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The Dilemma of Liberal Pluralism

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The Dilemma of Liberal Pluralism

ABNER S. GREENE†

Supporters of reproductive rights and of queer rights may sometimes live in harmony with advocates for religious exemptions. But sometimes these goals conflict. This Article explores this tension as a matter of liberal democratic theory and U.S. constitutional law, offering a case for seeing a robust pluralism as contained within a proper understanding of the liberal democratic state. The state's claimed authority may be the starting point, but just as the modern state was born in decentralized religious toleration, so should the modern state

† Leonard F. Manning Professor, Fordham Law School. This Article began as a lecture for the McGill University Research Group on Constitutional Studies. Thanks to Victor Muniz-Fraticelli and Jacob Levy for inviting me to Montreal for that. I am also grateful for feedback received at workshops at Fordham Law School, St. Thomas Law School (thanks to Mike Paulsen), and at the Annual Law and Religion Roundtable (thanks to Rick Garnett, Paul Horwitz, and Nelson Tebbe). My research assistants Grant Emrich, Alex Jacinto, and Devin Savaskan did terrific jobs finding lower court cases on religious exemptions, as did Jennifer Dixon in our library helping me hunt down various sources. Thanks to the editors and staff of the *Buffalo Law Review* for their work on this Article. Finally, thanks for helpful comments to: Tom Berg, Jim Fleming, Tracy Higgins, Zach Huffman, Andy Koppelman, Cécile Laborde, Doug Laycock, Linda McClain, David Post, Aaron Saiger, Rich Schragger, Jed Shugerman, Nomi Stolzenberg, Nelson Tebbe, Ben Zipursky, and students in my freedom of speech and religion seminar in the spring of 2021.

accommodate religious and other views of the good that compete with the state's own views. The Article sets forth a conception of the proper agnostic approach of the modern liberal state and explains how there is a distinctive case for accommodating religious belief. The Article also takes a wider lens to the problem, describing a case against political obligation and legitimacy and for acknowledging multiple possible sources of authority, and showing how the pairing of the two buttresses claims for accommodation from general law. In the final Part, the Article addresses types of harm to the body politic that may outweigh substantial burdens on religious practice, focusing on protection of equality in public accommodations law. The Article also explores issues presented by religious groups that wish to live apart from the rest of the community. While the state should accommodate such groups to the extent possible, liberal pluralism demands that when members choose to remain in the group, the decision is knowing and voluntary. The Article concludes that there is no "tragic loss" when the state accommodates, or fails to accommodate, a person or group following their own comprehensive conception of the good. Accommodation often reflects appropriate toleration of, and perhaps even respect for, the dissenting person or group, while insistence on uniform application of law may reflect core conditions such dissenters must accept, conditions that help buttress their own (often religious) liberty.

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“The really difficult thing is distinguishing the human universals from the historical constellations and not eliding the second into the first so that our particular way seems somehow inescapable for humans as such, as we are always tempted to do.

I can’t pretend to have a general formula for making this distinction. If I did, I would have solved the greatest intellectual problem of human culture.”

—Charles Taylor¹

INTRODUCTION

Say you are a supporter of queer² rights, and of reproductive rights. Not just a political supporter, but a supporter in principle—you believe that these rights are justified as a matter of political theory and U.S. constitutional law. Your support for such rights is grounded in a conception of equal liberty: the liberty to love and have sex with and marry whom one wants, and to decide when sex should lead to producing and giving birth to children, are core liberties of the adult person that should be equally shared. To deprive persons of the former based on sexual orientation is an unjustified infringement of such equality; to deprive persons of the latter is, often, an unjustified infringement of the rights of women.

Now say you are also a supporter of a broad conception of religious freedom. As a matter of political theory and U.S. constitutional law, you claim that the best understanding of such freedom is not just a rule against targeted, intentional discrimination; it also includes a rule requiring,

1. CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY* 112 (1989).

2. Others might prefer LGBTQ or LGBTQIA+. The term “queer” is less cumbersome and, hopefully, both descriptive and inclusive. I leave the deeper terminological debate to others.

presumptively, exemptions from generally applicable laws that place substantial incidental burdens on religion. The religious claimant can't prevail all the time, but there should be a heavy burden on the state to show why the law needs to be applied in a way that will significantly impair religious belief or practice.

On the one hand, you might find this set of commitments—to queer and reproductive rights, and to religious freedom—to be consistent, to represent a wide notion of the meaning of equal liberty. On the other hand, you might sometimes find yourself in a pickle—the laws that are meant to protect the former rights are alleged to infringe the latter, and vice versa. In such cases of apparent conflict, is there a principled way out? Or are we left with an insoluble dilemma, the resolution of the cases leaving one side or the other with a “tragic loss”?³ This Article explores this dilemma—what I call the dilemma of liberal pluralism—and offers an answer to the questions posed in this paragraph. There is a way of reconciling these sometimes conflicting commitments, I will argue, but only with a sufficiently broad understanding of the liberty and equality at stake.

The examples I provided above are of certain liberal ends in the U.S. constitutional landscape. They are “liberal” in the everyday political sense (left versus right) and in the theoretic sense. Regarding the latter, they are good examples of the equal liberty that many understand to be at the heart of liberalism—or, as I will use interchangeably, since this is a piece about our domestic constitutional order, liberal democracy. That is, the queer rights and reproductive freedom examples are in one sense about equality—the equal worth and dignity of gay men and lesbians and others who

3. See MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* 3 (2013); J. DONALD MOON, *CONSTRUCTING COMMUNITY: MORAL PLURALISM AND TRAGIC CONFLICTS* 10 (1993); VICTOR M. MUNIZ-FRATICELLI, *THE STRUCTURE OF PLURALISM: ON THE AUTHORITY OF ASSOCIATIONS* 11 (2014).

are not straight; the gender equality that is at the heart of the abortion debate.⁴ But they are also, and equally, about liberty—the liberty for queer persons to engage in sexual relations and get married;⁵ the liberty for a woman to decide whether to give birth to a baby as opposed to ending the pregnancy. Equal liberty is the appropriate term for these rights, and, more generally, for the structure of rights in our constitutional order. Part of my project is to show that religious freedom (and, by parallel reasoning, freedom of an ethnic, cultural, or tribal group) requires attention to this understanding of equal liberty in the same way as do rights that may seem to dominate the civil liberties landscape from the political left.⁶

When we see queer rights and reproductive rights as instances of negative liberty—of being let go from the state’s regulatory apparatus—the tension with religious freedom is rare, unless the religious claim is the unsustainable, almost theocratic one that would permit overtly religious norms to govern the lives of those who don’t worship the same God, or in the same way. But that view of the role of religion in lawmaking is inconsistent with our Establishment Clause; in several cases, the Court has invalidated laws based on

4. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852, 856 (1992) (plurality opinion). *But see Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245–46 (2022) (refusing to take Equal Protection Clause argument seriously).

5. See *Obergefell v. Hodges*, 576 U.S. 644, 672–76 (2015) (grounding the marriage right for same-sex couples in both due process liberty and equal protection).

6. The Court’s overruling of *Roe v. Wade*, 410 U.S. 113 (1973), and *Casey* in *Dobbs* does not change the basic contour of my argument for political pluralism protecting equal liberty in ways that those across the political and religious spectrums should appreciate. Moreover, in states where abortion rights remain protected, or become protected, variations on the dilemma I discuss will remain. This will also be true if the Court overrules *Dobbs*, or if Congress protects abortion rights.

predominant express religious justification.⁷ Moreover, religious persons don't need to commandeer the state's legislative apparatus to enjoy religious freedom. Thus, through the lens of negative liberty, we can all get along—those who advocate for queer rights, for reproductive rights, and for religious freedom (and sometimes, happily, these will be the very same people).

When the state acts to protect queer rights and reproductive rights as aspects of positive liberty (a goal I share), however, such protection may produce tension with religious freedom, as previously unregulated persons and entities are now subject to laws of general applicability that have incidental but profound effects on their religious beliefs. Two of the most prominent recent U.S. Supreme Court cases in this area have this structure—*Hobby Lobby* involved general legislation and regulation that required employers to fund contraception that some of them believed could serve as an abortifacient, thus violating their religious obligations;⁸ *Masterpiece Cakeshop* involved general legislation that required goods and services providers to serve same-sex wedding celebrations in a way that some religious business owners believed would violate religious obligations.⁹ For some in our constitutional culture, these laws of general applicability appear as the baseline, and requests for accommodation for religious practice and belief are seen as

7. See *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

8. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688–91 (2014).

9. See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018). Although religious freedom was at the heart of *Masterpiece Cakeshop*, because of the current structure of free exercise case law, the primary matter briefed and argued was a compelled speech claim. See *infra* text accompanying notes 250–53.

intruders and in need of special justification, infrequently met. If, though, we see religious freedom as part of the equal liberty to which our constitutional order aspires, then we can see that the proper baseline is not the laws of general applicability that today's majorities approve, but rather is a robust political pluralism that places views of the good that compete with those of the state on equal footing with the views of the good instantiated in the state's general laws. Part of the issue in today's political and constitutional culture, perhaps, is that traditional liberals who generally support the view of equal liberty that I have sketched fail to see religious freedom as equally part of such liberty.¹⁰ They do when the issue is discrimination against a religious group, but not when a religious person seeks an exemption from a law of general applicability that favors a different end of equal liberty, such as queer rights or reproductive rights. But the robust political pluralism that I will defend is not meant to undo the legislative gains of the political left; rather, it is meant to appreciate the harm these gains sometimes inflict on those with very different normative conceptions. A regime of accommodations in which the state has the burden to justify uniform application of law, and thus the incidental harm to the religious person, better accomplishes the ends of equal liberty than does a regime in which once the law of general applicability is enacted it becomes a new, unbreachable (or hard to breach) wall.

As I have done in prior work,¹¹ I argue in this Article that

10. I fear that a parallel issue exists with traditional conservatives failing to see queer rights and reproductive rights as equally part of equal liberty. I say more about this in a comment on *Dobbs*, in Part II.C.

11. ABNER S. GREENE, AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY (2012); Abner S. Greene, *Liberalism and the Distinctiveness of Religious Belief*, 35 CONST. COMMENT. 207 (2020); Abner S. Greene, *Three Theories of Religious Equality . . . and of Exemptions*, 87 TEX. L. REV. 963 (2009) [hereinafter Greene, *Three Theories*]; Abner S. Greene, *The Incommensurability of Religion*, in LAW AND RELIGION: A CRITICAL ANTHOLOGY 226 (Stephen M.

a strong regime of exemptions and accommodations not only fits with but also is required by the best view of a liberal democratic order such as ours.¹² I will seek to show that liberalism and pluralism contain each other, or at least are not inconsistent with each other. Part I maintains that liberalism was born in an accommodationist approach to views of the good that differ from those of the majority. The liberal democratic state that exists because of such a break from nonliberal or illiberal forms of governance is best understood as carrying forward, within it, an accommodationist approach to different religious (and other) conceptions of the good, and accordingly as containing an expansive conception of political pluralism. In a liberal democracy, though, religious persons must accept at least a modicum of state regulation to ensure that the choice of a person to adhere to religious norms, and perhaps to live in a religious community, is knowing and voluntary. Because the accommodationist standpoint is one of partial, not full, exit, it is appropriate for the liberal state to impose minimal limiting conditions on religious persons, perhaps living in enclaves, even if such persons would eliminate the knowing and voluntary conditions were they living in their own

Feldman ed., 2000); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 *YALE L.J.* 1611 (1993) [hereinafter Greene, *Political Balance*].

12. Throughout the Article, I mostly use the terms “accommodation” and “exemption” interchangeably. I also mostly do not draw a sharp distinction between what courts should do when confronted with claims for exemption grounded in the Free Exercise Clause and what legislatures should do when confronted with claims for accommodation either grounded in the Free Exercise Clause or as a matter of public policy more generally. There are institutional differences, and perhaps reasons to think different standards should apply, but since this Article presents an overarching normative case for the state’s excepting religious persons (and those with other comprehensive normative commitments) from generally applicable law, I mostly put aside potential differences between the role of legislatures and the role of courts in creating exceptions from generally applicable law.

theocratic state. The religious persons and groups I am discussing are not theocracies, and the concession they must make to accept some limiting conditions is a kind of accommodation in return for the state's accommodations.¹³ In making this argument for the intertwining of liberalism and pluralism, I offer some qualifications—the argument is for seeing comprehensive views of the good as on par with those of the state and thus needing accommodation at times; the views in question may, but need not, be based in conscience; the defense is not for simple claims of liberty; and mine is best understood as an argument for political, not comprehensive, liberalism.

Part II fleshes out the core point about liberalism existing hand in hand with political pluralism, by delving into the properly agnostic position the liberal state should have regarding views of the good. Although it will advance majoritarian ends, the state should attend to outlying, dissenting, minority positions based in competing views. This political agnosticism is not the same as religious (or other foundational) agnosticism. Instead, the point is that the liberal democratic state's basis in religious tolerance necessitates treating each person's view of the good as on par with each other person's view, so that when the state settles on policy X in area Y it should not only be open to political dissent and revision, but it should also be prepared to accommodate those whose religious and other comprehensive normative views are oppositional to the enacted policy. After all, such views may be right and the state may be wrong; at least that should be the state's formal position. Accordingly, I defend an epistemic humility that the state should adopt. I connect this to a core understanding of U.S. constitutional law—what I have dubbed “multiple

13. See Nomi Maya Stolzenberg, *Political Theology with a Difference*, 4 U.C. IRVINE L. REV. 407, 415 (2014).

repositories of power.”¹⁴ Throughout the structural and rights provisions and the developed understanding of our Constitution is distrust of concentrated power; many mechanisms exist as a hedge against that. I focus on freedom of religion. Religious belief and practice can and should be seen as distinctive, and accordingly in need of distinctive (though not necessarily unique) protection from state action (and not only targeted discrimination). This distinctiveness also means we should understand the Establishment Clause in a fairly broad way. I conclude Part II with a comment on *Dobbs v. Jackson Women’s Health Organization*.¹⁵

In addition to seeing an expansive political pluralism (and a regime of accommodations) as following from the best understanding of liberalism, and to understanding such as grounded in a wide political and constitutional agnosticism, we can dig one level deeper. Part III contends that political pluralism can be understood as advancing a conception of “permeable sovereignty”¹⁶—which norms we hold to be supreme, or sovereign, may vary from person to person, and the state should respect that. Such an affirmative conception works hand in hand with a critical point—that we don’t have a moral duty to obey the law just because it is the law, and that the state, correlatively, doesn’t have a justified claim on our across-the-board obedience. One doesn’t have to accept these arguments about political obligation and legitimacy to agree with the rest of my case for pluralism and liberalism co-existing without seeing one as triumphant over the other. But an argument against political obligation and legitimacy

14. GREENE, *supra* note 11, at 3–4, 103–05; Abner S. Greene, *Civil Society and Multiple Repositories of Power*, 75 CHI.-KENT L. REV. 477, 479 (2000); Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 14–16, 54 (1996) [hereinafter Greene, *Kiryas Joel*]; Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 132 (1994).

15. 142 S. Ct. 2228 (2022).

16. GREENE, *supra* note 11, at 2–3, 20–24, 139–57.

can buttress my other claims; the weaker the ground for a moral duty to obey the law just because it is the law, and the correlative state demand for obedience, the stronger the argument for the state's seeing itself as in competition with other normative views and giving ground when it can. I conclude this Part by responding to some criticisms of my work in this area.

The dilemma of liberal pluralism means that the same state that advances certain ends of equal liberty—say, regarding queer rights or reproductive rights—may find itself in conflict with other claims of equal liberty—say, from religious persons whose normative grounding may be opposed to the state's ends and to participating in helping advance them. But unless we are to insist on the correctness of the state's liberal ends, and (necessarily) the incorrectness of some of the religious resistance to such ends, we must find a way to split both the gains and the harms. Part of the foregoing will have made a case against omnivorous claims of comprehensive liberalism and in favor of a more ecumenical approach to governance in a world with plural notions of the good. To fully flesh out this approach would require assessing kinds of harms to religious persons (and others with comprehensive views of the good that may compete with those of the state), kinds of harms to identifiable others and the body politic, and a metric for balancing. I will not attempt all of this here. I mostly assume the credibility of religious persons' claims of substantial burdens caused by the laws in question, and I do not develop a detailed rubric or metric for the ultimate balancing. Instead, Part IV catalogues and describes the types of harm the state may claim are sufficient to outweigh burdens on religious persons. First, I describe the issue of third-party harms (i.e., harm to identifiable persons that might result from accommodations) but resist the notion that granting an accommodation in the face of such harms (necessarily, or even often) yields an Establishment Clause violation. I next explain that elevated, though not necessarily strict, scrutiny

is appropriate for when courts confront claims of exemption from generally applicable law. I then reject the possibility of excluding some types of accommodation up front, simply because of their nature or the nature of the harm on the other side; rather, I maintain (as I have done in the context of free speech law) that we cannot avoid the ultimate balancing that must take place.¹⁷ The notion of a threshold exclusion of certain types of accommodation claims smuggles the balancing in at an earlier stage.

After these introductory matters, I discuss some categories of possible harm in which the state interest may outweigh an exemption claim: harms to the body, paternalism, risk regulation, equality, and second-order concerns. The equality section is the most detailed; among other things, I canvass to what extent historical context should play a role in our assessments, how we should think about the nature of an equality harm, to what extent expressive harm should play a role, baseline questions about positive versus negative liberty, and the issue of complicity and (in)directness. After discussing these five categories, I delve into the limiting condition of the dilemma of liberal pluralism, enclave groups, which in ideal circumstances would engage in complete exit from the body politic, but cannot or do not. I begin this section by responding to critics of my work, as I explain why some pluralism arguments against the state do not similarly apply against nonstate groups. I then discuss how the state might consider a religious person's decision to opt out of all or most societal norms to be sufficiently voluntary and knowing that the state may defer to such decision. Insisting on these standard conditions for recognizing invocations or waivers of rights

17. For a similar view, see William A. Galston, *The Idea of Political Pluralism*, in *NOMOS XLIX: MORAL UNIVERSALISM AND PLURALISM* 95, 112 (Henry S. Richardson & Melissa S. Williams eds., 2009) (His theory in favor of balancing “will yield very few bright lines that neatly resolve entire categories of controversies”; we need the form of practical reasoning called “casuistry.”).

permits bedrock liberal norms to protect the individual's religious freedom.

The Article concludes by considering the claim that the dilemma of liberal pluralism inevitably leads to "tragic loss," i.e., that however we resolve the hard cases, one side or the other is left with irreparable harm—either the religious person, if an exemption is denied, or some other identifiable person (or the body politic), if an exemption is granted. In summing up my argument for how liberalism was born from and continues to exist on the back of a robust political pluralism, I will resist this conception of tragic loss. A world in which the state tolerates and respects competing conceptions of the good, and in which the state is none too sure it is right (even if it is competing with persons and groups who claim great certainty about their norms), can yield a world in which the gains, or losses, are shared. We can see that sharing as a community of diverse persons with diverse understandings of the good life working through how to be human.

I. THE BASIC CLAIM: LIBERALISM AND PLURALISM CONTAIN EACH OTHER

A. *The Core Argument*

At the dawn of the liberal state, there was a move away from centralized authority in a ruler with the people as subjects and toward an understanding of equal rights inhering in each person. Part of this decentralizing move was away from church-centered government and toward a gradual opening of toleration for and accommodation of various Christian sects and religions more generally. This toleration is a key instantiation of the concept of the liberal state. As the British political pluralist Harold Laski put it, "The problem of Church and State is in reality . . . but part

of the larger problem of the nature of civil society.”¹⁸ The contemporary political pluralist Jacob Levy observes that “[r]eligious liberty is a core commitment, if not *the* core commitment, of liberal political thought.”¹⁹ Although religious liberty may be at the historical core of liberalism as toleration-accommodation, we may then expand outwards from that model. For example, Chandran Kukathas develops a broad liberal theory based in individual conscience (not necessarily religious), which in turn grounds the freedom of association and disassociation. He invokes the metaphor of an archipelago, in which “[t]he islands in question . . . are different communities or . . . jurisdictions, operating in a sea of mutual toleration.”²⁰ Accordingly, says Kukathas, liberalism is best understood as supporting “institutions that permit different beliefs and ways of life to coexist; it accepts the fact of the plurality of ways of life . . . and favors toleration.”²¹ Nancy Rosenblum puts the point concisely: “Pluralism is at the heart of liberalism.”²² Indeed, some on

18. HAROLD J. LASKI, *STUDIES IN THE PROBLEM OF SOVEREIGNTY* 208 (1917).

19. JACOB T. LEVY, *RATIONALISM, PLURALISM, AND FREEDOM* 31 (2015); *see also* WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 13 (1991) (“Liberalism may be said to have originated in an effort to disentangle politics and religion.”); ANDREW KOPPELMAN, *GAY RIGHTS VS. RELIGIOUS LIBERTY? THE UNNECESSARY CONFLICT* 14 (2020) (Liberalism “began as an inference from religious liberty.”).

20. CHANDRAN KUKATHAS, *THE LIBERAL ARCHIPELAGO: A THEORY OF DIVERSITY AND FREEDOM* 22 (2003).

21. *Id.* at 2; *see also* JEFF SPINNER-HALEV, *SURVIVING DIVERSITY: RELIGION AND DEMOCRATIC CITIZENSHIP* 103 (2000) (“Liberalism is about enabling people to live the lives they choose.”); Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 *CARDOZO L. REV.* 959, 984 (1991) (“Liberal theory, especially in recent versions, recognizes that persons vary in their beliefs, commitments, and plans.”).

22. Nancy L. Rosenblum, *Pluralism and Self-Defense*, in *LIBERALISM*

the right-wing side of the current cultural divide invoke a liberal conception of toleration in an effort to unite with the left. Thus, Ryan Anderson and Sherif Girgis explain that “respect for these freedoms [of religion, conscience, and association] flows naturally from ideals so often cited by same-sex marriage advocates: toleration for people’s differences and support for their freedom to live with integrity.”²³

Accommodation of various beliefs, religious and secular, and of various practices based on such beliefs, is thus at the core of the liberal state’s spreading authority among the people rather than concentrating it in one or the few.²⁴ By “accommodation,” so far, I don’t mean whether and when religious (and other) folk should be let out from the grips of otherwise valid general law. Here I mean it in a broader sense of liberty, allowing belief (and concurrent practice) that a majority might deem false to coexist alongside the preferred tenets (and practices) of the majority. This broader sense of accommodation leads, though, to the one at issue in contemporary debates. The governing group might refrain from regulating at all in areas best left to competing notions

AND THE MORAL LIFE 207, 220 (Nancy L. Rosenblum ed., 1989); *see also* AVIGAIL EISENBERG, RECONSTRUCTING POLITICAL PLURALISM 16 (1995) (“[P]luralism is one of the key resources of liberalism.”).

23. Ryan T. Anderson & Sherif Girgis, *Against the New Puritanism: Empowering All, Encumbering None*, in DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION 108, 112 (John Corvino et al. eds., 2017).

24. Nomi Stolzenberg elegantly sets forth a genealogy of liberal accommodation, tracing it back to “divine accommodation,” according to which “God adjusted his acts in history to the capacity of men to receive and perceive them.” Stolzenberg, *supra* note 13, at 423. Modern liberal theory stems from this, claims Stolzenberg: “[A]ll accommodationist political theories (that is to say, all political theories derived from the theological principle of divine accommodation) were rooted in the inherently liberal principle that differences among human beings—religious differences, cultural differences, and differences in their historical circumstances—are to be respected as part of God’s plan.” *Id.* at 425.

of the good; or, it might regulate with appropriate exemptions as recognition of the equal liberty of competing beliefs.

The affirmative case for a vibrant political pluralism, thus, is based in an understanding of the equal liberty that animated the existence of the liberal state. Equal personal and political liberty require at least some acceptance of the coexistence of different notions of the good, which might stem from recognition of different sources of authority—how much to accept remains the difficult task of assessing harms that I will discuss in Part IV. One standard response to this case for political pluralism is that the state—and not other sources of authority—has a legitimate claim on our law-abidingness and that concomitantly we owe a moral duty to obey the state’s laws and not the normative injunctions of other sources of authority. I respond to (and reject) these claims of political legitimacy and obligation in Part III. An opponent of the kind of political pluralism I am advancing might then retreat to an argument that is part descriptive and part normative, i.e., that the state is (and, for systemic stability reasons, should be) the ultimate arbiter of conflicting notions of authority. I acknowledge in Part III that we must adopt a version of this claim. Nonetheless, the basic historical and conceptual understanding of the liberal state fits best with acknowledging competing conceptions of the good and of authority behind such conceptions. In performing its authority-dispute arbiter role, the liberal state should insist less on the need for uniform application of law and, through accommodations, recognize more the nonstate norms by which some of its citizens live.

Of the early twentieth century British political pluralists, Harold Laski stated a particularly clear version of the thesis I am advancing. His was a “pluralistic conception of society,”²⁵ “rooted in a denial that any association of men

25. HAROLD J. LASKI, *AUTHORITY IN THE MODERN STATE* 65 (1919).

in the community is inherently entitled to primacy over any other association.”²⁶ Rather, there are a “multiplication of centres of authority.”²⁷ Thus, “[e]verywhere we find groups within the state [that] challenge its supremacy”;²⁸ “the wills from which [the state’s] will is eventually formed struggle amongst each other for survival.”²⁹ In other words, “the allegiance of man is diverse”³⁰ and “a competition for allegiance is continuously possible.”³¹ A contemporary pluralist, Perry Dane, suggests we counter “what makes religion special?” with “[w]hat makes the state special?”³² Dane maintains that “liberal theory, especially recently, recognizes that persons vary in their beliefs, commitments, and plans,” that we often associate with like-minded persons, and that “the texture of such associations is often deeper and thicker than that of the state itself.”³³ Victor Muniz-Fraticelli offers an important modern restatement of the pluralist thesis: “[M]ultiple sources of legitimate political authority [are] personated in various groups and associations, of which the state is but one; none of these has inherent precedence over the others.”³⁴ For Chandran

26. Harold J. Laski, *Law and the State*, in *THE PLURALIST THEORY OF THE STATE* 199, 214 (Paul Q. Hirst ed., 1989).

27. HAROLD J. LASKI, *THE FOUNDATIONS OF SOVEREIGNTY AND OTHER ESSAYS* 247 (1921).

28. *Id.* at 169.

29. LASKI, *supra* note 25, at 67.

30. LASKI, *supra* note 27, at viii.

31. *Id.* at 169.

32. Perry Dane, *Master Metaphors and Double-Coding in the Encounters of Religion and State*, 53 *SAN DIEGO L. REV.* 53, 57 (2016).

33. Dane, *supra* note 21, at 984.

34. MUNIZ-FRATICELLI, *supra* note 3, at 18.

Kukathas, a free society described by liberalism is a “collection of communities (and, so, authorities) associated under laws which recognize the freedom of individuals to associate as, and with whom, they wish.”³⁵ “[T]here may be many such associations [N]one is ‘privileged’ or regarded as having especial moral significance.”³⁶ And there may be “many authorities, all authority resting in the end on the acquiescence of subjects rather than on justice.”³⁷ Political society (the state) thus has “only a limited claim on our allegiance.”³⁸ For Kukathas, the individual has broad liberty to act, often in association with others, by following nonstate sources of normative authority; the state’s legitimate power to impose its view of the proper balance of such liberty versus harm is narrow.³⁹

35. KUKATHAS, *supra* note 20, at 19.

36. *Id.*

37. *Id.*

38. *Id.* at 189.

39. *See id.*; *see also* Chandran Kukathas, *Cultural Toleration*, in NOMOS XXXIX: ETHNICITY AND GROUP RIGHTS 69, 92 (Ian Shapiro & Will Kymlicka eds., 1997) (“In a liberal society, . . . there are many authorities governing a multitude of practices or ways of life If there is an ultimate authority . . . that determines what ways are morally acceptable, liberalism is lost.”). Other contemporary scholars supporting robust political pluralism include EISENBERG, *supra* note 22, at 4 (“[I]ndividuals have *multiple* affiliations and memberships.”); *id.* at 21 (describing different generations of political pluralists who “oppose a unitary conception of state sovereignty”); WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 4 (2002) (“There are multiple, independent, sometimes competing sources of authority over our lives”); *id.* at 36, 124; MOON, *supra* note 3, at 191 (“The commitment to accommodating difference is at the heart of political liberalism.”); SPINNER-HALEV, *supra* note 21, at 55 (“A liberal theory that fails to recognize the right to be different and live a life of faith and obedience is not consistent enough with the liberal ideas of liberty and pluralism.”); *id.* at 201 (2006) (“A pluralistic society can have both communities that do not value

Just as the grounds for a wide understanding of political pluralism can be seen as inherent in the best understanding of liberalism, so does the liberal democratic state properly set limiting conditions on such pluralism.⁴⁰ Persons who benefit from accommodations from otherwise generally applicable law, and those who go further and live in enclaves of like-minded individuals, are not fully exiting the polis. Rather, we should see accommodations and community separation as a kind of partial exit.⁴¹ (This view leads to the discussion in Part IV of the inevitable need for balancing, rather than one side receiving all the gains.) The state may and should insist that the choice to seek an accommodation, or to live in a religious community, is knowing and voluntary, as is

autonomy and communities and a mainstream society that do.”); ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 9 (2010) (“commitment to decentralized moral authority in society”); *id.* at 113 (“[T]he state is just one more participant in the marketplace of moral claims, each seeking to attract the individual’s allegiance in a given scenario.”); Galston, *supra* note 17, at 96; Glen O. Robinson, *Communities*, 83 VA. L. REV. 269, 347–48 (1997) (“[A] society committed to fostering its ‘little platoons’ is likely to produce a more meaningful communitarianism, and certainly a more robust liberalism, than one that conflates community with society and presses for assimilation at the expense of diversity.”). *See generally* JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE (2016); LEVY, *supra* note 19; JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY (1995); Richard W. Garnett, “*The Freedom of the Church: (Towards) An Exposition, Translation, and Defense*,” 21 J. CONTEMP. LEGAL ISSUES 33 (2013). For an important statement of value pluralism, see ISAAH BERLIN, THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS 9 (1997) (Pluralism is “the conception that there are many different ends that men may seek and still be fully rational, fully men, capable of understanding each other and sympathizing and deriving light from each other.”).

40. *See* GALSTON, *supra* note 19, at 181 (“[T]he judgment that liberal societies allow the greatest possible scope for diversity is compatible with some limitations on individual choice.”).

41. *See* Greene, *Kiryas Joel*, *supra* note 14, at 4–5, 8–57.

appropriate for the exercise (or waiver) of any right. For a religious community to seek exit from even these minimal conditions would be to request dispensation to run a kind of theocratic state within the liberal democratic state. One could go further. As Lucas Swaine has argued, even the most hardened theocrats “are committed rationally to . . . principles of liberty of conscience and . . . the commitment makes it rational for them to support and affirm liberal institutions.”⁴² Swaine’s core insight is that liberalism protects against the “risk of being forced to practice another doctrine,”⁴³ whereas theocracy offers no such protection.⁴⁴ The political pluralism that is enabled by the accommodationist version of liberalism that I have described should, thus, enable each person to choose (or deem herself chosen by) this or that source of normative authority and concomitant notion of the good.⁴⁵ Accordingly, the liberal state should ensure some measure of freedom for adults to opt into or out of religions or other sources of authority that come packaged with comprehensive conceptions of the good. A nonstate group that has a more limited conception of, say, autonomy, than do the state and mainstream private groups should accept this core limiting condition as consistent with its own freedom to (for the most part) live by its own lights.

42. LUCAS SWAINE, *THE LIBERAL CONSCIENCE: POLITICS AND PRINCIPLE IN A WORLD OF RELIGIOUS PLURALISM* 29 (2006).

43. *Id.* at 67.

44. Some theocrats might be less risk averse, accepting greater risk of being forced off their religious practice in exchange for greater control when they have power.

45. See Bhikhu Parekh, *A Varied Moral World*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 69, 69 (Susan Moller Okin ed., 1999) (“The standard liberal strategy is to derive the limits of toleration from the grounds for it.”).

B. *The Claim Covers Comprehensive Views of the Good, Not Necessarily Conscience-Based, and Not Simply Based in a Claim of Liberty*

The case for political pluralism—more specifically, for recognizing the presumptive equal sovereignty of various sources of normative authority, and thus laying the foundation for exemptions from the state’s laws—covers comprehensive views of the good, when they conflict with those of the state in terms of duties owed. “Comprehensive” is shorthand for a full-life view of value, of the good, and of moral norms that allow conceptions of value and the good to be operationalized.⁴⁶ This is a robust version of political pluralism in two senses: I am discussing sources of normative authority that might compete with the state and that serve to ground alternative understandings of the good, and thus that are not thinner or more occasional notions; and my argument for such pluralism is meant to ground a rich, not thin, system of accommodations.

A focus on comprehensiveness or pervasiveness helps

46. See Jonathan Seglow, *Religious Accommodations: Responsibility, Integrity, and Self-Respect*, in RELIGION IN LIBERAL POLITICAL PHILOSOPHY 177, 182–83 (Cécile Laborde & Aurelia Bardon eds., 2017) (“Our interest in integrity self-respect is our interest in living up to our core beliefs and commitments.” To be bases for integrity self-respect, our beliefs “must be pervasive across a person’s value system . . . and centrally connected to her fundamental conception of the sort of person she aspires to be.”); see also KATHLEEN BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE 291–92 (2015); RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 101, 260–64 (2011); Anderson & Girgis, *supra* note 23, at 126 (“[Y]our integrity [even if you have mistaken convictions] . . . gives the rest of us *some* reason to respect and promote it.”); Jocelyn Maclure, *Conscience, Religion, and Exemptions: An Egalitarian View*, in RELIGIOUS EXEMPTIONS 9, 11 (Kevin Vallier & Michael Weber eds., 2018) (“Meaning-giving beliefs and commitments” have more normative weight than other “beliefs, values, attachments, and preferences,” and are therefore worthy of being singled out for “special legal treatment.”).

rebut Simon May's argument against exemptions.⁴⁷ He posits two persons who might have interest in preserving their comprehensive moral integrity through accommodation from law (one religious, one not). He then introduces a person with a similarly comprehensive commitment, but not a moral one in any normal sense of the term. One might argue we should offer an accommodation for the former two but not the third person. May then tweaks the third hypothetical—the person now has the same nonmoral comprehensive commitment plus a one-off moral concern. (The third hypothetical is a requested exemption from the military draft to hone skills to become a chess grandmaster; the added fact is that the money from winning tournaments would help repay a moral commitment to the person's grandparents.) May thinks this scuttles the case for exemptions—either we don't exempt this third person and thus forfeit our concern with moral integrity, or we award an exemption, and open the floodgates. The moral commitment May introduces for the third person, however, is not part of a comprehensive or pervasive set of commitments; rather, it is a one-off, or targeted, moral commitment. If we are otherwise drawing the line after the first two persons because only they have comprehensive commitments of the moral integrity sort, we can keep the line drawn at that point, because the third person, on either version, has no comprehensive, pervasive commitment of the right sort (moral, or of the good or value more generally).

I now need to say something about groups, conscience, and liberty. Regarding groups: my argument for political pluralism focuses on the individual's comprehensive normative commitments. Groups are often an important instrument for developing and carrying out such commitments, but they are not analytically at the root of the argument. In other words, I am not offering a theory of

47. See Simon Cabuela May, *Exemptions for Conscience*, in *RELIGION IN LIBERAL POLITICAL PHILOSOPHY*, *supra* note 46, at 191, 196–202.

groups or associations; in this way, my theory is similar to that of Chandran Kukathas, who also centers political pluralism in the individual and does not offer a theory of group rights.⁴⁸

Regarding conscience: an individual may develop his or her comprehensive normative commitments through the operation of conscience—of an internal sense of right and wrong⁴⁹—and may implement such commitments on a case by case basis through the operation of conscience.⁵⁰ But my argument is not about conscience per se, for two reasons. First, it is not about accommodating an individual's conscientious objection to the application of a law just because the individual has a (good) case for deferring to her

48. See KUKATHAS, *supra* note 20, at 5; see also LASKI, *supra* note 18, at 19 (The individual is “at the centre of things . . . linked to a variety of associations.”).

49. See KUKATHAS, *supra* note 20, at 55 (“At the core of any form of human flourishing is right conduct—conduct according to conscience.”); VISCHER, *supra* note 39, at 3 (understanding conscience as “a person's judgment of right and wrong”).

50. For conceptions of political pluralism focused on the operation of conscience, see KUKATHAS, *supra* note 20, at 25, 114–15, 119 (broadly libertarian pluralist theory rooted in associational freedom, protecting freedom of conscience); LASKI, *supra* note 25, at 46; LASKI, *supra* note 27, at viii; LASKI, *supra* note 26, at 214; SWAINE, *supra* note 42, at 45–49. See generally VISCHER, *supra* note 39. For John Henry Newman, confronted with a challenge to his Catholicism as potentially placing Pope over King, the core response was a version of “neither”; rather, if faced with a true conflict between those authorities, “then I should decide according to the particular case, which is beyond all rule, and must be decided on its own merits,” and ultimately “I must rule myself by my own judgment and my own conscience.” JOHN HENRY NEWMAN, A LETTER ADDRESSED TO THE DUKE OF NORFOLK: ON OCCASION OF MR. GLADSTONE'S RECENT EXPOSTULATION 40 (Aeterna Press 2015) (1874). Although he would override the Pope only after serious thought, and a burden on him to establish a case against the Pope's views, the “Pope is not infallible in that subject-matter in which conscience is of supreme authority . . .” *Id.* at 47.

sense of right or wrong. That would be insufficient, on my argument—it could be disconnected from a broader, more comprehensive set of norms, which is the anchor of the conception of political pluralism I am advancing. Second, conscience as a sense of right and wrong is also not a necessary condition for political pluralism that could lead to accommodation from law. Some conflicting duties, from a nonstate source of normative authority, could be based not in a sense of right and wrong but in perhaps more prosaic commitments, such as when to take a day off from work or what type of food to eat. Following such commitments might in a broad sense be thought to implicate “right” and “wrong” conduct, but not in the typical moral sense of avoiding harm to others or even perhaps to oneself.⁵¹

Regarding liberty: my theory of political pluralism that connects to a broad understanding of accommodation is not about liberty in and of itself.⁵² Although my later arguments against political obligation and legitimacy are not inconsistent with shifting the burden to the state to show the need for law’s uniform application and thus to reject accommodation even in the pure liberty case, my affirmative arguments for political pluralism cover a narrower swath. Above I have explained why conscience does not quite capture the focus on accommodating persons whose lives are governed by a nonstate source of normative authority. The same is true if the claim for exemption is from an unvariegated libertarianism. Such a claim is either a theory of self-sovereignty (the self is sovereign, not any entity, period) or a thick check against concentrated power (a goal with which I agree, but it need not be rooted in a

51. For a similar view, see BRADY, *supra* note 46, at 220; CÉCILE LABORDE, *LIBERALISM’S RELIGION* 61–67 (2017); Maclure, *supra* note 46, at 15–16 (revising former, narrower view about the grounding of exemptions, in response to Laborde’s critique).

52. See Dane, *supra* note 21, at 966 (“Sovereignty-talk is not libertarianism.”).

thoroughgoing libertarian position) or both. The claim might be invoked outside of subscribing to a comprehensive view of the good or of a conscientious belief that it would be wrong to follow the state's law. There is, thus, a potential thinness to a libertarian grounding for exemptions—"just leave me alone"—that I do not want to defend. Rather, I support accommodating sources of normative authority that compete with that of the state, sources that can respond to and encourage the development of comprehensive views of the good.

C. On Comprehensive and Political Liberalism

The view that toleration and accommodation are part of a proper conception of the liberal state entails rejecting "comprehensive liberalism,"⁵³ insofar as it authorizes the state to enforce a universalist conception of autonomy against groups who wish to adhere to a world view that prioritizes ceding autonomy in light of a nonstate source of authority that emphasizes more obedience and less free thinking. There are two aspects of concern here: one, a cosmopolitan universalism; two, a focus on autonomy as central to liberalism.

Regarding the former, Anthony Pagden theorizes that Enlightenment (and post-Enlightenment) thought—and (in a gloss I hope he would accept) an aspect of comprehensive liberalism that followed—is centered in a cosmopolitanism that focuses on what humans have in common and not what distinguishes one from another. The Enlightenment, says Pagden, wanted to recover a vision "of a unified and essentially benign humanity, of a potentially cosmopolitan world."⁵⁴ For core post-Enlightenment thinkers such as

53. For a summary of the differences between comprehensive and political liberalism, see JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 28, 153–57, 186–87 (2001).

54. ANTHONY PAGDEN, *THE ENLIGHTENMENT: AND WHY IT STILL*

Montesquieu and Mill, Pagden explains, “[c]ivilization was essentially a process of aggregation and cooperation—the working out in time of the ‘sympathy’ that bound all humans inexorably to one another.”⁵⁵ He adds that these ideas have led to “our ability to frame our understanding of the world in terms of something larger than our own small patch of ground, our own culture, family, or religion.”⁵⁶ Brian Barry offered a particularly blunt modern version of cosmopolitan liberalism. He maintained that liberals hold “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 the value of basic liberal rights.”⁵⁷ Although there are some basic rights that will trump any religious or cultural claim, liberal pluralism should balance the state’s centripetal claims against centrifugal assertions of competing norms. Cosmopolitan liberalism can overcome the excesses of sectarian merger of civil and religious authority, but it should not lead us to the opposite extreme, which would flatten out differences among comprehensive views of the good that compete for our allegiance.

Regarding the latter, in part critiquing my work and that of the political pluralist Victor Muniz-Fraticelli, Jean Cohen describes popular sovereignty in the liberal state as “entail[ing] autonomy,”⁵⁸ and including “a principle of

MATTERS 66 (2013).

55. *Id.* at 250.

56. *Id.* at 415.

57. BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* 132–33 (2001); *see also* John Corvino, *Religious Liberty, Not Religious Privilege*, in *DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION*, *supra* note 23, at 31 (“If peyote isn’t dangerous, it shouldn’t be against the law. If it is dangerous, religious beliefs do not change its potency.”).

58. Jean L. Cohen, *Sovereignty, the Corporate Religious, and*

legitimacy, inclusion, equality, voice, and accountability of government to the governed.”⁵⁹ The liberal values of which Cohen writes are important ones for the state to advance procedurally and through its expressive powers. As a citizen, I am happy to advocate for them as well. The hard question, however, is the extent to which the state should use its regulatory power to enforce these values and ends, against private associational or group activity engaged in by consenting adults whose view of autonomy and equality might differ from that of the state. To the extent that comprehensive liberalism as a regulatory model authorizes the state to use its coercive powers to enforce strong conceptions of autonomy and equality, we should see such use of state power as a parochial position inconsistent with the toleration-accommodation-based understanding of liberalism I am advancing.⁶⁰ Bhikhu Parekh states the case

Jurisdictional/Political Pluralism, in RELIGION IN LIBERAL POLITICAL PHILOSOPHY, *supra* note 46, at 83.

59. *Id.* at 98.

60. Others object to comprehensive liberalism insofar as its tentacles reach too far into what ought to be left to private choice (often in association with others). See KUKATHAS, *supra* note 20, at 36 (advancing a conception of liberalism that “agrees that liberty of conscience is fundamental to toleration . . . but rejects the connection with autonomy”); LABORDE, *supra* note 51, at 34 (The law should protect a “right not to be coerced into changing or abandoning the beliefs or way of life that one in fact has,” including those who “choose” and those who are “called.”); LEVY, *supra* note 19, at 287 (rejecting a social order in which “[t]he norms of thick group life are gradually hollowed out and replaced by the thin, egalitarian, and juridical norms associated at least in principle with the liberal state”); SWAINE, *supra* note 42, at 112 (“[P]ersonal autonomy ought not to be valued so highly as to undermine entirely the religious free exercise of strict religious devotees.”); Michael W. McConnell, “*God is Dead and We Have Killed Him!*”: *Freedom of Religion in the Post-Modern Age*, 1993 BYU L. REV. 163, 172–73 (rejecting a liberalism in which government has advanced individualism, autonomy, and rationality over religious commitments to community, theism, and faith); Rosenblum, *supra* note 22, at 211 (Private liberty can mean many things, including the “freedom not to avow, or do, anything”; one shouldn’t be

clearly: “To insist that [other cultures] must abide by our fundamentals is to expose ourselves to the same charge of fundamentalism that we make against them, and to rely solely on our superior coercive power to get our way.”⁶¹ He asks whether we want to insist that all cultures follow liberalism’s concerns with “autonomy, individualism, choice, free speech, and open internal debate.”⁶²

Parekh also contends that we do better to accept “political liberalism,” which recognizes authority competition within liberalism, a competition that is a key aspect of political pluralism.⁶³ We must guard, though, against a version of political liberalism that would accept only “reasonable” conceptions of the good as part of the political liberal fabric;⁶⁴ this approach might reject accommodations for all illiberal beliefs and practices. Rather, although we will inevitably balance harms, and deem the practical effect of some nonstate conceptions of the good to conflict in unjustified fashion with the equal liberty of others, we should begin with a presumption of accommodating those who claim adherence to views of the good and sources of authority that compete with the state.

obliged to attain autonomy or authenticity or creativity.).

61. Parekh, *supra* note 45, at 72.

62. *Id.*

63. *See id.* at 71–72; *see also* KUKATHAS, *supra* note 20, at 16; SWAINE, *supra* note 42, at xvi. As Donald Moon puts it, “[b]ecause political liberalism seeks to provide space for moral diversity, it does not offer a comprehensive view of the human good or a particular ideal of human excellence.” MOON, *supra* note 3, at 9. *See generally* JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

64. *See* GREENE, *supra* note 11, at 56–63; SWAINE, *supra* note 42, at 123.

II. HOW A PROPERLY AGNOSTIC LIBERALISM SUPPORTS A ROBUST POLITICAL PLURALISM

A. *On Political Agnosticism*

Political agnosticism provides a lens with which to appreciate the liberal state's toleration of different ways of life. Moving from nonliberal, plenary state power (sometimes merged with religious authority) to the liberal state involves caution when regulating, because of the possibility that another notion of the good⁶⁵ is better than the one the state is pursuing, and because of appropriate humility about the majority's notions of the good and attendant respect for competing notions.⁶⁶ These are separate but connected points. They are separate in that the former is about epistemic modesty while the latter is about political modesty.⁶⁷ They are connected in that they drive each other—if we start from a baseline of not only liberal toleration but also liberal respect for competing notions of the good, then we might adopt a modest as opposed to insistent epistemic posture; if we are inclined toward doubt about our truth claims, we might be more open to liberal toleration and respect. This claim can survive even if one thinks respect is too strong a term to describe appropriate state treatment of competing normative conceptions of the good; the argument for toleration, made earlier, will suffice. Also note that political agnosticism does not entail religious

65. See *supra* text accompanying note 46 for a more thorough description of “notion of the good.”

66. The respect is for the existence of such notions, as evidence that we exist in a world of plural notions of the good that compete with each other, including the state. The respect need not be for the *content* of any of the competing notions.

67. See Perry Dane, *Scope of Religious Exemptions: A Normative Map*, in RELIGIOUS EXEMPTIONS, *supra* note 46, at 138, 149–56 (discussing instrumental, empirical, and normative modesty).

agnosticism—the state should be agnostic as to whether religious agnosticism is correct! And it does not entail moral skepticism or relativism.⁶⁸ One can be a moral realist, believe that moral truths exist, but still appreciate that knowing such truths can be difficult and that giving leeway for various approaches is often the right move.

I will make several interconnected points, developing this conception of political agnosticism to support liberal pluralism. First, before getting to more specific points about agnosticism and accommodations, we might see an open-ended agnosticism as essential to a proper view of liberalism. Lucas Swaine argues that liberals should be open to the possibility of theological views containing some truth; such views “have a footing in reasonable views about the existence of otherworldly ends and the value of pursuits in that regard. . . .”⁶⁹ Mark Lilla observes that “[n]either Hobbes nor we can prove that those who lay claim to revealed truth have not in fact received it from on high.”⁷⁰ In a similar vein, as part of an argument that includes a case for accommodations, Andrew Koppelman writes, “[o]penness to the possibility that these goods are real is yet another reason to think that the state is promoting its citizens’ well-being when it treats religion as a good.”⁷¹ And from (nearly) opposite ends of the spectrum regarding theistic belief, Michael Stokes Paulsen and Philip Kitcher show how agnosticism can work alongside either thoroughgoing theism

68. See DEGIROLAMI, *supra* note 3, at 80; GALSTON, *supra* note 39, at 5; PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* 89–91 (2011); KUKATHAS, *supra* note 20, at 133, 260; MOON, *supra* note 3, at 53, 103.

69. SWAINE, *supra* note 42, at 150.

70. MARK LILLA, *THE STILLBORN GOD: RELIGION, POLITICS, AND THE MODERN WEST* 89 (2007).

71. ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 124 (2013).

(Paulsen) or “soft atheism” (Kitcher). Paulsen bases a theory of religious freedom on God’s existence (or likely existence), adding that an agnostic approach could lead to a similar theory.⁷² Kitcher argues that there is little to be said for the existence of a transcendent realm, but stops short of full-blown atheism. Rather, his “soft atheism makes small concessions in the direction of agnosticism: while there is no basis for endorsing the transcendent, the bare possibility of some future justified acceptance cannot be eliminated.”⁷³

Second, in writings that touch on the accommodation issue but are primarily about multiculturalism more generally, Abdullah An-Na’im and Bhikhu Parekh remind liberals why we should be cautious about interpreting life in minority cultures within western society. An-Na’im asks whether liberal Western theorists understand the meaning of “cultural membership in a minority culture in Western societies, as a daily existential experience and not merely a theoretical construct?”⁷⁴ Likewise, Parekh expresses concern with liberals who “ignore[] the problems involved in judging other cultures.”⁷⁵ Although not explicitly agnostic, in requiring an empathic approach toward fellow citizens whose cultural (and often religious) lives differ from ours, these scholars suggest a broad open-mindedness toward

72. See Michael Stokes Paulsen, *Is Religious Freedom Irrational?*, 112 MICH. L. REV. 1043, 1045 (2014) [hereinafter Paulsen, *Irrational?*]; Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1163 n.7, 1165 n.9 (2013) [hereinafter Paulsen, *Priority of God*]. For a similar view about open-ended agnosticism being sufficient to ground religious liberty, see BRADY, *supra* note 46, at 177, 324.

73. PHILIP KITCHER, *LIFE AFTER FAITH: THE CASE FOR SECULAR HUMANISM* 23–24 (2014).

74. Abdullahi An-Na’im, *Promises We Should All Keep in Common Cause, in IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 45, at 59, 59.

75. Parekh, *supra* note 45, at 71.

difference.

Third, in scholarship that focuses on exemptions from general law, often in the setting of religious freedom, epistemic and other brands of humility are front and center. As previewed in the introductory paragraph to this section, humility in judging ways of life different from one's own is based in an epistemic argument and a political theoretic normative argument. The epistemic argument is that it is difficult to determine right or best answers regarding what makes life good.⁷⁶ Our limited ability to assess long-term systemic risk is part of this; ascertaining what is commensurable with what to reach best answers can also be a fraught process. The epistemic difficulties bleed into the normative difficulties. Persons in different communities may value ends quite differently, sometimes because of reliance on nonstate sources of authority that have limited appeal outside of one's group. When we are sure enough in our judgments to insist we are right—and to insist to the point of regulating behavior to the contrary—should turn not only on a high level of confidence in our reasoning process but also in the strength of the argument that state coercive force is the right mechanism for getting nonconformists into line. The political pluralists I discuss share my position that on both epistemic and normative grounds it is preferable to err on the side of caution about the certainty of one's judgments.

Thus, scholars advancing theories of accommodation turn at key points to versions of epistemic (and other types of) humility in seeking to limit state power over subgroups. Paul Horwitz, who shares Na'im's and Parekh's empathetic approach toward religions with which one is not familiar, maintains that “[t]he spirit of constitutional agnosticism *is a*

76. See THOMAS NAGEL, *MIND & COSMOS: WHY THE MATERIALIST NEO-DARWINIAN CONCEPTION OF NATURE IS ALMOST CERTAINLY FALSE* 128 (2012) (“It is perfectly possible that the truth is beyond our reach, in virtue of our intrinsic cognitive limitations . . .”).

spirit that is not too sure it is right.”⁷⁷ Robert Vischer agrees with the “need for the political community to adopt a stance of humility when it comes to enforcing moral norms on ethical subcommunities.”⁷⁸ Chandran Kukathas develops a rich and detailed account of political pluralism—that sometimes verges on anarchism⁷⁹—and states that “[i]t is in recognition of our own fallibility that we are inclined to tolerate what we think is mistaken.”⁸⁰ Perhaps most helpfully, Perry Dane offers three ways in which the state can advance its claims more modestly than insisting that everyone obey all laws all the time.⁸¹ With “instrumental modesty”⁸² the state can, in some cases involving regulations that affect many people, find workarounds to achieve much of its general ends while still permitting some exemptions. With “empirical modesty”⁸³ the state can suspend certainty about some of its claims; his examples are animal slaughter,

77. HORWITZ, *supra* note 68, at 150. Nomi Stolzenberg offers a genealogy according to which the erosion of theological faith, for many, has brought in its wake a decreasing awareness of our cognitive limits, and an ascendancy of liberal secularism that sometimes is just as (problematically) self-righteous as religious fundamentalism. See Nomi Stolzenberg, *The Profanity of Law*, in LAW AND THE SACRED 29, 72–74 (Austin Sarat et al., eds., 2007). She observes, “[l]acking the religious mindset to function as a constant reminder and heightener of the awareness of the limits of the human mind, liberal secularism all too readily displays a hubris that galls religious believers and other critics of an overweening liberalism.” *Id.* at 74.

78. VISCHER, *supra* note 39, at 94.

79. See KUKATHAS, *supra* note 20, at 8 n.12 (stating that his “sympathies with (some form of) anarchism are quite evident”).

80. *Id.* at 126 (also noting that toleration is valuable “because it checks or counters moral certitude . . . [it] recogni[zes] . . . our own fallibility”).

81. See Dane, *supra* note 67, at 150–56.

82. *Id.* at 150.

83. *Id.* at 152.

declaration of death, and medical care laws where religious groups request accommodations. And with “normative modesty”⁸⁴ the state can perhaps back down from the full reach of certain laws when the social/cultural clash is “genuinely difficult”; an example is when the state seeks to protect same-sex couples in the face of religious objections to providing certain goods or services.

B. *The U.S. Commitment to Multiple Repositories of Power: Specifically, Religious Liberty*

The U.S. constitutional order is an excellent example of political agnosticism working to buttress liberal pluralism. I have used the term “multiple repositories of power” to describe how it works.⁸⁵ Consider the separation of legislative, executive, and judicial power; bicameralism and presentment for lawmaking; federal-state division of powers; judicial review of the political branches; and the political rights of speech, press, assembly, petition, and voting. This combination of structural and rights provisions makes it hard (though not impossible) for the nation to settle on specific conceptions of the good for regulatory enactment and enforcement. The lawmaking process is cumbersome, judicial review is always a possibility, and the political rights enable the citizenry to challenge laws in various ways (or seek to enact or revise them). Thus, “[m]ultiple repositories of power may exist both within government and”—the focus of this Article—“in the separation from government that some citizens desire.”⁸⁶

A core aspect of our multiple repositories of power is a commitment to religious liberty, as instantiated in the establishment and free exercise clauses of the U.S.

84. *Id.* at 154.

85. See sources cited *supra* note 14.

86. Greene, *Kiryas Joel*, *supra* note 14, at 17.

Constitution. A strong nonestablishment norm coupled with a strong free exercise norm is appropriate for special governance concerns implicated by religious belief and practice. For this to work, however, one needs to take religion seriously as a possible source of truth; some of the fight over accommodations comes from those who deem religion harmful superstition. While this is a possible position to hold personally, it is an inappropriate position for the liberal state to maintain. Additionally, one contemporary mode of religion clause scholarship takes religion seriously only insofar as it is like other commitments; this mode refuses to recognize the distinctiveness of religion. This at least is a plausible fit with the kind of liberal pluralism I am advancing; nonetheless, I'll explain why, as a matter of liberal democratic theory and U.S. constitutional law, there are good reasons for treating religion as distinctive.

It is easiest to take religion seriously as a possible source of truth if one is a theist. For example, Michael Stokes Paulsen takes the position that

[r]eligious freedom only makes entire sense as a social and constitutional arrangement on the supposition that God exists (or very likely exists); that God makes claims on the loyalty and conduct of human beings; and that such claims, rightly perceived and understood, are prior to, and superior to, the claims of any human authority.⁸⁷

The harder question for theists is not whether a liberal democracy should sometimes, or even often, award exemptions from general law to religious believers, but

87. Paulsen, *Priority of God*, *supra* note 72, at 1160. From this predicate, Paulsen contends that “*the First Amendment’s very strong presumption is that . . . the law . . . ordinarily must yield*” to the individual’s need to act according to God’s command, *id.* at 1184, excluding only “*conduct one can confidently say proceeds from views outside the realm of [a] conceivably correct view[] about what God requires or commands,*” *id.* at 1211. See also SPINNER-HALEV, *supra* note 21, at 6 (“Few theorists take seriously [religious] groups’ belief in God and ask what that means for difference and diversity.”).

rather why God's will should not be the express source of all law. I won't say more about the latter position other than that it is inconsistent with the historical move away from a union of church and state and with versions of pluralism that took the place of theocracy.

The position that religion is valuable and that a proper view of pluralism in a liberal democracy should take this value seriously need not, however, be based in an assertion of theistic belief. For example, Andrew Koppelman claims that "First Amendment doctrine treats religion as a good thing."⁸⁸ "Religion," argues Koppelman, "denotes a cluster of goods,"⁸⁹ including salvation, "harmony with [a] transcendent origin of universal order," recognition of the imperfect character of human life, courage in the face of tragedy, a transcendent underpinning for morality, and contact with the awesome and indescribable.⁹⁰ Similarly, referring to the "*intrinsic value of religious capabilities*," Martha Nussbaum contends that "the ability to search for the good in a religious way" needs protecting in the liberal state.⁹¹ To reject the possible value or good from religious belief and practice is to be, on liberalism's terms, indefensibly partisan. Thus, Lucas Swaine takes a commitment by some to otherworldly values as a given, in part because he doesn't want to have to "show cause against God's existence," but more importantly because "to deny that

88. KOPPELMAN, *supra* note 71, at 2; *see also* Andrew Koppelman, *Ronald Dworkin, Religion, and Neutrality*, 94 B.U. L. REV. 1241, 1245 (2014) ("[T]he state is permitted to favor and regard as a good religion in general.").

89. KOPPELMAN, *supra* note 71, at 124. Later, Koppelman says that "religion is an adequate . . . proxy for multiple goods." *Id.* at 144; *see also* KOPPELMAN, *supra* note 19, at 98–100, 104.

90. KOPPELMAN, *supra* note 71, at 124.

91. Martha C. Nussbaum, *A Plea for Difficulty, in IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 45, at 105, 107.

it is reasonable to place value in otherworldly powers and ends would be to deny the fact of reasonable pluralism.”⁹²

Some who offer theories of religious freedom do so backed by a broad theory of what counts as religion. For example, Thomas Nagel talks of our “yearning for cosmic reconciliation that has been part of the philosophical impulse from the beginning.”⁹³ The “desire for such completion” is a manifestation of “the religious temperament.”⁹⁴ The “religious response” that is part of philosophy’s attempt at grappling with this issue includes “some kind of all-encompassing mind or spiritual principle in addition to the minds of individual human beings and other creatures.”⁹⁵ So religion can play a central role in our lives, in this way, without invoking God as part of it, although Nagel’s formulation is close to a brand of theism. Even further from a theistic hook in support of a theory of religious freedom are Jonathan Haidt and Ronald Dworkin. Haidt writes of “divinity with or without God,”⁹⁶ maintaining that “the human mind perceives a third dimension, a specifically moral dimension that I will call ‘divinity,’” and this is so “whether or not God exists.”⁹⁷ In his final book, *Religion Without God*, Dworkin took the position to its endpoint: “The theme of this book is that religion is deeper than God. Religion is a deep, distinct, and comprehensive worldview: it

92. SWAINE, *supra* note 42, at 32.

93. THOMAS NAGEL, SECULAR PHILOSOPHY AND THE RELIGIOUS TEMPERAMENT: ESSAYS 2002–2008, at 3 (2010).

94. *Id.* at 4.

95. *Id.* at 4–5.

96. JONATHAN HAIDT, THE HAPPINESS HYPOTHESIS: FINDING MODERN TRUTH IN ANCIENT WISDOM 183 (2006).

97. *Id.* at 183–84.

holds that inherent, objective value permeates everything.”⁹⁸ This is controversial enough, but Dworkin doubled down, or, rather, explained: “The conviction that a god underwrites value . . . presupposes a prior commitment to the independent reality of that value.”⁹⁹ This is not the place to interrogate this provocative argument; some religious persons would flip the order of operations, and argue for a prior commitment to the independent reality of a deity (or deities), with value following in tow.

As what counts as religion gets broadened to Dworkin-like dimensions, it becomes harder to defend treating religion as distinctive, either for exemptions as a matter of protecting free exercise or for nonestablishment. Without viewing religious belief as distinctive, we might still be able to advance the argument that the best view of liberalism includes political pluralism with significant accommodations. I’ll return to that position in Part III when I describe my broader view that runs from a version of philosophical anarchism to a strong presumption for accommodating religious and secular comprehensive views of the good. But there is a good case for treating religious belief and practice as distinctive, especially in the U.S. constitutional order.

Some arguments for religion’s distinctiveness see it as standing for other values or representing contingent facts about the world. So, for example, Andrew Koppelman says that First Amendment doctrine properly “treats religion as a distinctive human good,”¹⁰⁰ but this is because “religion is an adequate . . . proxy for multiple goods,”¹⁰¹ the list of which I

98. RONALD DWORKIN, *RELIGION WITHOUT GOD* 1 (2013).

99. *Id.* at 1–2.

100. KOPPELMAN, *supra* note 71, at 11.

101. *Id.* at 144.

mentioned above.¹⁰² Mark Storslee pushes Koppelman's view a step further, maintaining that "[w]hen it comes to religion, the whole is more than the sum of its parts. And indeed, that might just be what makes it special."¹⁰³ The best route from Koppelman to Storslee is to identify an aspect of religious belief and practice that is different in a normatively relevant way from secular belief and practice. There is a candidate for this, identified by several scholars and, I claim, at the root of U.S. constitutional treatment of religion as distinctive.

At its core, religious belief includes belief in God, or a deity or deities, or an "extrahuman source of normative authority" (or generative power, although that aspect of theism doesn't tend to be at the root of legal battles).¹⁰⁴ Religious anthropologist T.M. Luhrmann observes, "[a]t the heart of the religious impulse lies the capacity to imagine a world beyond the one we have before us."¹⁰⁵ As Robert Audi puts it, "although religious reasons are not the only kind that should not be the basis for coercion, they are nonetheless

102. See *supra* text accompanying notes 89–90; see also Nussbaum, *supra* note 91, at 111 (arguing that although some secular beliefs and practices may need protection as does religion, we should give religion special protection because of the history of treatment of minority religions).

103. Mark Storslee, *On Religion's Specialness*, 81 REV. POL. 656, 661 (2019); see also Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 784 (2013) ("What makes religion distinctive is its unique *combination* of features, as well as the place it holds in real human lives and human history.").

104. GREENE, *supra* note 11, at 150; see also Greene, *Political Balance*, *supra* note 11, at 1617. This claim is true for most religious beliefs that have animated U.S. constitutional doctrine.

105. T.J. LUHRMANN, HOW GOD BECOMES REAL: KINDLING THE PRESENCE OF INVISIBLE OTHERS 76 (2020); see also *id.* at 111 ("[T]here is a highest common factor of all religions that delivers to us true knowledge of the divine.").

special,”¹⁰⁶ adding that “theistic religions raise the most important church-state issues, at least for societies like those in the Western World.”¹⁰⁷ Michael Stokes Paulsen states that “religion proceeds from some understanding of a self-existent, creating *God*.”¹⁰⁸ Kathleen Brady’s book-length argument, *The Distinctiveness of Religion in American Law*, is grounded in a similar claim, that “[r]eligious individuals embrace and act pursuant to beliefs about the divine and transcendent that nonreligious individuals do not share.”¹⁰⁹ In critiquing Ronald Dworkin, Paul Horwitz notes that “[c]onstitutional provisions guaranteeing religious freedom are often taken to involve some form of theism.”¹¹⁰ Some scholars refer to religion by focusing not on a deity but, closely related, on the supernatural or transcendent. So, Daniel Philpott observes that “[r]eligion offers answers to the grand questions of life through an affirmation of a superhuman, transcendent realm.”¹¹¹ Philip Kitcher, en

106. ROBERT AUDI, *DEMOCRATIC AUTHORITY AND THE SEPARATION OF CHURCH AND STATE* 71 (2011).

107. *Id.* at 165 n.10; see also Michael W. McConnell, *The Problem of Singling Out Religion*, 50 *DEPAUL L. REV.* 1, 1 (2000) (supporting the distinctiveness of religion for U.S. constitutional jurisprudence).

108. Paulsen, *Irrational?*, *supra* note 72, at 1055.

109. BRADY, *supra* note 46, at 2; see also *id.* at 6 (describing a “divine-human encounter that is at the heart of religion”), 27, 82, 102, 166, 209, 219, 287, 300.

110. Paul Horwitz, “A Troublesome Right”: *The “Law” in Dworkin’s Treatment of Law and Religion*, 94 *B.U. L. REV.* 1225, 1228 (2014); see also HORWITZ, *supra* note 68, at 278 (Claims of conscience in Free Exercise Clause balancing cases “represent a statement about the fact of the matter, about God’s actual existence and all that follows from it—one that, if true, should be insuperable.”).

111. DANIEL PHILPOTT, *RELIGIOUS FREEDOM IN ISLAM: THE FATE OF A UNIVERSAL HUMAN RIGHT IN THE MUSLIM WORLD TODAY* 22 (2019); see also Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 *IOWA L. REV.* 1, 67 (1998) (“[R]eligions that

route to developing his case for “soft atheism,”¹¹² explains that “[r]eligions are distinguished by their invocation of something beyond the mundane physical world, some ‘transcendent’ realm.”¹¹³ And Daniel Dennett, whose atheism is anything but soft, uses this as a working definition of religions: “*social systems whose participants avow belief in a supernatural agent or agents whose approval is to be sought.*”¹¹⁴

The belief or faith in God or more generally in the supernatural or transcendent that animates most of U.S. religion clause jurisprudence may involve reason, but it need not, and it often does not turn on the kind of material-scientific reasoning that animates most of politics. A “separate planes” view of science and religion helps support this case. Alvin Plantinga offers perhaps the best explication of this position.¹¹⁵ He asks “whether rational belief in God

point to a transcendent authority help check the power of the modern nation-state.”); *cf.* Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 363 (1980) (Religion need not be theistic, but religious beliefs must at least purport to be “compelled by a source beyond human judgment.”).

112. KITCHER, *supra* note 73, at 23.

113. *Id.* at 3.

114. DANIEL C. DENNETT, *BREAKING THE SPELL: RELIGION AS A NATURAL PHENOMENON* 9 (2006).

115. See ALVIN PLANTINGA, *WHERE THE CONFLICT REALLY LIES: SCIENCE, RELIGION, & NATURALISM* (2011); see also Stephen Jay Gould, *Nonoverlapping Magisteria*, 106 NATURAL HISTORY 16 (1997). In an exchange with Daniel Dennett, Plantinga maintains that theism is compatible with natural selection because God could have caused natural selection. See DANIEL C. DENNETT & ALVIN PLANTINGA, *SCIENCE AND RELIGION: ARE THEY COMPATIBLE?* 3–4 (2011). For support of the “separate planes” position, see AUDI, *supra* note 106, at 48–49; NAGEL, *supra* note 93, at 22 (“If the God hypothesis makes sense at all, it offers a different kind of explanation from those of physical science . . .”); McConnell, *supra* note 103, at 786–88; Paulsen, *Irrational?*, *supra* note 72, at 1055 (For religious believers, physical existence derives from “some

requires argument or ‘scientific evidence,’”¹¹⁶ and answers no. Many Christians (Plantinga is one) claim that “*faith* is a source of knowledge or information about the world in addition to reason.”¹¹⁷ Responding to the question “whether there is a source of rational religious belief going beyond perception, memory, a priori intuition, et cetera,”¹¹⁸ Plantinga answers yes: we have “knowledge in addition to,” but not contrary to, “reason.”¹¹⁹ Paul Horwitz endorses the “separate planes” view, writing that science “cannot refute the possibility of a supernatural world,” and noting that “[e]volutionary and religious accounts of religion are not mutually exclusive.”¹²⁰

Opposing Plantinga on the “separate planes” issue are Richard Dawkins and Daniel Dennett. Dawkins distinguishes “temporary agnosticism in practice”—where evidence might exist for a proposition but we don’t have enough of it yet—from “permanent agnosticism in principle”—which is appropriate for questions that cannot be answered “because the very idea of evidence is not applicable.”¹²¹ The question whether God exists belongs in the former category, claims Dawkins, and thus is susceptible

external act of creation, by some *cause*, being, or entity *extrinsic to and independent of* the physical universe, existence, and reality as perceived by ordinary human capacities.”).

116. PLANTINGA, *supra* note 115, at 43.

117. *Id.* at 44.

118. *Id.* at 45.

119. *Id.* at 46.

120. HORWITZ, *supra* note 68, at 133–34. For an illuminating exploration of separate planes in the lives of the religiously devout, see LUHRMANN, *supra* note 105, at 13 (Some people “seem to treat gods and spirits with different ontological attitudes than they do things of the everyday world.”).

121. RICHARD DAWKINS, *THE GOD DELUSION* 47 (2006).

to evidentiary inquiry.¹²² Dennett writes, “[t]he spell I say must be broken is the taboo against a forthright, scientific, no-holds-barred investigation of religion as one natural phenomenon among many.”¹²³ Dawkins’ and Dennett’s opposition to the “separate planes” position is part of their more general antagonism to faith-based religion, their “new atheism.”¹²⁴ After defining God as a “superhuman, supernatural intelligence” who designed and created the universe, Dawkins then issues a denial: “any creative intelligence, of sufficient complexity to design anything, comes into existence only as the end product of an extended process of gradual evolution.”¹²⁵ In setting forth his atheism, Dennett critiques religion as based in “[t]he mists of incomprehension and the failure of communication” and as refusing the scientific method of testing through evidence.¹²⁶ In even starker language, Sam Harris maintains that “[f]aith-based religion must suffer [a] slide into obsolescence,” adding that “the very ideal of religious tolerance . . . is one of the principal forces driving us toward

122. *See id.* at 48; *see also id.* at 71 (claiming that treating religion within “permanent agnosticism in principle” and adopting Gould’s nonoverlapping magisteria idea, *see source cited supra* note 115, is a kind of appeasement).

123. DENNETT, *supra* note 114, at 17; *see also id.* at 258–64 (rejecting the argument that religious claims aren’t on the same plane as science claims, i.e., that we can’t investigate religion as a natural phenomenon).

124. JOHN GRAY, SEVEN TYPES OF ATHEISM 9–24 (2018) (describing “The New Atheism”).

125. DAWKINS, *supra* note 121, at 31 (emphasis omitted).

126. DENNETT, *supra* note 114, at 245 (atheism), 217 (quotation), 233 (lack of evidence for religious faith); *cf.* CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING 5 (1st ed. 2009) (stating that he and similar thinkers “distrust anything that contradicts science or outrages reason”); PAGDEN, *supra* note 54, at 125–48 (describing Hume’s atheism).

the abyss.”¹²⁷ Within the legal academy, Brian Leiter has set forth the most important recent challenge to taking religious belief and practice seriously as a ground for exemptions. This is the core of his argument:

*If what distinguishes religious beliefs from other important and meaningful beliefs held by individuals is that religious beliefs are both insulated from evidence and issue in categorical demands on action, then is not there reason to worry that religious beliefs, as against other matters of conscience, are far more likely to cause harms and infringe on liberty?*¹²⁸

Ronald Dworkin’s challenge was somewhat more measured. Religion, claimed Dworkin, “holds that inherent, objective value permeates everything,” and does not “require or assume a supernatural person.”¹²⁹ God cannot be the ground of value, Dworkin maintained, because value is independent from history, including divine history.¹³⁰

This is not the place to endorse the separate planes view or to make the case for theism (as an open-ended agnostic, this is not a case I could make). For the issues of political and constitutional theory I am addressing in this Article, we need not do a deep dive into whether Plantinga (and fellow theists) or Dawkins (and fellow atheists) are correct. The political agnosticism that is part of liberal democratic theory and U.S. constitutional law should assume for purposes of argument

127. SAM HARRIS, *THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON* 14–15 (2004).

128. BRIAN LEITER, *WHY TOLERATE RELIGION?* 59 (2013); *see also* Jean L. Cohen, *Freedom of Religion, Inc.: Whose Sovereignty?*, 44 *NETHERLANDS J. LEGAL PHIL.* 169, 188 (2015) (pointing out, though not endorsing, what some assert: “Religious claims are thus special both because the state is constitutionally disabled from disputing their truth and because it cannot categorically deny the authority on which such a claim rests!”).

129. DWORKIN, *supra* note 98, at 1, 9.

130. *See id.* at 1–2, 22, 30.

the correctness of the separate planes view: people with theistic religious faith that operates at least in part on a plane different from the material-scientific may be correct; toleration of their beliefs and practices is therefore warranted because of what I have termed epistemic and political agnosticism, humility, modesty. Buttressing this position is the well-accepted (and correct) view that the state should not be in the business of adjudicating religious truth, in part because of the separate plane on which such truth might exist.¹³¹

One conclusion we may derive from the distinctiveness of reference to an extrahuman source of normative authority is that theistic faith, and tenets that the faithful believe follow from such faith, may be foreign to many fellow citizens. Accordingly, we might deem such faith deserving of some special measure of protection as it is lived out in ways also foreign to many.¹³² In constitutional law terms, this is the free exercise piece of the argument. A second, and related conclusion, is that norms and injunctions stemming from one's relationship to an extrahuman source of normative authority—from God—should not be the express basis of law or other state action. In constitutional law terms, this is the nonestablishment piece of the argument. The concern is one Justice O'Connor identified¹³³—the use of state action to overtly advance a dominant religious position splits the

131. For support of the position that the state should not determine religious truth, see HORWITZ, *supra* note 68, at 256; KOPPELMAN, *supra* note 71, at 3, 6, 177; LASKI, *supra* note 18, at 118; Koppelman, *supra* note 88, at 1245; McConnell, *supra* note 107, at 24; Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 148 (1992).

132. This is the converse of Leiter's position, which is that because of the relative insulation from evidentiary challenge of much religious belief, there is reason for the state to be especially wary of treating it with distinctive concern. See LEITER, *supra* note 128, at 33–34, 59, 63.

133. See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

citizenry into those who have access to the theistic beliefs and faith driving the state action from those who do not. This citizenship point is connected to a political participation point, because if sectarian religious reference becomes the driving source of state action, nonbelievers do not have access to the roots of such belief as they would to other types of argument.¹³⁴ The two conclusions intersect in ways that should make sense within a theory of liberal democratic governance and to devout religious believers.¹³⁵ The free

134. See Greene, *Political Balance*, *supra* note 11, at 1619–23.

135. In previous work I fleshed out a specific version of this intersection—that we should (and sometimes do) bar laws based on express, predominant religious justification, and that, accordingly, religious persons have been (somewhat) disabled in their political participation and thus that (some) exemptions are a proper legitimacy-protecting counterweight. See generally Greene, *Political Balance*, *supra* note 11. There have been various critiques of this position—and I need not sustain it to prove my case for religious distinctiveness and appropriate nonestablishment and free exercise norms, which can turn on a more general case for a proper public-private line for protecting religious freedom. Here I want to address Cécile Laborde’s critique that even if my nonestablishment argument holds (for rejecting laws based on express, predominant religious justification), we should nonetheless reject “the view that people should be compensated for the illegitimacy of some of the arguments they might present when acting in official capacity.” LABORDE, *supra* note 51, at 304 n.90.

Let’s consider two examples of illegitimacy of political justification. First: law backed by express, predominant religious justification. Second: law backed by express, predominant racist justification. For the first type of case, we’re not making a moral criticism of the religiously backed justification; we are (properly) making no objection to the content of such justification; rather, we are refusing to bind the citizenry through the legislature’s express reliance on an extrahuman source of normative authority. The political pluralism for which I have been arguing might now include the following proposition: Those whose normative positions have been excluded from expressly grounding law not because of content but because of source have a reason to complain about being fully bound by the resulting law. To respect such separate sources of normative authority (while not letting them expressly ground law), we should attempt, when possible, to accommodate persons who adhere to them.

exercise conclusion helps us see that the state can advance widely shared liberal values while tolerating (and more) those who adhere more centrally to competing sources of normative authority, specifically those whose belief in such sources operates on a separate plane from the material-scientific basis of most ordinary governance. The nonestablishment conclusion helps us see that the faith and belief in God that are often the life focus for the devout are properly kept from expressly governing the lives of nonbelievers. The two conclusions, working hand in hand, recognize the distinctiveness of religious faith in a consistent way.

U.S. constitutional doctrine has to some extent implemented the view that religion is distinctive, and to some extent it has not. For the most part, I applaud the Supreme Court when it has followed the religion-as-distinctive route, and critique it when it has not. Here is a summary, in seven parts:

First, the Court has invalidated state action as an Establishment Clause violation when the express, predominant purpose is religious.¹³⁶ There is no parallel for secular legislation. Second, under the Establishment Clause, the Court has invalidated state-led or sponsored prayer and teaching of religious doctrine in public school.¹³⁷ There is no parallel for state-led or sponsored secular speech or teaching

For the second type of case, we are making a moral and constitutional critique of the justification for law. We bar racist lawmaking because of its content, its viewpoint, and there is no argument from political legitimacy against legally binding those who have been limited in their ability to offer racist justifications for law.

136. See cases cited *supra* note 7.

137. Regarding state-led or sponsored prayer in public school, see *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). Regarding state teaching of religious doctrine in public school, see *Edwards v. Aguillard*, 482 U.S. 578 (1987).

of secular ideas in public school. Third, the Court has treated state-sponsored religious symbols with special Establishment Clause scrutiny, sometimes holding such symbols unconstitutional.¹³⁸ The Court gives no special constitutional scrutiny to state-sponsored secular symbols. Fourth, regarding public funding of private schooling, the Court has moved in a way that flattens out religious distinctiveness. Not only *may* government fund private religious schools (through indirect means such as vouchers and tax credits) without violating the Establishment Clause so long as it's part of a more general funding program,¹³⁹ but also if government funds private secular education it *must* fund private religious education, or else be in violation of the Free Exercise Clause.¹⁴⁰ Fifth, governmental discrimination against religion generally or against a specific sect violates the Free Exercise Clause.¹⁴¹ This might appear to be a religion-as-distinctive doctrine, but the same results would exist in cases involving animus against any group or belief system, under the Equal Protection Clause.¹⁴² Sixth, the

138. *Compare* *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (Christian cross), *Van Orden v. Perry*, 545 U.S. 677 (2005) (Ten Commandments monument), *Allegheny v. ACLU*, 492 U.S. 573 (1989) (Menorah), *and* *Lynch v. Donnelly*, 465 U.S. 668 (1984) (Nativity scene) (all upholding religious symbols on government property), *with* *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005) (Ten Commandments posting), *and* *Allegheny v. ACLU*, 492 U.S. 573 (1989) (Nativity scene) (both invalidating religious symbols on government property).

139. *See* *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

140. *See* *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2262 (2020); *Trinity Lutheran Church of Colom. v. Comer*, 137 S. Ct. 2012, 2024–25 (2017). *But see* *Locke v. Davey*, 540 U.S. 712, 719 (2004).

141. *See* *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *McDaniel v. Paty*, 435 U.S. 618 (1978).

142. *See* *Romer v. Evans*, 517 U.S. 620 (1996); *Cleburne v. Cleburne*

exemptions cases exemplify the Court in its most “religion is not distinctive” mode. From *Employment Division v. Smith* to today, the Court refuses to treat neutral laws of general applicability with any special scrutiny, even if as applied they impose a substantial obstacle on religious practice.¹⁴³ Finally, seventh, the Court mostly allows legislative accommodation for religion generally or for specific religions, so long as such accommodation can be seen as lifting a burden on the exercise of religion and not merely as throwing the state’s support behind a dominant sect.¹⁴⁴ Although these cases permitting legislative accommodation are about religion, they don’t represent the Court seeing religion as distinctive, because the state could constitutionally accommodate secular groups as well. These cases represent religion as distinctive only when the Court invalidates a so-called accommodation as really an establishment of religion (as it might do in the first, second, or third categories).

I support the religion-as-distinctive cases in the first three categories (although I would take a stricter look at state-sponsored religious symbols than has the Court); the Court has mostly gotten cases in the fifth and seventh categories correct; I have come around to the view that the Establishment Clause part of the fourth category is right, but I disagree with the Free Exercise part of the fourth category, believing that states should be permitted to fund private secular education without also funding private religious education;¹⁴⁵ and regarding the sixth category, as fleshed out

Living Ctr., 473 U.S. 432 (1985); *Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973).

143. See 494 U.S. 872 (1990).

144. See *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987); see also *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989); *Smith*, 494 U.S. at 890. But see *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

145. The combination of the Court’s decreased willingness to see state-

in much of this Article, I critique *Smith's* failure to see religion as distinctively in need of exemptions.¹⁴⁶

Although I hope to have persuaded you of the case for treating religion as distinctive, I want to set forth some of the opposition and offer a few responses, focusing on the discussion of accommodations and exemptions. Some scholars have either rejected exemptions generally or approved them but without treating religious belief and practice as distinctive. In the first group are Richard Arneson, Brian Leiter, and Jonathan Seglow. Arneson maintains “there is no moral right to freedom of conscience, and we should not establish any such legal right.”¹⁴⁷ In a

sponsored religious symbols as violative of the Establishment Clause, and its increased willingness to view the Free Exercise Clause as requiring state financial support for religious education when the state otherwise supports private secular education, reveals a Court endorsing an intertwining of the state with religion, which is hard to square with the core goal of the religion clauses, supporting the religious liberty of the people in their private capacity. My critique here isn't primarily about the Court's interring the so-called *Lemon* test, which looks to the religious purpose and effect of state action as well as to entanglement of church and state, and its “endorsement test offshoot.” See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2411 (2022) (explaining the gradual demise of *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). The formulation of a test is less important than appreciating that vibrant, diverse religious exercise cannot be maintained when the state, which speaks and acts for all the people in a nonsectarian capacity, openly endorses sectarian views of religious truth and requires its citizens to support doctrinal religious education when they otherwise support private secular education. For an elaboration of the first part of this claim, see Abner S. Greene, “*Not in My Name*” *Claims of Constitutional Right*, 98 B.U. L. REV. 1475, 1513–17 (2018).

146. Recall that I am mostly not distinguishing what courts and legislatures should do in terms of awarding exemptions and accommodations. See *supra* note 12. The *Smith* mistake is about courts refusing to seriously consider mandated Free Exercise Clause exemptions; my argument more broadly encourages both legislatures and courts to view exceptions for religious (and ethnic/cultural/tribal) practice as often warranted.

147. Richard J. Arneson, *Against Freedom of Conscience*, 47 SAN DIEGO

diverse democracy, he argues, we overcome difference best through general compliance with law.¹⁴⁸ An enforceable right (even merely *prima facie*) to opt-outs for conscientious objection “wrongfully privileges one particular group of people who might claim to be unfortunately burdened by legal requirements.”¹⁴⁹ Leiter follows his ringing rejection of special solicitude for religious beliefs with a refusal to extend accommodations (as a general matter) to nonreligious beliefs.¹⁵⁰ And Seglow takes the position that “in a democratic society where citizens have adequate opportunities to influence the law, we would not usually allow individuals to be exempt from those collectively determined laws with which they disagree.”¹⁵¹ We are “morally responsible for our beliefs,”¹⁵² contends Seglow. He then opens the door to situations in which fair background conditions don’t exist, but after identifying interests relevant for possibly awarding exemptions—integrity self-respect, civic participation, and ethical coherence—pushes us to see if we can comply with the law and still be true to those interests¹⁵³ and offers three examples in which he says the exemptions claimant should lose.¹⁵⁴ The position of Arneson et al.—echoing Brian Barry’s *Culture and Equality*¹⁵⁵—fails to adequately account for the manifold ways in which majorities neglect the interests of religious (and other)

L. REV. 1015, 1015 n.1 (2010).

148. *See id.* at 1018.

149. *Id.* at 1024.

150. *See* LEITER, *supra* note 128, at 4, 92–133.

151. Seglow, *supra* note 46, at 177.

152. *Id.* at 179.

153. *See id.* at 180–87.

154. *See id.* at 188.

155. BARRY, *supra* note 57.

minorities. Moreover, the no exemptions position adopts an overly sanguine view of state authority; even a modicum of political pluralism would acknowledge the various sources of normative authority that compete with the state and deserve attention for possible accommodation from law.¹⁵⁶

Christopher Eisgruber and Lawrence Sager have led the charge from those who refuse to deem religion as distinctive, but nonetheless think religion shares qualities with other forms of belief (and conduct) that sometimes deserve special protection from law.¹⁵⁷ They develop a theory of equal liberty that “denies that religion is a constitutional anomaly, a category of human experience that demands special benefits and/or necessitates special restrictions.”¹⁵⁸ Instead, they maintain that various persons especially vulnerable to conscious or unconscious majoritarian discrimination might at times need protection through exemptions from general law.¹⁵⁹ Cécile Laborde, although critiquing Eisgruber and Sager for “oscillat[ing] between normatively distinct criteria”¹⁶⁰ for identifying the proper recipients of protection through accommodations, nonetheless shares their view that

156. For a critique that shares some values with Arneson, Leiter, Seglow, and Barry, see Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015) (contending that an overly capacious view of exemptions threatens to “Lochnerize” free exercise of religion, by improperly seeing the unimpeded marketplace as a natural baseline).

157. See generally CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2010); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994).

158. EISGRUBER & SAGER, *supra* note 157, at 6.

159. See *id.* at 18, 59, 245.

160. LABORDE, *supra* note 51, at 54; see also Cécile Laborde, *Equal Liberty, Nonestablishment, and Religious Freedom*, 20 LEGAL THEORY 52, 62–71 (2014).

“religion is not uniquely special: whatever treatment it receives from the law, it receives in virtue of features that it shares with nonreligious beliefs, conceptions, and identities.”¹⁶¹ Laborde ultimately focuses on “integrity-protecting commitments” as the proper category for grounding exemptions.¹⁶² Nelson Tebbe and Micah Schwartzman also back the Eisgruber and Sager position. In *Religious Freedom in an Egalitarian Age*, a work that supports accommodations in various settings, Tebbe states “[d]oubt about the specialness of religion” as one of the book’s themes, maintaining that awarding exemptions for religious citizens only “would be intolerably partial.”¹⁶³ Schwartzman echoes this position.¹⁶⁴

The Eisgruber and Sager position, backed by others, shows how the post-Civil War commitment to broad equality allows us to see religion as just one of many types of deep,

161. LABORDE, *supra* note 51, at 3; *see also* Cécile Laborde, *Introduction*, 81 REV. POL. 643, 643 (2019); Cécile Laborde, *Reply: Disagreement, Equal Respect, and the Boundaries of Liberalism*, 81 REV. POL. 665, 671 (2019) [hereinafter Laborde, *Reply*].

162. LABORDE, *supra* note 51, at 203.

163. NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE* 4–5, 75 (2017).

164. *See* Micah Schwartzman, *What if Religion is Not Special?*, 79 U. CHI. L. REV. 1351, 1421 (2012). For others who share the Eisgruber and Sager view of supporting some exemptions but not distinctively for religious belief, *see* Corvino, *supra* note 57, at 25, 32, 56–66, 208; Christie Hartley & Lori Watson, *Political Liberalism and Religious Exemptions*, in *RELIGIOUS EXEMPTIONS*, *supra* note 46, at 97, 99; Maclure, *supra* note 46, at 10; Alan Patten, *Religious Exemptions and Fairness*, in *RELIGION IN LIBERAL POLITICAL PHILOSOPHY*, *supra* note 46, at 204, 218; Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341, 1388 (2020); Steven D. Smith, *What Does Religion Have to Do With Freedom of Conscience?*, 76 U. COLO. L. REV. 911, 916, 936 (2005); Kyle Swan, *How Should We Treat Religion? On Exemptions and Exclusions*, in *RELIGIOUS EXEMPTIONS*, *supra* note 46, at 37, 38.

comprehensive belief that one might hold. Nonetheless, there are good normative and doctrinal reasons (although the doctrine needs some adjusting) to treat religion as distinctively in need of accommodation from laws of general applicability that impose substantial burdens. To take seriously the belief in God that animates the lives of some of our fellow citizens, we should appreciate that faith in an extrahuman source of normative authority fits well with a public-private line that requires special protection for religious belief and conduct as well as special disestablishment of religion from the apparatus of the state.¹⁶⁵

C. *A Comment on Dobbs*

Just as respect for equal liberty, and a cautious political agnosticism, should yield a readiness to grant religious accommodations, so should these same principles have led the Court to sustain some version of abortion rights in *Dobbs v. Jackson Women's Health Organization*.¹⁶⁶ I will make three points: about political pluralism generally, about equality, and about compromise as accommodation. Although these arguments are primarily framed in terms of political theory, I intend them also to undergird substantive due process and equal protection arguments for judicial enforcement, although I do not flesh out the contours of those arguments here.

First, although homicide laws¹⁶⁷ are usually made by

165. For a more detailed response to Eisgruber and Sager, see Greene, *Three Theories*, *supra* note 11.

166. 142 S. Ct. 2228 (2022).

167. By “homicide laws” I refer to laws that punish the taking of human life. Anti-abortion advocates believe a woman’s intentional termination of her pregnancy is a type of homicide, and they wish to include such actions in the body of homicide laws (putting aside here whether they advocate punishing the health care provider (if one is involved), or the

legislative majorities, when viewed through the lens of political pluralism, we should permit each pregnant woman¹⁶⁸ to make the existential decision about the fertilized egg¹⁶⁹ she is carrying and supporting. Some women may believe they are carrying a human being (or potential human being) with a soul from the moment of conception. Some may believe this is true (or a less overtly religious version of it) but at a somewhat later stage of fetal development. Yet other women may believe that what or whom they are carrying is part of their body, subject to the normal (and otherwise protected) principles of bodily autonomy and medical decisionmaking. For each pregnant woman, whether or not she deems the status of her fertilized egg to be a religious question, the issue is similar to many religious questions in giving rise to broad and perhaps irreconcilable disagreement and in covering core ontological territory (about the status or nature of the fertilized egg).¹⁷⁰

woman, or both). Arguments in favor of abortion rights should acknowledge head-on this fact about anti-abortion laws. In this discussion, I assume *arguendo* that the purpose behind anti-abortion laws is protection of asserted rights of the fertilized egg/embryo/fetus. I put to one side the possibility that such laws are predominantly based in sectarian religious doctrine and/or in outdated views about a woman's role. The first possibility would animate a possible Establishment Clause objection; the second, a possible Equal Protection Clause objection.

168. I appreciate there is a debate about whether to use the term "pregnant woman" or "pregnant person." I may have more to say about this in future writing, but for now, I will use the term "pregnant woman." Whichever term one uses, only people with eggs and uteruses get pregnant and are capable of carrying fetuses to term—and of being compelled to do so by anti-abortion laws based on deeply contested views of the status of the fertilized egg.

169. "Fertilized egg" describes the point at which some anti-abortion advocates wish to begin regulating. Some anti-abortion laws will start regulating later in pregnancy. I use the term "fertilized egg" to refer to the moment of conception around which much of the abortion debate turns.

170. For a similar approach, see generally RONALD DWORKIN, *LIFE'S*

A wide political pluralism leaves as many core value decisions to individual persons and families as possible. For example, I support broad rights for parents to educate their children as they see fit.¹⁷¹ This will mean children in some religious communities will receive an education that is quite different from what other children receive. Voters outside the religious communities in question may believe that the children of the religious parents are being harmed and that state legislative majorities should intervene and prevail. That is not my view, as Part IV.C of this Article explains. We ought to see, from anti-abortion citizens, a similar interpretive humility regarding the status of the fertilized egg and a willingness to engage in mutual recognition of the difficult existential choice faced by all pregnant women.

Second, because only women can become pregnant, outlawing abortion has the potential to create significant systemic burdens on women alone—on their sexual lives, their health, their work lives, their family lives, and sometimes their life itself. As I have sketched in the above paragraph, such burdens result from highly contested religious and parallel secular beliefs. The political pluralism argument for permitting each pregnant woman the opportunity to consider and determine the status of what or whom she is carrying is deepened by sounding in a conception of equality¹⁷²: the freedom to make this

DOMINION (1993). See also Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 15, 32 (1973) (discussing *Roe v. Wade*, 410 U.S. 113 (1973), just after it was decided; developing role-allocation model and suggesting a “personal question” doctrine for the abortion setting).

171. I once took a different view on this, supporting state power to insist that all children attend public school. See Abner S. Greene, *Civil Society and Multiple Repositories of Power*, 75 CHI.-KENT L. REV. 477, 491–92 (2000); Abner S. Greene, *Why Vouchers are Unconstitutional, and Why They’re Not*, 13 NOTRE DAME J. LAW, ETHICS, & PUB. POL’Y. 397, 406–08 (1999).

172. The judicially enforceable Equal Protection Clause requires a

existential choice is a freedom that enables women to maintain broad social equality with men. This tracks my argument throughout the rest of the Article for religious accommodations and exemptions—they allow religious persons, who might be substantially burdened by generally applicable law, to flourish equally across various social dimensions with nonreligious persons (or persons with more mainstream religious beliefs).

Third, my position so far might suggest an absolute right for a pregnant woman to determine the status of her fertilized egg. But consider *Roe*'s trimester approach, *Casey*'s viability line, and Chief Justice Roberts' *Dobbs* formulation that "a woman's right to choose to terminate her pregnancy . . . should . . . extend far enough to ensure a reasonable opportunity to choose, but need not extend any further."¹⁷³ In different but related ways, these views appreciate that we are in unique territory—whether to view the situation through a political pluralism lens with deference to pregnant women, or as a type of homicide law subject to majority vote, represents an unusual spectrum of possibility. *Roe*, then

showing of intentional discrimination to make out a case for sex discrimination. *See Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). For a theory of equality to ground a constitutional objection to anti-abortion law, we would have to either see anti-abortion laws as intending to disadvantage women or adopt a broader view of intent that includes knowledge of effects. Or we could move on from *Feeney* and employ a more sociologically sensitive understanding of the kinds of state action that may cause systemic harm to women.

173. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2310 (Roberts, J., concurring). Roberts doesn't say whether he is committed to the "reasonable opportunity to choose" test or whether in a case with a statute that outlaws all abortion (or most) he would go as far as the *Dobbs* majority. There is some reason to believe his preferred outcome, in part because of stare decisis, is the test he states in *Dobbs*. For example, Roberts writes, "Both the Court's opinion and the dissent display a relentless freedom from doubt on the legal issue that I cannot share. I am not sure, for example, that a ban on terminating a pregnancy from the moment of conception must be treated the same under the Constitution as a ban after fifteen weeks." *Id.* at 2316.

Casey, then the Roberts position in *Dobbs* advance an understanding that our Constitution is often committed to an accommodation of conflicting principles, and that we often must employ a balancing test or something similar to be true to this commitment.¹⁷⁴

III. HOW THE FAILURE OF THE CASE FOR POLITICAL OBLIGATION AND LEGITIMACY SUPPORTS A ROBUST POLITICAL PLURALISM

A. *Against Political Obligation (and Legitimacy)*

In the foregoing, I have argued that liberalism is best understood as containing an accommodation-toleration core, and thus that it fits with, and is not in tension with, a robust political pluralism.¹⁷⁵ This understanding is advanced through the state's adopting a posture of epistemic and political agnosticism, i.e., by appreciating the difficulty of finding true or best answers and by valuing a competition between state and nonstate actors for the normative allegiance of the people. Moreover, the instantiations of this in U.S. constitutional law are significant—structural provisions, political rights, and the distinctive role of the religion clauses.

Many liberals accept a version of political pluralism, adopting some of my points about toleration. But their starting point is a strong commitment to political legitimacy

174. *See id.* at 2323 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (“The constitutional regime we have lived in for the last 50 years recognized competing interests, and sought a balance between them.”); *see also* SHERRY F. COLB AND MICHAEL C. DORF, *BEATING HEARTS: ABORTION AND ANIMAL RIGHTS* 4, 46 (2016) (maintaining that moral rights of a fetus begin with sentience, not before; even after that, terminating a pregnancy might sometimes be morally appropriate).

175. *See* GALSTON, *supra* note 39, at 20 (A liberal polity will “pursue a policy of *maximum feasible accommodation*.”).

and obligation—they believe the state is justified in demanding uniform obedience to law and that we have a moral duty to obey law, at least presumptively in both cases (subject to override). On this standard view of the liberal democratic state, the state has plenary power to grant or deny accommodations, and there's a heavy burden on claimants to show why they should be let free from the grip of otherwise valid generally applicable law. As Harold Laski put it, the state seeks to be “all-absorptive.”¹⁷⁶ As he explained, although various associations compete for the citizen's allegiance, the state comes with “the assertion that it enjoys a unique position for its power. It claims the right to judge between conflicting associations and to interpose its will between them. It claims that the rights of societies other than itself are, in fact, within its gift; and their existence conditioned by its graciousness.”¹⁷⁷ Although she ultimately supports exemptions to protect “integrity-related liberties,” Cécile Laborde nicely states the standard case for the liberal democratic state's claiming (and having) legitimate authority:

In circumstances of reasonable disagreement, the state does not act *ultra vires* when it imposes and enforces a democratically arrived-at solution . . . [I]t is the only institution with the legitimacy to do so, because it can reliably enforce a scheme of cooperation over time, and because it represents the interests of citizens as citizens.¹⁷⁸

If the case for political obligation and legitimacy fails, however, then the burden shifts to the state to defend its demand for uniform adherence to law. Nonstate sources of normative authority and the good would now be seen as presumptively on par with the state. That is the argument I

176. LASKI, *supra* note 18, at 1; *see also* LASKI, *supra* note 27, at 235 (“The state is an absorptive animal.”).

177. LASKI, *supra* note 25, at 84; *see also* LASKI, *supra* note 18, at 51–57.

178. LABORDE, *supra* note 51, at 168.

advanced in my book *Against Obligation: The Multiple Sources of Authority in a Liberal Democracy*,¹⁷⁹ and that I will summarize here. The upshot is that the case for a vibrant political pluralism (as incorporated within a proper view of liberalism) goes hand in hand with the case against political obligation and legitimacy.

Even in a liberal democracy, we don't have a moral obligation to obey the law. This position on the question of political obligation makes up the first chapter of the book. One may divide the arguments for political obligation into three types—agent-centered, status-based, and state-centered. For each type of argument, I am asking and answering a question at the following level of generality: does one have a moral duty to obey all laws all the time, as a *prima facie* matter, subject to case-by-case override? The state claims authority in this general way. It makes a content-independent demand, that we should obey the law simply because it is the law. Granted there are normative arguments behind this demand—arguments I summarize in a moment—but the demand is neither law-specific nor application-specific.

Agent-centered arguments look to acts by a state's subjects that may qualify as grounding a moral duty to obey the law. I discuss and reject express and implied consent (including residence plus benefits),¹⁸⁰ the duty of fair play,

179. See generally GREENE, *supra* note 11.

180. Chandran Kukathas, whose support for political pluralism is similar to mine, endorses a version of consent theory that turns on acquiescence to authority. See KUKATHAS, *supra* note 20, at 19, 25, 96, 101, 204. Oddly for someone who is reluctant to endorse the legitimate authority of the state, Kukathas adopts a thin version of consent; depending on how much inaction and apathy would be enough to constitute acquiescence, Kukathas' theory could end up legitimating state authority (and other authorities) in a fashion that doesn't seem to fit his otherwise vigorous insistence that conscience, and the freedom of association that follows from conscience, must be respected.

and political participation. One of the problems connecting these arguments for political obligation is that although they are powerful when they obtain, they don't often obtain, and when they do they may generate obligations narrower than a general duty to obey the law.

Status-based arguments for political obligation focus on a particular role or position one has. I first evaluate a Rawlsian argument based in a natural duty to obey the law of a generally just regime. A key objection is that Rawls' baseline of so-called reasonable comprehensive views forming an overlapping consensus depends on a comprehensive liberal understanding of what is just and reasonable, failing to give appropriate concern to religious and philosophical views that abjure Enlightenment rationalism.¹⁸¹ Next I consider arguments from what is sometimes called associative obligation—that we have a moral duty to obey the law based on what we owe our fellow citizens. I contend that this improperly extends to fellow citizens the kind of loyalty we may owe to family and friends. And as with some consent-based arguments, here too we may owe some obligations to fellow citizens that are short of a general duty to obey the law.

Finally, state-centered refers to consequentialist, systemic arguments for political obligation. I discuss the problem of self-dealing and the virtues of settlement, concluding that although each should be part of what Frederick Schauer calls (critically) rule-sensitive particularism, neither can undergird the general case for political obligation. The self-dealing problem (concern that persons will favor their own interests too often, against rules, and for insufficient reasons) and the virtues of settlement (better to have one general rule for a given issue, rather than a scheme of rule and exemptions) give too much weight to majorities and insufficient consideration for persons of

181. For a similar critique, see Kukathas, *supra* note 39, at 74, 78.

religions and cultures whose values may not be properly represented and considered in the legislative process. Furthermore, the state-centered position for political obligation risks deeming all “let me go my way” responses as self-dealing, without giving proper weight to competing sources of normative authority that may animate requests for opt-outs in a more substantial fashion. “Rule-sensitive particularism” is a good middle ground; it requires each of us to account for the virtues of the rule at hand, weighing those against our need for an exception, both in our independent actions and in our requests for accommodations. Schauer and others deem this insufficiently rule-obedient, in part because they think it fails to account for the risk of error that an individual or the system may make in demanding or heeding an opt-out request.¹⁸² But Schauer’s position puts too much of the risk of error on the side of the individual claimant and on the state in its exemption-granting mode, and not enough on the side of the state in its rule-insistence mode, when it might make errors large and small in requiring uniform adherence to law. Perry Dane’s careful discussion of the types of modesty the state should employ in deciding whether its laws need uniform enforcement supports my view here.¹⁸³ And as Nathan Chapman puts it, “by promoting minority thought and practice that keeps alternatives alive,” “[p]rotecting conscience hedges against the chance that the majority has come to the wrong conclusion.”¹⁸⁴

182. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 97–98 (1991); Arneson, *supra* note 147, at 1037.

183. See Dane, *supra* note 67, at 149–56.

184. Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1499. Ensuring that error costs are comparative and not too heavily weighed against individual claimants is a central theme of HORWITZ, *supra* note 68. John Henry Newman elegantly discussed the balance of error costs of one’s conscience versus both Pope and King. See NEWMAN, *supra* note 50, at 41, 47, 88; see also KUKATHAS, *supra* note 20,

B. *Political Pluralism as “Permeable Sovereignty”*

The case I make in the book is not just against political obligation. I also defend a version of political pluralism that I call “permeable sovereignty.”¹⁸⁵ Some of us adhere to norms other than the state’s laws. There’s no good reason to treat such other norms—religious, ethnic, cultural, tribal—as subservient to the law. We should see all sources of value, of how to live, as at least presumptively on par with each other, even though in some circumstances we’ll have to let go of our separate norms and adhere to the state’s law. We should see sovereignty as permeable through to our plural sources of obligation, rather than as plenary in the state and its laws. I make my case against political obligation and legitimacy and for permeable sovereignty together—one of the reasons we should reject a moral duty to obey the law and the state’s claim that it is justified in demanding we obey the law all the time is that we shouldn’t understand the law as having pride of place over other sources of norms. Seeing all sources of norms as on equal footing requires the state, when it can, to accommodate ways of living different from those dictated by law.

If one accepts the argument against political obligation and for permeable sovereignty—for the view that the sources of authority in a liberal democracy are multiple—then one

at 136 (maintaining that the risk of oppression inside minority groups must be balanced against the risk of oppression by the state). For a reminder that religious persons should also attend to the possible error of their beliefs, see AUDI, *supra* note 106, at 18.

185. This paragraph is drawn from GREENE, *supra* note 11, at 2-3. *See also id.* at 20-24. Laski also both made an affirmative case for political pluralism, discussed above at text accompanying notes 25-31, and questioned the sufficiency of the state’s claim that we defer to its laws in a content-independent way. *See* LASKI, *supra* note 27, at 244-45; Laski, *supra* note 26, at 207. Laski’s view “puts the State’s acts . . . on a moral parity with the acts of any other association. It gives to the judgments of the State exactly the power they inherently possess by virtue of their moral content, and no other.” LASKI, *supra* note 27, at 245.

has shifted the baseline from “the state’s law should be obeyed unless you can make a case for an exemption” to “the state must defend the need to apply the law uniformly and to not grant an exemption.” As Ryan Anderson and Sherif Girgis argue, in dramatic terms, “there is something decidedly Orwellian about seeing the actual coercion of traditionalist consciences as the neutral freedom-loving baseline.”¹⁸⁶ Rather, as Harold Laski put it, the state must “prove[] to its members by what it performs that it possesses a claim inherently greater than” religion or other normative sources.¹⁸⁷

C. Fending Off Some Criticism of My Position

The foregoing helps rebut the views of scholars such as Jean Cohen and Robin West. Cohen has offered critiques of my work. First, she suggests that I paradoxically seem to accord the state “a logically privileged place.”¹⁸⁸ As a threshold question about my argument against political obligation and legitimacy and for permeable sovereignty as

186. Anderson & Girgis, *Reply to Corvino*, in *DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION*, *supra* note 23, at 244, 245; see Anderson & Girgis, *supra* note 23, at 112, 136, 154; see also GALSTON, *supra* note 39, at 3 (“Liberalism requires a robust though rebuttable presumption in favor of individuals and groups leading their lives as they see fit . . .”); *id.*, at 17 (“[B]urden of proof lies with those who seek to shape or restrict internal life of nonpublic associations.”); PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 35 (2011) (“Equity embodied the idea that there must be the possibility of exceptions to a legal rule. Without such a possibility, justice—the assumed goal of all legal norms—would fail.”); SWAINE, *supra* note 42, at 104 (“Quasi-sovereignty would place the burden on government to show why prospective legislation should apply to members of theocratic communities.”); Galston, *supra* note 17, at 97, 120; Swan, *supra* note 164, at 45–46 (state coercion demands justification).

187. LASKI, *supra* note 18, at 19; see *id.* at 23.

188. Cohen, *supra* note 58, at 90–91.

represented by accommodations, Cohen asks whether, if one believes as I do that the state's norms are presumptively on par with other norms, the state may ever legitimately enforce compelling public interests?¹⁸⁹ Next, she contends that my argument for accommodations as a remedy, as a kind of exit, does not “follow from the general argument against political obligation.”¹⁹⁰ Finally, she places me with “jurisdictional pluralists” in believing there “should be no constitutional barrier to the state's ceding public as well as private attributes of sovereignty to religious groups that want to live under their own law.”¹⁹¹

In response to Cohen's first critique, I don't cede to the liberal democratic state legitimacy in the sense of justified power to demand uniform compliance with law, nor do I accord the state a logically privileged place. My argument against political legitimacy (and correlatively against political obligation) is a rejection of a general claim the state makes—the claim to justifiably command uniform obedience to all laws. But as a sociological matter, the state is the power to be confronted; it is the power that offers the possibility of exemption. The state asserts a monopoly on legitimate coercive power; it claims authority, with its police, guns, prosecutors, courts, juries, and prisons (not to mention its legislatures). So I take the state and its power as a starting

189. Cohen poses this concern in a discussion otherwise supporting the legitimacy of the liberal state. See Jean L. Cohen, *On Liberalism's Religion*, 23 *CRITICAL REV. INTL. SOCIAL & POL. PHIL.* 48, 56–64 (2020); see also LABORDE, *supra* note 51, at 161–71 (expressing similar support for the liberal state's legitimacy).

190. Cohen, *supra* note 58, at 90.

191. *Id.*; see also Cohen, *supra* note 128, at 202. A fourth critique of Cohen's is that I fail to apply my “philosophical anarchist skepticism” to, say, illiberal religious groups' assertions of authority. See *id.* at 90. I will address this concern below at text accompanying notes 282–85, *infra*.

point in fact, if not in justification.¹⁹² Furthermore, my argument is not a thoroughgoing philosophical (let alone political) anarchism; the state may justify individual laws and/or applications of law. In those instances, the state may legitimately advance public interests through enforcement of law. But if one accepts my arguments against political obligation and legitimacy and for permeable sovereignty, then the burden has shifted from the claimant pleading for an opt-out to the state making its case for why uniform adherence to the law in question is necessary.¹⁹³

Regarding Cohen's second critique, that the case for exemptions doesn't follow from an argument against political obligation, there appear to be two concerns. First, mirroring the prior critique, if the state lacks the legitimate authority to compel uniform compliance with law, then exemptions are beside the point in a normative sense, because the state is in no position to be demanding compliance to begin with.¹⁹⁴ My answer here tracks my answer above, namely, that I am responding to the situation on the ground and to the claims of authority (backed by force) that the state makes, legitimate or not. Cohen at times seems to be pressing an all-or-nothing position: either the state is legitimate (in the sense of justification for demanding uniform compliance with law), or it is not, in which case we have a free-for-all and the state is no position to be granting (or denying) exemptions. My position, though, is a kind of compromise, a second best. We are confronted with a powerful armed state that claims

192. See Dane, *supra* note 21, at 985 (state plays a mediating, even regulating role, among other nonstate sovereigns).

193. Although this sounds like strict scrutiny in constitutional law, I explain below that although some form of elevated scrutiny is warranted, strict scrutiny goes too far when dealing with laws of general applicability that have only incidental burdens on religious practice. See *infra* text accompanying notes 216–17.

194. I am grateful to Andrew Koppelman for raising a similar point in correspondence.

authority and demands compliance; such a state is not legitimate in the sense set out here; the burden should thus be on the state to justify a need for uniform compliance; otherwise it should grant claims for exemption based on substantial burdens to religious and similar interests; such exemptions may serve as a kind of partial exit, a balm though not a cure for an otherwise illegitimate state.

Second, there is perhaps a concern that the argument against political obligation and legitimacy, if correct, would ground a wider berth of exemptions, for all persons with what we might call simple liberty claims. In response, first, the case against political obligation and legitimacy is in part based in the seriousness and comprehensiveness of religious and other (ethnic, cultural, tribal) norms, lacking in simple liberty claims. Several of the concerns I express in *Against Obligation* regarding standard arguments for political obligation are about their grounding in mainstream, majoritarian value systems, either intentionally or negligently overlooking people who (wish to) live by norms other than those of the state. Second, core principles of political pluralism are based in such competing systems of normative authority and not in simple liberty claims versus the state.¹⁹⁵ I am building on a tradition of strong claims of normative competition, both in opposing political obligation and legitimacy and in securing a stable method for obtaining exemptions. Third, although I would have to work this out in more detail, there is a stronger case for ceding ground to competing normative systems than to simple liberty claims. This is because of the possible existence of an extrahuman source of normative authority that would have a kind of universal supremacy (in the case of religion), and because (more generally) of the value that communal norms give to people's lives that may be absent in simple liberty claims. Fourth, and a purely practical but not insignificant matter, opening the door to simple liberty claims grounding

195. See *supra* text accompanying note 52.

exemptions would lead to a massive increase in exemptions claims (and grants) and poses a greater risk of anarchic disruption than allowing claims (and grants) in the setting of persons claiming exemptions based in comprehensive notions of the good.

Regarding Cohen's third critique, that along with others I advocate for ceding public (state) power to religious groups, this is a mistaken understanding of my position.¹⁹⁶ There might be a version of legal pluralism that not only recognizes the assertions of normative authority by various nonstate groups but also believes such groups are asking to be let free to govern themselves as a public entity (and perhaps that would grant such requests, at least at times).¹⁹⁷ My argument is not of that sort. In part this is because, as mentioned two paragraphs earlier, I accept the presence and claims of the state as the starting point of analysis. And in part my not proceeding to a more capacious legal pluralism is because of Establishment Clause concerns about religious groups using public power to advance overtly religious ends; my case is for giving such groups appropriate exemptions from public law, to live by religious norms, but not to convert

196. Later work of Cohen's suggests she has softened this critique, viewing religious institutionalists' claims "as a device to emphasize the normative force of rightful claims on behalf of churches and the religious to accommodation within and by, not over and against, the liberal democratic state." Cohen, *supra* note 189, at 61. That formulation accurately captures my position, although I am not exactly a religious institutionalist (i.e., my argument is not focused on special concerns of religious institutions, but rather of religious persons, who might associate in institutional form).

197. See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 25 (1983) (discussing how insular communities "establish their own meanings for constitutional principles through their constant struggle to define and maintain the independence and authority of their *nomos*"); *id.* at 28 (In the realm of constitutional meaning, the insular nomic community "creates law as fully as does the judge."); Dane, *supra* note 32, at 56 (We need a "robust, jurisdictional, legal pluralist account of religion and law.").

such norms into public law.

Robin West counterposes rights to enter (exemplified by civil rights laws) against rights to exit (represented by the kinds of argument I have been making).¹⁹⁸ She critiques the latter as damaging core shared social commitments, and as harming weaker members of exiting groups. As West puts it, “Exit rights . . . create separate sovereignties . . . separate spheres of loyalty, of authority, and of obligation We should recognize this for the tragedy that it is.”¹⁹⁹ This is only a tragedy, though, if one starts from the position that the state’s laws are either generally morally obligating or good in terms of value or both. My arguments against obligation and for permeable sovereignty, and for seeing liberalism as containing a broad agnosticism about the good, suggest reasons to be skeptical of West’s centripetal force contentions. To the extent we can accommodate persons and groups seeking to live by their own lights, we can still achieve a significant measure of otherwise shared social goods, while recognizing there are other notions of the good that may command the allegiance of some of our fellow citizens. I return to the question of watching out for the weaker members of exiting groups in Part IV.C, when I discuss enclaves and other intra-group issues.

IV. WHEN MAY THE STATE REJECT A POLITICALLY PLURALISTIC CLAIM FOR ACCOMMODATION?

A. *Some Preliminaries*

My claim has been that we can resolve the dilemma of

198. See Robin West, *Freedom of the Church and Our Endangered Civil Rights: Exiting the Social Contract*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 399, 404 (Micah Schwartzman et al. eds., 2016) [hereinafter West, *Freedom*]; Robin West, *A Tale of Two Rights*, 94 *B.U. L. REV.* 893, 905 (2014).

199. West, *Freedom*, *supra* note 198, at 413.

liberal pluralism by seeing liberalism as containing not just a toleration for difference but also a robust political pluralism realized in part through accommodating different comprehensive views of the good. At the same time, persons and groups who are living by some or many norms different from those of the state—perhaps because of state accommodation—are living within the state and are subject to at least the outer reaches of its jurisdiction. The state should ensure that religious and other choices to depart from state law are made knowingly and voluntarily. Moreover, my arguments have not been for anarchy or secession, but rather for partial exit under law—we can see accommodations as a representation of such; enclaves are a further step, but not yet full exit. We live together as members of the same political community and should appreciate that insistence on one or another source of authority will lead to gains to some, harms to others. In the end, then, we must find a way to balance harms from granting accommodations against harms from denying them. If this seems a second-best compromise, that's because it is—political pluralism in the liberal state avoids any single view of the good reaping all the political and constitutional gains. Many scholars have supported this view, including those who put a thumb on the balance in favor of the state, those who do so in favor of the individual claimant, and those who appear more neutral in their approach.²⁰⁰

200. For support of a state-favoring approach, see Cohen, *supra* note 58, at 100; Peter de Marneffe, *Rights, Reasons, and Freedom of Association*, in *FREEDOM OF ASSOCIATION* 145, 145–73 (Amy Gutmann ed., 1998); Seglow, *supra* note 46, at 188–89. For support of a claimant-favoring approach, see HORWITZ, *supra* note 68, at 201; Anderson & Girgis, *supra* note 23, at 131; Paulsen, *Priority of God*, *supra* note 72, at 1211. For support of a neutral approach, see LABORDE, *supra* note 51, at 197; Kent Greenawalt, *Religious Toleration and Claims of Conscience*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY*, *supra* note 199, at 3, 3; Peter Jones, *Religious Exemptions and Distributive Justice*, in *RELIGION IN LIBERAL POLITICAL PHILOSOPHY*, *supra* note 46, at 163, 173; Patten, *supra* note 164, at 209–10; Cass R. Sunstein, *Should Sex Equality Law*

Before examining types of harm to others that might outweigh a claim for religious exemption,²⁰¹ I briefly discuss the general need to account for such harms, whether granting exemptions in the face of such harms raises Establishment Clause concerns, the proper type of elevated judicial scrutiny when state action incidentally burdens religious practice, and whether some exemption claims cause types of harm that would preclude any balancing.

If accommodations were costless, we could allow them all the time. But assuming there is at least a rational basis for the laws of general applicability that are alleged to infringe on religious practice, accommodating such practice will impose at least some cost either on identifiable persons or in a more diffuse fashion.²⁰² Accounting for harms to others in determining whether to exempt a religious person, group, or institution from generally applicable law follows the basic Millian principle that coercion is legitimate to prevent harm or evil to others.²⁰³ “[F]or such actions as are prejudicial to the interests of others, the individual is accountable and may be subjected either to social or to legal punishment.”²⁰⁴ In the

Apply to Religious Institutions?, in IS MULTICULTURALISM BAD FOR WOMEN?, supra note 45, at 85, 92.

201. Two categories I do not discuss are common pool and public fisc. The former is exemplified by cases in which a religious person may request an accommodation in a way that would affect co-workers. *See, e.g.,* *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). The latter is exemplified by cases in which a religious group may request an opt-out from contributions to a public benefit. *See, e.g.,* *United States v. Lee*, 455 U.S. 252 (1982).

202. In the latter situation, where the state may be regulating risk generally and not protecting clearly identifiable third parties, the loss of uniformity from accommodation may increase the relevant risk, if only by a small amount.

203. *See* J.S. MILL, ON LIBERTY 68–69 (Penguin ed. 1985) (1869); *see also id.* at 141, 145–46, 163–64.

204. *Id.* at 163.

setting we're discussing, the "action" that would be "prejudicial to the interests of others" would be the action (or omission) of the religious party that the state would be permitting by granting an exemption. In a modern-day version of Mill's principle, Cécile Laborde writes that "religious practices can only be interfered with *if* they injure or harm others, or otherwise infringe on their rights."²⁰⁵ Acknowledging the delicate balancing act that must occur between harms from granting exemptions and harms from not granting them, Nelson Tebbe argues for accommodations unless they would cause "undue hardship" to others,²⁰⁶ while Alan Patten argues for accommodations "only for a *fair opportunity* to pursue and fulfill [one's] integrity-protecting commitments,"²⁰⁷ and for rejecting accommodations that would "impos[e] an *unfair* cost on others."²⁰⁸ And Philip Kitcher observes that if we grant accommodations to those of a religious faith that relies on knowledge not based in material-scientific fact, then we must be on a particular kind of guard for harm to others.²⁰⁹ This is similar to Brian Leiter's concern with accommodating religious beliefs that "are *both* insulated from evidence *and* issue in categorical demands on action."²¹⁰

205. LABORDE, *supra* note 51, at 35; *see also* SPINNER-HALEV, *supra* note 21, at 30 ("As long as [people] are not harming others and still allow others to make their own choices . . . liberals need to respect their choices."); *id.* at 219. For general support for the view that the state must account in some way for third-party harms when considering granting exemptions, see Corvino, *supra* note 57, at 32, 43–45; Dane, *supra* note 32, at 66 n.56; McConnell, *supra* note 107, at 20–21.

206. TEBBE, *supra* note 163, at 62.

207. Alan Patten, *Religious Accommodation and Disproportionate Burden*, 15 CRIM. L. & PHIL. 61, 73 (2020).

208. *Id.* at 72.

209. KITCHER, *supra* note 73, at 15–19.

210. LEITER, *supra* note 128, at 59.

As a categorical matter, a religion-only accommodation does not violate the Establishment Clause, assuming the accommodation alleviates a state-imposed burden on religious practice and does not merely advance the interests of the religiously dominant group.²¹¹ Additionally, if one adopts my “political balance of the religion clauses” argument,²¹² then we can see religious exemptions as in some sense counter-balancing religious exclusions.

Some case law²¹³ and scholarship²¹⁴ suggest that certain

211. In his plurality opinion for the Court in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989), Justice Brennan explained that the Court has permitted religion-only accommodation if it “did not, or would not, impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs,” or if it was “designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause.” As Brennan’s discussion of *Corporation of Presiding Bishop v. Amos*, 488 U.S. 327 (1987), makes clear, the Court will tolerate some third-party harm toward the end of avoiding “potentially serious encroachments on protected religious freedoms.” 489 U.S. at 18 n.8.

212. Greene, *Political Balance*, *supra* note 11. *See also supra* note 135.

213. The case most often cited is *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). Connecticut law granted persons an absolute right not to work on their Sabbath, including a right against adverse employment action for so doing. The Court reasoned that “[t]his unyielding weighting in favor of Sabbath observers over all other interests” violates the Establishment Clause. *Id.* at 710. That seems some evidence in favor of scholars who maintain that excessive third-party harm from accommodation renders the accommodation unconstitutional. But *Thornton* is an odd case: the law was not lifting a state-imposed burden on the free exercise of religion. The state was not insisting that Sabbatarians work on their Sabbath, and then un-insisting on that through the accommodation. Rather, the law handed out a gratuity to certain religious people while not handing out the gratuity to others and while burdening others in their work-week scheduling.

214. *See* TEBBE, *supra* note 163, at 49–70; *see also* KOPPELMAN, *supra* note 19, at 178 n.30; Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 53 (2014); Frederick

types of (and perhaps degrees of) third-party harm from religious accommodation renders such accommodation violative of the Establishment Clause. I am skeptical of this conclusion. I favor a strongly judicially enforced Establishment Clause, but that is meant to keep the dominant group or groups from using power to advance their religious interests (as I explained earlier in discussing how we might think religion is distinctive). Whether a legislature is confronting a claim for accommodation from a statute, or a court is confronting a claim for exemption after the legislature has failed to accommodate, either body should carefully account for potential harm to others from granting a religious accommodation or exemption. But if the state concludes that harm to a religious person from enforcing a law of general applicability is greater than harm caused by granting an accommodation or exemption, we should not deem such conclusion (and accommodation or exemption grant) an Establishment Clause violation, even though some third-party harm will ensue.²¹⁵

This Article focuses on laws of general applicability that incidentally (i.e., directly but not intentionally) substantially burden religious practice, and not on targeted, intentional harm to religion. Regarding the latter, strict judicial scrutiny is needed to deter and remedy animus that doesn't exist with otherwise valid laws of general applicability. Such general laws, however, may cause unintended harm to religious interests, harm that we should (and the U.S. system

Mark Gedicks & Rebecca Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 348 (2014); Micah Schwartzman, Nelson Tebbe, & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781, 782–83 (2018).

215. For a related view, see Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 930–38 (2019). See also Stephanie H. Barclay, *First Amendment "Harms"*, 95 INDIANA L.J. 331, 335–38 (2020) (arguing that third-party harm theories to reject exemptions are often over- or under-inclusive).

sometimes does) take into special account.²¹⁶ Thus, when the legislature does not intentionally harm religion but nonetheless enacts a law of general applicability that substantially burdens a person's religious practice, there is a good case for elevated though not strict judicial scrutiny when the claimant asks for judicial exemption from the law. We could call the scrutiny intermediate, or intermediate with bite.²¹⁷

216. I discuss the state of play regarding the scrutiny appropriate for such cases below at text accompanying notes 250-56.

217. See Anderson & Girgis, *supra* note 23, at 153; Corvino, *supra* note 57, at 32, 51. I mean the call for intermediate scrutiny to be a stand-in for factually intensive, case-by-case balancing, with a significant but not near-insurmountable burden on the state. Formally speaking, conducting some form of elevated scrutiny is not the same as balancing. Under the strict/intermediate scrutiny approach, after the claimant has made out their threshold case, the state wins if it can show that the law is narrowly tailored to advancing a compelling state interest (strict scrutiny) or that the law bears a substantial relationship to an important state end (intermediate scrutiny). The outcome may vary depending on whether the state is defending the law on its face or as applied. My contention, which I will not elaborate in this Article, is that instead of strictly following the elevated scrutiny two-step approach, courts should (and inevitably will) balance harm to the religious claimant without an exemption against harm to the public interest with one. (Legislatures should consider claims for accommodation in similar fashion, although legislatures may consider matters of public policy that go beyond what the Free Exercise Clause may require. Recall that this Article mostly asks the same from legislatures and courts—to see claims for religious exception from general law as a core part of how things work in a liberal democracy.) Once a claimant has shown that the law as applied creates a substantial burden on religious practice, we should then look at the kind and amount of harm that would be created from granting the exemption and ask whether that harm outweighs the harm to the claimant. There may be instances in which applying the law advances an important enough state interest in a tight enough means-ends way, satisfying at least intermediate scrutiny, but the harm to the claimant is profound and granting an exemption would not harm the state very much. The facts of *Employment Division v. Smith*, 494 U.S. 872 (1990), are a good example. Insisting that no one ingest peyote advances the state's general, and important, controlled substances regulatory interest

Finally, before turning to the types of harm the state may claim are sufficient to outweigh burdens on religious persons and thus deny an exemption, a point about method. Sometimes we see an argument for a two-step approach to balancing, i.e., some accommodation claims are too extreme to countenance as a threshold matter, and we should not even get to a balancing test. For example, Cécile Laborde divides exemption claims into the “morally abhorrent” and the “morally ambivalent,” and would permit only the latter to get to a balancing test.²¹⁸ Alan Patten argues that “a person has a *pro tanto* claim on others only for a *fair opportunity* to pursue and fulfill her integrity-protecting commitments [IPCs]. There is no *pro tanto* claim to realize IPCs that either by their very nature are inconsistent with the fair claims of others, or that for contingent reasons (resource scarcity, etc.) are incompatible with the fair claims of others.”²¹⁹ We see similar arguments regarding the free speech clause, according to which some expressive acts are outside the scope of the “freedom of speech” and should not trigger any kind of First Amendment scrutiny.²²⁰

These two-step approaches, in both religion and speech law, are mistaken. When we exclude certain claims supposedly up front, as “morally abhorrent” or “by their very nature . . . inconsistent with the fair claims of others,” we are implicitly doing a kind of balancing—it’s just that the case is

in a tight way. But the harm to practitioners of a core religious ritual vastly outweighs the minimal and marginal harm from granting the exemption in that case.

218. LABORDE, *supra* note 51, at 207; Laborde, *Reply*, *supra* note 161, at 668.

219. Patten, *supra* note 207, at 73 (emphasis in original).

220. See Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association*, 2005 SUP. CT. REV. 195, 213 (2005); Frederick Schauer, *Out of Range: On Patently Uncovered Speech*, 128 HARV. L. REV. FORUM 346, 347–49 (2015); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 181 (2016).

so heavily tilted toward regulatory power that we risk blinding ourselves to the presence of a claim of religious or expressive freedom. It is better not to bury any of the normative work we're doing. Rather, we should acknowledge a wide array of claims for religious freedom or freedom of speech, and then realize that some of these claims are quite weak, either on their merits, or because of strong countervailing state interests, or both.

B. *Types of Harm*

1. Harm to the Body

This seems to be the easiest category for regulating. Nonetheless, if we dig a bit deeply, problems arise. There is a core state interest in protecting public health—against injury, illness, and death. That is hard to challenge. But even here, what counts as legitimate protection of the public good, versus a different religious or cultural understanding of bodily integrity, may vary with how science becomes settled versus unsettled, contested.

We don't let people engage in human sacrifice, even if they claim strong religious, ethnic, cultural, or tribal norms. This is an easy case, but note that even with easy cases we should pause and ask what we have just done. Here, we are sure enough about our position regarding the good and hold a perhaps not fully worked out theory of bodily integrity or some other term capturing a core value of human existence. Other regulation of direct harm to the body might not be as easy. Take the outlawing of female genital mutilation (FGM). Note that even the name for this reflects the conclusion of the liberal state that there is nothing to be said positively from a cultural perspective for such practices. I agree with this, but it's important to note that in agreeing, we are adopting a notion of harm to the body, combined with a conception of equality, that outweighs any claim the cultural group might have to the contrary. I use this example in part to contrast it with circumcision, about which there is no such settled liberal state norm regarding harm, and for which

there are strongly asserted age-old religious arguments. So, here is the World Health Organization (WHO) on FGM:

FGM is recognized internationally as a violation of the human rights of girls and women. It reflects deep-rooted inequality between the sexes, and constitutes an extreme form of discrimination against women. It is nearly always carried out on minors and is a violation of the rights of children. The practice also violates a person's rights to health, security and physical integrity, the right to be free from torture and cruel, inhuman or degrading treatment, and the right to life when the procedure results in death.²²¹

And here's the WHO on male circumcision:

Male circumcision is one of the oldest and most common surgical procedures worldwide, and is undertaken for many reasons: religious, cultural, social and medical. There is conclusive evidence from observational data and three randomized controlled trials that circumcised men have a significantly lower risk of becoming infected with the human immunodeficiency virus (HIV).²²²

WebMD is more nuanced; it says, "[t]he use of circumcision for medical or health reasons is an issue that continues to be debated."²²³ And then you could look at circumcision.org; I have no idea what that group is or who is behind it, but let's just say their view and the WHO's view are not aligned.

Whether the liberal state has or doesn't have accepted science and norms makes all the difference here. If it does, the cultural group loses. If it doesn't, the cultural group wins. That's an overly simplified way of putting it, but even for direct contact with the body, the value versus harm debate

221. World Health Org., *Female Genital Mutilation*, <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation> (Jan. 21, 2022).

222. WORLD HEALTH ORG. & JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, *MALE CIRCUMCISION: GLOBAL TRENDS AND DETERMINANTS OF PREVALENCE, SAFETY AND ACCEPTABILITY 3* (2007).

223. WebMD, *Circumcision*, <https://www.webmd.com/sexual-conditions/guide/circumcision> (2022).

can be contentious and previously backgrounded acceptance may yield to a more fractured argument. For many regulations of the security of the human body,²²⁴ however, there is broad acceptance of harm that will trump more sectarian claims.

2. Paternalism

Laws based on knowing what's best for you—when third-party harms are zero to low—are the easiest category for accommodations. Granted, the state will always have a case for why each person may be harmed by engaging in the regulated activity, but at least when we're talking about adults acting with awareness of risk and in an uncoerced fashion, the balance will usually tip in favor of the claimant. And the possibility of indirect third-party harms should not weigh heavily for the state. This is a good place for a reminder that I am focused on accommodations for religious practice (and other comprehensive notions of the good), and not merely from a claim of liberty.

As examples of paternalistic laws conflicting with religious practice, consider insisting that a turbaned Sikh wear a motorcycle helmet or forbidding adult members of the Native American Church from ingesting peyote as part of a

224. What constitutes harm to animals that the state may regulate raises a related issue. For example, if a state has a law dictating methods of animal slaughter for food consumption, should it ever grant an exemption for a religious group? One might say that once the state has determined a certain method is improper, there should be no exemptions. On the other hand, if we do not adopt the same bodily integrity position for nonhuman animals as for humans, then we might weigh the state's interest somewhat less and the religious group's interest in slaughtering per its religious mandates somewhat more. *See, e.g.*, U.S. DEP'T OF AGRIC., A RELIGIOUS EXEMPTION FOR THE SLAUGHTER AND PROCESSING OF POULTRY (2021), <https://www.fsis.usda.gov/policy/fsis-directives/6030.1>. For the never exempt side, see BARRY, *supra* note 57, at 42–44; Jones, *supra* note 200, at 172.

private religious ritual.²²⁵ Both can be converted into not strictly paternalistic arguments—if a motorcycle rider is hurt because he wasn't wearing a helmet, his family will be affected and there may be other costs to society. And the case for uniform peyote regulation includes an argument about drug diversion. But in both settings, the core argument for applying the laws to these persons is paternalistic—the state claims to know better what is in the adult person's best interests—and in both settings the liberal state case for regulation should yield to the religious claim.²²⁶

3. Risk Regulation

Many laws regulate risk of harm to others rather than immediate harm. Accommodations will always marginally increase the relevant risk, so if such marginal increase is sufficient to deny the accommodation, the religious claimant will lose every time. In this category, the incidence of accommodation claims matters—too many may undercut the state's goals in an unacceptable way, but not so if claims are few. And in this area, in particular, the state and the claimant may be able to work out sensible compromises.

Let's look at two types of case involving risk regulation and claims for exemption. Consider the kirpan, which is a dagger or miniature sword carried by Sikhs.²²⁷ Any regulation of carrying or wearing a sword or knife is a risk regulation, because the mere wearing or carrying isn't

225. See Peter Jones, *Accommodating Religion and Shifting Burdens*, 10 CRIM. L. & PHIL. 515, 527–32 (2016) (discussing, inter alia, British exemption for Sikhs from motorcycle helmet laws); *Employment Division v. Smith*, 494 U.S. 872 (1990).

226. For a classic statement against paternalistic regulation, see MILL, *supra* note 204, at 68–69. See also PATTEN, *supra* note 164, at 208. For a contrary view, see BARRY, *supra* note 57, at 44, 48; Jones, *supra* note 200, at 171.

227. See World Sikh Org. of Canada, *What is the Kirpan?*, https://www.worldsikh.org/what_is_the_kirpan (2022).

harmful. The concern with wearing a kirpan to school is real, although more or less so depending on the nature of the kirpan and how it is worn and secured. Any rule against wearing a sword or knife, in general or in school, without exception, is a victory for the regulatory side.²²⁸ The application of orange triangle slow-moving vehicle signs to the Amish is another instance of risk regulation that might come into conflict with religious norms, about simplicity or plainness.²²⁹

As a category, risk regulation cases are hard, because risk regulation isn't about certain actions absolutely causing harm, but about balancing public safety and other needs against countervailing claims. It may be hard to know statistically how much the risk is increased, and of what precise harm, should the state accommodate the religious claimant. For the state not to accommodate, however—or even to push hard for what seems to the state to be a compromise but appears to the claimant to be a defeat—might in many cases be a victory for the liberal state over a position that more deeply appreciates the virtues of political pluralism.

4. Equality

This category raises the hardest set of contemporary questions for liberal pluralism. When generally applicable laws seek to advance equality goals when, if ever, should the state grant exemptions for religious claimants? This requires

228. For an argument favoring kirpan exemptions, see HORWITZ, *supra* note 68, at 206–09. *See also* Multani v. Commission scolaire Marguerite-Bourgeois, [2006] 1 S.C.R. 256 (Can.) (holding total ban on wearing kirpan in school disproportionate to safety objective, in light of freedom of religion for Sikh boy).

229. *See* Gingerich v. Kentucky, 382 S.W.3d 835 (Ky. 2012) (upholding state slow-moving vehicle sign against free exercise challenge from Amish). The dissent points to 23 states and D.C, which do not require such bright signs for horse-drawn vehicles. *Id.* at 849 (Scott, J., dissenting).

assessing what harms such laws are seeking to prevent or ameliorate: economic?,²³⁰ dignity?,²³¹ decreasing stereotyping?²³² Sometimes granting an exemption may not cause direct economic harm but may cause the other types of harm. How can we properly balance these harms against claims that (say) having to serve a same-sex wedding causes deep sinful harm to the religious claimant?²³³ As with risk regulation, how much nonuniformity can we allow and still achieve the overall goals of the laws in question?

230. Robert Vischer develops a market-based argument for giving great leeway for religious conscience, while letting the state regulate to assure nondiscriminatory market access. See VISCHER, *supra* note 39, at 5, 146, 149–51, 173, 306.

231. For support of the view that exemptions should be denied even if market access is not impaired, to assure the equal civic standing of persons protected by anti-discrimination laws, see Lori Watson, *Integrity: An Individual or Social Virtue?*, 81 REV. POL. 652, 654–55 (2019). See also Hartley & Watson, *supra* note 164, at 99; Sepper, *supra* note 156, at 1477–83. Similarly, Richard Schragger and Micah Schwartzman maintain that “[f]or LGBT persons seeking equal rights . . . pluralism is only plausible on equal terms.” Schragger & Schwartzman, *supra* note 164, at 1420.

232. As Andrew Koppelman observes, “[a]ntidiscrimination law is an intervention that aims at systemic effects in society, dismantling longstanding structures of dominance and subordination.” Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 639 (2015); see also KOPPELMAN, *supra* note 19, at 46–47.

233. Acknowledging that this type of case raises difficult questions, Martha Nussbaum asks whether combatting sex discrimination is a sufficient ground for insisting on regulation without exemption, or only if the discrimination in question denies women certain fundamental rights. See Nussbaum, *supra* note 91, at 113. Also acknowledging the difficulty of these matters, and sometimes open to exemptions, Cécile Laborde nonetheless argues that “[t]he more tightly a law promotes a goal of egalitarian justice, and the more it requires universal and uniform compliance for its effectiveness, the less it will tolerate exemptions.” LABORDE, *supra* note 51, at 225.

The difficult issues posed by this sort of case are a microcosm of the larger dilemma of liberal pluralism. Competing conceptions of equality are at stake—the same-sex couple claiming sexual orientation equality under the law; the religious goods or services provider asking for equal treatment by being let out from under the law, equal in the sense of the religious beliefs and values being treated as at least presumptively on par with the state’s ends. If we follow my argument against political obligation and legitimacy, then the state’s baseline has no pride of place. It has significance and weight but must compete with the religious claimant’s baseline.

We sometimes approach this kind of hard case—e.g., a religiously devout service provider who balks at serving a same-sex wedding—by thinking of the equality interest on the side of the same sex couple and the liberty interest on the side of the service provider. But there are liberty and equality interests on both sides. The members of the same-sex couple can point to constitutional jurisprudence that protects them as a matter of equality and as a matter of liberty.²³⁴ And the service provider is not only making an argument about the freedom or liberty of religion. The provider is also offering a point about equality²³⁵—a law need not be overtly discriminatory against religion to impose norms that, from the standpoint of some religious believers, treat their faith on an unjustifiably unequal basis. At the same moment that, say, a public accommodations anti-

234. See *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003).

235. For any equality-based argument to get off the ground, we must believe the thing for which we are demanding equal treatment has value worth protecting. See generally Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). That predicate is met here—in our constitutional culture, religious liberty is worth protecting, and thus the argument that it requires equal treatment, at least in some measure (and what measure will be the hard question), is properly animated.

discrimination law is seeking to ensure that gay men and lesbians can purchase goods and services on equal terms with heterosexuals, that law might, in some instances, be imposing a norm on religious persons that does not equally respect their most deeply held conscientious beliefs.²³⁶ Finally, my argument against political obligation and legitimacy, understood as a case against the state's general claims (not necessarily against specific laws or specific applications of law), insists that all sources of value and the good be treated on equal footing. This argument helps buttress the case for seeing the equality claims of both the same-sex couple and the religious businessperson as demanding attention.

One difficult question in resolving the current set of cases pitting same-sex marriage rights against religious

236. Cf. KOPPELMAN, *supra* note 19, at 62, 145; SWAINE, *supra* note 42, at 19; Anderson & Girgis, *supra* note 23, at 108 (advocating a live and let live approach whereby both sides reap some of the gains and we don't press dissenters "into the service of progressive social outcomes"); Dane, *supra* note 67, at 156 (advocating "normative modesty" for "genuinely difficult" questions); Koppelman, *supra* note 232, at 626 ("Both gay people and religious conservatives seek space in society wherein they can live out their beliefs, values, and identities."). Although he is sometimes open to accommodation, Nelson Tebbe adopts a different starting point from the one I'm suggesting. Comparing the harm to (say) a religious provider of goods or services and the harm to (say) a same-sex couple denied a good or service for their wedding, Tebbe says that "a key argument of this book is that the harms are not perfectly symmetrical." TEBBE, *supra* note 163, at 16. Tebbe's point is that the former is not being targeted, but rather is subject to a law of general applicability, whereas the latter is subject to the religious businessperson's beliefs as specifically applied to something about the couple (their same-sex status). And were the state to accommodate the businessperson, that accommodation, from Tebbe's point of view, is similarly targeted rather than general. But this approach re-animates my concern stated in the text—that the majority has enacted a law of general applicability while the objector has a beef with a specific application of said law (and an accommodation would disrupt the law's uniformity in that specific way) is better seen as a description of how the majoritarian-favoring baseline operates than as a normative argument that it should operate that way.

freedom is whether the harm to a gay or lesbian couple denied a wedding good or service is the same as the harm to a black or interracial couple in the era before the civil rights advances of the 1960s (or even today). And, to the extent we can adjudicate such things, we might also ask whether the motivation of the religious businessperson is the same in both settings. Some say we cannot distinguish on either ground, and that what may appear to be a more benign and less bigoted refusal to deal now, regarding same-sex marriage, is no different from the most blatant refusals based on race.²³⁷ On the other hand, scholars such as Robert Vischer contend that although we have reached a settlement on the evils and unjustifiability of racial discrimination, we have not reached that point regarding opposition to same-sex marriage, even though the Court has interpreted the Constitution as denying states the power to award marriage licenses to opposite-sex couples only.²³⁸ Ryan Anderson and Sherif Girgis argue that in today's America, discrimination against queer persons has become less pernicious, has shallower roots, and is easing profoundly, all compared to racial discrimination.²³⁹ Michael Perry contends that while "moral opposition to interracial marriage is finally explicable, even in its 'God's will' version, only as an aspect of the ideology of white supremacy," "moral opposition to same-sex marriage . . . is readily explicable other than as an aspect of an ideology or sensibility according to which some human beings are morally inferior to others," and "other than as an aspect of homophobic bigotry."²⁴⁰ Douglas

237. See Louise Melling, *Heterosexuals Only: Signs of the Times?*, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 245, 253–54 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019) [hereinafter RELIGIOUS FREEDOM].

238. See VISCHER, *supra* note 39, at 27, 29, 149–51.

239. See Anderson & Girgis, *supra* note 23, at 185.

240. Michael J. Perry, *Conscience v. Access and the Morality of Human*

Laycock has authored a case for seeing the current-day situation regarding religious objection to providing goods or services for same-sex marriages as different from the racism of (say) the 1950s, regarding both the relative position of gain that the queer community has achieved and the (often) limited nature of the bigotry²⁴¹ on the other side (e.g., the owner of Arlene's Flowers, Barronelle Stutzman, had a good, long-standing business relationship with Robert Ingersoll but balked at providing the floral arrangements for his same-sex wedding).²⁴² Perry Dane's position of "normative modesty" that the state should adopt in exemptions settings cuts the same way regarding this kind of case,²⁴³ and Andrew Koppelman, a supporter of gay rights and religious accommodations, advances a version of a "live and let live" argument,²⁴⁴ putting it bluntly as a realpolitik matter: "The gay rights movement has won. It will not be stopped by a few

Rights, with Particular Reference to Same-Sex Marriage, in RELIGIOUS FREEDOM, *supra* note 238, at 256, 260–61. Perhaps we can reach conclusions such as Perry's, and others cited in this paragraph, only by accepting that there is some reasonable core in thinking of men and women as different in a way that we attend to every day, even if we are extremely cautious about allowing legal differences to track biological differences, whereas there is no reasonable core in thinking of people of different races as different in any way, legally or otherwise (except for such cultural differences that groups have developed over time and wish to express and maintain).

241. For an extended discussion of accusations of "bigotry" in these and other settings, see generally LINDA C. MCCLAIN, *WHO'S THE BIGOT? LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW* (2020).

242. *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1210–11 (Wash. 2019); Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop*, 2019 BYU L. REV. 167, 189–96 (2019); see also KOPPELMAN, *supra* note 19, at 108–27.

243. See Dane, *supra* note 67, at 156.

244. Koppelman, *supra* note 232, at 626.

exemptions. It should be magnanimous in victory.”²⁴⁵

We should also attend to socio-historical context in determining whether grants or denials of religious accommodation express an unduly harmful state message. Nelson Tebbe (writing alone and with Lawrence Sager) has launched a vigorous defense of accounting for expressive harm in the setting of religious accommodations.²⁴⁶ Tebbe’s contention is that in some instances, judicial exemptions or legislative accommodations signal state approval or endorsement of private anti-gay discriminatory animus,²⁴⁷

245. *Id.* at 628. In later work, Koppelman steps back a bit from this claim, acknowledging the ongoing vulnerability of the gay community, but still asserting that the gay rights movement “will not be stopped by a few exemptions.” KOPPELMAN, *supra* note 19, at 121.

246. *See generally* TEBBE, *supra* note 163; Lawrence G. Sager & Nelson Tebbe, *Discriminatory Permissions and Structural Injustice*, 106 MINN. L. REV. 803 (2021).

247. TEBBE, *supra* note 163, at 134 (“While many religion exemptions from antidiscrimination laws carry no particular message of approval or disapproval, some do.”); *see also* Sager & Tebbe, *supra* note 246, at 806 (“encourage”), 810 (“message of approval”), 812 (“authorization”), 813 (“endorsement”), 826 (“condoning”), 832 (“inviting”). Note that although Tebbe says many religion exemptions might be okay, and only some might not be, he concludes that “religious exemptions from public accommodation laws generally should be unavailable,” TEBBE, *supra* note 163, at 137, so for purposes of my discussion here, his concern about expressive harm is front and center. Tebbe talks about signaling and expressive harm in other ways, as well. For example, when a photographer won’t work for a same-sex wedding because of her religious beliefs, that “sends a message of disfavored membership.” *Id.* at 35. Or if the state accommodates the religious person but not a similarly situated secular photographer with moral objections to the wedding, the latter has “received a government message that its opposition to civil rights laws is less worthwhile or understandable” than the religious person’s. *Id.* at 78. In the former case, however, the photographer may be coming from a place of truly held religious belief with no animus toward gay men and lesbians. If so, then we should be cautious before concluding that the service denial sends a “message of disfavored membership.” In the latter case, the state may have good, normatively justifiable reasons for

reducing gay men and lesbians to second-class citizenship status and constituting a kind of unconstitutional inequality.²⁴⁸

I have two concerns with Tebbe's line of argument. First, we should be cautious in using the concept of expressive harm to evaluate and perhaps nullify state action that is not inherently expressive. Second, and more importantly for this Article, careful assessment of the socio-historical baseline for state permissions may make it difficult to attribute to the state the kind of signaling and concurrent expressive harm that Tebbe wants to attribute.

On the first point, much has been written about the social and expressive meaning of state action.²⁴⁹ Some instances of state action are inherently expressive—for example, erecting a Latin cross at a public highway intersection or putting up a banner on City Hall. Other instances of state action are not inherently expressive but may be thought to carry social meaning in an expressive way—e.g., the state enacting a public accommodations anti-discrimination law, or doing so and not including sexual orientation when asked to include it, or including it. I don't doubt that for many people, each of these actions carries distinctive social meaning and that in some way there is expressive value (or harm) from the state action. But what the law does (or what the failure to include something in the law does) is the heart of the matter, and we should evaluate

treating religion distinctively. If so, then we should be similarly cautious before concluding that the failure to accommodate the secular photographer sends a message that her views are "less worthwhile or understandable."

248. For other scholars who have raised a similar concern, see Corvino, *supra* note 57, at 67; Greenawalt, *supra* note 200, at 10.

249. See generally, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

state action primarily on this basis. Furthermore, once we start seeing all state action as potentially expressive, we have introduced a capacious understanding of constitutional harm. Tebbe would limit the judicial review piece of this, leaving other correction to legislatures, but still the understanding of constitutional harm is broad. This is an area with much scholarship and competing perspectives, and whether one agrees with my caution here need not influence one's response to my second point.

There is no context-neutral way to determine whether a particular state action (or failure to act) carries one social meaning or another. I don't take Tebbe to disagree with this point, but his arguments against religious accommodation sometimes assume as the backgrounded baseline the existence of (say) a public accommodations anti-discrimination law that includes sexual orientation among the covered categories, while assuming the claim for exemption from such law as the foregrounded intruder. With these assumptions in place, the average or reasonable observer of the situation might think that letting someone out from under the law because she has a religious objection to same-sex marriage would signal government approval of or at least sympathy for the religious objection. But if we see religious freedom and attendant sources of value as competing with and on equal footing with the state, and not as coming after a public accommodations settlement (nor as pre-existing such a settlement, although religious persons might push that point), then a religious accommodation might take on a different meaning: not state approval of anti-same-sex marriage on religious grounds, or even sympathy, but rather concern and respect for the dilemma of conflicting obligations into which the law places the religious person.

With the foregoing in mind, let's consider the most famous case of this genre, *Masterpiece Cakeshop, Ltd. v.*

Colorado Civil Rights Commission.²⁵⁰ It involved a cake baker, Jack Phillips, who makes generic and custom-made cakes. Citing religious beliefs, he refused to make a cake for a same-sex couple's (Craig and Mullins) wedding celebration, although he sells baked goods to gay men and lesbians otherwise. The Commission held him in violation of Colorado public accommodations anti-discrimination law, which requires providers of goods and services to the general public not to discriminate on the basis of sexual orientation, among other protected characteristics. The primary remedy was to order Phillips not to discriminate on this basis. Because in *Employment Division v. Smith* the Court had held that there is no presumptive free exercise right for exemption from laws of general applicability, and that only a deferential rational basis test applies when the state insists on uniform application of such laws,²⁵¹ unless the Court had been willing to overrule *Smith*, Phillips could not have prevailed in a request for a constitutionally compelled exemption. Phillips' primary argument, thus, was that the law unconstitutionally compelled him to engage in expressive activity supporting same-sex marriage. This is a complex issue,²⁵² but the Court didn't resolve it. Rather, the Court held, on a case and fact-specific ground, that Colorado had unconstitutionally

250. 138 S. Ct. 1719 (2018).

251. 494 U.S. 872, 886–90 (1990).

252. By my count on SCOTUSBlog, there were 94 amicus briefs filed in the case. See *Masterpiece Cakeshop, Lt. v. Colorado Civil Rights Commission*, SCOTUSBLOG (Aug. 14, 2018), <https://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/>. Many addressed the compelled speech issue. *Id.* As this Article goes to print, the Court has under consideration a case that promises to resolve the compelled speech issue in cases such as this. See *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021), *cert. granted*, 142 S. Ct. 1106 (Feb. 22, 2022) (No. 21-476). For some of my thoughts on the compelled speech issue in this setting, see Abner S. Greene, *Barnette and Masterpiece Cakeshop: Some Unanswered Questions*, 13 FIU L. REV. 667, 677–85 (2019).

discriminated against Phillips' religious beliefs.²⁵³

Of interest here is whether Phillips should have received (and whether similarly situated persons should receive) a compelled religious exemption from the public accommodations law. This issue could arise in several ways: first, if the Court overturns *Smith*, and requires some form of stepped-up scrutiny;²⁵⁴ second, if state courts face similar claims under state constitutions with broader free exercise rights than announced in *Smith*; third, under state Religious Freedom Restoration Acts, or similar, that require stepped-up scrutiny;²⁵⁵ or fourth, if the federal government were the defendant, under the federal Religious Freedom Restoration Act, requiring stepped-up scrutiny.²⁵⁶

253. See *Masterpiece Cakeshop*, 138 S. Ct. at 1729–32.

254. The Court came close to overturning *Smith* in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). The question was whether Philadelphia violated the Free Exercise Clause by ceasing referrals of foster children to Catholic Social Services (CSS) because CSS would not place children with same-sex couples. Parties and amici briefed whether the Court should overrule *Smith* and apply some form of elevated scrutiny. The Court ruled that the city violated CSS' free exercise rights, but without overruling *Smith*. Instead, the Court pointed to the terms of the city's standard foster care contract, which stated that providers (such as CSS) may not reject prospective foster parents because of their sexual orientation, but which then gave the administrator sole discretion to grant exceptions. Such discretion means the city is no longer relying on a law of general applicability, and thus we are no longer in *Smith*'s terrain; therefore, the city may not refuse to grant an exception without a compelling reason, which the Court held the city lacked. Three Justices would have overruled *Smith*, *id.* at 1883 (Alito, J., concurring in the judgment), and three other Justices raised questions that would arise were the Court to overrule *Smith*. *Id.* at 1882 (Barrett, J., concurring).

255. See, e.g., *State Religious Freedom Restoration Acts*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 5, 2017), <https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

256. See 42 U.S.C. § 2000bb-1.

I am torn about this case.²⁵⁷ My instinct is to want everyone to get along, for Craig and Mullins to get their cake elsewhere and for Phillips to be able to act in accordance with his religious beliefs.²⁵⁸ I appreciate that one argument to the

257. Nelson Tebbe is also torn. In the end, he would come out against the wedding goods and services providers in these cases. *TEBBE, supra* note 163, at 137–38. Agreeing with laws that permit doctors to refuse to provide abortions if their conscience dictates otherwise, Tebbe contrasts the wedding goods and services provider same-sex marriage cases. *See id.* at 129–31. I set forth Tebbe’s grounds for contrasting the two situations; possible rejoinders follow in parentheses: (a) the medical exemption involves more directness (but Jack Phillips is directly involved in making the cake with his hands, as is a photographer shooting a wedding (even more so)), (b) similarly, the doctor has a more personal involvement than a business (but that is not so if it is a small business providing custom, personal service), (c) the doctor’s objection is time-limited, whereas Phillips et al. might extend their refusal to providing goods or services to a same-sex couple at any time (but this is where balancing comes in; we might limit exemptions to assisting with rituals such as wedding celebrations, and not lifetime refusals to deal), (d) conscience clauses protecting doctors in the abortion setting tend to not be about religion distinctively, whereas the Phillips et al. cases tend to be just about religion, thus raising the separate question whether religion-distinctive exemptions are constitutional (I have argued above that they are), and (e) we do not grant exemptions for religious goods or service providers who object to re-marriage ceremonies or inter-faith marriage ceremonies, so why should we do so regarding same-sex marriage ceremonies? (but maybe we should have a broader view of religious exemptions, including these kinds of objection to providing a personal hands-on good or service). As a compromise solution, Andrew Koppelman suggests that we grant accommodations in cases such as this, but that we insist the business in question publicly and clearly identify itself as not providing goods or services for same-sex wedding celebrations. *KOPPELMAN, supra* note 19, at 11, 59, 138; Koppelman, *supra* note 232, at 620.

258. *See* Kent Greenawalt, *Mutual Tolerance and Sensible Exemptions*, in *RELIGIOUS FREEDOM, supra* note 238, at 102, 107 (supporting exemptions that “focus on direct participation in the wedding itself”). Greenawalt would exempt the wedding photographer, *id.* at 108, but it is unclear if he would exempt the baker or the florist. *See also* Douglas Laycock, *Liberty and Justice for All*, in *RELIGIOUS FREEDOM, supra* note

contrary is to analogize to the race setting, in which virtually no one would want to accommodate a baker who refused to bake a cake based in religious belief about race (say, to a mixed-race couple getting married). But as discussed earlier, there's a case to be made that the cultural moment in which we find ourselves regarding queer rights is different from where we are (or were) regarding race, that Phillips' objection is not based in the same kind of animus as much racism is, and that things may work themselves out without the hand of the law if we give it some time.

The case for accommodating Phillips is partly because there are other places for Craig and Mullins to get their cake. That market solution, though, doesn't fully address the equality harm to the couple, which is a core part of their case. By being told Phillips doesn't want their business, and that they must go elsewhere, they suffer an affront based on their sexual orientation. Although it may be hard to put a price tag on this harm, it is real and part of why these laws exist.²⁵⁹

238, at 24, 29 (supporting exemption for small business owners providing creative or promotional services for weddings, "so long as another vendor is available without hardship").

259. In his concurrence in the judgment in *Fulton v. City of Philadelphia*, Justice Alito contends that denying an exemption to a religious goods or services provider, because the law is meant (at least in part) to protect same-sex persons from dignitary affronts, runs afoul of the First Amendment's protection of freedom of expression. 141 S. Ct. at 1924–25 (Alito, J., concurring in the judgment); see also BRADY, *supra* note 46, at 248–49; Laycock, *supra* note 258, at 30; Michael W. McConnell, *Dressmakers, Bakers, and the Equality of Rights, in RELIGIOUS FREEDOM*, *supra* note 238, at 378, 380. This argument is mistaken. Whatever else one thinks about how these cases should come out, the state interest in the dignity of the same-sex couple is not (only, or primarily) from the expressive aspect of a goods or services denial; it's from the *act* of the denial (apart from any market access issue). There's an important difference between the state's regulating X for saying something insulting about same-sex couples (generally protected as freedom of speech) and the state's regulating X for doing something that discriminates against same-sex couples (even if the reason for the state action in the latter case is to protect the dignity of the turned-away

This leads me to another instinct, which goes the opposite way from the paragraph above. Perhaps we should view Phillips as in the position of the classic conscientious objector, and thus give him three choices: one, disobey the law and take the penalties;²⁶⁰ two, adjust his business to providing custom cakes by appointment only, that is, no longer be a provider of goods and services to the general public; or three, adjust his business by providing custom cakes to co-religionists only.²⁶¹ I assume that options two and three would mean less income for Phillips. The point of this competing instinct is that if you're providing goods and services to the general public, perhaps you forfeit your right to discriminate based on your religious beliefs.

The third option I mention—that Phillips could choose to provide custom cakes to co-religionists only—suggests that by remaining within an enclave (perhaps physical, perhaps metaphorical), someone such as Phillips may live more consistently with his religious beliefs. Conversely, by being a devout Christian with a certain belief set and a person who lives and works in a more integrated setting, Phillips must forfeit some consistency with his religion, must, in other words, compromise his beliefs and practices. Is that unfair to

couple). The argument I'm making here is similar to how the Court in *Wisconsin v. Mitchell*, 508 U.S. 476, 489–90 (1993), distinguished the core holding of *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395–96 (1992). It is also similar to Justice Scalia's move in *R.A.V.* to distinguish some Title VII cases. *See id.* at 389–90. If the state is regulating the *purpose* of a private act, that doesn't implicate the free speech clause, even if that purpose is evidenced by speech acts or understood in part as protecting against expressive harm.

260. In Colorado, the fine is \$50 to \$500 per violation. COLO. REV. STAT. § 24-34-602.

261. I am assuming it would be possible to take one's business out from under the coverage of public accommodations law by operating in either of these ways (by appointment only, or to co-religionists only). I don't have more detailed information about how Colorado law would treat these situations.

him? Is it proper to say to religious people that we will let them live by their own lights only if they stay away from the rest of us?²⁶² This kind of exit from society is one way of ameliorating the difficult problem of political obligation and legitimacy that otherwise exists when the state makes categorical demands of obedience. Perhaps this is asking too much, though, and accommodations and exemptions can serve as representations of exit. Should it matter whether, in cases such as this, the affected same-sex couple and perhaps queer community writ large would see and understand an accommodation for Phillips in a sympathetic light, as relieving the baker of an otherwise scorching conflict of norms and obedience?

Douglas Nejaime and Reva Siegel recognize the complicity-based nature of cases such as *Masterpiece Cakeshop* but turn that fact against granting exemptions.²⁶³ These exemption claims, they say, are different from ones in which the state action in question forbids or requires something in direct contravention of one's religious beliefs. Here, by contrast, the religious concern is that the state action, in certain instances, requires one to be complicit in what someone else is doing, and thus to grant an exemption necessarily imposes costs on that third party. This kind of case—which includes *Hobby Lobby*, also discussed by Nejaime and Siegel—is indeed different in structure from (some) other religious exemptions cases. The question is how that difference should matter for analysis. The harm to a third party from granting an exemption must be considered in the balancing, but the harm to the religious claimant in

262. See Steven D. Smith, *Against "Civil Rights" Simplism: How Not to Accommodate Competing Legal Commitments*, in RELIGIOUS FREEDOM, *supra* note 238, at 233, 243.

263. See generally Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015). For similar concerns, see Arneson, *supra* note 147, at 1024; Sepper, *supra* note 156, at 1483–89.

complicity cases can be real as well, and significant. We should, though, be attentive to directness or indirectness as a factor. For example, in *Hobby Lobby*, the business claimed that compelling it to provide its employees health insurance that includes contraception, where a type of contraception (purportedly) serves as an abortifacient, rendered the business complicit in abortions funded this way, in contravention of the owners' religious faith. I have argued that this type of general funding, with an action taken down-the-line with the funds by another person, should not be held to constitute a "substantial burden" on religious exercise for federal RFRA purposes.²⁶⁴ Requiring Jack Phillips to use his own hands to make a cake for a wedding that is contrary to his religious beliefs is a different matter.

5. Second-Order Concerns

Some argue it is too hard for judges and legislatures to balance consistently and in sufficiently apolitical fashion in the setting of religious exemptions and accommodations. The former is a standard legal worry about consistency over time and cases; the latter connects to a more specific religion clauses concern about the state guaranteeing equal religious freedom, which includes not treating one religion more favorably than another and not involving the state in scrutinizing the truth or values of a particular religion or of religion generally.

As related to judicial exemptions, these concerns are front and center in Justice Scalia's *Smith* majority opinion.²⁶⁵ For example, regarding *United States v. Lee*,

264. See Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 HARV. L. & POLICY REV. 176, 177–90 (2015).

265. In rejecting the claim that the state should have to satisfy strict scrutiny before substantially burdening religious practice through generally applicable law, Scalia also made the following argument: "Any society adopting such a system would be courting anarchy." *Emp. Div. v.*

Scalia observed “[t]here would be no way . . . to distinguish the Amish believer’s objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes.”²⁶⁶ Regarding the suggestion that courts could look, in part, to the centrality of religious beliefs claimed for exemption, Scalia retorted “[i]t is no more appropriate for judges to determine the ‘centrality’ of religious beliefs before applying a ‘compelling interest’ test in the free exercise field, than it would be for them to determine the ‘importance’ of ideas before applying the ‘compelling interest’ test in the free speech field.”²⁶⁷ Elsewhere in the opinion, Scalia maintained “it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.”²⁶⁸

In *Lee*, Justice Stevens expressed concern about exceptions for religion by either judicial exemption or legislative accommodation:

Smith, 494 U.S. 872, 888 (1990). Similarly, after saying claimants such as the Native American Church in *Smith* would be left to the legislative process, Scalia concluded “that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.” *Id.* at 890. Elsewhere in this Article I address the “anarchy/law unto itself” concern: in arguing that the formal equality of Scalia’s approach is not as true to our liberal democratic political pluralism as is a substantive equality that refuses to recognize majoritarian preferences as foundational; and in arguing for the absence of political obligation and legitimacy, without which Scalia’s argument doesn’t get off the ground. For other objections to Scalia’s “anarchy” concern, see Swan, *supra* note 164, at 47–48. For a historical understanding that political pluralism has sometimes been deemed (improperly) anarchic, see LASKI, *supra* note 18, at 5, 13, 208, 214.

266. *Smith*, 494 U.S. at 880 (discussing 455 U.S. 252).

267. *Id.* at 886–87.

268. *Id.* at 889–90 n.5. For academic support for the *Smith* result, if not necessarily the reasoning, see generally William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

[T]he principal reason for adopting a strong presumption against such claims . . . is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.²⁶⁹

Similarly, Stevens concurred in the Court's refusal to award a religious exemption from uniform military dress code regulations to an Air Force officer, so he could wear his yarmulke on base:

The interest in uniformity . . . has a dimension that is of still greater importance for me. It is the interest in uniform treatment for the members of all religious faiths If exceptions from dress code regulations are to be granted on the basis of a multifactored test . . . inevitably the decisionmaker's evaluation of the character and the sincerity of the requester's faith—as well as the probable reaction of the majority to the favored treatment of a member of that faith—will play a critical part in the decision. The Air Force has no business drawing distinctions between . . . persons [of different religions] when it is enforcing commands of universal application.²⁷⁰

Finally, scholars such as Ira C. Lupu have argued for judicial exemptions for religion but not for similar legislative accommodations.²⁷¹ Courts decide cases based on narrow facts and specific litigants, and they must explain their reasons in written opinions, presumably according to principles that may be applied over cases. Legislatures operate in a political realm without these constraints.

The main defense for a regime in which courts sometimes

269. *Lee*, 455 U.S. at 263 n.2 (1982) (Stevens, J., concurring).

270. *Goldman v. Weinberger*, 475 U.S. 503, 512–13 (1986) (Stevens, J., concurring).

271. See Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 599–609 (1991).

award religious exemptions and legislatures sometimes create religious accommodations is that otherwise majoritarian values, including majoritarian religious values, would constantly triumph, as legislative majorities craft laws of general applicability that are sensitive to avoiding harm to such mainstream values but at times are insensitive to the harm such laws cause to those with less mainstream religious beliefs and practices. Case by case balancing of harm to religious practice, if generally applicable law is applied without exception, against harm to the body politic generally or to specific others, from granting an exception, is similar to a type of common law balancing with which courts are familiar. And, although Lupu's concerns about legislative accommodations are significant, seeking judicial exemptions can be costly, time-consuming, and uncertain; asking legislatures to consider ways in which proposed legislation may harm religious practices can be a method for reducing harms from the majoritarian political process. If courts and legislatures engage in proper procedure and explain why they have awarded some exceptions and not others, those not awarded exceptions and those affected by the hit to uniform application of law should be able to accept the outcome. As for the concern with the state's scrutinizing or determining religious truth or values, understanding how application of law would harm religion involves hearing evidence on such a claim and appreciating *how* the law would harm the claimant. It need not involve making determinations *about* the truth of or values present in such claims. If we refuse to consider such claims of harm, we refuse to take seriously the possibility that the harms to religious practice are real ones. This hit to political pluralism need not occur. The state can carve out limited exceptions from law, thus recognizing that some of its citizens live by different norms and acknowledging that it has limited legitimacy in requiring uniform application of all laws all the time.

C. Enclaves and Other Intra-Group Issues

Most of the issues I'm discussing arise because heterogeneous people live and work intermingled, or at least enough so to create demands for accommodation and concerns about third-party harm. But what about enclaves such as Kiryas Joel,²⁷² or other groups who seek to exit in a mostly (though not fully) complete sense? These groups may present the deepest version of political pluralism, with the greatest resistance to seeing the nation-state as the foundation from which rights and duties should be determined. As Chandran Kukathas argues in asking us not to take claims of national sovereign power as the starting point, "[s]ociety . . . is a kind of union of associations But it is not a union of stable or immutable associations; and indeed, its own boundaries are unstable."²⁷³ He adds, "in the end (as in the beginning) maps are not what matter at all."²⁷⁴ In a similar vein, Martha Minow writes, "[t]he historical perspective reminds us that subcommunities exist before and after the rise of particular nation states."²⁷⁵ And even with extant nation-states as a predicate, advocates of deep political pluralism push for allowing subgroups to live by themselves and govern their own lives to a significant extent. For example, William Galston advances the possibility of a kind of partial exit²⁷⁶ for groups who want to "withdraw, to

272. See generally *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994); Greene, *Kiryas Joel*, *supra* note 14.

273. KUKATHAS, *supra* note 20, at 84.

274. *Id.* at 270.

275. Martha Minow, *The Constitution and the Subgroup Question*, 71 *IND. L.J.* 1, 16 (1995).

276. This is my term, see *supra* text accompanying note 41, but it captures Galston's view in the piece cited.

be left alone”²⁷⁷ to live by their own normative lights. Glen Robinson makes a similar argument “in support of recognizing, and accommodating, community autonomy.”²⁷⁸ Lucas Swaine endorses the possibility of “quasi-sovereignty”²⁷⁹ for religious communities, which “would place the burden on government to show why prospective legislation should apply to members of”²⁸⁰ such communities. And all scholarship in this area owes a debt to Robert Cover’s *Nomos and Narrative*, in which he maintained, “[w]e inhabit a *nomos*—a normative universe The *nomos* that I have described requires no state [Insular communities are engaged in a] constant struggle to define and maintain the independence and authority of their *nomos* We ought to stop circumscribing the *nomos*; we ought to invite new worlds.”²⁸¹

In a moment, I’ll turn to the question whether the liberal state is justified in demanding some minimum conditions for liberty *within* groups to predicate accommodations *for*

277. William Galston, *Civic Education in the Liberal State*, in LIBERALISM AND THE MORAL LIFE, *supra* note 22, at 89, 97. Galston cautions that this approach might work only if there are few groups wishing to cordon themselves off. *See id.* at 98. And he notes that it might be difficult to operate a middle position between “citizenship and actual physical exit.” *Id.* One of the tasks of this Article is to try to coax out just such a middle position. *See also* SPINNER-HALEV, *supra* note 21, at 5, 25, 68, 201 (supporting existence of religious communities living according to some illiberal values; offering a caveat that they are “living within a pluralistic culture”).

278. Robinson, *supra* note 39, at 335 n.158; *see also* Mark Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1133 (1998) (expressing sympathy for “municipal perfectionist zones such as . . . Kiryas Joel”).

279. SWAINE, *supra* note 42, at xviii, 90.

280. *Id.* at 104.

281. Cover, *supra* note 197, at 4, 11, 25, 68.

groups. Before that, note two threshold points about the proper domain of pluralism claims. First, Jean Cohen critiques me for not applying what she calls my “philosophical anarchist skepticism” to illiberal religious groups, querying why my arguments against a moral obligation to obey the law would not apply to members of such groups toward the rules and norms of such groups.²⁸² The answer is that what motivates the argument against political obligation and legitimacy, and thus for a broad scheme of accommodations, is the state’s claim of a monopoly on legitimate coercive power—i.e., police, jails, armies. So on the state is the burden of justifying its general claim of law’s bindingness and toward the state is the question of a moral duty to obey law. Private groups in a liberal democracy, religious or otherwise, neither have nor claim (at least they should not be claiming) legitimate coercive power. And thus we don’t need to ask the standard questions of political obligation and legitimacy.

In a similar vein as Cohen, Leslie Green argues that just as Hume showed a formal right of exit from the state is insufficient to ground a moral obligation to obey the state’s laws, so a formal ability to exit from a private illiberal group is insufficient to render remaining voluntary and thus is insufficient to override concerns we might have about injustice within such a group.²⁸³ Green is correct that “[i]t is risky, wrenching, and disorienting to have to tear oneself from one’s religion or culture.”²⁸⁴ That remaining in one’s nation—or in one’s private group—is in this sense involuntary, however, means different things in the two settings. Because the state has the police, jails, and armies,

282. Cohen, *supra* note 58, at 90.

283. Leslie Green, *Internal Minorities and Their Rights*, in *THE RIGHTS OF MINORITY CULTURES* 256, 266 (Will Kymlicka ed., 1995) [hereinafter *MINORITY CULTURES*].

284. *Id.*

the lack of a moral obligation to obey the law (here, based in a theory of implied consent from remaining in the jurisdiction) places a burden on the state to justify its laws and applications of law, or grant accommodations (or so I have argued). Private groups—even illiberal ones—do not claim a legitimate power of coercion backed by force, and thus the lack of voluntariness in remaining in the group, in the way Green puts it above, does not generate a burden on the group to accommodate those who would go their own way.²⁸⁵

Second, I have touted the virtues of political pluralism that rests on agnosticism and distrust of centralized/totalizing claims, i.e., in favor of multiple repositories of power over concentrated power.²⁸⁶ An extreme version of this argument might push back against private religious groups that are not agnostic about value or the good, and that have centralized and totalizing authority and norms.²⁸⁷ That is, it would insist on the truth of agnosticism

285. Nonetheless, religious and other groups who request accommodations should consider if they can step back from such requests, especially when accommodations would result in harm to others by the law not being enforced uniformly. Such groups are part of the politically pluralist liberal society and may be thought to have a duty to accommodate others, even if the duty is weaker than that of the state to award accommodations, and as discussed in the text, is different in kind. Perhaps we might not call it a duty, but think of it as a virtue, when exercised.

286. See *supra* text accompanying notes 14, 85–86; LASKI, *supra* note 25, at 69–77 (praising the division of sovereign power); LASKI, *supra* note 18, at 243 (same).

287. For scholarship that pushes an anti-foundationalist, anti-teleological approach, across the board, see Homi K. Bhabha, *Liberalism's Sacred Cow*, in IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 45, at 79, 84 (“An agonistic liberalism questions the ‘foundationalist’ claims of the metropolitan, ‘Western’ liberal tradition with as much persistence as it interrogates and resists the fundamentalisms and ascriptions of indigenous orthodoxy.”). See also WILLIAM JAMES, A PLURALISTIC UNIVERSE 67 (Frederick H. Burkhardt et

and pluralism and enforce such against private groups.²⁸⁸ But it is not the state's role to insist that such groups adopt the kind of pluralism that I am arguing the state should follow (although state speech may encourage it).²⁸⁹

To help support a broad political pluralism, the liberal state should permit religious (and other) enclaves to exist. Such groups might adhere to illiberal norms and be relatively cut off from the rest of society. They may not, though, wield public power in ways that contravene the Constitution. Furthermore, at a minimum, adult members of these groups must be able voluntarily and knowingly to remain in such enclaves or depart.²⁹⁰ I will advance a fairly

al. eds., 2006) (1909) (“[R]eality MAY exist in distributive form, in the shape not of an all but of a set of caches, just as it seems to—this is the anti-absolutist hypothesis.”). *See generally* Gray, *supra* note 124, (pushing back against teleological, classical commitments of all sorts, including purported atheisms); *id.* at 157 (“The only observable reality is the multitudinous human animal, with its conflicting goals, values and ways of life.”). Although not a theme of this Article, my beliefs are a mix of this kind of anti-teleological position and what seems an ineluctable pull toward overcoming finitude and difference, toward something beyond human understanding, perhaps something divine. *See generally* Abner S. Greene, *Reflections/Lovingkindness*, 97 NOTRE DAME L. REV. REFLECTION 61 (2022).

288. *See* Green, *supra* note 283, at 266–70. *See generally* AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS* (2001) (similar).

289. For my views on government speech, see Abner S. Greene, *The Concept of the Speech Platform: Walker v. Texas Division*, 68 ALA. L. REV. 337, 353–59 (2016); Abner S. Greene, *State Speech and Political Liberalism*, 28 CONST. COMMENT. 421, 423–24 (2013); Abner S. Greene, *Government Endorsement: A Reply to Nelson Tebbe’s Government Nonendorsement*, 98 MINN. L. REV. HEADNOTES 87, 87–95 (2013). *See generally* Abner S. Greene, *Government Speech on Unsettled Issues*, 69 FORDHAM L. REV. 1667 (2001); Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1 (2000).

290. The knowing and voluntary conditions on remaining/exiting are to some extent a liberal construct. But the religious enclaves I’m discussing exist within a liberal state, and we can take the existence of such a state

thin view of what the liberal state should require from enclave groups, to be true to the political pluralism I have advanced throughout this Article, while also recognizing that the liberal state is the frame within which the groups are existing.

For an adult's choice to remain in (or leave) an enclave to be voluntary, maintains Chandran Kukathas, it must be free of enslavement or physical coercion, as well as of "cruel, inhuman, or degrading treatment."²⁹¹ This approach seems sound; some applications of these standards may be difficult around the edges, but the core examples should be clear enough. Beyond the absence of physical coercion and the like, some scholars suggest conditions that seem somewhat broader. For example, Mark Rosen argues that groups may not make exit too onerous in terms of costs;²⁹² Brian Barry maintained that groups may not subject members to "gratuitous losses" if they leave;²⁹³ and Amy Gutmann contends that group members must "be *effectively* free, not just *formally* free" to exit the group.²⁹⁴ On the other hand, Glen Robinson describes contracts made by adults in

as our starting point. Furthermore, the political pluralism I have been defending seeks to secure a power for individuals to adhere to sources of normative authority different from that of the state, and the knowing and voluntary conditions help to secure that power. *See supra* text accompanying notes 40-45.

291. Chandran Kukathas, *Are There Any Cultural Rights?*, in *MINORITY CULTURES*, *supra* note 283, at 228, 249-50; *see* SPINNER-HALEV, *supra* note 21, at 76 (no physical harm to children or preventing people from leaving); *id.* at 27, 71 (no coercion); SWAINE, *supra* note 42, at xviii (protecting exit rights); VISCHER, *supra* note 39, at 247 (the state may protect group members from serious harms); Robinson, *supra* note 39, at 295-96 (enforcement of basic laws against physical violence).

292. *See* Rosen, *supra* note 278, at 1101.

293. BARRY, *supra* note 57, at 128.

294. Amy Gutmann, *Freedom of Association: An Introductory Essay*, in *FREEDOM OF ASSOCIATION*, *supra* note 200, at 3, 23.

enclave-type communities, enforced against them when they left; he approves of court decisions enforcing such contracts, holding that the adults were “not entitled to any share of the communal property or compensation.”²⁹⁵ Robinson’s basic approach seems correct; private groups may present adult members with the option to stay with attendant financial/property benefits or to leave and forfeit such benefits. It would be harder to defend a system that deprived an exiting adult member of basic wherewithal to survive outside the group; if that’s what Rosen and Barry are referring to, then we can accept such limited individual rights against the group (enforceable by the state) without intruding into more idiosyncratic group financial/property norms that might require one to be a continuing group member to take advantage of certain benefits.

Several considerations are relevant to the “knowing” portion of an adult group member’s choice to remain or exit the group. I will discuss: (1) minimal education that group children should receive; (2) whether that includes promoting autonomy in the sense of self-critique and openness to alternatives; (3) whether we should be concerned about false consciousness when adults choose to remain in enclave groups; and (4) whether the group must make children (and adults) aware of life options outside the group.

(1) What educational requirements for children may the state impose on religious groups who have opted out of public schools? We should consider questions about the ability to weigh options, basic skills regarding self and other, and substantive curricula. First, what must children learn regarding how to consider options beyond remaining in their group, once they reach the age of majority? Group members must be able to consider options and make choices (such as remain versus exit),²⁹⁶ but need not learn how to critique

295. Robinson, *supra* note 39, at 285.

296. See GALSTON, *supra* note 39, at 123 (capacity to assess

group practices.²⁹⁷ Groups should be permitted to teach that the values and religious truths of the group are the real values and truths, and to refrain from teaching how to critique such values and truths. Although the state may insist that children in public schools be taught the pluralist value of open-mindedness, it may not require such teaching in private schools. I will say more on this in (2). As a related matter, beyond the limited exposure to options I discuss in (4), the group need not show children the world outside.

Second, William Galston argues that children must be taught basic social skills as well as the ability to care for themselves and their families.²⁹⁸ Lucas Swaine adds that children must know the value of toleration and respect for persons.²⁹⁹ These suggestions seem sound and not overly intrusive on even a fundamentalist religious group, so long as we appreciate that tolerating and respecting persons as persons need not extend to tolerating and respecting the normative beliefs and lifestyles of those outside the group. If the state is to be properly pluralistic and respectful of illiberal groups, it may teach and otherwise foster the value of broad ideological toleration and respect, but it may not insist that all groups teach this value.

Third, what minimal educational substance must children receive?³⁰⁰ The focus should be on protecting both

alternatives); SPINNER-HALEV, *supra* note 21, at 71; Robinson, *supra* note 39, at 322–23; Daniel M. Weinstein, *How the Interests of Children Limit the Religious Freedom of Parents*, in RELIGION IN LIBERAL POLITICAL PHILOSOPHY, *supra* note 46, at 220, 220.

297. See GALSTON, *supra* note 19, at 253; GALSTON, *supra* note 39, at 127; SPINNER-HALEV, *supra* note 21, at 34, 36, 47, 50; Galston, *supra* note 277, at 100. *But see* Sunstein, *supra* note 200, at 88.

298. See GALSTON, *supra* note 19, at 252; Galston, *supra* note 277, at 98.

299. See SWAINE, *supra* note 42, at 96.

300. Scholars offer a variety of suggestions. See, e.g., SPINNER-HALEV,

the children—when they’re children inside the group and for when they become adults who might wish to exit—and the group itself, to permit it to impart its values and way of life to the children.³⁰¹ With this in mind, the state may insist that the group teach sufficient literacy (reading and writing) and math skills so group members can engage in basic life tasks if they leave the group. Although the state might wish the group would also teach the basics regarding what it means to be a citizen (civics, rights, and law), the group might wish to focus on civic obligations within the group and religious norms. If an adult member exits the group, with sufficient literacy skills that member can learn the rights and responsibilities of citizenship easily enough. But even living within the group, members have rights as citizens, and must be aware of at least those rights that involve state protection against abuse at the hands of the group. Beyond what I have sketched in this paragraph—literacy, math, rights of state protection—other subjects that some might see as bedrock, such as history and science, might be contentious within some groups, and the state should permit groups to teach these subjects as they choose.

(2) Although supporting group rights in some important ways, Will Kymlicka nonetheless adds that “[a] liberal theory of minority group rights . . . cannot accept . . . internal restrictions . . . that restrict the ability of individuals within the group (particularly women) to question, revise, or abandon traditional cultural roles and practices . . . since they violate the autonomy of individuals and create injustice

supra note 21, at 79 (reading, math, science); SWAINE, *supra* note 42, at 96 (literacy, math, civic knowledge, nature of rights, and how the polity’s institutions support them); Galston, *supra* note 277, at 98 (linguistic skills, civics, respect for law).

301. See VISCHER, *supra* note 39, at 238 (to take value pluralism seriously, we should maximize the efficacy of parental child-rearing decisions). See generally Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996).

within the group.”³⁰² If “restrictions” means physical coercion or inhumane psychological treatment, then I agree with Kymlicka. But I assume Kymlicka is also talking about group education and acculturation that favor a hierarchical or otherwise nonreflective, nonautonomous life,³⁰³ i.e., that favor accepting certain written or human sources as “gospel,” as it were, and developing a life of thought and behavior accordingly. If Kymlicka’s view insists that the liberal state should intervene to push back against such a nonautonomous lifestyle, then that is where he and I part ways.³⁰⁴ This view does not respect political pluralism in a deep enough fashion; it insists on a pluralist core for both public and private communities. But it is the state that must be pluralist, not the group. And thus although the state as governing body should have a habit of open-mindedness that we might see as autonomy at the public corporate level, and although the state may advocate for such a habit of mind, it may not insist on such within groups that believe otherwise. Chandran Kukathas advances an argument similar to mine when he says it is not necessarily “important that people be able rationally to assess and revise their ends.”³⁰⁵ “We can be quite unthinking about our lives.”³⁰⁶

302. Will Kymlicka, *Liberal Complacencies*, in *IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 45, at 31, 31; *see also* WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 37 (1995) (“[L]iberals . . . should reject internal restrictions which limit the right of group members to question and revise traditional authorities and practices.”).

303. *See* Nussbaum, *supra* note 91, at 110.

304. *See* VISCHER, *supra* note 39, at 247 (the state may not intervene simply to protect autonomy, i.e., the capacity to choose).

305. KUKATHAS, *supra* note 20, at 58.

306. *Id.* at 62; *see also* WILLIAM A. GALSTON, *THE PRACTICE OF LIBERAL PLURALISM* 190 (2005) (“From a pluralist point of view, many lives based on habit, tradition, or faith fall within the wide range of legitimacy.”).

(3) In part because within illiberal groups the value of autonomy may be downplayed and the value of adhering to a more rigid social structure emphasized, some contend that an adult's choice to remain or leave might be too constrained to trust it. Susan Moller Okin was one of the leading scholars to advance this concern. Sometimes cultures "socialize" oppressed members, she wrote, "so that they accept, without question, their designated cultural status."³⁰⁷ Although she resisted labeling the choice to remain the product of false consciousness, her critique was of that sort. For example, regarding mikvehs for some Jewish women, she wondered if the women who adhere to that custom are "seriously deluded in viewing themselves as having 'equal dignity' with men."³⁰⁸ Persons in this situation, Okin claimed, sometimes "adapt their preferences so as to conceal the injustice of their situation from themselves."³⁰⁹ Cass Sunstein agrees that people adapt to their background, and in some circumstances it is "not even clear whether the relevant preferences are authentically 'theirs.'"³¹⁰

Some scholars, however, argue that Okin improperly insisted on a comprehensive liberal/autonomy-based understanding of adult choice for all groups. One point is that all choices are culturally circumscribed,³¹¹ and there's no good reason to critique the choices of, say, adult women in

307. Susan Moller Okin, *Reply*, in *IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 45, at 117.

308. *Id.* at 126.

309. *Id.*; see also Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 45, at 22 (asking "whether our culture instills in us and forces on us particular social roles").

310. Sunstein, *supra* note 200, at 88. See generally SHACHAR, *supra* note 288 (in these settings, choice is burdened and options are scarce).

311. See Janet Halley, *Culture Constrains*, in *IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 45, at 100, 104.

illiberal cultural groups for acting according to how they have been acculturated any more than we might critique the choices of adults in other cultural groups. Moreover, as Bhikhu Parekh maintains, we shouldn't say that women in groups with sex roles different from those of mainstream liberal society "are victims of a culturally generated false consciousness and in need of liberation from well-meaning outsiders. That is patronizing, even impertinent, and denies them the very equality we wish to extend to them."³¹² As examples, Parekh mentions conversion to Islam or traditional Judaism because one finds the traditions appealing, or the choice to wear a Muslim hijab in part to make a statement against open sexual availability.³¹³ Bonnie Honig makes a similar point when she notes that many Muslim feminists view the veil as empowering.³¹⁴

(4) Finally, adults have to make a knowing and voluntary choice to remain (or not) in the group. Cutting them off from awareness of the outside world would place in question the "knowing" part of the choice. But saying the group may not cut members off from such awareness is not the same as saying the group must make members aware (this is connected to the minimal education piece, although it extends into adulthood).

Lucas Swaine suggests that group members must understand they have exit rights.³¹⁵ Jeff Spinner-Halev goes further and argues that the state "needs to make sure that

312. Parekh, *supra* note 45, at 73; *see also* An-Na'im, *supra* note 74, at 59 (If liberal theorists "encourage young women to repudiate the integrity and cohesion of their own minority culture, how can the theorists then help to sustain the identity and human dignity of those women?").

313. *See* Parekh, *supra* note 45, at 73.

314. *See* Bonnie Honig, "My Culture Made Me Do It," in *IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 45, at 35, 37.

315. *See* SWAINE, *supra* note 42, at 131.

people are aware that they have options.”³¹⁶ Daniel Weinstock puts the point more bluntly, maintaining that parents must raise “their children in such a way as to provide them with *sufficient* access to a *sufficient* number of options.”³¹⁷

Requiring groups to provide broad information regarding how life might go in the outside world is tantamount to requiring the kind of education regarding civics and pluralism that I argued above is too much to demand of enclave groups who wish to teach a more insular, less pluralist view of the world. Group leaders should, though, offer members access to whatever information the leaders themselves have about the outside world, in terms of the kinds of jobs and other forms of economic sustenance that might be available if a member were to leave the group. I agree with Larry Alexander that in these situations the state must make a decision about how much exposure to the outside world to require, and that such a decision will err on the side of either more exposure (to ensure knowing choice, but perhaps at odds with a group desire for more insularity) or less exposure (to aid the group’s insularity, but perhaps at odds with ensuring knowing choice).³¹⁸ I do not, however, agree with Alexander that the liberal state is claiming to be a “neutral umpire”³¹⁹; instead, it is advancing its values while recognizing a good reason for accommodating counter-

316. SPINNER-HALEV, *supra* note 21, at 27. Alternatively (perhaps) he maintains that members must be “not completely (or nearly so) cut off from other communities and mainstream society.” *Id.* at 107.

317. Weinstock, *supra* note 296, at 230; *see also* KYMLICKA, *supra* note 302, at 82 (“A liberal society . . . requires children to learn about other ways of life (through mandatory education) . . .”).

318. *See* Larry Alexander, *Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism*, 12 J. CONTEMP. LEGAL ISSUES 625, 629 (2002).

319. *Id.* at 630.

values. I also don't agree that "there are no principles for sorting out our differences"³²⁰ in matters such as this. Alexander's approach is similar to those who say these situations leave us with "tragic choice," and as I explained at the outset of this Article and will reiterate at the end, seeing liberalism and pluralism as accommodating each other, with a necessary balancing (often reticulated and common-law like), doesn't take us out of the realm of principle and into what Alexander claims to be "politics all the way down."³²¹

To sum up my views about the "knowing" part of knowing and voluntary choice, in the enclave setting: By the time they are adults, group members should have learned how to consider options and make choices, how to care for themselves and their families, to tolerate and respect persons as persons, basic math and literacy skills, basic rights of state protection against abuse, and whatever awareness of the outside world the group leaders have, with no active cutting off of persons from the outside world. But to help preserve what may often be more traditionalist group views and practices, members need not be taught how to critique the group, to tolerate and respect the views of other groups, subjects such as civics, history, or science, and a deep knowledge of the outside world. This package of "shoulds" and "need nots" strikes a balance between, on the one hand, state protection of group members and their ability to make a knowing as well as voluntary choice to remain or leave the group and, on the other hand, the group's comprehensive normative views that may differ sharply from those of most of their fellow citizens.

320. *Id.* at 636.

321. *Id.*; see Daniel M. Weinstock, *Value Pluralism, Autonomy, and Toleration*, in *MORAL UNIVERSALISM AND PLURALISM*, *supra* note 17, at 125, 146 ("[T]he chasm . . . between autonomy and toleration liberals is not as unbridgeable as may initially have been thought.").

CONCLUSION: THUS, THERE IS NO “TRAGIC LOSS”

I have stated a case for liberalism and pluralism containing each other, rather than standing in opposition to each other. The liberal regulatory state should not insist on comprehensive views of autonomy and equality (or any comprehensive view, but those are the most likely liberal candidates), but rather should leave great space for persons, as individuals who may be part of private religious or secular groups, to choose lives that may place differential value on autonomy and equality. Political pluralism in the liberal state should, however, operate in tandem with the basic contours of equal liberty, at least insofar as private groups (and all persons) must accept minimal state oversight to ensure equal freedom to choose whether to subscribe—or not to subscribe—to certain perhaps nonliberal or illiberal ways of life. How we balance certain liberal claims of the state against opposing claims of persons and groups will require attention to both categorical and case by case reasoning, as I explored in Part IV.

Rather than accepting this image of liberal pluralism as anchored in the middle space of a Venn diagram, and thus satisfying enough aspects of liberalism and pluralism to be acceptable to both, several theories of liberalism and pluralism coalesce around the idea that core values contained within the two are irreconcilable. Victor Muniz-Fraticelli, Mark DeGirolami, and Donald Moon refer to a “tragic” situation that results. Muniz-Fraticelli sets forth a “parallel structure thesis”³²² for various forms of pluralism (including political), which involves three claims: a plurality of sources, that such sources are in some way incommensurable, and that there will be “*tragic conflict or tragic loss*.”³²³ Regarding the latter, he observes, “there is

322. MUNIZ-FRATICELLI, *supra* note 3, at 11.

323. *Id.*

always a possibility of conflict between any two elements, even if only in principle, such that no solution may be found that does not involve a genuine loss which is not completely compensated by a gain on the other side.”³²⁴ Similarly, DeGirolami writes of the inevitable loss and sacrifice involved in working out and operationalizing a theory of religious freedom.³²⁵ He argues that we end up with conflicting values that “are incompatible and . . . incommensurable.”³²⁶ Moon maintains that political liberalism offers a “tragic view of political life and its possibilities.”³²⁷ Jacob Levy doesn’t use the term “tragic,” but makes a similar point when he states a “central claim”: “I argue not only that the tension between rationalism and pluralism within liberal thought is longstanding, but also that it is to a large degree irresolvable.”³²⁸ In related fashion, Nomi Stolzenberg offers what might seem a critique of balancing. In some situations, granting an accommodation might seem to be yielding to a kind of private intolerance, while not granting an accommodation might seem, to the claimant, to be intolerant. Stolzenberg finds this a paradoxical situation, and wonders whether liberalism can find its way out.³²⁹

324. *Id.*; see also *id.* at 1, 3–4, 11, 17, 54–55, 175, 179, 183, 249 (referencing tragic loss or conflict).

325. See DEGIROLAMI, *supra* note 3, at 3.

326. *Id.* at 64 (emphasis omitted).

327. MOON, *supra* note 3, at 10; see also *id.* at 98, 163.

328. LEVY, *supra* note 19, at 3; see also *id.* at 253, 283. In the same vein, Steven Lukes says that in cases of conflicting obligations, “there is no way of avoiding moral loss.” Steven Lukes, *Making Sense of Moral Conflict*, in LIBERALISM AND THE MORAL LIFE, *supra* note 22, at 127, 129.

329. See Nomi Maya Stolzenberg, “He Drew a Circle that Shut Me Out”: Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 HARV. L. REV. 581, 650 (1993); see also Nomi Maya Stolzenberg, *The Return of the Repressed: Illiberal Groups in a Liberal State*, 12 J.

One way to view my task throughout this Article is as a response to the “paradox” or “tragic” loss thesis of these scholars. As to the former, the dilemma of liberal pluralism suggests that we may have to balance claims that a liberal norm should apply uniformly, with justifiable costs to certain persons, against claims that accommodations will assuage a serious harm to such persons at justifiable cost to others. When we resolve each case, one way or the other, we may be yielding from our position—even if firmly held as true—but such yielding does not mean we have acted paradoxically. Rather, we have appreciated that political agnosticism, caution, modesty, and respect is the most defensible form of liberalism. As to the latter, we need not see liberalism and political pluralism as inconsistent, as entailing some kind of tragic loss when we insist either that law be applied uniformly (and thus, say, we fail to accommodate a religious group) or that law cede room for a notion of the good, and source of authority, competing with the state (and thus some of the state’s ends are not met in the case at hand). Either outcome fits with the best understanding of liberalism, containing toleration as accommodation, and of political pluralism, containing protection for the liberty needed to follow separate sources of authority and the good life.

CONTEMP. LEGAL ISSUES 897, 900 (2002) (discussing “paradox” of liberalism both suppressing and opening space for illiberal groups).