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DEFINING "SUBSTANTIAL BURDENS" ON RELIGION AND OTHER LIBERTIES

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The U.S. Supreme Court seems poised to restore free exercise exemptions from neutral laws that burden religion. But pivotal Justices have asked how to narrow religious exemptions. This Article proposes answers with wide-ranging implications for the future—and limits—of free exercise, and for the doctrine on other liberties.

To date, courts applying exemptions from "substantial burdens" on religion have tended to narrow protections to the detriment of religious minorities. But many fear that expanding exemptions would over-protect Christians in culture-war cases.

Striking a balance will require a sound definition of "substantial burdens." But the current, strongly pro-religion Court will not impose real limits unless it is given a way to do so that avoids forcing judges to second-guess claimants' beliefs about what is important in religious matters. And here legal texts, history, and precedent do not shed much light.

For answers, this Article looks to how our law handles the same issue for other liberties—when legal burdens on them trigger scrutiny. It is the first article to pursue this approach, which has support in case law on other liberties. This Article offers, in the process, the most comprehensive theory to date of how other liberties guard against incidental burdens. Each liberty is shaped by what I call an "adequate alternatives" principle: a law that burdens the liberty will trigger heightened scrutiny if the law leaves no adequate alternative way to exercise that liberty. And an alternative is adequate if it lets someone realize the interests served by that liberty to the same degree, and at no

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greater cost. This principle can guide doctrine on those liberties in new circumstances and inform debates about which liberties to constitutionalize in the first place.

And applying the principle to define "substantial burdens" on religious liberty would resolve many issues that have vexed courts. The resulting test would urge deference to believers on religious questions but not on what "substantial" means, thus limiting this liberty. Yet the test would expand protection for religious minorities harmed by existing doctrines biased toward mainstream religions. And it would offer cogent answers to a range of cases discussed here, involving inmates, street preachers, and protesters; government contractors raising conscience claims; churches challenging zoning laws; and tribes challenging public works projects.

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INTRODUCTION

Does the Free Exercise Clause entitle people to exemptions from general laws that happen to burden their religion? For decades, the U.S. Supreme Court said yes.[1] Then in *Employment Division v. Smith* (1990),[2] it said no. Now, in *Fulton v. City of Philadelphia* (2021),[3] five Justices have signaled a willingness to reverse *Smith* and say yes again.[4] That would restore heightened scrutiny of—and exemptions from—neutral laws that incidentally burden religion. But two pivotal Justices in *Fulton* said that if and when the Court reverses *Smith*, it will face several questions about what should replace *Smith*. This Article proposes answers, with wide-ranging implications for the future—and *limits*—of free exercise rights. Its framework also provides a method for developing doctrines on other liberties, like speech, guns, and travel—and for telling which liberties a system ought to constitutionalize at all.

Under the pre-*Smith* regime, which exists now in more limited contexts under some federal and state statutes, courts would ask if a law had "placed a substantial burden" on a person's religious exercise.[5] If so, courts would apply heightened scrutiny, granting her an exemption from

[1] See, e.g., Sherbert v. Verner, 374 U.S. 398, 403–04 (1963); Wisconsin v. Yoder, 406 U.S. 205, 214–29 (1972).
[2] 494 U.S. 872, 878–79 (1990).
[3] 141 S. Ct. 1868 (2021).
[4] See id. at 1882 (Barrett, J., joined by Kavanaugh, J., concurring) (finding "textual and structural arguments against *Smith* . . . more compelling"); id. at 1883, 1926 (Alito, J., joined by Thomas & Gorsuch, JJ., concurring in the judgment) (calling for *Smith* to be overruled).
[5] Hernandez v. Comm'r, 490 U.S. 680, 699 (1989).

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the law unless doing so would have harmed a compelling interest.[6] But how to test for substantial burdens? That is, when should heightened scrutiny kick in?

This Article develops answers based on how our law handles the same issue as it arises for other constitutional liberties—when legal burdens on *them* are serious enough to trigger heightened scrutiny.[7] Courts have developed large bodies of case law on that question. And in answering this issue for one liberty, courts have often drawn on the doctrines defining the trigger for heightened scrutiny under other liberties.[8] Some Justices have hinted that borrowing from other liberties might be the best way to limit religious liberty, too (and one circuit has already gestured vaguely in this direction[9]).[10] This method promises to provide a practical way for courts to limit religious liberty. But this Article is the first to pursue this approach—offering, in the process, the most comprehensive theory to date of how constitutional liberties *in general* guard against incidental burdens.

As shown below, courts have relied on what I call an *adequate alternatives* principle.[11] This principle triggers heightened scrutiny of a law that burdens a civil liberty if the law leaves no adequate alternative means of exercising the liberty at issue. And an alternative is adequate if it allows people to pursue the interests served by that liberty to the same degree and at no greater cost.

This Article shows that applying that principle to religion offers easy-to-implement answers to several questions about the scope of religious liberty. The answers are especially timely as critics fear that if and when this particular Court reinstates free exercise exemptions, it will fail to impose sensible limits on exemptions.[12] The concern not to over-protect

[6] *Sherbert*, 374 U.S. at 404, 406–07.

[7] See infra Section II.A.

[8] Id.

[9] See, e.g., Mahoney v. Doe, 642 F.3d 1112, 1117, 1121 (D.C. Cir. 2011) (determining whether a law substantially burdens religion by asking whether it leaves open a "multitude of means" for practicing religion, echoing the "ample alternative channels of communication" test used in the same opinion to evaluate a free speech claim (internal quotation marks and citation omitted)).

[10] See Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., joined by Breyer & Kavanaugh, JJ., concurring) (suggesting, based on analogies to other liberties, that free exercise protections against incidental burdens should not be categorical).

[11] See infra Part II.

[12] See, e.g., Micah Schwartzman, Richard Schragger & Nelson Tebbe, Symposium: Religious Privilege in *Fulton* and Beyond, SCOTUSblog (Nov. 2, 2020, 9:29 AM),

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has arisen especially in politically charged cases raising Christian claims in the "conscience wars."[13] These include *Fulton* itself, which involved a Catholic agency declining to work with same-sex couples as foster parents.[14]

There and elsewhere, if courts found a "substantial burden" anytime someone *claimed* one, however trivial the burden in fact was, courts would be doing what skeptics of exemptions—and several Justices in *Fulton*[15]—oppose: replacing *Smith*'s categorical denial of exemptions with "an equally categorical strict scrutiny regime,"[16] as Justice Barrett put it. This would give religious claimants *carte blanche*. To avoid doing so, courts must insist, as Justice Sotomayor once wrote of a *statutory* religious exemptions regime, that merely "*thinking* one's religious beliefs are substantially burdened . . . does not make it so."[17]

But as Part I shows, a single fear has stopped the Court from setting real limits on "substantial burdens," including in culture-war-related cases like *Burwell v. Hobby Lobby Stores, Inc*.[18] The Court worried that any attempt to limit successful claims would require judges to play theologians, deciding for themselves what is true or important in religious matters.[19]

https://www.scotusblog.com/2020/11/symposium-religious-privilege-in-fulton-and-beyond/ [https://perma.cc/3RD3-T74T].

[13] See Douglas NeJaime & Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 Yale L.J. 2516, 2520 (2015).

[14] *Fulton*, 141 S. Ct. at 1874–75.

[15] Justice Barrett wrote an opinion, joined in full by Justice Kavanaugh, that indicated a willingness to revisit *Smith*. Id. at 1882 (Barrett, J., joined by Kavanaugh, J., concurring). Both Justices may be needed for a majority to reverse *Smith* since only three Justices called for reversal outright. See id. at 1883, 1926 (Alito, J., joined by Thomas & Gorsuch, JJ., concurring). Justice Breyer joined the portion of Justice Barrett's opinion raising questions about what would replace *Smith*. Id. at 1882 (Barrett, J., joined by Breyer & Kavanaugh, JJ., concurring). However, Justice Breyer himself had previously joined an opinion arguing that *Smith* was wrongly decided. See City of Boerne v. Flores, 521 U.S. 507, 544–45 (1997) (O'Connor, J., joined by Breyer, J., dissenting).

[16] *Fulton*, 141 S. Ct. at 1883 (Barrett, J., joined by Breyer & Kavanaugh, JJ., concurring).

[17] Wheaton Coll. v. Burwell, 573 U.S. 958, 966 (2014) (Sotomayor, J., dissenting).

[18] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–91 (2014) (granting religious exemptions from a federal regulation requiring employers to provide insurance coverage for contraceptives).

[19] Id. at 725. The risk of forcing judges into this role also concerned the Justices in *Fulton* who held off on reversing *Smith*, see *Fulton*, 141 S. Ct. at 1883 (Barrett, J., joined by Breyer & Kavanaugh, JJ., concurring), as well as the *Smith* Court itself, see Emp. Div. v. Smith, 494 U.S. 872, 886–87 (1990).

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So for any substantial burdens test to have a *shot* at appealing to this strongly pro-religion Court, it will have to avoid forcing judges to do theology. This Article offers a practical test that does so while still imposing real limits on religious claims in culture-war cases. But as seen in many other applications below, this test is also well-suited to "the vast majority of claims brought under" religious liberty statutes, which "have nothing to do with topics like contraception, gay rights, or abortion."[20]

The substantial burdens test proposed here also aims to avoid a *second* problem, which has plagued lower courts' substantial burden doctrines: by relying on concepts drawn from mainstream religions, courts have harmed religious minorities.[21] So for minorities and also (as seen below) inmates, the substantial burdens test has been "the most difficult doctrinal hurdle" to clear.[22] For example, one study found that courts hearing "Muslim prisoner claims" often second-guessed the prisoners' religious views and "summarily den[ied]" their claims.[23] Because minorities bring the majority of claims under existing statutes,[24] refining the "substantial burdens" test would meet a pressing need whether or not *Smith* is reversed. That need arises in cases involving Apache Indians wearing headdresses with eagle feathers, Sikhs carrying kirpans to work, Santeríán priests performing sacrifices, Black churches using inner-city spaces, Muslim prisoners growing beards, and Jewish inmates keeping kosher.[25] This Article's substantial burdens test aims to offer protection in such cases without over-protecting in others.

[20] Mark Storslee, Religious Accommodation, the Establishment Clause, and Third-Party Harm, 86 U. Chi. L. Rev. 871, 874 (2019); see also 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, 384 (2018) (finding only two Religious Freedom and Restoration Act ("RFRA") challenges filed in the U.S. Court of Appeals for the Tenth Circuit in the thirty-two months after the *Hobby Lobby* decision, neither of which involve abortion, contraception, or gay rights).

[21] See infra Subsection III.D.1.

[22] Michael A. Helfand, Identifying Substantial Burdens, 2016 U. Ill. L. Rev. 1771, 1777.

[23] Adeel Mohammadi, Note, Sincerity, Religious Questions, and the Accommodation Claims of Muslim Prisoners, 129 Yale L.J. 1836, 1841–42, 1886 (2020).

[24] Over five years in the Tenth Circuit, "half of all decisions involve[d] prisoners or asylum seekers," and over half of the prisoners' claims were brought by non-Christians. Goodrich & Busick, supra note 20, at 356–57, 376. Among non-prisoner and non-asylum cases, Muslims were overrepresented 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.

[25] John Corvino, Ryan T. Anderson & Sherif Girgis, Debating Religious Liberty and Discrimination 10, 17 (2017).

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But as Part II reveals, this basic problem—developing a balanced but limited trigger for exemptions from incidental burdens—is not unique to religious liberty. Courts face the same challenge in implementing other constitutional liberties. For example, this exact issue arose regarding abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[26] In fact, it is an underappreciated fact that the changes *Casey* made to *Roe v. Wade*[27] were *entirely* about limiting which incidental burdens on pre-viability abortion would require a compelling justification and which would not.[28] And *Casey*'s express reason for introducing this distinction into abortion law was to bring abortion in line with all other constitutional liberties, under which "not every law which makes [the liberty] more difficult to exercise is, *ipso facto*, an infringement of that right."[29] Specifically, *Casey* held, only laws imposing an "undue burden" on abortion should require a compelling justification.[30] And while this test was criticized as novel, its substance resembled doctrines playing the same narrowing role for other liberties.[31] Bringing out the resemblance here will show how to extend those other liberties' doctrines to new circumstances—and how to fashion a well-supported substantial burdens

[26] 505 U.S. 833, 874 (1992).

[27] 410 U.S. 113 (1973).

[28] It is sometimes supposed that *Casey* did away with *Roe*'s heightened scrutiny—*Roe*'s demand for a compelling justification for abortion laws—altogether. See, e.g., Mark D. Rosen & Christopher W. Schmidt, Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case, 61 UCLA L. Rev. 66, 95 (2013) (noting *Casey* "rejected *Roe v. Wade*'s test of strict scrutiny, adopting in its place the new and unique undue burden standard" (footnote omitted)). But, in fact, *Casey* did not "disturb" but rather "reaffirm[ed]" what it called *Roe*'s "essential holding" on when the state interest in fetal life was and was not constitutionally sufficient to support laws preventing abortion—and thus also reaffirmed, implicitly, *Roe*'s demand that such laws serve a compelling interest. 505 U.S. at 871, 878–79. *Casey* simply shrank the class of regulations that would trigger such scrutiny: not all abortion restrictions, but only those imposing an "undue burden" or prohibition. See Sherif Girgis, Misreading and Transforming *Casey* for *Dobbs*, 20 Geo. J.L. & Pub. Pol'y 331, 340 n.46 (2022). While the Court has since, in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022), reversed *Casey* along with *Roe*, *Casey*'s framework remains a helpful guide to how our law has long addressed incidental burdens on individual liberties.

[29] *Casey*, 505 U.S at 873 (plurality opinion).

[30] See id. at 874.

[31] See generally Alan Brownstein, How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine, 45 Hastings L.J. 867, 894–908 (1994) (arguing that the Supreme Court has undertaken analyses similar to the undue burden analysis when considering liberties such as the right to marry, the right of political association, and property rights, among others); see also infra Section II.A.

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test for religion, in the absence of textual or historical guidance for doing so.

To that end, Part II draws a principle from the laws of speech, abortion under *Roe* and *Casey*, and other liberties. These doctrines not only forbid state action that targets protected conduct, but also guard against incidental burdens from *some* neutral laws.[32] Which? The law's answer is guided by what I call an *adequate alternatives* principle. This principle triggers heightened scrutiny of a law burdening a civil liberty *if the law leaves no adequate alternative means of exercising the liberty*. But courts have said little on what makes an alternative "adequate." To derive an answer, Part II extrapolates from case law and rights theory. Ultimately, the adequate alternatives principle ensures that laws curbing some liberty will leave people other ways to pursue the interests served by that liberty to the same degree, at no greater cost. This account can be used to clarify the scope of any number of liberties.

Finally, Part III applies the adequate alternatives principle to limit what will count as a "substantial burden" on religion.[33] It offers a unified resolution of dozens of cases and several unsettled questions. The cases addressed involve prisoners and death row inmates; street preachers and protesters; government contractors raising conscience claims; churches challenging zoning laws; and tribes challenging public works projects. And the general legal questions addressed in Part III, some of which were raised by Justices in *Fulton*, include the following: What questions judges should ask in assessing substantiality, whether to allow exemptions from "garden-variety laws,"[34] whether to treat "indirect and direct burdens on" religion differently,[35] what forms of religious exercise to count in the first place, when to defer to claimants' beliefs about a burden's significance, and when not to defer. The test will ensure that heightened scrutiny applies only when the religious claimant really is worse off than others

[32] See Michael C. Dorf, Incidental Burdens on Fundamental Rights, 109 Harv. L. Rev. 1175, 1178–79, 1202, 1209, 1223 (1996) (noting that a "floodgates concern" has led courts to limit civil liberties protections against merely incidental burdens).

[33] Other scholars have discussed the adequate alternatives principle in the context of religion but to opposite effect—arguing that because such alternatives are hard to come by in the case of religion, religious burdens should trigger *stricter* protection. See Douglas Laycock & Thomas C. Berg, Protecting Free Exercise Under *Smith* and After *Smith*, 2020–2021 Cato Sup. Ct. Rev. 33, 48–49.

[34] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., joined by Breyer & Kavanaugh, JJ., concurring) (citation omitted).

[35] Id.

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subject to the same law, allaying concerns about over-protecting religion. But the test will also avoid the constitutional landmines of having judges do theology or giving short shrift to less familiar, minority religious claims.

I. THE CHALLENGE

Both pre-*Smith* free exercise protections against incidental burdens on religion and some current statutory protections limit relief to cases involving a substantial burden on religion. This Part reviews the challenges that courts and commentators face in defining "substantial burden."

It helps to have background about the test's place in our scheme of civil liberties. By "civil liberties" I simply mean rights to freedom from state interference in private conduct. These include many constitutional rights, but not all.[36] In our system, a constitutional liberty to do *X*—engage in speech, travel, keep and bear arms, exercise religion—has two jobs. Not only does a civil liberty prohibit laws whose purpose is to forbid *X* (what I will call "targeted" laws), it also protects against *some* laws that burden *X* only as a side effect, or incidentally ("non-targeted" laws).[37]

This Article focuses on this second protection—from non-targeted laws. When it comes to such laws, as seen below, most constitutional liberties require a two-step inquiry from courts.[38] The first concerns the burden on the individual's conduct, and the second is about the public benefits of imposing that burden.[39] A court reaches the second step only if it finds a weighty burden on private conduct at step one.[40] It is the first

[36] Contrast such liberties with rights that are entitlements to government resources—to counsel, a fair trial, a vote—which are not addressed here except insofar as the government might deny one of these resources in a way that penalizes the exercise of a liberty. Of course, this private conduct/public resources dichotomy is not sharp or exhaustive. Some entitlements both spare individuals from government interference in private conduct and entitle individuals to certain government aid (like property rights). And others are about neither private conduct nor access to such resources, but some other form of state action or abstention (like equal protection or non-establishment).

[37] See generally Dorf, supra note 32, at 1232–33 (concluding that incidental burdens on free speech, freedom of religion, and the right to privacy appear to trigger heightened scrutiny under the case law).

[38] See generally Brownstein, supra note 31, at 867–68 (identifying two steps after recognition of a right's existence: one asking "whether the right has been infringed," the other asking "whether any infringement can be justified").

[39] Id.

[40] Id.

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step that is governed by the substantial burdens test in the case of religion.[41] The test's job, then, is to identify when enough is at stake for the religious believer that courts should weigh the costs of granting her an exemption.

Such a test is needed for reviewing laws incidentally burdening religion, but not for reviewing laws *targeting* religion. Targeted laws, courts and commentators agree, are unlawful whether or not the burden they impose is "substantial."[42] The law should, and can afford to, bar targeted laws across the board because there is never a good reason to target religion for the sake of targeting religion.[43]

By contrast, non-targeted laws aim at legitimate interests; any harm to religion is incidental. Heightened scrutiny of non-targeted laws is *sometimes* needed because incidental burdens can be just as harmful to the interests underlying our liberties as targeted laws.[44] But guarding against *all* incidental burdens might drown courts and cripple the state's pursuit of what are, after all, legitimate public interests. The doctrine meant to hold back the flood (and prevent the crippling) under pre-*Smith* free exercise law was the substantial burdens test: only *substantial* burdens on free exercise would trigger strict scrutiny and thus, potentially, exemptions.

That crucial role makes it all the more important to define "substantial burdens" well. This Part will show why that is a challenge and will survey problems with existing substantial burdens tests, motivating Part III's defense and application of a new test.

A. Gaps in Legal Sources

The usual sources of legal authority offer little help in shaping a "substantial burden" doctrine.

[41] See id.; see also id. at 901.

[42] See, e.g., Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 170 (3d Cir. 2002) ("[T]here is no substantial burden requirement when government discriminates against religious conduct." (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–47 (1993))).

[43] Cf. Brown v. Borough of Mahaffey, 35 F.3d 846, 849–50 (3d Cir. 1994) ("Applying such a burden test to non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment.").

[44] See generally Dorf, supra note 32, at 1195–98 (arguing that both consequentialist and non-consequentialist theories of rights counsel in favor of some protection against incidental burdens, not only direct burdens).

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First, neither the text nor the original understanding of the First Amendment sets the scope of the substantial burdens test. After all, the test did not appear until the Court's 1963 decision inaugurating religious exemptions from neutral laws in *Sherbert v. Verner*.[45] Even the leading originalist defenders of free exercise exemptions do not claim that original understandings tell us *which burdens* on religion were thought significant enough to require special justification.[46] At most, history tells us what sort of *justification* was thought sufficient to override a free exercise claim: according to "early colonial charters" and "State Constitutions," only the need to preserve "peace and safety."[47]

So at most, history speaks to the question raised at step two of the inquiry under civil liberties doctrines today: how to apply heightened scrutiny. History is silent on the prior question of when there is a sufficient clash between a law and someone's religion to trigger scrutiny. That question really encompasses several issues: *Which* conduct is protected except when it would undermine peace and safety? (All religiously motivated conduct? Only religious obligations? Something in between?) And what is that conduct protected *against*? (Criminal penalties? Civil? The indirect pressure of losing otherwise available public benefits?) History draws a blank on these questions about defining "substantial burdens."

Second, precedent on the substantial burdens test is conflicted and underdeveloped. While *Sherbert* found a substantial burden when a state banned nothing and just incidentally raised the cost of religious exercise,[48] *Sherbert* also officially left in place[49] a then-recent precedent blessing laws that make "religious practices" "not . . . unlawful" but merely "more expensive."[50] Or again, while *Sherbert* looked askance at laws increasing

[45] 374 U.S. 398, 406–07 (1963) (requiring a "substantial infringement" of free exercise rights to serve a "compelling" interest).

[46] See, e.g., Michael W. McConnell, Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in *City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 819, 824–27 (1998) (offering evidence only on the question of when a burden on religion would be constitutionally tolerated).

[47] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1901–02 (Alito, J., joined by Thomas & Gorsuch, JJ., concurring in the judgment).

[48] *Sherbert*, 374 U.S. at 403–04 (conceding that "no criminal sanctions directly compel [Sherbert] to work a six-day week" contrary to her faith).

[49] See id. at 408 (distinguishing *Braunfeld v. Brown*, 366 U.S. 599 (1961)).

[50] *Braunfeld*, 366 U.S. at 605–06.

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the expense of religion,[51] a later *Sherbert*-era case allowed state action that the Court admitted might "virtually *destroy*" a Native American tribe's ability to practice its faith.[52] Indeed, Justice Scalia's opinion for the Court in *Smith* effectively abolishing the *Sherbert* regime did so on the ground that it was "utterly unworkable."[53]

Third, besides tensions in the precedents, there were gaps. The Court gave little or no guidance on several questions that have become pressing and contentious: whether to look at the theological burden of compliance with a law as well as the material burden for non-compliance; when to defer to claimants' views about those matters and when not to; what range of state actions to regard as candidates for review, and which forms of religious exercise to count as candidates for protection.[54]

Fourth, the same questions (and lack of guidance) arose under the statutes Congress enacted when the Supreme Court in *Smith* scrapped the constitutional entitlement to exemptions.[55] Like pre-*Smith* cases, the Religious Freedom Restoration Act of 1993 ("RFRA") provided for strict scrutiny of only "substantial[]" burdens on religion (whether imposed by state or federal action).[56] And when RFRA was invalidated as applied to the states,[57] Congress restored some protection against state action (where jurisdictional hooks existed) with the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[58] RLUIPA, too, demands strict scrutiny only in cases of "substantial[] burdens" on religion (in the context of zoning laws and policies affecting prisoners).[59]

And in passing both RFRA and RLUIPA, Congress added no clarity on "substantial burdens." The text and legislative history simply point back to the Court's *Sherbert*-era cases,[60] which are spotty and conflicted.

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[51] See *Sherbert*, 374 U.S. at 408 (requiring laws that make "religious beliefs more expensive" to serve a "strong state interest" (citation omitted)).

[52] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451–52 (1988) (emphasis added) (citation omitted).

[53] Emp. Div. v. Smith, 494 U.S. 872, 888 n.4; see also id. at 889–90 n.5.

[54] See infra Section I.C.

[55] See *Smith*, 494 U.S. at 890.

[56] 42 U.S.C. §§ 2000bb-1(a)–(b), 2000bb-2 (2018), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[57] *City of Boerne*, 521 U.S. at 534–36.

[58] 42 U.S.C. §§ 2000cc–2000cc-2 (2018).

[59] Id.

[60] See RFRA, 42 U.S.C. §§ 2000bb(b), 2000bb-1 (forbidding "substantial[] burden[s]" on religious exercise absent a compelling interest, echoing *Sherbert*'s imposition of strict scrutiny to "substantial infringement[s]" of religious exercise, Sherbert v. Verner, 374 U.S. 398, 407 (1963), and later cases' glossing of the test expressly as a "substantial burden" test, Hernandez

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Since then, Congress's one amendment of the statutory substantial burdens test clarified only what is *not* required for such a burden (namely, that the affected conduct be "compelled by, or central to" one's faith).[61]

Fifth, dictionaries will not help much in interpreting the "substantial burden" language as it appears in RFRA and RLUIPA because the term "substantial" is vague. That is why the term takes on different senses in different areas of law, based on bodies of cases peculiar to each context.[62] Yet any such body of cases here is, as noted, unhelpful.

So religious liberty's scope—before *Smith*, after a possible reversal of *Smith* and under RFRA and RLUIPA now—is fixed by the substantial burdens test. But there is little to guide courts in applying that test.

B. Existing Answers (and Their Dilemmas)

To fill the gap, courts and commentators have hazarded a range of substantial burdens tests. But none does everything that most agree the test should do. As noted earlier, no one wants courts to take theological positions by second-guessing a plaintiff's own judgments about what is true or valuable in religious matters. (This is sometimes called the "religious questions doctrine."[63]) But to avoid that risk, some would have courts lurch to the other extreme of always deferring to a plaintiff's claim that a burden is "substantial." This reads the "substantial" burdens limitation out of the law. To avoid this bind, some theories give the "substantial burden" inquiry only the thinnest content. Or they reach for bright-line tests that work better for more familiar and mainstream

v. Comm'r, 490 U.S. 680, 699 (1989), *invalidated in part by City of Boerne*, 521 U.S. 507 (1997)); RLUIPA, 42 U.S.C. §§ 2000cc(a), 2000cc-1(a) (same); see also S. Rep. No. 103-111, at 12 (1993) (clarifying that the RFRA's purpose is "only to overturn the Supreme Court's decision in *Smith*" rejecting the *Sherbert* test, and not to "unsettle other areas of the law"), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1902; id. at 8 (expecting courts applying RFRA to "look to free exercise cases decided prior to *Smith* for guidance"), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898; 146 Cong. Rec. 16,700 (2000) (joint statement of Sen. Hatch and Sen. Kennedy) (RLUIPA "does not include a definition of the term 'substantial burden' " because that term "should be interpreted by reference to Supreme Court jurisprudence").

[61] 42 U.S.C. § 2000cc-5(7)(A).

[62] See Rucho v. Common Cause, 139 S. Ct. 2484, 2505–06 (2019) (noting that the term "substantial," in several areas of law, takes its meaning from a distinctive "common law confining and guiding the exercise of judicial discretion").

[63] See Christopher C. Lund, Rethinking the "Religious-Question" Doctrine, 41 Pepp. L. Rev. 1013, 1013, 1027 (2014); see also Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969) (stating that judicial decisions should not "turn on the resolution by civil courts of controversies over religious doctrine and practice").

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religions. But in doing so, these tests end up with too narrow a scope of protection, especially for minorities. Part II will suggest that courts can avoid these difficulties—and answer a range of ongoing controversies—by using a test derived from a principle implicit in other constitutional liberties.

1. Conduct-Focused Tests

One set of proposals focuses on the link between religious belief and the burdened conduct. It urges that courts protect (1) all conduct motivated by religion,[64] (2) only conduct central to it,[65] or (3) only conduct required by it.[66] None works.

The first is too broad because a person can be motivated by religion in doing anything—even when she would consider another available activity just as religiously valuable. She might have a religious motivation for taking a walk in the park—as a quiet setting for prayer—without seeing any religious advantage to praying there as opposed to elsewhere. Her mere religious motive should not entitle her to exemptions from regulations about when walking in the park is allowed. Likewise, it is not obvious that speech should get more protection when it is engaged in for religious rather than secular reasons.[67] Simply put, a motives-only test would allow believers to get an exemption from the law just by adopting a religious motive for any ordinary activity the law might forbid. They could do so without showing that they would be *worse off* than others absent an exemption. This would give believers an arbitrary privilege. And it would effectively "read out of [the law] the condition that only *substantial* burdens" trigger heightened scrutiny.[68]

Yet a focus on religious *duties* is too narrow. It might have left exposed the peyote use that, contrary to local drug laws, the plaintiffs in *Smith* claimed the right to engage in.[69] Peyote use in worship was central to the

[64] See, e.g., Jolly v. Coughlin, 76 F.3d 468, 476 (2d Cir. 1996).

[65] See, e.g., Thiry v. Carlson, 78 F.3d 1491, 1495 (10th Cir. 1996) (citing Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995)).

[66] See Mahoney v. Doe, 642 F.3d 1112, 1121 (D.C. Cir. 2011) (focusing on "whether the regulation at issue 'force[d plaintiffs] to engage in conduct that their religion forbids or . . . prevent[ed] them from engaging in conduct their religion requires'" (quoting Henderson v. Kennedy, 253 F.3d 12, 16 (D.C. Cir. 2001))).

[67] See infra Subsection III.D.3.

[68] *Mahoney*, 642 F.3d at 1121 (quoting *Henderson*, 253 F.3d at 17) (emphasis added).

[69] See Emp. Div. v. Smith, 494 U.S. 872, 876 (1990).

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plaintiffs' Native American religion: a path to contact with God.[70] But the claimants professed no *duty* to use the drug.[71] Thus, to protect only duties would allow even heavy burdens on minority religions that draw no sharp line between what is spiritually valuable versus spiritually required. Even for religions that do draw this line, some non-obligatory conduct is important enough that a burden on the conduct would seem to be substantial.[72] So motivation is too broad and duty too narrow.

And both are underspecified. Whatever conduct receives protection, one must decide what to protect it *against*. A law might burden a religious duty, for example, by criminalizing some means of carrying out that duty, or all. Or the law might merely raise the cost of some means, or all. Or the law might entirely disable you from discharging the duty (by denying you needed resources, as in prison). Not all these burdens are necessarily substantial. As Professor Hamilton writes, a fine for speeding to church should not trigger heightened scrutiny, even if making it to services on time is, for you, a solemn duty.[73]

Perhaps foreseeing these problems, Judge Posner adopted a hybrid test. It covers some mandatory and some non-mandatory conduct and specifies the relevant form of burden on each.[74] Under this test, substantial burdens include *absolute conflicts* of legal and religious duties: laws that ban what the religion requires or require what the religion bans. Also covered are mere "inhibit[ions]" of conduct or expression that is "central" to religion, even if not commanded by it.[75] But even this test is over- and under-inclusive,[76] and the vagueness of "centrality" might raise constitutional

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[70] See 1 Kent Greenawalt, Religion and the Constitution: Free Exercise and Fairness 68–69 (2006).

[71] See Brief for Respondents at 39, *Smith*, 494 U.S. 872 (No. 88-1213) (characterizing peyote use as the "central ceremony" of the Native American Church, but not as a duty of practitioners).

[72] See, e.g., Douglas Laycock, Free Exercise and the Religious Freedom Restoration Act, 62 Fordham L. Rev. 883, 893 nn.36–37 (1994) (citing Brandon v. Bd. of Educ., 635 F.2d 971 (2d Cir. 1980) (prayer case); and Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1123 (Wash. 1989) (ministry case)).

[73] Marci A. Hamilton, The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act Is Bad Public Policy, 9 Harv. L. & Pol'y Rev. 129, 131 (2015).

[74] Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996).

[75] Id.

[76] See Greenawalt, supra note 70, at 204 ("One could have a 'substantial burden' if a forbidden practice is [only] 'moderately significant,'" and conversely, even for mandatory conduct, "a slight impairment" might be "less than substantial. For example, members of a particular church might regard communion as mandatory and central and hymn singing as

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concerns, not least by inviting judges to gainsay plaintiffs' views on what really matters in their religion.[77] These problems with the centrality *and* duty criteria make it no surprise that Congress has repudiated both by specifying that RFRA and RLUIPA protect some conduct not "compelled by, or central to, a system of religious belief."[78] So the obstacles to this hybrid test are not only normative and constitutional, but statutory.

2. Cost-Focused Tests

Professor Helfand fears that *any* effort to "[i]nterrogat[e] the religious substantiality of conduct on a theological metric runs afoul of core Establishment Clause prohibitions."[79] So he would bracket the kind of religious exercise at stake and look only to the extent of the penalty for engaging in it. But this approach—by including religious exercise of *any* kind, as opposed to exercise that clears a certain threshold of significance—effectively collapses into the "motivation" test mentioned above. So the approach runs into all the same problems of overbreadth. Simply put, high material costs are not sufficient for a substantial burden. The steepest fine for breaking a public park's curfew in search of a quiet place to pray is not a substantial burden if your religion is equally satisfied with prayers elsewhere.[80]

3. Claimant-Focused Tests

If not the nature of the religious claim or extent of the penalty, perhaps courts should look to the regulation's impact on the claimant more directly. Professor Flanders would ask if the state action "*puts some kind*

neither mandatory nor central. Yet a ban on all singing might constitute a substantial burden, whereas a ban on all use of wine might not, if the members believed they could use grape juice for communion without loss of religious effect." (emphasis omitted)).

[77] See infra Subsection III.C.1.

[78] 42 U.S.C. § 2000cc-5(7)(A).

[79] Helfand, supra note 22, at 1787.

[80] In helpful correspondence, Professor Helfand has suggested that his test, which asks whether a person can "still engage in religious exercise while only enduring an insubstantial civil burden," id. at 1805 (emphasis omitted), can accommodate such cases: someone who wishes to pray in a public park past its legally imposed curfew could engage in religious exercise at little civil cost by praying elsewhere. But on this understanding of his test, I think it would, after all, require a sizing up of the religious as well as civil burdens—contrary to his aim to avoid just that. For courts would have to see, in this case, how much the plaintiff's faith is set back if she is forced to engage in one form of exercise (praying on a stroll through her neighborhood) rather than another (praying on a stroll through the closed public park).

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of pressure on someone to act contrary to his religious beliefs."[81] But this has the surprising result that a prison imposes no substantial burden on Muslim inmates by denying them access to Friday services, halal meals, and Korans. After all, the prison has not pressured the inmates at all. It has simply denied them needed resources. Indeed, Flanders seems to embrace this result when he calls his view a "major lesson" of *Lyng v. Northwest Indian Cemetery Protective Ass'n*.[82] That case found no substantial burden from the government's choice to run a road through a forest held sacred and used for rituals by Native American tribes.[83] As Flanders notes approvingly, the Court relied on the fact that the state "did not put pressure on them to violate their beliefs or change their religion. The action of the government was not of the form, 'do this, or else pay a price.'"[84]

Professor Lupu plausibly finds *Lyng* "disturbing" because it "blocks at the threshold all Indian free exercise claims involving tribal use of public lands for ritual observance."[85] More to the point, it is a stretch to say that "moderate discouragement of religious practice, such as the denial of unemployment benefits, counts as 'prohibiting' the exercise of religion but that total destruction of a sacred site does not."[86] Below I will give a more general and fully theorized objection to *Lyng*'s narrow pressure test, plus grounds to distinguish *Lyng* from the defensible precedent it relied on.[87]

While Lupu rightly objects to the *Lyng*-favorable implications of Flanders's focus on coercion, he joins Flanders in offering a claimant-centered account of substantial burdens. Lupu would ask if a regulation causes "significant psychic distress."[88] But if this criterion is asking about

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[81] Chad Flanders, Substantial Confusion About "Substantial Burdens", 2016 U. Ill. L. Rev. 27, 27–28.

[82] Id. at 28.

[83] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 442, 447 (1988).

[84] Flanders, supra note 81, at 28 (citing Sherbert v. Verner, 374 U.S. 398, 404 (1963)).

[85] Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933, 945–46 (1989).

[86] Greenawalt, supra note 70, at 197.

[87] See infra notes 234–44. The *Lyng* majority seemed to gesture toward a different and narrower basis for its decision: that recognizing claims against the government's use of its property could lead to incoherence by requiring two incompatible uses of the same property, to meet the conflicting demands of different claimants. 485 U.S. at 452. We need not settle whether this narrower concern provides better support for *Lyng*'s result.

[88] Ira C. Lupu, To Control Faction and Protect Liberty: A General Theory of the Religion Clauses, 7 J. Contemp. Legal Issues 357, 379 (1996) (emphasis omitted). This seems to represent a revision of Lupu's earlier-expressed view that a "coercion-based test," or any other

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emotional impact on the *objectively reasonable* adherent of a given religion, the criterion invites courts to make their own assessments of religious importance. If the criterion is directing courts instead to the claimant's actual emotional response, it is missing the target. Intensity of distress, turning on things like your temperament and your last meal, will not track what I will suggest below is really relevant: the realization of interests served by religion that are *not* reducible to psychological states.[89]

4. Common Law-Focused Tests

The tension between the various criteria that any definition of "substantial burden" should satisfy come to a head in Professor Gedicks's approach. Gedicks does not want a court blindly accepting every plaintiff's claim that her religion has been substantially burdened.[90] But he also does not want courts second-guessing plaintiffs' religious beliefs—e.g., a Catholic's belief that paying for insurance coverage of a drug she deems sinful makes her complicit in the drug's use (and thus guilty herself).[91] The theology of complicity, Gedicks plausibly argues, is off-limits to courts.[92] Judges should not be deciding whether Catholic teachings are too lax or too scrupulous, or even simply whether those teachings are plausible or beyond the pale.[93] That would require courts to take theological positions.[94]

But how would Gedicks avoid the other extreme—of blind deference to plaintiffs? He would assess substantiality using a *secular* body of principles, the common law—at least when it speaks to the topic

"focused on impact," would be riddled with problems and should give way to a test focused on analogies to actionable private harms under the common law. Lupu, supra note 85, at 962, 964, 966.

[89] See infra Section III.B.

[90] Frederick Mark Gedicks, "Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA, 85 Geo. Wash. L. Rev. 94, 100 (2017) (calling it "folly to leave this question [of whether a burden is 'substantial' for legal purposes] in the hands of persons so self-interested in the answer" as plaintiffs bringing a RFRA claim).

[91] Id. at 131 (arguing that courts must "judge whether the accommodation process is a 'substantial' burden on religion . . . without challenging the claimant's own religious understanding of complicity, scandal, and other theological doctrines which are believed to prevent participation in the process").

[92] Id.

[93] Id. at 106 ("The religious-question doctrine prohibits civil courts from deciding questions of religious doctrine or practice, including whether a belief or practice is logically consistent, plausible, reasonable, or weighty . . . ." (citations omitted)).

[94] Id.

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addressed by the religious belief at issue.[95] Thus, suppose a plaintiff contends that a legal burden on her religion is substantial because it makes her complicit in (what she regards as) someone else's sinful action. She is relying on a religious belief about when it is wrong to contribute to another's wrongdoing. But as it happens, that same subject (complicity) is also addressed by tort doctrines on proximate causation. So in assessing the substantiality of the plaintiff's religious concern, Gedicks would consult the tort doctrines. If the plaintiff's forced contribution to the sinful activity is significant enough to count as proximate causation in tort law (supposing the sin were an injury), then the burden on her religion is substantial. But if tort law would deem the connection too attenuated for liability, the religious burden is *in*substantial.

Gedicks's goal is admirable, but his proposal is self-defeating. His aim is to avoid second-guessing a plaintiff's religious views, but his approach would require just that. The second-guessing would simply be masked. True, courts would not be reasoning from theological first principles; they would not be rifling through sacred texts. But courts *would* be picking theological winners and losers based on whether the underlying religious beliefs fit some independent standard of plausibility. It is just that the standard would happen to come not from another *theological* source, but from a secular one. A religion would win if its test for immoral proximity to sin tracked the common law's test for unlawful proximity to injury. And the religion would lose if it happened to be more scrupulous than the common law. But whether the common law agrees with your religion on complicity has nothing to do with what I will suggest below matters here: whether your pursuit of religious interests has been hampered.[96] *That* depends simply on what you believe, not on how well your belief matches the common law's take on a vaguely related topic. The common law is neither here nor there.

C. The Hole in Hobby Lobby *and* Fulton

The points above offer more detail on why it is hard to find a coherent substantial burdens test. Courts face a dilemma. On the one hand, they

[95] Id. at 115 (affirming that the "religious-question doctrine" forbids judges to "decide . . . a theological question by answering that question" (emphasis omitted)).

[96] See infra Sections II.B (arguing that the proper scope of protections against incidental burdens on a civil liberty depends on the interest served by that liberty) & III.A (applying this interest-based criterion to define the proper scope of protections against incidental burdens on free exercise).

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cannot avoid taking account of the *religious* significance of the burdened form of exercise. (While the extent of the *material* penalty for violating a law is also relevant, it is not enough, as seen in connection with cost-focused tests.[97]) But on the other hand, no way of measuring religious significance seems quite right. First, bright-line tests prove inadequate: religious duty is too narrow a standard, and religious motivation too broad.[98] Second, attempts to get at religious significance indirectly—by asking if the plaintiff has been coerced or has suffered distress—turn out to be either too narrow themselves, or circular, or not on point.[99] And finally, measuring a religious teaching against its most similar-sounding common law doctrine faces the same problem as questioning the "centrality" of religious exercise: it would have courts stand in judgment over plaintiffs' own views on what is religiously true or reasonable.[100] But then what is left, besides blindly deferring to plaintiffs' allegations that a burden on their religion is "substantial"?

The Supreme Court seemed to do just that in its most important (and most recent and extended) case on the substantial burdens test, *Hobby Lobby*.[101] That case involved a RFRA challenge to the "contraceptive mandate" embodied in guidelines (and ultimately rules[102]) issued under the Affordable Care Act.[103] The mandate required covered employer-provided insurance plans to include contraceptives.[104] Plaintiffs, including Hobby Lobby Stores, Inc. and its owners, sought an exemption under RFRA from having to cover some of the twenty specified contraceptives.[105] They objected to the four that (according to the Food

[97] See supra Subsection I.B.2.
[98] See supra Subsection I.B.1.
[99] See supra Subsection I.B.3.
[100] See supra Subsections I.B.1, I.B.4.
[101] See Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 724–26 (2014).
[102] See Coverage of Preventive Health Services, 45 C.F.R. § 147.130 (2011).
[103] 42 U.S.C. § 300gg-13(a)(4) (2018); *Hobby Lobby,* 573 U.S. at 696–98.
[104] See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 47) (requiring covered employers to provide "coverage, without cost sharing" of specified "approved contraceptive methods, sterilization procedures, and patient education and counseling").
[105] See *Hobby Lobby*, 573 U.S. at 683, 691 (describing the "owners of the businesses" as having "religious objections to abortion" and believing that "four contraceptive methods at issue are abortifacients").

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and Drug Administration ("FDA")[106]) had the potential to prevent the implantation of an embryo.[107] The owners said that having to cover those four drugs would substantially burden their religion by making them complicit in the destruction of a new human being.[108]

The Court agreed that the mandate's burden on religion was "substantial."[109] Without offering a general analysis of that term, the Court focused on the steep fines or penalties attached to flouting the mandate (or to sidestepping the mandate by dropping insurance plans altogether).[110] But the government's response to these points about material costs required the Court to say something as well about the religious side of the burden. The government argued that even if the material penalties for violating the mandate were high, the religious cost of obeying the mandate was low—because the link between what the law required of the employers (insurance) and what their religion forbade (embryo destruction) was "too attenuated."[111] The Court replied that accepting this argument would effectively require rejecting as "flawed" the plaintiffs' religious beliefs on complicity—on when it is wrong to cooperate in another's wrongdoing.[112]

But the Court never said what it *can* and *should* do to determine if the religious significance of the compelled conduct makes the legal burden overall a "substantial" one, and indeed suggested that courts had *no role to play at all*, declaring that "it is not for us to say that [the plaintiffs'] religious beliefs are mistaken *or insubstantial*."[113] But if courts always defer on whether burdens are substantial, they risk giving believers *carte blanche*, rendering the substantial burdens test a dead letter. Besides, no one has a religious belief about what constitutes a substantial burden for RFRA purposes. Or at any rate, no one is entitled to judicial deference on that. As Justice Sotomayor has put it, "[*T*]*hinking* one's religious beliefs

[106] Birth Control, U.S. Food and Drug Admin., http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm. [https://perma.cc/HT24-TNGX] (June 18, 2021).

[107] *Hobby Lobby*, 573 U.S. at 697–98, 701–02.

[108] Id. at 691, 701, 703.

[109] Id. at 691.

[110] Id. at 720.

[111] Brief for Petitioners at 32–34, *Hobby Lobby*, 573 U.S. 682 (No. 13-354), https://www.becketlaw.org/case/burwell-v-hobby-lobby/?section=caseLegal [https://perma.cc/84EA-Q54W].

[112] *Hobby Lobby*, 573 U.S. at 723–24.

[113] Id. at 725 (emphasis added).

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are substantially burdened—no matter how sincere or genuine that belief may be—does not make it so."[114]

Critics charged that *Hobby Lobby* read the "substantiality" requirement out of the statute,[115] and they were half-right. The *Hobby Lobby* Court was happy to specify the *material* costs that counted as substantial,[116] but only that. (It did the same in another RFRA case a few years earlier.[117]) And as noted above, that is not enough. Courts need to say something about when a plaintiff's religious concern about an activity is acute enough to make the loss of that activity a "substantial" burden on her religion.

Most recently, *Fulton* made no progress on this issue. In one sentence, *Fulton* declared it "plain that the City's actions" sufficiently "burdened" a Catholic agency's religious exercise "by putting it to the choice of curtailing its mission" of care to foster children or certifying same-sex couples as foster parents and thus "approving relationships inconsistent with its beliefs."[118] As seen below, this was too quick, and potentially misdescribed the impact of the City's requirements on the agency.[119] As a result, the *Fulton* Court jumped over, rather than clarifying, the questions facing courts in identifying substantial burdens for themselves, without deciding religious questions.

Any sound resolution will have two key features. It will leave it ultimately to courts to determine whether a burden is substantial, but it will not require or allow courts, in the course of answering that question, to rely on anyone's religious beliefs but the plaintiffs'. What would such a test look like, and what legal support or pedigree could it claim?

II. THE SOLUTION FOR OTHER LIBERTIES: THE ADEQUATE ALTERNATIVES PRINCIPLE

Start with the question of legal pedigree. Without guidance from text, history, precedent, and dictionaries,[120] a good place to turn is the law of

[114] Wheaton Coll. v. Burwell, 573 U.S. 958, 966 (2014) (Sotomayor, J., dissenting).
[115] See, e.g., Abner S. Greene, Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?, 9 Harv. L. & Pol'y Rev. 161, 179–81 (2015).
[116] See *Hobby Lobby*, 573 U.S. at 720.
[117] Holt v. Hobbs, 574 U.S. 352, 361 (2015) (finding a substantial burden based only on the claimant's sincerity and the secular costs of non-compliance).
[118] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1875–76 (2021).
[119] See infra Subsection III.D.1.
[120] See supra Section I.A.

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other civil liberties. Time and again, courts have drawn material from one liberty's doctrines to fill in gaps or resolve tensions in another's.

Thus, the U.S. Court of Appeals for the D.C. Circuit has borrowed from free speech law to fashion doctrines to implement the clean slate that is the Second Amendment.[121] So did the Second Circuit in an opinion expressly defending the legitimacy of drawing such parallels:

> The practice of applying heightened scrutiny only to laws that "*burden* the Second Amendment right *substantially*" is . . . broadly consistent with our approach to other fundamental constitutional rights, including those protected by the First and Fourteenth Amendments. . . . [In implementing the Second Amendment] we readily "consult principles from other areas of constitutional law, including the First Amendment."[122]

The Supreme Court echoed these parallels in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which revised *Roe*'s abortion doctrine precisely to bring it more in line with the doctrines of "all" other constitutional "liberties."[123] While *Roe* had imposed heightened scrutiny on any law so much as "touching upon" abortion access, *Casey* observed that "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right."[124] And as seen below, the test *Casey* used to sort out which incidental burdens on abortion are substantial enough to require a compelling justification had roots in the doctrine of other liberties.[125]

Closer to home for present purposes, in fashioning a test for religious exemptions in *Sherbert*, the Court justified its substantial burdens test by appeal to a similar test in a free speech case.[126] And most relevant of all, there is the implicit support for this approach provided by the Justices in *Fulton* who asked for clarifications on how to apply free exercise exemptions.[127] They, too, drew analogies to other liberties—not in fleshing out doctrines on free exercise exemptions, but in making the case

[121] See infra note 172 and accompanying text.

[122] N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 259 (2d Cir. 2015) (first emphasis added).

[123] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873 (1992) (plurality opinion).

[124] Id. at 871, 873.

[125] See infra Section II.A.

[126] 374 U.S. 398, 403 (1963) (citing NAACP v. Button, 371 U.S. 415, 438 (1963)).

[127] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., joined by Breyer & Kavanaugh, JJ., concurring).

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that such exemptions should exist at all.[128] On that question, while the Justices found the "historical record" relatively "silent," they found analogies to other liberties more compelling: "As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers" no protection from incidental burdens.[129] Likewise, those Justices cited the law on other liberties as a reason to reject a "categorical" right to exemptions from absolutely all incidental religious burdens: "[T]his Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced."[130]

In short, if the case for granting religious exemptions from neutral laws and the case for limiting such exemptions both depend on analogies to other liberties, courts should also draw on other liberties to settle the *scope* of any free exercise protection from incidental burdens.

Across a range of civil liberties, the Court's doctrine about when laws that burden them will trigger heightened scrutiny has reflected two concerns.[131] First, non-targeted burdens on a liberty can be more onerous, and thus more harmful to the associated interests, than many *targeted* burdens are. But second, opening the courts to litigation of just any incidental burden, however minor, would drown the courts and destroy the State's ability to regulate. So the Court's solution—for many different liberties—has been to limit heightened scrutiny to a certain subset of non-targeted burdens: those that are undue or substantial.[132]

A. Tracing the Principle Elsewhere

While the Court has now reversed *Roe* and rejected constitutional abortion rights, the way it handled incidental burdens on abortion access for decades is still instructive. Like free exercise doctrine before *Smith*, abortion doctrine before *Dobbs v. Jackson Women's Health*

[128] Id.
[129] Id. at 1882.
[130] Id. at 1883.
[131] See generally Dorf, supra note 32, at 1177–78 (explaining the challenge of constructing a doctrine that addresses severe incidental burdens without opening the floodgates of litigation). Note that this limitation of heightened scrutiny to substantially burdensome laws does not constrain the anti-discrimination components of free exercise, equal protection, free speech, and the like, because the constitutional infirmity in such governmental discrimination lies in the intent, not primarily in the magnitude of the effects.
[132] Id. at 1210 (noting that "only *substantial* incidental burdens trigger heightened scrutiny").

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Organization[133] is indicative of longstanding patterns in our law's approach to constitutional liberties.

In the abortion context, the Court tackled the issue of incidental burdens in *Casey*. Revising *Roe*'s broad application of heightened scrutiny to any law so much as "touching upon"[134] abortion, *Casey* limited the right to guard against laws imposing an "undue burden" by creating a "substantial obstacle" to pre-viability abortions.[135] But while that test's language may have been novel, as the dissents protested, its substance was not.[136] Professor Brownstein has traced the overlap between *Casey*'s "undue burden" test and the doctrinal tests for heightened-scrutiny-triggering burdens on speech, travel, and at least some free exercise cases before *Smith*.[137] In a similar vein, Professor Dorf has shown that when it comes to free speech, abortion rights, and free exercise before *Smith*, the law has closely scrutinized non-targeted burdens, but only when the burdens are *substantial*.[138] I think one can say more about what makes a burden "undue" or "substantial," and show that the principle subjecting such burdens to heightened scrutiny applies as well under other civil liberties.

The common thread is this: a (non-targeted) burden on a liberty is "substantial" or "undue"—and so triggers heightened scrutiny—if the burden *leaves no adequate alternative means of exercising* that liberty.

[133] 142 S. Ct. 2228 (2022).

[134] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871 (1992) (plurality opinion).

[135] Id. at 877.

[136] *Casey*, 505 U.S. at 964 (Rehnquist, C.J., concurring in part) (calling undue burden test "created largely out of whole cloth by the authors of the joint opinion"); id. at 987 (Scalia, J., dissenting) (same). Some have suggested that the "undue burden" test was novel because it didn't simply demand heightened scrutiny of certain regulations, but imposed a per se bar. But that is misleading, as noted above. See supra note 28 and accompanying text. *Casey* presupposed laws imposing a substantial obstacle (or ban) on abortion would have to serve a compelling interest (just as *Roe* would have required). Id. It's just that *Casey*—like *Roe* itself—also pre-determined the results of applying strict scrutiny by telling us exactly when there would (and wouldn't) be a compelling justification for bans or effective bans: always after viability, never before. Id. That was why undue burdens and bans would always be invalid until viability. See *Casey*, 505 U.S. at 846 ("Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."); see also Girgis, supra note 28, at 340–41 n.46 (arguing that *Casey*'s reasoning presupposed that *Roe* was right both to demand a compelling interest of any abortion prohibition and to hold that no such interest exists until the point of fetal viability).

[137] See Alan Brownstein, How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine, 45 Hastings L.J. 867, 893–94, 925, 935–36 (1994).

[138] See Dorf, supra note 32, at 1205, 1212–13, 1221.

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This is not to be confused with the "least restrictive alternative" test sometimes invoked by courts at stage two of a civil-liberties analysis, the application of heightened scrutiny.[139]

The adequate alternatives principle does not simply re-describe "substantial burden": it adds substantive content. So our law's reliance on the principle constitutes a rejection of many other ways courts might have measured burdens on civil liberties.[140] Of course, the adequate alternatives principle does not *exhaust* the doctrine on any civil liberty but only gives a sufficient condition for heightened scrutiny. So stated, the principle abstracts from minor variations from right to right. And like any doctrine, it is not applied perfectly. But it is there, in substance or even in so many words.

1. Free Speech

For all its crosscutting rules and standards, free speech law sits on two "tracks."[141] "Track" one imposes strict scrutiny on *any* regulation that is based on the content of a message being conveyed[142]—in my terms, any targeted burden. At least officially,[143] then, content-based restrictions will

[139] See, e.g., Ashcroft v. ACLU, 542 U.S. 656, 666 (2004). Under the adequate alternatives principle, the question is whether the claimant has other forms of conduct by which to pursue her interests—whereas the "least restrictive means" test asks if the government has other policies by which to pursue its interests. The first determines if the burden on an individual is substantial. The second dictates whether an admittedly substantial burden on the individual is justified because it is overridden by some other interest.

[140] Note, for example, that the adequate alternatives principle doesn't measure the weight of a legal burden in isolation, but always by means of a comparison. And the comparison is not between the legal burden at issue and the burdens imposed by other laws, or between the law's burden on the individual and benefits to the public. It is between two ways of exercising the burdened liberty: the option closed off by the law, and the next-best option (if any). To see the concrete difference this doctrinal choice makes, contrast the adequate alternative principle's implications for measuring free exercise burdens (in Section III.D) with the implications of four other proposed measures (in Section I.B). Or contrast the principle's implications for abortion with those of a sliding-scale balancing test. See infra notes 155–63 and accompanying text.

[141] Laurence H. Tribe, American Constitutional Law § 12-2, at 791–92 (2d ed. 1988).

[142] See Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

[143] For an argument that the two "tracks" have begun to run together such that "further attempts to establish any clear hierarchical distinction are no longer worth the effort," see R. George Wright, Content-Neutral and Content-Based Regulations of Speech: A Distinction That is No Longer Worth the Fuss, 67 Fla. L. Rev. 2081, 2081–82 (2015).

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generally face heightened scrutiny whether or not their impact on speech is deemed "substantial" in any sense.[144]

But the topic here is non-targeted burdens on civil liberties, which in the case of free speech would fall on "track" two.[145] These include content-*neutral* laws of two kinds: (1) restrictions on the time, place, and manner of speech in a public forum (e.g., noise ordinances); and (2) regulations of expressive conduct—not of written or spoken words but of behavior (e.g., flag-burning[146]) that is intended and understood to convey a message.[147] And as it happens, "track" two regulations must, among other things, "leave open ample alternative channels for communicat[ing] . . . the information."[148] For example, no strict scrutiny applied to an ordinance that prevented bands who performed in Central Park from using their own sound equipment.[149] That is because the ordinance left them an adequate alternative: using a sound system provided by the city.[150] (The Court has clarified that the same "alternatives" standard applies to burdens on expressive conduct,[151] even though the test was first cast in slightly different terms.[152]) Quite explicitly, then, non-targeted burdens on free speech must satisfy a kind of adequate alternatives principle.

2. Abortion

Under *Casey*'s revision of *Roe*, as noted, the Fourteenth Amendment required a compelling justification for "undue burdens" on abortion access[153] (which ultimately made all such burdens unlawful before fetal

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[144] See, e.g., United States v. Alvarez, 567 U.S. 709, 715–17 (2012) (stating content-based regulations that trigger "exacting scrutiny" are "presumed invalid," and are "permitted, as a general matter, only when confined to the few historic and traditional categories" of exceptions, including obscenity, defamation, and the like (internal quotation marks and citation omitted)).

[145] Tribe, supra note 141, § 12-23, at 977–78.

[146] Texas v. Johnson, 491 U.S. 397, 402, 406 (1989).

[147] Spence v. Washington, 418 U.S. 405, 410–11 (1974).

[148] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citation 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).

[149] *Ward*, 491 U.S. at 784, 797–98, 798 n.6.

[150] Id. at 784, 802–03.

[151] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 (1984).

[152] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[153] See supra note 28.

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viability, the point at which the state's interest in fetal life became compelling under *Casey* and *Roe*[154]). Before it was rejected in *Dobbs*, this doctrine precluded not only regulations whose *goal* was to prevent abortions, but also those that had the "effect of placing a substantial obstacle in the path of a woman seeking an abortion."[155] On its face, and as implemented, this standard required non-targeted burdens on abortion to leave women adequate access to abortion—i.e., to satisfy the adequate alternatives principle. Thus, the *Casey* plurality upheld Pennsylvania's recordkeeping and reporting requirements because they would "increase the cost of some abortions" only by a "slight amount."[156] That is, the requirements left open an adequate (almost equally affordable) path to an abortion. But the spousal notification requirement was held invalid, despite serving what the plurality deemed a permissible purpose,[157] because it would sometimes give a husband "an effective veto over his wife's decision"[158]—leaving her no adequate means of procuring an abortion.

In *Whole Woman's Health v. Hellerstedt*, the Court seemed to replace the adequate alternatives test (focused exclusively on legal burdens) with one that weighs benefits and burdens together,[159] which might have made a significant difference in the outcomes of other cases.[160] But four years later, in *June Medical Services L.L.C. v. Russo*, a majority of the Court "reject[ed] the *Whole Woman's Health* cost-benefit standard"[161] and Chief Justice Roberts's apparently controlling[162] opinion restored a

[154] See supra note 136.

[155] *Casey*, 505 U.S. at 877.

[156] Id. at 901.

[157] Id. at 895.

[158] Id. at 897.

[159] 136 S. Ct. 2292, 2309 (2016) (requiring courts to "consider the burdens a law imposes on abortion access together with the benefits those laws confer" and referring to this as a "balancing" test (citation omitted)).

[160] Since *Casey* determines if a law imposes an "undue" burden without any reference to the law's benefits, it makes "undue" a fixed standard. By contrast, *Hellerstedt* would have made "undue" a moving target: the greater the law's benefits, the greater its burden would have to be to count as undue, and the smaller the law's benefits, the smaller the burdens that would count as undue. So *Casey*'s test is more forgiving than *Hellerstedt*'s when a law's benefits are large, but more demanding when the law's benefits are small.

[161] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2182 (2020) (Kavanaugh, J., dissenting) (citations omitted).

[162] See, e.g., Hopkins v. Jegley, 968 F.3d 912, 916 (8th Cir. 2020) ("Chief Justice Roberts's separate opinion . . . is controlling."); see also Marks v. United States, 430 U.S. 188, 193 (1977) (when no opinion garners a majority, the opinion that "concur[s] in the judgment[] on

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standard that looks only at the extent of the obstacle faced by a woman seeking an abortion.[163] That the Court later overturned *Casey* on the ground that it had been wrong to accept a constitutional abortion right does not negate *Casey*'s relevance here as an indicator of how the Court has dealt with incidental burdens on liberties.

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."[164] And here the adequate alternatives pattern recurs. Not only does this civil liberty rule out regulations that take direct aim at it, but even non-targeted regulations also infringe this liberty if they are unduly burdensome. As then-Justice Rehnquist said in a dissent whose principles the Court later adopted[165]: "[T]he line to be derived" from the case law makes the lawfulness of "financial" obstacles to interstate travel turn on how extensive a "barrier[]" they impose.[166] In particular, the question is whether regulations are so sweeping that they "foreclose[]" claimants "from obtaining some part of what [they] sought"[167]—in a word, whether the regulations leave adequate travel alternatives.

4. Guns

The D.C. Circuit has adopted a similar approach to Second Amendment rights (and a since-vacated panel decision of the Ninth Circuit expressly agreed[168]). That court held that historical sources and the Supreme Court's analysis in *District of Columbia v. Heller*[169] yield an adequate alternatives principle for the rights both to keep and to carry: "regulations on each must leave alternative channels for both."[170] As the

the narrowest grounds" is controlling (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)).

[163] *June Med.,* 140 S. Ct. at 2135–38 (Roberts, C.J., concurring).

[164] Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

[165] See Sosna v. Iowa, 419 U.S. 393, 405–09 (1975).

[166] Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 284 (1974) (Rehnquist, J., dissenting).

[167] *Sosna*, 419 U.S. at 406.

[168] Young v. Hawaii, 896 F.3d 1044, 1070 (9th Cir. 2018) (citations omitted), *reh'g en banc granted*, 915 F.3d 681, 682 (9th Cir. 2019).

[169] 554 U.S. 570, 626–29 (2008).

[170] Wrenn v. District of Columbia, 864 F.3d 650, 662 (D.C. Cir. 2017).

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court explained, expressly drawing on "the law of content neutral speech" and its "ample alternative channels" principle,[171]

> The idea that the government must leave ample channels for keeping and for carrying arms explains much of the analysis in *Heller I*. It explains why *Heller I* saw no need to bother with "any of the [familiar] standards of scrutiny" in reviewing a ban on ownership that left *no* means of defense by handguns at home. It explains why the Court favorably treated cases allowing bans on concealed carry only so long as open carry was allowed. The Court itself highlighted this feature of those cases, explicitly describing one of them as limiting only the "manner" of exercising gun rights. The "ample alternative channels" principle also explains the Court's approval of bans on some types of guns so long as those most useful for self-defense remained accessible.[172]

To gloss the Amendment this way is not to prove that the right is desirable as a policy matter, any more than the *Casey* Court's articulation of the right to abortion was self-justifying. The point here is just that current Second Amendment and privacy doctrines embody an adequate alternatives principle, as do other civil liberties.[173]

*5. Some Pre-*Smith *Free Exercise Cases*

Before reversing course in *Smith*, the Court asked under the Free Exercise Clause "whether government ha[d] placed a substantial burden" on religion "and, if so, whether a compelling governmental interest

[171] Id. at 663 (internal quotation marks and citations omitted).

[172] Id. at 662–63 (citations omitted).

[173] The fact that the pre-*Smith* law involved exemptions is no anomaly. Such exemptions are analogous to the relief granted in as-applied challenges available for speech and abortion. See, e.g., Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 323 (2006) (holding that if an abortion regulation "would be unconstitutional in medical emergencies, . . . invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief"); see also Gillian E. Metzger, Facial and As-Applied Challenges Under the Roberts Court, 36 Fordham Urb. L.J. 773, 773–74, 776 (2009) (discussing the Roberts Court's preference for as-applied challenges to abortion); Stephanie H. Barclay & Mark L. Rienzi, Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions, 59 B.C. L. Rev. 1595, 1596 (2018) ("Far from being 'anomalous' or 'out of step' with our constitutional traditions, religious exemptions are just a form of 'as-applied' challenges offered as a default remedy elsewhere in constitutional adjudication.").

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justifie[d] the burden."[174] Its application of this standard was inconsistent. But in a few major cases—including ones to which Congress later directed courts in creating *statutory* substantial burdens tests[175]—the Court looked for the presence of adequate alternatives for exercising religion.

In *Wisconsin v. Yoder*, for example, the Court emphasized that a law requiring the Amish to send their children to school beyond eighth grade, contrary to their religious convictions, would "interpose[] a serious barrier to" their ability to form their children in their faith; that the law's "impact" on the "practice of the Amish religion [wa]s not only severe, but inescapable"; and that the law thus left them no choice but to "abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region."[176] So the law left the Amish no adequate alternatives for living out their religion.

Likewise, in *Sherbert*, a state agency's denial of unemployment insurance to a Seventh-day Adventist who refused to work on the Sabbath "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."[177] In other words, the agency's action left Ms. Sherbert only one alternative for exercising her religion, and that alternative was not adequate.

By contrast, when a claimant faced no pressure to violate their religion—when the "only burden" was a marginal decrease in "the amount of money [the claimant] ha[d] to spend on its religious activities"—there was no substantial burden, no heightened scrutiny.[178] Nor was there a substantial burden from minimum-wage laws requiring employees of a nonprofit to receive "wages," against their felt duty to volunteer, since there was "nothing in the Act to prevent [them] from returning the [wages]."[179] The Act left an adequate alternative way for them to honor their beliefs.

[174] Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) (citations omitted).

[175] See 42 U.S.C. § 2000bb(b)(1) (Congress's purpose is "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972)").

[176] 406 U.S. 205, 211, 213, 218 (1972).

[177] 374 U.S. 398, 399, 404 (1963).

[178] Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 391 (1990).

[179] Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 303–04 (1985).

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Again, the Court applied this doctrine unevenly and left key questions open. I will survey the inconsistencies and gaps and propose a more coherent, justified, and specified version of the test in Part II.

B. What Makes an Alternative "Adequate"?

The doctrine raises the question: What does it mean to say that a law burdening a civil liberty leaves adequate alternatives for exercising it?

First, "adequacy" must be about the *quality* of the alternatives, not just the number. For example, a noise ordinance that banned all speech louder than a whisper would leave you many alternative means in some sense—speaking at twenty decibels, at nineteen decibels, etc.—but none of those alternatives is adequate. And what counts as a qualitatively good alternative for exercising your liberty will not be completely arbitrary. It will be based on some purpose or function the liberty is designed to serve. So one can think about what makes an alternative "adequate" for each civil liberty by thinking of the liberty as having a certain purpose or function.[180] (This is in the first instance a view about what a right covers, not about the best method for judges to *figure out* what it covers; i.e., this does not by itself require purposivism.[181])

As to freedom of speech, for example, the Court has taught that whatever its ultimate purposes are, they are adequately served by the *proximate* goal of enabling speakers to express their preferred message to their preferred audience,[182] but not necessarily in their preferred spot[183] or

[180] 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, 341 (2016) ("Without a clear theory of the [right's] values, there is simply no way to characterize or measure the significance of a burden.").

[181] Even if what makes an alternative "adequate" is its ability to serve a certain purpose, it may be that the best way for judges to tell if it is "adequate" (or, equivalently, to determine the law's purpose, in the relevant sense) is to look to the history of which regulations were long understood to be consistent with the right. That is the precise position taken by arch-anti-purposivist Justice Scalia on Second Amendment rights to keep and bear arms. He conceptualized the content of those rights partly in terms of a purpose (self-defense) but suggested that the outer bounds of those rights are best ascertained by appeal to historical sources as well as longstanding practice. See, e.g., District of Columbia v. Heller, 554 U.S. 570, 624–26 (2008) (relying on "longstanding prohibitions" as guides to the rights' boundaries).

[182] See Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 655 (1981).

[183] See id. at 654–55. But there are limits to this tolerance of place restrictions. See Schneider v. State, 308 U.S. 147, 163 (1939).

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by their preferred means.[184] (And that is plausible.[185]) So speech regulations leave adequate alternatives "so long as the overall ability to communicate is not impaired."[186]

More broadly, the first lesson about what makes an alternative way of exercising a given liberty "adequate" is this: the alternative must allow you to pursue the liberty's justifying function[187] or purpose to about the same degree as you could have through the means that is now closed off.

A *second* crucial point: civil or criminal bans are not the only ways to close off adequate alternatives. That is, a law might deny you adequate alternatives even if the law does not *prohibit* anything via civil or criminal penalties. For example, under the *Casey* regime, a regulation that had the effect of requiring women to drive much farther to get an abortion imposed an undue burden on them even if the regulation did not ban the procurement of an abortion.[188] Likewise, the right-to-travel cases cited above involved regulations—durational residency requirements—that did not impose criminal or civil penalties for travel, but only significant (but indirect) financial burdens.[189] And the regulation struck down on free exercise grounds in *Sherbert* did not impose criminal or civil penalties on Ms. Sherbert for taking her Sabbath rest on Saturdays. The regulation only raised the cost of her doing so by denying her unemployment benefits for

[184] City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984).

[185] See Geoffrey R. Stone, Constitutionally Compelled Exemptions and the Free Exercise Clause, 27 Wm. & Mary L. Rev. 985, 991 (1986) ("This conception of the free speech guarantee is at least arguably consistent with both the self-governance and self-fulfillment rationales for free expression.").

[186] Id.

[187] In speaking of "justifying function," I am running together two ideas that the philosophical literature on rights tends to consider distinct: function (a conceptual issue) and justification (a normative issue). Professor Fallon's treatment of constitutional rights and liberties does not separate these aspects, see Richard H. Fallon, Jr., Individual Rights and the Powers of Government, 27 Ga. L. Rev. 343, 344 (1993) (arguing that "in American constitutional law, rights typically do not operate, as we often assume, as conceptually independent constraints on the powers of government" because "[w]e have no way of thinking about constitutional rights independent of what powers it would be *prudent* or *desirable* for government to have" (emphasis added)), nor do many theorists' accounts of moral rights, see Leif Wenar, The Nature of Rights, 33 Phil. & Pub. Affs. 223, 224 (2005), but that is no surprise or problem, in my view. When it comes to rights, I have argued that the conceptual and normative questions are inseparable: the most satisfying account of the nature and function of rights will include reference to their justifying purposes. See generally Sherif Girgis & Robert P. George, Civil Rights and Liberties, *in* Cambridge Companion to Philosophy of Law 291, 293 (John Tasioulas ed., 2020).

[188] See Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 614 (2016).

[189] See supra notes 164–67 and accompanying text.

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refusing Saturday work.[190] Thus, leaving open *some* option for achieving a right's purpose is not enough. An alternative will not be "adequate" if it is much costlier than the option eliminated by the regulation.

These two points provide more detail on what makes an alternative adequate. An adequate alternative means of exercising some liberty will allow you to achieve the liberty's function (i) to the same degree, and (ii) at not much greater cost, than you could have through options now blocked by the law.

But what, *finally*, is a civil liberty's "justifying function" or purpose? Constitutional norms serve many ideals—wellbeing, autonomy, dignitary interests in equality, and systemic interests "in avoiding abuse of government power."[191] But legal theorists broadly agree that, at least when it comes to constitutional liberties like those at issue here, the object is to promote people's fundamental needs or interests.[192]

Hence the following line of best fit across constitutional-liberties case law is:

> *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.

[190] See Sherbert v. Verner, 374 U.S. 398, 404–05 (1963) (noting that while "no criminal sanctions directly compel appellant to work a six-day week," "forc[ing] 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 hand" creates "the same kind of burden . . . as would a fine imposed against appellant for her Saturday worship").

[191] Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1366–67 (2000) (quoting Fallon, supra note 187, at 355).

[192] In Joseph Raz's influential formulation of an interest-based theory of rights, there is a necessary connection between a person's rights, his interests, and others' duties. A person has a right on this view if and only if, and because, "other things being equal, an aspect of [his] well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty." J. Raz, On the Nature of Rights, 93 Mind 194, 195 (1984); see also H.L.A. Hart, Legal Rights, *in* Essays on Bentham 162, 192–93 (1982) (arguing that an individualistic critique of the law must consider fundamental individual needs).

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Spelled out this way, the adequate alternatives principle requires a prizing apart of two things: (1) the conduct that some liberty covers, and (2) the interest said to be served by that conduct (or by its protection). With free speech, for example, the "conduct" is expression—writing, speaking, making art, burning flags and draft cards to make a point. But the interests said to be served by that conduct or its protection are many: the development of knowledge and functioning of democracy, to name two. With abortion, the covered conduct was simply the procurement of an abortion. And the interests that abortion was said to serve included a woman's life or health, professional and economic opportunities, equality with men, and so on.

In general, the interest is the end, and the protected conduct is a means. Civil liberties serve the end by protecting our access to the means—our ability to engage in certain conduct free of interference from the state.

III. APPLICATIONS TO RELIGION: "SUBSTANTIAL BURDENS"

Applying the adequate alternative principle to religion yields a balanced substantial burdens test—a workable trigger for heightened scrutiny and, potentially, exemptions—that avoids several problems with existing proposals.

A. An Adequate Alternatives Principle for Religion

To tailor the adequate alternatives principle to religion, one must determine when one form of religious exercise is an "adequate" alternative to another. And this turns on whether the two forms of exercise achieve *the interests served by* religious conduct to the same degree. But how to judge that? What are the interests served by religious conduct? And whatever they are, how can a judge tell when those interests are realized just as well by this form of religious exercise as by that one?

Similar questions arise for free speech. There is disagreement over the interests served by it—democracy, autonomy, the pursuit of knowledge—and such general interests would hardly offer judicially manageable criteria for "adequacy." But I outlined above the Court's solution. It has focused on a more concrete standard that would, if enforced, arguably secure the ultimate purposes of free speech well enough, *whatever* those might be. The concrete question is: Does the challenged law leave the

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claimant free to convey her preferred *message* as effectively?[193] If so, the law passes muster.

Something similar is possible here, I submit: a wide range of views about the interests served by religious exercise will converge on the same test for "adequacy." And that test will be more tractable for courts than a direct focus on the interests themselves would be. That is likely to hold whether religious exercise serves the interests of forging one's personal identity,[194] or pursuing meaning or "ultimate concerns"[195] "in one's own way,"[196] or seeking harmony with the transcendent as one understands it.[197] Whichever interest is at stake, a claimant realizes that interest just insofar as her own values and standards (her religious creed or code) *say* that she does. On any of these views, an alternative form of religious exercise will be "adequate" if the alternative is just as good religiously *in the claimant's view*. So courts applying this internal-criteria rule for adequacy can be agnostic on what the precise interests served by religious exercise may be. Whatever the interests are, they are secured if people live as their creed recommends or demands. And it is easier for courts to test for this than to consider directly how much an option realizes the interests served by religion.

With this, one can tailor the adequate alternatives principle above to religion:

[193] See supra notes 148–52.

[194] 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."); see also Jocelyn MacLure & Charles Taylor, Secularism and Freedom of Conscience 13 (2011) (discussing freedoms of conscience and religion as ways of respecting the "moral identity" constituted by a person's "[c]ore beliefs and commitments").

[195] The phrase is Paul Tillich's. Paul Tillich, Dynamics of Faith 1 (1957).

[196] See, e.g., Martha C. Nussbaum, Women and Human Development: The Capabilities Approach 179–80 (2000).

[197] See, e.g., Sabina Alkire, Valuing Freedoms: Sen's Capability Approach and Poverty Reduction 51–52, 76–77 (2002). 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 Professor Finnis, for example, the objective interest at stake consists of "harmony between oneself and the wider reaches of reality including the reality that the 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 (1980).

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> *Substantial Burdens Test*: State action that prevents, prohibits, or raises the cost of religious exercise imposes a "substantial burden" unless it leaves you another way that you could realize your religion to *about the same degree* as you could by the now-burdened means of exercise, and at *not much greater cost* than you could by that means.

So an alternative might flunk if it is not as good from your religion's perspective, *or* if it is significantly[198] more costly in *non*religious terms (requiring you to give up unemployment insurance, go to jail, etc.). Another way to put this, roughly,[199] is that substantial burdens increase the cost to you of living your faith to about the same degree as you could before.

This test is a linguistically plausible gloss on what "substantially burdens" a religion, and thus "prohibit[s] the free exercise thereof," as the First Amendment proscribes. After all, no one takes the Amendment to rule out *only* those laws that prohibit the exercise of someone's religion *entirely* (like a law simply banning Quakerism or Islam). So the Amendment must be referring to laws that prohibit the exercise of one's religion *to the same extent* as was possible in the absence of those laws. And on this reading, the text fits the adequate alternatives principle perfectly.

The principle above also has moral appeal, limiting protection to cases where it is really needed. And it has doctrinal and historical pedigree,

[198] I think whether a cost is significant should vary by regulatory context. Maybe $2,000 is significant when a state agency denies you weeks of unemployment insurance, but not when a zoning law requires you to build a church on another plot. Since the prices of alternative plots can vary easily by the thousands anyway, someone setting out to build has to be ready for price variations of that size. Cf. Guru Nanak Sikh Soc'y v. County of Sutter, 326 F. Supp. 2d 1140, 1152 (E.D. Cal. 2003) (finding mere inconvenience insufficient to establish a substantial burden from a zoning decision). But perhaps a difference of millions of dollars is burdensome even in the zoning context. See Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 359 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (free exercise analysis turning partly on whether church could afford legally mandated repairs costing millions of dollars).

[199] For the two formulations to match up exactly, two things would have to be true: (1) both preventing and prohibiting religious conduct count as (limiting cases of) "increasing the cost"; and (2) "to the same degree as before" means "to the same degree as you could by the means now burdened by the regulation." The second clarification ensures that, for example, a prison rule will not count as a substantial burden just because the rule, by taking up an hour of your time, leaves you less time overall to advance in your religion. Rather than compare your total amount of access to religion before and after the law, my test would compare particular forms of exercise: (i) the one burdened and (ii) the one still open to you.

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given its basis in a principle that pervades our law now and (officially) the Court's free exercise doctrine before *Smith*.

For all these reasons, the principle could guide courts if *Smith* were reinstated. It could also legitimately inform the Supreme Court's attempt to *reshape* any post-*Smith* test if the First Amendment's text and history are silent and practice ("liquidation"[200]) or policy considerations can be used to fill the gaps[201]—as even some originalists think.[202] (Indeed, at least one originalist thinks that originalism as applied to the Free Exercise Clause *requires* courts to advert to certain moral principles.[203]) Meanwhile, textualists and non-textualists alike would have good reason to rely on this gloss on "substantial burden" under RFRA and RLUIPA. That is because statutory text (and legislative history[204]) suggests that

[200] See William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1, 8, 61 (2019) (arguing that when the constitutional text is vague, constitutional meaning can be liquidated and settled by practice that enjoys popular support). The Court's pre-*Smith* doctrine, applied (unevenly) for thirty years, enjoyed so much support that Congress reproduced the doctrine in RFRA by a voice vote in the House of Representatives and a 97–3 vote in the Senate, with the support of a wide coalition from across the political and religious spectrums. See Douglas Laycock & Oliver S. Thomas, Interpreting the Religious Freedom Restoration Act, 73 Tex. L. Rev. 209, 210–11, 210 n.9 (1994).

[201] See Andrew Koppelman, Is It Fair to Give Religion Special Treatment?, 2006 U. Ill. L. Rev. 571, 577–78 ("The normative claim is relevant" when "[t]he text is vague, and the doctrine is confused.").

[202] Originalists will think, and I agree, that text and history should constrain courts applying the First Amendment, but they will disagree about what to do when text and history are indeterminate. That "is beyond the scope of a theory of originalism per se and turns on a broader set of normative issues." Keith Whittington, Originalism: A Critical Introduction, 82 Fordham L. Rev. 375, 406 (2013); see also Greenawalt, supra note 70, at 13 ("When originalists rely on abstract principles that lie behind provisions, the gap narrows between them and nonoriginalists, who typically believe that wise modern understandings of constitutional texts correspond with fundamental values they have always embodied."). In fact, originalism per se might have nothing to say about a post-*Smith* order if Professor Hamburger is right that as originally understood, the Free Exercise Clause does not entitle one to judicial exemptions at all. See Philip A. Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915, 916 (1992).

[203] See Gerard V. Bradley, Moral Truth and Constitutional Conservatism, 81 La. L. Rev. 1317, 1328 (2021) (arguing that originalism, properly applied, requires judges to "resort, as the Constitution directs, to critically justified metaphysical and moral truths[,]" as judges "can be faithful to the Founders *only* by relying upon moral and metaphysical truths that lie beyond the Constitution").

[204] See Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary, 102d Cong. 1 (1992) (statement of Don Edwards, Chairman, S. Comm. on Civ. & Const. Rts.) ("The bill simply restores the compelling governmental interest test.").

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these laws use the phrase as a term of art recalling the very pre-*Smith* doctrine I have tried to render clearer and more coherent.[205]

A full specification of this test might address other nuances.[206] But the test has three virtues discussed below: (1) It yields more compelling outcomes than the proposals offered to date. (2) It strikes the right balance between blind deference to claimants and violations of the religious questions doctrine. And (3) it resolves several questions that remain open in the case law on substantial burdens—including questions that will loom large for free exercise law if *Smith* is reversed.

B. What Is Covered: Achieving the Right Scope

To see when this test does and does not trigger scrutiny, consider the kinds of religious conduct the test protects, and the kinds of legal burdens it protects that conduct *from*.

1. Religious Conduct Protected

This test protects less than the "religious motivation" criterion, but more than the "religious duty" criterion. The latter asks if you were religiously obligated to engage in some burdened conduct *X*. The motivation test essentially asks whether you had any religious reason to do *X* rather than nothing. My test asks if you had a religious reason to do *X* rather than *any alternative left open by the law*.

So first, this test covers conflicts between religious and legal *duties*. If the only alternative left open by a law—or the only equally affordable one—involves violating a religious duty, that alternative is *by definition*

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[205] RFRA's stated goal is to "restore the compelling interest test as set forth in Sherbert v. Verner . . . and Wisconsin v. Yoder . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1) (Supp. V 1993). RFRA also says that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5).

[206] For instance: (1) What are the proper baselines when measuring costs? (2) Should courts recognize group claimants and, if so, should the test vary for them, and indeed should there be some kinds of substantial burdens that only groups can challenge (e.g., zoning regulations, or governmental land use as in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988))? (3) What is this right's "coverage" in Schauer's sense, see Frederick Schauer, The Politics and Incentives of First Amendment Coverage, 56 Wm. & Mary L. Rev. 1613, 1617–18 (2015)? (4) Should courts take a claimant's financial situation into account when judging a cost substantial or not?

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religiously inferior. This will cover, for instance, criminal laws requiring a religiously forbidden clerical disclosure of a penitent's confessions.[207]

But second, such cases are only a subset of those that trigger protection. Violation of a perceived religious *duty* (like the confidentiality of the confessional) is only a special case of what counts on my view: not being able to pursue one's religion to the same extent. The latter category can also involve burdens on *non*-obligatory conduct that still intuitively seem substantial. Take, for example, bans on the religious solemnization of same-sex marriages;[208] public development of grounds held sacred by Native American tribes;[209] bans on the central worship service of the Native American religion;[210] and denials of access to Friday services for Muslim inmates,[211] to parochial schooling, and to ministry-training.[212]

But finally, not just any religiously-motivated-but-optional activities will count. For not all are activities the claimant thinks more religiously valuable than available alternatives. Recall the example of laws imposing curfew on a public park. These should not trigger scrutiny just because they deprive someone of one quiet place to pray if other, still-available options—like strolling through her neighborhood—would be just as good from her religion's perspective. To trigger protection, the conduct blocked by the law must be religiously non-fungible with options left open.

This non-fungibility test may be what the once-favored "centrality" test meant to track, but it has advantages over the latter, as seen below.[213]

2. Legal Burdens Protected Against

Just as my test covers more than religious requirements, though without protecting all religious conduct, so it protects against more than legal requirements (i.e., laws imposing criminal or civil penalties), but not against all legal burdens.

[207] See, e.g., Trammel v. United States, 445 U.S. 40, 51 (1980); see also Greenawalt, supra note 70, at 246 ("All jurisdictions in the United States have some form of priest-penitent privilege that protects clergy from having to testify about what they have learned in their professional roles.").

[208] See, e.g., Gen. Synod of the United Church of Christ v. Resinger, 12 F. Supp. 3d 790, 791 (W.D.N.C. 2014).

[209] *Lyng*, 485 U.S. at 441–42.

[210] Emp. Div. v. Smith, 494 U.S. 872, 874, 906 (1990).

[211] O'Lone v. Estate of Shabazz, 482 U.S. 342, 344–45 (1987).

[212] Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1123 (Wash. 1989).

[213] See infra Subsection III.C.1.

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First, as already noted, the test triggers heightened scrutiny of *criminal or civil bans* on protected religious conduct—e.g., laws requiring priests to disclose sins from the confessional, or forbidding religious education or solemnizations of same-sex weddings.

But second, there's also a substantial burden when the law, though not *banning* protected religious conduct, forces you to choose between that conduct and some otherwise generally available material benefit—e.g., between your Sabbath obligation and your unemployment benefits,[214] or between wearing religious attire and serving in the military[215] or playing high school sports[216] or joining ROTC.[217] This directly answers another question posed by several Justices in *Fulton*: whether, in a regime providing free exercise exemptions from neutral laws that burden religion, courts should treat "indirect and direct" burdens differently.[218] They should not. The same question applies to both: whether the burdens leave no adequate alternatives. (Of course, the answer may be "yes" more often for direct burdens.)

And finally, not all legal burdens are substantial. A law penalizing *or* indirectly burdening protected conduct will trigger no scrutiny if the law leaves an equally affordable alternative means to achieving the same religious goal. This includes speeding laws that leave Catholics with an affordable alternative for making it to Mass on time: leaving home on time.

To say all this is already to pick sides in some disputes among courts. It is to recognize, for example, that zoning laws "making a mosque relatively inaccessible within the city limits," though not preventing or punishing Muslim worship, impose a serious burden on "the exercise of religion by the poor"[219]—contrary to some courts' reluctance to hold that expense is enough to make a burden substantial.[220] It is also wrong to require, as some courts have, that incidental burdens involve "coercion in

[214] Sherbert v. Verner, 374 U.S. 398, 404 (1963).
[215] Goldman v. Weinberger, 475 U.S. 503, 504 (1986).
[216] Menora v. Ill. High Sch. Ass'n, 683 F.2d 1030, 1031 (7th Cir. 1982).
[217] Singh v. McHugh, 109 F. Supp. 3d 72, 75–76 (D.D.C. 2015).
[218] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., concurring).
[219] Islamic Ctr. of Miss., Inc. v. City of Starkville, 840 F.2d 293, 299 (5th Cir. 1988).
[220] Christian Gospel Church, Inc. v. City of San Francisco, 896 F.2d 1221, 1224 (9th Cir. 1990); cf. Guru Nanak Sikh Soc'y v. County of Sutter, 326 F. Supp. 2d 1140, 1152 (E.D. Cal. 2003) (finding mere inconvenience insufficient to create a substantial burden).

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religious practice" or the inability to go on practicing, rather than financial burdens.[221] I explore more applications below.[222]

C. Who Decides: Setting Limits While Avoiding Religious Questions

Some might worry that the test above is constitutionally problematic because it requires courts to see if the law leaves open conduct that is as good from the claimant's religious perspective. This inquiry might seem as problematic as the "centrality" test was said to be. Is it not "jurisdictionally off-limits" for courts to determine "the religious impact" of a legal burden, as Professors Lupu and Tuttle contend?[223] Is this not a "contra-constitutional excursion into appraising theological questions," as they might fear?[224] No and no.

As to Lupu and Tuttle's first question, the substantial burdens test *requires* courts to compare the religious impacts of legal burdens, precisely by deeming some "substantial" and others not. And good policy requires this, too, if our system is not to protect just any religiously motivated conduct (which would be too broad, as seen above[225]).

Lupu and Tuttle are right to worry about courts "appraising theological questions." But putting this worry more precisely will make it easier to see how to address the worry while still testing for substantiality. A good substantial burdens test will allow a court to (1) determine for itself if the religious significance of a legal burden is substantial, but (2) *without replacing the claimant's own answer to any religious question with answers provided by the court itself or anyone else*. My test can square task (1) with (2), while the centrality test systematically risks failure on task (2).

1. No Theology by Judges

To begin with task (2): For courts to respect the religious questions doctrine while also giving a substantial burdens test real teeth, two things must happen. First, courts must determine which questions to ask about the claimant's faith in testing for substantiality. (And the questions cannot

[221] Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 355 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).
[222] See infra Section III.D.
[223] Ira C. Lupu & Robert W. Tuttle, The Forms and Limits of Religious Accommodation: The Case of RLUIPA, 32 Cardozo L. Rev. 1907, 1916 (2011).
[224] Id. at 1917.
[225] See supra Section II.A.

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amount to legal questions like "should you win?") But second, courts must then accept the claimant's own answers to (beliefs about) those religious questions, if they are sincere. Just so, my test provides the non-circular question that determines substantiality: whether any options left open by a law are as religiously valuable as the ones blocked by the law. But then the test takes, as its key input, the *claimant*'s views about relative religious value.

At this point, one might worry that my test makes no progress on the centrality test. For that test could be thought to turn on the claimant's view of a question that is only slightly different from mine: whether a practice is "*central*" to her faith. So if (as is widely believed) the centrality test was problematic, one might suppose that my test is, too. But when you scratch the surface of scholarly and judicial objections to centrality tests, it becomes clear that the most common and compelling one is *not* that courts would have to decide if a *claimant* thinks some practice religiously central. It is that in doing so, courts might end up relying on *someone else's* answer to that question—whether the "someone else" be the judge, the jury, the claimant's co-religionists, or a rival church. Indeed, one or another of these risks was the explicit concern of all four precedents cited in *Smith* against "centrality" tests,[226] as well as of the *Lyng v. Northwest Indian Cemetery Protective Ass'n* Court[227] and several scholars who reject such tests.[228]

Why fear that courts applying a centrality test would test a plaintiff's religious views against others'? Perhaps "centrality" is so vague that

[226] What all four precedents rejected was the idea of judges second-guessing the truth of a claimant's answer—whether by rejecting a claimant's account of his own faith for one given by his co-religionists, see Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 716 (1981); by privileging one church's theology over another's in church-property disputes, see Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969); Jones v. Wolf, 443 U.S. 595, 602–606 (1979); or by submitting to a jury "the truth or verity of [claimants'] religious doctrines or beliefs," United States v. Ballard, 322 U.S. 78, 85–87 (1944).

[227] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 457–58 (1988) (averse to "holding that some sincerely held religious beliefs and practices are not 'central' to certain religions, *despite protestations to the contrary from the religious objectors who brought the lawsuit*," and fearing that this would "require [courts] to rule *that some religious adherents misunderstand their own religious beliefs*." (emphases added)).

[228] Even Lupu and Tuttle, who offer a blanket rejection of judicial inquiries into "religious impact," object simply to having judges usurp a function "distinctive to religious communities and their members." See Lupu & Tuttle, supra note 223, at 1919; see also Gedicks, supra note 90, at 106 (describing the religious-question doctrine as forbidding civil courts to decide whether "a claimant properly understands what his or her (or its) religion requires").

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courts cannot easily test the *sincerity* of a plaintiff's answer (to the question of what conduct she deems "central") without judging her answer by external standards. And that would indeed be a problem, since the interests that justify religious liberty (as seen above[229]) rise and fall with the plaintiff's fidelity to her own creed, not *others' views* of what her creed should be.

But this risk does not arise for courts applying my test, which asks the more determinate question of whether the plaintiff thinks *one option is religiously as good as another*. Indeed, my question *must* be more tractable. For there is no deep difference between asking my question and asking if a plaintiff is religiously *motivated* to engage in some conduct *C*. And courts ask the latter all the time, under all kinds of religious liberty regimes. There is no deep difference because (i) the "motivation" question asks if someone sees a religious reason to do *C* rather than nothing, and (ii) my test asks if she sees a religious reason to do *C* rather than some activity left open by the law. Both ask what the claimant believes. Both are sharp enough that courts can—and should—test for sincerity based on fit with the *claimant's* statements or conduct,[230] rather than fit with anyone *else's* religious views.

2. Meaningful Narrowing of Successful Claims

One might now have the opposite fear—that leaving it to the claimant to say if two options are religiously interchangeable is *too* deferential.

If the fear is about claimants gaming the system with crafty pleading, that will be possible no matter how stingy a test courts adopt. More important, in some cases it will just be too implausible to plead around this test. The person speeding to religious services cannot seriously claim that the alternative way of making it to the service on time—leaving home on time—is inferior from his religion's perspective. Or take the real-life cases below, where people engaged in disruptive religious speech in locations on public grounds where such speech happened to be forbidden.

[229] See supra Section III.A.

[230] See Nathan S. Chapman, Adjudicating Religious Sincerity, 92 Wash. L. Rev. 1185, 1191–92 (2017). As Chapman argues, a court can test for sincerity without itself taking positions on religious questions, as long as the court never infers that a belief is insincere from its judgment that the belief is implausible. I would add that courts should avoid relying on others' judgments of religious plausibility, too. They should instead focus on whether context suggests that the claimant has special incentives to assert the belief at issue insincerely, see id. at 1231–34, and on whether there is "narrative fit" between the claimant's asserted belief and her other statements and conduct, see id. at 1234–37.

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They could not and did not claim that their religion required them to speak in the forbidden spots rather than a few yards over. The adequate alternatives principle blocks these and other claims.

If the concern is instead that my test invites judicial abdication, it is misplaced. As a preliminary matter, under my proposal, courts would be (1) defining, not deferring on, the essentially legal question of what "substantial" *means*. They would do so by spelling out the two criteria above about religious significance and material cost. And then courts would be (2) applying the cost criterion without consulting the plaintiff's views at all. True, the religious-significance criterion would turn on a claimant's creed, not judges' opinions about religious matters. But enforcing this criterion, too, would set real limits on plaintiffs for two reasons.

First, requiring plaintiffs to make more than a conclusory claim[231]—to "show that the [challenged] decision poses a substantial and realistic threat" to their religious exercise—is hardly trivial.[232] One court rejected a Jewish inmate's substantial burden claim against the state's practice of inspecting his kosher meals on the ground that he failed to show that "the manner in which the meals were uncovered and inspected rendered them, or was likely to render them, non-kosher."[233] The court never second-guessed the inmate's understanding of kosher laws. The court pointed out his failure to show that kosher laws *seen as he sees them* were really at risk of being violated.

Second and more important, enforcing the religious-significance criterion would weed out cases involving *mere religious motivation*. Again, to take one example, plaintiffs would be denied exemptions from neutral speech laws when preaching at a different time or place would have served their religious purposes just as well. More broadly, Subsections III.D.1–2 review other real-life cases where this test would have made a difference, weeding out unmeritorious claims.

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[231] See Krieger v. Brown, 496 F. App'x 322, 326 (4th Cir. 2012) (finding insufficient for RLUIPA "substantial burden" purposes an inmate's "blanket assertion" that certain "sacred items were 'necessary' to perform 'well-established rituals'" when plaintiff "did not identify those rituals or explain why the absence of the sacred items had an impact on the rituals and violated his beliefs." (citations omitted)).

[232] *Lyng*, 485 U.S. at 475 (Brennan, J., dissenting).

[233] Lewis v. Zon, 920 F. Supp. 2d 379, 385 (W.D.N.Y. 2013).

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3. No Superfluous Element

Finally, one might object that the religious-significance prong of my test is superfluous. After all, one might think, if a law did not confine you to religiously inferior options, you would have no motivation to run to court in the first place. So in cases that do get to court, the alternatives left open by the challenged law will always flout the religious-significance prong, making that prong dispensable (one might object). But the objection's premise is false. Even if a law leaves you religiously adequate alternatives, you might be motivated to challenge it if you prefer the option precluded by the law for *non*religious reasons. (You might be speeding to church not because your faith required you to leave the house late, but because you preferred to hit the snooze button, or watch a few more minutes of "Meet the Press.") The religious-significance prong stops believers from exploiting religious liberty in such cases to get an exemption for their mere wants when others cannot. And again, these cases do arise in real life, as revealed by several examples described in Section III.D.

So the test proposed here requires neither too much nor too little deference to claimants, and no part of it is superfluous.

D. What Results

To see the fruits of this test, I will apply it to three questions exemplifying a broader set of questions facing courts.

1. Regulating Internal Affairs: Religious Minorities and Government Contractors

My test draws a plausible, principled line between two major pre-*Smith* cases on whether the government's disposition of its own affairs (e.g., its property) can be a substantial burden. The line drawn here embraces the better of these decisions and rejects the other, but on more principled grounds than others have given. The test would vindicate prisoner rights that are systematically under-enforced today. And it would provide sensible guidance in more recent cases, like *Fulton*, involving government contractors seeking exemptions from anti-discrimination laws.

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The first pre-*Smith* case at issue is *Bowen v. Roy*.[234] The claimant there believed that his daughter's "spirit would be robbed" if the government used a social security number to identify his daughter for the purpose of administering welfare benefits.[235] The Court found no burden on religious exercise, holding that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[236] Relying on that proposition two years later in *Lyng*, the Court rejected a free exercise challenge to the government's plan to develop part of a forest long used for religious purposes by three Native American tribes, even if this development would "virtually destroy" the tribes' "ability to practice their religion."[237]

The *Lyng* majority insisted that "[t]he building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number."[238] But the two cases have struck many as quite different—with the first drawing wide support and the second, heavy criticism.[239] After all, if discouraging religious exercise can impose a burden, so must a "decision that promises to destroy an entire religion," to quote Justice Brennan's vigorous dissent in *Lyng*.[240] Yet Brennan's own basis for distinguishing *Lyng* from *Bowen* was dubious. He said the government in *Bowen* had acted "in a purely internal manner," whereas the land-use decision in *Lyng* had "external effects."[241] But the *Bowen* claimant thought the policy there, too, had external effects—spiritually devastating ones.[242] How could courts deny that claim in *Bowen*, but credit the tribes' assertions of harm in *Lyng*, without effectively taking positions on the underlying theological beliefs?

On my framework, the distinction is not between actions that do and do not involve the government's internal affairs (as *Lyng* held), or

[234] 476 U.S. 693 (1986).

[235] Id. at 697.

[236] Id. at 699.

[237] *Lyng*, 485 U.S. at 451–52 (quoting Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 668, 693 (9th Cir. 1986)). Based on this language, I will assume that the development would do more than inconvenience the tribes—that there was some discrete, religiously significant conduct prevented by the development.

[238] Id. at 449.

[239] See, e.g., supra note 85 and accompanying text.

[240] *Lyng*, 485 U.S. at 476 (Brennan, J., dissenting).

[241] Id. at 470.

[242] Bowen v. Roy, 476 U.S. 693, 696 (1986) (reporting Roy's belief that the challenged action would "'rob the spirit' of his daughter" (citation omitted)).

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between actions that do and do not have *some* external effect (as Brennan urged). It is between actions that do and do not inhibit the claimant's religious conduct.[243] The reason that prevention of conduct (as in *Lyng*) is at least as bad as discouragement (as in *Sherbert*) is that both have a negative impact on religious conduct, and the adequate alternatives principle is all about a policy's impact, not form.

On the other hand, it is not arbitrarily *narrow* to focus on conduct when the *Bowen* claimant asks the Court to weigh broader spiritual impact. Limiting the analysis to conduct does not dismiss his claim on a technicality, or implicitly reject his theological assertions. No, limiting relief to burdens on conduct,[244] too, is fully justified by the political-moral justifications for religious liberty canvased above. For our civil liberties, in general, advance interests only by protecting from state interference the *private conduct that advances* those interests.

These critiques of *Lyng*, as corrections of pre-*Smith* precedent, would be relevant if the Court reversed *Smith*. But the corrections also help us now to fill gaps and resolve tensions and ambiguities in another area where the challenged state action involves regulation of the government's own property—namely, in cases involving prisoners' claims. In RLUIPA cases, many courts[245] have relied on *Lyng*'s "distinction between governmental actions that compel affirmative conduct inconsistent with religious belief, and those governmental actions that prevent conduct consistent with religious belief."[246] Such courts have found substantial burdens only in the former. That has had a devastating effect on prisoners, for obvious reasons[247]: prison is one place where private conduct is intimately tied up with, and at the mercy of, the state's arrangement of internal affairs.

In *Adkins v. Kaspar*, a pro se prisoner argued that prison officials violated his RLUIPA rights by effectively preventing him from "congregating with other YEA [Yahweh Evangelical Assembly] members on many Sabbath and YEA holy days."[248] The Fifth Circuit

[243] For a similar account, see Stephanie Hall Barclay & Michalyn Steele, Rethinking Protections for Indigenous Sacred Sites, 134 Harv. L. Rev. 1294, 1300–01 (2021).

[244] Here I am using "conduct" loosely to include expression and belief as well as behavior.

[245] See James D. Nelson, Note, Incarceration, Accommodation, and Strict Scrutiny, 95 Va. L. Rev. 2053, 2074–76 (2009) (collecting cases relying on *Lyng* to limit substantial burdens under RLUIPA to state actions that risk coercing inmates).

[246] *Lyng*, 485 U.S. at 468 (Brennan, J., dissenting).

[247] See Nelson, supra note 245, at 2074–76.

[248] Adkins v. Kaspar, 393 F.3d 559, 571 (5th Cir. 2004).

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denied there was a substantial burden, holding that the real obstacle to assembly was beyond the prison's control: "a dearth of qualified outside volunteers available" to supervise the YEA members' meetings.[249] But then why did the prison regulation requiring outside volunteers not also contribute to the burden? Here the Fifth Circuit fell back on its *Lyng*-inspired view that a cognizable burden must "truly *pressure*[] the adherent to significantly modify his religious behavior and significantly violate his religious beliefs."[250] The court held that it is lawful to entirely *prevent* the adherent's religious exercise if this is a side effect of arranging governmental affairs.[251] But again, the better distinction is not between internal and external operations. It is between actions that do and do not impede religious conduct. *Adkins* is wrong on substantial burdens.

The *Lyng* principle was also raised in *Fulton*, the recent Supreme Court case in which the Court flirted with applying free exercise exemptions from neutral laws. In that case, Philadelphia had contracted with private agencies, paying them to provide social services for foster children or 'congregate care' (group facilities) for children who are unable to remain in their homes.[252] The City had also tasked the agencies with taking applications from prospective foster parents, conducting home studies, and "certifying" whether the would-be parents satisfied the City's official eligibility criteria for taking in foster children.[253] One agency, Catholic Social Services ("CSS"), sought relief from the City's requirement that all contracted agencies receiving City funds must certify same-sex couples if they accept funds to certify opposite-sex couples.[254]

In response, the City invoked *Lyng*-related cases for the notion that "contractors generally do not suffer a cognizable burden on their religious exercise when the government conducts the quintessentially 'internal affair[]' of telling its own agents how to do their jobs."[255] But by my test, the question is not whether the City's rule is "internal," but whether the rule hinders the agency's religion: Does the anti-discrimination rule put the agency to a choice between violating (or not as fully realizing) its faith, and giving up otherwise-available funding for its work?

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[249] Id.
[250] Id. at 570 (emphasis added).
[251] Id. at 571.
[252] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1875 (2021).
[253] Id.
[254] Id. at 1875–76.
[255] Brief for City Respondents at 19, *Fulton*, 141 S. Ct. 1868 (No. 19-123).

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As to the conditions for fully realizing its faith: the agency plausibly pleaded that it has historically felt a special religious calling to care for children in need.[256] But the agency could *not* have (and did not) plausibly allege that its Catholic faith historically saw special value in the specific task that Philadelphia now hindered the agency from performing: namely, applying the City's criteria and "wielding [the City's] authority to determine whether other private parties may legally care for" such children.[257] After all, this *particular* way of helping foster children, entirely a creature of state law,[258] was not even possible until the City began regulating in this field. Meanwhile, though CSS could no longer certify couples on the City's behalf (without violating its faith), CSS *did* "continue[] to provide congregate care and case management services for children in the City's custody, for which the City [was still paying] CSS approximately $17 million annually."[259]

Assume that if pressed, CSS would have said that it saw distinctive religious value in helping foster children, but *not* in helping with the certification process as such. Then the agency's exclusion from the latter would not have substantially burdened its religion under my test. *Unless*, that is, this exclusion would have also denied CSS the ability or funding to perform other elements of foster care that *do* have irreplaceable religious significance for CSS—e.g., recruiting new foster parents in any fashion, or giving them spiritual guidance and support. Whether that was so turns on factual details not clearly addressed in the briefing. (The details were not addressed precisely because the City focused on a *Lyng* argument, while CSS framed the burden on itself too broadly: CSS said the City "exclude[d it] from its historical ministry of caring for foster children,"[260] period.) The Court's opinion in *Fulton*, for its part, glossed over the question of the cognizability of the burden on religion in a short

[256] See Brief for Petitioners at 3–4, *Fulton*, 141 S. Ct. 1868 (No. 19-123) ("Since 1797, the Catholic Church in Philadelphia has cared for children in need. Pet.App.12a, 252a-254a. As an arm of the Catholic Church, CSS performs what the Church calls corporal works of mercy. Catechism of the Catholic Church § 2447. Those include caring for 'orphans and widows,' James 1:27, and the 'least of these.' Gospel of St. Matthew 25:40; Pet.App.12a. Today, CSS continues that work by providing foster homes for abused and neglected children. J.A.41.").

[257] Marty Lederman, What *Fulton v. Philadelphia* Is--and Isn't--About, Balkinization (Nov. 4, 2020), https://balkin.blogspot.com/2020/11/what-fulton-v-philadelphia-is-and-isnt.html [https://perma.cc/3LBK-XGKP].

[258] See *Fulton*, 141 S. Ct. at 1875 ("Pennsylvania law gives the authority to certify foster families to state-licensed foster agencies like CSS." (citation omitted)).

[259] Brief for Intervenor-Respondents at 6, *Fulton*, 141 S. Ct. 1868 (No. 19-123).

[260] Brief for Petitioners, supra note 256, at 51.

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paragraph.[261] If the adequate alternatives framework is the one to apply, *Fulton* skipped over the crucial questions.

2. Preferences, Desires, and Substantiality: Prisons and Zoning

Last Subsection's reading of "substantial burden" might sharpen a concern raised by RFRA and RLUIPA's expansion to cover burdens on religious exercise, whether they are mandatory or central: What is left to distinguish substantial from non-substantial burdens? Are preferences decisive? If making preferences decisive is too favorable to claimants, what is the alternative? Courts have struggled—sometimes drawing convincing lines on unconvincing grounds, and sometimes flouting RLUIPA's command to protect non-central conduct.

That struggle was on display in a case brought by an inmate who practiced Asatru, an ancient polytheistic religion.[262] Prison officials afforded him several items used in Asatru worship rituals but denied his request to hold outdoor worship circles.[263] He sued under RLUIPA, arguing that the prison's policy required him to practice religion "differently than he otherwise would have."[264] This bare expression of a preference for an alternative means seemed hardly sufficient, and the district court found no substantial burden.[265] But the court did so on RLUIPA-forbidden grounds: that practicing outdoors was not "essential" to the Asatru.[266] Then, the Fourth Circuit, agreeing with this result but not the rationale, instead reasoned that the prison's denial of access to an outdoor ceremony did not have the effect of "modify[ing] [the inmate's] behavior."[267] But that is obviously false. If there is a sound basis for rejecting the claimant's bare preference, neither court found it.

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[261] The Court's burdens analysis begins: "As an initial matter, it is plain that the City's actions have burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs." *Fulton*, 141 S. Ct. at 1876. The only counterargument addressed by the Court goes to whether "approv[al]" really would be inconsistent with CSS's beliefs, see id.—not whether CSS's only alternative is to "curtail[] its mission" to a cognizable extent, which I have suggested is less clear. Id. at 1876–77.

[262] Krieger v. Brown (*Krieger I*), No. 5:08-CT-03090, 2010 WL 4026090 (E.D.N.C. Oct. 13, 2010), aff'd, 496 F. App'x 322, 322–23 (4th Cir. 2012).

[263] Krieger v. Brown (*Krieger II*), 496 F. App'x 322, 323 (4th Cir. 2012).

[264] Id. at 325.

[265] *Krieger I*, 2010 WL 4026090, at *7.

[266] *Krieger I*, 2010 WL 4026090, at *5; *Krieger II*, 496 F. App'x at 326.

[267] *Krieger II*, 496 F. App'x at 326.

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What does my test say? It says that an alternative is inadequate if it is significantly costlier in material terms or *worse in religious terms*. The frustration of a mere preference is not by itself a significant material cost, so the question is whether the alternatives are as good in religious terms.[268] If the inmate thinks outdoor worship is more religiously valuable, then the burden is substantial, even if outdoor worship is not "central" to his faith.[269] But if the inmate's preference reflects nothing more than personal taste, the policy creates no substantial burden, even if it *does* require him to "modify his behavior."[270] Enforcing this distinction between religiously grounded preferences and mere taste or convenience prevents claimants from getting an unfair advantage over nonbelievers: the distinction keeps claimants from stretching religious liberty to get an exemption for their mere taste or convenience. A few cases will show how the distinction plays out in practice:

- Someone religiously duty-bound to run a soup kitchen seeks an exemption from zoning laws to run the kitchen out of her garage.[271] Unless her religion cares *where* the kitchen is run, or she has not a single affordable alternative space to use, this zoning law imposes no substantial burden on her religion.
- A Muslim inmate challenged a ban on standing for long periods in prison dayrooms, saying the ban interfered with the postures required for his prayer five times a day. The court found no substantial burden because he was free to stand in the yard and his cell, to which he had access every hour.[272] Rightly so: Islam (as understood by the inmate) had nothing to say about whether prayers are better said in prison dayrooms or yards. His preference was a matter of taste.

[268] Cf. Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) (emphasizing the Amish way of life being protected "is not merely a matter of personal preference, but one of deep religious conviction").

[269] See, e.g., Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996); see also supra Subsection III.C.1.

[270] *Krieger II*, 496 F. App'x at 325.

[271] See Christopher L. Eisgruber & Lawrence G. Sager, Religious Freedom and the Constitution 11 (2007).

[272] DeMoss v. Crain, 636 F.3d 145, 153 (5th Cir. 2011).

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By contrast:

- Certain prison restrictions prevented two Muslim inmates from attending Jumu'ah, a weekly religious service of "central importance," and one that their faith required to take place on Fridays.[273] Though granting all of this, the Supreme Court upheld the restrictions, partly on the ground that the inmates were free to engage in other Muslim practices.[274] But whatever the propriety of this reasoning under the relaxed standard applied to burdens on prisoners' First Amendment rights generally,[275] the prison had surely imposed a substantial burden. As the prisoners pleaded and the Court never denied, their "preference" for Friday services was rooted in their religion, not taste.

- A Buddhist inmate challenged execution protocols forbidding his chaplain to accompany him in the execution chamber; the state suggested they meet shortly beforehand.[276] "Persons of many faiths may *desire* the support of a cleric in the moments before death," Justice Alito observed, but is denial of that desire a substantial burden?[277] Though acknowledging that RLUIPA does not require religious conduct to be central or mandatory, Alito noted that the Court has never said "what results when the State offers a prisoner an alternative practice that, *in terms of religious significance, is indistinguishable* from the prohibited practice."[278] My test's verdict: if the alternative is no worse religiously,[279] it is adequate, and the burden is not substantial. By that standard, the burden here was substantial because the claimant, a Pure Land Buddhist, believed he could be reborn in the Pure Land "only if he [was] able to focus on the Buddha at the time of his death and that the presence of his

[273] O'Lone v. Estate of Shabazz, 482 U.S. 342, 345, 351 (1987).
[274] Id. at 352.
[275] Turner v. Safley, 482 U.S. 78, 88–89 (1987).
[276] Murphy v. Collier, 139 S. Ct. 1475, 1476 (2019).
[277] Id. at 1484 (Alito, J., dissenting).
[278] Id. (emphasis added).
[279] There was no question of a substantial material burden here: the prison was not offering to allow the Buddhist chaplain into the chamber for a fee, for example.

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> spiritual advisor . . . would permit him to maintain the required focus by reciting an appropriate chant."[280]

There will be (as always) close cases, where the basis of the "preference" (religion or taste) is fuzzy. But this framework gives courts guidance on how to identify substantial burdens, beyond RFRA's and RLUIPA's negative rule about what not to require.

3. No Religious Privilege in Speech: Evangelists and Abortion Protestors

The Supreme Court has long taught that religious speech warrants no more protection than nonreligious speech. Perhaps for that reason, the Court has reviewed burdens on religious speech under the Free Speech Clause. (Some of the most famous free speech cases involved religiously motivated expression.[281]) But RFRA might be read to give religious speech *more* protection. After all, RFRA imposes strict scrutiny of neutral burdens on religion, whereas the Free Speech Clause requires only intermediate scrutiny of content-neutral burdens on speech.[282] But tighter protection of religious versus nonreligious speech might pose constitutional problems of its own, interfering with the free flow of ideas.[283]

So it is worth asking: Does RFRA give religious speech as such extra protection[284] and, if it does, would that result be justified by religious liberty principles? The answers are "no" and "no" if the framework above is sound.

Content-neutral speech regulations generally face intermediate scrutiny, though only if the regulations leave adequate alternative channels for communication. But most regulations that do *that* will leave adequate alternatives for exercising religion (through speech), too, and thus should not trigger strict scrutiny under RFRA. That is because the

[280] Brief for Petitioner at 13, *Murphy*, 139 S. Ct. 1475 (No. 18-8615).

[281] E.g., W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 629–30 (1943); Cantwell v. Connecticut, 310 U.S. 296, 301 (1940).

[282] See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (requiring such restrictions to serve only a "significant" governmental interest (citation omitted)).

[283] See William P. Marshall, In Defense of Smith and Free Exercise Revisionism, 58 U. Chi. L. Rev. 308, 320 (1991).

[284] For what it is worth, the Senate Judiciary Committee at the time would have answered in the negative. See S. Rep. No. 111, at 9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898.

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purpose of religious speech is usually the same as the already-protected purpose of nonreligious speech: spreading a message.

In other words, the religious goal of religious speech is usually no more particular than the goal of nonreligious speech: both aim to communicate. And that goal is safe under any content-neutral law that leaves adequate alternative channels for communication, and hence under any that passes muster under the Free Speech Clause. That is why religious expression usually needs no more protection than nonreligious expression receives.

Conversely, if a speech regulation left you *no* adequate alternatives—because you felt obligated to do something more specific than spreading a message—the regulation would be burdening more than speech. It would be burdening obligatory conduct not reducible to the "conduct" of sharing a (religious) view with others. And then giving you more protection would not constitute an official preference for religious *speech* as such, so it would not raise free speech concerns.[285]

Consider *Heffron v. International Society for Krishna Consciousness, Inc.*, the leading Supreme Court case on this. In *Heffron*, a Minnesota regulation limited the distribution of written materials and solicitation of funds at the state fair to a few fixed locations.[286] Members of the Krishna religion brought a First Amendment challenge, saying the regulation forbade them to carry out a religious duty to hand out literature in public places.[287] The Court upheld the regulation as a content-neutral restriction leaving ample alternative channels for speech.[288] And in an oft-quoted line, the Court denied that religious organizations "for present purposes . . . 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."[289]

But why did the Free Exercise Clause (pre-*Smith*) not give religious groups superior rights to communicate? The Court fudged this hard issue with its "for present purposes" hedge and its failure to address the group's free exercise claim head on.[290] In fact, Professor Stone suggests that the

[285] Protecting religious conduct that happens to be tied up with religious speech may have a disparate impact in favor of some religious speech, on some occasions, but then so do less controversial measures like, for example, the ministerial exception, which gives religious groups more of a handle on their leadership and thus on their messaging.

[286] 452 U.S. 640, 642 (1981).

[287] Id. at 644–45.

[288] Id. at 648–49, 654–55.

[289] Id. at 652–53.

[290] See id. at 652, 659 n.3 (Brennan, J., concurring).

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Court deliberately avoided reviewing religious expression claims under the Free Exercise Clause precisely to avoid the "embarrassment" of having to treat religious speech better, as pre-*Smith* doctrine might seem to have required.[291]

My test would not have embarrassed the Court. The Krishna claimants, like adherents of many other faiths, felt a duty to give witness, to preach the word—but they did not avow a duty to preach from *this versus that location on the Minnesota fairgrounds*.[292] So the regulation that closed off only some spots left the preachers alternatives that were perfectly adequate. That is why it imposed no substantial burden and deserved nothing more than the intermediate scrutiny applied to other content-neutral laws. *Heffron* came out right.

Something quite like the adequate alternatives principle seemed to drive the D.C. Circuit's rejection of RFRA claims in two cases involving religious expression. But in both, the court ended up overstating the principle at stake in ways that may unfairly limit religious claims in other cases.

In one of the two cases involving expression, a Christian group sought to sell on the National Mall some t-shirts bearing Christian messages—against a regulation barring sales on the Mall.[293] The court found no substantial burden because the group's "declarations do not suggest that their religious beliefs demand that they sell t-shirts in every place human beings occupy or congregate," and because the regulation "is at most a restriction on one of a multitude of means" of spreading the gospel.[294] But the court failed to spell out the principle at work in this distinction. While the court rightly rejected a test that asks only if the restriction makes claimants refrain from "religiously motivated conduct,"[295] it lurched to the other extreme of protecting only religiously *mandatory* conduct.[296] This rule would protect too little. What the court was after—but failed to

[291] See Stone, supra note 185, at 994–96 (describing "the special embarrassment that exists when free speech and free exercise claims coalesce").

[292] See *Heffron*, 452 U.S. at 645 (reporting plaintiffs' claim that their religion "enjoins its members to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion").

[293] Henderson v. Kennedy, 253 F.3d 12, 13 (D.C. Cir. 2001).

[294] Id. at 16–17.

[295] Id. at 17 (citation omitted).

[296] Id. at 16 ("[P]laintiffs cannot claim that the regulation forces them to engage in conduct that their religion forbids or that it prevents them from engaging in conduct their religion requires." (citation omitted)).

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articulate—is something like the adequate alternatives principle of protection.

Similarly, in the second expression case, the D.C. Circuit rightly rejected a claimant's request for a RFRA exemption from a defacement ban preventing him from using chalk to write pro-life messages on the sidewalk in front of the White House when this was but "one of a multitude of means" of "spread[ing] his message"—it does not even "prevent [him] from chalking elsewhere."[297]

In the same vein, the Eleventh Circuit was right to reject a RFRA challenge to a law forbidding religious protestors from obstructing access to an abortion clinic since the law left them "ample avenues" for "express[ing] their deeply-held belief" about the injustice of abortion and expressing that message was all they felt a religious duty to do.[298]

CONCLUSION

Our constitutional liberties have an underappreciated coherence to them. Each liberty guards against some but not all incidental burdens. And each sifts the serious from insubstantial burdens in the same way: by appeal to an adequate alternatives principle. This principle ensures that in the face of regulations touching on a given liberty, people remain free to realize the interests served by that liberty to the same degree and at no greater cost.

Courts have long borrowed from the doctrine of one liberty to develop doctrines for another. So I have used this principle to spell out a test for "substantial burdens" on religion under RFRA, RLUIPA, and—if *Smith* is reversed—the First Amendment. The resulting test has linguistic, doctrinal, and moral appeal, giving religion protection only where religion has more *need* of protection. And the test produces unified answers to a range of doctrinal puzzles about when courts should find that a legal burden on religion triggers heightened scrutiny. This test offers a balanced approach to politically charged cases and ensures fairness to less familiar minority faiths. And it avoids giving believers *carte blanche*, on the one hand, and having judges second-guess their religious judgments, on the other.

It may also speak to deeper questions of constitutional design—questions about which interests to protect with a civil liberty in the first

[297] Mahoney v. Doe, 642 F.3d 1112, 1121–22 (D.C. Cir. 2011).
[298] Cheffer v. Reno, 55 F.3d 1517, 1522 (11th Cir. 1995).

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place. For decades, scholars have debated, for example, whether it could be fair to give religion special protection over secular commitments from education to conscience to sports.[299] Both sides have generally assumed that the answer turns on value judgments alone: special protection for religion is fair if religion matters more, and unfair if not. Something similar is true of a related debate about whether it makes sense to single out speech for more protection than other activities.[300] But "what rights are recognized" turns *also* on "perceptions of which interests *need* judicial protection."[301] So for special protections of a given activity to be fair, the activity need not be more important than others. It might be, not more worthy, but more *needful* of this particular protection. But to tell if it is, one needs a clear view of the protection at issue.

This Article has proposed an answer: our civil liberties guard against incidental burdens that leave no adequate alternatives for pursuing important interests. So an interest will have greater need for this protection if neutral burdens on the interest are likelier to leave no adequate alternatives, compared to neutral burdens on other interests; if the interest is, in that sense, more *fragile*—a possibility I have pursued elsewhere.[302] Thus, as I have tried to show at some length,[303] this Article's analysis of our existing liberties can shed light not only on how to fix their scope, but on whether to recognize them at all—and on which new civil liberties to create.

[299] Compare Eisgruber & Sager, supra note 271, at 8–9 (arguing for the arbitrariness or unfairness of giving certain legal protections to religion but not other deep commitments), and Brian Leiter, Why Tolerate Religion? 3–4 (2013) (same), with Kathleen Brady, The Distinctiveness of Religion in American Law 300 (2015) (arguing that special religious protections may be justified), Andrew Koppelman, Defending American Religious Neutrality 1 (2013) (same), John Garvey, What Are Freedoms For? 1 (1996) (same), and Christopher C. Lund, Religion Is Special Enough, 103 Va. L. Rev. 481, 523 (2017) (same).

[300] See, e.g., Leslie Kendrick, Free Speech as a Special Right, 45 Phil. & Pub. Affs. 87, 89 nn.6–7 (2017) (collecting articles on the topic).

[301] Richard H. Fallon, Jr., Further Reflections on Rights and Interests: A Reply, 27 Ga. L. Rev. 489, 494 (1993) (emphasis added).

[302] Sherif Girgis, Fragility, Not Superiority? Assessing the Fairness of Special Religious Protections, 171 U. Pa. L. Rev. (forthcoming 2022) (manuscript at 21).

[303] Id.