

IS IT FAIR TO GIVE RELIGION SPECIAL TREATMENT?

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It is widely believed that the First Amendment puts courts and legislatures of the United States in a double bind when it comes to religion: requiring them to remain neutral with respect to religious concerns, while simultaneously protecting these same concerns. Many areas of law currently recognize religious exemptions from generally applicable laws, but there has been persistent uncertainty as to whether it is fair or appropriate for government actors to single out religious objectors for this type of special treatment.

This article offers a way to resolve the difficulty. Government may privilege religion, but the First Amendment requires that it do so at a very high level of abstraction. It is possible to treat all ultimate human concerns with equal respect. It is, however, impossible to formulate a rule that will guarantee that religion be treated precisely no better or worse than other, equally valuable human concerns. As soon as one sets aside crude utilitarianism and begins to decide which human concerns ought to receive special weight and dignity in political decision making, some amount of discretion is unavoidable. All we can do is enumerate ultimate goods, such as religion, and honor them as best we can. But we can only accommodate them one at a time. Because religion is a distinctive human good, accommodation of religion as such is not unfair.

Professor Koppelman begins with a critique of Christopher Eisgruber and Lawrence Sager's fairness objection to the singling out of religion. Eisgruber and Sager argue that religion should not be privileged over other deep and valuable concerns, but should be protected from discrimination, due to the particular vulnerability of religious minorities. Professor Koppelman observes that protection and privi-

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As this article was going to press, I received the manuscript of Christopher Eisgruber and Lawrence Sager's *The Vulnerability of Conscience: Religious Freedom and the Constitution* (forthcoming 2006, Harvard University Press). The book is a fine work, which sheds valuable light on many important issues. At this writing it is still a work in progress, and so it is not yet possible to engage with its treatment of the specific issue that I take up here.

lege are logically continuous with one another, and that Eisgruber and Sager's approach still calls for the special treatment of religion. If religion cannot be treated with indifference, the question remains why religion should be given special consideration over other human concerns.

After considering various approaches to determining which values should be privileged, Professor Koppelman concludes that the most defensible approach relies upon what Charles Taylor calls "strong evaluation." Taylor argues that ordinary practical reasoning involves discriminations of better and worse that are independent of our desires and offer standards by which those desires are to be judged. Professor Koppelman notes that religion is only one of many objects of strong evaluation, and that other objects of strong evaluation, such as the desire to protect the environment and the need to accommodate persons with disabilities, are currently under the protection of the government. Because religion in its broadest sense—humanity's various efforts to address what is fundamentally problematic in the human condition—is an object of strong evaluation that is not reducible to any other good, it should be accorded government protection as well.

A persistent uncertainty plagues the theory of religious liberty. At times, some religious people have conscientious objections to obeying a law. The classic case is Quakers' objection to participation in war. But there are plenty of other cases. Persons whose religions place special value on the ritual consumption of peyote or marijuana (or wine, during Prohibition) seek exemption from drug laws. Landlords who have religious objections to renting to unmarried couples want to be excused from antidiscrimination laws. Churches seeking to expand want exemption from zoning or landmark laws. These scruples have often been deferred to, and religious objectors have frequently been exempted from obligations that the law imposes on all others.¹

Is it fair to single out religion for special treatment in this way? Judges, constitutional theorists, and philosophers have struggled with this problem for years. Some say that religion is such a distinctive sphere of human concern that special treatment is justified.² Others think that religion should not be privileged over other, equally valuable, human con-

1. First Amendment scholarship has for years been dominated by a furious debate over whether such exemptions are appropriately granted by the courts or by legislatures or by both. I am addressing the logically prior question of whether it is appropriate for *any* governmental actor to single out religious objectors for special exemption from generally applicable laws. However, the clarification of that question that I offer here does have institutional implications, which I consider briefly at the conclusion.

2. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 855 (1995) (Thomas, J., concurring); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia & Thomas, JJ., concurring in the judgment); *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting); John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275 (1996).

cerns, and that such special treatment itself is an unconstitutional establishment of religion.³ The Court has frequently upheld and has sometimes mandated religious exemptions, but has not squarely confronted the fairness problem.⁴

The issue is related to one of the deepest problems in First Amendment theory. The Court has held that the Establishment Clause “mandates governmental neutrality between religion and religion, and between religion and nonreligion.”⁵ But it has also held that “the Free Exercise Clause, . . . by its terms, gives special protection to the exercise of religion.”⁶ The Court has described its task as “to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.”⁷ The trouble with this diagnosis is that it precludes a cure. There is no neutral course out of a contradiction.⁸

3. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring); PHILIP B. KURLAND, *RELIGION AND THE LAW* (1962); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555 (1998); Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1978–79).

4. For example, in its most recent establishment clause decision, upholding the special protection of religious exercise for prisoners by the Religious Land Use and Institutionalized Persons Act, the Court declared that “[r]eligious accommodations . . . need not ‘come packaged with benefits to secular entities,’” and that “There is no requirement that legislative protections for fundamental rights march in lockstep.” *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2124 (2005) (quoting Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987), and *Madison v. Riter*, 355 F.3d 310, 318 (4th Cir. 2003)). The Court acknowledged the claim that religion was being unfairly privileged, but responded that the argument “founders on the fact that Ohio already facilitates religious services for mainstream faiths. The State provides chaplains, allows inmates to possess religious items, and permits assembly for worship.” *Cutter*, 125 S. Ct. at 2122 n.10. This response shows that the statute promotes equality among religions, but is completely unresponsive to the claim that religion is being unfairly privileged over other deep concerns. This odd evasiveness suggests that the Court is uncertain how to respond to that claim, though it is confident that the claim is wrong.

5. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

6. *Thomas v. Review Bd.*, 450 U.S. 707, 713 (1981). The privileged status of religion is somewhat diminished after *Employment Division v. Smith*, 494 U.S. 872, 878–81 (1990), which held that (with a few ad hoc exceptions, based on reluctance to overrule previous decisions) there is no right to religious exemptions from laws of general applicability. Even after *Smith*, however, religions retain some special protection that nonreligious beliefs do not share. In *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524 (1993), the Court struck down four ordinances that a city had enacted with the avowed purpose of preventing a Santeria church from practicing animal sacrifice. The laws, the Court held, violated the Free Exercise Clause of the First Amendment because their object was the suppression of a religious practice. *Id.* at 542, 547. The result would have been different if the law had targeted a club that did exactly what the Santeria did, not as part of a religious ritual, but because its members thought that killing animals was fun. See also *infra* text accompanying notes 18–19.

7. *Walz v. Tax Comm’n*, 397 U.S. 664, 668–69 (1970).

8. Justice Breyer, who cast the swing vote in the most recent Ten Commandments cases (*compare* *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), *with* *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005)), describes the way to reconcile the tension in frankly mystical terms:

If the relation between government and religion is one of separation, but not of mutual hostility and suspicion, one will inevitably find difficult borderline cases. And in such cases, I see no test-related substitute for the exercise of legal judgment. That judgment is not a personal judgment. Rather, as in all constitutional cases, it must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and consequences measured in light of

This article will argue that there is a way to resolve the difficulty. Government may privilege religion, but the First Amendment requires that it do so at a very high level of abstraction. It is possible to treat all ultimate human concerns with equal respect. It is, however, impossible to formulate a rule that will guarantee that religion be treated precisely no better or worse than other, equally valuable human concerns. As soon as one sets aside crude utilitarianism and begins to decide which human concerns ought to receive special weight and dignity in political decision making, some amount of discretion is unavoidable. All we can do is enumerate ultimate goods, such as religion, and honor them as best we can. But we can only accommodate them one at a time. Because religion is a distinctive human good, accommodation of religion as such is not unfair.

This article has three parts. Part I considers the fairness objection to the singling out of religion. It describes and critiques the arguments of the objection's most persuasive proponents, Christopher Eisgruber and Lawrence Sager. Eisgruber and Sager argue that religion should not be privileged over other deep and valuable concerns. Rather, religion should only be protected from discrimination. My analysis, however, shows that privileging and protection are not analytically distinct, but are rather logically continuous with one another. The question is not whether, but rather what, to privilege. An objection to privileging any human commitments is overbroad, because it precludes any kind of protection of religion. Part II considers various candidates for privileging, concluding that the category should include all commitments that reflect what Charles Taylor calls "strong evaluation"—discriminations of better and worse that are independent of our desires and offer standards by which those desires are to be judged. Part III examines possible rules for singling out religion, and concludes that such singling out involves the weighing of incommensurable considerations. Critics of the singling out of religion are correct that the procedure for deciding when to accommodate religion is impossible to reduce to any clear rule. This is not, however, an argument against such weighing any more than it is in other areas where such weighing must take place, such as environmental protection, the accommodation of persons with disabilities, or the unimpeded flow of goods across state lines.

I. THE CASE AGAINST PRIVILEGING RELIGION

A. *Eisgruber and Sager's Objection*

The unfairness objection to religious accommodation is presented in its most sophisticated form by Christopher Eisgruber and Lawrence

those purposes. While the Court's prior tests provide useful guideposts—and might well lead to the same result the Court reaches today—no exact formula can dictate a resolution to such fact-intensive cases.

Van Orden, 125 S. Ct. at 2869 (Breyer, J., concurring in the judgment) (citations omitted).

Sager.⁹ They argue that it is unfair and arbitrary to privilege religion over other deep human commitments. “To single out one of the ways that persons come to understand what is important in life, and grant those who choose that way a license to disregard legal norms that the rest of us are obliged to obey, is to defeat rather than fulfill our commitment to toleration.”¹⁰ Instead of privilege, Eisgruber and Sager propose that the principle of accommodation be what they call equal regard. “Equal regard requires that the state treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally.”¹¹

Eisgruber and Sager do think that it is *sometimes* appropriate to single out religion. This is not because of its distinctive value, but because “persons and groups can be vulnerable to victimization by virtue of their shared commitments and practices.”¹² Courts should prevent states from discriminating against religious minorities.¹³ Thus, for example, when the drug laws of some states refuse exemptions for the sacramental use of peyote by Native Americans, in the teeth of evidence from other states that such exemptions do not lead to any increase in drug abuse, this refusal could reasonably be found to be a violation of equal regard.¹⁴ But such singling out is never appropriate when it privileges religion over other deep concerns. Eisgruber and Sager compare the case of Sergeant Goldman, whose faith required him to wear a yarmulke that was not part of the army uniform,¹⁵ with the hypothetical Sergeant Collar, who has a rare skin disorder that prevents him from wearing a tie that is part of the army uniform. Goldman’s claim to exemption, they argue, cannot be favored over Collar’s without unfairly privileging religion over other equally valid reasons for exemption.¹⁶

This, however, is an odd description of present law, which frequently singles out religion for favorable treatment. They nowhere acknowledge, for example, that present law (albeit not constitutional law) honors Goldman’s claim while rejecting Collar’s.¹⁷ Workers who lose

9. See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1315 (1994) [hereinafter Eisgruber & Sager, *The Vulnerability of Conscience*].

10. *Id.*

11. *Id.* at 1285.

12. *Id.* at 1252.

13. See *id.* at 1291–97.

14. *Id.* at 1290. Eisgruber and Sager try to use this type of reasoning to account for all of the case law on exemptions. See *id.* at 1277–82.

15. See *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986) (holding that the challenged regulation prohibiting visible religious apparel was constitutional in light of the military’s “perceived need for uniformity”).

16. Eisgruber & Sager, *The Vulnerability of Conscience*, *supra* note 9, at 1264–65.

17. They do note that Goldman’s claim was rejected by the Supreme Court but subsequently granted by Congress. See *id.* at 1304 & n.117. Claims such as Collar’s are supported in many contexts by the Americans with Disabilities Act, but that Act is not applicable to the military or any other part of the federal government. See 42 U.S.C. § 12111(5)(B)(i) (2000) (excluding the United States government from the Act’s coverage); see also *Henrickson v. Potter*, 327 F.3d 444 (5th Cir. 2003); *Baldwin v. U.S. Army*, 223

their jobs for religious reasons, such as an unwillingness to work on the Sabbath or to construct armaments, are constitutionally entitled to unemployment compensation.¹⁸ Those who cannot work for powerful secular reasons, such as the need to care for a dependent, have no such constitutional right.¹⁹ The federal Religious Freedom Restoration Act (hereinafter RFRA), which requires courts to consider religious (and only religious) accommodation claims, was invalidated by the Supreme Court as applied to state and local government,²⁰ but continues to apply to federal action. The Religious Land Use and Institutionalized Persons Act protects religion (and only religion) from land use and prison regulations.²¹ Similar protections against state law are given by many state constitutions²² and state Religious Freedom Restoration Acts.²³ There are thousands of exemptions in specific statutory schemes, and the Supreme Court has held that these are permissible even when they are not constitutionally required.²⁴ Eisgruber and Sager do not agree with all of this, but they do not condemn it all either. Most tellingly, as Judge Michael McConnell has observed in his incisive critique of their argument, Eisgruber and Sager would make constitutionally enforceable the right of religions to be treated with equal regard, while similar rights for secular concerns are merely precatory.²⁵

In order to conclude that the case law reflects the idea of equal regard, Eisgruber and Sager find it necessary to surpass the already remarkable level of deference that the Court displays in the context of race, which is the paradigmatic case of a status that needs legal protection because it is vulnerable to discrimination.²⁶ The Court is hostile to racial classifications, but as long as a law is not overtly discriminatory, the Court is easy to satisfy. It has held that laws that in practice hurt blacks more than whites are unconstitutional only if the challenger can show discriminatory intent.²⁷ It has been remarkably reluctant to find such intent. Daniel Ortiz has shown that the Court's approach to government

F.3d 100 (2d Cir. 2000); *Coffman v. State of Mich.*, 120 F.3d 57 (6th Cir. 1997); *DeFrees v. West*, 988 F. Supp. 1390 (D. Kan. 1997).

18. See *Thomas v. Review Bd.*, 450 U.S. 707, 709, 720 (1981) (armaments); *Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (Sabbath).

19. See generally *Sokol v. Smith*, 671 F. Supp. 1243, 1246 (W.D. Mo. 1987) (holding that the denial of unemployment compensation to pregnant women does not unconstitutionally impinge on the right to bear children).

20. *City of Boerne v. Flores*, 521 U.S. 507, 532–36 (1997).

21. 42 U.S.C. § 2000cc (2000). This statute was enacted after the publication of Eisgruber and Sager's writings discussed here.

22. Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 5 (2000).

23. *Id.*

24. *Id.* at 3–6, 19–21.

25. *Id.* at 37.

26. See Christopher L. Eisgruber & Lawrence G. Sager, *Unthinking Religious Freedom*, 74 TEX. L. REV. 577, 613 (1996) [hereinafter Eisgruber & Sager, *Unthinking Religious Freedom*]; Eisgruber & Sager, *The Vulnerability of Conscience*, *supra* note 9, at 1250–52.

27. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

decisions that have a disparate impact on minorities, at least with respect to housing and public employment, amounts in practice to minimal scrutiny. “Instead of asking whether the decisionmaker *would* have made the same decision without the discriminatory motivation, the Court asks something a bit closer to whether it *could* have done so.”²⁸ Eisgruber and Sager seem to make a similar argument: the Court’s religious accommodation cases did not rely on the idea of equal regard, but they *could* have, so they are consistent with it.²⁹

Suppose the Court went even further, and validated overtly racial classifications on the grounds that they *might* not have reflected racist intent.³⁰ At that point, it would be willful blindness to say that the Court was in the business of protecting anyone from discrimination at all. But Eisgruber and Sager are in just this position. They defend a series of cases that single out religion for special treatment, on the basis of a theory that nominally forbids such singling out.

The observation that Eisgruber and Sager are inconsistent does not, however, answer their objection from unfairness. Their core claim is that “religion does not exhaust the commitments and passions that move human beings in deep and valuable ways.”³¹ This claim is correct, and McConnell does not satisfactorily answer it. But when the claim is elaborated, it can be shown that it does not categorically preclude the singling out of religion.

The unfairness claim is not, strictly speaking, a claim about the First Amendment. There is nothing in the text of the amendment that directly supports it. It is rather a claim based on normative political theory: it would be wrong for the state to discriminate in favor of religion in this way. “[T]he idea of a broad privilege for religiously motivated conduct baldly contradicts the best understanding of the foundations of religious freedom.”³² The normative claim is relevant to constitutional law because law lacks the resources within itself to resolve interpretive questions about the amendment. The text is vague, and the doctrine is con-

28. Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1115 (1989). Thus, in *Washington v. Davis*, 426 U.S. 229, 246 (1976), the Court found the employment test was “neutral on its face and *rationaly* may be said to serve a purpose the Government is *constitutionally empowered* to pursue.” In *Pers. Adm’r of Mass v. Feeney*, 422 U.S. 256, 279 n.25 (1979), the disproportionate number of females excluded by a Massachusetts law granting employment benefits to veterans was described as “essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be *legitimate*.” Ortiz, in supplying emphasis to the above quotations, observes that the emphasized words “resonate with the language of reduced scrutiny.” Ortiz, *supra*, at 1115.

29. Eisgruber and Sager also note that many of the cases fall short even of the level of protection that would be given by equal regard, since they declined to impose exemptions when “the government’s interests were diaphanous and its indifference to religious practice stark.” Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 SUP. CT. REV. 79, 100 [hereinafter Eisgruber & Sager, *Congressional Power*].

30. This is of course what the Court did do in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

31. Eisgruber & Sager, *The Vulnerability of Conscience*, *supra* note 9, at 1245 n.††.

32. Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 448 (1994) [hereinafter Eisgruber & Sager, *Religious Freedom Restoration Act*].

fused. Interpreters thus have some discretion in defining the liberty protected by the amendment, and political theory can offer guidance as to how that discretion should be used. I take it that Eisgruber and Sager are relying on assumptions of this kind, and I further take it that those assumptions are sound. I will also follow them in this article. If singling out religion for special treatment is unfair, then the ambiguous words of the First Amendment should not be construed to require, or perhaps even to permit, this unfairness.

Finally, there is some uncertainty about just what Eisgruber and Sager's claim amounts to. They do not categorically reject all religion-specific accommodations. They are, however, confident that *Employment Division v. Smith*,³³ which held that there is no constitutional right to religious exemptions, is correct, and that the Religious Freedom Restoration Act,³⁴ which sought to ban all burdens on religious practice that were not necessary to a compelling state interest, is unconstitutional.³⁵ What they object to is the singling out of religion for better treatment than other, comparably deep commitments. But their defense of *Smith* and attack on RFRA does not rely on any specific comparison with the law's treatment of other claims (such as Sergeant Collar's). Without such a comparison, it is hard to see how the unfairness claim can be sustained. RFRA is not unfair to other comparably strong commitments unless those commitments are not being treated comparably. It is not unfair for my sister to get to go to the circus unless I have to stay home. This suggests that perhaps they find something problematic about religion-specific accommodations as such.

B. Dworkin Against Subsidies

Eisgruber and Sager explain their unfairness claim by noting that if religion is singled out for special benefit, the faithful "receive disproportionate authority over decisions about the use of collective authority."³⁶ The objection to privileging religion is like one classic objection to welfare-driven measures of justice. Just as utilitarians must explain why their theory does not require the grant of disproportionate resources to "welfare monsters" whose utility curves demand more resources than anyone else, so those who would privilege religion must explain why such privileging does not license extravagant demands by the religious.

The argument here cites the work of Ronald Dworkin,³⁷ who argues that welfare-based ideas of equality will always have this defect. The problem with equality of welfare, Dworkin explains, is that under it "people are meant to decide what sorts of lives they want independently

33. 494 U.S. 872 (1990).

34. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2000).

35. Eisgruber & Sager, *Religious Freedom Restoration Act*, *supra* note 32.

36. Eisgruber & Sager, *The Vulnerability of Conscience*, *supra* note 9, at 1257.

37. *Id.* at 1256 n.30.

of information relevant to determining how much their choices will reduce or enhance the ability of others to have what they want.”³⁸ The consequence is to force everyone to unfairly subsidize those who have expensive tastes. Dworkin thinks that justice requires rather that “only an equal share of social resources be devoted to the lives of each of its members, as measured by the opportunity costs of such resources to others.”³⁹

However, like Eisgruber and Sager, Dworkin is inconsistent in maintaining this position. Thus, when he considers the question of government subsidies for the arts, he rejects the view that the amount of art produced should be left to the free market.⁴⁰ That rejection is not—or at least, Dworkin says it is not—based on what he calls the “lofty approach,” which relies on the supposed intrinsic value of art.⁴¹ That approach is defective, Dworkin argues, because it “turns its back on what the people think they want” and instead aims at “what it is good for people to have.”⁴² Instead, he thinks that subsidies can be justified as protecting “the diversity and innovative quality of the culture as a whole,”⁴³ which should be understood to be a public good. “We should try to define a rich cultural structure, one that multiplies distinct possibilities or opportunities of value, and count ourselves trustees for protecting the richness of our culture for those who will live their lives in it after us.”⁴⁴ The only value judgment that the state should make is that “it is better for people to have complexity and depth in the forms of life open to them.”⁴⁵

The attraction of this approach follows from Dworkin’s first principles. Dworkin thinks that government fails to treat citizens with equal concern and respect whenever it restricts individual liberty on the ground that one citizen’s conception of the good life is better than another’s.⁴⁶ He therefore cannot rely on the lofty view. But he does not want to abandon subsidized art. He offers an alternative rationale for subsidies, one that purports to be consistent with neutrality. He claims that subsidy, on his rationale, merely “allows a greater rather than a lesser choice, for that is exactly the respect in which we believe people are better off with a richer than a poorer language.”⁴⁷

38. RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 69 (2000).

39. *Id.* at 112.

40. RONALD DWORKIN, *Can a Liberal State Support Art?*, in *A MATTER OF PRINCIPLE* 221 (1985).

41. *Id.* at 221.

42. *Id.*

43. *Id.* at 233.

44. *Id.* at 229.

45. *Id.*

46. *See id.* at 222. This claim is more fully developed in *Liberalism*, in *id.* at 181–204.

47. *Id.* at 230.

This rationale leaves us with a problem: which “distinct possibilities or opportunities of value” is it important to preserve? The state still has to decide that. The value of a large menu does not entail the presence on it of any item, or even of any class of items. Why support highbrow art, but not romance novels, karate movies, or pornography? These low cultural forms are not devoid of complexity,⁴⁸ and some of that complexity will be lost if the state does not act to preserve it.⁴⁹ If Dworkin is untroubled by the way in which the state picks and chooses, then it would seem that he is committed to the lofty view despite himself. If you reject the lofty view, then you ought to leave these matters to the market. The question of what forms of culture will survive would not be different in kind from the question of what forms of razor blade, or vacuum cleaner, or laundry detergent will survive.

One can similarly imagine a purely economic approach to the exemption question. Free exercise claims arise only because some valid laws will be able to achieve their purposes even if they are not uniformly enforced.⁵⁰ Some draft exemptions are tolerable, for instance, so long as enough recruits are still drafted to stock the army. Exemptions should then be regarded as a scarce resource. And when they are so regarded, the question inevitably arises, why not just auction them off?⁵¹

48. The complexity of various forms of pornography, for example, has been explored in LINDA WILLIAMS, *HARD CORE: POWER, PLEASURE, AND THE “FRENZY OF THE VISIBLE”* (rev. ed. 1999) and LAURA KIPNIS, *BOUND AND GAGGED: PORNOGRAPHY AND THE POLITICS OF FANTASY IN AMERICA* (1999). For an argument that First Amendment law has not adequately reckoned with this complexity, see Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005).

49. Thus, for example, Linda Williams’s history of pornography depends in part on fragmentary sources collected by the Kinsey Institute for Sex Research, which is one of the only collections of early stag films in existence. “Many of the films I wanted to see proved to be in a state of such decay that they could not be projected.” WILLIAMS, *supra* note 47, at 60. Had libraries been collecting these films when they were first produced, shortly after 1900, they would not be lost to us now.

50. The proportion of laws that fit this description is controversial. William Marshall thinks that “[t]he state interest in a challenged regulation will seldom be seriously threatened if only a few persons seek exemption from it,” because state interests are generally compelling “only in relation to cumulative concerns,” such as the pollution from large numbers of factories. William Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 312 (1991). The same is true of military conscription, taxes, and antidiscrimination laws. Brian Barry, on the other hand, argues that religious accommodations are only justified under

a combination of very precise conditions that are rarely satisfied all together. It must be important to have a rule generally prohibiting conduct of a certain kind because, if this is not so, the way in which to accommodate minorities is simply not to have a rule at all. At the same time, though, having a rule must not be so important as to preclude allowing exceptions to it. We are left with cases in which uniformity is a value but not a great enough one to override the case for exemptions.

BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* 62 (2001). For a critique of Barry’s view, see Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 157–58 n.257 (2002).

51. Or, if one is concerned about the unfairness of initial distributions of cash, give each person tradable exemption credits. Thanks to Max Schanzenbach for this suggestion.

C. *Protection Is Privileging*

Eisgruber and Sager justify their doctrine of equal regard in terms similar to Dworkin's justification of neutrality. Equal regard "holds that the interests and concerns of every member of the political community should be treated equally, that no person or group should be treated as unworthy or otherwise subordinated to an inferior status."⁵² These premises, they think, entail that "one's status as a member of our political community ought not to depend in any way upon one's religious beliefs."⁵³

The problem, for both Dworkin and Eisgruber-Sager, is that respect for a person is not the same as respect for his ends. There is a gap between the premise of equal concern and respect and the conclusion of neutrality. Preferences based on *who* people are necessarily violate equal concern and respect; views of *how* people ought to behave do not.⁵⁴ The equality that Eisgruber and Sager are concerned about is not precisely the equality of persons, or even of persons' preferences.

The real issue is that "religion does not exhaust the commitments and passions that move human beings in deep and valuable ways."⁵⁵ Their claim is really that all *deep and valuable* human concerns should be treated with equal respect. This principle is attractive. All preferences are not the same. George Kateb rejected Robert Nozick's libertarianism because "I find it impossible to conceive of us as having nerve endings in every dollar of our estate."⁵⁶ We do not have nerve endings in every one of our preferences, either. Some are more pressing than others. Some aim at ends that are unusually valuable. If two human undertakings are equally urgent or valuable, then this is a reason to treat both with equal regard.

But in order to operationalize this principle, we need to be able to make decisions about value. Indeed, we need to make such decisions whether we are following a privilege or a protection model of rights. The distinction between the two models, of privilege and protection, is less sharp than Eisgruber and Sager suggest. Deep commitments, in their view, ought to be privileged relative to shallow ones, but they should be protected from discrimination relative to one another.

To see how privilege and protection are intertwined with one another, consider a familiar rule of law: all adults and no infants may vote in elections. Under this rule, adults A and B may vote, while infant C

52. Eisgruber & Sager, *Unthinking Religious Freedom*, *supra* note 26, at 600–01.

53. *Id.* at 601.

54. See Gerald Dworkin, *Equal Respect and the Enforcement of Morality*, 7 SOC. PHIL. & POL'Y 180, 193 (1990). Respect for *some* ends *is* required by respect for persons, but as we shall see, Eisgruber and Sager do not adequately specify what these are. Ronald Dworkin does not even try to do so, instead claiming that the state must be neutral among *all* ideas of the good. See DWORIN, *supra* note 38, at 1.

55. Eisgruber & Sager, *The Vulnerability of Conscience*, *supra* note 9, at 1245 n.††.

56. George Kateb, *The Night Watchman State*, 45 AM. SCHOLAR 816, 824–25 (1975–76).

may not. A and B are thus privileged relative to C. If someone proposes to deny A the right to vote—say, because A is black, or female—this is discriminatory, and A is entitled to be protected from such a discriminatory rule. That rule would be wrong because it would impose an equality of the wrong sort: it would treat A as if she were (equal to) an infant. Guaranteeing the right to vote to both A and B protects each from discrimination relative to one another, but it also privileges both relative to C.

The continuity of privilege and protection explains why the unprincipled, ad hoc decision making that Eisgruber and Sager think characteristic of privileging⁵⁷ is also present with protection. They propose that each legislative accommodation “establishes a minimum against which the Constitution directs us to measure every other claim for accommodation: the government may not treat any individual’s deep personal interest less well than the one that it accommodates most favorably.”⁵⁸ But what does this mean in practice? Is Collar’s claim similar enough to Goldman’s to give him a similarly pressing claim for accommodation? Does a serious and thoughtful secular recreational user of hallucinogens (Aldous Huxley, for example⁵⁹) have as strong a claim as the native American peyote user? Judgments of this kind are not eliminated by Eisgruber and Sager’s principle. They are merely displaced to a different stage of the analysis.

The closest the Supreme Court has come to adopting an equal regard standard was a pair of draft exemption cases during the Viet Nam war. The Court held that allowing only theistic exemptions, but not exemptions for conscientious objectors who were uncertain about the existence of God, might violate the establishment clause.⁶⁰ The Court avoided privileging religious over nonreligious claims, but some privileging was going on. The argument should by now be familiar. Those who objected to going to war for family reasons, or even just because they did not want to risk getting hurt, had no constitutional claim at all. Once one has decided to give exemptions to some but not all claims, one is already privileging.

Thus, as noted earlier, one cannot say that the Religious Freedom Restoration Act is unconstitutional because it singles out religion and treats it as more valuable than other human activities. Eisgruber and Sager single out religion in just the same way. The difference is that they do not privilege religion alone. Religion is a subset of some larger group of human concerns, all of which have special value and none of which is

57. Eisgruber & Sager, *Religious Freedom Restoration Act*, *supra* note 32, at 452.

58. *Id.* at 458.

59. See ALDOUS HUXLEY, *THE DOORS OF PERCEPTION* (1954).

60. See *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965). The importance of the rule of avoidance is emphasized in separate opinions in those cases. See *Welsh*, 398 U.S. at 244–67 (Harlan, J., concurring in the result); *Seeger*, 380 U.S. at 188–93 (Douglas, J., concurring).

categorically superior to the others. In order to show that RFRA is unfair, we would have to compare its treatment of religion with the law's treatment of all other equally deep commitments. It is not clear how one could show this at the wholesale level. The Viet Nam exemption cases did manage to do it at retail, and they are obviously correct. The nontheistic conscientious objectors in those cases closely resemble, in all pertinent respects, the paradigmatic Quaker objector. Discriminating against them would be unfair. But what would the appropriate comparison set be for the whole universe of cases affected by RFRA? Until this is specified, it is not apparent how one could know whether religion is being privileged unfairly.

II. WHAT SHOULD BE PRIVILEGED?

A. *Equal Regard Is Not Utilitarianism*

Eisgruber and Sager have their own enfranchised class: deep commitments. They have no problem with privileging these relative to other commitments. It does not even occur to them to auction off legal exemptions. But they think that deep commitments ought to be protected from discrimination relative to one another.⁶¹

Thus, they part company with a familiar utilitarian principle:

- (1) Everyone's preferences should be given equal weight in political decision making.

Utilitarianism is in some ways the ultimate antiprivileging philosophy, and a comparison with it sheds useful light on Eisgruber and Sager's position. The argument for equal regard is superficially reminiscent of classical utilitarianism's insistence on the equal value of all human pleasures. Thus Bentham famously claimed that, so long as the pleasure was the same, the game of pushpin was as good as poetry.⁶² But if all pleasures are to be ranked alike, then we are back to welfare economics (which owes a lot to Bentham).

Eisgruber and Sager are not utilitarians. They want to be able to discriminate among classes of preference, as utilitarianism refuses to do.⁶³ Their claim is not that religion should never be valued above any other human inclination. This gives rise to obvious questions:⁶⁴ What is the

61. See Eisgruber & Sager, *The Vulnerability of Conscience*, *supra* note 9, at 1255.

62. See J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, in UTILITARIANISM: FOR AND AGAINST 1, 12 (1973).

63. In one formulation they appear to reject such discrimination: "Equal regard . . . holds that the interests and concerns [deep or otherwise?] of every member of the political community should be treated equally." Christopher L. Eisgruber & Lawrence G. Sager, *Equal Regard*, in LAW AND RELIGION: A CRITICAL ANTHOLOGY 200, 203 (Stephen M. Feldman ed., 2000); Eisgruber & Sager, *Unthinking Religious Freedom*, *supra* note 26, at 600-01. But this appears to be a slip.

64. These questions are pressed with particular force by Brian Barry, whose critique of religious accommodations rests crucially on his refusal to distinguish beliefs from other preferences. See BARRY, *supra* note 50, at 36.

basis for distinguishing those preferences that are to be privileged? And what is the justification for so privileging them?

Utilitarianism has been largely discredited as a political theory, and Eisgruber and Sager appear to be relying implicitly on some of the objections to utilitarianism's leveling tendencies. We have already encountered the most pertinent of these objections: some human concerns have more dignity and weight than others, and so they generate more pressing claims.

B. *Deep Preferences*

What Eisgruber and Sager propose is, in effect, a modified version of the utilitarian principle:

- (2) Everyone's *deep* preferences should be given equal weight in political decision making.

Principle (2) is one of both privilege and protection. The analytical structure is identical with that of the voting case we just considered. Deep preferences A and B are entitled to be privileged over shallow preference C. It would be a failure of equal regard, however, to treat A as if it were no more urgent than C. A is protected from discrimination relative to B, but privileged relative to C.

In order to determine what this principle means in practice, though, we need to determine what the adjective "deep" refers to. Eisgruber and Sager use "deep" more often than any other term to describe the preferences they would protect, but they do not explain what they mean by it.⁶⁵ We must therefore consider some possible specifications.

C. *Intense Preferences*

One possible candidate would focus on the intensity of a preference: a preference is deep if it is intensely felt. Justice Harlan once advocated this approach. If Congress is going to create exemptions, Harlan thought, it must show "equal regard for men of nonreligious conscience."⁶⁶ "The common denominator must be the intensity of moral conviction with which a belief is held."⁶⁷ This would yield:

65. Professor Eisgruber, who generously read a draft of this article, responds that this vagueness is "deliberate, because I mean the proposition to be neutral among various ways of filling out the concept—though I do mean to insist that there exist some 'comparably serious and fundamental' non-religious commitments." E-mail from Christopher L. Eisgruber to author (July 10, 2005) (on file with author). But in order for the principle to have any bite, it is necessary to specify what those commitments are. Unless that is done, one cannot possibly tell whether those commitments (whatever they are) are unfairly being treated less favorably than comparable religious commitments.

66. *Welsh v. United States*, 398 U.S. 333, 360 n.12 (1970) (Harlan, J., concurring in the result).

67. *Id.* at 358; *see also id.* at 366 (speculating that the policy of granting exemptions is based on "the assumption that beliefs emanating from a religious source are probably held with great intensity").

- (3) Everyone's *intense* preferences should be given equal weight in political decision making.

Thus, in Eisgruber and Sager's example described above, Sergeant Collar's desire not to wear a necktie is "deep" because his skin condition is such that a tie would be intensely uncomfortable. That desire is hardly a life-defining commitment, but it is a very strong one.

Relying on intensity, however, gives rise to the same kinds of difficulty as those raised by the somewhat similar standard of respect for "conscience," which Eisgruber and Sager explore.⁶⁸ Many distinguished legal theorists and philosophers have been drawn to the idea that it is conscience that is entitled to special protection.⁶⁹ The attraction of this position is that the person in the grip of conscience has such a strong need to act in accordance with it that he really has no other option. The aim of accommodation is "to prevent persons bound by moral duties they cannot renounce from having to violate either those duties or the law."⁷⁰ But this specification cannot be defended. One problem, highlighted by Eisgruber and Sager, is that conscience, like religion or welfare, can generate exorbitant demands. "Both good and evil can emanate from conscience: the feeding of the poor, perhaps, but also the purification of the caucasian race."⁷¹ The same is true of intense concern. Its objects, too, may be unworthy and dangerous.

Both intensity and conscience are overinclusive and underinclusive. We just saw the way in which they are overinclusive: they may include objects that are manifestly unworthy of special treatment. It is both unsurprising and untroubling that some intense concerns are vulnerable to discrimination, which here means devaluation by comparison with other, equally intense concerns. Consider heroin addiction, which is severely

68. Eisgruber & Sager, *The Vulnerability of Conscience*, *supra* note 9, at 1268–69.

69. See, e.g., KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* 98 (2005); WILLIAM A. GALSTON, *THE PRACTICE OF LIBERAL PLURALISM* 45–71 (2005); MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 65–71 (1996); Ira C. Lupu, *The Trouble With Accommodation*, 60 *GEO. WASH. L. REV.* 743 (1992); Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little "Conscience,"* 1996 *BYU L. REV.* 645; Rodney K. Smith, *Conscience, Coercion and the Establishment of Religion: The Beginning of an End to the Wanderings of a Wayward Judiciary?*, 43 *CASE W. RES. L. REV.* 917 (1993). The critique of conscience that follows is elaborated in Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions* (unpublished manuscript, on file with author).

70. SANDEL, *supra* note 69, at 68.

71. Eisgruber & Sager, *The Vulnerability of Conscience*, *supra* note 9, at 1269. Slavery and white supremacy have been understood, at various times, to represent aspirations of the highest order. See FORREST G. WOOD, *THE ARROGANCE OF FAITH: CHRISTIANITY AND RACE IN AMERICA FROM THE COLONIAL ERA TO THE TWENTIETH CENTURY* (1990); Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 *CONST. COMMENT* 271, 310–15 (1997).

A pointed illustration comes from a prison interview with Dan Lafferty, who, in response to a religious revelation reported to him by his brother Ron, murdered his sister-in-law and her fifteen-month-old daughter: "It was like someone had taken me by the hand that day and led me comfortably through everything that happened. Ron had received a revelation from God that these lives were to be taken. I was the one who was supposed to do it. And if God wants something to be done, it will be done. You don't want to offend Him by refusing to do His work." JON KRAKAUER, *UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH*, at xxi (2003).

discriminated against by the law. Some heroin addicts are unapologetic about their addiction and regard their consumption of the drug as a central concern in their lives. These users' concern does not entitle them to the kind of exemption available to the Native American peyote users. Another way that intensity is overinclusive is that it will give weight to a preference that the holder herself may not wish to satisfy. Many heroin users are severely alienated from their addiction and want desperately to be rid of it.

The underinclusiveness is even more striking. Many religious claims that are uncontroversially weighty, and which nearly everyone would want to accommodate, are neither conscientious nor intensely felt. The emphasis on conscience focuses excessively on duty.⁷² Many and perhaps most people engage in religious practice out of habit, adherence to custom, or happy religious enthusiasm, rather than a sense of obligation or fear of divine punishment.⁷³ A paradigm case for religious exemption, for most proponents of such exemptions, is the use of peyote by the Native American Church, which the Supreme Court declined to protect in *Employment Division v. Smith*.⁷⁴ Yet neither of the claimants in *Smith* was motivated to use peyote by religious conscience. Al Smith was motivated primarily by interest in exploring his Native American racial identity, and Galen Black was merely curious about the Church.⁷⁵ Smith's motivation was intense. Black's was not.

Conscience is also underinclusive because it covers only those cases in which the agent feels impelled by a duty that she is capable of performing alone and unaided. (Intensity does not have this problem: principle (3) will cover my intense desire for you to take a certain action.) "Conscience" is a poor characterization of the desire of a church to expand its building to be able to hold its growing congregation, as in *City of Boerne v. Flores*.⁷⁶ Conscientious objection was not an option. The reconstruction could not be done without the help of architects and contractors, whom the city could prevent from doing the work merely by withholding the necessary permits. The problem is even more pronounced in *Lyng v. Northwest Indian Cemetery Protective Association*, in which Native Americans objected to a proposed logging road that would

72. There is some evidence that, at the time the First Amendment was written, "conscience" referred only to beliefs and not to behavior. See MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 82–84 (2002). If conscience is understood in this way, then it is discontinuous with, rather than a wellspring of, a duty to act in certain ways. (Thanks to Martha Nussbaum for raising this objection.) But this is not the view of modern defenders of freedom of conscience, and in contemporary usage, conscience is above all a source of duties. See *supra* note 69.

73. See Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 25–26; Marshall, *supra* note 50, at 321.

74. 494 U.S. 872, 882 (1990).

75. See Garrett Epps, *To an Unknown God: The Hidden History of Employment Division v. Smith*, 30 ARIZ. ST. L.J. 953, 959–64, 981–82 (1998).

76. 521 U.S. 507 (1997) (challenge, based on Religious Freedom Restoration Act of 1993, against local zoning ordinances that would restrict remodeling of church).

pass through an ancient worship site that was sacred to their tribe.⁷⁷ The logging road, the Court conceded, would “virtually destroy” the ability of the Native Americans “to practice their religion.”⁷⁸ Nonetheless, the Court, evidently persuaded that exemptions had to be based on conscience, held that there was no constitutionally cognizable burden, because the logging road had “no tendency to coerce individuals into acting contrary to their religious beliefs.”⁷⁹

The basic problem is that if “deep” in principle (2) is interpreted to mean “intense,” as in (3), then it collapses back into (1). Bentham, whose philosophy is now regarded as a paradigm of excessively crude utilitarianism (most modern utilitarians are much more sophisticated),⁸⁰ did not think that pleasures and pains were identical in weight, but thought that they could be distinguished by their intensity, duration, certainty or uncertainty, propinquity or remoteness, and likelihood of being followed by sensations of a like or of an opposite kind.⁸¹ An auction is still the best way of addressing these complexities. Those who have more intense preferences presumably will pay more to have those preferences satisfied.

D. Valuable Preferences

The Sergeant Collar example notwithstanding, Eisgruber and Sager probably do not mean to refer to intensity alone. Though they usually refer to people’s “deep” commitments, a few passages put the point in other terms: they write that religion should not be privileged “by comparison to comparably serious secular commitments,”⁸² that “religion does not exhaust the commitments and passions that move human beings in deep and valuable ways,”⁸³ and that “religious practices enjoy a dignity equal to other deep human convictions (such as the love parents feel for their children).”⁸⁴ Perhaps the rule they really have in mind is this:

- (4) Everyone’s *valuable* preferences should be given equal weight in political decision making.

The trouble with this formulation, however, is that it too collapses into (1). Any preference has *some* value just because it is held by someone. My desire for a vanilla ice cream cone is not especially intense, se-

77. 485 U.S. 439, 442–45 (1988).

78. *Id.* at 451.

79. *Id.* at 450.

80. For a taxonomy of utilitarian positions, see WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 13–20 (2d ed. 2002).

81. See JEREMY BENTHAM, *The Psychology of Economic Man*, in 3 JEREMY BENTHAM’S *ECONOMIC WRITINGS* 421, 435 (W. Stark ed., 1954).

82. Eisgruber & Sager, *The Vulnerability of Conscience*, *supra* note 9, at 1271; see also Eisgruber & Sager, *Congressional Power*, *supra* note 29, at 104 (referring to “other, comparably serious commitments”).

83. Eisgruber & Sager, *The Vulnerability of Conscience*, *supra* note 9, at 1245 n.††.

84. Eisgruber & Sager, *Congressional Power*, *supra* note 29, at 114.

rious, or committed, but the fact that I want one counts as a reason why I should have it. (That is the valid core of utilitarianism and is why its approach, worthless as a complete political philosophy, remains a useful premise for so much economic analysis.) So this principle is just utilitarianism again. To get beyond this, we should consider more carefully what is wrong with utilitarianism.

E. *Strong Evaluation*

Utilitarianism is an indefensible moral theory because it treats all preferences the same, and nobody actually does that—not even people who claim to be utilitarians.⁸⁵ Rather, ordinary practical reasoning relies on the distinction, articulated by Charles Taylor, between strong and weak evaluation. Strong evaluation involves “discriminations of right or wrong, better or worse, higher or lower, which are not rendered valid by our own desires, inclinations, or choices, but rather stand independent of these and offer standards by which they can be judged.”⁸⁶ Thus, for example, I may “refrain from acting on a given motive—say, spite, or envy—because I consider it base or unworthy.”⁸⁷ A person who did not make any such discriminations, a “simple weigher of alternatives,”⁸⁸ would be a very strange sort of person; it is not clear whether there could be a person so lacking in depth.⁸⁹

The language of seriousness, value, and dignity suggests that Eisgruber and Sager are not utilitarians at all, not even (as the implications of “deep” that we have just explored would have it) utilitarians of a complicated sort, but instead are relying on something like Taylor’s idea of strong evaluation.⁹⁰ If this is correct, then their unstated premise would be

85. For an elaboration of utilitarianism’s failings in this regard, see Bernard Williams, *A Critique of Utilitarianism*, in *UTILITARIANISM: FOR AND AGAINST* 75, 75–150 (1973).

86. CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 4 (1989).

87. CHARLES TAYLOR, *What is Human Agency?*, in *HUMAN AGENCY AND LANGUAGE: PHILOSOPHICAL PAPERS* 1, 16 (1985).

88. *Id.* at 23.

89. TAYLOR, *supra* note 86, at 27; TAYLOR, *supra* note 87, at 28. Even utilitarians who are officially committed to such simple weighing tend to be animated by motives of a loftier sort; they cannot account for their own existence. If all human motivation is reducible to the pursuit of pleasure, then why should a utilitarian care (and regard herself as obligated to care) about the suffering of others? TAYLOR, *supra* note 86, at 76–86, 322–45. That preferences differ in dignity and weight is argued in T.M. Scanlon, *Preference and Urgency*, 72 *J. PHIL.* 655 (1975). Taylor’s terminology of strong evaluation is one possible specification of Scanlon’s more general point.

90. The evaluative component of Eisgruber and Sager’s standard is highlighted if it is compared with the rationale for exemptions proposed by Jeremy Waldron, who focuses on the fact that minority cultures typically have their own systems of regulation, and that a person’s allegiance to such a system has *social* reality; it is not just a matter of subjective conviction. Because of the positive existence of a scheme of regulation rivaling the state law, the person we are considering is already under a socially-enforced burden, established as part of an actual way of life, a burden grounded in the actually-existing and well-established regulation and coordination of social affairs afforded by a re-

- (5) Everyone's *strong evaluations* should be given equal weight in political decision making.

This premise entails a kind of neutrality, but one very different from Dworkin's. Neutrality is possible at many different levels of abstraction. Until the level of abstraction is specified, we will not know what "neutrality" means.⁹¹ We have already canvassed some possibilities: the state can be neutral among preferences, as the utilitarians propose, or among deep commitments, or among valuable commitments, or among objects of strong evaluation, or in other ways.

III. HOW TO SINGLE OUT RELIGION

A. *The Fluidity of Religious Neutrality*

To determine the proper level of neutrality with respect to religious accommodation, begin by considering more generally the level of neutrality required of the state by the religion clauses of the First Amendment, taken together.⁹² Defining this level of neutrality has long been regarded as a puzzle. The Court has declared that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."⁹³ But the Court has also acknowledged that "the Free Exercise Clause, . . . by its terms, gives special protection to the exercise of religion."⁹⁴

Eisgruber and Sager make a similar point. Government, they note, is specifically forbidden from subsidizing religious activity as such.⁹⁵ This

religious or a cultural tradition. Others claiming an exemption simply as a matter of liberty or personal conscience might not be under any burden comparable to that.

Jeremy Waldron, *One Law for All? The Logic of Cultural Accommodation*, 59 WASH. & LEE L. REV. 3, 24 (2002). Waldron acknowledges that this rationale does not correspond to established constitutional doctrine. *Id.* at 22. Not only does established doctrine single out religion; it also accommodates even religious beliefs that are idiosyncratic and not shared by the objector's faith community. *See, e.g.*, *Thomas v. Review Bd.*, 450 U.S. 707, 713–16 (1981) (sustaining refusal of military work by a Jehovah's Witness, even though other Witnesses found such work acceptable). Eisgruber and Sager similarly are not interested in cultural rootedness; they are interested in seriousness, value, and dignity. Present doctrine—and Eisgruber and Sager—depends on the value of the objector's commitment, not the fact that it is embedded in some community's norms. If idiosyncratic religions are worth protecting, then Waldron's criterion is underinclusive.

On the other hand, if what concerns Waldron is the weight of the burden, then his criterion is both overinclusive and underinclusive, in just the way that "conscience" is. *See supra* text accompanying notes 71–79.

91. *See* Andrew Koppelman, *The Fluidity of Neutrality*, 66 REV. POL. 633 (2004).

92. The text of the Amendment states that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

93. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

94. *Thomas v. Review Bd.*, 450 U.S. at 713; *see also* *Marsh v. Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting) ("[I]n one important respect, the Constitution is *not* neutral on the subject of religion: under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional rights that other strongly held beliefs do not.")

95. Eisgruber & Sager, *Congressional Power*, *supra* note 29, at 106.

is a problem for any religious exemption. “There is no sound reason to distinguish subsidies from exemptions that alleviate purely financial burdens (and thereby provide a financial benefit). If it is impermissible to prefer religion in one setting, it cannot be mandatory to prefer it in the other.”⁹⁶ In many religious exemption cases, notably zoning cases, “the burdens upon religious exercise reduce to considerations of cost and convenience.”⁹⁷

It is not logically possible for the government both to be neutral between religion and nonreligion and to give religion special protection. Some justices and many commentators have therefore regarded the First Amendment as in tension with itself.⁹⁸

This apparent tension can be resolved in the following way.⁹⁹ Begin with an axiom: The Establishment Clause forbids the state from declaring religious truth. One principal reason why it is so forbidden is because it is incompetent to determine the nature of this truth. “The one only narrow way which leads to heaven is not better known to the magistrate than to private persons,” Locke wrote, “and therefore I cannot safely take him for my guide who may probably be as ignorant of the way as myself, and who certainly is less concerned for my salvation than I myself am.”¹⁰⁰ Madison wrote that the idea “that the Civil Magistrate is a competent Judge of Religious Truth” is “an arrogant pretension falsified by the contradictory opinions of Rulers in all ages.”¹⁰¹ The idea of state incompetence is reinforced by evidence that state sponsorship tends to diminish respect for religion.¹⁰²

This incompetence entails that the state may not favor one religion over another. It also bars the state from taking a position on contested theological propositions, such as whether God exists.¹⁰³ (There is an ex-

96. *Id.* at 107.

97. *Id.*

98. As the Court put it in its most recent pronouncement, “the two Clauses . . . often exert conflicting pressures.” *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2120 (2005).

99. The following discussion summarizes an argument first made in Koppelman, *supra* note 50, at 129–38. This account of the Establishment Clause is also developed in Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713 (2001); Andrew Koppelman, *No Expressly Religious Orthodoxy: A Response to Steven D. Smith*, 78 CHI-KENT L. REV. 729 (2003); Andrew Koppelman, *On the Moral Foundations of Legal Expressivism*, 60 MD. L. REV. 777 (2001); and Andrew Koppelman, *Akhil Amar and the Establishment Clause*, 33 U. RICH. L. REV. 393 (1999).

100. JOHN LOCKE, A LETTER CONCERNING TOLERATION 32 (Patrick Romanell ed., William Popple trans., 1950) (1689).

101. James Madison, *Memorial and Remonstrance Against Religious Assessments*, in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 5, 9 (Marvin Meyers ed., rev. ed. 1981).

102. See, e.g., ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 294–301, 442–49 (George Lawrence trans., J.P. Mayer ed., Anchor ed. 1969) (1835).

103. There is, of course, a substantial minority faction on the Supreme Court that holds the contrary. In *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005), Justice Scalia, joined by as many as three of his colleagues, has proposed that the state may endorse the idea that God exists, thus “contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs.” *Id.* at 2752–53 (Scalia, J., dissenting, joined by Rehnquist, C.J. and Thomas, J.). Justice Kennedy did not join this part of Scalia’s dissent, but he joined a later part declaring that the Ten

ception for the “de facto establishment,” confined to public rituals of long standing whose religious content is sufficiently bland, but in its nature this exception cannot permit any new instances.¹⁰⁴)

A second classic reason for barring the state from declaring religious truth is civil peace: in a pluralistic society, we cannot possibly agree on which religious propositions the state should endorse. The argument for government agnosticism is that, unlike government endorsement of any particular religious proposition, it is not in principle impossible for everyone to agree to it.¹⁰⁵

A final reason for getting the state out of the religion business is respect for individual conscience. This argument states that the individual’s search for religious truth is hindered by state interference.

It is, however, possible for the state, without declaring religious truth, to favor religion at a very abstract level. The Court noticed this in *Texas Monthly v. Bullock*¹⁰⁶ when it invalidated a law that granted a tax exemption to theistic publications, but not atheistic or agnostic publications. Justice Brennan’s plurality opinion thought that a targeted exemption would be appropriate for publications that “sought to promote reflection and discussion about questions of ultimate value and the contours of a good or meaningful life.”¹⁰⁷ Justice Blackmun thought it permissible for the state to favor human activity that is specially concerned with “such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong.”¹⁰⁸ What is impermissible is for the state to decide that one set of answers to these questions is the correct set.¹⁰⁹

Commandments “are assuredly a religious symbol, but they are not so closely associated with a single religious belief that their display can reasonably be understood as preferring one religious sect over another. The Ten Commandments are recognized by Judaism, Christianity, and Islam alike as divinely given.” *Id.* at 2762. In response to Justice Stevens’s objection that different versions of the commandments are endorsed by different religious groups, Scalia (here also joined by Rehnquist, Thomas, and Kennedy) wrote that “[t]he sectarian dispute regarding text, if serious, is not widely known. I doubt that most religious adherents are even aware that there are competing versions with doctrinal consequences (I certainly was not).” *Id.* at 2762 n.12. Justice Scalia thus envisions a role for the Court in which it decides which articles of faith are sufficiently widely shared to be eligible for state endorsement. Christians, Jews, and Muslims are in; Hindus, Taoists, and Buddhists are out. Scalia’s suggestion that the Court should now begin compiling a list of permissible official articles of faith flatly contradicts his claim that “I have always believed, and all my opinions are consistent with the view, that the Establishment Clause prohibits the favoring of one religion over others.” *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 748 (1994) (Scalia, J., dissenting). Perhaps Justice Scalia means to say that the state may not favor Christianity over Islam, but then difficulties are presented as to what “one religion” is. Is Christianity one religion or many?

104. Koppelman, *supra* note 50, at 152–55.

105. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 322 (1996).

106. 489 U.S. 1 (1989).

107. *Id.* at 16 (Brennan, J., plurality, joined by Marshall and Stevens, JJ.).

108. *Id.* at 27–28 (Blackmun, J., concurring, joined by O’Connor, J.).

109. Other cases that insist on understanding religion at a similar level of abstraction include *Welsh v. United States*, 398 U.S. 333 (1970), *United States v. Seeger*, 380 U.S. 163 (1965), and *Torcaso v. Watkins*, 367 U.S. 488 (1961).

But the state can abstain from endorsing any diagnosis of or prescription for the universal human problem while acknowledging that there *is* a problem, and that efforts to address it have a distinctive kind of value. Not all human activities attempt to respond to the fundamentally flawed character of human existence. Indeed, most human activities are to some extent an effort to distract oneself from the problem. The establishment clause permits the state to favor religion so long as “religion” is understood very broadly, to encompass all efforts to address the fundamental human problem, while forbidding any discrimination or preference among them.¹¹⁰ The state is incompetent to determine the soundness of any diagnosis or the efficacy of any prescription.

B. Judge McConnell's Solution

Because the state must not declare religious truth, it cannot say, as McConnell does, that religion is privileged because it involves a duty to God. He claims that religion is unique because “[n]o other freedom is a duty to a higher authority.”¹¹¹ Even those who do not believe in God should understand the value of avoiding “conflicts with what are perceived (even if incorrectly) as divine commands.”¹¹² But this approach holds that there is something special, indeed uniquely special, about divine commands, that distinguishes them from other reasons for resistance that may be just as exigent to the person who feels the pinch of the law. Exemptions thus conceptualized could only be available to theistic religions, because only those religions can generate the unique source of moral authority that McConnell's theory demands.

The constraint understood by McConnell is narrower even than conscience, which we considered and rejected earlier as the basis of exemptions, in part because it was over- and underinclusive. McConnell's constraint singles out certain ends and privileges them on the basis of frankly theological considerations. It only makes sense in terms of the thin (but alas, not thin enough) theology that Justice Scalia would allow states to endorse: “a benevolent, omnipotent Creator and Ruler of the world.”¹¹³ The divine-command rationale is thus an inappropriate basis for public policy.¹¹⁴ (It also does not justify the whole range of religious exemptions. It is not only that some religions are nontheistic. Even for the theistic ones, as noted earlier, not all religious activities are divinely

110. Accommodation of religion thus need not presume that religion is better than any other human concern, as Frederick Gedicks thinks. See Gedicks, *supra* note 3, at 567–68. It need only presume that religion is more valuable than *some* other human concerns.

111. McConnell, *supra* note 22, at 30; see also Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1151–52 (1990).

112. McConnell, *supra* note 22, at 30.

113. *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

114. McConnell emphasizes that government is forbidden to declare religious truth, see McConnell, *supra* note 22, at 23–28, but he does not resolve the tension between this idea and the idea that religious exercise is privileged because it is a duty to God.

commanded, capable of being obeyed by unaided individuals, or matters of conscientious obligation.)

Finally, the kind of conflict between law and conscience that McConnell cites is not uniquely religious. He thinks that a religious basis makes dissent from the law especially urgent for the believer, but an obligation to resist law's claims can as easily be derived from the idea of the autonomous individual, liberated from accountability to any higher authority.¹¹⁵

McConnell offers a better argument elsewhere when he emphasizes that religion is a good that is not commensurable with or reducible to any other. There have been numerous attempts to define the basis of religious exemption in secular terms, as a good that is not distinctively religious (and whose religious manifestations therefore ought not to receive special treatment). McConnell rejects all such attempts:

Religion is a special phenomenon, in part, because it plays such a wide variety of roles in human life: it is an institution, but it is more than that; it is an ideology or worldview, but it is more than that; it is a set of personal loyalties and locus of community, akin to family ties, but it is more than that; it is an aspect of identity, but it is more than that; it provides answers to questions of ultimate reality, and offers a connection to the transcendent; but it is more than that. Religion cannot be reduced to a subset of any larger category. In any particular context, religion may appear to be analogous to some other aspect of human activity—to another institution, worldview, personal loyalty, basis of personal identity, or answer to ultimate and transcendent questions. However, there is no other human phenomenon that combines all of these aspects; if there were such a concept, it would probably be viewed as a religion.¹¹⁶

This is a more promising approach. The state cannot regard religion as a superior source of moral obligation. It must be agnostic on that question. What it can say is that religion is one of a plurality of goods. It should, indeed, treat all of those goods, all the objects of strong evaluation, with equal regard. But if it is going to do that, then it should notice that religion is not reducible to any other good.¹¹⁷ This is why Eisgruber and Sager are mistaken in thinking that equal regard forbids rules specifically privileging religion.

The great strength of Eisgruber and Sager's view is that religion is not categorically superior to other human goods, and McConnell, when he insists on the uniqueness of religion, sometimes comes close to claiming such categorical superiority. Taylor's analysis of the phenomenology

115. See ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* (1976).

116. McConnell, *supra* note 22, at 42.

117. The idea that religion is an irreducible human good is argued in JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 89–90 (1980). Finnis's specification of this good is inappropriately theistic, see Koppelman, *supra* note 50, at 130–31, but the general point is correct and, in this context, crucial.

of strong evaluation observes that some goods do present such claims of priority. In our ordinary moral reasoning, “we acknowledge second-order qualitative distinctions which define higher goods, on the basis of which we discriminate among other goods, attribute differential worth or importance to them, or determine when and if to follow them.”¹¹⁸ Taylor calls such higher goods “hypergoods.”¹¹⁹ Religious belief is one such hypergood, but there are also secular hypergoods, such as the ideal of universal benevolence and respect. The weight of hypergoods is controversial. A common complaint against hypergoods is that they require too heavy a sacrifice of the goods they subordinate. Taylor thinks that the central problem of modern morality is the search for “a way in which our strongest aspirations for hypergoods do not exact a price of self-mutilation.”¹²⁰

Religion is a distinctive kind of hypergood, because it attempts to respond to the inadequacy of human existence as a whole. All religions take human life to be flawed in some fundamental way, and offer a prescription that claims to address this fundamental defect.¹²¹ Religion, thus understood, has a value that can override many other goods and preferences. But religion is one among many hypergoods. It should not be privileged over the rest of them. This fundamental problem of modernity should not be adjudicated by the state. The problem of determining the appropriate hypergood, if any, and its reconciliation with the broad range of ordinary goods, is a question that occupies the same existential territory as religion. If the state is incompetent to resolve religious questions, it is likewise incompetent to resolve this one.

C. *Making Religious Impact Relevant*

Given the diversity of human goods, there is sometimes good reason to entrench respect for some of them by institutional mechanisms to ensure that these goods retain their privileged status. Judicial protection is one such mechanism, and the proliferation of RFRA reflects a widely shared judgment that it is an appropriate mechanism for protecting religion. But there are others. The intrinsic value of natural beauty and undisturbed ecological patterns are protected by the requirement that major federal projects be accompanied by environmental impact statements.¹²² The Americans with Disabilities Act requires architects to consider the exercise of limited human powers in circumstances they might otherwise have overlooked.¹²³ Even efficiency is protected, for ex-

118. TAYLOR, *supra* note 86, at 63.

119. *Id.*

120. *Id.* at 106–07.

121. See Koppelman, *supra* note 50, at 125–39.

122. See 42 U.S.C. § 4332(C) (2000).

123. See 42 U.S.C. § 12112(b)(5)(A) (defining prohibited discrimination to include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified in-

ample by the dormant commerce clause doctrine, which requires judges to engage in just the kind of weighing of incommensurables that they do in religious exemption cases.¹²⁴ And so forth.

Put in the context of the broad range of privileging laws, the judicial protection of religion is hardly unique, and it is far from clear that it singles out religion in an unfair way. The fact that religion is singled out, without more, tells us nothing about whether other, equally valuable goods are being discriminated against.¹²⁵ In order to determine that, we would have to see what weight the political system was assigning to religion, and compare it with the treatment of all other goods. In our earlier voting example, the fact that adult B was given a right to vote that was denied to infant C told us nothing about whether A was being wrongly discriminated against. In order to know that, we would need to know whether A was an adult and whether A could vote or not.

Moreover, any plausible proposal to privilege religion would confer, not an absolute immunity from legal regulation, but a balancing test that sometimes upholds and sometimes rejects the religious liberty claim.¹²⁶ Eisgruber and Sager point out that some courts are giving unreasonably great weight to religion.¹²⁷ But this is not an objection to balancing as such. Balancing tests come in a variety of flavors; some are very deferential to asserted state interests,¹²⁸ while others are nearly impossible to satisfy.¹²⁹

To whatever extent religion is *constitutionally* protected, it does get something that is not available to environmental protection, the accommodation of disabilities, or the unimpeded movement of interstate commerce. This might suggest that judicial protection of religion is unfair.

dividual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity”).

124. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citation omitted):

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

125. For a similar argument, see McConnell, *supra* note 22, at 32–33.

126. The Court has recently suggested that such a balancing test, which gives religion some but not absolute weight, may be the most that the Establishment Clause permits. It noted that it had earlier invalidated a law giving Sabbatarians an absolute right not to work on their Sabbath because the law “‘unyielding[ly] weigh[ted]’ the interests of Sabbatarians ‘over all other interests,’” while the RLUIPA, which it upheld, would likely “‘be applied in an appropriately balanced way.” *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2123 (2005) (quoting *Thornton v. Caldor*, 472 U.S. 703, 710 (1985)).

127. See Eisgruber & Sager, *Congressional Power*, *supra* note 29, at 105–09.

128. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (deferential balancing test for content-neutral regulations of the time, place, and manner of speech); *United States v. O’Brien*, 391 U.S. 367, 376–82 (1968) (deferential balancing test for governmental regulation of conduct that incidentally burdens freedom of expression).

129. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (racial classifications presumptively unconstitutional). But see *Grutter v. Bollinger*, 539 U.S. 306 (2003) (effectively relaxing that presumption).

That is essentially what the Supreme Court concluded in *Employment Division v. Smith*,¹³⁰ when it held that religious accommodation was, as a general matter, a legislative question. But one might also give religion judicial protection because one regards it as handicapped in the lawmaking process, perhaps because minority religions are likely to be the object of prejudice. It might be (this is Eisgruber and Sager's view) that religion needs judicial protection in order to be treated no better and no worse than other equally worthy pursuits. Adjudicating this controversy is, once more, beyond the scope of the present paper.

D. *A Presumption of Noninterference*

Principle (5), which requires that all strong evaluations be given equal weight in political decision making, is not a rule of decision, but a background principle to guide such decision making. A better candidate for such a rule is a principle proposed by William Galston:

- (6) "Liberalism requires a robust though rebuttable presumption in favor of individuals and groups leading their lives as they see fit, within a broad range of legitimate variation, in accordance with their own understanding of what gives life meaning and value."¹³¹

Galston's principle is quite different from the utilitarianism of principles (1), (2), (3), and (4). In order to be equivalent to those principles, it would have to refer in the final clause to "their own preferences" rather than "their own understandings of what gives life meaning and value." Galston's formulation is superior because it is responsive to the demands of strong evaluation; it does not treat all preferences as identical.

But Galston's formulation would still be unworkable if one tried to use it as a rule. A claim that a desire should be given weight because of its place in the holder's understanding of life's meaning and value is still too abstract to be handled by courts. It is all courts can do to figure out whether a claim is religious.¹³² Galston's formulation should not be understood as a rule, but as a rule-generating device, "a set of factors that courts [or other rule makers] should consider in defining the more precise rules."¹³³ It motivates more particular rules, that protect, e.g., natural beauty, the capabilities of the handicapped, consumer preference, conscience, identity, the freedom of the mind, sexuality—or religion.

130. 494 U.S. 872, 890 (1990).

131. WILLIAM A. GALSTON, *LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY* 3 (2002).

132. See George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 *GEO. L.J.* 1519 (1983); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 *CAL. L. REV.* 753 (1984); Eduardo Peñalver, Note, *The Concept of Religion*, 107 *YALE L.J.* 791 (1997).

133. I borrow this distinction from EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* 699 (2d ed. 2005).

Each of these lesser rules might generate the objection that it is *too* particular, and unfair to comparable goods. But since Galston's rule is not administrable as a rule, more particular rules are unavoidable. All that the state can do, in order to satisfy the principle of equal regard, is to try to fashion the rules in such a way as to honor all of the various categories of morally serious endeavor.

All one needs to say, in order to justify distinctive treatment of religion, is that religion is a category that may be relevant to legitimate legislative purposes. Legal categories are almost always somewhat over- and under-inclusive. Some fifteen-year-olds are better drivers than some eighteen-year-olds, but a minimum driving age is not unconstitutional.¹³⁴

Galston has noted several pertinent consequences of the view that there is a plurality of incommensurable human goods. "These qualitatively distinct values cannot be fully rank-ordered; there is no summum bonum that enjoys a rationally grounded priority for all individuals."¹³⁵ Nonetheless, "[d]eliberative argument can provide reasons for choices among qualitatively different claims even when no common measure of value is available."¹³⁶ Galston, who was President Clinton's Deputy Assistant for Domestic Policy, observes that many of the policy issues he confronted presented this heterogeneity of considerations, but "I found it remarkable how often we could reach deliberative closure in the face of this heterogeneity."¹³⁷

Our practice is consistent with equal regard because there is no other way to accommodate the variety of goods that are subject to strong evaluation. They have to be accommodated at retail, not wholesale.

E. Nussbaum's Capabilities Approach

Principles (1) through (5) all concern the process of political decision making, and instruct the state to give equal weight to all concerns that fit a certain description. They are not, however, theories of distributive justice, but rather are constraints on whatever distributive principles one might (on other grounds) choose to adopt. Principle (6) has more practical bite, indicating that all people should have the means to pursue their understandings of life's meaning. That has distributive implications, but they are only implications. How would our conclusion fit in with a more fully worked out theory of distributive justice?

134. Justice Oliver Wendell Holmes remarked long ago that "the machinery of government would not work if it were not allowed a little play in its joints," and that equal protection involves "not a geometrical equation between [a party and other similarly situated individuals], but whether the difference does injustice to the class generally, even though it bear hard in some particular case." *Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 501 (1931).

135. GALSTON, *supra* note 131, at 31.

136. *Id.* at 35.

137. *Id.* at 7.

In this section, I will argue that principle (6) is implicitly honored, and as a consequence religion is singled out for special treatment, by the theory of distributive justice that has been developed by Martha Nussbaum, perhaps the most prominent political theorist addressing such issues today. Nussbaum has been powerfully influenced by the same concern about fairness that animates the work of Eisgruber and Sager, and she has similarly attempted to resolve it by giving no special treatment to religion.¹³⁸ But, in the end, she has found it impossible to avoid such special treatment.

John Rawls observes that in order to develop any theory of distributive justice, we need to know what we are distributing. His answer to this problem was a “thin theory of the good,” a list of items that any rational person would want in order to carry out any plan of life: income and wealth, rights and liberties, and the social bases of self-respect.¹³⁹ Whatever else they wanted, persons would want more rather than less of these “primary goods.”¹⁴⁰ These primary goods, he concluded, should be distributed equally, unless (in order to provide the necessary incentives for a capitalist economy, for example) an unequal distribution of any or all of these goods is to the advantage of the least favored.¹⁴¹ In his later work, he qualified that view by saying that the primary goods are not all-purpose means, but rather citizens’ needs understood from a political point of view as necessary to the development and expression of their moral powers.¹⁴²

Amartya Sen objected that primary goods do not necessarily translate into either well-being or freedom.¹⁴³ Primary goods have different value for different people.¹⁴⁴ The same bundle of goods will give much more freedom to a healthy young man than it will to a pregnant woman or a paraplegic. What is really relevant to the realization of people’s varying life plans is capability. We should not ask whether people have primary goods. We should ask what they are capable of doing.¹⁴⁵

Sen, however, has declined to specify which capabilities are the most important ones. Nussbaum argues that this deprives Sen’s theory of the power to decide concrete questions of distributive justice.¹⁴⁶ Some capabilities limit others. There are not enough resources to promote

138. See, e.g., MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 206–12 (2000) [hereinafter *NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT*].

139. JOHN RAWLS, *A THEORY OF JUSTICE* 303, 396–97 (1971).

140. *Id.* at 395–99.

141. *Id.* at 302–03.

142. JOHN RAWLS, *POLITICAL LIBERALISM* 75–76 (rev. paperback ed. 1996).

143. AMARTYA SEN, *INEQUALITY REEXAMINED* 27 (1992).

144. *Id.*

145. See *id.* at 26–28; Amartya Sen, *Justice: Means Versus Freedoms*, 19 *PHIL. & PUB. AFF.* 111 (1990).

146. Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 *FEMINIST ECONOMICS* 33, 35 (2003).

every human capability. So we must decide which capabilities are most important. A capability-based theory must set priorities.¹⁴⁷

Nussbaum addresses this problem by offering a list of capabilities that, she claims, are most important. Its elements include the ability to live a life of normal duration, the ability to have good health, the ability to move about freely, freedom from violence, reproductive choice, the ability to imagine, think and reason, the ability to laugh and play, political and property rights on an equal basis with others, and many others.¹⁴⁸ In his later work, Rawls summarily suggested that a basic minimum might be lexically prior to any other principles of distributive justice.¹⁴⁹ Nussbaum is pursuing the same idea: her list of capabilities is not a complete theory of distributive justice, but a basic minimum that should be available to everyone.¹⁵⁰ “[I]n certain core areas of human functioning a necessary condition of justice for a public political arrangement is that it deliver to citizens a certain basic level of capability.”¹⁵¹ A central goal of political action, then, should be to provide all people with all the capabilities on her list.

Religious capabilities are among the important ones. “To be able to search for an understanding of the ultimate meaning of life in one’s own way is among the most important aspects of a life that is truly human.”¹⁵² But Nussbaum is unwilling to say that religion is a separate basic capability. “Because the religious capabilities have multiple aspects, I have included them among the capabilities of the senses, imagination, and thought, and also in the category of affiliation.”¹⁵³

She worries, in the same way that Eisgruber and Sager do, about unfairly singling out religion for special benefit. She wants to “leave to citizens the choice whether to pursue the pertinent human functions at all, and whether to pursue them through religion or through secular activity.”¹⁵⁴ There is sometimes a case for accommodation, she thinks, but “[t]he fea-

147. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 138, at 11–15; Nussbaum, *supra* note 146 *passim*.

148. The list appears in many of Nussbaum’s writings. One recent version is included in NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 138, at 78–80.

149. See JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 44 n.7 (2001); RAWLS, *supra* note 142, at 7.

150. Nussbaum writes:

The notion of a threshold is more important in my account than the notion of full capability equality: as I argue, we may reasonably defer questions about what we shall do when all citizens are above the threshold, given that this already imposes a taxing and nowhere-realized standard. Thus my proposal is intended to be compatible with several different accounts of distribution above the threshold; it is consequently a partial, rather than a complete, theory of just distribution.

NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 138, at 12.

151. *Id.* at 71.

152. *Id.* at 179.

153. *Id.*

154. *Id.* at 180.

tures that make religion worthy of deference are frequently found in nonreligious belief-systems and practices."¹⁵⁵

A political-liberal political conception based on an idea of human capability should not play favorites among the comprehensive conceptions of the good citizens may reasonably hold; my approach reflects this by making religion one of the permissible ways of pursuing a wide variety of human capabilities, rather than a separate capability all its own¹⁵⁶

Nussbaum proposes to address the problem of potential unfairness in the following way: "First, we confine the explicit area of potential exemptions to religion; but we allow religion to be somewhat broadly defined, including non-theistic belief systems . . . It remains essential, however, to determine that the exercise of freedom of conscience is religion-like in having a systematic and non-arbitrary character."¹⁵⁷ Some deeply felt claims will simply be impossible to evaluate:

If X says that his personal search for the meaning of life requires him to get stoned and listen to Mahler, he may be entirely sincere, and he may well have just as good a case morally as those who use drugs in a religious context; but ascertaining the centrality of this practice to his search for meaning will be virtually impossible¹⁵⁸

Nussbaum is correct that there is no way to fashion a rule that adequately accommodates X while effectively maintaining a prohibition of a drug that is generally deemed to be dangerous.¹⁵⁹ On the other hand, has Nussbaum not betrayed her promise to assimilate religion into other capabilities, rather than treating it as a distinctive human good? There continues to be a decided advantage for religion in her scheme insofar as religion is the paradigm case to which other belief systems must conform in order to qualify for special treatment. Why give it that privileged place if it is merely one of many equally valid ways of exercising the pertinent capabilities? Evidently, she thinks that it does have distinctive value, and that this is what justifies treating it as a distinctive category.¹⁶⁰

155. *Id.* at 207.

156. *Id.* at 208.

157. *Id.* at 209.

158. *Id.* at 208.

159. I presume for purposes of this hypothetical that there can be a rational policy of drug prohibition. This should not be construed as approval of the policies now being pursued in the United States. See Andrew Koppelman, *Drug Policy and the Liberal Self*, 100 NW. U. L. REV. 279 (2006).

160. One might perhaps say that the capabilities on her list correspond to appropriate objects of strong evaluation. Neither she nor Taylor has put it this way, but their one scholarly exchange makes clear that each is in deep sympathy with the other's philosophical project. See Charles Taylor, *Explanation and Practical Reason*, in *THE QUALITY OF LIFE* 208–31 (Martha Nussbaum & Amartya Sen eds., 1993); Martha Nussbaum, *Charles Taylor: Explanation and Practical Reason*, in *id.* at 232–41. One is not obligated to exercise all of the capabilities. But if the availability of those capabilities is a matter of social justice, then each person has an obligation to make those capabilities available to each other person. A has an obligation to make this capability available to B even if neither A nor B actually value it. Cf. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 141, at 135–48 (explaining why persons' actual preferences should not be dispositive of issues of distributive justice). The capabilities have value even if they are not in fact valued by some people. They fit Taylor's de-

Her announced strategy for avoiding unfairly preferential treatment of religion is, in essence, to treat religious freedom as a conclusion rather than a premise. The foundations of that freedom are capabilities that can be described without reference to religion. In earlier work, she observed that Aristotle made no special provision for religion in his list of virtues, and proposed to follow him: “Our Aristotelian conception then, makes no special provision for religion, regarding it as one of the ways in which citizens may choose to exercise their powers of thought, emotion, and imagination; it protects the separateness with which they do this, and fosters a climate of non-interference.”¹⁶¹ Now, however, she is prepared to adopt rules that make specific reference to religion, at least as a paradigm case. Since she now favors religious exemptions, her views evidently have changed, at least to that extent.

Now that she has grappled with the problem of religious exemptions in greater detail, she apparently has found that she cannot avoid using religion as a premise after all, at least as a paradigm case. At one point, she comes close to treating it as if it belongs on the list of basic capabilities: “The liberty of religious belief, membership, and activity is among the central human capabilities.”¹⁶² This is not quite equivalent to the specification that does appear on her list—“Being able to search for the ultimate meaning of life in one’s own way”¹⁶³—but the difference is subtle.

In the end, it does not matter whether religion actually makes it onto the list or not. What does matter is that it is now clear that her theory of justice gives special treatment to religion as such, and that religion as such figures into the process of deciding which capabilities are important and which exercises of those capabilities are specially protected in practice.

F. The “Compelling Interest” Test

Finally, there is the compelling interest test, which now governs federal law and the law of more than half the states.¹⁶⁴

- (7) “Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental

scription: “a strongly evaluated goal is one such that, were we to cease desiring it, we would be shown up as insensitive or brutish or morally perverse.” Taylor, *supra*, at 210.

161. Martha Nussbaum, *Aristotelian Social Democracy*, in *LIBERALISM AND THE GOOD* 236 (R. Bruce Douglass et al. eds., 1990).

162. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 138, at 179.

163. *Id.* at 79.

164. For a survey, see Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 *HARV. L. REV.* 155, 211–12 & nn.368–73 (2004).

interest; and is the least restrictive means of furthering that compelling governmental interest.”¹⁶⁵

This test sounds like, but obviously cannot be, the familiar compelling interest test that is strict in theory and fatal in fact. There are too many legitimate state interests that would be thwarted by exemptions. It is a balancing test. The state often wins. What the “compelling interest” test requires in practice is that, when the balance is struck, the value of religion be given *some* weight. That is all the test can do. The verbal formulation conceals more than it informs.

The decision whether to treat religion specially in any particular case requires the decision maker, whether it is a legislature or a court, to balance the good of religion against whatever good the generally applicable law seeks to pursue. That balancing is a matter of context-specific judgment.¹⁶⁶ It is not reducible to any legal formula.

There are at least two different ways in which religion can be unfairly privileged. One occurs if religious claims are made a basis for a colorable exemption claim when other, equally valuable concerns are not given similar weight. The other occurs if, after the balancing test is triggered, the exercise of religion is permitted to override other, equally valuable human concerns. But, once more, there is no way to decide in the abstract whether this is happening. It all depends on how the balance is struck in individual cases.

The argument for giving these judgments to the judiciary is that courts hear cases one at a time and so are confronted, as legislatures are not, with concrete situations. Courts are also committed to treat like cases alike. Legislatures often overlook the impact of rules on minority religious groups. If those groups are able to go to court, even with the support of a rule as vague as the so-called “compelling interest” test, they will often prevail.¹⁶⁷ On the other hand, the contestable nature of the

165. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b) (2000) (subsection numbers omitted). Congress was attempting to codify earlier Supreme Court decisions that nominally adopted the same test, though in fact the Court had shown a range of different levels of deference in different contexts. See Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 6–7 (1998).

166. Just how context-specific was not clear to me until I read 1 KENT GREENAWALT, *RELIGION AND FAIRNESS: FREE EXERCISE* (forthcoming 2006, Princeton University Press), which carefully treats, seriatim, the full range of typical free exercise situations and thus brings forth just how heterogeneous they are. The present article was in large part provoked by reflection on Greenawalt’s important book.

167. Before *Employment Division v. Smith*, 494 U.S. 872 (1990), held that there is no right to religious exemptions from laws of general applicability, free exercise claims had a success rate of 39.5%. Afterward, that success rate dropped to 28.4%. More importantly, the number of filed claims plunged after *Smith*, from 310 decided in the nine-and-a-quarter years before the decision to 38 in the three-and-a-half years after it. Under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, which temporarily (until the Supreme Court struck it down in *City of Boerne v. Flores*, 521 U.S. 507 (1997)) restored the “compelling interest” test, success rates rose to 45.2% and the number of filed claims in that three-year period rose to 114, perhaps in response to the strong legislative signal that courts should take religious impact very seriously. See Amy Adamczyk et al., *Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA*, 46 J. CHURCH & ST. 237, 250 tbl.1 (2004).

value judgments that are involved suggest that courts should not have the last word on these matters.

The regime we now have in most of the United States is one in which courts are instructed by legislatures to balance on a case-by-case basis, but the results that courts reach can be revisited and overridden by legislatures. Eugene Volokh has observed that this result plays to the strengths of both courts and legislatures. Courts get to decide, in the first instance, what to do in concrete instances of hardship. But the ultimate tough calls are governed by the political process. The result is not all that different from the common-law regimes that already govern issues of property, contract, and tort, where courts craft rules in response to specific disputes, but legislatures have the last word.¹⁶⁸ This is not a bad place to end up.

IV. CONCLUSION

I cannot pretend to have dispelled the concern about unfairness. It will always be with us. Fairness cannot be guaranteed, but space can be created for its possibility. A mechanism for considering specifically religious exemptions is one means toward that end.

Because no single legal rule can protect all deeply valuable concerns, more specific rules are necessary. Accommodation of religion is one of these. The point is similar to the idea, in Hindu theology, that humans cannot comprehend the fullness of God, and so must look to multiple finite representations.¹⁶⁹ We can only honor these representations one at a time. Acknowledgement of the unique value of each human good is no insult to the others.

168. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999).

169. See, e.g., SARVEPALLI RADHAKRISHNAN, *THE HINDU VIEW OF LIFE* 11–25 (1927). For an attempt to adapt the same insight to the Christian tradition, see DIANA L. ECK, *ENCOUNTERING GOD: A SPIRITUAL JOURNEY FROM BOZEMAN TO BANARAS* (1993).

