

Three Theories of Religious Equality . . . and of Exemptions

LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY. By Martha Nussbaum. New York, New York: Basic Books, 2008. 416 Pages. \$28.95.

RELIGIOUS FREEDOM AND THE CONSTITUTION. By Christopher L. Eisgruber & Lawrence G. Sager. Cambridge, Massachusetts: Harvard University Press, 2007. 352 Pages. \$28.95.

CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM. By Brian Barry. Cambridge, Massachusetts: Harvard University Press, 2001. 399 Pages. \$24.50.

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James Madison proposed amendments to the Constitution protecting, among other things, “equal rights of conscience,” as well as protecting, separately, “religious belief or worship.”¹ The House of Representatives considered a few versions of an amendment that would have protected “rights of conscience,” again separately from protecting “the free exercise of religion.”² But the Senate produced different language, protecting “the free exercise of religion” with no mention of rights of conscience, and it’s that language that remained in our First Amendment.³ Yet, despite this history that appears to distinguish conscience from religion, Martha Nussbaum has produced an elegantly written book titled *Liberty of Conscience: In Defense of America’s Tradition of Religious Equality*.⁴ Furthermore, in the face of two clauses in the First Amendment explicitly committed to protecting religious liberty, coming in the wake of clear paradigmatic historical instances of religious persecution that the framers wished to alleviate, Chris Eisgruber and Larry Sager argue that it is a misreading of the Constitution to treat religious practice as distinctive for either establishment or free exercise

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1. MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 98 (2008).

2. *Id.* at 98–99.

3. U.S. CONST. amend. I; NUSSBAUM, *supra* note 1, at 99–100.

4. NUSSBAUM, *supra* note 1.

purposes,⁵ in their somewhat misleadingly titled book *Religious Freedom and the Constitution*.⁶

So we have a historical and textual focus on protecting religious liberty, and books that appear to reject the constitutional specialness of religion. Nussbaum, it turns out, is much closer to accepting the distinctiveness of religious practice for constitutional purposes than are Eisgruber and Sager, but she does so with some reluctance and by offering a somewhat expansive view of what counts as religion. In this Review, after summarizing Nussbaum's book, I will first briefly explore a question of constitutional interpretive theory, what I will call the question of constitutional reductionism:⁷ When, if ever, should we reduce specifically stated constitutional protections to their underlying values and, in so doing, alter the coverage of such protections from their explicit scope?

Then I will turn to questions of religious freedom in our constitutional order. I will focus on two issues. First, what theory of equality best fits with our Religion Clauses? There are several candidates; Eisgruber and Sager's is importantly different from Nussbaum's, and Brian Barry offers another alternative.⁸ Second, I will explore the problem of religious exemptions.⁹ The first set of questions here is about harm. What sort of harm from religious practice should be sufficient to outweigh legal infringements on the free exercise of religion? Here I will compare Barry's all-or-nothing approach with Nussbaum's more nuanced balancing strategy. I also take a look at the relationship between harm from religious practice that would count against free exercise exemptions and harm from government action sufficient to make out an Establishment Clause violation. Next I will turn to a set of questions about how we determine the strength of a claim for religious exemptions. I conclude this Part with a critical analysis of Eisgruber and Sager's counterfactual approach, which, I argue, both fails to overcome the malleability concerns of the balancing strategy and makes it harder to protect religious liberty than does the balancing strategy. In the final Part, I

5. When I say Eisgruber and Sager refuse to treat religion as "distinctive" for constitutional purposes, I mean they don't think religious belief and practice deserve special treatment that would set them apart from other forms of belief and practice. For more on the terminology here, see *infra* note 108.

6. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007).

7. See Abner S. Greene, *Constitutional Reductionism, Rawls, and the Religion Clauses*, 72 *FORDHAM L. REV.* 2089, 2089 (2004); see also William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 *CASE W. RES. L. REV.* 357, 361 (1990) (explaining that his argument for treating free exercise claims under the Free Speech Clause has been called an argument from "reduction").

8. BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* (2001).

9. I will use "exemptions" to refer to judicial exceptions as of right and "accommodations" to refer to legislative exceptions, which may be as of right or as of legislative grace. Sometimes I will use "exceptions" to refer to both exemptions and accommodations.

introduce the problem of intra-group inequality; that is, how should our Religion Clause jurisprudence deal with the illiberal nature of the practices of some religious groups?

I. Nussbaum's Approach

Before starting into my three principal topics—reductionism in constitutional theory, the meaning of equality for the Religion Clauses, and the problem of exemptions—I first offer a brief tour of Nussbaum's book.¹⁰ Her theme is religious liberty in the United States, refracted through the lens of equality. “[E]quality is the glue that holds the [religion] clauses together,” she argues throughout.¹¹ But even as she details some contemporary threats to such liberty, she also argues against a secularism that would cordon off religious folk and their beliefs and practices.¹² Her conclusions throughout mostly track accepted doctrine, with some critiques. Overall, she believes that we have “struck basically the right balance between the need for neutral institutions and the needs of people of faith.”¹³ After an introduction that sets

10. Here are some quibbles with aspects of Nussbaum's argument I will not otherwise be discussing later: (1) She distinguishes legislative from judicial exceptions for religious minorities in part by asking whether the Constitution requires such exceptions in the latter setting. NUSSBAUM, *supra* note 1, at 118. But the Constitution applies to legislatures, too, and thus legislators as well as judges should consider constitutional strictures. (2) In discussing the peyote case, *Employment Division v. Smith*, 494 U.S. 872 (1990), Nussbaum at one point blends two separate attacks on judicial exemptions: that they are too difficult for judges to apply consistently, and that they entail a kind of anarchy, allowing different persons to live under different rules. NUSSBAUM, *supra* note 1, at 154. (3) She states, “With Justice O'Connor, I believe that *Smith* was wrongly decided,” NUSSBAUM, *supra* note 1, at 173, but O'Connor actually concurred in the judgment in *Smith*. 494 U.S. at 891 (O'Connor, J., concurring in the judgment). (4) She approves the O'Connor endorsement test and the Court's purpose analysis in Establishment Clause cases, but she would do better by seeing the connection between the two, which both focus on use of governmental power by dominant religious groups to advance their views at the expense of less powerful groups. *E.g.*, NUSSBAUM, *supra* note 1, at 248, 260. (5) She misstates a few key facts about the *Kiryas Joel* case, *Board of Education v. Grumet*, 512 U.S. 687 (1994). She says that the public school district set up by New York was “only for Satmar children with disabilities,” NUSSBAUM, *supra* note 1, at 294, when in fact it was formally open without any religious restrictions. *Grumet*, 512 U.S. at 743 (Scalia, J., dissenting) (explaining that non-Satmars chose not to live in the Village, not that they were formally excluded); *Grumet v. Bd. of Educ.*, 618 N.E.2d 94, 113 (N.Y. 1993) (Bellacosa, J., dissenting) (“[T]here is no showing that non-Satmarer Hasidim students are precluded from attending and taking advantage of this special education program.”). She also states that the case involved “government's delegation of its power to run an agency of government . . . to a religious group as such,” NUSSBAUM, *supra* note 1, at 294, which is false, and crucially so for understanding the case. The case was decided on the pleadings; there was no evidence that the school was being run by a synagogue or religious group “as such,” even though the children at the school and persons running the school were Satmar Hasidic Jews. Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 5 n.26 (1996); *see also Grumet*, 512 U.S. at 732–33 (Scalia, J., dissenting) (showing how the school was not a religious one and was not run by a religious organization).

11. NUSSBAUM, *supra* note 1, at 104.

12. *See id.* at 9–10 (criticizing intellectuals and philosophers who evince contempt for religious belief).

13. *Id.* at 14.

up the basic concepts and principles with which she'll be working, she turns to an exegesis of the writings of Roger Williams, the founder of Rhode Island and "seminal writer about the persecuted conscience."¹⁴ She highlights two strands of Williams's thought: "finding a way to live on terms of mutual respect with people whom one believes to be in error" and "the preciousness and vulnerability of each individual person's conscience."¹⁵

Next Nussbaum turns to religious liberty during the late eighteenth century. She claims that Americans of that period were influenced by Roman Stoicism. Specifically, "The Stoics taught that every single human being, just by virtue of being human, contains a portion of the divine."¹⁶ Stoic "ideas about human dignity and equality were the common currency in which people talked to one another."¹⁷ Another relevant Stoic idea was "that of human beings as 'citizens of the world,' or 'cosmopolitans.'"¹⁸ She canvasses some of the challenges to church establishments and discusses the framing of the Religion Clauses of the First Amendment.

Her next chapter is about the exemptions issue,¹⁹ which I treat further below.²⁰ After discussing some of the historical debate on the subject, she goes through some of the key cases—*Sherbert*,²¹ *Yoder*,²² and *Smith*²³—and outlines her view that is very much in line with that of Justice Brennan and Professor (and Judge) McConnell, as I'll explore later. She also discusses legislative efforts to accommodate religious practice and explains how she believes religion is special for constitutional purposes—another issue I'll discuss further.

Next up is a historical chapter on "Fearing Strangers," focusing on three discreditable periods of religious suppression of feared minorities—of Mormons and polygamy; of Jehovah's Witnesses and the Pledge of Allegiance; and of Catholics and schooling issues.²⁴ In the next chapter, Nussbaum explains how the Establishment Clause and the Free Exercise Clause protect the equality of religious liberty.²⁵ Here she canvasses cases on prayer in public school and government-sponsored religious displays. She supports the doctrine in these areas, which has invalidated government-sponsored public school prayer and religious symbols when a reasonable observer would deem such symbols an endorsement of a favored religion.

14. *Id.* at 36.

15. *Id.* at 36, 37.

16. *Id.* at 78.

17. *Id.* at 79.

18. *Id.* at 82.

19. *See id.* at 115–74.

20. *See infra* Part IV.

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

22. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

23. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

24. NUSSBAUM, *supra* note 1, at 175–223.

25. *Id.* at 224–72.

Nussbaum next addresses the multitude of cases involving public funding of religious schools, again generally supporting the case law, which upholds such funding so long as it is available for both religious and secular schooling and so long as individual parents decide where to send their kids and thus channel the public funds.²⁶ Before concluding, she discusses several contemporary controversies. She would hold the words “under God” in the Pledge of Allegiance unconstitutional;²⁷ she approves of the case law that has invalidated efforts to introduce creationism and intelligent design into public school science classes;²⁸ she talks about how exposing children in public school to ideas different from those of their parents’ religion should not be thought a violation of free exercise;²⁹ she discusses whether the debate over same-sex marriage implicates the Religion Clauses (not “as such,” she says);³⁰ and she addresses some issues involving Muslim-Americans in the aftermath of 9/11.³¹

II. Reductionism in Constitutional Theory

Why might we think the Religion Clauses are a marker for a different type of protection, namely, for any kind of belief or practice that is particularly vulnerable to invidious discrimination (or even neglect) by majorities, as Eisgruber and Sager do? Where else in constitutional law do we use stated protections as a marker for other values, i.e., where we reduce the stated protections to the other values?

Let’s start with freedom of speech. It’s a commonplace assumption that we don’t take the Free Speech Clause literally: “Congress shall make no law . . . abridging the freedom of speech.”³² We allow much abridgement of speech—we have laws against perjury, blackmail, etc. Whether these laws abridge the “freedom” of speech is a hard question, but one acceptable answer is that we allow such abridgment, even based on speech content, in the face of clear, overriding state interests. On the flip side, we also don’t take the Free Speech Clause literally in terms of protection: we protect the symbolic wearing of (say) black arm bands in public school,³³ even though in so doing we are protecting expression, and not (strictly speaking) speech. So these are a few ways in which the Free Speech Clause is not taken literally.

With these caveats (and many other important doctrinal moves), the Free Speech Clause nonetheless protects speech, and not the values that free speech embodies. We give speech special protection for reasons that include

26. *Id.* at 273–305.

27. *Id.* at 308–16.

28. *Id.* at 316–27.

29. *Id.* at 327–34.

30. *Id.* at 346, 334–46.

31. *Id.* at 346–53.

32. U.S. CONST. amend. I.

33. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

advancing individual liberty and promoting democracy and self-government. The proper scope of judicial protection for free speech varies with the underlying values that free speech protects; for example, a democracy–self-government theory of free speech might yield a narrower scope of judicial protection than an individual-liberty theory. But despite much effort at delineating the values that free speech protects, we don't then say that the Free Speech Clause protects those values when they are embodied in nonexpressive conduct.

What about the Takings Clause of the Fifth Amendment—“nor shall private property be taken for public use without just compensation”?³⁴ There is much writing about what type of governmental activity triggers the Clause, in particular whether regulation of property as well as the physical taking of property triggers the Clause. Part of this discussion includes exploring the underlying values protected by the Takings Clause; perhaps the type of freedom that ownership of private property promotes is best protected by a strong rule requiring compensation for physical takings but by a weaker rule in the regulatory area. However one comes out on this issue, we don't see an extension of the following sort: Because the Takings Clause promotes individual freedom as a kind of outpost against government, we should see the Takings Clause as protecting similar types of checking freedoms, even when ownership of private property is not involved.³⁵

Perhaps more helpful to a theory that would reduce the Religion Clauses to the values they promote or protect would be the development of judicial protection of unenumerated rights. The right to “privacy” doesn't appear in the Constitution and is better seen anyway as a right to a certain scope of liberty regarding one's body. The Due Process Clause of both the Fifth and Fourteenth Amendments does protect liberty, but to say that one may not be “deprived . . . of liberty . . . without due process of law”³⁶ literally suggests that with due process, one may be so deprived. To develop the so-called substantive due process jurisprudence, the Court has had to elaborate a theory of individual liberty involving contraception,³⁷ abortion,³⁸ and consensual adult sexual relations.³⁹ These holdings transcend a literal understanding of the Due Process Clause and require instead a broader structural, doctrinal, and political theoretic argument. Perhaps in the development of these so-

34. U.S. CONST. amend. V.

35. Consider also: The Second Amendment protects the right to keep and bear arms. U.S. CONST. amend. II; *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008). The justification sounds in a certain conception of liberty and self-government preserved even after the institutions of state are established, but the Second Amendment does not protect such residual self-government beyond keeping and bearing arms.

36. See U.S. CONST. amends. V, XIV.

37. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

38. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 853 (1992); *Roe v. Wade*, 410 U.S. 113, 153 (1973).

39. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

called unenumerated rights (to which we could add the freedom of association⁴⁰ and the right to travel⁴¹) lies the germ for the idea of reductionism in Religion Clause jurisprudence.

The problem with this argument is that the Religion Clauses do specifically indicate the subject matter of protection. It's one thing to construct a set of rights involving liberty in the area of sexuality and reproduction without a clear textual hook. It's another thing to say that the textual hooks that do exist mean something other than they appear to mean. Maybe we need to turn to original intent. Just as in statutory interpretation, there's a case for going beyond textual plain meaning to legislative intent, maybe we need to do the same for constitutional interpretation. I wish to put aside here whether what we'd be looking for is best termed "original intent" or "original meaning," and the possible differences between the two;⁴² in either case, we'd be asking a historical question about what the drafters (or ratifiers, or both) of constitutional text believed they were doing in choosing the language they chose or about the original public meaning of such language. But even if we go beyond (or underneath) constitutional text in this way, we're not going to find, for the Religion Clauses, evidence that the Religion Clauses were understood as a marker for a broader protection of vulnerable beliefs and practices.

The best case for constitutional reductionism in Religion Clause jurisprudence—for, that is, taking the Religion Clauses as a textual marker of a value or values that underlie protecting religious liberty and then that sweep more broadly—is that the Equal Protection Clause of the Fourteenth Amendment⁴³ has changed everything. Bruce Ackerman puts the argument (not specifically regarding the Religion Clauses) as one of intergenerational interpretive synthesis.⁴⁴ In this reading, we have specific protection of religion from moment one combined with a broader equality principle from moment two, yielding a different theory of religious liberty than we had at the outset. However, Ackerman's intergenerational interpretive synthesis, although reminding us to interpret the original Constitution in light of equal protection values, still does not tell us how equal protection properly alters our understanding of religious liberty—or, put somewhat differently, what

40. See *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008).

41. See *Saenz v. Roe*, 526 U.S. 489, 498 (1999).

42. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 92 (2004) ("Whereas 'original intent' originalism seeks the intentions or will of the lawmakers or ratifiers, 'original meaning' originalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.").

43. U.S. CONST. amend. XIV.

44. I BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 88–89, 140–41, 159–62 (1991); see also Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 488–90 (1989) (setting out a related discussion of "constitutional moments").

conception of equality is the right one to take away from the Fourteenth Amendment and slap onto the First.

In a moment, I will turn to exploring different theories of equality for the Religion Clauses. I suggest that we can treat religion as distinctive for both the Establishment and Free Exercise Clauses, while keeping equality as a central value. I hope this brief excursion into constitutional interpretive theory has at least cast a cloud over thinking of the Religion Clauses in a reductionist manner. As with most of the Constitution, we should start by assuming the text covers (and, regarding rights, protects) what it denotes, and does not cover more broadly other, not-named practices. Perhaps a strong enough structural, intergenerational, or other type of argument could disrupt this presumption; part of the discussion in the next Part will be to suggest that there are good enough reasons to treat religion distinctively—as the text seems to say—so as not to displace denotation with reduction.

III. The Meaning of Equality for the Religion Clauses

At the heart of the dispute over the shape of religious freedom is a debate about what equality means in this setting, and to what extent, if any, religious belief and practice deserve distinctive treatment, as opposed to treatment that places such belief and practice on the same plane as nonreligious belief and practice. I will examine three positions and introduce the theory of exemptions that connects with each position. (In the next Part, I will discuss the theories of exemption in further detail.) Barry has advanced what one might consider a formal equality view, based on a premise of moral universalism and human rights. Legislative majorities have presumptive legitimacy; this can be trumped by an appropriate human-rights–moral claim, in which case all regulation in the relevant area is unjustified, but religious (and other cultural) minorities have no claim to special protection. Eisgruber and Sager offer a theory called “equal liberty,” which denies the distinctiveness of religion for either nonestablishment or free exercise purposes, but which nonetheless protects the practices of religious (and other) minorities that can show a special kind of vulnerability to majoritarian disfavor. Finally, Nussbaum mostly tracks the Brennan–McConnell view—after Justice William J. Brennan Jr., and Professor (and Judge) Michael McConnell (perhaps not coincidentally a former Brennan clerk). This view accepts religious belief and practice as distinctive for both nonestablishment and free exercise purposes.⁴⁵ Nussbaum hedges her bets a bit here with a somewhat expansive definition of religion, but for the most part her arguments accept the distinctiveness of religion and the need for strong

45. Brennan and McConnell share this view generally and apply it similarly in the exemptions setting. See *infra* notes 151–52. I am not discussing their applications in the Establishment Clause setting, which don’t line up as smoothly.

judicial checks against legislative majorities to ensure the lived equality of minority religions.

A. *Barry's Formal Equality*

Barry rejects a “politics of difference” and endorses instead a “politics of solidarity,” according to which “citizens belong to a single society and share a common fate.”⁴⁶ We should resolve disputes “by adopting the policy favoured by the majority,” and minorities should receive no special protections so long as they have had “an equal say in the outcome.”⁴⁷ “[W]ithin a liberal state all groups are free to deploy their energies and resources in pursuit of culturally derived objectives on the same terms.”⁴⁸ The “conditions for maintaining liberal democracy must be quite stringent.”⁴⁹ A sense of solidarity is needed, and citizens must

have certain attitudes toward another. It must be accepted on all hands that the interests of everyone must count equally, and that there are no groups whose members' views are to be automatically discounted. Equally important is a willingness on the part of citizens to make sacrifices for the common good⁵⁰

“[C]itizens should have firm expectations of one another”⁵¹ This “cluster of attitudes towards fellow citizens” is “a sense of common nationality.”⁵²

This politics of solidarity is buttressed by a moral universalism and a comprehensive liberalism⁵³ that includes a conception of universal human rights. “The defining feature of a liberal is,” Barry writes, “that it is someone who holds that there are certain rights against oppression, exploitation and injury to which every single human being is entitled to lay claim, and that appeals to ‘cultural diversity’ and pluralism under no circumstances trump

46. BARRY, *supra* note 8, at 300.

47. *Id.* See generally JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

48. BARRY, *supra* note 8, at 318.

49. *Id.* at 79.

50. *Id.* at 80; see also RONALD DWORKIN, *LAW'S EMPIRE* 195–216 (1986) (developing a theory of associative or communal obligations).

51. BARRY, *supra* note 8, at 80.

52. *Id.*

53. Barry is a comprehensive liberal in much the same way as the Rawls who wrote *A Theory of Justice* (but not necessarily the Rawls who wrote *Political Liberalism*). See *id.* at 16 (“The egalitarian liberalism that I shall lay out here is influenced by, and related to, Rawls’s theory of justice, at any rate on my interpretation of it.”); see also *id.* at 331 n.27 (“I have no interest in defending anything Rawls has written since about 1975, including his subsequent interpretations of *A Theory of Justice* or his revisions of its text.”). See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1993); JOHN RAWLS, *A THEORY OF JUSTICE* (1971). For an argument that even the Rawls of *Political Liberalism* was somewhat of a comprehensive liberal, see Greene, *supra* note 7, at 2099–2103; and Abner S. Greene, *Uncommon Ground: A Review of Political Liberalism by John Rawls and Life’s Dominion by Ronald Dworkin*, 62 *GEO. WASH. L. REV.* 646, 667–71 (1994) (book review).

the value of basic liberal rights.”⁵⁴ Barry argues that “moral universalism is valid”⁵⁵ and claims that “liberals are universalists.”⁵⁶ “Liberal democracy,” he maintains, “depends on a general belief that there is such a thing as truth, as against my truth or your truth.”⁵⁷ This means that if “there are sound reasons against doing something, these cannot be trumped by saying—even if it is true—that doing it is a part of your culture.”⁵⁸ Barry basically admits his is a version of natural law theory. He claims that

precisely because human beings are virtually identical as they come from the hand of nature—at any rate at the level of groups—there is nothing straightforwardly absurd about the idea that there is a single best way for human beings to live, allowing whatever adjustments are necessary for different physical environments.⁵⁹

One way to support the claim that basic human interests are universal “would be to argue that there is a universal human nature which gives rise to certain physiological and psychological needs,” and Barry “see[s] no reason why this argument should not be carried through successfully.”⁶⁰

Thus, for Barry, equal rights of political participation combined with laws that steer clear of violating universal human rights suffice for political legitimacy, and religious or cultural minority groups whose practices are nonetheless harmed have no standing to complain. Liberalism is not culturally neutral in effect, for (inter alia) “in relegating religion to the private sphere, [it] fails to accommodate all those whose beliefs include the notion that religion ought to have public expression.”⁶¹ But liberalism is neutral in that it is “fair”; by “privatizing religion” (for example), liberalism gives religions “equal treatment, and equal treatment is what in this context is fair.”⁶² Laws will affect different religions differently, but it is “a mistake” to claim that such disparate impact “is a sign of unfairness.”⁶³ Accordingly, Barry supports the outcome and reasoning of *Employment Division v. Smith*.⁶⁴ There, the Court rejected a claim that Oregon deprived a minority religious group of free exercise of religion by applying its controlled-substances laws

54. BARRY, *supra* note 8, at 132–33.

55. *Id.* at 18.

56. *Id.* at 136, 138.

57. *Id.* at 236.

58. *Id.* at 258.

59. *Id.* at 262.

60. *Id.* at 285.

61. *Id.* at 25–26; *see id.* at 27 (“It would seem that for liberalism . . . to be culturally neutral, there would have to be no existing (or possible?) world-view with which it conflicts. Since this is manifestly absurd, the assertion that liberalism is not culturally neutral asserts something that could not conceivably be denied.”).

62. *Id.* at 28.

63. *Id.* at 34.

64. 494 U.S. 872 (1990); *see* BARRY, *supra* note 8, at 170–73.

to the religious practice of ingesting peyote, a hallucinogenic substance.⁶⁵ Moreover, the Court denied that harm to religious practice from the incidental impact of a nondiscriminatory, generally applicable law should trigger any kind of elevated Free Exercise Clause scrutiny.⁶⁶ “[J]ustice (in the form of equal treatment) and freedom of religion,” contends Barry, “do not require exemptions from generally applicable laws simply on the basis of their having a differential effect on people according to their beliefs, norms, compulsions or preferences.”⁶⁷ Barry argues that to defend a minority’s right to practice its religion in the face of otherwise morally legitimate laws enacted through a democratic majoritarian process is tantamount to “moral anarchy”; i.e., to insist that we tolerate minority religious practices that run counter to otherwise valid laws is to assert that “[t]here are no overarching norms by which groups and communities can be judged—or at any rate no such [judgments] can legitimately form a basis for the exercise of political authority.”⁶⁸

To see how Barry applies these theories in practice, consider these two case studies. One: Barry discusses a proposal “to require all animals to be stunned before death,” backed by studies showing that animals not stunned before death experience a higher degree of pain, suffering, and distress.⁶⁹ Responding to claims that such a law would infringe the religious liberty of some Jews and Muslims (for whom ritual slaughter of animals for human consumption does not permit stunning before death),⁷⁰ Barry argues that “an appeal to religious liberty provides only spurious support for this and other similar exemptions, because the law does not restrict religious liberty, only the ability to eat meat.”⁷¹ Two: Barry discusses a British law requiring all motorcycle riders to wear helmets, with no exception for Sikhs, whose religion requires wearing a turban, even in that setting. Such a law is properly considered not to interfere at all with Sikh religious practice, Barry maintains, “because the inability to ride a motorcycle does not prevent a Sikh from observing any demands of his religion.”⁷² I will take up both of these cases again below, in discussing exemptions.

Barry’s comprehensive liberalism is based in a too-confident certainty regarding the content of rights and a conception of the community that improperly (and unnecessarily) privileges common ground over difference. Furthermore, as Nussbaum puts it, underlying the desire to iron out

65. *Smith*, 494 U.S. at 890.

66. *Id.* at 884.

67. BARRY, *supra* note 8, at 171.

68. *Id.* at 133; *see also Smith*, 494 U.S. at 888–90 (reasoning that the adoption of a serious system of exemptions would be “courting anarchy” and that a no-exemptions rule “must be preferred to a system in which each conscience is a law unto itself”).

69. BARRY, *supra* note 8, at 42.

70. *Id.* at 33, 35, 40–48.

71. *Id.* at 44.

72. *Id.*

differences is often a fear of “the other,” the dissenter.⁷³ First: Barry’s argument admits of no epistemic doubt about the content of rights. Once we have enough evidence for an argument that a certain type of practice should be regulated, then it should be regulated, regardless of countervailing claims from minority practices. This is at the core of Barry’s moral universalism translated into universally enforceable human rights. It is no different in its use of certainty than any other comprehensive doctrine (for example, religious ones). My principal critique here is not from any kind of skepticism, but rather from doubt. One can be a moral objectivist and believe that there are moral truths, but still be uncertain about their content and their application. The U.S. structure of divided power and rights of both political participation and individual liberty is best understood as setting up multiple repositories of power, as deeply wary of concentrated power.⁷⁴ Thus, even as we regulate based on best evidence and arguments, we still should be open to our being wrong, either in full or at the margins, and should exempt or accommodate minority practices to the extent possible consistent with protecting the liberty of others. (I will talk more in the next Part about the difficult question of developing a theory of regulable harm for a liberal democracy and how that applies to claims for exemptions.) The Nussbaum balancing approach recognizes this doubt about our premises and hedges our bets in all directions.

Second: As does Rawls, Barry privileges the centripetal over the centrifugal, community solidarity over cultural and religious difference. But there is no reason we can’t have both—government (and the private sector) can push in many ways for cohesion and common ground, while leaving (usually) minority groups to develop, simultaneously, their own conceptions of the right and the good. We can see conceptions of common ground as appropriate for persuasive and hortatory action, but not for regulatory action, at least presumptively.⁷⁵ Because of his premises of moral and human rights, universalism, and majoritarian democratic preferences, Barry pays zero attention to how majorities use legislation to favor their own cultural and religious interests and neglect those of minorities. This kind of discrimination by neglect is something to which Eisgruber and Sager, and Nussbaum, pay close attention. But it is off of Barry’s radar screen. (We see this most blatantly in his conclusions that animal-stunning laws and motorcycle-helmet laws do not infringe freedom of religion, but rather—for the affected minorities—the ability to eat meat or ride a motorcycle.) Moreover, his argument that the disparate impact of generally applicable laws on cultural

73. See *infra* text accompanying notes 77–81.

74. Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 132, 156 (1994); Abner S. Greene, *Civil Society and Multiple Repositories of Power*, 75 CHI.-KENT L. REV. 477, 479–80 (2000); Greene, *supra* note 10, at 8, 14–16, 54, 86.

75. Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 5 (2000); Greene, *supra* note 10, at 83–86.

and religious minorities raises no fairness concerns not only is grounded in the universalism, majoritarian, and common-ground–solidarity premises, but also assumes, sub silentio, the political legitimacy of states that advance a conception of the common good through regulation, even if such regulation rides roughshod (in effect) over minority interests. Similarly, there is a sub silentio assumption of political obligation here, i.e., that all citizens in such a republic have a prima facie moral duty to obey the law. These assumptions of legitimacy and obligation need a deeper grounding than Barry gives and, I would suggest, than can be provided.⁷⁶

Third: Although it is to some extent a psychological argument, Nussbaum maintains throughout her book that fear of “the other,” of the strange and different, drives both private groups (such as religious sects) and the state to insist on a kind of flat social order, a common ground that bulldozes dissent. “[F]ear makes people ask whether equal treatment should really apply to all citizens—or only to citizens who hold religious and moral views similar to their own,”⁷⁷ she writes. She provides many examples of such fear, including a chapter called “Fearing Strangers,”⁷⁸ which focuses on anti-Mormon, anti-Jehovah’s Witnesses, and anti-Catholic periods of U.S. history. She sets the background of these constitutional stories in colonial America, where the Puritans “found it prudent to shore up the structures of order within their communities, seeking comfort in homogeneity and discouraging spontaneous outbursts of personal will.”⁷⁹ Such insistence on common ground and exclusion of difference is often thought “necessary for civil order.”⁸⁰ This theme is central to what Nussbaum gleans from Roger Williams, who “trac[ed] persecution to anxious fear and the accompanying desire to create security by lording it over others.”⁸¹ Granted, her stories are about intentional discrimination against minorities, which even Barry rejects, but the failure to recognize harm to minorities within one’s midst from the differential impact of otherwise valid laws can be traced to a similar, although perhaps more subconscious, type of fear.

76. See *infra* notes 188–91 and accompanying text. For more discussion about these matters of political theory, see Abner S. Greene, *Against Interpretive Obligation (to the Supreme Court)*, 75 *FORDHAM L. REV.* 1661, 1661–62 (2006) [hereinafter Greene, *Against Interpretive Obligation*]; Abner S. Greene, *Can We Be Legal Positivists Without Being Constitutional Positivists?*, 73 *FORDHAM L. REV.* 1401, 1413–14 (2005) [hereinafter Greene, *Legal Positivists*]; and Abner S. Greene, *Against Obligation: A Theory of Permeable Sovereignty* (unpublished manuscript, on file with author).

77. NUSSBAUM, *supra* note 1, at 9.

78. *Id.* at 175–223.

79. *Id.* at 38.

80. *Id.*

81. *Id.* at 68.

B. Eisgruber and Sager's Equal Liberty

As does Barry, Eisgruber and Sager begin from a premise of the legitimacy of majoritarian governance and the stability that such governance can bring. “Our laws,” they write, “are the product of legislative and administrative concerns, enacted by our representatives in service of what those representatives deem good and sufficient reasons. And very often those reasons are indeed both good and sufficient.”⁸² In rejecting a presumption that government should have to justify its unintentional impositions on religious liberty, Eisgruber and Sager endorse a Hobbesian view of the state:

[W]e are regularly called upon to act in ways that we dislike. . . . We accept the imposition of a myriad of rules, even though those rules often deflect us from the course we would otherwise pursue; and even, in some cases, when we regard the collective projects that underwrite the rules as misguided. We accept the imposition of these rules because our society—indeed any modern society—could not function without reciprocal sacrifices of this sort.⁸³

In a later discussion of government subsidies to religious organizations, Eisgruber and Sager similarly explain (after citing Hobbes) that the appropriate baseline for thinking about political theory is not individual liberty, but rather the state.⁸⁴ “Government . . . inevitably constitutes the options of a free people,” they write, “the question is not whether it should affect them, but how it should do so.”⁸⁵

Unlike Barry, Eisgruber and Sager open the door for exemptions for religious practice—but not as such. We should protect religious practice even from unintentional impositions because religious practice is vulnerable to majoritarian neglect, they argue, but we should do so only insofar as we would protect similarly situated nonreligious practice from such neglect. There is nothing distinctive about religious practice that warrants special treatment, Eisgruber and Sager argue throughout the book. Thus they develop a theory called “equal liberty,” which “denies that religion is a constitutional anomaly, a category of human experience that demands special benefits and/or necessitates special restrictions.”⁸⁶ Apart from the concern with equality that would protect any vulnerable group against majoritarian neglect (or worse), Eisgruber and Sager “have no reason to confer special constitutional privileges or to impose special constitutional disabilities upon religion.”⁸⁷ So even as “Equal Liberty insists that no member of the community ought to be devalued on account of the spiritual foundations of his or her

82. EISGRUBER & SAGER, *supra* note 6, at 82.

83. *Id.* at 84.

84. *Id.* at 202 (citing THOMAS HOBBS, *LEVIATHAN* 185–86 (Penguin Books 1985) (1651)).

85. *Id.*

86. *Id.* at 6.

87. *Id.*

basic commitments,”⁸⁸ Eisgruber and Sager carefully add that “aside from this deep and important concern with discrimination”—which includes both hostility and neglect—“we have no constitutional reason to treat religion as deserving special benefits or as subject to special disabilities.”⁸⁹ Perhaps because their language might appear at times to give special solicitude to religious practice—they repeat the “on account of the spiritual foundations” language several times⁹⁰—Eisgruber and Sager explain that such foundations are no different for their theory than other foundations that might be subject to majoritarian hostility or neglect. The “[a]ntidiscrimination principles” on which Eisgruber and Sager rely “focus . . . on chronic social circumstances that leave some groups peculiarly vulnerable to deep and undeserved disadvantage.”⁹¹ They write:

[I]t makes perfectly good sense to single out vulnerable groups for special concern precisely because of their vulnerability to discrimination. The aim of such [antidiscrimination] laws is parity, not advantage. In just this way, religion is sometimes singled out for distinct treatment in our constitutional tradition, precisely with the goal of protecting persons from discrimination.⁹²

Lest there be any doubt about whether Eisgruber and Sager might believe there is anything distinctive about religious practice that might have led to religion receiving two clauses all its own in the First Amendment, they explain that their theory focuses “attention on equality and remov[es] it from imponderable questions about the goodness of religion.”⁹³ And this: “Equal Liberty demands not only that religions be protected from hostility and neglect, but that citizens in general enjoy broad space within which to pursue and act upon their most valued commitments and projects, whether these be religious or not.”⁹⁴

In making their case that religious practice should be treated no better (or worse) than secular practice, Eisgruber and Sager reject some standard arguments for the (constitutional) distinctiveness of religious practice. Thus, they reject the argument that religious obligations are different from secular ones because of the (believed) divine source of the command or the

88. *Id.* at 18.

89. *Id.* at 52.

90. *E.g.*, *id.* at 4, 15, 18, 52; *see also, e.g., id.* at 89 (using the similar formulation, “on the basis of their spiritual foundations”).

91. *Id.* at 59.

92. *Id.*

93. *Id.* at 20.

94. *Id.* at 245; *see also id.* at 108 (“[T]he right of religious freedom is the right to participate in the constitutional project on fair terms, so that one is neither privileged nor disfavored on the basis of the religious (or nonreligious) character of one’s commitments.”); *id.* at 114 (“If the government granted conscientious-objector status only on the basis of religiously motivated opposition to war, it would be favoring some needs over others purely on the basis of their theological character or spiritual foundations.”).

(believed) effects in life beyond death.⁹⁵ They contend that there is no reason to assume “that as a matter of real-world phenomenology, religious convictions exercise a more powerful grip upon the individual psyche than do deeply felt secular convictions.”⁹⁶

As mentioned above, Eisgruber and Sager would protect religious practice, but (1) their presumption favors the state and its laws of general applicability, and (2) they protect not religious practice as such, but any (usually minority) practice that is vulnerable to the law’s neglect (or worse). Thus, instead of requiring the government to justify impositions on religious practice (as the Nussbaum view I discuss below would do), Eisgruber and Sager propose a theory called “equal regard,” which protects vulnerable practices through what is often a counterfactual strategy. A failure of equal regard is “a failure by the state to show the same concern for the fundamental needs of all its citizens.”⁹⁷ To challenge state action successfully on this ground, one must determine whether the state treats our “most valued commitments and projects” evenhandedly, whether religious or secular.⁹⁸ To do that, one must look to what the law regulates and what it fails to regulate, establish relevant benchmarks of comparison, and ask whether, if the majority were in the minority’s shoes, it would be regulating the same way. One example is the federal government’s initial decision to build a road through a sacred Native American site. To determine whether equal regard is violated in an unconstitutional fashion, Eisgruber and Sager write:

There is an important counterfactual question lurking in the background, of the form “If the location of the road threatened a well-recognized conservationist interest . . . or was a site sacred to a small but well-acknowledged group of Catholics or Orthodox Jews, would the [government] have pushed ahead with its plans?” The answer to that question is almost certainly no.⁹⁹

I will discuss this benchmarking–counterfactual strategy further in the next Part.

Eisgruber and Sager’s equal liberty and equal regard theory turns on a conception of equality that denies distinctiveness to religious belief and practice, at least for constitutional purposes; they are careful to explain throughout how religion is protected (or burdened) only insofar as it can be seen as being similar to other practices. Yet their argument often, seemingly

95. *Id.* at 103.

96. *Id.*; *see id.* at 301 n.39 (“Secular moral requirements, [similarly to religious requirements], are experienced as duties that ‘transcend the individual and are outside the individual’s control.’” (quoting Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1497 (1990))).

97. *Id.* at 89.

98. *Id.* at 245.

99. *Id.* at 92.

inadvertently, helps make the case for religious distinctiveness. Furthermore, their doctrinal claims for an antidistinctiveness position are weak.

In developing their argument for when and why we should invalidate certain governmental religious displays, Eisgruber and Sager describe “four structural features of religion in our society.”¹⁰⁰ These are: (1) “religions tend to be comprehensive”; (2) “there are still important respects in which one is either ‘in’ or ‘out’ of a religion”; (3) “open ritual is prevalent in religion”; and (4) “the perceived stakes of being within or without these structures of belief and membership are often momentous.”¹⁰¹ They summarize these “cultural characteristics of religions in America” again when analyzing prayer and the Pledge of Allegiance in public school classrooms.¹⁰² Later, when discussing public financing of religious schools, they note that “[s]ecular institutions and principles are self-consciously incomplete”; “[r]eligions, by contrast, are typically comprehensive; they speak to ultimate questions about life’s meaning, origins, and value.”¹⁰³ Moreover, they acknowledge here that “[t]his difference is critical to the constitutional project of religious liberty.”¹⁰⁴ In an endnote, while arguing that people experience obligations from both secular and religious sources, they nonetheless note that the religious and not the secular ones “emanate from a mystical spirit or being.”¹⁰⁵ Eisgruber and Sager describe the four structural features of religion in our society as “empirical features of religious practice that affect the application of constitutional principles to it,”¹⁰⁶ and, earlier, summarize their description of religious practice as “matters of sociological fact.”¹⁰⁷

So Eisgruber and Sager deny the historical and textual distinctiveness of religious belief and practice (as will be even clearer in a moment when I canvass their treatment of several doctrinal matters); they insist on reducing whatever protection religion gets to a concern with the equality of vulnerable groups; and yet they accurately tell us how religion is experienced by many Americans as a distinctive form of belief and practice. They do the latter in the service of justifying religion’s inclusion in the umbrella of protection that they call “equal liberty,” but in so doing, they raise the inevitable question: Aren’t these factors precisely why (or at least part of why) religion has two clauses all its own?¹⁰⁸

100. *Id.* at 125.

101. *Id.*

102. *Id.* at 164.

103. *Id.* at 210.

104. *Id.*

105. *Id.* at 301 n.39.

106. *Id.* at 197.

107. *Id.* at 62.

108. For similar readings of Eisgruber and Sager as occasionally supporting special constitutional treatment of religion, see Thomas C. Berg, *Can Religious Liberty Be Protected as Equality?*, 85 TEXAS L. REV. 1185, 1198–99 (2007); and Ira C. Lupu & Robert W. Tuttle, *The Limits of Equal Liberty as a Theory of Religious Freedom*, 85 TEXAS L. REV. 1247, 1267 (2007).

Eisgruber and Sager struggle mightily to fit their reductionist theory—that we protect (and sometimes disable) religion only insofar as it is like other beliefs and practices—into various doctrinal holes.

1. *Government-Sponsored Religious Symbols.*—The case law is clear on this: Government may not sponsor religious symbols (such as a crèche or a Ten Commandments monument) if doing so would either endorse the majority’s favored religion or reflect a predominant religious purpose.¹⁰⁹ That violates the Establishment Clause. The still-governing theory behind this is Justice O’Connor’s concern with the government sending a signal that one is “in” or “out,” favored or disfavored, based on one’s adherence to the favored religion.¹¹⁰ There is no indication in the case law that this theory extends further to government sponsorship of nonreligious symbols. Yet Eisgruber and Sager argue that whether a government-sponsored religious symbol is unconstitutional turns on its social meaning (so far, so good)—specifically, on whether the “risk of disparagement” is too high.¹¹¹ They focus on religious symbols, but their underlying principle is unmistakable—it is not religion per se that government may not endorse nor advance; rather, government may not engage in any expression that would disparage or

In the end, though, despite their willingness to acknowledge how religion is *experienced* as distinctive, Eisgruber and Sager’s theory depends on seeing religion as being like other practices, for both establishment and free exercise, as should be clear from my textual discussion throughout this subpart. In a reply to critics, Eisgruber and Sager write:

[I]t is not true that we deny the constitutional distinctiveness of religious commitments. On the contrary, our view affirms and depends upon their distinctiveness in two different albeit closely related ways. First, we believe that religion deserves constitutional solicitude because religious convictions are important constituents of how people view themselves and others and that these convictions have historically been targets of hostility, discrimination, and neglect. . . . Second, we maintain that, when judges and other constitutional interpreters apply Equal Liberty’s principles, they must pay attention to distinctive cultural and sociological features of religion.

Christopher L. Eisgruber & Lawrence G. Sager, *Chips Off Our Block? A Reply to Berg, Greenawalt, Lupu and Tuttle*, 85 TEXAS L. REV. 1273, 1274 (2007); *accord id.* at 1280–81. It is fine to use “distinctive” in this way, i.e., to describe what something is, what role it plays, how it fits with other things, etc.—that is, to use “distinctive” to refer to what distinguishes a thing (or a practice, belief, or what have you). But the debate in Religion Clause scholarship is not so much about what distinguishes religion in the descriptive sense—although there is some of that. *See infra* note 154. Rather, the debate is about whether it is appropriate to *treat religion as special*—as different from other forms of practice or belief—for both establishment and free exercise purposes. On that question, Eisgruber and Sager’s book offers a thoroughgoing “no” answer. For an example of Eisgruber and Sager clearly using “distinctive” in contradistinction to “special” or “different,” see *id.* at 1282, where they write, “[T]he Constitution’s prohibitions on public religious disparagement are distinct in application but not unique.”

109. *See* *McCreary County v. ACLU*, 545 U.S. 844, 881 (2005) (holding that displaying the Ten Commandments in a court constituted a religious purpose and was therefore a violation of the Establishment Clause); *County of Allegheny v. ACLU*, 492 U.S. 573, 621 (1989) (concluding that the display of a crèche in the county courthouse is unconstitutional because it has the effect of endorsing or promoting religion).

110. *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O’Connor, J., concurring).

111. EISGRUBER & SAGER, *supra* note 6, at 20, 124–28.

denigrate a portion of the community in a way that is relevant to social standing in a deep sense. The pedigree in constitutional law for this analysis, they argue, is governmental segregation on the basis of race.¹¹² Certain governmental practices have a disparaging effect; the most famous ones “pertain to important constituents of identity—most notably, race and religion—that, within American culture, function as especially significant markers of social division.”¹¹³ Their argument is ultimately based in the Equal Protection Clause. It’s a compelling tale, and perhaps we should construe the Equal Protection Clause to forbid government speech in the way Eisgruber and Sager suggest. But the case law is all about religious symbols, not secular ones; the doctrinal hook is the Establishment Clause; and the express concern of the Court is with majority religions’ using governmental power to enhance their status, i.e., with the blending of church and state.

2. *Recitation in Public Schools*.—The case law, beginning with *Engel v. Vitale*,¹¹⁴ prohibits government-sponsored prayer in public schools, even if students have a right to remain silent.¹¹⁵ There are two strands of justification for these holdings: a jurisdictional argument that government has no business sponsoring religious worship in public schools;¹¹⁶ and a psychological-coercion argument that even though students may opt out, they are under tremendous pressure to participate.¹¹⁷ Separately from this line of doctrine, the Court held in *West Virginia v. Barnette*¹¹⁸ that public schools may not insist that students participate in the Pledge of Allegiance, but the schools may still lead the Pledge so long as students have opt-out rights. The justification for the principal holding is that government may not compel speech in this way;¹¹⁹ although the students were Jehovah’s Witnesses and although later Congress added “under God” to the Pledge, *Barnette* is not about religious liberty. Although the Court has endorsed the psychological-coercion strand in the school prayer cases, it has not applied that strand in the Pledge of Allegiance setting; arguably, to do so would require disabling government from leading the Pledge at all in public schools, because the

112. *Id.* at 127.

113. *Id.* at 128.

114. 370 U.S. 421 (1962).

115. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000); *Lee v. Weisman*, 505 U.S. 577, 599 (1992); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963); *Engel*, 370 U.S. at 370.

116. *See Schempp*, 374 U.S. at 222 (applying a conception of neutrality that rejects “a fusion of governmental and religious functions or a concert or dependency of one upon the other”); *Engel*, 370 U.S. at 431 (stating that the “first and most immediate purpose” of the Establishment Clause “rested on the belief that a union of government and religion tends to destroy government and to degrade religion”).

117. *See Lee*, 505 U.S. at 590–99 (developing and applying a theory of psychological coercion in the setting of high school graduation); *Engel*, 370 U.S. at 430–31 (“When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure . . . is plain.”).

118. 319 U.S. 624 (1943).

119. *See id.* at 634.

psychological pressure to say the Pledge could be thought to violate one's right not to speak, just as it is thought to violate one's religious liberty in the prayer setting.¹²⁰ But as it stands, we have a clear doctrinal difference: religious recitation is treated differently from secular.

Eisgruber and Sager acknowledge this difference, but they can't get around it. They are reduced to observing that "it would be possible to argue that" the rule in *Barnette* (permitting the teacher-led Pledge with an opt-out right), and not the one in *Engel* (forbidding the teacher-led prayer, even with an opt-out right), is "mistaken."¹²¹ Moreover, rather than accept either of the stated doctrinal hooks—jurisdictional or psychological coercion—Eisgruber and Sager suggest that the real problem with government-sponsored public school prayer is disparagement of those who don't share the dominant faith.¹²² They argue that if there were secular rituals that were similarly disparaging, they would be unconstitutional, and the Court should strike them down; it just so happens that there are no cases doing this.¹²³ They argue as well that there are no cases *upholding* secular rituals that create this kind of "either you're with us or against us" message—but they have to reckon with *Barnette*, which allows schools to lead a potentially divisive Pledge of Allegiance. Although Eisgruber and Sager suggest that maybe the rule should be no school-led pledge at all in public schools,¹²⁴ as things stand, their doctrinal argument is unwieldy.

They also think the Constitution forbids a teacher (or coach, in their example) from leading students in a partisan political ritual of allegiance to the values of the American feminist movement (their example), even if the students have an opt-out right.¹²⁵ How do they square this with *Barnette*, which allows the teacher-led Pledge of Allegiance with an opt-out right? By quoting from *Barnette*! By quoting its most famous line: "[I]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, may prescribe what shall be orthodox in matters of politics . . . or religion."¹²⁶ The teacher-led feminist pledge—even with a student opt-out right—would, in the view of Eisgruber and Sager, violate this "imposition of

120. See *Lee*, 505 U.S. at 639, 638–39 (Scalia, J., dissenting) ("If students were psychologically coerced to remain standing during the invocation, they must also have been psychologically coerced moments before, to stand for (and thereby, in the Court's view, take part in or appear to take part in) the Pledge. Must the Pledge therefore be barred from the public schools . . .?"); Abner S. Greene, *The Pledge of Allegiance Problem*, 64 *FORDHAM L. REV.* 451, 451–52 (1995) (raising a similar concern).

121. EISGRUBER & SAGER, *supra* note 6, at 162.

122. *Id.* at 163.

123. *Id.* at 166.

124. See *supra* text accompanying note 121.

125. *Id.* at 170.

126. *Id.* (quoting *West Virginia v. Barnette*, 319 U.S. 624, 642 (1943) (internal quotation marks omitted)).

orthodoxy” principle.¹²⁷ This can’t be right, but to see why, we must move to the next section.

3. *Public School Curriculum*.—Public school officials make content-based curricular choices all the time. School boards, principals, and teachers decide what courses to teach, what books to assign, what syllabi to use, and what lesson plans to follow. Sometimes they make controversial choices: Sex education or abstinence education? What slant on American history (of which there are many)? Which books are part of the canon for a literature course? But to hear Eisgruber and Sager on the subject, there appears to be some sort of anti-orthodoxy rule of constitutional pedigree, which applies not only to student recitation (even with an opt-out, pace *Barnette*) but also to what teachers may say and teach. So, the problem with the teacher leading the feminist pledge—even with the student opt-out right—is that the teacher is imposing an orthodoxy. How is it an imposition of orthodoxy? Remember that Eisgruber and Sager do not rely on a psychological-coercion argument here. They later discuss *Epperson v. Arkansas*, which invalidated a state ban on the teaching of evolution in public school.¹²⁸ The opinion turns on a concern that fundamentalist Christian groups had commandeered the legislative process for a doctrinal religious end.¹²⁹ Eisgruber and Sager don’t like that line of reasoning, but they support the holding anyway as one not about religious liberty at all. Rather, relying again on *Barnette*’s anti-imposition-of-orthodoxy line, they conclude, “When the state identifies some specific topic, widely recognized as a fit subject for education, and labels it taboo, we may reasonably suspect that the state is attempting to impose an illegitimate kind of orthodoxy.”¹³⁰

I have two problems with this. First, teaching (or not teaching) cannot be the “imposition” of orthodoxy. The *Barnette* Court uses this line to strike down a compelled Pledge of Allegiance. To use it for a noncompelled utterance (such as the feminist pledge or even the Pledge of Allegiance post-*Barnette*, after the Court allowed it with an opt-out), or to use it for a curricular decision about what to teach and not to teach, stretches the plausible meaning of an “imposition” of orthodoxy well beyond its bounds.¹³¹ Second,

127. *Id.*

128. 393 U.S. 97, 103 (1968).

129. *See id.* (“The overriding fact is that Arkansas’ law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine . . . [of] a particular religious group.”).

130. EISGRUBER & SAGER, *supra* note 6, at 191.

131. Nussbaum at times falls into the same trap, equating government speech with the imposition of public orthodoxy. *See* NUSSBAUM, *supra* note 1, at 23 (using the phrase “establish a public orthodoxy,” the kind of language I am concerned with here); *id.* at 25 (using the phrase “signify an orthodoxy,” which is less problematic, as it goes to what message is being sent, not what is being established or imposed). Whatever else we might want to say about government speech—and I agree with Nussbaum that government-sponsored religious symbols are problematic—it is not because it imposes orthodoxy. We can always respond to speech by disagreeing with it, as standard Free Speech Clause doctrine states. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 419, 419–20 (1989)

if Eisgruber and Sager are serious about this, we'll have to undo a lot of curricular decisions throughout the country¹³²—for example, delicate decisions each school board or school makes about sex education for teenagers.

The line of cases forbidding the teaching of doctrinal religion in public schools, and more generally forbidding governmental actors from using the power of the dominant religion to shape the curriculum, is well established and fits with the case law denying government the power to erect religious symbols when doing so sends a message of insider–outsider status based on religion. That is, the principle forbidding government from acting with a predominantly religious purpose (embodied in several cases about religion in public schools¹³³) and the principle of nonendorsement of religion¹³⁴ are first cousins,¹³⁵ stating jointly a rule against dominant religious groups' using state power to openly and divisively achieve doctrinal religious ends.¹³⁶ The cases state a religion-specific rule rooted in the Establishment Clause.

4. *Legislative Accommodation of Religion.*—The doctrine in this area is murky, at times permitting and at other times forbidding accommodation of religious practice that does not extend to secular practice. The best explanation for the doctrine remains Justice Brennan's plurality opinion in *Texas Monthly, Inc. v. Bullock*, which invalidated an exception from state sales tax for religious periodicals only.¹³⁷ Brennan wrote that accommodation of religion only violates the Establishment Clause, with two exceptions. First, legislatures may seek to alleviate governmental burdens on the free exercise of religion.¹³⁸ Second, religion-only accommodations are okay if they do not

(suggesting that the best way to counter flag burning is “not to punish those who feel differently about these matters” but to “persuade them that they are wrong”); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“[T]he remedy to be applied is more speech, not enforced silence.”).

132. See Kent Greenawalt, *How Does “Equal Liberty” Fare in Relation to Other Approaches to the Religion Clauses?*, 85 TEXAS L. REV. 1217, 1233–34 (2007) (book review) (providing a list of controversial subjects that public schools are permitted to take positions on, and implying that these topics might also be subject to the “anti-orthodoxy rule” suggested by Eisgruber and Sager).

133. See *Edwards v. Aguillard*, 482 U.S. 578, 585, 594, 597 (1987); *Epperson v. Arkansas*, 393 U.S. 97, 107–08 (1968); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 742, 746–63 (M.D. Pa. 2005).

134. See *County of Allegheny v. ACLU*, 492 U.S. 573, 592–602 (1989).

135. And in *McCreary County v. ACLU*, 545 U.S. 844 (2005), a case invalidating a courthouse Ten Commandments display, Justice Souter beautifully links the two. See *id.* at 861–63 (explaining the objective-observer test at work in the purpose inquiry, and referring back to the endorsement analysis penned by Justice O'Connor).

136. Abner S. Greene, *The Incommensurability of Religion*, in LAW AND RELIGION: A CRITICAL ANTHOLOGY 226, 232–33 (Stephen M. Feldman ed., 2000) [hereinafter Greene, *Incommensurability*] (formulating the express-purpose test as requiring that “any dominant express purpose for the law must be secular, and any expressly religious purpose for the law must be no more than ancillary”); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1624–25 (1993) [hereinafter Greene, *Political Balance*] (making the same argument).

137. 489 U.S. 1, 5 (1989) (plurality opinion).

138. *Id.* at 15, 18 n.8.

impose substantial burdens on nonbeneficiaries.¹³⁹ Under this reasoning, the Court has invalidated legislative accommodations that benefited specific religious practices when the accommodations did not serve to lift a governmentally imposed burden on free exercise.¹⁴⁰

Eisgruber and Sager generally believe religion-only accommodation to be unconstitutional. They approve of the Court's creative extension of Congress's conscientious-objector statute to include nonreligious objection¹⁴¹ and argue that "[i]f the government granted conscientious-objector status only on the basis of religiously motivated opposition to war, it would be favoring some needs over others purely on the basis of their theological character or spiritual foundations."¹⁴² Legislatures may seek to guarantee equal liberty through accommodating religion, say Eisgruber and Sager, but they should extend the accommodation as the Court did in the conscientious-objector case, and courts should do so if legislatures do not.¹⁴³

But Eisgruber and Sager struggle with two cases upholding religion-only accommodations: *Amos*¹⁴⁴ and *Cutter*.¹⁴⁵ In *Amos*, the Court upheld a federal statute excepting religious organizations from the general prohibition on employment discrimination based on religion. The Court itself struggled in that case, which involved a maintenance worker and not clergy. Although free exercise is not directly implicated in the hiring and firing of a maintenance worker, the Court was concerned that case-by-case judicial inquiry into a religious organization's tenets would risk an entanglement between church and state that seems problematic under both Religion Clauses.¹⁴⁶ Eisgruber and Sager basically support this holding and rationale, while noting that the exception "pushes to the perimeter of the constitutional power to craft religion-specific accommodations."¹⁴⁷ In *Cutter*, the Court upheld a federal statute requiring prison wardens to accommodate when feasible inmates' religious practices.¹⁴⁸ Eisgruber and Sager are okay with this too, maintaining that the Court "helped to ensure that such accommodations will

139. *Id.*

140. See, e.g., *Bd. of Educ. v. Grumet (Kiryas Joel)*, 512 U.S. 687 (1994); *Texas Monthly*, 489 U.S. 1; *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). The Sabbatarian accommodation in *Thornton* imposed significant burdens on nonbeneficiaries—employers and other employees. 472 U.S. at 709–10. The sales-tax regime in *Texas Monthly* discriminated against nonreligious periodicals. 489 U.S. at 5. The accommodation in *Kiryas Joel* did not obviously impose any such burdens; the Court's concerns were more with the favoritism the accommodation showed and the drawing of a political boundary at the behest of a religious group. 512 U.S. at 690. For critique of both majority arguments in *Kiryas Joel*, see Greene, *supra* note 10.

141. *United States v. Seeger*, 380 U.S. 163, 166 (1965).

142. EISGRUBER & SAGER, *supra* note 6, at 114.

143. *Id.* at 247.

144. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

145. *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

146. *Amos*, 483 U.S. at 335–36, 339.

147. EISGRUBER & SAGER, *supra* note 6, at 251.

148. 544 U.S. at 712–13.

result in equal treatment rather than special privilege.”¹⁴⁹ But in both settings, Eisgruber and Sager are approving religion-only accommodations without judicial extension to similarly situated secular interests. It’s not clear whether Eisgruber and Sager would insist, as they do in other contexts,¹⁵⁰ on judicial extension to such interests.

C. *Nussbaum’s Equal Opportunity to Practice Religion*

So we have seen Barry’s theory of formal equality, according to which religious and other cultural minorities have no claim of right to exemption from nondiscriminatory laws of general applicability. And we have Eisgruber and Sager’s theory, dubbed “equal liberty,” according to which vulnerable groups (usually minorities) will sometimes have a claim of right against deliberate or inadvertent majoritarian neglect, but with no special protection for religious practice. The final equality theory I will discuss is the one that Nussbaum adopts; it was developed in the case law initially by Justice Brennan¹⁵¹ and then in scholarship by Michael McConnell.¹⁵² This theory—what one might call equal opportunity to practice one’s religion—begins from a baseline not of the necessity of the state or majoritarian governance, but rather of liberty, and specifically of religious liberty. According to this view, which I share, the Religion Clauses mark a special solicitude for a certain type of belief and practice—*religious* belief and practice. There are certainly strong historical arguments for this.¹⁵³ There are also arguments based in the nature of religious belief. For most Americans, religious belief is different from secular belief in its basis in an extrahuman source of normative authority. We can add to that religion’s comprehensiveness and obligatory nature. Although some have argued that religious belief and practice are grounded in asserted facts just as are secular belief and practice,¹⁵⁴ and conversely that secular belief and practice rely as much on faith as do religious belief and practice,¹⁵⁵ it’s hard to show a secular analogue to the theistic foundations for most religious belief and practice in the United States. Exactly what one should make of this rather clear aspect of religious distinctiveness remains to be developed, but if we combine it with the religious-specific nature of the First Amendment’s text and the paradigmatic historical cases behind that text, the burden should be on the

149. EISGRUBER & SAGER, *supra* note 6, at 248.

150. *See supra* text accompanying notes 125–27.

151. *Goldman v. Weinberger*, 475 U.S. 503, 520–22 (1986); *Sherbert v. Verner*, 374 U.S. 398, 403–04 (1963).

152. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1151–52 (1990); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 137–40 (1992).

153. *See generally*, e.g., McConnell, *supra* note 96.

154. E.g., Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 768–69 (1993).

155. E.g., *id.* at 769.

side of those claiming religion should get no special solicitude or even only the solicitude afforded similarly situated, vulnerable secular groups. My main point here is this: Given the textual and historical distinctiveness of the protections for religious liberty, it should take only a plausible argument (perhaps ontological, about what religion is, or perhaps phenomenological, about how it is experienced) to buttress the constitutional case for religious distinctiveness. And my brief excursion above into how we treat other constitutional rights such as freedom of speech and takings also suggests that it makes sense not to reduce the Religion Clauses to a value they are thought to mark.

In a section of her book called “Should Religion Be Special?,”¹⁵⁶ Nussbaum carefully, and cautiously, endorses the view that we should treat religion as distinctive for Religion Clause purposes. She begins with the obvious (and important) facts of the text of the Religion Clauses and the framers’ rejection of “rights of conscience” language.¹⁵⁷ Case law does sometimes treat religion as distinctive, and Nussbaum says there is at least a practical reason for this: “[R]eligious reasons are typically reasons that pertain to a group of people, and the genuineness of the claim is therefore relatively easy to assess.”¹⁵⁸ She maintains that this practical reason is insufficient, though; we still have to deal with the fairness question that a nonreligious person might raise to special treatment for religion.¹⁵⁹ She then rejects a series of arguments for treating religion as distinctive, before locating one that’s acceptable. (1) Religion isn’t more likely to be a ground of persecution; we see atheists and nonbelievers persecuted, as well.¹⁶⁰ (2) The Establishment Clause creates special disadvantages for religion, and these offset special advantages granted under the Free Exercise Clause, creating an overall fair regime. As stated, this isn’t an argument for treating religion as distinctive; it’s an argument that if we do treat religion as distinctive, at least we’re doing so in a way that is balanced. Nussbaum notes this point and moves on.¹⁶¹ (3) We cannot treat religion as special because it concerns a person’s relationship to God, because too many recognized religions are nontheistic.¹⁶² (4) Neither can we focus on the organized structure of

156. NUSSBAUM, *supra* note 1, at 164–74.

157. *Id.* at 164. Nussbaum explains that the framers might have equated conscience with religion, but “that the text the framers chose does make religion (whatever that includes) special for purposes of the Free Exercise Clause, fair or unfair.” *Id.* at 102.

158. *Id.* at 165.

159. *Id.*

160. *Id.*

161. *Id.* at 166.

162. *Id.* at 167; see 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 56, 135, 239 (2006). Although I am in the Brennan–McConnell–Nussbaum camp regarding treating religion as distinctive for constitutional law purposes, my argument for this is different from Nussbaum’s. As discussed in the preceding textual paragraph, we should focus on the most paradigmatic way in which religion is distinctive for most religious people—namely, its theistic component. This leads to an argument for a political balance of the Religion Clauses, with

religion, because some religious persons aren't part of such a structure (and, one might add, some secular commitments are based in an organized structure).¹⁶³ (5) Strongly felt commitments might be secular as well as religious; and some religious commitments are not strongly felt.¹⁶⁴ (6) Similarly, both secular and religious commitments might be felt as obligatory (or not).¹⁶⁵ (7) She also rejects the claim that finding the ultimate meaning of life, whether theistic or not, has intrinsic value. Too many of us doubt there is such ultimate meaning, and some have dogmatic anti-meaning views.¹⁶⁶

But she's nearing a view she's willing to accept here: (8) Returning to her discussion of Roger Williams, she argues that we should protect the faculty with which each person searches for the ultimate meaning of life, not the goal of such a search. As she puts it, "[W]e ought to respect the space required by any activity that has the general shape of searching for the ultimate meaning of life."¹⁶⁷ This "is probably the best we can do in trying to make sense of our feeling that there really is something about religion or quasi-religion that calls for special protection and delicacy."¹⁶⁸ She includes nontheistic as well as theistic religions, and idiosyncratic and highly individual searches as well as those that are part of a group structure.¹⁶⁹ She agrees with the result of the Court's conscientious-objection cases,¹⁷⁰ as they "stretch[ed] the account of religion" in a way compatible with her "search for ultimate meaning" definition.¹⁷¹ Having defined religion in this somewhat

Free Exercise Clause exemptions offsetting Establishment Clause barriers. I won't otherwise pursue this claim here. For further elaboration of it, see Greene, *Incommensurability*, *supra* note 136, at 237–39; Abner S. Greene, *Is Religion Special? A Rejoinder to Scott Idleman*, 1994 U. ILL. L. REV. 535, 536; and Greene, *Political Balance*, *supra* note 136, at 1643–44. Note also that at an interesting and perhaps unguarded moment, Eisgruber and Sager advert to the theistic grounding of religion. See EISGRUBER & SAGER, *supra* note 6, at 301 n.39 (describing religious obligations as ones that "emanate from a mystical spirit or being"). In defending special constitutional treatment for religion, Greenawalt writes that "[m]ost people in this country believe in transcendental sources of truth." GREENAWALT, *supra*, at 238; see also Berg, *supra* note 108, at 1214 ("[B]y respecting religious freedom the government leaves room for at least the possibility of a power higher than itself.").

163. See NUSSBAUM, *supra* note 1, at 167.

164. *Id.*

165. *Id.* at 167–68.

166. *Id.* at 168.

167. *Id.* at 169; see Berg, *supra* note 108, at 1203 ("The definition of religion can be broadened to encompass moral claims arising not only from atheism or agnosticism, but also . . . from any belief system that addresses 'ultimate' questions in a 'comprehensive' manner.").

168. NUSSBAUM, *supra* note 1, at 169.

169. *Id.* at 170.

170. *Welsh v. United States*, 398 U.S. 333, 343–44 (1970); *United States v. Seeger*, 380 U.S. 163, 165–66 (1965).

171. Nussbaum, *supra* note 1, at 172. For a similar approach to these cases, see GREENAWALT, *supra* note 162, at 58.

expansive way, Nussbaum says, “[W]hat sways me are the pragmatic and historical arguments for giving religion a special place.”¹⁷²

This view that religion is distinctive for Religion Clause purposes leads Nussbaum to endorse the view that religious liberty is the baseline and the burden should be on the government to justify impositions on religious practice, even from nondiscriminatory, generally applicable laws.¹⁷³ Although some of the arguments for this position sound in antidiscrimination theory, and are thus similar to Eisgruber and Sager’s position, the approaches are importantly different. Because of the baseline in religious distinctiveness and religious liberty, Nussbaum insists on exemptions for religious practice as a rule, without first having to find an appropriate benchmark for how other interests are treated, as Eisgruber and Sager do in their equal regard counterfactual approach. So, Nussbaum, echoing McConnell, observes that “[m]ajority thinking is usually not malevolent, but it is often obtuse, oblivious to the burden such rules impose on religious minorities.”¹⁷⁴ Eisgruber and Sager are alert to this problem; their examples of counterfactual reasoning (discussed below) to support exemptions are based in the kind of unintentional discrimination that can occur when the majority favors its interests but fails to equally value a minority interest. But Nussbaum goes further. A correct view of religious liberty, she claims, “involv[es] not formally similar treatment but, rather, the removal or prevention of hierarchies. Sometimes making minorities fully equal requires treating them differently, giving them dispensations from laws and customs set up by the majority.”¹⁷⁵ For example, consider *Sherbert v. Verner*, in which the Court announced that government must provide a compelling reason for burdening religious liberty, and accordingly ordered the state to award Sherbert unemployment compensation when she was fired for refusing to work on her Sabbath.¹⁷⁶ Eisgruber and Sager see this outcome only as a prophylaxis against

172. NUSSBAUM, *supra* note 1, at 173. For a similar approach, see GREENAWALT, *supra* note 162, at 72, 81–83, 99, 107, 175–77, 187, 194, 237–38.

173. NUSSBAUM, *supra* note 1, at 135–47, 173. Eisgruber and Sager correctly describe this approach (which they reject):

We could . . . hold that religious believers are normally entitled to disregard laws that get in the way of their religious convictions but still recognize limits on this get-out-of-jail-free privilege. There could be in effect a presumption that persons are free to act as their religions dictate, but that presumption could be overborne in cases in which the public interest behind a legal regulation was very strong.

EISGRUBER & SAGER, *supra* note 6, at 82. They clarify this appropriately: “[T]he formula would . . . have to be sensitive to the nature and weight of the burden imposed on religious exercise as well as to the gravity of the state’s interest.” *Id.* at 85.

174. NUSSBAUM, *supra* note 1, at 116. For examples of how this works in practice, see *id.* at 116 (military-uniform requirements; courtroom-behavior rules; military-conscription rules; subpoena exceptions); *id.* at 128 (rules designating days in a work week; spousal exemptions); and *id.* at 349–51 (school dress codes).

175. *Id.* at 20.

176. 374 U.S. 398, 403–04 (1963).

discrimination; the state had a relatively ad hoc rule for what sort of reasons for refusing to work were valid, and arguably was disfavoring Sherbert's minority religious status.¹⁷⁷ But Nussbaum sees the matter somewhat differently, asserting that "Sherbert was given a break that no Christian who refused Saturday work would get, because the Court was aware that the workplace put her in an unequal position vis-à-vis the majority."¹⁷⁸ Although Nussbaum is concerned, as are Eisgruber and Sager, with the equality problem of majorities disfavoring minorities, and discusses *Sherbert* in these terms later in the book,¹⁷⁹ she also approves the outcome in *Wisconsin v. Yoder*, in which the Court held that the Free Exercise Clause required an exemption from compulsory-schooling laws for Amish parents regarding their teenage children.¹⁸⁰ She appreciates that the Court based this holding in the Free Exercise Clause, and that the Court stated that similarly situated secular parents would have lost their case.¹⁸¹ *Yoder*, she says, "was an important deepening and extension of *Sherbert*," and the "*Sherbert* framework"—requiring the state to provide a compelling interest to overcome a claim of even inadvertent burden on religious practice—"was widely employed at the lower court level . . . and it did result in a modest success rate for minorities pressing religious claims."¹⁸² (This is in response to the standard argument, from Justice Scalia in *Smith* and from Eisgruber and Sager, that the *Sherbert* framework rarely worked in favor of claimants.¹⁸³) Nussbaum criticizes the outcome in *Smith* (the peyote case) and endorses "a return to the *Sherbert* regime."¹⁸⁴ Elsewhere she says we have strong reasons "to applaud the *Sherbert* framework."¹⁸⁵

177. EISGRUBER & SAGER, *supra* note 6, at 40–41, 98.

178. NUSSBAUM, *supra* note 1, at 20.

179. *Id.* at 137.

180. 406 U.S. 205, 235–36 (1972).

181. NUSSBAUM, *supra* note 1, at 143; *see Yoder*, 406 U.S. at 215–16.

182. *Id.* at 145–46.

183. *See Employment Div. v. Smith*, 494 U.S. 872, 879–80 (1990); EISGRUBER & SAGER, *supra* note 6, at 41–44.

184. NUSSBAUM, *supra* note 1, at 173.

185. *Id.* at 147. Another way of seeing how Nussbaum supports the Brennan–McConnell rather than Eisgruber–Sager equality view can be gleaned from how she discusses equality in the exemptions setting. Equality is the core issue for her, but she says the level of generality at which we do the comparison—between how a minority is being treated and how the majority (or other minorities) are being treated—is malleable. *Id.* at 138. In discussing *Yoder*, which she believes on balance was correctly decided, *id.* at 145, she says "there is no comparable educational exemption for the majority, so the way the fairness issue figures is at a higher level of generality: the majority gets to abide by and preserve their religious ways of life and the Amish (arguably) don't." *Id.* at 144. This is equality analysis from a Brennan–McConnell perspective; the very fact that the law of general applicability impedes the religious practice of one minority group and not of others raises free exercise concerns.

IV. The Problem of Exemptions

I turn now to how Nussbaum, Barry, and Eisgruber and Sager deal with the exemptions question. A preliminary point: Under *Smith*, courts are under no requirement to grant free exercise-based exemptions.¹⁸⁶ So any discussion of a constitutional right to exception from generally applicable law must be seen either as directed to legislatures, or as directed to courts if legislatures constitutionally direct courts to engage in a *Sherbert*-like balancing test,¹⁸⁷ or as an argument for how courts should operate were *Smith* overturned.

A. *Evaluating the Harm Caused by Religious Practice*

No one argues for an absolute right to exemption for free exercise. The right is *prima facie* only, subject to override by a compelling state interest. The pre-*Smith* case law, at least at the Supreme Court level, often found sufficient state interests, although it is hard to say that all were “compelling.”¹⁸⁸ If we are to rework the theory and case law in this area, we will need a more stable sense of what counts as a state interest sufficient to override a free exercise claim.

Let’s start with the question of the baseline. The weaker the presumption of the legitimacy of general law, and the stronger the presumption of religious liberty, the more government should have to do to override infringement on free exercise and thereby not be required to provide an exemption. I am elsewhere developing an argument that denies that we have a *prima facie* moral duty to obey the law and that correlatively denies that law, even in a liberal democracy, is *prima facie* legitimate.¹⁸⁹ Government has to earn its stripes, law by law or case by case; the justificatory burden is always on the coercive governmental entity. This is not an anarchistic position—the state can often prevail—but it is an effort at shifting the

186. 494 U.S. at 890.

187. This is a complex matter, given the Court’s invalidation of a congressional effort of this sort with the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb-1–2000bb-4 (2000)), *invalidated in part* by City of Boerne v. Flores, 521 U.S. 507, 536 (1997). But RFRA still stands regarding the federal government, *e.g.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006), and some states have passed their own versions of RFRA, directing their courts to apply rigorous scrutiny to generally applicable legislation that burdens the free exercise of religion. EISGRUBER & SAGER, *supra* note 6, at 273–75; NUSSBAUM, *supra* note 1, at 160. There are many unresolved questions here, which I will bracket for present discussion.

188. *See, e.g.*, *Bowen v. Roy*, 476 U.S. 693, 709 (1986) (upholding a benefit program’s requirement that applicants submit Social Security numbers because of an interest in preventing fraud); *Goldman v. Weinberger*, 475 U.S. 503, 508–10 (1986) (upholding an Air Force restriction on the wearing of headgear indoors due to the military’s interest in uniformity); *United States v. Lee*, 455 U.S. 252, 258–59 (1982) (rejecting a religious exemption to Social Security taxes because of the government’s interest in maintaining a sound Social Security system). For dissenting views on the substantiality of the government interest, see *Bowen*, 476 U.S. at 726 (O’Connor, J., dissenting); *Goldman*, 475 U.S. at 517–20 (Brennan, J., dissenting).

189. Abner S. Greene, *Against Obligation: A Theory of Permeable Sovereignty* (unpublished manuscript, on file with author).

burden and making the case that sovereignty is permeable through to all of our sources of value and not plenary in the state. This argument is not specific to religion; it includes all deeply held sources of normative authority. The arguments I am making in this Review, and have made before,¹⁹⁰ supporting the Nussbaum position regarding placing a burden on government to justify burdens on religious practice, are not inconsistent with the broader argument against obligation and legitimacy. They should be seen as a smaller version of such an argument, hitched to a more clause-, history-, and case-specific reading of our constitutional order. The premises of both arguments are the same, however: The presumption of liberty is a strong one, and government may overcome it, but only with a substantial case about the harm that would likely ensue were an exception provided.

Although Nussbaum doesn't put it precisely this way, she clearly supports this baseline of individual liberty and justificatory burden on the state. In part we see this from her adoption of the "equal opportunity to practice religion" theory of equality, i.e., that the state must provide a compelling reason to justify even incidental burdens on religious practice from generally applicable law. We can also see Nussbaum's support for a baseline of individual liberty and burden-shifting to government from the six normative principles she argues are "amply recognized in our constitutional tradition and in the philosophical works related to it."¹⁹¹ The principles are:

(1) "The Equality Principle. All citizens have equal rights and deserve equal respect from the government under which they live."¹⁹²

(2) "The Respect-Conscience Principle. Respect for citizens requires that the public sphere respect the fact that they have different religious commitments . . . , and provide a protected space within which citizens may act as their conscience dictates. . . . If respect for persons is to be equal, this consideration for the conditions in which conscience operates must also be equal: all citizens enter the public square 'on equal conditions.'"¹⁹³

(3) "The Liberty Principle. Respect for people's conscientious commitments requires ample liberty."¹⁹⁴

(4) "The Accommodation Principle. . . . [S]ometimes some people (usually members of religious minorities) should be exempted from generally applicable laws for reasons of conscience."¹⁹⁵

(5) "The Nonestablishment Principle. . . . The state may make no endorsements in religious matters that would signify an orthodoxy, creating an in-group and out-groups."¹⁹⁶

190. For example, see the Greene sources listed in note 162, *supra*.

191. NUSSBAUM, *supra* note 1, at 22.

192. *Id.* (emphasis omitted).

193. *Id.* at 22–23 (emphasis omitted).

194. *Id.* at 24 (emphasis omitted).

195. *Id.* (emphasis omitted).

196. *Id.* at 25 (emphasis omitted).

(6) “The Separation Principle. . . . [A] certain degree of separation should be created between church and state: on the whole, church and state have separate spheres of jurisdiction.”¹⁹⁷

Nussbaum recognizes the need to develop a theory, or at least some principles, for what kinds of state interests may outweigh religious liberty claims. But she doesn’t develop this idea in any detail, instead invoking somewhat murky tests along the way. This begins with her discussion of Roger Williams’s (revised) charter for Rhode Island, which essentially requires accommodation of religious practice, insofar as such practice does not “disturb the civil peace,” as in causing “civil injury or outward disturbance of others.”¹⁹⁸ Nussbaum summarizes her discussion here in this way: “Laws of general applicability have force only up to the point where they threaten religious liberty (and public order and safety are not at stake).”¹⁹⁹ The difficult question, though, is what counts as “public order and safety” sufficient to override a claim of religious liberty. Nussbaum does give some examples, based in colonial cases, where public order and safety would be insufficient for override: “forcing Jews to testify on the Sabbath” and “forcing Quakers to remove their hats in court.”²⁰⁰ In the first case, we can accommodate the Jewish witness by allowing him to testify on a day other than his Sabbath; that seems a small blow to public order and safety. In the second case, there’s no way to similarly assure the end we want—removal of hats in court; rather, we’ll have to let the Quaker appear in court with hat on. So the question then is this: What kind of harm to public order and safety does this entail? We must consider the question from the standpoint of the time and place, and there were reasons based in strong social norms to require the removal of hats in court. But still, even with deference to the extant mores, we can still argue—not too anachronistically, one hopes—that public order and safety wouldn’t have been too severely compromised by accommodating the Quakers. We are reasoning case by case here,²⁰¹ moving toward what would be more universally considered harm and perhaps that would be more grounded in physical harm to the body (and perhaps economic harm, as well).

Williams was aware of the slippery nature of public-order-and-safety claims and also was keen to establish a high hurdle for government to meet.

197. *Id.* (emphasis omitted).

198. *Id.* at 49.

199. *Id.* at 50. Later she says Williams was “sympathetic to the idea of accommodation, where peace and safety interests are not at stake.” *Id.* at 61.

200. *Id.*

201. Nussbaum admits as much. She explains that specifying compelling state interests is difficult and that because the state’s functions change, we can’t specify in advance a list of sufficiently compelling state interests, but rather the law must develop over time. *Id.* at 139. On the virtues of casuistic reasoning, see CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 121–35 (1996), and Cass R. Sunstein, *Problems With Rules*, 83 CAL. L. REV. 953, 1006–21 (1995).

As Nussbaum reports, Williams “repeatedly stresse[d] the danger of hypocrisy in making judgments in this regard”; he was alert to “the constant claim of the would-be persecutor that heretics are threatening peace and stability.”²⁰² Nussbaum then apparently summarizes Williams’s view (without citation, so perhaps it’s more her view): “Religious liberty must therefore have extremely ample protection, and the threat to stability must be extremely evident, in terms of a manifest breach of *civil* peace, if there is to be any legitimacy to state infringement.”²⁰³ This makes sense normatively, if one adopts the equal-opportunity view of religious equality. Still, we’ll need to do more than use words such as “extremely” and “manifest,” which make clear the high burden on the state, but don’t do much to separate what meets such a burden from what doesn’t. Nussbaum’s reference to a breach of the “civil” peace is meant to exclude breach-of-the-peace claims made from a religious perspective alone (e.g., heresy) and to point us toward more tangible and universally acceptable concepts of harm. She excludes a “mere desire for homogeneity” as a strong enough state interest;²⁰⁴ this might go to the Quaker hat example. But is it so clear that homogeneity is always insufficient? What about public school uniform requirements, when officials have reasonably concluded that order and safety are advanced by eliminating any gang or other group identification from clothing? Should a religious student be permitted an accommodation from this rule to wear an item required by her religion? What if the school reasonably believes that would open the same can of worms it’s trying to close, identifying students by group when the school wants the kids to see each other just as kids and not otherwise identified? The kids could still wear their religious attire out of school, and perhaps that should be enough. It’s not clear how this case should come out; I raise it to suggest that a “mere desire for homogeneity” might sometimes be a strong state interest.

A related issue here is what kind of harm from governmental action should suffice to trigger a *prima facie* claim that religious liberty has been violated. All agree that clear discrimination is sufficient; some agree that incidental burdens from generally applicable laws count. Trickier is expressive harm: Why exactly does government erection of a favored religious symbol suffice for a cognizable violation of religious liberty? The case law here does not turn on the minuscule amount of money that is coercively taken from taxpayers for the symbols. Rather, it turns on a signal that the government sends, when the religiosity is foregrounded, of insider–outsider status. Nussbaum spends a lot of time on this problem. She refers to a concern with

202. NUSSBAUM, *supra* note 1, at 63.

203. *Id.*; *see also id.* at 117 (“Some such burdens to religion may have to be borne, if the peace and safety of the state are really at stake, or if there is some other extremely strong state interest.”).

204. *Id.* at 117.

“unequal standing in the public domain.”²⁰⁵ Government should not “establish[] a religious doctrine that denigrates or marginalizes some group of citizens,”²⁰⁶ she says, adding that her conception here “is highly sensitive to dignitary affronts in the symbolic realm, even when they entail no material disadvantage.”²⁰⁷ She develops the idea in a chapter devoted in part to the matter of state-sponsored religious displays.²⁰⁸ Adapting somewhat loosely Madison’s concern that coerced financing of churches “degrades” dissenters,²⁰⁹ Nussbaum argues that “a failure of respect in the symbolic domain is like an insult, a slap in the face, and, moreover, it is the sort of slap in the face that a noble gives to a vassal, one that both expresses and constitutes a hierarchy of ranks.”²¹⁰

I wish Nussbaum had been a bit more careful here, for metaphors usually need unpacking. A slap in the face is not the same as a statement; we know this from many Free Speech Clause opinions.²¹¹ A state-sponsored religious symbol is often meant to proclaim a dominant faith, and perhaps some members of minority faiths feel left out by this. But they still go about their daily activities, including worship activities, cheek by jowl with the majority. So we need more to understand why an expression of the majority faith is not only harmful (we can assume it is at least to some), but also harmful at a *constitutional level* of harm and actionable in a court of law. Finally, should we see it as inconsistent to believe that mere expression can be sufficiently harmful to individuals to constitute a violation of religious liberty, while we are simultaneously developing a far more strict and narrow theory of harm from religious practice sufficient to constitute a compelling state interest? Perhaps there is no contradiction, for the symbols cases involve government (arguably) causing harm, and the other matter involves private citizens (arguably) causing harm while engaged in their religious practice. But the dramatic difference in what we are willing to accept as cognizable harm should give us pause, on one end or the other, or both.

205. *Id.* at 9; *see id.* at 19 (echoing Justice O’Connor’s concern with endorsement and focusing on “a violation of that civic equality, equality of standing in the public realm”).

206. *Id.* at 11. While extending the argument beyond religion, Eisgruber and Sager share Nussbaum’s argument that government speech might constitute sufficient disparagement of a minority group to be actionably unconstitutional. EISGRUBER & SAGER, *supra* note 6, at 20, 173, 179.

207. NUSSBAUM, *supra* note 1, at 21.

208. *Id.* at 225–32, 252–65.

209. *Id.* at 92 (quoting James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), in JAMES MADISON: WRITINGS 29, 33 (Jack N. Rakove ed., 1999) (“[State] establishment [of religion] . . . degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree.”)).

210. NUSSBAUM, *supra* note 1, at 227.

211. For cases holding that mere exposure to offensive expression is an insufficient ground for regulation, *see, e.g.,* *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208–12 (1975); and *Cohen v. California*, 403 U.S. 15, 18, 21–22, 24–25 (1971).

The difficulty of determining what type and degree of public-order-and-safety concerns may override claims of religious liberty is part of what leads Barry to his all-or-nothing view.²¹² (As discussed above, his view is based primarily in his first-order argument for solidarity and universal rights and against government bending to cultural–religious difference.²¹³) Here is how he makes his case, using two examples: stunning of animals prior to killing them, and helmets for motorcycle riding. For the first, he says there are two plausible positions. One is “that there should be no collective view about the demands of animal welfare.”²¹⁴ The other is “that there is a legitimate collective concern with the welfare of animals which underwrites the requirement that all animals be stunned prior to being killed.”²¹⁵ To adopt neither of these, but rather a rule-plus-exemption approach, “it is necessary to postulate that, although ritual slaughter is far from being best practice [for animal welfare], it is nevertheless above some threshold of cruelty below which prohibition would be justified.”²¹⁶ To maintain this position “requires a capacity for mental gymnastics of an advanced order,” Barry contends.²¹⁷ For the second case, Barry makes the same point:

Suppose we accept that it is a valid objective of public policy to reduce the number of head injuries to motorcyclists, and that this overrides the counter-argument from libertarian premises. Then it is hard to see how the validity of the objective somehow evaporates in the case of Sikhs and makes room for an exemption from the law requiring crash helmets.²¹⁸

In Barry’s view of politics, there is no room for doubt. We gather the evidence and make a determination about whether government regulation is appropriate, and then it either is or isn’t. This politics of certainty is rooted in Barry’s argument that moral universalism requires not only that there be moral truths (as opposed to a general skeptical view to the contrary), but also that we have access to such truths (sufficient to regulate, one might add). But there is another way of looking at things. We could believe in moral truths but doubt our ability to appreciate them fully, at least sometimes. We could also start from the outside in, rather than the inside out, and begin with a presumption that various comprehensive views, not just our own, might be correct. We could then begin the delicate and difficult task of seeking common ground—an overlapping consensus if you will—regarding (inter alia)

212. Eisgruber and Sager nod in this all-or-nothing direction when critiquing the balancing approach, EISGRUBER & SAGER, *supra* note 6, at 87, but instead of rejecting exemptions as of right entirely, as Barry does, they develop their “equal regard” approach, as I discuss below. *See infra* subpart IV(C).

213. *See supra* text accompanying notes 46–52.

214. BARRY, *supra* note 8, at 42.

215. *Id.*

216. *Id.* at 43.

217. *Id.*

218. *Id.* at 48.

what type of harm we should regulate, while simultaneously recognizing the possible flaws in our position. We could yield (at least presumptively) when another position is offered, based not in whim but in an alternative, developed normative view. Part of this project would involve attributing weight, both to what we are protecting with our regulation and to what is being asserted as counterpoint. As sketched above (and below) in considering Nussbaum's book, developing an appropriately reticulated theory of public order and safety, and of the interests of the countervailing views, may not be easy. But it would be doable and would require no more mental gymnastics than are required for the baseline presumption of uncertainty. And the difficulties here are no more or less than the difficulties that even Barry's all-or-nothing position faces as it seeks to justify regulation versus the libertarian position.²¹⁹

As to his examples: The case of the Sikh motorcycle rider should be an easy one for an exemption. There are plenty of good arguments for requiring helmets for motorcycle riders, but they are not of the strength of arguments against murder, for example. So while we won't exempt the ritual slaughter of persons, we will bow to those whose comprehensive, considered normative view requires covering one's head in a certain way in public, even while on a motorcycle. It is not inconsistent to grant this exemption for a Sikh but not for a mere pleasure-seeker.²²⁰ The case involving animal slaughter is harder because we have to determine how to rank the interest in animal welfare (as against the Jewish or Muslim interest in ritual slaughter). On the one hand, avoiding the infliction of pain on animals seems weightier than the paternalistic interest invoked in the helmet setting. On the other hand, there is a legitimate debate about the extent to which we must consider animal welfare on a par with human welfare. Exempting ritual slaughter from the stunning rules is a plausible way of finding a middle ground between two claims of right—the claim on behalf of the animals and the claim from religious truth. For those of us who aren't sure about either claim (in part

219. And even Barry is willing to yield: He admits there might be cases (not many) in which “uniformity is a value but not a great enough one to override the case for exemptions,” giving the example of “the Sikh boy whose turban contravened the school rules.” *Id.* at 62. Here, Barry admits the possibility of weighing the public-order-and-safety need against the dissenting interest. If he can do so here, he should be able to do so elsewhere.

220. On distinguishing between preferences and more systemically developed values, see RONALD DWORKIN, *LIFE'S DOMINION* 201–02 (1993), which discusses experiential versus critical interests. Whether we should exempt the religious person but not the secular person with an equally comprehensive, worked-out view about head-covering is a harder question, addressed to some extent above in the discussion of religious distinctiveness. See BARRY, *supra* note 8, at 48 (“But why should not anybody else make a similar claim [regarding exemption from the helmet rule]? Religion appears to play no essential part in what is in essence a simple argument to the effect that people should be free to decide for themselves what risks of injury to accept.”). As I noted earlier, although as a matter of Religion Clause doctrine for the U.S. Constitution the religious distinctiveness approach seems right to me, I am also working through a broader view of exemptions, which would apply to both religious and secular normative views that compete with that of the state. See *supra* text accompanying notes 189–90.

because we're not nonhuman animals and because we're not devout Jews or Muslims), the rule-plus-exemption approach makes sense.

B. *Harm to Religious Observers*

What about the other side of the ledger, the harm to the religious claimant? Should we accept all claimed harms to religious practice from generally applicable law,²²¹ or at least all such claims determined to be bona fide?²²² If so, should each have equal weight, or are there factors we can use to determine weight?

Nussbaum discusses this briefly. Following *Sherbert*, she says the burden has to be a substantial one, but that the conduct in question need not involve a religious obligation (either to do or not to do something).²²³ She adds (without citation), “[A] standard looser than that of command, but still requiring some religious centrality, has on the whole prevailed.”²²⁴

Perhaps we can do no better than ask courts—and when appropriate, legislatures—to inquire generally into whether there's a substantial or significant burden on religious practice from the law in question.²²⁵ This inquiry may involve whether the practice is obligatory or central, and it may involve other questions as well, such as the long-standing nature of the practice, its connection to other aspects of the religious practice, and whether its contours are well-enough defined for an appropriate exemption to be crafted. Questions that arise often in this setting are whether courts (and legislatures, but I'll save the institutional comparison discussion for below) are capable of drawing these case-by-case distinctions, and whether the very drawing of such distinctions harms (or risks harm to) religious liberty, both by entangling courts in the nuances of religious doctrine and by awarding exemptions to some but not other religious claims.

Even Nussbaum, who generally supports the balancing approach, evinces some concerns along these lines. In a discussion of a bill submitted in Virginia by Patrick Henry in 1784 to establish a tax to support teachers of Christianity, she explains that the bill included exemptions for some small

221. Some free exercise claims arise not from the regulatory impact of generally applicable law, but from one-off decisions by the government, for example, a Forest Service decision to build a road through what happened to be a sacred area for a specific Indian tribe. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 439 (1988). This sort of case, especially in the land-use setting, presents a different set of problems than the more common setting of a request for exemption from an otherwise valid regulatory law, and I won't otherwise address it.

222. *See Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829, 832–33 (1989) (stating that one may invoke the Free Exercise Clause based on a sincere religious belief, even if not based on the tenets of a specific sect).

223. NUSSBAUM, *supra* note 1, at 138.

224. *Id.* All of the Justices writing in *Smith* said that judges should not inquire into the “centrality” of a religious practice, but the Justices applying strict scrutiny would look at the substantiality of the burden. *Employment Div. v. Smith*, 494 U.S. 872, 886–87 & n.4 (1990); *id.* at 899, 906–07 (O'Connor, J., concurring in the judgment); *id.* at 919 (Blackmun, J., dissenting).

225. GREENAWALT, *supra* note 162, at 211.

sects.²²⁶ She adds, “If even Henry’s list of exemptions doesn’t work well enough, we can surely see that a long open-ended laundry list of exemptions, changing every time a new sect or subsect emerged, would be quite impossible to administer, and would give rise to constant political wrangling.”²²⁷ Eisgruber and Sager put it this way:

[A] good deal of indeterminacy and ad hocery enters the picture. . . . In the absence of a clear standard, judges and other public officials may give preferential treatment to mainstream, familiar claims of conscience at the expense of more exotic ones, raising serious concerns about a failure of equal treatment.²²⁸

And central to Justice Scalia’s opinion for the Court in *Smith* was a concern that it’s too hard for judges to conduct the balancing test with any consistency.²²⁹

I have two sets of responses to this set of concerns about administrability, judicial entanglement with religion, and a potential equality problem with only some religious claimants receiving exemptions. First, even on Eisgruber and Sager’s preferred equal regard theory, precisely the same concerns arise. I will discuss this in the next subpart when I show, *inter alia*, that the malleability of the Eisgruber–Sager approach is severe; if their approach is defensible, it can’t be on the ground that it produces outcomes with a more rule-like precision than does the balancing approach.

Second, case-by-case balancing is a familiar task for courts; parties asking for exemptions have waived any concern with judicial entanglement with their religious practices; and, so long as outcomes are well-explained, losing claimants will have no justifiable equality argument. We should not be troubled by case-by-case judicial balancing. It’s a familiar task for courts well-schooled in common law methods of adjudication, where standards rather than rules often apply and where interests are frequently balanced.²³⁰ It’s familiar as well throughout constitutional doctrine; my favorite example is the line of “time, place, or manner” cases in free speech law, where the Court engages in open-ended balancing of individual speech interest against governmental regulatory interest, with the cases coming down roughly evenly on each side.²³¹ As we do elsewhere, in considering claims of reli-

226. NUSSBAUM, *supra* note 1, at 90–91.

227. *Id.* at 93.

228. EISGRUBER & SAGER, *supra* note 6, at 85.

229. 494 U.S. 872, 890, 885–90 (1990); *see also* BARRY, *supra* note 8, at 187 (supporting Scalia’s view in *Smith* “that courts are not equipped to discern the occasions for exemptions to general laws”).

230. *See supra* note 201.

231. *Compare, e.g.*, *Int’l Soc’y of Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 684–85 (1992), *United States v. Kokinda*, 497 U.S. 720, 736–37 (1990), *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989), *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984), *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655–56 (1981), and *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (all upholding time, place, or manner regulations), *with*

gious liberty we can reason from the easy cases at the extreme—a ritual that is central and obligatory receives higher weight than a more amorphous concern with how a law might affect practice; on the other hand, a practice that harms another person’s personal bodily integrity is more defensibly regulated than one that causes harm, if at all, only to consenting adults. That hard cases will exist makes this area of law no different from any other.

As to the judicial-entanglement issue, i.e., the concern that courts should not be getting into questions such as whether a religious practice is obligatory or central, if parties don’t want such judicial questioning, they don’t have to ask for the exemption. Waiver here seems a sensible posture, unless we consider the judicial-entanglement concern as more a structural, jurisdictional matter. That would render almost all Religion Clause jurisprudence problematic; courts are always examining and pronouncing on matters of religious practice—whether we are in the exemptions area or we are looking at prayer in public school, the introduction of intelligent design into public school curricula, government placement of religious symbols, or government funding that runs to religious-institutional recipients. Moreover, we should distinguish the one area in which judicial entanglement is a serious constitutional concern, namely, judicial determinations of intra-church disputes over religious doctrine. Case law disallows this.²³²

The concern about judicial victories for some but not other religious groups should be obviated by careful judicial explanations and distinctions.²³³ Judicial attention to the substantiality of the burden—including a discussion of whether the practice is obligatory, central, and otherwise connected to aspects of the religion—and to the nature of the state interest and whether the interest requires uniform enforcement or can tolerate exceptions, should help ameliorate losses. Analogizing losing claims to each other and distinguishing winning claims could help develop a body of case law that would help predict future outcomes. We must remember that equality involves treating like cases alike and unlike cases unlike.²³⁴

Watchtower Bible & Tract Soc’y v. Village of Stratton, 536 U.S. 150, 168–69 (2002), City of Ladue v. Gilleo, 512 U.S. 43, 58–59 (1994), Lee v. Int’l Soc’y for Krishna Consciousness, Inc., 505 U.S. 830, 830 (1992), Bd. of Airport Comm’rs v. Jews for Jesus, 482 U.S. 569, 577 (1987), Schad v. Borough of Mount Ephraim, 452 U.S. 61, 75–77 (1981), Martin v. City of Struthers, 319 U.S. 141, 149 (1943), and Schneider v. State, 308 U.S. 147, 165 (1939) (all invalidating time, place, or manner regulations).

232. Jones v. Wolf, 443 U.S. 595, 602 (1979).

233. In part because legislatures don’t give explanations in the same way courts do, and in part because they are subject to capture by small groups in a way that might exacerbate inter-sect inequality, Chip Lupu has argued for judicial exemptions only, and against legislative accommodations. Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 600 (1991).

234. See Goldman v. Weinberger, 475 U.S. 503, 521–22 (1986) (Brennan, J., dissenting); see also GREENAWALT, *supra* note 162, at 105 & n.80 (defending the result in *Yoder* and the Court’s attention to facts about the Amish that might not have supported an exemption for other groups).

As a final point for this discussion about how we might engage in a balancing process, let's consider the argument that this should be left to the legislature. Barry puts it plainly:

There is no principle of justice mandating exemptions to generally applicable laws for those who find compliance burdensome in virtue of their cultural norms or religious beliefs. . . . There are considerations of some weight on both sides [i.e., burden on religion and state interest] and the only appropriate forum for casting up the balance is a publicly accountable one: a process in which the public at large is, ideally, consulted and (in the absence of compelling reasons for believing that the majority view rests on misinformation or prejudice) heeded.²³⁵

But legislative majorities are not always the best judges of how to ameliorate the impact of general legislation on small, relatively powerless groups. This is why we have stepped-up judicial review for rights of political participation and for discrete and insular minorities.²³⁶ If we depart from the all-or-nothing approach and admit that exceptions are sometimes justified, courts may often be the only resort for groups that either lack the political clout to persuade a majority to craft an exception or are otherwise disfavored by the majority. It's not clear how much Barry's exception to his rule for "misinformation or prejudice" will do to ameliorate majoritarian neglect. Furthermore, we can make litigation more publicly accountable by permitting intervenors and amici to represent various community points of view.

Although they otherwise support judicial exemptions, pursuant to their equal regard approach that I will discuss further in the next subpart, Eisgruber and Sager argue that in some instances legislative rather than judicial exceptions are appropriate. They advance this point as an instance of judicial "underenforcement" of the Constitution, a term developed by Sager²³⁷ to explain and justify the judiciary's abstaining from enforcing otherwise extant constitutional rights because judges "recognize institutional limits on the judiciary's capacity to enforce" such rights.²³⁸ Eisgruber and Sager invoke judicial underenforcement to argue that cases such as *Smith*, involving the Native American Church's sacramental use of the hallucinogen

235. BARRY, *supra* note 8, at 321. (This is a backup argument for Barry, whose principal position, stated again on the same page, is the all-or-nothing view, excluding legislative accommodations as well as judicial exemptions. *Id.*) Bill Marshall also has advanced a version of this position favoring legislative over judicial exceptions for religion. See generally William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1989–90).

236. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

237. LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 84–128 (2004) (explaining the reasons for "underenforcement" of moral justice by the Judiciary); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

238. EISGRUBER & SAGER, *supra* note 6, at 255.

peyote, and *Lyng*,²³⁹ involving another Indian tribe's claim of sacred land against the government's development plans, "are hard precisely because they involve judgments of social value that seem more naturally to belong to the legislature."²⁴⁰ Above, I discussed one take on this point—that legislatures are more accountable to the public. Here, let's consider the other take—that legislatures are better situated than are courts to balance burdens and benefits. It's true that in both cases, after losses at the Court, the Indian groups in question received congressional accommodations.²⁴¹ We should not make too much of the legislature-to-the-rescue story, however; the (at least doctrinally plausible, at the time) litigation might have been a key factor affecting the ultimate legislative outcomes. Moreover, it's hard to see how the peyote case, in particular, is better situated for legislative than judicial decision making. The relevant facts involve the nature of the controlled substance and its range of effects, its place or lack thereof in a larger supply chain that might be diverted to more dangerous uses (such as by children), and its function in (and other facts about) the religious ritual. These are all matters as to which trial courts can take evidence and determine both the substantiality of the burden on the religious practice and the significance of the government's need—not for enforcement of controlled-substances laws generally but for enforcement regarding this drug in this setting. Sometimes litigation is a better setting than legislation for such focused inquiries. At least we can see it as a stopgap against legislative neglect, which might occur for a variety of reasons.

C. *Eisgruber and Sager's Equal Regard Approach*

Eisgruber and Sager develop a theory of judicially required exemptions that they call "equal regard."²⁴² They argue that "minority religious practices, needs, and interests must be as well and as favorably accommodated by government as are more familiar and mainstream interests."²⁴³ (And as a reminder, they argue the converse as well, i.e., if government is going to accommodate religious interests it must do the same for secular ones.²⁴⁴) The task is always a comparative one: Has government treated mainstream interests more favorably than vulnerable minority interests? Violations of equal regard can happen in a variety of ways; Eisgruber and Sager focus on examples in which the law permits conduct that mainstream interests deem important, while regulating "equivalent" con-

239. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

240. EISGRUBER & SAGER, *supra* note 6, at 256; *see id.* at 243.

241. *See* 42 U.S.C. § 1996a (2000) (accommodating the sacramental use of peyote); Act of September 27, 1988, Pub. L. No. 100-446, 102 Stat. 1774, 1809 (defunding the road project at issue in *Lyng*).

242. EISGRUBER & SAGER, *supra* note 6, at 13, 89.

243. *Id.* at 13, 87–120.

244. *See supra* text accompanying notes 91–99, 141–43.

duct important to vulnerable minorities.²⁴⁵ The key is figuring out what counts as equivalent and whether the majority would have regulated in the same way had it been in the minority's position.

Here are some of Eisgruber and Sager's examples: (1) A city requires its police officers to be clean shaven, accommodates officers with a skin condition making it painful to shave, but fails to accommodate Sunni Muslims whose religious beliefs require them to wear beards.²⁴⁶ (2) To protect high school basketball players from slipping on headgear that has fallen off, a state prohibits such players from wearing headgear during play. The state permits players to wear eyeglasses with retaining straps, but fails to accommodate Jewish players with a religious need to wear yarmulkes.²⁴⁷ (3) The U.S. government decides to build a road through federal lands in a way that desecrates an Indian tribe's most sacred site.²⁴⁸ (4) A state accommodates Catholics by providing some exceptions to alcohol regulation for sacramental wine, but fails to accommodate the Native American Church by providing an exception to its controlled-substances laws for sacramental peyote.²⁴⁹

Eisgruber and Sager say that the first two cases involve "ready-made comparisons,"²⁵⁰ where government sees a health-and-safety concern and adjusts its regulation accordingly, but fails (or refuses) to see a religious need as cause for adjustment. Eisgruber and Sager also use language of counterfactual reasoning for these cases, contending that "[i]t is very likely that the officials who authored the regulations in those cases would have reshaped them to accommodate" the religious concerns had the officials appreciated the effect on the religious claimants and taken such religious obligations seriously.²⁵¹ In the road-in-the-forest case, there is no ready-made comparison, they say, and thus we must turn to the "implicit counterfactual question lurking in the background," namely, whether the state would have ignored similarly situated majority or well-established minority needs.²⁵² In the peyote case, Eisgruber and Sager say they have gone beyond any "obvious benchmark[s]" to find the analogy between the exceptions from alcohol regulation for sacramental wine and the lack of a peyote exception from laws regulating controlled substances.²⁵³ Eisgruber and Sager clearly believe equal regard has been violated in the first two cases; they are somewhat less clear in the latter two cases,²⁵⁴ in part because of the difficulty

245. EISGRUBER & SAGER, *supra* note 6, at 90.

246. *Id.* at 90–91.

247. *Id.* at 91.

248. *Id.* at 91–92.

249. *Id.* at 92–93.

250. *Id.* at 91.

251. *Id.* at 89.

252. *Id.* at 92.

253. *Id.*

254. And this leads them to shunting cases such as these off to the legislature, pursuant to their "underenforcement" argument. See *supra* text accompanying notes 141–50.

of benchmarking and in part because (at least in the peyote case) the state might indeed have a good reason for treating sacramental wine and peyote differently.²⁵⁵

Eisgruber and Sager argue that their equal regard approach is superior to the balancing approach for first-order and second-order reasons. Recall that Eisgruber and Sager operate here with a presumption of the legitimacy of generally applicable law.²⁵⁶ As part of that argument, they inveigh against special treatment for religion as “anomalous” and “potentially disruptive of legitimate public purposes.”²⁵⁷ And recall as well that they critique the balancing approach for its “indeterminacy and ad hocery.”²⁵⁸

I have several responses to their first-order claims. First, as mentioned earlier, there are good reasons to conclude that we do not have a *prima facie* moral duty to obey the law, and correlatively that the state does not have a *prima facie* legitimate claim on our obedience to all laws all of the time. Government as a coercive agent must justify its coercion law by law or case by case; systemic justificatory claims are unavailing. If this position is correct, then the balancing approach is a good fit, for it insists that government acknowledge deeply held and considered normative views about right action and override them only with strong justifications. Second, the state should be able to prevail under Eisgruber and Sager’s equal regard approach by showing how the relevant law produces net gains for society, even considering harms to vulnerable minority groups. Whether we focus on a law’s incomplete scope or its more patent exceptions,²⁵⁹ there will usually be a plausible argument for why it was drawn as it was. Eisgruber and Sager effectively grant this point in their discussion of the peyote case. After considering the claim that perhaps Oregon violated equal regard by providing sacramental-wine exceptions to some alcohol regulations but no peyote exception to the controlled-substances laws, they write: “Of course, it might be possible for Oregon to justify its disparate treatment of peyote and alcohol by reference to the different characteristics of the two drugs.”²⁶⁰ All laws produce inequalities; by definition, a law will cover some conduct and not other conduct. Sometimes the inequality of coverage will flunk a rational basis test, and in such a case equal regard will be violated, as well. But when government can provide a rational explanation for a law’s coverage, it’s not immediately apparent why it would ever flunk Eisgruber and Sager’s test.

255. EISGRUBER & SAGER, *supra* note 6, at 92–93.

256. *See supra* text preceding note 88.

257. EISGRUBER & SAGER, *supra* note 6, at 12.

258. *See supra* text accompanying note 228.

259. Eisgruber and Sager write that “[t]ruly generally applicable laws are . . . relatively rare: many laws contain some exceptions to accommodate special hardships.” EISGRUBER & SAGER, *supra* note 6, at 97. But the conceptual point is more powerful than this: Unless government passed a law saying “all conduct is banned” or “all conduct is permitted,” any law is incomplete in scope and thus subject to challenge as to why some conduct was covered and other not.

260. *Id.* at 92–93, 242.

Third, as a related but separate matter, I have argued earlier against the concern with giving religion special treatment; this is the “is religion distinctive for constitutional purposes?” debate.²⁶¹

Now let’s turn to the second-order claim that equal regard is more easily and consistently administered than is balancing. This seems clearly false, as we can see from considering how Eisgruber and Sager describe their own approach, how they apply it, and from some observations about the approach.²⁶² I have already shown how they do an about-face in the peyote case, from ferreting out an appropriate benchmark (alcohol exceptions) to considering the possibility that Oregon has a good reason for the alcohol exceptions but not the peyote exception. To figure out whether the reason is good enough to overcome the equal regard concern, we’ll need to establish a metric for weighing the state interest that looks quite a bit like the metric for weighing state interests in the balancing approach. Even more tellingly, perhaps, they describe equal regard as “a public stance or posture, an attitude,” and ask us to figure out which disparities in treatment are between “what seem roughly comparable secularly grounded interests and religiously grounded interests, or between interests grounded in mainstream beliefs and those that derive from minority beliefs.”²⁶³ They acknowledge that their approach “depend[s] on our ability to see these interests as sufficiently comparable.”²⁶⁴ They admit that analogies become “less exact,” and that in such cases all that is available is “the counterfactual question of whether more mainstream concerns would have been treated more favorably.”²⁶⁵ And what is it that gives us confidence in making such counterfactual judgments? “[O]ur experience in the world,” they answer.²⁶⁶ Thus, if one’s concern is administrability, it is far from clear that the equal regard approach has any edge over the balancing approach. Both require determination of the weight of the state interest, and both require a threshold determination of whether the claim is from a person or group that is vulnerable to disfavor as a minority group.²⁶⁷

From Eisgruber and Sager’s applications of their approach, we can see the lack of clear lines. I have already discussed the difficulty of application, under their approach, in the peyote case and in the road-in-the-forest case.

261. See *supra* note 108 and accompanying text.

262. For similar concerns with Eisgruber and Sager’s approach, see Berg, *supra* note 108, at 1194–98, and GREENAWALT, *supra* note 162, at 230.

263. EISGRUBER & SAGER, *supra* note 6, at 102, 300 n.37.

264. *Id.* at 102.

265. *Id.* at 105–06.

266. *Id.* at 106.

267. I don’t take Eisgruber and Sager to argue that everyone has standing to raise an equal regard claim; although they don’t limit claimants to religious persons or groups, they consider interests that are susceptible to majoritarian disfavor, and they are not concerned with individuals asking for exceptions to live according to whatever whimsical life plans they happen to have.

Another good example is *Goldman*,²⁶⁸ in which the Court held there was no free exercise violation from the military's failure to accommodate a Jewish person's religious need to wear a yarmulke on base (at home, not in the field of operations).²⁶⁹ Eisgruber and Sager acknowledge there are "no obvious benchmarks" here; we have to "compare the Air Force's prohibition of yarmulkes to the military's general stance with regard to mainstream religious needs. So far as we know, there were no examples of military accommodation that provide a simple one-to-one comparison."²⁷⁰

Finally, given that every law is both overinclusive and underinclusive, the potential universe of comparisons for benchmarking is limitless. If one examines all the laws, regulations, and adjudications in a given jurisdiction, one will find a complex array of covered and uncovered behavior. It's one thing to say we have to argue by analogy, but as we know from basic common law reasoning, we can find lots of analogies, depending on the field of comparisons and the level of generality applied.²⁷¹ Some comparisons may seem more obvious than others—e.g., allowing beards for those who have a skin condition that makes it painful to shave while not allowing beards for religious reasons—but how do we know that even *that* is the right comparison? What if mainstream religious practices are not accommodated in other areas, e.g., if the police force refuses to accommodate religious claims for wearing a beard but also refuses to accommodate more mainstream religious claims, say, for Sabbath observance? Maybe the relevant level of generality in the given police force is "we don't accommodate any religious practices, but we accommodate all health concerns." How do we know now whether equal regard has been violated?

V. The Problem of Intra-group Inequality

Nussbaum has offered us a rich and sweeping treatment of religious liberty issues that have been with us from colonial days. Her theory of equality and the related balancing approach to the exemptions question track a familiar, although increasingly beleaguered (both in the Court and in the academy), way of looking at both free exercise and establishment. Before closing, I would like to raise an issue that anyone dealing with religious liberty questions must confront, what I call the problem of intra-group inequality. Many of the groups that seek exemptions and accommodations from generally applicable law—who seek, that is, the application of a capacious conception of equality so that their practices may be treated on par with mainstream ones—have internal conceptions of equality that are quite

268. *Goldman v. Weinberger*, 475 U.S. 503 (1986).

269. *Id.* at 505–10. Congress responded by accommodating the wearing of religious apparel in the military. 10 U.S.C. § 774 (2000).

270. EISGRUBER & SAGER, *supra* note 6, at 242.

271. See NUSSBAUM, *supra* note 1, at 138, 144 (discussing the levels-of-generality issue in the balancing setting).

begrudging, often to women and children. If we are to create exceptions for some of these practices, what should we require in return?

For adults, the answer must be that they have sufficient options to exit the group. Barry discusses this matter in some detail,²⁷² and Nussbaum does a bit, when discussing *Yoder* and the exit options for children about to become adults²⁷³ and when discussing Mormon polygamy and exit options for women.²⁷⁴ The problem regarding children is more difficult because we do not generally believe that children have the capacity to act with full knowledge and volition, nor can they survive on their own. If children cannot exit a group that applies illiberal conceptions of equality, how should the larger society find a balance between accommodating the group's norms and protecting the children's ability to exercise an exit option once they reach adulthood? Nussbaum mentions the concern, and Barry treats it in some detail, offering a rich approach to protecting children's rights.²⁷⁵ "The authority of parents over children," Barry maintains, "must be seen as a devolved power, whose scope is limited by the legitimate claims of those over whom the power is exercised."²⁷⁶ Although I am generally sympathetic to the Nussbaum view of equality regarding religious liberty and the balancing test for claims of exemption, I find much to admire about Barry's approach to the child-parent-state issues, which must be part of any discussion of religious liberty. Even as we grant adults presumptive rights to live by their own religious (or other normative) lights, so must we not unthinkingly assume that the children of such adults are simply in tow. It may in the end be best to leave judgments about children's best interests to their parents, but that should come only after we have determined that the children's options are sufficiently left open that they can later make their own choices as adults.

272. BARRY, *supra* note 8, at 127–28, 146–54, 158, 189.

273. NUSSBAUM, *supra* note 1, at 141–45.

274. *Id.* at 186–88, 195.

275. BARRY, *supra* note 8, at 194–249.

276. *Id.* at 202.