice, and that the religion clauses of the First Amendment as they have been developed in the last generation are a model for the state’s treatment of sexuality.”). But this isn’t to defend the protection of religion over important secular pursuits if with the latter, too, minorities are overlooked.

<sup>9</sup> See, e.g., Ira Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 570 (1991) (“[T]he Free Exercise Clause suggests the privileging of religion over nonreligion”); Paulsen, *supra* note 6, at 1602 (“Without an argument why religious autonomy is more important than, or different in kind from, other human desires for autonomy and freedom of action—we do not have a theory justifying religious freedom under the Constitution.”); Melissa Moschella, *Beyond Equal Liberty: Religion as a Distinct Human Good and the Implications for Religious Freedom*, 32 J. LAW & REL. 123, 146 (2017) (arguing that “religion is a distinct and architectonic human good” and, because of this, “deserves special treatment in law”); John Finnis, *Does Free Exercise of Religion Deserve Constitutional Mention?*, 54 AM. J. JURIS. 41, 44 (2009) (conceding that if religion is “just one among the deep passions and commitments that move people, [it] does not deserve constitutional mention on account of any special dignity or value”).

<sup>10</sup> Michael Stokes Paulsen, *Is Religious Freedom Irrational?*, 112 MICH. L. REV. 1043, 1043 (2014); see also Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1884 (2009) (concluding that “there is simply no good justification” in secular terms); Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1185 (2013)

for their view. Others offer unabashedly theological defenses.<sup>11</sup> Some have flipped to the critics' side.<sup>12</sup> Those relying "on nontheological grounds" are dwindling.<sup>13</sup>

Comparing different interests' importance is critical to the debate, which has produced a wealth of insights. But common on both sides is the unsound assumption that importance is *all* that matters.<sup>14</sup> As Professor Fallon notes, "what rights are recognized" turns partly on "which interests *need* judicial protection."<sup>15</sup> For special religious protections to be fair, religion need not be more important. It might be "special" (or in other words, fair to single out) not because it's more worthy, but because it's more needful of the kind of protection at stake. This Article is the first systematic effort to explore that possibility.<sup>16</sup>

But measuring the need for protection requires something else absent from the debate: a sustained look at the protection at issue. The debate is often billed as one about whether religion warrants "special" legal status, full stop.<sup>17</sup> So framed, the question is unanswerable. One cannot judge the fairness of special rules for religion without a detailed account of the rules at stake.

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("[Without] essentially religious premises about the reality and priority of God, the Free Exercise Clause really makes no sense.")

<sup>11</sup> See John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 283-89 (1996) (arguing from the "believer's viewpoint" rather than the "agnostic's viewpoint" in support of religious freedom); Paulsen, *supra* note 6, at 1611 ("[E]ven from the state's perspective, the claims of the state ordinarily should yield to the claims of God as sincerely articulated by the religious believer, because the claims of God rightfully have a stronger claim on human loyalty.")

<sup>12</sup> See Gedicks, *supra* note 6, at 557 (urging the abandonment of religious exemptions "for the pragmatic reason that they can no longer be justified with the theoretical resources available in late 20th century legal culture.")

<sup>13</sup> Micah Schwartzman, *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085, 1087 (2014).

<sup>14</sup> For a survey of approaches that focus on importance, see *infra* Section I.B. For variations on this theme, see *supra* note 8 and accompanying text.

<sup>15</sup> Richard H. Fallon, Jr., *Further Reflections on Rights and Interests: A Reply*, 27 GA. L. REV. 489, 494 (1993) (emphasis added).

<sup>16</sup> Professors Eisgruber and Sager once used a cognate concept—the "vulnerability" of what they referred to as "conscience"—to defend a conclusion nearly opposite to mine here. First, they seemed to presuppose the premise that I've said is common to both sides, but is questionable—namely, that if "religious practices" don't have "distinctive value," it would be arbitrary "privilege" to protect them, but not secular practices, against the incidental burden imposed by neutral laws pursuing "legitimate governmental concerns." See Eisgruber & Sager, *The Vulnerability of Conscience*, *supra* note 6, at 1248. While Eisgruber and Sager argued that the "vulnerability" of conscience does call for protection, what they thought religion is more vulnerable to was, not incidental burdens from neutral laws, but *discrimination*. So it was protection from discrimination, not exemptions from neutral laws, that the authors defended, differing from my conclusion.

<sup>17</sup> See *infra* notes 30–32 and accompanying text.

Part I's review of the arguments advanced in the fairness debate reveals its precise focus.<sup>18</sup> The debate is about whether to shield religion (but not certain other interests) from incidental burdens. It is about exemptions from laws that are neutral toward religion—the exemptions eliminated by *Smith*<sup>19</sup> and now poised to return. As Part I catalogues, the defenses of these protections are vulnerable, and the critiques incomplete. Defenses take the contested view that religion has more value.<sup>20</sup> The critiques ignore that religion might simply have more need of protection.<sup>21</sup>

Of course, an interest's need for protection would not matter if civil liberties came for free. Then it would make sense to protect every important interest, secular or not. But since each civil liberty has costs,<sup>22</sup> it can be fair to prioritize those interests that most need this protection. (By analogy, all arbitrary discrimination is unjust. Yet it's fair to ban only discrimination based on race, sex, and the few other traits that most need it.)

To develop a measure of need for protection, Part II reviews how our constitutional liberties protect against incidental burdens. Here a surprisingly constant (and largely unnoticed) pattern emerges. The protection that religion enjoyed pre-*Smith* (and might enjoy post-*Smith*,<sup>23</sup> and enjoys in limited contexts by statute<sup>24</sup>), is similar to that provided by our other liberties: speech, abortion under *Planned Parenthood v. Casey*,<sup>25</sup> gun rights, and travel. As our law's trademark approach to incidental burdens, this scheme can be used to develop a general measure of different interests' need for this protection.

Exactly when do these liberties offer a shield from the burdens imposed by neutral laws? The law's answer is given by what I call an *adequate alternatives* principle.<sup>26</sup> This principle triggers heightened scrutiny of a

<sup>18</sup> See *infra* Section I.A.

<sup>19</sup> See *Emp. Div. v. Smith*, 494 U.S. 872, 882 (1990) (rejecting a claim to exemption from a state drug law that incidentally burdened a Native American religion's ritual use of peyote).

<sup>20</sup> See *infra* notes 60–65 and accompanying text.

<sup>21</sup> See *infra* Section I.C.

<sup>22</sup> See *infra* notes 82–84 and accompanying text.

<sup>23</sup> *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1924 (2021) (Alito, J., concurring) (“If *Smith* is overruled, what legal standard should be applied in this case? The answer that comes most readily to mind is the standard that *Smith* replaced: A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest.”).

<sup>24</sup> See *infra* note 41.

<sup>25</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>26</sup> When others writing on religious liberty have discussed this principle, they have done so in passing and to nearly opposite effect. What I aim to show is that the principle properly applies across our civil liberties and might help explain why special religious protections fair. Others, assuming that religious protections are justified on some other ground, have suggested that the adequate alternatives principle is the *wrong* standard to use for free exercise law, which should offer different and more stringent protections. See, e.g., Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under Smith and After Smith*, 2020 CATO SUP. CT. REV. 33, 48 (“[R]eligious practices are rarely

neutral law that burdens a civil liberty only when the burden is “substantial” or “undue.” The principle deems legal burdens undue if they leave no adequate alternative way of exercising the liberty. Alternatives are adequate only if they let people pursue the interests served by that liberty to about the same degree and at not much greater cost.

Part II flips this formula around to derive a rigorous analytic framework for gauging when an interest *needs* an adequate alternatives principle’s coverage. The framework measures how much an interest is likely to face the problem to which this principle is our law’s solution. *First*, an interest will have greater need of this protection, the likelier it is that a law burdening some means to that interest will leave no adequate alternatives. Or, as I’ll put it, the more “*fragile*” the interest is. But *second*, even an interest that is fragile—because burdens on it are likely to be too heavy—will not need protection if it rarely faces regulatory burdens at all, heavy or not. Call this second feature of an interest—how often it’s burdened at all, absent a civil liberty’s protection—“*exposure*.” Together, an interest’s fragility and exposure together will tell us its overall need for a civil liberty from incidental burdens.

This framework reflects precedent. It highlights distinct sources of different interests’ need for civil liberties. It lays bare their unique value to minorities, who need and seek exemptions at disproportionately high rates<sup>27</sup> (in a striking variety of cases).<sup>28</sup> So the framework is useful for assessing the need for—and hence the desirability of having—other civil liberties, current

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fungible. Assessing whether another practice is close enough to the one restricted would involve courts in difficult religious judgments based on a mistaken premise of near fungibility.”); McConnell, *supra* note 6, at 692 (“Speech can be threatened by generally applicable laws; but in most instances, there are alternative channels of communication that will allow the speaker to convey his message . . . . By contrast, when a member of the Native American Church is forbidden to ingest peyote, he has no alternative means for practicing his religion.”); Geoffrey R. Stone, *Constitutionally Compelled Exemptions and the Free Exercise Clause*, 27 WM. & MARY L. REV. 985, 992 (1986) (noting the Supreme Court’s emphasis on alternative means of communication in free speech cases); Lund, *supra* note 6, at 522-23 (2017) (comparing exemptions in free exercise jurisprudence to exemptions in other civil liberties cases); Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 378 (1996) (“Although most assuredly a case can be made for an exemption doctrine in free speech cases as well as free exercise cases, it is not difficult to see why those engaged in religious exercise might need exemption from generally applicable law more than those claiming rights under the freedom of speech.”).

<sup>27</sup> From 2012 to 2017 in the Tenth Circuit, “half of all [religious liberty] decisions involve[d] prisoners or asylum seekers,” and over half of those decisions involved non-Christians. Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. 353, 356, 376 (2018). Among non-prisoner and non-asylum cases, Muslims were overrepresented in religious liberty decisions by a ratio of 11.86:1, Native Americans 6.78:1, Fundamentalist Mormons 5.08:1, and Hindus 3.39:1. *Id.* at 374.

<sup>28</sup> See CORVINO, *supra* note 7, at 10, 17 (describing cases involving Apache Indians wearing eagle-feather headdresses, Sikhs carrying kirpans to government offices, Santería priests performing sacrifices, black churches using inner-city spaces, Muslim prisoners growing beards, and Jewish inmates keeping kosher).



or new. And it can help courts narrow civil liberties like religion to apply only when people's interests are fragile and exposed, and thus really *need* protection. Part II ends by briefly illustrating each of these payoffs of the framework.

With this framework in hand, Part III shows that fairness critics have offered little evidence (anecdotal or otherwise) that other interests need the protection at issue. The debate rarely features even realistic fictional examples of neutral laws in our system subjecting important interests to undue burdens.<sup>29</sup> So for all the critique has shown, religion may still be special in *this* respect, and thus warrant special protection: It may be the rare important interest that's also fragile and exposed.

Part IV then shows that this scenario is a live possibility. It offers *prima facie* reasons—tentative grounds—for thinking religion might indeed be more fragile than other important interests. One Section takes an inductive and sociological approach to doing so, the other a more systematic and theoretical one. Neither tries to *prove* that religion is more fragile. The point is to motivate, and set an agenda for, next steps in the debate.

First, Section IV.A considers why religious interests are fragile to some extent, and guides research into whether other interests are comparably so. It considers a wide range of views of the interests served by religion. On any view, those interests turn out to be fragile. That's because any particular believer's pursuit of those interests has to be funneled into the often narrow range of behaviors dictated by her own creed. And her creed is what it is. At least she cannot change it just to get around the law. If laws make it hard for her to live as a Muslim, she cannot make up for that by living as a Mennonite. (Nor can she make up for breaking one religious duty by redoubling fidelity to another, assuming they really are separate duties.) And for reasons to be seen, religions are often more particular in their demands than other life shaping pursuits. This "pickiness" only further limits believers' options for pursuing the interests served by religion. Thus, religion's fragility: taking away certain options can leave no adequate alternatives. Is the same true of the nonreligious interests in, say, professional wellbeing, education, or secular conscience (Kantianism is a commonly cited example)? This question sets a research agenda for participants in the debate who might draw on history, sociology, ethnography, or political science. I give examples of how such disciplines can fill gaps in the debate by looking at discrete secular interests' level of need for protection and comparing that to religious interests' need.

Section IV.B explores a more systematic approach. It asks whether the very thing that makes a crucial interest important, might also tend to make

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<sup>29</sup> Commonly cited examples of clashes—or would-be clashes—involve secular conscience claims that already enjoy legal protection. See *infra* subsection III.B.2.

the interest less fragile. If so, then the important interests may often have less need of protection. And the important *and* fragile interests (including perhaps religious ones) may be outliers: unusually needful of protection for their level of importance. This approach to testing need requires a political-moral theory—an account of what makes interests matter for constitutional design. Here, too, I sketch just enough of a possible answer to suggest that this inquiry is worth pursuing. It might help fill crucial gaps in a rich debate that has taken a turn toward greater practical importance.

## I. THE FAIRNESS DEBATE

This Part clarifies the question driving the fairness debate, sorts the voluminous contributions to it, and identifies its limitations.

### A. *The Question*

The specialness debate has sometimes been hobbled by vague articulations of the issue—e.g., whether religion warrants “special treatment,”<sup>30</sup> or “deserves constitutional mention,”<sup>31</sup> or more vaguely still, “is special.”<sup>32</sup> Divorced from a clear sense of what special protection involves, debates about its fairness reach an impasse. A close look at the fairness critics’ arguments reveals a pattern. What most concerns them is a civil liberty from state interference in religion (not other forms of religious protection). Specifically, critics object to shielding religion from the burdens imposed by neutral laws (not other protections that a civil liberty might provide). And the debate is not about whether to protect in this way religion and *nothing* else. It’s whether it’s fair to protect religion on top of existing liberties like speech, if we’re not going to protect other currently *unprotected* interests, like secular conscience. I’ll elaborate.

First, the debate is about giving religion but not certain other interests the protections of a civil liberty.<sup>33</sup> So it is narrower than one about special legal status for religion, full stop. After all, the law recognizes, and supports or protects, *secular* interests in plenty of other ways: public funds (to advance the arts),<sup>34</sup> tort law and criminal law (to shield assets and lives), public works projects (e.g., roads, to promote commerce), environmental-impact

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<sup>30</sup> See KOPPELMAN, *supra* note 6, at 11.

<sup>31</sup> See Finnis, *supra* note 9, at 41.

<sup>32</sup> See Lund, *supra* note 6, at 481.

<sup>33</sup> See *supra* note 6 and accompanying text.

<sup>34</sup> See, e.g., *Arts Funding Snapshot: GIA’s Annual Research on Support for Arts and Culture*, 31 GIA READER 1 (2020), <https://www.giarts.org/sites/default/files/31-1-vital-signs.pdf> [<https://perma.cc/A6DU-XEVK>] (outlining public funding for arts and culture in 2017 and 2019).

statements (to curb the environmental harms of state action),<sup>35</sup> antidiscrimination laws (to curb harm done by private action).<sup>36</sup> Religious freedom exemplifies just one kind of interest-promoting device: a civil liberty. As I use the term, such liberties do not encompass all individual constitutional rights. Rather, they include only those rights that protect an underlying interest by *preventing state interference in the private conduct that advances* the interest. The fairness debate asks if it is fair to extend *this* protection to religion in particular.

Second, the debate is narrower still. Civil liberties in our legal system prevent two kinds of interference, and only one is at issue here. Take free speech. It guards against laws that target speech (viewpoint discrimination) *as well as* laws that incidentally burden it (time, place, and manner restrictions).<sup>37</sup> And fairness critics rarely question giving religion the first type of protection, against targeted burdens. They rarely object to constitutional bars on state discrimination against religious conduct<sup>38</sup> or on legal meddling in religious communities' internal affairs or property disputes.<sup>39</sup> What critics most often focus on are religious exemptions from laws *neutral* toward religion.<sup>40</sup> And that focus is unsurprising. After all, the

<sup>35</sup> See 42 U.S.C. § 4332(2)(C)(i) (requiring federal agencies to include environmental impact statements in every recommendation for “major Federal actions significantly affecting the quality of the human environment”).

<sup>36</sup> See, e.g., 42 U.S.C. §§ 12101-12213 (codifying the Americans with Disabilities Act).

<sup>37</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”).

<sup>38</sup> See *supra* note 16; see also *Emp. Div. v. Smith*, 494 U.S. 872, 877 (1990) (government may not ban “acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display”); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 523 (1993) (“The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions.”); Kevin Vallier & Michael Weber, *Introduction*, in *RELIGIOUS EXEMPTIONS* 21 (Kevin Vallier & Michael Weber eds., 2018) (“That the free exercise right is an antidiscrimination right is not disputed; whether it is more than an antidiscrimination right is disputed.”).

<sup>39</sup> The general principle enjoys wide support. See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Emp. Opp. Comm'n*, 565 U.S. 171, 181 (2012) (unanimous decision confirming the “uniformly recognized” ministerial exception precluding the application of employment discrimination laws to church employment disputes). However, particular applications can be controversial. See, e.g., *Our Lady of Guadalupe Sch. V. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (7-2 decision) (reversing and remanding based on lower court’s misapplication of the ministerial exception).

<sup>40</sup> See Vincent Phillip Muñoz, *If Religious Liberty Does Not Mean Exemptions, What Might It Mean? The Founders’ Constitutionalism of the Inalienable Rights of Religious Liberty*, 91 NOTRE DAME L. REV. 1387, 1388 (2016) (“[T]he entire debate . . . presumes that religion’s special status means religious individuals and institutions deserve special consideration for exemptions from burdensome laws.”), KENT GREENAWALT, *FREE EXERCISE AND FAIRNESS* 439 (2006) (“Doubters about the importance of protections of free exercise do not really contest the significance of freedom of

fairness debate flared up around the time when the Court in *Smith* rejected such exemptions and lawmakers reacted by restoring some exemptions by statute.<sup>41</sup> So the debate concerns the fairness of giving religion, but not other pursuits, a presumptive shield against incidental burdens.

Third, the issue is not whether to exempt religion from *all* incidental burdens. It is whether to impose heightened scrutiny on, and so potentially exempt people from, sufficiently *weighty* burdens on religion but not other interests.<sup>42</sup> (I will flesh out this limitation below.<sup>43</sup>)

Finally, even that framing is too broad. That is because no one thinks we should deny this shield to *all* secular activities. All agree religion is not utterly unique. Both sides take for granted existing secular freedoms like secular speech. The debate is whether, on top of those, it is fair to shield (from incidental burdens) religion but not currently *unrecognized* secular interests.

The issue is whether it's fair to protect religion this way but not "close-knit nonreligious associations, such as families, friendships, business partnerships, sports clubs, recreational clubs, and political associations, that bring with them a sense of meaning, identity, and purpose."<sup>44</sup> Why not exemptions for artists,<sup>45</sup> racial-justice advocates,<sup>46</sup> chess champions,<sup>47</sup> "lovers overwrought with love?"<sup>48</sup> Why no "specific guarantee of the right to dance,

religious practice. Rather they ask whether the Free Exercise Clause does anything that is not accomplished by other constitutional provisions."); see also Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 72 (2001) (stating that the present scope of the Free Exercise Clause is small because it does not protect from neutral statutes after *Smith*). Cf. EISGRUBER & SAGER, *supra* note 6, at 109 ("Free exercise claims get interesting and difficult at exactly the point where the heartland of free speech is left behind.").

<sup>41</sup> When *Smith* scrapped a constitutional entitlement to exemptions from neutral laws, Congress tried to reproduce it with the Religious Freedom Restoration Act of 1993 (RFRA). RFRA provides exemptions from neutral laws that "substantially burden a person's exercise of religion" unless strict scrutiny is satisfied. 42 U.S.C. § 2000bb (2012). And when RFRA was invalidated as applied to the states, see *City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress restored some protection against state action (where jurisdictional hooks existed) with the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which applied to zoning laws and policies affecting those "institutionalized" by the state, including prisoners. 42 U.S.C. § 2000cc (2000).

<sup>42</sup> Courts will grant an exemption only if the burden on the claimant is weighty enough and granting the exemption would not do too much harm to state interests. See *infra* note 93.

<sup>43</sup> See *infra* Section II.A.

<sup>44</sup> Kimberley Brownlee, *Is Religious Conviction Special?*, in RELIGION IN LIBERAL POLITICAL PHILOSOPHY 309, 314 (Cécile Laborde & Aureélia Bardón eds., 2017).

<sup>45</sup> See Eisgruber & Sager, *supra* note 6, at 1262 (arguing that to privilege religious groups' obligation to follow the commandments of their faith is unfair to "the artist for whom art is the highest command of life, [or] the activist to whom the pursuit of racial justice is all").

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

<sup>47</sup> See Simon Căbulea May, *Exemptions for Conscience*, in RELIGION IN LIBERAL POLITICAL PHILOSOPHY, *supra* note 44, at 196–98 (explaining that combat drafts may exempt a religious pacifist but would not exempt someone who has no moral objection to war but believes serving in the military would "interfere with his development as a chess grandmaster.").

<sup>48</sup> Eisgruber & Sager, *supra* note 6, at 1263.

or play sports, or do science?”<sup>49</sup> What about gardening, or being a “supporter of the Green Bay Packers,” or breeding pigeons?<sup>50</sup> “[W]hy . . . not golf?”<sup>51</sup>

For a taste of the fairness concerns, take Professors Eisgruber and Sager’s work, widely and rightly seen as a high-water mark of this debate.<sup>52</sup> Eisgruber and Sager argue that to grant exemptions for religion alone is “[t]o single out [merely] one of the ways that persons come to understand what is important in life, and grant those who choose that way a license to disregard legal norms that the rest of us are obliged to obey.”<sup>53</sup> There are, in this view, no relevant differences in the “grand diversity of relationships, affiliations, activities, and passions” in which people in “a modern, pluralistic society . . . find their identities, shape their values, and live the most valuable moments of their lives.”<sup>54</sup> So the law should show “equal regard” to all “deep” or “important” personal “commitments and projects.”<sup>55</sup> Religion as such does not warrant special protection.

### B. Existing Answers

Most on both sides have assumed that the fairness issue turns on whether religion matters more than other interests. This is clear from the gamut of positions taken, from the most ambitious positions against special religious protections to most ambitious in favor. To summarize the positions under three broad headings:

A. *Abolish*<sup>56</sup> special constitutional protection for religion, for one of two reasons:

- (1) Not only is religion *not better* than secular pursuits; it is worse. Religion is a socially noxious mix of confident categorical demands and imperviousness to reasoned argument—fanatical, irrational, and

<sup>49</sup> Ellis, *supra* note 6, at 219.

<sup>50</sup> Paulsen, *supra* note 6, at 1602.

<sup>51</sup> Larry Alexander, *Good God, Garvey—The Inevitability and Impossibility of Religious Justification of Free Exercise Exemptions*, 47 *DRAKE L. REV.* 35, 37 (1998) (quoting Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 *HARV. L. REV.* 7, 59 (1969)).

<sup>52</sup> See Lund, *supra* note 6, at 513 (describing their work as including “a series of fine pieces and a very fine book”); Koppelman, *supra* note 6, at 571 (describing their book as “a fine work, which sheds valuable light on many important issues”).

<sup>53</sup> Eisgruber & Sager, *supra* note 6, at 1315.

<sup>54</sup> *Id.* at 1266.

<sup>55</sup> EISGRUBER & SAGER, *supra* note 6, at 52, 89, 101.

<sup>56</sup> My terms—“abolish,” “replace,” or “retain”—assume that our current order gives religion some special protection, as the Court did before *Smith* and Congress and many states have at the statutory level since roughly that time.

authoritarian. It's the antithesis of Enlightenment values and liberal-democratic ideals.<sup>57</sup>

(2) While religion is valuable to individuals and useful to society, it is not superior in these ways to secular commitments.<sup>58</sup>

B. *Replace* special protection for religion with protection for something broader because religion is just one instance of a broader category of equally valuable commitments (like conscience or conscientious commitment).<sup>59</sup>

C. *Retain* special constitutional protection for religion, for one of three reasons:

(1) While religion is not superior to other pursuits in any single respect, religion (or its protection) is roughly correlated with several overlapping benefits to individuals and societies.<sup>60</sup> It's an unusually strong wellspring of moral and social reform. It shields individuals from the state. It's especially apt to give people a sense of purpose,

<sup>57</sup> See generally LEITER, *supra* note 6; Gey, *supra* note 6; Suzanna Sherry, *The Sleep of Reason*, 84 GEO L.J. 453 (1996).

<sup>58</sup> See generally EISGRUBER & SAGER, *supra* note 6; Marshall, *What's the Matter?*, *supra* note 6; BARRY, *supra* note 6.

<sup>59</sup> See Schwartzman, *supra* note 6 at 1353 ("The problem, however, is that religion cannot be distinguished from many other beliefs and practices as warranting special constitutional treatment."); Ellis, *supra* note 6, at 219 ("[M]any things that are enormously important to many people are not thus singled out in the way that the 'Free Exercise Clause' of the First Amendment singles out religion [yet to some people, these things are] considerably more important, in some cases, than [] religion."); Laycock, *Religious Liberty*, *supra* note 8, at 331, 336 ("[T]he law should protect nontheists' deeply held conscientious objection to compliance with civil law to the same extent that it protects the theistically motivated conscientious objection of traditional believers"); Lupu, *supra* note 26, at 384 ("I am inclined to extend the protection of exemptions to those claims of secular conscience that are highly analogous to protected religious claims."); see also MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 164-74 (2008) (explaining the role individual conscientious has played in debates surrounding religious liberty); Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1806-08 (2006) (describing the first enacted exemption for conscientious objectors to military service, which was based on one's "judgment and conscience"); Paul Bou-Habib, *supra* note 6, at 122 ("[A]theist conscientious objectors should be accorded the same exemptions from military drafts as religious conscientious objectors"). Laborde would "disaggregate" religion into several different interests to be protected, and enact separate protections for each. See Laborde, *supra* note 6, at 2-3 ("My theory of liberalism's religion . . . eschews the term 'religion' to focus on the values it realizes . . . . Disaggregating religion, then, allows us to treat religious and nonreligious individuals and groups on the same terms, as expressions of ethical and social pluralism."). Dworkin would replace religious liberty with a right to "ethical independence." DWORKIN, *supra* note 6, at 132.

<sup>60</sup> See Lund, *supra* note 6, at 132 ("[F]reedom of religion serves a large set of overlapping values in a messy, imprecise kind of way."); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 31-32 (2000) (arguing that special treatment of religion "can be defended by a combination of philosophical arguments, experiences, prudential judgments, and popular intuitions."); 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 439 (concluding that religious liberty "is supported by many overlapping considerations" that, when taken together, "constitute a strong basis to mark religion for special protection").

belonging, consolation in suffering, and help in adversity.<sup>61</sup> Suppressing it is especially likely to lead to social strife.<sup>62</sup>

(2) Religion realizes an objective human good—an aspect of human wellbeing—that differs in kind from the goods promoted by other activities.<sup>63</sup>

(3) Religion discharges obligations to God, whose demands trump everything else in life,<sup>64</sup> not least because flouting them has eternal consequences.<sup>65</sup>

Again, all these positions are premised on comparisons of religion and other interests with respect to importance. Advocates of abolishing or replacing religious liberty think religion at best no more valuable than other activities. And supporters of religious liberty think it more important.

<sup>61</sup> See generally Smith, *supra* note 6.

<sup>62</sup> See Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 96 (noting that “[n]early all of the Justices writing on the [constitutional place of religion] have recited [a fear of social disunity]”); Branton J. Nestor, Note, *The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion*, 42 HARV. J.L. & PUB. POL’Y 971, 991 (2019) (arguing that the denial of free exercise broadly could “fuel[] violent dissent and creat[e] a competition between sects for power to define the public peace in a way that suppresses rival sects” and that “inter-sect competition for power would disproportionately harm minority religious groups, the very groups that religious liberty protections were primarily designed to protect”); see also Laycock, *Regulatory Exemptions*, *supra* note 59, at 1798-1808 (suggesting that religious exemptions and norms against religious establishment fostered peaceful toleration).

<sup>63</sup> See generally Finnis, *supra* note 9; Moschella, *supra* note 9.

<sup>64</sup> James Madison in his *Memorial and Remonstrance Against Religious Assessments* writes that the duty to “render to the Creator . . . homage” is “precedent, both in order of time and in degree of obligation, to the claims of Civil Society.” James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), reprinted in *THE FOUNDERS’ CONSTITUTION* 82, 82 (Philip B. Kurland & Ralph Lerner eds., 1987). Nicholas Wolterstorff brings out some of the other Founders’ reliance on this argument in *A Religious Argument for the Civil Right to Freedom of Religious Exercise, Drawn from American History*, 36 WAKE FOREST L. REV. 535, 541 (2001). For similar arguments, see also McConnell, *supra* note at 60, at 30 (“No other freedom is a duty to a higher authority.”); Smith, *supra* note 6, at 154 (describing a “priority claim” to justify religious liberty that rests on distinctive goods of religion that “are more valuable or more important than most or perhaps all other human goods”); GARVEY, *supra* note 6, at 54 (“The believer’s duties are more compelling [than non-religious duties] just because they arise from God’s commands.”); Gregory C. Sisk, *Stating the Obvious: Protecting Religion for Religion’s Sake*, 47 DRAKE L. REV. 45, 45 (1998) (stating that the “manifest purpose” of the Free Exercise Clause is “to recognize and protect the positive good of religious faith and practice”).

<sup>65</sup> See, e.g., Paulsen, *supra* note 6, at 1622 (“[T]he personal ethical individual who objects to war but is forced to bear arms has not been true to his own principles; the religious believer who has been forbidden by God to bear arms against his fellow man, but does so anyway, risks eternal damnation and the fires of hell.”).

### C. Limitations

All six positions raise questions. Start with the defenses, given at (4)–(6). The last might justify protections only for the true religion,<sup>66</sup> theistic religions, or those anticipating hell.<sup>67</sup> Position (5) does not follow from its own premise that religion is a basic good since its adherents say the same of interests that get no legal protection (like friendship).<sup>68</sup> And position (4) depends on causal claims that seem hard to assess.<sup>69</sup> It also tells us little about what scope to give statutory or other religious liberty protections. Since it's hard to trace religion's alleged social benefits to any particular form of religious exercise, there's a real risk of over- or under-protecting.

As for the three positions against: Position (1) holds that religion is not only *not superior* to other interests, but positively harmful. Stephen Gey<sup>70</sup> and Suzanna Sherry powerfully defend this position.<sup>71</sup> But it seems, in the end, inapt. For whatever harms are posed by certain exemption claims, courts could handle them by denying the claims when applying heightened scrutiny. They could reject exemptions that would unduly harm legitimate state interests. This sort of basis for denial is built into the legal tests by which our courts resolve *all* constitutional claims to exemptions, including free exercise exemptions before *Smith*.<sup>72</sup>

<sup>66</sup> That is, a religion that is right about whether a supreme being exists and, if so, what that being has in fact demanded of human beings. See Alexander, *supra* note 51, at 40 (“Religious believers do not view compliance with *imagined* duties as a good. Rather, they view compliance with *actual* duties as a good.”).

<sup>67</sup> See GARVEY, *supra* note 6, at 54 (“The believer’s suffering is special precisely because she believes in heaven, hell, eternal life, and so on.”). But see Marshall, *In Defense of Smith and Free Exercise Revisionism*, *supra* note 6, at 321 (“The violation[s] of deeply held moral or political principles may cause as much psychic harm to the believer as would a violation of a religious tenet, even if the latter is believed to have an extra-temporal effect.”).

<sup>68</sup> See, e.g., JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 86-89 (1980) (listing various “basic forms of good” including “sociability (friendship)” and religion). It is unsurprising, then, that Finnis, one proponent of this view, says nothing about whether religion requires exemptions and what those might look like. He focuses on the pedagogic value of giving religion constitutional prominence. See generally Finnis, *supra* note 9.

<sup>69</sup> Compare *Wolman v. Walter*, 433 U.S. 229, 263 (1977) (Powell, J., concurring in part and dissenting in part) (finding that “we are quite far removed from the dangers that prompted . . . the Establishment Clause” and that an accommodationist approach offers substantial benefits while creating only a “remote” risk of civil strife), with Toni M. Massaro, *Religious Freedom and Accommodationist Neutrality: A Non-Neutral Critique*, 84 OR. L. REV. 935, 941 (2005) (“[The] doctrinal and political turns in favor of government support of religious ends are a decidedly mixed blessing.”).

<sup>70</sup> See generally Gey, *supra* note 6.

<sup>71</sup> See generally Sherry, *supra* note 57.

<sup>72</sup> See generally Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007) (discussing strict scrutiny—which asks if a burdensome law serves a compelling interest by narrowly tailored means—as applied to free speech, freedom of association, free exercise); see also *id.* at 1269



Professor Leiter's influential and more recent arguments<sup>73</sup> are redolent of Gey's and Sherry's but more nuanced. He withholds judgment on whether religion is a *net* harm,<sup>74</sup> and thinks religious conscience warrants toleration (but not exemptions<sup>75</sup>) just as an instance of conscience.<sup>76</sup> But he does contend that "religion qua religion" warrants no affirmative respect.<sup>77</sup> His reason is that religion necessarily involves a rejection of reason and evidence, and nothing so defined could be valuable in itself.<sup>78</sup> Yet it would not follow that jogging has no value in itself just because it necessarily involves something negative, like the wearing down of joints and shoes.<sup>79</sup> Jogging is valuable under other descriptions—as exercise, as recreation. Likewise, even if religion generally involved a rejection of evidence,<sup>80</sup> it could be valuable under other descriptions—as pursuit of ultimate meaning or identity.<sup>81</sup>

Finally, positions (2) and (3)—representing most fairness critics—assume that special protection is unfair if religion is no more valuable than other interests. But the fairness critique cannot rest *exclusively* on the premise that religion is no more important than other interests. The critique should also give reasons to think the other interests *need* protection.

(explaining that before *Smith*, statutes that substantially burdened free exercise were subjected to strict scrutiny).

<sup>73</sup> See generally LEITER, *supra* note 6.

<sup>74</sup> *Id.* at 63 (suggesting that no one would think religion produces more utility than harm, "absent an antecedent bias in favor of religion").

<sup>75</sup> *Id.* at 94, 133 (arguing that religious exemptions would "amount to a legalization of anarchy," and that "toleration does not require" exemptions).

<sup>76</sup> *Id.* at 64 ("[I]f matters of religious conscience deserves toleration . . . then they do so because they involve matters of conscience, not matters of religion").

<sup>77</sup> See *id.* at 67-91.

<sup>78</sup> Leiter assumes that if "there is any *special* reason to tolerate" religion, that could only be because religion's instrumental benefit ("existential consolation") outweighs its harmful effects. *Id.* at 60-63. He skips over the possibility that religion could have value in itself, and indeed says it warrants no affirmative respect. *Id.* at 68-91.

<sup>79</sup> Perhaps Leiter's point is not simply that religion *necessarily* involves a rejection of reason, but that it *essentially* does (in the philosopher's sense of "essence")—i.e., that religion's rejection of reason (and categoricity) is what *makes* it religion. *Id.* at 47. But it need not follow from this that religion lacks inherent value (especially if, as Christine Korsgaard argues, something can be valuable for its own sake due to *extrinsic* properties. See Christine M. Korsgaard, *Two Distinctions in Goodness*, 92 PHIL. REV. 169, 172 (1983). Moreover, I do not think that Leiter has established the premise about religion's essence, and there are good reasons to doubt it. See, e.g., MARK MURPHY, *NATURAL LAW AND PRACTICAL RATIONALITY* 131-33 (2001).

<sup>80</sup> This is, of course, contested. See Paulsen, *supra* note 10, at 1054-65 ("Religion is a fundamental reason for action.").

<sup>81</sup> Cf. MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 180-81 (2000) ("Even if such a position were correct, even if a certain group of religious beliefs (or even all beliefs) were nothing more than retrograde superstition, we would not be respecting the autonomy of our fellow citizens if we did not allow them these avenues of inquiry and self-determination.").

Fairness critics might reply that once society finds an interest important, it should protect that interest no matter what. This objection would stick if civil liberties were free. But there are costs<sup>82</sup>—to creating a protection (the resources and opportunity costs of passing this protection and not that), to having it up and running (the chilling effect on even lawful regulation), and to enforcing it (the litigation of meritless claims, and loss of the benefits of laws curtailed). These costs make it fair to set priorities about which important interests to protect, based on which ones *need* protection.

Our history and traditions seem to agree. The Bill of Rights contains few protections of private conduct, and the list of substantive due process liberties is short.<sup>83</sup> Thus, many valuable interests have no civil-liberty coverage: higher education, professional wellbeing, athletics, etc. If the limits have not been random or reckless or unchosen, then some actors (the first Congress, later ones, referendum voters) have judged some interests less needful of protection. As Professor Fallon puts it, “what rights are recognized predictably varies with changing perceptions of which interests need judicial protection.”<sup>84</sup> Need matters. Because there are costs to enshrining civil liberties (in the Constitution or a super-statute<sup>85</sup>), it’s fair to prioritize those whose underlying interests most need the help.

## II. STEPPING BACK: THE WHAT AND WHY OF OUR CIVIL LIBERTIES

To compare religious and secular interests’ need for protection will require more details on the protections at issue. But which protections? The doctrines that protected religion before *Smith*? Or those doctrines that courts would likely use if we created new civil liberties for the interests cited by fairness critics? Simplifying my job, the two are the same. There’s surprising similarity between pre-*Smith* free exercise doctrine and our law’s regime for curbing incidental burdens on other protected conduct: speech, abortion

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<sup>82</sup> To impose no costs at all, a protection would have to generate no resistance when proposed, and no wasteful litigation when passed; the state actions it prevented would have to be worthless or always fungible with others or almost never necessary; and its terms would have to be determinate enough that legitimate regulation would not be chilled. Perhaps the Third Amendment is an example of a nearly costless protection.

<sup>83</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (explaining “reluctan[ce] to expand the concept of substantive due process” and the need for “the utmost care whenever we are asked to break new ground in this field” (internal quotation marks and citations omitted)). *But see* *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) (cabining *Glucksberg* to certain contexts and explaining that “rights come not from ancient sources alone”).

<sup>84</sup> Fallon, *supra* note 15 at 494.

<sup>85</sup> See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001) (“A super-statute is a law that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does ‘stick’ in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law . . .”).

(pre-*Dobbs*<sup>86</sup>), gun rights, and travel. It stands to reason that courts would use the same sort of regime if we created new civil liberties for other interests. So that is the sort of regime for which I will compare secular and religious interests' levels of need.

Exactly when and how, then, do our civil liberties prevent incidental burdens on protected conduct? And what do the answers tell us about how to measure a given interest's need for this sort of protection?

### A. *The Adequate Alternatives Principle*

Begin with the essential features of civil liberties. Because they limit state action—state interference in private conduct—they normally take constitutional form. But they could also be embodied in statutes. The Religious Freedom Restoration Act (RFRA),<sup>87</sup> for instance, authorizes exemptions from agency actions and future statutes that do not preempt it expressly.<sup>88</sup> What sets civil liberties apart is not constitutional status, then, but two things: they are general in scope, and they are created separately from the laws or regulations that they guard us against. This is in contrast to the custom accommodations carved into a particular regulation before it takes effect (like religious exemptions built into some vaccination mandates<sup>89</sup>). Unlike the custom accommodations carved into a particular regulation, civil liberties shield us from whatever unspecified legislative or executive action the future may bring (and sometimes from judicial decisions<sup>90</sup>). So they can compel an exemption from (or invalidation of) a law even if the majority that supported that law would oppose that particular exemption. (That's how the wildly popular First Amendment can spawn a wildly unpopular right to flag-burning.<sup>91</sup>) This separation—between the general provision protecting an

<sup>86</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (rejecting a constitutional right to elective abortions).

<sup>87</sup> See *supra* note 41.

<sup>88</sup> See 42 U.S.C. § 2000bb-3(a)-(b) (2018) (making RFRA applicable to “all Federal law” and subjecting all federal law to RFRA “unless such law explicitly excludes such application by reference”).

<sup>89</sup> For an overview of legislative exemptions from state vaccine mandates, see *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT'L CONF. OF STATE LEGISLATURES, (Jan. 10, 2022), <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> [<https://perma.cc/C8A2-X9B7>].

<sup>90</sup> Two areas where judicial decisions might raise religious liberty concerns are in property “disputes among factions of religious groups” (e.g., between a particular congregation and its church's hierarchy), see KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: VOLUME I: FREE EXERCISE AND FAIRNESS* 266 (2006), and in torts (e.g., a community's decision to excommunicate a former member, publicly disclose embarrassing facts about them, aggressively recruit members, and so on), see *id.* at 295-328.

<sup>91</sup> See *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (holding that the First Amendment protects flag burning).

interest and the specific laws that would otherwise harm that interest for specific groups—is essential to civil liberties’ unique character. It explains their particular value to minorities.<sup>92</sup>

Courts normally enforce civil liberties against neutral laws (laws that do not *target* the protected conduct) in two steps. At the first step, courts ask if the incidental burden on the protected conduct clears a certain threshold of seriousness.<sup>93</sup> If so, they move on to the second step and ask if the sufficiently serious burden is justified by a sufficiently weighty state interest.<sup>94</sup> Step two is the application of heightened scrutiny, and the options for how that analysis should go are familiar.<sup>95</sup> Often courts will require the state action to be either substantially related to an important interest (intermediate scrutiny), or narrowly tailored to a compelling interest (strict scrutiny).<sup>96</sup>

But what about the first step—deciding whether heightened scrutiny is triggered at all? It turns out that there’s remarkable (but largely unremarked-on) uniformity in the answers across our constitutional liberties. First, courts will apply heightened scrutiny not to just any incidental burden, but only to those burdens deemed “undue,” “substantial,” or the equivalent.<sup>97</sup> As Professor Dorf has shown, this limitation on exemptions from incidental burdens is meant to ensure that exemption claims do not flood the courts and cripple the state’s ability to regulate.<sup>98</sup> Second, I submit that there is an even more specific common thread. Courts will find a law “substantially” or “unduly” burdensome if it denies you some means of exercising a civil liberty,

<sup>92</sup> See *supra* notes 27–28 and accompanying text.

<sup>93</sup> See Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1176, 1182 (1996) (“[E]xisting law treats substantial incidental burdens as problematic and largely ignores other incidental burdens.”); Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Design*, 45 HASTINGS L.J. 867, 867–68 (1994) (“[W]e ask whether a particular law prevents people from exercising this right.”).

<sup>94</sup> See Dorf, *supra* note 93 (arguing that a sufficiently weighty state interest can justify substantial incidental burdens, even in areas like free speech, free exercise of religion, and privacy)

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

<sup>96</sup> See generally Fallon, *supra* note 72, at 1273, 1298–1301 (discussing the origins of and differences between intermediate scrutiny and strict scrutiny). In one context—the Second Amendment—the Supreme Court has instructed courts not to weigh a challenged law’s benefit and burden themselves, but to see whether the law has a similar tradeoff of benefit to burden as a regulation that was historically permitted. See *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2118 (2022) (“To determine whether a firearm regulation is consistent with the Second Amendment, . . . [courts should consider] first, whether modern and historical regulations impose a comparable burden on the right of armed self-defense, and second, whether that regulatory burden is comparably justified.”); see also *infra* notes 123–127 and accompanying text. The Court’s historical approach to assessing the lawfulness of substantial burdens is consistent with my proposal that something like an adequate-alternatives principle for gun rights determines when a substantial burden exists at all. See *infra* note 128.

<sup>97</sup> See generally Dorf, *supra* note 93 (explaining when heightened scrutiny is applied in speech, religion, and privacy cases).

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

without leaving you adequate alternative means. In another article, I defend this claim by a close analysis of the case law of several liberties.<sup>99</sup> Here I will limit myself to a few illustrative examples, and refer readers to the other article for a more complete account, on which the following summary draws:

### 1. Free Speech

Courts have reviewed two kinds of incidental burdens on free speech.<sup>100</sup> They arise from (1) time, place, and manner restrictions on speech in a public forum (e.g., noise ordinances) and (2) regulations of expressive conduct—not words but behavior (e.g., flag burning<sup>101</sup>) intended and understood<sup>102</sup> to convey a message. And both types of burdens will trigger heightened scrutiny if they do not “leave open ample alternative channels for communicat[ing] the information.”<sup>103</sup> To take just one example, no heightened scrutiny applied to an ordinance preventing bands performing in Central Park from using their own sound system since they could still use one provided by the city.<sup>104</sup> Quite explicitly, then, non-targeted burdens on free speech must satisfy a kind of adequate alternatives principle.

### 2. Abortion

While the Court has recently rejected a constitutional right to elective abortions,<sup>105</sup> its approach to enforcing such a right over several decades is still

<sup>99</sup> See Sherif Girgis, *Defining “Substantial Burdens” on Religion and Other Liberties*, VA. L. REV. (forthcoming 2022) (examining the adequate alternatives principle in the realm of free speech, abortion, travel, and gun rights).

<sup>100</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 12-2 (2d ed. 1988) (distinguishing two ways the government might “abridge” speech).

<sup>101</sup> *Texas v. Johnson*, 491 U.S. 397 (1989) (examining flag burning under the First Amendment).

<sup>102</sup> *Spence v. Washington*, 418 U.S. 405, 410–411 (1974) (protecting the display of a flag with a peace symbol taped to it as reflecting “[a]n intent to convey a particularized message” under circumstances that made it likely “that the message would be understood by those who viewed it”).

<sup>103</sup> *Ward*, 491 U.S. at 791 (citations omitted). Courts alternate between speaking of “adequate” and “ample” alternative means. See, e.g., *Contributor v. City of Brentwood*, 726 F.3d 861, 864 (6th Cir. 2013) (citing *Ward*, 491 U.S. at 791) (referring to “adequate alternative channels”).

<sup>104</sup> *Ward*, 491 U.S. at 803 (upholding the ordinance as a measure “narrowly tailored to serve the substantial and content-neutral governmental interest of avoiding excessive sound volume” and because it left open “ample channels of communication”). While *Ward* involved a time, place, or manner restriction, the Court has clarified that the same “alternatives” standard applies to incidental burdens on expressive conduct, too. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (holding that restrictions on expression “are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information”). This is so even though the Court had also framed the test for expressive conduct burdens in slightly different terms. See *United States v. O’Brien*, 391 U.S. 367 (1968).

<sup>105</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

instructive here. It confirms a general pattern in our law's approach to civil liberties. *Planned Parenthood v. Casey*<sup>106</sup> revised *Roe v. Wade*'s<sup>107</sup> approach to incidental abortion regulations—like waiting periods for women or credentialing requirements for providers. Under *Casey*, such regulations required a compelling interest<sup>108</sup> (and were thus invalid insofar as they applied before fetal viability<sup>109</sup>) if they had the “effect of placing a substantial obstacle in the path of a woman seeking an abortion.”<sup>110</sup> As applied, this required incidental burdens to leave adequate access to abortion. Thus, *Casey* upheld Pennsylvania's clinic-recordkeeping requirements because they would at most “increase the cost of some abortions” by a “slight amount.”<sup>111</sup> That is, they left adequate (almost equally affordable) access to abortion. But *Casey* rejected a spousal-notification rule that would allow a husband to “wield an effective veto over his wife's decision,”<sup>112</sup> leaving her no alternative means of aborting.

### 3. Travel

The Constitution requires “that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”<sup>113</sup> And this liberty bars a subset of incidental burdens defined in similar terms as above. Then-Justice Rehnquist put it this way in a dissent he later parlayed into a majority opinion<sup>114</sup>: Under the case law, the lawfulness of “financial impositions on interstate travelers”<sup>115</sup> turns on whether they impose “barrier[s]” to travel that “foreclose[.]” the claimant “from obtaining some part of what she sought.”<sup>116</sup> That is, regulations must leave adequate travel alternatives.

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<sup>106</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884-85 (1992).

<sup>107</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>108</sup> *Casey* did “not disturb the central holding of *Roe*” that identifies when abortion bans serve a constitutionally sufficient interest. 505 U.S. 833 at 879. This suggests that *Casey* left intact *Roe*'s demand for a “compelling state interest” for bans, as well as *Roe*'s conclusion that a compelling state interest “in potential life” is absent until fetal viability. 410 U.S. at 155, 163.

<sup>109</sup> See *Casey*, 505 U.S. at 860 (“*Roe*'s central holding [is] that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.”); *Roe*, 410 U.S. at 163 (concluding that “interest in potential life” becomes “compelling” at fetal viability).

<sup>110</sup> *Casey*, 505 U.S. at 877.

<sup>111</sup> *Id.* at 901.

<sup>112</sup> *Id.* at 897.

<sup>113</sup> *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).

<sup>114</sup> See *Sosna v. Iowa*, 419 U.S. 393 (1975).

<sup>115</sup> See *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 284 (1974) (Rehnquist, J., dissenting).

<sup>116</sup> *Sosna*, 419 U.S. at 406.

□ *Guns*: As the D.C. Circuit (and a since-vacated Ninth Circuit decision<sup>117</sup>) reads *District of Columbia v. Heller* (2008),<sup>118</sup> burdens on the rights to keep and to carry “must leave alternative channels for both.”<sup>119</sup> This alternative-channels principle explains why *Heller* allowed limits on carrying near sensitive places like schools<sup>120</sup>: One could “preserve an undiminished right of self-defense by not entering” such places.<sup>121</sup> One had, in other words, adequate alternatives for self-defense. Likewise, “[t]he idea that the government must leave ample channels for keeping and for carrying arms explains” *Heller*’s invalidation of (1) “a ban on ownership that left *no* means of defense by handguns at home”; (2) its favorable treatment of “cases allowing bans on concealed carry only so long as open carry was allowed”; and (3) its “approval of bans on some types of guns so long as those most useful for self-defense remained accessible.”<sup>122</sup> The D.C. Circuit’s reading is confirmed by the Supreme Court’s 2022 decision on the right to carry,<sup>123</sup> which favorably cites the D.C. Circuit’s ruling<sup>124</sup> and reiterates the general points that restrictions are suspect if they “impose[] a substantial burden on public carry”<sup>125</sup> (or ban it “altogether”<sup>126</sup>) but are permissible if their exclusion of *some* means of carrying leaves people “generally free”<sup>127</sup> to carry responsibly for self-defense.<sup>128</sup>

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<sup>117</sup> *Young v. Hawaii*, 896 F.3d 1044, 1070 (9th Cir. 2018), *reh’g granted*, 915 F.3d 681 (9th Cir. 2019) (en banc) (citing the D.C. Circuit’s interpretation of *Heller*).

<sup>118</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>119</sup> *Wrenn v. District of Columbia*, 864 F.3d 650, 662 (D.C. Cir. 2017) (citations omitted).

<sup>120</sup> *Heller*, 554 U.S. at 626 (“[N]othing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings”).

<sup>121</sup> *Wrenn*, 864 F.3d at 662 (citations omitted).

<sup>122</sup> *Id.* at 662–63.

<sup>123</sup> *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2156 (2022).

<sup>124</sup> *Id.* at 2126, 2148.

<sup>125</sup> *Id.* at 2145.

<sup>126</sup> *Id.* at 2146.

<sup>127</sup> *Id.*

<sup>128</sup> My thesis (that Second Amendment doctrine, like the law on other constitutional liberties, permits regulations that leave adequate alternative means of exercising rights granted under the Amendment) is fully consistent with *Bruen*’s choice to subject challenged gun laws to a historical test rather than more familiar forms of heightened scrutiny. *Bruen* instructs courts to uphold a modern regulation of conduct covered by the Second Amendment only if the regulation has a “proper analogue” in historically permitted regulations. *Id.* at 2132. That historical test is a *decision procedure*—a way for courts to figure out which laws are permissible. The imposition of that test is consistent with my thesis that what *makes* the permissible regulations (whether historical or modern) permissible is the fact that they leave adequate alternative means of armed self-defense.

4. Pre-*Smith* Free Exercise

Before *Smith*, when the Court imposed heightened scrutiny on religion-neutral laws that “placed a substantial burden” on religion,<sup>129</sup> the substantial-burden test effectively turned on the presence of adequate alternatives. In *Sherbert v. Verner*, the Court granted an exemption to a Seventh Day Adventist who lost unemployment insurance because she refused to work on her Sabbath.<sup>130</sup> The Court reasoned that this denial “force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other . . . .”<sup>131</sup> It left her one alternative for exercising her religion, and that alternative was inadequate. By contrast, the Court found no substantial burden when the “only burden” on a claimant was a marginal decrease in “the amount of money [the claimant] ha[d] to spend on . . . religious activities.”<sup>132</sup> Likewise the Court found no substantial burden when minimum wage laws required a nonprofit’s employees to receive “wages”—against their felt duty to volunteer—since there was “nothing in the Act to prevent [them] from returning the [wages] to the Foundation.”<sup>133</sup> The law left open an alternative way to honor their beliefs.

Finally, for all these civil liberties, there is more to say about what makes an alternative “adequate.”<sup>134</sup> First, adequacy must be about the quality of the alternative options left open to claimants, not the quantity of options. A law requiring people to speak in a whisper wouldn’t leave adequate alternatives just because it left a large *number* of options (speaking at 19 decibels, at 18, at 17, etc.). An alternative means of exercising a liberty is “adequate” only if it allows people to *realize the interest served by the protected conduct* to the same degree.<sup>135</sup>

This way of putting things requires one to tease apart the conduct that a liberty protects and the interest or good that is realized by that conduct. With free speech, the protected “conduct” is expression—writing, speaking, making art, or burning flags and draft cards to make a point. The interests said to be served by it, however, are different: the development of knowledge, the functioning of democracy, etc.<sup>136</sup> With abortion under *Casey* and *Roe*, the covered conduct was simply the procurement of an abortion. But the interests said to be served by it included a woman’s life or health, professional and

129 *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989).

130 *Sherbert v. Verner*, 374 U.S. 398, 410 (1963).

131 *Id.* at 404.

132 *Jimmy Swaggart Ministries v. Bd. of Equalization of Ca.*, 493 U.S. 378, 379, 391 (1990).

133 *Tony & Susan Alamo Found. v. Sec’y of Lab.*, 471 U.S. 290, 304 (1985).

134 *Girgis*, *supra* note 99, at 4.

135 *Id.*

136 *See, e.g., Stone*, *supra* note 26, at 991 (outlining these interests).



economic opportunities, equality with men, and so on.<sup>137</sup> Thus, an alternative means of speaking or getting an abortion was adequate if it enabled one to realize the interests above to the same extent.

Second, civil and criminal bans are not the only way for laws to deny a person an adequate alternative. Even without imposing civil or criminal penalties, laws can substantially burden a given liberty by *raising the cost* of its exercise. Before *Dobbs*, a regulation that incidentally required women to drive much farther to get an abortion imposed an undue burden—even if it did not ban abortions.<sup>138</sup> And the denial of unemployment insurance in *Sherbert* did not criminalize Sherbert’s avoidance of work on her Sabbath.<sup>139</sup> It just made that costlier. So an alternative means of exercising a liberty—of engaging in the conduct that liberty protects—will not be “adequate” if it’s much costlier than the option eliminated by the law under review. And the limiting case of “increasing the cost” of exercising a liberty is to *prevent* its exercise altogether. The law does that by denying someone necessary resources—as when a prison prevents an inmate from reading the Koran by denying him a Koran.

Hence the thread running through our law against incidental burdens:

*The adequate alternatives principle:* A (non-targeted) law that prevents, prohibits, or raises the cost of exercising your civil liberty imposes a “substantial” or “undue” burden (triggering heightened scrutiny) if the law leaves you no adequate alternatives. And to be adequate, an alternative means of exercising the liberty must let you pursue *the interest served by* that liberty (i) to about the same degree, and (ii) at not much greater cost, than you could have through the options the law has closed off.

### B. Gauging Need: Fragility and Exposure

Our civil liberties, then, subject “substantial” or “undue” incidental burdens to heightened scrutiny.<sup>140</sup> They preserve adequate alternatives for pursuing the underlying interests.<sup>141</sup> Given this, how can one tell when an important interest really *needs* the services of a civil liberty? This Section’s answer: when the interest is fragile and exposed.

The goal of this Section is conceptual and analytic. It is to translate the foregoing account of civil liberties (rooted in caselaw) into an illuminating

<sup>137</sup> See *infra* note 153.

<sup>138</sup> See *Whole Woman’s Health v. Hellerstedt*, 132 S. Ct. 2292, 2313 (2016) (finding that the law’s “admitting-privileges requirement [for abortion providers] led to the closure of half of Texas’ clinics” and that the increased driving distances imposed on women constituted an undue burden).

<sup>139</sup> See *Sherbert*, 374 U.S. at 403 (“[I]t is true that no criminal sanctions directly compel appellant to work a six-day week”).

<sup>140</sup> See *supra* notes 93–99 and accompanying text.

<sup>141</sup> See *supra* Section II.A.

and tractable framework—not to build new normative ideas into the framework. If this Section is done right, “fragile and exposed” will be synonymous with “likely to experience substantial or undue burdens,” which in turn indicates need for an adequate alternatives principle. But the translation is worthwhile because the analytic distinction between fragility and exposure will provide a firmer grip on three things. As seen below, it helps one grasp what *causes* an interest to need civil-libertarian protection<sup>142</sup>; *when* an interest needs this protection<sup>143</sup>; and *which* interests do.<sup>144</sup> That’s how this investment in conceptual overhead will pay dividends.

To think about different interests’ need for civil-liberty protection, it helps to begin with a crucial interest that has *little* need. Take cardiovascular health. This interest, like those that underlie our civil liberties, is advanced through a certain kind of conduct: aerobic exercise. Yet even though we have no civil liberty for that conduct, our ability to exercise for health suffers no “undue” or “substantial” legal burdens. While plenty of laws eliminate options for exercise, they leave equally good alternatives. It is illegal to swim around the Hoover Dam,<sup>145</sup> but you can take a jog across it. You cannot do Pilates on the White House lawn,<sup>146</sup> but you can do it in your basement. *Whatever* the state does, it will leave you alternative means of building up your cardiovascular health to the same degree, at no greater cost. That is why neutral legal burdens on exercise would never be undue or substantial. (They would never run afoul of an adequate alternatives principle for aerobic exercise.) In this way, you might say our interest in cardiovascular health is resilient. Conversely, an interest is fragile if neutral legal burdens on it *are* likely to be undue burdens. More precisely: An interest is more *fragile*, the likelier it is that a (neutral) law that burdens *some* means of realizing the interest will leave you no adequate alternatives—i.e., no other option for realizing the interest to about the same degree, at not much greater cost.

Thus, fragility, which measures an interest’s need for the protections of an adequate alternatives principle, is just the mirror image of that principle. If an interest is not at all fragile (e.g., cardiovascular health), we do not need a civil liberty protecting the conduct that promotes it (exercise). After all, the

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<sup>142</sup> See *infra* subsection II.C.2.

<sup>143</sup> See *infra* subsection II.C.3.

<sup>144</sup> See *infra* subsection II.C.2; see also *infra* Part IV.

<sup>145</sup> See, e.g., Faiza Saqib & Nicola Slawson, *Drunk Briton Fined After Surviving Hoover Dam Swim*, THE GUARDIAN (Sept. 11, 2017, 1:53 PM EDT), <https://tinyurl.com/4fa5xfzy> [<https://perma.cc/2JHR-DLL9>] (describing how a British man was arrested and fined for swimming near the Hoover Dam).

<sup>146</sup> See, e.g., Laurel Wamsely, *Intruder Arrested After Entering White House Grounds*, NPR (Mar. 11, 2017), <https://tinyurl.com/2xe3zydr> [<https://perma.cc/FR6W-U4LW>] (reporting that a man was arrested for trying to enter the White House lawn).

whole point of such a liberty would be to presumptively exclude undue burdens, and the interest is one for which burdens are *never* “undue.”

But fragility is not the only source of need. That’s because fragility in this sense is, so to speak, conditional, just like physical fragility. Fragile chinaware is likelier to break *if* struck, and fragile interests are likelier to be burdened unduly *if* burdened at all. Even the most fragile vase will never break if it’s never exposed to other objects. And even a fragile interest will not need constitutional protection if (for whatever reason) the workings of ordinary politics in a system would rarely touch it. For then the overall risk of losing adequate access to the interest would be low even *without* the shield of a civil liberty. “Exposure” captures this second source of need for protection: exposure is the measure of how often our law—absent a civil liberty to prevent this—will deny *some* means of realizing an interest. Fragility is about how often a law denying you some means of realizing the interest will leave *no adequate alternative* means. Thus, the overall risk of harm to an interest (without civil-libertarian protection) is a product of its fragility and exposure together. An interest of high fragility but no exposure will suffer no harm.

It is nonetheless useful to distinguish fragility and exposure because they point to different *sources* of need.<sup>147</sup> Fragility depends on an interest’s intrinsic features—on how many equally good ways there are to pursue it. (Below I explain the usefulness of zeroing in on this factor and offer a hypothesis about what features tends to make interests fragile.<sup>148</sup>)

Exposure depends less on the *interest’s* features than on variable facts about the world: the structure of government, those in charge of it, or those seeking protection. Maybe religion is unexposed because your system’s enumeration of limited legislative powers will head off conflicts, as Federalists who saw no need for a Bill of Rights supposed.<sup>149</sup> Or maybe yours is a Catholic medieval state with a Catholic prince unlikely to burden his own.

As these examples suggest, focusing on exposure shed slight on why civil liberties like religion are, as noted,<sup>150</sup> crucial for minorities in particular. An interest will be exposed to incidental burdens if lawmakers (i) can’t foresee which laws will burden it or (ii) don’t care enough to prevent burdens by redrafting the bill before passage. Both conditions obtain more often for minorities’ interests. A Protestant majority might not know enough about

<sup>147</sup> See *infra* subsection II.C.2.

<sup>148</sup> See *infra* subsection II.C.3; see also *infra* Sections IV.A–B.

<sup>149</sup> See Dorf, *supra* note 93, at 1188 (explaining the Federalists’ belief that a bill of rights was unnecessary in light of the Constitution’s limitations on federal power).

<sup>150</sup> See *supra* notes 27–28 and accompanying text.

Native American religions to realize that drug laws would impinge on their ritual use of peyote.<sup>151</sup> Or the majority might know but not care.

Civil liberties can remedy this problem precisely because they are separate from and more general than the laws they limit. This enables them to curb a statute whose impact the supporting majority does not foresee or care enough about to avoid through redrafting. Civil liberties thus exploit the fact that even if there is no majority for preventing a particular law's burden on a particular group, there may be a supermajority for a general rule against burdens of that kind on anyone. They are super-majoritarian measures with antimajoritarian effects. And this is what makes them apt to remedy an interest's exposure for minorities.

Finally, recall why fragility and exposure matter for the fairness debate and constitutional design issues more broadly. Because all civil-liberty protections have costs,<sup>152</sup> it is fair to prioritize the most desirable or pressing ones. The more exposed or fragile an interest is, the greater the harm done without its protection, and the more desirable and urgent protection becomes. If religious interests are significantly more fragile and exposed, it will be fair to prioritize them even if they are no more *important*.

### C. Deploying the Fragility-Exposure Framework

To set the stage for applying this framework to the fairness debate, this Section does three things. First, it uses the framework to model the case for a wide range of our liberties. Second, it applies the framework to *critique* the case for a certain liberty. By using the Second Amendment as my case study, I hope to show that the concepts of fragility and exposure fit secular as well as religious pursuits, making them neutral tools for addressing the fairness debate. Third, this Section shows how the fragility-exposure framework can prescribe *limits* on a liberty's scope. Here my case study will be religious liberty itself. Tracing its proper limits will have the added benefit of clarifying the precise protections whose fairness Parts III and IV assess.

#### 1. Tying Civil Liberties to Fragile and Exposed Interests

Does it really make sense to think of our civil liberties as protecting fragile and exposed interests? Most liberties do not pick out a fundamental interest—an inherently valuable aspect of human wellbeing—by name. Abortion under *Casey* and *Roe*, guns, speech: these have been thought valuable

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<sup>151</sup> Emp. Div. v. Smith, 494 U.S. 872, 874 (1990) (describing the Oregon law that categorized the hallucinogenic drug peyote, which is used in the Native American Church, as a controlled substance).

<sup>152</sup> See *supra* note 82 and accompanying text.

as means (at best), not as ends. But the theory described above makes sense of protecting them all the same. Each is thought to serve one or more interests, fragile in some respects, and exposed in the absence of protections for certain conduct. It's just that there are different connections in each case between the conduct covered (the means) and the interest served (the end).

First, sometimes a readily identifiable means is thought crucial to an array of interests, and then our law defines the liberty in terms of the means alone. Under *Roe* and *Casey*, for example, access to a particular procedure (abortion) at a particular stage (until fetal viability) was thought to be needed for realizing autonomy in sexual and familial matters, physical health, career, and participation in public life.<sup>153</sup> Or in this Article's terms, laws impeding pre-viability abortions are thought to leave many women no other way to realize these interests to the same degree and at no greater cost. Such abortion laws implicate fragile interests that would be, absent this liberty, exposed. Or so *Casey* and *Roe* presuppose.

The case for free speech, too, ties a readily identifiable means to an indefinite range of interests.<sup>154</sup> The Supreme Court has held (plausibly<sup>155</sup>) that whatever interests free speech might serve, they're secured by a doctrine enabling people to convey their preferred message to their preferred audience.<sup>156</sup> This amounts to the idea that a law burdening "the overall ability

<sup>153</sup> See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting) (internal quotation marks and citations omitted) ("Women . . . have the talent, capacity, and right to participate equally in the economic and social life of the Nation. Their ability to realize their full potential, the [*Casey*] Court recognized, is intimately connected to their ability to control their reproductive lives. Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."); Reva B. Siegel, *Siegel, J., concurring*, in *WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION* 63 (Jack M. Balkin ed., 2007) (citing, as a basis to scrutinize and ultimately invalidate abortion bans, the concern that "laws that single women out for special treatment in virtue of their maternal role have excluded women from participating as equals with men in core activities of citizenship"); Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *STAN. L. REV.* 261, 273-74 (1992) (arguing that *Roe's* account of women's interest in abortion overlooked the social forces contributing to women's need for abortion access).

<sup>154</sup> For an argument to this effect, see ROBERT P. GEORGE, *MAKING MEN MORAL* 192-208 (1993) (arguing for a strong presumption in favor of freedom of speech based on the value of most speech in achieving a variety of human goods).

<sup>155</sup> See *Stone*, *supra* note 26, at 991 ("This conception of the free speech guarantee is at least arguably consistent with both the self-governance and self-fulfillment rationales for free expression").

<sup>156</sup> See *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (upholding a regulation that allowed a group distributing religious pamphlets to "mingle with the crowd and orally propagate their views" among the target audience).

to communicate”<sup>157</sup> implicates certain interests’ fragility. It’s likely to leave no alternative ways to achieve those interests as well and as affordably.

Second, sometimes an identifiable interest is thought to hinge on access to an easily identifiable means, so the law defines the right in terms of the means and end together. That’s how *Heller* glosses the Second Amendment: as a right to keep and bear arms *for self-defense*.<sup>158</sup> More precisely, the right is to self-defense by means of weapons equal to those an attacker is likely to use (those “in common use”<sup>159</sup>).<sup>160</sup> Modeling the right this way helps us better assess (and critique) the case for it, as I will suggest below.

Finally, sometimes the interests served by a liberty are identifiable in advance, but the crucial means are *not*. And then our law defines the liberty as covering, in general terms, whatever activity might promote the interests in question. I suggest that the interests served by religious conduct are like that. Their crucial means in any given person’s case are hard to identify in advance because they depend on the not-entirely-foreseeable contents of her creed.

This last point follows from a number of views about exactly what interests religious practice serves. Scholars have suggested various candidates: the forging of one’s personal identity;<sup>161</sup> the pursuit of meaning or “ultimate concerns”<sup>162</sup> “in one’s own way”<sup>163</sup>; or the search for harmony with the transcendent.<sup>164</sup> Yet all seem to agree that a claimant realizes the

<sup>157</sup> See Stone, *supra* note 26, at 991.

<sup>158</sup> District of Columbia v. Heller, 554 U.S. 570, 625-30 (2008) (recognizing that though the Second Amendment right is not unlimited, self-defense interests have long been central to understanding that right).

<sup>159</sup> *Id.* at 626-27.

<sup>160</sup> Cf. Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 302 (arguing that on one possible reading of the Second Amendment, “just as truth is most likely to emerge from an open marketplace of ideas, optimal security is likely to occur when people can freely keep and bear arms as a deterrent to antagonists—a marketplace of violence, so to speak”).

<sup>161</sup> See, e.g., Town of Greece v. Galloway, 572 U.S. 565, 636 (2014) (Kagan, J., dissenting) (“A person’s response to the doctrine, language, and imagery contained in those invocations reveals a core aspect of identity who that person is and how she faces the world.”); JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* 76 (2011)(explaining relationship between core and meaning-giving convictions and commitments and an individual’s moral identity).

<sup>162</sup> The phrase is Paul Tillich’s. See generally PAUL TILlich, *DYNAMICS OF FAITH* (1957).

<sup>163</sup> See, e.g., NUSSBAUM, *supra* note 81, at 179, 180.

<sup>164</sup> See, e.g., SABINA ALKIRE, *VALUING FREEDOMS: SEN’S CAPABILITY APPROACH AND POVERTY REDUCTION* 48, 71, 79-80 (2002) (noting that some scholars have identified peace with the transcendent as a goal of religion); BRADY, *supra* note 6; Moschella, *supra* note 9; MURPHY, *supra* note 79, at 131-133 (2001). A more specific version of this view (albeit one inadequate to explain many intuitively compelling religious protections) might equate religion with obedience to the one true God. But the view can be more capacious; for Finnis, for example, the objective interest at stake consists of “harmony between oneself and the wider reaches of reality including the reality that the

pertinent interest just insofar as her own religious creed or code *says* she does.<sup>165</sup> This means that an alternative form of religious conduct is “adequate” if and only if the claimant *believes* it’s as religiously valuable (If a regulation prevents a Jewish person from making it to synagogue, she cannot live out her identity, etc., by going to Mass). Call this the “internal-criteria rule”: The criteria for whether a religious person has advanced in the interests served by religion are internal to her own creed. The liberty is thus rightly defined in terms of a person’s ability to do what her own beliefs counsel (and not what *someone else* thinks her religion requires).<sup>166</sup> It is burdens on *that* ability that implicate religious interests’ fragility. Below I suggest that one can use this principle to *narrow* the right’s scope, too.

## 2. Using Fragility and Exposure to Test the Case for a Civil Liberty

The Second Amendment provides a case study in how analytically separating fragility and exposure helps one assess a liberty’s rationale—to see if the liberty really advances the interest meant to justify it. Showing as much will confirm that the framework works well for studying secular interests’ need. It’s a neutral basis for comparing that to religious interests’ level of need, as Part III will do to advance the fairness debate.

For the Second Amendment to be needed, and hence justified, the interest in self-defense has to be both fragile and exposed in the absence of a liberty to use arms equal to those commonly used by attackers.<sup>167</sup> Is it?

If one focused on the first factor—fragility—the case for having such a right to equal an attacker’s weapons might seem strong for all times and places.<sup>168</sup> Intuitively, at least, *any* burden on your ability to use weapons equal to your attacker’s is likely to be an undue burden—even fatal. This seems like a commonsense point that needs no special empirical support. For that reason, focusing on fragility makes the case for this liberty seem to flow directly from a timeless natural right (self-defense).

world has some more-than-human source of meaning and value.” John Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1, 2 (1990). Or, “harmony with whatever can be known or surmised about” the “transcendent origin of the universal order-of-things and of human freedom and reason,” JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 89-90 (2d ed. 2011).

<sup>165</sup> See, e.g., NUSSBAUM, *supra* note 81, at 180; *supra* note 164.

<sup>166</sup> Under prevailing doctrine, courts cannot reject a claimant’s account of his own faith for one given by his coreligionists. See *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981). Nor may courts submit to a jury “the truth or verity of [claimants’] religious doctrines or beliefs.” *United States v. Ballard*, 322 U.S. 78, 86 (1944).

<sup>167</sup> See *supra* note 160 and accompanying text.

<sup>168</sup> Cf. Timothy Hsiao, *The Moral Case for Gun Ownership*, in *ETHICS, LEFT AND RIGHT: THE MORAL ISSUES THAT DIVIDE US* (Bob Fischer ed. 2020) (defending a moral right to gun ownership regardless of the contingent costs).

But now consider exposure—the likelihood that, *absent this civil liberty*, gun regulations would impose any burden your self-defense interests in the first place. That likelihood would be low if empirical investigation showed that, unshackled by a Second Amendment, gun laws could keep guns from your attackers *as well as* you.<sup>169</sup> For then you would rarely need guns in order to be *equally* armed. And so the point that self-defense is fragile, even if true, would be less telling. The overall need for gun access—and so the strength of the case for this right—would be lower than fragility alone made it seem.

Indeed, the fragility-based defense might well prove *self-defeating*. For the right it identifies as crucial to protecting an interest might turn out to *undermine* the interest—in this case, by arming one’s attackers.

Separating fragility and exposure makes it easier to see these different possibilities—and thus to assess the need and justification for a civil liberty.

### 3. Using Fragility to Limit a Liberty’s Scope

Once a liberty is recognized, zeroing in on fragility can also guide courts in limiting its scope. Why does fragility do a better job at limiting scope? The alternative is shielding conduct wherever the underlying interest is *exposed*—burdened *at all*. Doing so would protect against every incidental legal burden. And that is just what our civil-liberty doctrines try to avoid, so as not to cripple regulation or flood courts.<sup>170</sup> In the case of religion, protecting against all incidental burdens would also be unfair. That’s because not every burden on religion sets believers’ interests back compared to others’.<sup>171</sup> So exemptions should be limited to cases where religion is fragile. This ensures that believers get relief only when they would otherwise be worse off.

And the resulting limits are meaningful. That is so even though the test for fragility in the case of religion—the test for adequacy—depends on each person’s own creed. A few examples here will illustrate the fragility concept’s usefulness. Equally important, it will also add detail to our picture of the precise religious protections whose fairness I will discuss in Parts III and IV.

First, a law won’t implicate religion’s fragility just because it blocks conduct *motivated* by religion.<sup>172</sup> Someone might have a sincere religious

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<sup>169</sup> Cf. Nicholas Dixon, *Handguns, Philosophers, and the Right to Self-Defense*, 25 INT’L J. APPLIED PHIL. 151 (2011).

<sup>170</sup> See *supra* notes 93–99 and accompanying text; see also See Sherif Girgis, *Defining “Substantial Burdens” on Religion and Other Liberties*, VA. L. REV. (forthcoming 2022) (manuscript at 18–24) (examining the adequate alternatives principle in the realm of free speech, abortion, travel, and gun rights).

<sup>171</sup> See *supra* subsection II.C.3.

<sup>172</sup> For a scholar proposing what amounts to a religious-motives test, see Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1772–75 (2016) (proposing that courts assess any alleged burden on religion by examining the civil penalties triggered by religious exercise).



motivation to enter a public park at night, for a quiet place to pray. But park curfew rules should not trigger exemptions just for that reason if they leave her alternatives—like strolling through her neighborhood—that are just as good from her religion’s perspective. So a religious motivation to engage in the burdened conduct is not enough. It has to be the case that every single alternative left open by the law would be worse for one’s religion.

Thus, a religious inmate shouldn’t get an exemption from a ban on standing for long periods in prison dayrooms, in keeping with religiously prescribed postures for prayer, if he is free to stand in the yard or his cell and his faith sees no special value in prison dayrooms.<sup>173</sup> Religious people should not get special privileges for mere matters of taste.

Or convenience: If two drivers are speeding, one to make yoga on time and the other to make Mass on time, the latter won’t be exempt just because she had a religious reason.<sup>174</sup> After all, she could’ve left a few minutes earlier, with all the interests served by religion intact. Rather, religious people should be exempted only when the law puts them but not others in a bind—e.g., by forcing a choice between their identity and a government benefit.<sup>175</sup>

Second, content-neutral speech regulations generally should not trigger more scrutiny than they otherwise would, just because they’re applied to religious speech.<sup>176</sup> That’s because the goal of most religious speech is the same as (no more fragile than) the already-protected<sup>177</sup> goal of nonreligious speech: to spread a message.

So religious groups should not “enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize.”<sup>178</sup> Nor should religious pro-life protestors get an exemption from laws barring physical obstruction of access to abortion clinics if the laws leave them “ample avenues” for expressing “their deeply-held belief” about abortion, and expressing that message was all they felt a religious duty to do.<sup>179</sup>

<sup>173</sup> This set of facts is examined in *DeMoss v. Crain*, 636 F.3d 145, 153 (5th Cir. 2011).

<sup>174</sup> Marci A. Hamilton, *The Case for Evidence-Based Free Exercise Accommodation: Why The Religious Freedom Restoration Act Is Bad Policy*, 9 HARV. L. & POL’Y REV. 129, 131 (2015) (“[T]he ‘vast majority’ of the Court’s cases had not applied strict scrutiny to neutral, generally applicable laws. The Court has consistently followed this reasoning that religious actors are obligated to obey the laws that govern everyone else and that no one may be a law unto oneself.”)(footnote omitted).

<sup>175</sup> See *Sherbert v. Verner*, 374 U.S. 398, 400-02 (1963) (finding violation of religious liberty when Seventh Day Adventist who sought for religious reasons not to work on Saturdays was denied unemployment insurance).

<sup>176</sup> See *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 652-53 (1981) (refusing to give speakers of religious messages privileges over speakers of secular messages).

<sup>177</sup> See *supra* note 156 and accompanying text.

<sup>178</sup> *Heffron*, 452 U.S. at 652-53.

<sup>179</sup> *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995).

Finally, for a still more pointed example, it is not clear that fragility was implicated in the recent case where several Justices cast doubt on *Smith*.<sup>180</sup> In *Fulton*, Philadelphia's bar on discrimination against same-sex couples prevented a Catholic agency from playing one narrow role at one stage of the multi-step process of finding foster homes for children<sup>181</sup>—a role that was entirely a creature of State law. (It involved “certifying” whether a couple met various statutory criteria for becoming foster parents.<sup>182</sup>) But the agency never suggested that its Catholic faith urged involvement in *that* part of the process, as opposed to *some* meaningful contribution to helping children find homes. As Professor Lederman put it: “Not surprisingly, [the agency didn’t] argue that its religious ministry has historically included wielding governmental authority to determine whether other private parties may legally care for children.”<sup>183</sup> So unless there were other costs to bowing out of the certification process,<sup>184</sup> there may have been religiously (and otherwise) adequate alternatives,<sup>185</sup> and no substantial burden.<sup>186</sup>

These limits on religious liberty's scope become clear only if one goes from asking if religion is more valuable, and thus worth protecting at all,<sup>187</sup> to asking when and where it is fragile, and so especially needful of protection from incidental burdens.

In short, the fragility-exposure framework is useful for modeling, assessing, and duly limiting a range of liberties. That makes it a reliable guide through the fairness debate.

<sup>180</sup> See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (noting that the concurrences in judgment argue that *Smith* should be overruled).

<sup>181</sup> *Id.* at 1874-75.

<sup>182</sup> *Id.* at 1875 (“Pennsylvania law gives the authority to certify foster families to state-licensed foster agencies like [Catholic Social Services]. Before certifying a family, an agency must conduct a home study during which it considers statutory criteria including the family’s ‘ability to provide care, nurturing and supervision to children,’ ‘[e]xisting family relationships,’ and ability ‘to work in partnership’ with a foster agency. The agency must decide whether to ‘approve, disapprove or provisionally approve the foster family.’”) (citations omitted).

<sup>183</sup> Marty Lederman, *What Fulton v. Philadelphia Is—and Isn’t—About*, BALKINIZATION, <https://bit.ly/3jDWOZQ> [<https://perma.cc/FR6W-U4LW>] (last visited Sept. 10, 2022).

<sup>184</sup> It is unclear to me from the briefing whether exclusion from the certification process deprived the agency of funds it had been using to provide other forms of support for orphaned children. *Cf. id.* (“[Catholic Social Services] continues to receive many millions of dollars a year from the City to perform services as a ‘Community Umbrella Organization’ (CUA), in which capacity it helps support foster children (such as in arranging for a child’s social services and doctor’s visits). CSS also operates two ‘congregate-care’ facilities, which provide group housing for children in the City’s care (distinct from the foster-care system).”)

<sup>185</sup> See *id.*

<sup>186</sup> This is separate from the question whether there was, not an incidental (and substantial) burden on the agency’s free exercise, but *discrimination* based on the agency’s religious conduct or status, or some other constitutional violation.

<sup>187</sup> See *supra* notes 63–68.

### III. HOLES IN THE FAIRNESS CRITIQUE

The concepts of fragility and exposure highlight a gap in the fairness debate. In order for protecting religious interests to be unfair, other interests must be not only as important, but also as needful of protection.<sup>188</sup> And for an interest to need adequate-alternatives protection—a trigger for scrutiny of substantial burdens—it must, well, face substantial burdens. It must be fragile and exposed. (Friendships are a great good, but if neutral laws rarely deny us adequate alternative ways to pursue them, the state need not recognize a civil liberty to make friends.<sup>189</sup>) So the fairness critique can't rest on the premise that religion is no more important than other interests. The critique should offer reasons to think other interests need protection. That's especially so if, as Part IV will explore, there may be *prima facie* reason to expect most crucial interests *not* to be fragile and exposed.

One might object that the state should protect all the important interests, regardless of fragility or exposure—especially since one or both factors might change over time. But this objection assumes that we do not have to choose. Since civil liberties have costs,<sup>190</sup> we may have to. And then fragility and exposure will matter.<sup>191</sup> Thus, it won't do to object that fragility and exposure are contingent matters, irrelevant to fundamental moral questions about fairness. Relying on contingent facts is a feature, not a bug, of any sound argument about what fairness requires in the non-ideal conditions of the real world, where all protection has costs and we must (and evidently do, all the time<sup>192</sup>) prioritize some candidates for protection.

#### A. *What to Look For*

What kinds of evidence could guide decisions about what civil liberties to create? One can draw lessons from other contexts in which lawmakers have had to triage protection of civil rights and liberties. Our record of deliberations over the liberties enshrined in the Bill of Rights is scant. But we know the kind of evidence that informed protections against *private* discrimination—e.g., the Civil Rights Act of 1964<sup>193</sup> and the Americans with

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<sup>188</sup> See *supra* Section I.C.

<sup>189</sup> See *supra* notes 145–146 and accompanying text.

<sup>190</sup> See *supra* note 82.

<sup>191</sup> When deciding what to protect constitutionally (where there are costs to protecting too much, too soon), how far ahead should the state look to anticipate social changes that might increase an interest's exposure? The answer should depend on how quickly and easily the constitution can be changed. The harder it is to change the constitution, and the more risk-averse a society is, the more it will want to err on the side of over-protection.

<sup>192</sup> See *supra* notes 83–85.

<sup>193</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

Disabilities Act.<sup>194</sup> Like our civil liberties, these concern matters of justice, and yet they are highly selective. They ban only a small subset of unjust forms of discrimination. (The same is true of judicially created analogues like equal protection doctrine on suspect classifications.<sup>195</sup>) And in choosing what to ban, lawmakers have relied on the mix and range of sources one would find in the legislative findings behind other laws—or, for that matter, in agency rulemakings, executive orders, and even judicial opinions.<sup>196</sup> They have relied on economic data;<sup>197</sup> sociological studies, surveys, and reports;<sup>198</sup> history and testimony;<sup>199</sup> reason and common sense.<sup>200</sup>

Of course, academic participants in the fairness debate about religious protections are not trying to get a landmark civil rights bill through Congress. It would be silly to expect them to have commissioned reports. (Even as academics, they lean more theoretical than empirical, though some—like Professor Nussbaum—have done important interdisciplinary work.)<sup>201</sup> But they do aim to get readers to feel the urgency of the fairness critique.

So the least one might seek in such works is realistic *anecdotal* evidence that the interests cited by critics need civil-libertarian protection. What's needed is evidence that neutral laws will burden some ways of realizing such interests without leaving adequate alternatives. Concretely, this requires pointing to secular analogues of the conflicts prompting religious claims—like the conflict between drug laws and Native Americans' ritual use of peyote, or between prison regulations and religious worship.<sup>202</sup> Examples

<sup>194</sup> Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327 (*codified at* 42 U.S.C. § 12101).

<sup>195</sup> See generally Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 161-163 (2011).

<sup>196</sup> See *Brown v. Bd. Of Educ. Of Topeka*, 347 U.S. 483, 494-95 (1954) (citing, as evidence of segregation's psychological impact, seven surveys or empirical studies).

<sup>197</sup> See S. REP. 88-872, (1964), as reprinted in 1964 U.S.C.C.A.N. 2355, 2371-72 (tallying the economic costs of segregation as support for the Civil Rights Act of 1964).

<sup>198</sup> *Id.* at 2365 (reviewing findings of Truman Commission report cataloguing need for antidiscrimination laws); see also S. REP. 101-116, at 6 (1989) (establishing need for ADA based on “[t]estimony . . . reports by the National Council on Disability [and] by the Civil Rights Commission . . . polls,” etc.).

<sup>199</sup> See *supra* note 198 and accompanying text.

<sup>200</sup> See *Id.* at 2368 (observing, as evidence of “the need for federal legislation” against race discrimination, the fact that such discrimination “hampers our economic growth by preventing the maximum development of our manpower, by contradicting at home the message we preach abroad. It mars the atmosphere of a united and classless society in which this Nation rose to greatness. It increases the cost of public welfare, crime, delinquency, and disorder. Above all, it is wrong.”) (citation omitted).

<sup>201</sup> See NUSSBAUM, *supra* note 81.

<sup>202</sup> See generally *Emp. Div. Dep’t Hum. Res. Oregon v. Smith*, 494 U.S. 872 (1990) (assessing a free exercise claim to peyote use); *O’Lone, Leesburg Prison Complex v. Estate of Shabazz*, 482 U.S. 342 (1987) (assessing Muslim prisoners’ claim to attendance at Friday worship services).

drawn from experience, from news stories, or even from realistic thought experiments.

### B. *What One Finds*

A search for realistic examples of such collisions tends to confirm Professor Greenawalt's passing conjecture: "The most obvious reason to limit [exemption] claims to religious ones is the absence or implausibility of parallel nonreligious ones."<sup>203</sup>

#### 1. Overview

*First*, some work does not even attempt to offer reasons to expect substantial burdens on important nonreligious interests. Articles can go by without presenting a single conflict, real or even merely imagined. To be clear, the articles offer examples of secular interests thought to be just as important as religious interests: secular conscience, professional fulfillment, and the like.<sup>204</sup> But they never offer examples (real or hypothetical) of meaningful *clashes* between those interests and neutral regulations. As to secular conscience, for example, critics will cite broad-strokes philosophical outlooks—Humeanism, Kantianism, and Hegelianism come up surprisingly often<sup>205</sup>—without ever pointing to concrete conflicts with neutral laws.<sup>206</sup>

*Second*, other work will offer hypothetical examples of substantial burdens on other interests that may seem, on reflection, "fanciful."<sup>207</sup> One piece asks us to imagine a man whose secular identity is so tied up with his beard that "he struggles to conceive of himself without it."<sup>208</sup> (Even Eisgruber and Sager, prominent critics of special religious protections, find it "hard to imagine" "how a wholly secular person could feel gripped by a compelling moral duty to wear a beard."<sup>209</sup>) Another imagines an artist whose work requires him to "bring toxic paints vital to the full realization of his artistic vision into his locality in the face of local environmental laws prohibiting their possession

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<sup>203</sup> Greenawalt, *supra* note 5, at 458; *see also* KOPPELMAN, *supra* note 6, at 174 (arguing that atheists enjoy adequate protections, including legal protection against discrimination, as under the Supreme Court's nonreligious conscientious objection cases).

<sup>204</sup> *See, e.g.*, Cornelissen, *supra* note 6 (discussing whether non-religious moral beliefs should trigger exemptions if religious beliefs do).

<sup>205</sup> *See, e.g.*, *Introduction to JOHN RAWLS, POLITICAL LIBERALISM, EXPANDED EDITION* xxvii (2005); Schwartzman, *supra* note 6, at 1423 (referencing Kant, Hegel, and Mill).

<sup>206</sup> Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1480 (2013) ("[I]t is unclear which beliefs or practices of a thoroughgoing Kantian or Humean would require special protection in exchange for entering the social contract.")

<sup>207</sup> Mark Storslee, *On Religion's Specialness*, 81 REV. POL. 14, 17 (2019).

<sup>208</sup> Cornelissen, *supra* note 6, at 94.

<sup>209</sup> EISGRUBER & SAGER, *supra* note 6, at 96.

and use”—an artist for whom paint made of non-contraband pigments will not do.<sup>210</sup> And so on.<sup>211</sup>

*Third*, a few articles or books do provide a small handful of real-life examples of regulations that would (absent built-in accommodations) impose a substantial burden on a nonreligious interest. But while they show that the related nonreligious interest might be fragile, they do not show that it's exposed. So they do not establish need for a civil liberty.

Virtually all the (very few) real-life examples have to do with one nonreligious interest in particular: secular moral conscience, or adherence to one's perceived moral duties. Virtually all burden secular conscience in the same way: by making people complicit in killing. Indeed, virtually all involve complicity in a small handful of kinds of killing: war, capital punishment, assisted suicide, abortion, and animal slaughter.<sup>212</sup> This small universe of

<sup>210</sup> EISGRUBER & SAGER, *supra* note 16, at 1255.

<sup>211</sup> What about alleged conflicts with other interests? Several that have been offered do not actually involve a *conflict*, even as described by the authors. Professor Gedicks, echoing Eisgruber and Sager, imagines a woman seeking an exemption from a zoning ordinance to run a homeless shelter out of a secular moral desire to help the poor. Gedicks, *supra* note 6, at 555. But he offers no explanation of how her moral concern for the poor might require a homeless shelter in the *particular* location ruled out by regulations, as I think (and argued in Part II) a religious claimant, too, should have to show to establish a substantial burden on religion. More compellingly, Gedicks asks why we should exempt Sabbatarians from having to work Saturdays to get unemployment insurance, but not an agnostic non-custodial parent who gets to see his children only on Saturdays. *Id.* at 556. But unlike religious duties to rest on Saturdays, legal arrangements to see children are changeable. Of course, a claimant would surely have good cause to avoid Saturday work if he could not change when he saw his children, but this does not point to a pattern of parental interests being fragile (or thus needful of protection) in the face of ordinary regulations. Similarly unpersuasive is one of Eisgruber and Sager's few concrete examples, featuring someone seeking an exemption from military grooming rules because a rare skin condition gives him a rash when he shaves. EISGRUBER & SAGER, *supra* note 6, at 105. For this example to establish an important interest that is as needful of protection as religion, it would have to be the case that health concerns are often ignored and hence exposed, something Eisgruber and Sager themselves go on to deny. Indeed, claims like the one in question would normally come under the Americans with Disabilities Act. But the Act does not apply to the federal government. See 42 U.S.C. § 12111(5)(B)(i) (excluding the United States from the definition of 'employer').

<sup>212</sup> See, e.g., 32 C.F.R. § 1630.16(a) (2013) ("Any registrant whose acceptability for military service has been satisfactorily determined and who . . . has been found, by reason of religious, ethical, or moral belief, to be conscientiously opposed to participation in both combatant and noncombatant training and service in the Armed Forces shall be classified in Class 1-O."); Health Programs Extension Act of 1973 § 401(b), Pub L No. 93-45, 87 Stat 95 (codified as amended at 42 U.S.C. § 300a-7(b)); 18 U.S.C. § 3597(b) ("No employee . . . shall be required . . . to be in attendance at or to participate in any prosecution or execution under this section if such participation is contrary to the moral or religious convictions of the employee. In this subsection, 'participation in executions' includes personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.").

examples appears in the literature on secular conscience claims again<sup>213</sup> and again<sup>214</sup> and again<sup>215</sup> (and again<sup>216</sup>).

The reason these particular examples do not show a need for a civil liberty is that they do not show the underlying interest to be exposed. In fact, they show the opposite: Regulations that might impose those burdens consistently provide built-in accommodations for secular as well as religious objectors.<sup>217</sup> The only exception to that rule—the only burden cited by critics that did not *originally* exempt secular conscience—involved the draft. But the Supreme Court soon carved out secular conscience exemptions there, too.<sup>218</sup> As Professor Koppelman says of one prominent critic of special protections for religion as opposed to conscience generally the only examples he offers are the selective draft cases, and he acknowledges that in those cases, the problem was resolved by deeming the objectors to be “religious”[,] . . . a result that is facilitated by the undeniable fact that the boundaries of the category of “religion” are so fuzzy. *The problem hasn’t arisen since.*<sup>219</sup>

## 2. A Closer Look: Secular Conscience

In response to Koppelman, a fairness critic might object that the absence of later cases involving secular-conscience claims does not prove much. After all, there is no clause under which these claims could have been brought to court. So we can’t search Westlaw to measure the demand for protecting secular conscience against incidental burdens.<sup>220</sup> With religion, by contrast, we can. We can count how many lawsuits sought exemptions under the Free Exercise Clause (before *Smith*) or statutory religious exemptions regimes.

That’s true: we cannot expect as much evidence in the case of secular conscience. But as I argued above, it’s fair to expect *some* evidence of undue

<sup>213</sup> See Schwartzman, *supra* note 13 at 1100-01 (discussing military service, abortion, sterilization, assisted suicide, animal testing, capital punishment).

<sup>214</sup> See Mark L. Rienzi, *The Case for Religious Exemptions—Whether Religion Is Special or Not*, 127 HARV. L. REV. 1395, 1411-15 (2014) (discussing military service, abortion, assisted suicide, veganism, capital punishment).

<sup>215</sup> See Jocelyn MacLure, *Conscience, Religion, and Exemptions*, in RELIGIOUS EXEMPTIONS, *supra* note 38, at 13-14 (discussing military service, veganism, vegetarianism).

<sup>216</sup> See GREENAWALT, *supra* note 90, at 56-75 (discussing military service).

<sup>217</sup> See *supra* note 212.

<sup>218</sup> See *Welsh v. United States*, 398 U.S. 333, 339-341 (1970) (holding that the term “religious” should be read broadly and that registrants may qualify for exemption even if they categorize their own beliefs as nonreligious); *United States v. Seeger*, 380 U.S. 163, 165 (1965) (holding that an exemption for those opposed to war based on their “belief in a relation to a Supreme Being” covered anyone opposed to war based on a belief that “occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption”).

<sup>219</sup> Andrew Koppelman, *Religion’s Specialized Specialness*, 79 U. CHI. L. REV. DIALOGUE 71, 78 (2013).

<sup>220</sup> *But see infra* notes 276–277 and accompanying text.

burdens on this or other interests before concluding that special religious protections are unfair. Not evidence from Westlaw, but evidence from experience or common sense or just realistic thought experiments.

To see if fairness critics have produced any, I will take a closer look at two important pieces trying to show that substantial burdens on secular conscience are more than hypothetical. Then I will discuss other possible points to make on their behalf, explaining why those may not succeed either.

*a. Existing Examples*

Professor Nelson Tebbe proposes “straightforward examples demonstrating a realistic possibility” of legal burdens on secular conscience, but the list might well suggest the opposite. He offers eight examples drawn from over a decade. Apart from the draft, none involves a clash between the law and a perceived moral duty or other need unprotected by existing rights (free speech or non-establishment).<sup>221</sup> The case that comes close, though it involved a dietary request by an inmate, sprang from a belief system that by the inmate’s own admission did not require his preference but had for its sole tenet, “do what thou wilt.”<sup>222</sup> It is literally impossible to produce a creed less particular in its demands or, thus, needful of protection.

Likewise, Professor Schwartzman has dedicated several illuminating articles to critiquing the special protection of religion precisely in contrast to conscience.<sup>223</sup> But the closest he comes to providing a real-life case of a secular moral conscience claim butting up against a neutral law is to cite a story involving no conscience claim or law. It involved a doctor resigning from a Catholic hospital after performing an abortion. To repurpose this, Schwartzman asks readers to assume that the doctor’s choice was rooted in conscience, but not religious conscience; that the doctor had stayed put, not resigned; that the hospital had taken adverse action; that the doctor had then invoked RFRA or the First Amendment; and that the Catholic hospital had been a state actor. A real-life case needing these adaptations to be serviceable is poor evidence that such claims arise much. Indeed, a few pages down, Schwartzman admits that “outside of specific high-stakes,” life-and-death contexts mentioned above, which are accommodated politically,<sup>224</sup> and thus don’t establish exposure, “there might be relatively few instances in which

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<sup>221</sup> See Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1156-57 (2011) (imagining hypotheticals in which nonbelievers claim exemptions in order to wear atheistic symbols, read atheistic literature, eat vegetarian meals, and so on).

<sup>222</sup> *Koger v. Bryan*, 523 F.3d 789, 793-94 (7th Cir. 2008).

<sup>223</sup> See generally Schwartzman, *supra* note 6; Schwartzman, *supra* note 13.

<sup>224</sup> *Supra* note 212.



nonbelievers seek constitutional exemptions from conflicts with their moral beliefs.”<sup>225</sup>

Surveying the evidence, Christopher Lund writes: “Unfairness to hypothetical people is hypothetical unfairness; secular conscientious objectors are not devalued by exemptions for religious conscience unless there are comparable claims of secular conscience that are being denied. If that is happening, I do not know about it.”<sup>226</sup> Koppelman calls such conflicts vanishingly rare and thinks the academic concern with them is proxy for a broader one: that our society, saddled with an ugly history of discrimination against atheists, would treat them as equal citizens.<sup>227</sup> But that crucial goal won’t be in tension with a religious exemptions policy, if the meritorious nonreligious claims are rightly covered by more targeted accommodations.

### *b. Other Possible Examples*

Of course, one can generate examples of substantial burdens on secular conscience that fairness critics have not mentioned. But in the case of many that spring to mind, there may be a reason that fairness critics have not invoked them.

Suppose I feel bound not to testify against my sister at her trial, or to harbor my brother when he’s on the run from the law, and so seek exemptions from criminal laws banning either.<sup>228</sup> Or say I feel morally obliged to spend another day each week with my children, and seek an exemption from the requirement that I be open to working on Saturdays if I want unemployment insurance.<sup>229</sup> (To feel these obligations, I needn’t believe that it’s always wrong to turn in one’s relatives, or to miss an extra day each week with one’s children. I might simply believe that it’s wrong to do either *when the law leaves me a choice* in the matter.)

Notice that such beliefs arise from a moral value—in these cases, family unity—that is widely shared, not unique to the religiously unaffiliated. So if the law authorized exemptions for such beliefs, exemptions might quickly proliferate, defeating the purpose of having the underlying regulations. For that reason, it hardly makes sense to adopt such a regulation *and* grant secular-conscience exemptions from it. The real choice that society faces is to adopt the regulation without such exemptions, or not adopt it at all.

<sup>225</sup> Schwartzman, *supra* note 6, at 1409.

<sup>226</sup> Lund, *supra* note 6, at 510.

<sup>227</sup> Koppelman, *supra* note 219, at 79-80.

<sup>228</sup> *See, e.g.*, 18 U.S.C. § 792 (2012) (creating criminal liability for anyone who harbors or conceals a criminal).

<sup>229</sup> *Cf. Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (involving a Seventh Day Adventist who had been found ineligible for unemployment insurance because she refused on religious grounds to work on Saturdays).

By the same token, then, claims like those above are not a good argument for creating a general right to secular-conscience exemptions. After all, the whole point of such a right would be to trigger an inquiry into whether to grant an exemption, yet the answer would (by hypothesis) always be “no.”

This suggests that an example of a substantial burden on secular conscience will buttress the case for a right to secular-conscience exemptions only when the example involves a moral belief that is not widely shared. This may explain why the conscience claims that *are* cited by fairness critics arise from minority moral objections to killing—pacifism, vegetarianism, and the like.<sup>230</sup> But since those moral objections have already been accommodated,<sup>231</sup> they don’t show a need for further protection, either.

To show that secular conscience needs a civil liberty to protect it, then, fairness critics have to produce other examples of minority nonreligious beliefs that are substantially burdened by neutral laws (and not too costly to accommodate). Doing so might be possible in the end, but as I showed above,<sup>232</sup> the most sustained efforts to date seem not to have been successful.

### *c. A Final Possible Objection*

I have been assuming that if there is a problem with exempting religious claims in particular, it is something like the unfairness of tolerating an unjustified disparate impact on nonreligious people. But one might instead have a different kind of objection: that enforcing a right to exemptions for religious but not secular conscience claims is *per se* discrimination—disparate *treatment*—against the nonreligious.

But this isn’t clear either. Note that *believers can have secular conscience, too*—if that just means beliefs about morality that are not sourced in a theological belief of the claimant’s. Indeed, believers and nonbelievers may often have overlapping secular moral beliefs since by definition, these beliefs cannot flow from what separates the two groups. (Nonbelief in religion doesn’t itself produce secular moral beliefs—those have to come from “some source other than unbelief itself”<sup>233</sup>—and of course religion doesn’t produce secular moral beliefs either.) For instance, shared conventions might supply moral norms for professions and relations, religious or not.<sup>234</sup>

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<sup>230</sup> See *supra* notes 213–216.

<sup>231</sup> See *supra* note 212.

<sup>232</sup> See *supra* subsection III.B.2.

<sup>233</sup> Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT REV. 1, 11.

<sup>234</sup> The agnostic father who keeps vigil with his ill daughter isn’t obliged to do so by his skepticism of miracles. The Anglican lawyer won’t look to Canterbury for the most ethical way to handle escrow funds for her client.

As a result, a new entitlement to secular conscience exemptions would allow both groups to vindicate claims that both might have and that *neither* can protect through religious liberty: claims not flowing from a religious belief. If the case for such a liberty is weaker than for religious liberty, that won't be because of anything distinctive about atheists, agnostics, and the unaffiliated. It will follow from facts about moral beliefs, in believers *and* nonbelievers, that happen not to stem from the claimant's faith. It will follow from something about their relative fragility and exposure.

#### IV. RELIGION'S SPECIAL NEED: A LIVE POSSIBILITY?

Are religious interests, then, more fragile and exposed than other, currently unprotected interests? Of course, it's always possible to define an interest narrowly enough that a law burdening one means to it will not leave alternatives. (The "interest" in swimming-right-up-to-the-Hoover-Dam is an example.)<sup>235</sup> But the question is whether it would be easy to find substantial burdens on intuitively *important* interests—those that seem most worth protecting.<sup>236</sup> Such burdens would be rare if the important interests, the ones that seem to call out for constitutional protection, tended not to be fragile or exposed, and so not to *need* protection. Then the burning question wouldn't be, "Why not protect education, sports, etc., in addition to religion?"<sup>237</sup> It would be, "Why protect even religion?" Religion would be fair to single out only because it had more need for protection. Does it?

I am not sure and certainly won't try to settle that here. In two steps, I hope only to show that the question is worth pursuing, and how it might be pursued. First, I will identify the features of religious interests that seem to make them more fragile than at least some secular interests, and ask what would have to be true for other secular interests to be as fragile as religious ones. This sets a research agenda for political science, sociology, ethnography, and the like. It exemplifies an inductive approach to the issue: taking important secular interests one-by-one and asking if they have anything like the features that make religion fragile. Second, I will explore a more systematic and theoretical approach to determining whether interests that are both important *and* fragile will be rare. Together, I think, both discussions will suggest that religion's special need for protection is a serious possibility. It's worth exploring along the two paths traced here as well as others.

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<sup>235</sup> See *supra* note 145.

<sup>236</sup> On what might make for importance in this sense, see *infra* Section IV.B.

<sup>237</sup> See *supra* notes 44–49 and accompanying text.

### A. *Why Religious Interests Are More Fragile and Exposed Than Some Others*

I've argued<sup>238</sup> that a wide range of views about which interests are served by religious conduct will converge on a test of adequacy. Under all of them, an alternative form of religious exercise will be "adequate" if and only if the alternative is just as good *according to the claimant's creed*. That conclusion, what I have called the "internal criteria" rule, allows this Section to explore religious interests' fragility and exposure without settling on a specific view about exactly which interests are at play.

#### 1. Exposure

As to exposure: religious interests become more exposed as we become more religiously diverse, as those in charge become less religious than the populace, and as the scope of regulation grows—as in liberal democracies today.<sup>239</sup> (Critics and supporters of religious protections acknowledge these points.)<sup>240</sup> Exposure is also greater for religious interests insofar as religion (the conduct advancing them) is, well, exotic.<sup>241</sup> It tends to make demands untethered to temporal concerns, which it would therefore be either hard or unreasonable for our laws to steer clear of entirely. By contrast, as Doug Laycock notes, the religiously unaffiliated "do not draw their morality from ancient books written in a radically different culture that lived with radically different technology and had a radically different understanding of the world; they do not obey an omnipotent, omniscient God whose commands may be beyond human understanding."<sup>242</sup>

#### 2. Fragility

Besides being exposed, the interests served by religious exercise—whether they be harmony with the transcendent, pursuit of ultimate meaning, or living out of personal identity—also seem fragile. While these interests may not be fragile in everyone's case, they may often be fragile for the

<sup>238</sup> See *supra* notes 161–166 and accompanying text.

<sup>239</sup> See *Thomas v. Rev. Bd. of Indiana Emp. Sec. Division*, 450 U.S. 707, 721 (Rehnquist, J., dissenting) ("First, the growth of social welfare legislation during the latter part of the 20th century has greatly magnified the potential for conflict between the two Clauses, since such legislation touches the individual at so many points in his life.")

<sup>240</sup> See EISGRUBER & SAGER, *supra* note 6, at 79 (describing the increased likelihood of clashes between the modern regulatory state and diverse religious beliefs); NUSSBAUM, *supra* note 59, at 135 (noting that the expansion of government regulation coincided with the growth of religious diversity in the United States).

<sup>241</sup> See Christopher B. Gilbert, *Harry Potter and the Curse of the First Amendment: Schools, Esoteric Religions, and the Christian Backlash*, 198 EDUC. L. REP. 399 (2005).

<sup>242</sup> Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J.L. & RELIGION 139, 171 (2009).

religious. That's because, *if* someone is religious, her pursuit of these interests may have to be funneled into a relatively narrow range of behaviors dictated by her particular creed—worship rituals, discharges of perceived religious duties, and the like. Having a range of religious options isn't enough. If Muslims can't attend Friday services,<sup>243</sup> if the claimants in *Smith* can't worship using peyote,<sup>244</sup> they have no adequate alternatives for pursuing the interests served by religion.

More precisely, this fragility flows from three features that narrow a believer's access to the interests served by religious exercise—the fact that they tend to be (1) filtered; (2) nonvoluntary; and (3) particular (picky). By “filtered,” I mean that people cannot realize these interests by living out just any religion. Each person's realization of the interests has to be filtered through *her* creed or code. By “nonvoluntary,” I mean that people cannot pick, choose, and change their creed or code at will—or at any rate, they can't do so simply to get around legal obstacles to fulfilling their creed or code, and still realize the interests served by religion.<sup>245</sup> By “particular,” I mean that religious creeds and codes often impose particular or “picky” obligations (e.g., commands) and criteria for progress (worship and other ways to advance).

Note that only the combination of all three “access-narrowing” features (as I will call them) makes a believer's pursuit of religious interests fragile. If she could achieve those interests through any religion, the field would be wide open: a ban on some means would leave her ample alternatives. Even if she had access through only one religion at a time, it would remain easy to find alternatives if she could switch religions at will. And even if she had to pass through her religion, and couldn't easily change it, her avenues for progress in religious interests would remain broad if religions were never picky. (If every creed were as relaxed as one that told people to do one kind thing each day and nothing more,<sup>246</sup> there would always be plenty of adequate options.) Thus, important nonreligious interests won't be comparably fragile if they lack even one of these three features (or analogues).

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<sup>243</sup> See *O'Lone v. Est. of Shabazz*, 482 U.S. 342 (1987) (involving Muslim inmates who objected to prison policies that prevented them from attending Friday services).

<sup>244</sup> *Emp. Div. v. Smith*, 494 U.S. 872 (1990) (involving the ingestion of peyote, an outlawed hallucinogen, as part of a Native American Church ritual).

<sup>245</sup> This has deep roots in our political-theoretical and legal traditions. See, e.g., *Smith*, *supra* note 6, at 155 (quoting Roger Williams' “pungent expression, ‘forced worship stinks in God's nostrils’”).

<sup>246</sup> Cf. *Koger v. Bryan*, 523 F.3d 789, 794 (7th Cir. 2008) (describing creed for which the sole tenet is “do what thou wilt”).

a. *Filtered and Nonvoluntary.*

The first access-narrowing feature—that each religious person can pursue these interests only as dictated by her own creed—doesn't depend on empirics. It's a corollary of the internal-criteria rule defended above.<sup>247</sup> Nor is it undermined by the fact that there may be non-religious ways to pursue some of these interests. The interest at issue might still be stymied for a religious person prevented from living out her faith. Take the interest in living out one's identity. A devout Muslim prevented from practicing Islam might still get to pursue other aspects of her identity. But a part of her identity will remain unfulfilled.<sup>248</sup>

Of course, the “filtered” quality of the interests served by religion wouldn't matter if one could just replace one's “filter” (the creed or code) as needed, to get around the law's demands. But one cannot, according to the second access-narrowing feature: religion's *nonvoluntariness*. As Professor Tushnet notes, “[a] person who truly believes cannot—simply cannot—be induced to change his or her beliefs” by “external incentives.”<sup>249</sup> The point is not that beliefs never change. They do. The key is that people can't change their beliefs at will in response to external legal incentives, without vitiating the authenticity of the interests served by religion. After all, those interests depend on a person's creed, as noted, and most believers' creeds tell them that their beliefs “cannot change by the operation of incentives; they can change through the methods that each religion acknowledges as a basis for belief.”<sup>250</sup> For instance, Islam gives Muslims many grounds for developing their theological beliefs—the Koran, the Hadith (sayings of the Prophet), reflection and prayer.<sup>251</sup> But a threat of legal penalties is not an officially sanctioned basis for changing what one believes to be true about theological matters. And in this respect, Islam is hardly alone.

Compare religion in these two respects (its filtered quality and its nonvoluntariness) with self-determination, an interest that critics of special

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<sup>247</sup> See *supra* notes 161-166.

<sup>248</sup> Even though this interest is not religiously defined, and is common to believers and nonbelievers, and hence is not “in itself” fragile, a specific person's realization of it will be fragile if she is a devoted believer. (Likewise for the pursuit of ultimate meaning.) To recognize this is no injustice to nonbelievers—any more than it's unfair to men for equal-protection arguments for abortion access to suggest that some interests common to men and women are more imperiled for women absent abortion.

<sup>249</sup> Mark Tushnet, *In Praise of Martyrdom?*, 87 CALIF. L. REV. 1117, 1119, 1119n.16 (1999); see also Christopher C. Lund, *Martyrdom and Religious Freedom*, 50 CONN. L. REV. 959, 962 (2018) (considering the role of martyrdom in clashes between religious freedom and government action).

<sup>250</sup> Tushnet, *supra* note 249 at 1119 n. 16.

<sup>251</sup> See *Islam*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Islam> [<https://perma.cc/DJQ4-4J9R>].

religious protections have said requires the same treatment.<sup>252</sup> We have an interest in living out plans of our own choosing. That's an interest you can realize by doing *X* only if *X* is something you've freely embraced. So a person's plans narrow the range of ways she can realize this interest, just as creeds narrow access to religious interests. But one contrast is that in many cases, there may not be anything *inauthentic* about changing commitments to get around legal obstacles. If I'm a committed hiker of certain trails and the government develops the land, I could take up other commitments (even other *hiking* commitments) and get the value of self-determination that way. But if I'm a Native American and the development of that land makes it impossible for me to worship on grounds I believe sacred,<sup>253</sup> I can't take up Pentecostalism and get my religious interests that way.<sup>254</sup> One question for the fairness debate, then, is whether the commitments that contribute to self-determination in general are, on the whole, more susceptible to change without losing value.

*b. Particular*

Even interests that *are* both filtered and nonvoluntary won't be as fragile as religious ones if their "filters" (their criteria for progress) are less particular, or picky, than religious creeds.

The particularity of religion is made vivid by the history of concrete conflicts between law and religion. Consider what John Garvey calls the "distinctively religious" category of "performance of ritual acts," including "prayer and other kinds of worship; compliance with sumptuary rules governing dress, diet, the use of property; the observance of sacred times (feasts and holy days) and places (pilgrimages to shrines); rites connected with important events in the believer's life (birth, death, maturity, marriage);

<sup>252</sup> Alan Patten, *Religious Exemptions and Fairness*, in RELIGION IN LIBERAL POLITICAL PHILOSOPHY, *supra* note 44, at 207.

<sup>253</sup> See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (involving American Indians challenging the federal government's plans to build a road on sacred land).

<sup>254</sup> The hiker might feel just as *personally attached* to these particular trails as the Native American feels to these particular grounds, but that is not sufficient to entitle either believers or nonbelievers access to an interest (whether the interest itself be religious or not). The question in each case is whether the alternative option available to each is similar enough in *objective* ways or in good-making properties. See *infra* Section IV.B. And by that standard, the Native American gives up more.

A purely subjective criterion is unworkable because we can have subjective desires for awful things; desire-intensity is hard for courts to measure; and it's of the essence of law to regulate our behavior when we want to do otherwise. See, e.g., Lawrence Sager, *Why Churches (and, Possibly, the Tarpon Bay Women's Blue Water Fishing Club) Can Discriminate*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY 77, 78-79 (Micah Schwartzman ed., 2016) (arguing on similar grounds that it is untenable to grant exemptions based simply on the strength of a claimant's desire to engage in the prohibited conduct).

and so on.”<sup>255</sup> No adequate alternatives are left if a ban on sex discrimination denies Catholics the kind of priesthood they think essential for administration of the sacraments central to their faith;<sup>256</sup> if Prohibition prevents the use of wine deemed essential to their central act of worship, the Mass;<sup>257</sup> if dress and grooming regulations forbid religious headdress for the Amish, Muslims, Sikhs, and members of Native American faiths;<sup>258</sup> if prison cafeterias deny Muslim inmates halal meals,<sup>259</sup> or Jewish inmates kosher ones;<sup>260</sup> if food-inspection regulations forbid the slaughter of animals and preparation of meat in keeping with dietary laws;<sup>261</sup> if travel regulations make a visit to Mecca impossible; if historic preservation laws interfere with religiously required features of church buildings; if Jewish high school athletes can’t wear yarmulkes.<sup>262</sup> In each case, because the claimant’s creed is particular, she cannot fully channel her pursuit of religion into alternatives left open by the law. Hence the need for an adequate alternatives principle.

Indeed, courts and scholars have intuited that particularity matters. Consider the Supreme Court’s reasoning in *Wisconsin v. Yoder* (1972), which exempted the Old Order Amish from a requirement to send children to school past the eighth grade, contrary to their faith. *Yoder* emphasized the particularity of the Amish religion, which “pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.”<sup>263</sup> Several scholars, too, have observed at least in passing that when it comes to religion, adequate alternatives can be hard to come by.<sup>264</sup>

For the fairness debate, the task is to compare religion on this score (particularity) to similarly weighty secular interests. Take knowledge or education. This category of interest will be less particular if it is so

<sup>255</sup> GARVEY, *supra* note 6, at 49.

<sup>256</sup> *Cf.* Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171 (2012) (holding a minister’s employment discrimination suit against a religious institution to be barred by the First Amendment).

<sup>257</sup> The Volsted Act eventually made allowances for “wine for sacramental purposes.” *United States v. Farrar*, 281 U.S. 624, 631 (1930) (citation omitted).

<sup>258</sup> *See, e.g.*, *Singh v. McHugh*, 109 F. Supp. 3d 72 (D.D.C. 2015) (challenging the military’s refusal to accommodate a Sikh student’s religious practice of wearing a turban).

<sup>259</sup> *See Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1306 (10th Cir. 2010) (involving denial of halal diet for Muslim inmate).

<sup>260</sup> *See Beerheide v. Zavaras*, 997 F.Supp. 1405 (D. Colo. 1998) (challenging denial of kosher foods for Jewish inmates).

<sup>261</sup> James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1446 (1992) (acknowledging that federal law exempts religious food-preparation practices from food-inspection regulations).

<sup>262</sup> *See Menora v. Ill. High Sch. Ass’n*, 683 F.2d 1030 (7th Cir. 1982) (challenging regulations forbidding Jewish athletes to wear yarmulkes while playing basketball).

<sup>263</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

<sup>264</sup> *See supra* note 26 and accompanying text.



inexhaustible, realizable in so many ways, that a neutral law (not a book-burning edict) will be unlikely to close off so many options as to leave you with less knowledge overall. Another interest that critics say we should treat just the same as religion is tight-knit nonreligious associations or “caregiving” bonds.<sup>265</sup> These require regular conversation, for example, but that can happen at any number of times of the day or week. Compare this with the Muslim duty to converse with God at five set times a day and in community on Fridays, using certain words, moving through certain postures, facing a certain cardinal direction.<sup>266</sup> That duty is more particular, more fragile, and hence likelier to conflict with prison rules.<sup>267</sup> The question for the fairness debate is: does this sort of contrast hold as a rule?

What about another interest cited by fairness critics—the interest in deep relationships? These will require us to meet with people for many ends. But will the demands of such relationships be so particular as, say, the Catholic’s duty to attend a certain group event every Sunday (other days won’t suffice), at one of several buildings outfitted for the purpose (not just any assembly hall), where a man (not a woman) says certain prayers over bread and wine (not grape juice)?<sup>268</sup> That obligation may require accommodations from zoning ordinances, antidiscrimination laws, Prohibition-era laws, and eligibility rules for unemployment insurance.<sup>269</sup> Nor is it easy to think of cases where fidelity to our deep personal bonds will put us at odds with rules about military gear,<sup>270</sup> truancy laws requiring high school attendance,<sup>271</sup> the use of a social security number,<sup>272</sup> or the public development of a forest.<sup>273</sup> Are these

<sup>265</sup> Jocelyn MacLure, *Conscience, Religion, and Exemptions*, in RELIGIOUS EXEMPTIONS, *supra* note 38, at 12–13.

<sup>266</sup> See *Religion & Ethics: Muslim Prayer Movements*, BBC, <https://www.bbc.co.uk/religion/galleries/salah/> [<https://perma.cc/WWN9-WHJX>] (detailing the precise movements Muslims are obligated to make while praying).

<sup>267</sup> See *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987) (involving Muslim prisoners prevented from attending weekly services on the religiously prescribed day).

<sup>268</sup> See *General Instruction of the Roman Missal*, U.S. CONF. OF CATH. BISHOPS, <https://www.usccb.org/prayer-and-worship/the-mass/general-instruction-of-the-roman-missal> [<https://perma.cc/KB4E-FRB3>] (setting forth detailed requirements for the conduct of a Catholic Mass).

<sup>269</sup> Cf. GREENAWALT *supra* note 40, at 175 (a nonbeliever is “extremely unlikely” to think work on a particular day of the week “is wrong in principle” since “from an ordinary secular point of view, one day is like another”).

<sup>270</sup> See *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986) (involving a Jewish soldier who wished to wear a yarmulke while in uniform).

<sup>271</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972) (holding Old Order Amish exempt from truancy laws).

<sup>272</sup> See *Bowen v. Roy*, 476 U.S. 693, 695 (1986) (involving Native Americans with religious objections to use of a Social Security number for their child).

<sup>273</sup> See *Lyng v. Nw. Indiana Cemetery Protective Ass’n*, 485 U.S. 439, 441–42 (1988) (challenging federal government’s attempt to develop land held sacred by Native Americans).

examples representative? Do other deep associations similarly run into substantial burdens from neutral laws?

Finally, take the interest in living by a commitment of secular-moral conscience—environmentalism is a prominent example. Is this interest “picky” (and thus needful of protection)? If the moral commitment is simply to undertake the most effective available project for improving the environment, it will not be fragile, *assuming many available projects will have the same net impact on the environment*. A law that took one option off the table would leave effective alternatives. One might feel a duty to plant trees to help replenish the ozone, but not on a *particular* plot of governmental land rather than elsewhere, as with the Native Americans in *Lyng* seeking to block public development of what were for them sacred grounds.<sup>274</sup> on the other hand, if environmentalists’ felt duty is typically pickier than a duty to *maximize net positive impact on the environment*, then the interest in living out environmentalism may well be more fragile.

What sort of empirical work could help on these issues?

*First*, we might test hypotheses by comparing nonreligious interests to similar interests (including religious ones) on which we do have systematic data regarding need for protection. For example, one might hypothesize that religious duties tend to be pickier because they are often thought to flow from a personal deity. Such a being might be seen as both particular in its preferences (like ordinary persons) and unlikely or unwilling to subordinate them to the demands of social life (unlike ordinary persons). To test this hypothesis—that theism contributes to pickiness, and hence to need for protection—we might compare the frequency of nontheistic *religious* exemption claims to that of theistic ones.

Just as the hypothesis would predict, nontheistic (e.g., Buddhist) challenges to neutral laws are vanishingly rare. A recent Westlaw search of all jurisdictions and all times showed that outside the prison context (where it’s easy to burden someone’s faith, picky or not<sup>275</sup>), the number of Buddhist exemptions claims under the federal RFRA or any similarly named state

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<sup>274</sup> *Id.* One might suppose that state action that destroys the only habitat of a particular endangered species will prevent environmentalists from carrying out their felt obligation to guard that species. But even if environmentalism is specific enough to create perceived obligations to tend to *this* endangered species rather than *that* (when there are many such species, and too many for any given person to be able to work to protect all of them), the interest in carrying out those obligations is not exposed, and thus in need of civil-liberty protection, insofar as other legal protections might promote it. Consider, for example, the requirement that agencies produce environmental impact statements regarding major Federal actions “significantly affecting the quality of the . . . environment.” 42 U.S.C. § 4332(C).

<sup>275</sup> One could, for example, simply deny someone literature or a quiet place to pray.

analogue—not *victorious* claims, but claims at all—was just two<sup>276</sup> or arguably three.<sup>277</sup>

If theism does make a creed pickier, and most religions (or at any rate potential religious claimants) in a jurisdiction are theistic, then religions in that jurisdiction may be pickier and hence more fragile than nontheistic moral systems. And this seems borne out by the moral systems cited in the fairness debate—like Kantianism and Humeanism: “[I]t is unclear which beliefs or practices of a thoroughgoing Kantian or Humean would” suffer substantial burdens, or thus “require special protection.”<sup>278</sup>

A *second* approach would be this. Take another interest that shares some of religion’s access-narrowing features, and draw on disciplines like history and sociology to see if it has the other access-narrowing features, too. For example, consider the interest in living out one’s cultural identity—in keeping the language, literature, customs, and other markers of one’s family heritage. This interest, like religion, is filtered in a nonvoluntary way. A Mexican-American can’t realize it by observing Polish customs. But is the nonvoluntary filter for this interest also as particular (or picky) as religious codes? Do members of cultural minorities in our legal system regularly find their ability to live out their cultural identity burdened by neutral laws, at anything like the rate at which Sikhs, Apache Indians, and Muslims find their religion burdened? (Do unemployment insurance practices prevent them from observing cultural holidays and the like?<sup>279</sup>) Here history, ethnography, and related disciplines might fill the gap.

But as a start, as far as the fairness literature is concerned, even *anecdotal* evidence of substantial legal burdens on other interests would be an improvement. It would begin to make progress on establishing fragility and exposure, and thus need, and thus the unfairness of protecting only religion.

<sup>276</sup> See *United States v. Hsia*, 24 F. Supp. 2d 33, 45, 46 n.13 (D.D.C. 1998) (rejecting RFRA challenge to an indictment “premised on the government’s allegation that Ms. Hsia orchestrated a scheme in which monks and nuns from the His Lai Temple” donated to political committee “money that ‘actually’ belonged to the Temple,” where defendant had argued that this accusation “misperceives religious doctrine and the role and use of wealth within the Buddhist community at the Temple”); see also *Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan*, 953 P.2d 1315, 1347 (Haw. 1998) (rejecting RFRA challenge to denial of zoning variance to Buddhist temple). These results are based on a search of the Westlaw federal and state court databases using the terms “RFRA ‘Religious Freedom Restoration Act’” and “Buddhism Buddhist”.

<sup>277</sup> In *United States v. Zimmerman*, 5114 F.3d 851, 853 (9th Cir. 2007), a man raised Catholic objected to being forced to provide a blood sample based on “his Catholic upbringing, his time spent studying other religions such as Buddhism and a passage from the Bible.” *Id.* at 854. The plaintiff did not identify as a Buddhist, and it is not clear to what extent specifically Buddhist beliefs underlay his objection.

<sup>278</sup> Chapman, *supra* note 206, at 1480.

<sup>279</sup> Cf. *Sherbert v. Verner*, 374 U.S. 398, 399-402 (1963) (involving a Seventh Day Adventist who was disqualified from unemployment insurance for refusing to work on Saturdays).

B. *Whether Religious Interests Might Be More Fragile as a Rule*

There may be a more systematic approach. This one would not start with particular important interests and compare their fragility to religion's, one-by-one. It would start with a general theory about what features make any important interest crucial to protect. And it would ask if those features will also tend, for whatever reason, to make the same interests less fragile. If so, then religion would be an exception, thanks to the access-narrowing features above. Maybe a few other interests would be similar. But there'd be reason to expect such *fragile-and-important* interests to be outliers. Religion would be, if not one of a kind, one of a few. And then special protections for religion (and perhaps a few other interests) would be fair.

I have no room to sketch, much less defend, much less apply to this debate, a full-dress theory of political-moral value. (Some existing work may help.<sup>280</sup>) Instead, I will say just enough about what one *might* find at the end of this systematic path into the fairness issue, to show that it's a path worth taking.

Which basic human interests are important for constitutional design? The question is pressing because no constitution can protect access to every interest. Most regulations will deny us access to *something* of value. There may be a distinctive and objective value—a certain aesthetic value—to beholding a certain rock at a certain time (say, Yosemite's El Capitán) in the moonlight. But it is no knock against a park regulation that it might deny us access to *that*, by setting a curfew.<sup>281</sup> For even if there is something distinctive to that sight at that time, the closest substitute—the same sight by day—will offer *most* of the same value in objective terms<sup>282</sup>: beauty, visual beauty, the beauty of a landscape, and the beauty specific to Yosemite's landscape. Thus, it seems less important for us to have adequate alternative means of pursuing the first, most highly specific interest, rather than the more general categories of interests. And maybe this is a pattern: the more specific an interest is, the more similar it is to its closest substitute, and so the more adequate that substitute would be, and the less important it is for the state to secure us access to the original interest rather than its substitute.

But leaving us access to more general interests isn't just more important for the state to do. It's also easier to do. Highly specific interests are harder to leave open. For example, there's only one way to get the specific aesthetic

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<sup>280</sup> See *infra* note 283.

<sup>281</sup> See NAT'L PARK SERV., *Yosemite National Park Superintendent's Compendium of Designations, Closures, Permit Requirements, and Other Restrictions Imposed Under Discretionary Authority* (last visited Feb. 8, 2022), available at <https://www.nps.gov/yose/learn/management/upload/yose-compendium.pdf> [<https://perma.cc/WM59-YVW2>] (restricting public access to Yosemite National Park).

<sup>282</sup> And while one might have a stronger *subjective* preference for the one means than its objectively similar substitute, that is an unsound basis for protecting it more. See *supra* note 254.

value of seeing El Capitán from a certain angle by moonlight: You have to be standing in the right spot at the right time. So it's easy for a regulation (a curfew) to block all access to that interest. But there's a wider range of ways to realize the very similar (but slightly more general) interest in seeing El Capitán at some time of day. There's an even wider range of ways to see Yosemite in general, or natural landscapes in general, or to behold the outdoors or experience visual beauty. These ever more general aesthetic interests are ever less fragile. Laws blocking some ways of realizing them will more often leave adequate alternatives. Indeed, there will be more paths to realizing these interests *because* they're more general.

For this category of interests (appreciation of visual beauty), then, the more general subcategories are more important, but also easier to access.

Do these two patterns hold for other categories of interests? Do they hold not just for aesthetic interests but for intellectual ones like knowledge, social ones like friendship, and so on? For these interests, too, are the more important-to-protect categories more general, and the general less fragile? If so, then importance and fragility will normally be *inversely related*. The interests most worth protecting through a civil liberty will typically have less need. Religious interests would be an exception, due to the access-narrowing features described above. Maybe a few other interests would be, too. But we'd have some antecedent reason to expect these important-*and*-fragile interests to be rare, and hence fair to single out.

To test these possibilities, one could draw on moral and political theorists who have attempted systematic catalogues of the basic interests that liberal and pluralistic societies should protect.<sup>283</sup> This general and normative approach could complement the last Section's case-by-case, social-scientific approach to comparing different interests' level of need.

### C. *Whether a Fragility Defense Would Be Over- and Under-Inclusive*

Suppose it turned out that the interests served by religion are as a rule more fragile than secular ones cited by fairness critics. And suppose we have to pick and choose what to protect (because of the costs of protection), so

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<sup>283</sup> Isaiah Berlin's lecture "Two Concepts of Liberty" is a kind of Ur text for building a liberal political theory on value pluralism. William Galston has offered a more recent treatment. WILLIAM GALSTON, *LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE* (2002). For evidence of the Medieval roots of such an account, see generally JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* (1998). And for contemporary moral and political theorists' accounts of value pluralism and resulting value conflicts generally, see, for example, NUSSBAUM, *supra* note 81; Bernard Williams, *Conflicts of Values*, in BERNARD WILLIAMS, *MORAL LUCK* (1981); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); MICHAEL STOCKER, *PLURAL AND CONFLICTING VALUES* (1990); *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* (Ruth Chang ed., 1997).

relative need matters.<sup>284</sup> Would *even that* be enough to justify religious protections of the sort outlined in Part II?

One might worry that if the law protects religion just because religious creeds are pickier *as a class*, it's still being unfair. After all, not every religion is pickier than every non-religious system (recall Buddhism<sup>285</sup>). And even the picky religions are not *always* so (think of generic calls to serve one's neighbor). So an across-the-board protection of religion would apply even where the rationale for singling religion out didn't apply. And that's unjust.

The objection's premise is mistaken. Even if religion generally needs protection badly enough to justify the costs of creating a civil liberty, it doesn't follow that the resulting liberty will have to protect even where religion *doesn't* need it. On the contrary, my account, by pinpointing the source of religion's need, would guide efforts to *limit* protections based on need. (I tried to show this in Section II.C.3's discussion of how to narrow religious liberty's scope, and I do so at great length in another Article.<sup>286</sup>) So the unpicky dimensions of religion would get no privileged treatment over unpicky secular interests. Claimants would be exempt only when their religion put them at a disadvantage relative to others, by denying them adequate alternatives for an important interest.

For example, suppose a Buddhist (or, for that matter a member of a more particular religion—say, a Baptist) and a secular humanist both seek a zoning exemption to run a soup kitchen from their garage. The Buddhist (or Baptist) won't get exemptions if her religion doesn't care *where* the soup is served. For then being forced to serve the soup from another location won't make her worse off than the humanist with respect to any interest served, in her case, by religious exercise—whether personal identity or pursuit of ultimate meaning or otherwise. The Buddhist (or Baptist) will be exempt only when the law puts her in a bind that the humanist does not face—e.g., by forcing her to choose between her identity and a government benefit,<sup>287</sup> in which case the failure to exempt might in fact be unfair to her.

## CONCLUSION

At the heart of this Article is the adequate alternatives principle at work in our constitutional doctrines on abortion, speech, and the like. The principle guards against incidental burdens on protected conduct, but only some such burdens: undue or substantial ones. The principle ensures adequate

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<sup>284</sup> See *supra* note 82 and accompanying text.

<sup>285</sup> See *supra* notes 276–277 and accompanying text.

<sup>286</sup> See Girgis, *supra* note 99.

<sup>287</sup> Cf. *Sherbert v. Verner*, 374 U.S. 398 (1963) (involving a Seventh Day Adventist who was denied unemployment insurance for refusing to work on Saturdays).

alternatives for pursuing important interests. I analyzed this principle to spell out a test for when an interest needs protection. That depends on when the interest is likely to suffer substantial or undue burdens—or, equivalently, when people are likely to lose adequate access to it. This, in turn, was resolved into two factors: fragility and exposure. If exposure tells us how often our law will deny us some means of realizing an interest, fragility tells us how often a law denying us some means will leave no adequate alternatives. An interest needs protection only where it's fragile and exposed. And only the fragile and exposed interests need protection.

Since civil liberties have costs, our law sets priorities about which interests to protect, based on which need it most. So specific protections for religion may be fair if religious interests are more fragile and exposed—if others suffer fewer undue or substantial burdens. Yet the thirty years of the fairness debate have produced almost no evidence of undue burdens on other interests.

To explore whether the interests served by religion might have more need of protection, I gave an account of why they are often fragile. A person's access to them is limited by the creed she happens to have, which is often picky, and which she cannot change at will. I discussed what would have to be true for other interests to be similarly fragile—and one tentative but general basis to think that important-*and*-fragile interests may be rare.

Along the way, I illustrated other uses of this framework, including for other liberties. Fragility and exposure point to different possible sources of an interest's need for protection. Teasing them apart can help one conceptualize the case for or against any of our liberties. It exposes a hole in one kind of argument for Second Amendment rights. And it can help courts properly narrow religious claims, to avoid giving believers undue privilege.

By the same token, the fragility-exposure framework could address another debate in constitutional theory: whether it makes sense to protect free speech but not other activities that serve autonomy and self-expression. Just as many scholars have argued that singling out religion is narrow and arbitrary, Larry Alexander, Paul Horton, Leslie Kendrick, Tim Scanlon, and Fred Schauer have discussed whether there is any justification for singling out speech.<sup>288</sup> As Professor Schauer puts it, if the interests advanced by free speech aren't unique to speech, or uniquely important, then a right to free speech is as arbitrary as a right to "free speech on Tuesdays."<sup>289</sup> Professor Kendrick, for her part, has addressed the prior question of what criteria any good justification of the "specialness" of free speech would have to satisfy.<sup>290</sup>

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<sup>288</sup> See, e.g., Leslie Kendrick, *Free Speech as a Special Right*, 45 PHIL. PUB. AFF. 87, 89 nn.6-7 (2017) (collecting articles on the topic).

<sup>289</sup> Frederick Schauer, *Free Speech on Tuesdays*, 34 LAW & PHIL. 119, 120 (2015).

<sup>290</sup> See *supra*, note 288, at 110.

This Article's framework has implications for both questions. An adequate defense of free speech need *not* show that the interests in speech are especially important. It need only show that they are unusually exposed or fragile in the face of laws that burden speech. It may be, then, that Schauer and others were too quick to reject all existing justifications of free speech as being under-inclusive. And if some interests advanced by speech are more fragile and exposed, one can ask what the scope of this liberty would look like if free speech law focused on guarding just where interests are fragile.

Whatever its ultimate verdicts, this fragility-exposure framework might render debates about religion as well as speech more mundane than they have felt. Both liberties, once consensus values, are now deeply contentious and will remain so, for a host of reasons too obvious to list and others too subtle or serious to gesture at in passing here.<sup>291</sup> But we should take any relief from the tension where we can come by it honestly. Our debates about freedom of religion, for example, however they come out in the end, needn't proceed as a referendum on the inferiority or superiority of religion or its absence. There are other interests and, more to the point, there are other questions to ask about each interest—considerably more prosaic questions, at times even boring questions: Is it fragile? Is it exposed?

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<sup>291</sup> See, e.g., Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2202 (2015) (discussing claims for religious exemptions that, if accommodated, may burden other citizens).